**FIRST DRAFT**

# STATUS AND PERFORMANCE OF PUBLIC-PRIVATE PARTNERSHIPS IN SELECT EASTERN AND SOUTHERN AFRICAN COUNTRIES

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## Acknowledgements

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## Executive Summary

This study broadly seeks to evaluate the implementation and effectiveness of PPPs in selected eastern and southern African countries as an alternative financing source for infrastructure development in Africa. The specific objectives are to:

- Assess whether PPPs are a viable mechanism for financing infrastructure development;
- Identify the key challenges of and good practices in PPPs implementation; and
- Provide recommendations on how best to structure PPP arrangements for effective execution and achievement of desired outcomes.

The study focuses on infrastructure projects in Kenya; Lesotho; Malawi, Tanzania; Uganda and Zimbabwe, covering transport and communications, energy, health and education. The study combines literature review of past country experience in PPPs and stakeholder engagement through separate structured questionnaires for government officials involved in PPP projects and the private sector institutions as implementers of PPP projects.

**Policy and institutional frameworks**

The countries surveyed have diverse institutional and legislative frameworks governing the implementation of PPPs. Some countries have both, the policy and legislative frameworks while others started implementing PPPs with guideline and/or policy framework without an accompanying legislative framework.

For example Lesotho has a draft policy and is yet to enact the legislation to guide the implementation of PPPs. Zimbabwe has PPP guidelines preceded the enactment of the legislation. Some of the stakeholders interviewed noted that the absence of the guiding legislative framework stalled the implementation of PPPs projects because funders are unwilling to provide resources where they do not have the backing of the legislative framework which defines rights and obligations of contracting parties. Thus, the best practice is for the design and implementation of PPPs projects to be guided by robust policy and legislative frameworks as well other supportive institutional frameworks. The legal framework also boost investor confidence as it brings certainty, transparency and clarity in the contracting and implementation processes.

The PPPs legislative frameworks in the studied countries are recent (six years or less), while the countries have a fairly long history of implementing PPPs. This may suggest that the need for a separate legislative framework may have been promoted by challenges encountered during the implementation processes or lessons learnt from other countries that have adopted and successfully implemented the PPPs for the provision of infrastructure. One key factor identified among the six countries studied, is the need for operational independence of PPPs implementing agency. Operational independence provides assurance to contracting parties especially the private investors that decisions of the agency would be independent from political influence. The surveyed countries reflect varying degrees of operational independence of the PPPs implementing agencies.

While all the countries have some experience in PPPs implementation in different sectors, Kenya has deeper experience regime, having implemented at least 71 PPP projects. Uganda and

Tanzania have relatively more institutions that are directly involved in the approval process of PPPs, suggesting existence of more bureaucratic approval process compared to other countries.

In all the countries surveyed there are infrastructural deficits particularly in energy, water and transport sectors. The infrastructure deficits/gaps present opportunities for government and private investors to engage in PPPs. Energy; water and an efficient transport system are key enablers for other investment initiatives in these countries. The study also noted that limited in-country capacity (particularly in the public service) in risk quantification and allocation and viability analysis are potential threats to structuring viable PPP contracts. Over-reliance on external experts and consultancy firms increase the overall cost of PPP projects and also limits the accumulation of local expertise in the design and implementation of PPPs contracts. Failure to correctly capture demand and anticipate vested interests, as well as data availability constraints are some of the factors that have been identified as threats to viability of PPP projects. In addition, corruption was identified as one of the main obstacles which erode profits and confidence among investors, hence affecting the viability of PPPs.

The following are some of the key recommendations which the study makes:

- There is need for the finalisation of the policy and legislation framework where this is not yet been completed;
- PPP projects need to continue to be prioritised as the economies are still characterised by infrastructural deficits among the key enablers, which also affects production;
- Countries should invest in capacity building and embed skills and knowledge transfer in PPP contracts. This will ensure that at the end of the project, local private sector players would also have gained some experience expertise and knowledge in the design and implementation of PPP projects. Overreliance on foreign suppliers and consultants limits replication possibilities of the models in other sectors;
- The PPP projects design stage needs to ensure that accurate data is used in projecting future income streams from the projects as well as demand projections. Overestimating demand is mostly at the expense of government, which ends up subsidising the PPP for losses as was the case in Uganda in the electricity sector;
- There is need for intensive training programs on PPPs among the regulating institutions to properly exercise their mandate in monitoring risk as well as project viability. PPP projects are often implemented when the oversight institutions lack the necessary regulating capacity.

## 1. INTRODUCTION

### Background

Many African economies continue to be characterised by poor state of infrastructure, especially economic (physical) infrastructure, such as power, transport, telecommunications, and water and sanitation. However, while the desire of greater efficiency and better services is there, the capacity to respond is curtailed by the limited volume of public resources available to finance such services. This has generally seen the public-private partnerships (PPPs) approach being embraced as one of the strategies to ensure that resources can be harnessed within the local economies from the private sector by allowing the sector to invest in areas traditionally reserved for the public sector. This also includes funding the public health sector projects, following cases of disease outbreaks whose control often goes beyond the government's response capacity.

In the African region, the African Development Bank Group (AfDB) has been involved in supporting PPPs, serving as an important backer of future PPP projects to give potential investors confidence that PPPs remain a viable platform in Africa. The AfDB has also served as lender and advisor to African countries in supporting PPPs, particularly in establishing basic infrastructure essential for Africa's economic development, such as transportation, energy generation and information and communications technologies (Ventures Africa, 2003). The Development Bank of Southern Africa (DBSA), wholly owned by the South African government has also financed and advised on infrastructure and socioeconomic funding for Southern African economies.

Despite general acceptance in Africa as well as existence of success stories, there are still some challenges in having PPPs fully embraced in the region due to a number of challenges. Such challenges include the following:

- inadequate legal and regulatory framework for PPPs;
- lack of technical skills to manage PPP programmes and projects;
- unfavourable investor perception of country risk,
- Africa's limited role in global trade and investment,
- small market size,
- Shallow financial markets[2].

Given the critical role that the envisaged PPPs are expected to play in resuscitating the African economy, it is critical that a detailed focus on the scope for applying PPPs in the region be done. In particular, it is important to outline the current status of PPPs adoption in the region, paying particular attention to current projects, challenges and success stories that can be replicated across the region. It is within this context that the study was developed.

[2] African Development Bank at its website http://www.afdb.org/en/topics-and-sectors/sectors/private-sector/areas-of-focus/public-private-partnerships/ accessed 09 May 2016

## 1.1 Study objectives

This study broadly seeks to evaluate the implementation and effectiveness of PPPs in selected Eastern and Southern African countries as an alternative financing source for infrastructure development in Africa. The following are the specific objectives of the study:

- Assess whether PPPs are a viable mechanism for financing infrastructure development;
- Identify the key challenges of and good practices in PPPs implementation; and
- Provide recommendations on how best to structure PPP arrangements for effective execution and achievement of desired outcomes.

The scope of the study is primarily limited to PPPs in infrastructure projects in six of the fourteen MEFMI member states-namely Kenya; Lesotho; Malawi; Tanzania; Uganda and Tanzania. The number of the countries was dictated by budgetary constraints, while the choice sought to balance between three countries in the eastern African region and three in the southern African region, taking cognisance of the popularity of PPPs as an infrastructure financing mechanism in the selected countries. The sectors that are covered are mainly transport and communications, energy, health and education.

## 1.2 Methodology

The study employed a two-pronged approach, combining a desk research and selective in country interviews to assess and evaluate country experiences with implementing PPPs. The interviews targeted government officials and private sector players involved in implementing PPP projects. Separate structured questions were prepared for government officials and the private sector institutions in each country. While the survey was not exhaustive with regard to all the PPP projects in each country, attempts were made to interviews as many as possible in each country. However, the majority of countries surveyed had only a few running PPP projects, which also affected the number of interviews. Government officials in the six countries were engaged, while officials from a total of 11 PPP projects were also contacted (Table 2).

**Table 1: Surveyed PPP Projects by Country**

| | Kenya | Malawi | Lesotho | Tanzania | Uganda | Zimbabwe | Total |
|---|---|---|---|---|---|---|---|
| PPPs engaged | 2 | 2 | 1 | 0 | 3 | 3 | 11 |
| Government | 1 | 1 | 1 | 1 | 1 | 1 | 6 |

Stakeholder engagements for both the implementing private company and the government responsible for specific PPP projects, was collected by the MEFMI trained enumerators in each of the covered countries except for Zimbabwe which was covered by ZEPARU. The structured questions used were designed to capture a wide range of information, including the following:

a) PPP Projects that have been implemented in the country;
b) The type of the PPP schemes implemented;
c) How the private sector player was selected;
c) The financing mechanism used for selected PPP Projects;

d) Attempts to cover and manage risk; and
e) The policy and institutional framework.

Secondary data and information obtained from document (government policies; legislative frameworks and consultancy reports) and literature review on the theory and practice of PPPs also assisted in identifying the major institutional and operational frameworks guiding the implementation of PPPs in each of the countries. Gaps from the questionnaires were thus closed by information obtained from the extensive literature review.

### 1.3 Organisation of the study

The rest of the study is organized as follows: section 2 covers the basic literature on the theory and practice of PPPs while section 3 gives outlines of the policy, legal and institutional frameworks on PPPs in the study's six countries. Section 4, focuses on cross country comparisons of the individual countries' PPP frameworks. Section 5 covers the study's data analysis and findings and section 6 concludes the study with a summary of major findings and their policy implications.

## 2. GENERAL UNDERSTANDING OF PPPs

### 2.1 Definition

PPPs involve an arrangement where the government invites the private sector to supply infrastructure assets and services that traditionally have been provided by the government (IMF, 2004) with some risk being placed on the private sector as well. As a result, PPPs are different from the general public procurement contracts, where government enters into a service contract or a construction contract where the private sector just performs the service for a fee. PPPs are therefore legally-binding contracts between government and business for the provision of assets and the delivery of services that also allocates responsibilities and business risks to both the private sector and public sector players involved in the partnership (Partnerships British Colombia, 2003).PPPs are mostly undertaken as a way of tapping into the private sector resources as well as expertise in infrastructure provision. This generally implies that resource constraints on the part of the public sector as well as lack of the requisite expertise (skills) mostly push governments into inviting private sector participation in areas that should have been their sole responsibility in providing the infrastructure services.

Properly structured PPP frameworks produce benefits to both the private sector and public sector players. They allow the government to pass operational roles to efficient private sector operators while retaining and improving focus on core public sector responsibilities, such as regulation and supervision (Asian Development Bank (ADB), 2008). The government therefore enjoys benefits from an improvement in service delivery and cost effectiveness arising from the private sector's innovative ideas and experience. The opportunity to implement huge infrastructure projects, which the government would also not have been able to afford such as investment public hospitals, schools, highways and utility infrastructure, is also an anticipated benefit on the part of government.

The private sector players also gain business opportunities in sectors that traditionally would have been closed off. Revenues from fees collected from users (e.g tollgates) once the structure is completed as well as some fees that could be paid by government make investment by the private sector players into the projects worthwhile.

PPPs, however, also have their own disadvantages, which makes it critical that they be properly structured. CEDR (2009) for examples identifies about six disadvantages of PPPs as follows:

- Since private finance is used in PPPs, financial costs are usually higher due to the fact that private companies normally have lower credit ratings than public authorities and sovereign debt.
- High transaction costs, given that a PPP tender process is longer and generally more complex compared to the process required for traditional public procurement contracts.
- Reliance on users for cost recovery rather than taxpayers generally implies that a heavy burden is placed on the public than normal projects funded from the national budget. Examples include toll fees, where motorists who are already paying for fuel and other vehicle taxes have to pay for using roads that have been developed using PPPs.
- The procedure for resolving conflicts in the event that the private sector player fails to comply with the terms of the contract are generally more complex and cumbersome compared to the general procurement contracts, which often makes them risky.
- The various parties involved in PPPs also imply that the contractual framework that is needed to ensure that all responsibilities, risks, and covenants are taken into account can be very complex.
- Given the nature of the PPPs schemes, financial failure on the part of the contractor (private sector player) is generally more disruptive compared to the traditional construction contracts.

## 2.2 Models that can be used in PPPs

Although all PPPs involve a private sector player and the public sector, there are various methods that can be used to operationalise the arrangement. However, all the schemes eventually see the government assuming ownership of the infrastructure at completion, although the manner and timing would differ. There are several types of PPP arrangements that have been identified by authors (for example ADB (2008), CEDR (2009), PPIAF (2009), Dube and Chigumira (2010), IMF (2004)) and these include the following:

*Build-and-Transfer scheme (BT)*
A BT scheme involves the private sector player sourcing the finance and constructing the infrastructure and upon completion, the company hands the infrastructure to government. This often happens where the infrastructure in question is a critical facility which cannot be operated by the private sector. This could also include projects that have security implications if operated by a private sector. Thus, the government would be forced to find out other methods of paying the private sector player, including long term payment from use of the facility but with the Government being responsible for the operation of the infrastructure.

*Build-Operate-and-Transfer Scheme (BOT)*
This is similar to a BT scheme, the difference being mainly that upon completion, the private sector player operates the facility for a fixed term. The private sector player would be allowed to charge users of the infrastructure some fees to enable the company to recover its costs as well as earn a reasonable return. The period in which the private sector player operates the facility would be pre-determined, at the end of which the facility is transferred to the government agency or local government unit concerned.

*Build-own-operate-and-transfer scheme (BOOT)*
Under a BOOT scheme, the private sector company finances, constructs, own and operates the infrastructure for a fixed term. 'Ownership' implies that the company is allowed to make any decisions it sees fit during the ownership tenure, with minimal or no government interference (Dube and Chigumira, 2010). The private sector player also gets the opportunity to recover its total investment, operating costs, as well as a reasonable return. This would be done through collecting tolls (e.g for highways), fees, rentals or other charges. The government will take over the ownership of the facility at the end of the fixed term, for which normally a condition would be imposed to ensure that the facility would still be in a good condition.

*Build-lease-and-transfer (BLT)*
This model would see a private sector player constructing the infrastructure, following which it hands the operation issue to the government on a lease arrangement. This implies that the government/government agency would be paying for the lease to the private sector player, which gives an opportunity to recover its costs. After a predetermined period, the government would stop paying for the lease and assumes ownership and control over the facility.

*Rehabilitate-operate and transfer (ROT)*
This scheme works where the private sector refurbishes or rehabilitates an infrastructure that exists but is not in a functioning state. After refurbishing the infrastructure, the private sector player reconditions and operates the infrastructure for a period long enough to recoup investment costs and get a reasonable return, before handing over the facility to government.

*Lease, develop and operate (LDO)*
Under an LDO scheme, the private sector player leases an existing facility from the government, renovates, modernises or expands it before assuming operation rights for a fixed term. In that process, the company gets an opportunity to recover costs, with the government benefiting from the lease payments (Dube and Chigumira, 2010).

## 2.3 Operational framework

The operational frameworks for PPPs differ depending on the project. However, there are critical stakeholders that play a role in PPPs, especially during the negotiation process and implementation of the projects. CEDR (2009) identifies the following stakeholders as critical in the PPPs process and defines their roles in the process as follows:

### 2.3.1 Stakeholders in PPPs

*a) The public authority*

Each PPP project needs a public entity responsible for the project and for the decision to carry out and design the PPP scheme. At the preparation stage, the public authority prepares the tender documents, manages the tender process, including selecting the winning bid and formalizing the contractual framework. During implementation of the project, the public authority ensures that the terms of the contract are followed, without duplicating or replacing other regulatory authorities that could also perform their oversight roles. The public authority is also normally responsible for managing the transfer process at the end of the PPP tenure when the private sector hands over the infrastructure. In this case, the role could include arranging alternative management or operation of the infrastructure.

*b) The PPP contractor*

The PPP contractor is the private sector player responsible for the development of the project, as specified in the contract. The PPP contractor is the main player in the PPP project, tasked with the delivering of the services, either directly or through hiring the services of other third parties as the contractor deems fit. Although the project PPP contractor can be a company that exists before the PPP project, it is also possible for the contractor to be a company set up specifically for the development of the project. Such contractors set up as part of the implementation of the project are more common where PPP projects are structured as ‘project finance’ schemes, where the future expected cash flows from the project are the only means of finance (CEDR, 2009). These are often referred to as special purpose vehicles (SPV). The SPV is a legal entity which facilitates the allocation and diversification of risk and financing requirements to more than one party.

*c) The operator*

Although the PPP contractor can operate the PPP project, there are situations where some specialized technical knowledge might be needed, which the contractor might not possess. In that case, an independent company, known as the operator, can be engaged by the contractor to operate the project on behalf of the project PPP contractor. This would call for a specific contract that binds the relationship between the contractor and the operator.

*d) Financial agents*

PPP projects require an initial investment which has to be recovered later through the expected income streams. A finance scheme is needed to ensure that the initial investments as well as other compensation measures over the lifetime of the project are provided for. Sources of finance for PPP include the capital provided by the project PPP contractor (equity), loans provided by banks, and securities or bonds sold on capital markets as an investment product. A sound finance scheme is central to the success of the PPP project.

*e) Funding agents*

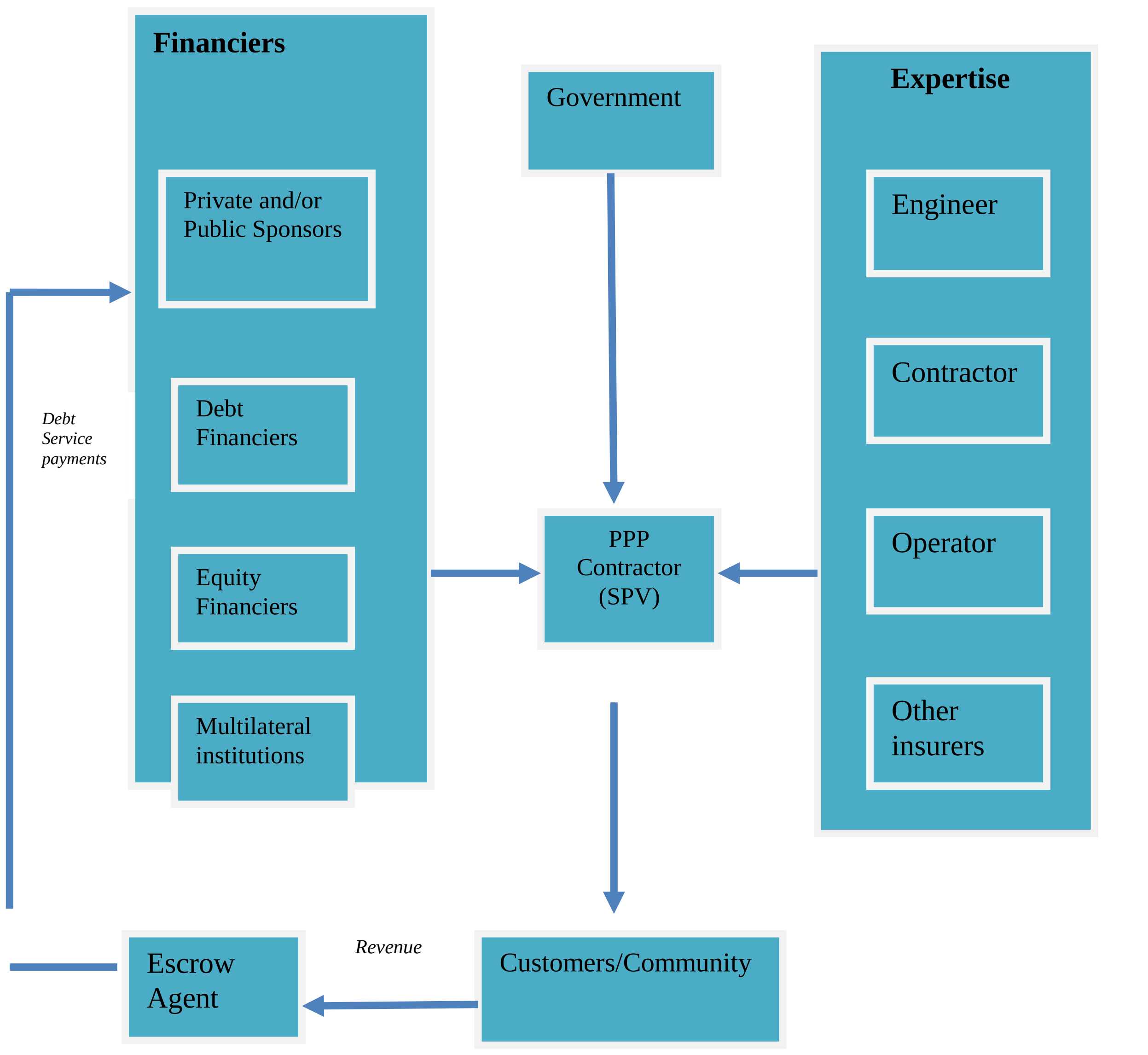
These are those expected to provide future income streams on which the project feasibility rests. This includes users of the facility who have to pay the user fees or toll fees.

*f) The regulatory authority*

In addition to the public authority, other regulatory authorities still continue to exercise their regulatory oversight during the operation of the PPP project. This includes both technical regulation, for example an energy regulator in the case of energy PPP projects, and economic regulation, for example, competition authorities governing the conduct of the PPP project with respect to other competitors.

The interaction of the different stakeholders can be diagrammatically represented as shown in Figure 1.

**Figure 1: Possible PPP stakeholders and their interaction**




*Source: Dube and Chigumira (2010)*

### *2.3.2 Policy and institutions for PPPs*

A clearly laid down policy and institutional framework for PPPs is a critical determinant of the success of the PPP project. The policy framework on PPP guides the PPP process and makes it easy for investors to predict the environment with respect to PPPs. Also critical is the public authority to oversee the whole process, normally referred to as a PPP Unit. Given that a PPP Unit helps in project preparation; helps in the selection and management of specific advisors; ensures that the project fits into the overall PPP policy and also plays a role in project approval and quality assurance (Dube and Chigumira, 2010), then it is important for such an institution to be seen to be professional and free from political interference and corruption.

Also critical in the framework is the legislation governing PPPs, which can give some form of assurance to investors that government is committed to the projects. A stand-alone piece of legislation to govern PPPs is often preferred compared to having scattered pieces of legislation. Such legislation would also provide for the regulatory institution to regulate PPPs. Many countries have opted for a standalone legislation, and in the region, these include Uganda (The Public Private Partnership Act, 2015), Mauritius (PPP Act, 2004), Zambia (Public-Private Partnership Act, 2009), Tanzania (Public-Private Partnership Act, 2010) and Kenya (The Public Private Partnerships Act, 2013).

### *2.3.2 Risk Analysis in PPPs*

Given that PPP projects are generally long term, uncertainties about future outcomes crop up. These result in different categories of risk, which need to be carefully anticipated and managed during the project implementation process. Risk analysis, which involves the assessment of the possible uncertain environment concerns and strategizing on managing them, needs to be undertaken. There is always risk that the time, the budget, anticipated revenues and expenses, as well as forecasted targets might fail to materialise as originally expected. This can be a result of performance failure, insolvency and external factors (e.g political uncertainties). The success of a PPP project thus hinges largely on transferring risk to a party that is best suited to manage or minimise it (Chigumira and Dube, 2010).

There are different types of risks that can crop up during the PPP project life cycle. The IMF (2004) identifies the following types of risks and describes them as follows:

*a) Construction risk*

This type of risk arises from a number of sources related to the project construction. This includes infrastructure design problems, cost overruns that can arise in construction and from delays in project implementation.

*b) Financial risk*

Economies always face volatilities in some financial variables, which include interest rates and exchange rates. Due to the long term nature of the projects, it might be difficult to carefully anticipate such volatilities. Thus, any PPP project is bound to have financial risk, which is the risk that movements of these key variables can threaten the implementation of the project.

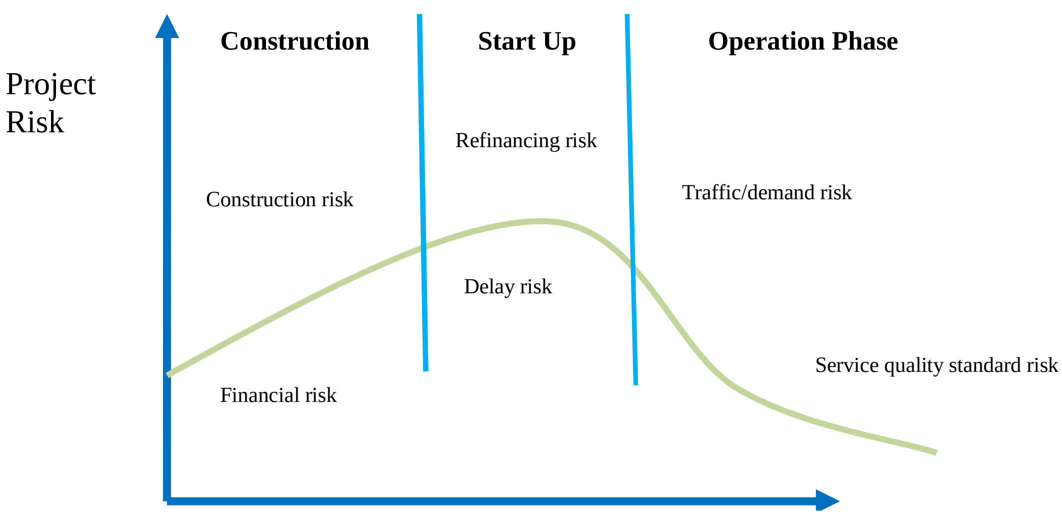
*c) Performance risk*
Performance risk in the risk that the stakeholders might fail to perform as expected, resulting in the availability and quality of the services being compromised.

*d) Demand/traffic risk*
More serious in project finance PPPs, this is the risk that the demand for the service, as reflected by payments by the users after completion of the project, would not be adequate to compensate construction expenditure. This also includes the risk that the demand for the services could also fall after project completion, resulting in cost recoupment challenges. Demand risk is therefore bound to happen if anticipated benefits of the project to the users are overestimated.

*e). Residual value risk*
PPP projects are generally expected to be handed over to the government after a fixed term. The assumption is that the assets would still be in a good working order. However, there is a risk that the future market price of the assets might be overstated, making it of less value at the time of being handed over.

Risk management is therefore a central issue in PPP contract negotiations. The risks occur at different stages during the PPP project (Figure 2).

**Figure 2: Risks in PPP projects**




*Source: Dube and Chigumira (2010)*

## 3. OVERVIEW OF PPPS IN THE SIX COUNTRIES

### 3.1 Uganda

Although Uganda recently (2015) passed the Public Private Partnerships Act, the country has some experience in dealing with PPPs. Before the passage of the Act in 2015, PPP projects were being implemented using traditional procurement procedures, especially the Public Procurement and Disposal Act, 2003. However, even within a limited legislative environment, the country was able to implement a number of PPP transactions, especially in the energy, telecom and water sectors.

#### 3.1.1 Policy and Institutional framework

*PPP Policy*
The current legal and institutional framework governing PPPs can be traced to the Public-Private Framework Policy of 2010. As outlined in the policy document, the main objectives of the PPP Policy include to:

- put in place an enabling environment for stimulating investment in infrastructure and related services in Uganda;
- encourage private sector investment in critical infrastructure;
- ensure that the PPP procurement process is streamlined; and
- enhance accountability in PPP projects.

The PPP Policy document also shows that it was also espoused due to conviction on the part of the Ugandan government that PPPs had certain advantages compared to traditional public procurement projects. These include:

- that the net present cost of a service delivered under PPPs should be lower than that achieved under traditional procurement;
- that the quality of service delivered under a PPP should be equivalent or higher than that achieved under traditional procurement;
- that by allocating risk to the party best able to manage it and linking service payments to performance, PPPs deliver clear incentives for timeliness delivering of quality services compared to traditional procurement systems; and
- that by allowing the private sector to generate income using public assets, better asset utilisation would result while reducing the cost of public service provision.

The PPP Policy also identifies examples of projects that are to benefit from PPP arrangements. This includes physical assets such as economic infrastructure, which include roads, rail, ports and communication. Also included is social infrastructure, which includes correctional facilities, health care facilities, educational facilities and accommodation facilities. Other related services which can also benefit from PPPs include non-core services such as maintenance, security, cleaning, laundry, grounds keeping and other support services.

*Legislative Framework*

The legislative framework for PPPs in Uganda is the Public Private Partnerships Act, 2015, which became effective on 12th August 2015. The purpose of the Act was to put in place the necessary institutional framework and provide guidelines on how PPPs are to be conducted in Uganda. As reflected in the preamble to the Act, in addition to the institutional framework, the purposes of the Act include to:

- provide for the role of the private sector in PPPs;
- provide for project inception and feasibility studies for PPPs;
- to provide guidelines to be used in evaluating bidders for PPP projects;
- to provide guidelines for agreements and monitoring of the projects;
- to outlining bidding methods, procurement procedures and types of PPPs to be implemented.

Section 2 of the Act specifies infrastructural projects under which the PPP Act will apply. These include those that are specified by the PPP Policy (economic infrastructure, social infrastructure and related services) implying that section 2 generally operationalises the policy provisions on how sectors to benefit from the PPP projects are to be determined.

*Institutional Framework*

**a) The Public Private Partnerships Unit (PPP Unit)**

The regulatory institution that plays a close interaction with PPP projects is the PPP Unit. The PPP Unit is established under section 10 of the Act and is an independent body under the oversight of the Ministry responsible for Finance. The functions of the PPP Unit, as outlined in section 11 of the Act include:

- To serve as the secretariat and technical arm of the Public Private Partnerships Committee
- To provide technical, financial and legal expertise to the Public Private Partnerships Committee and the Project Team[3];
- To serve as a resource centre on matters relating to PPPs;
- To conduct awareness campaigns on PPPs;
- To provide capacity building to stakeholders on PPPs;
- To maintain a register of PPPs and their performance ratings;
- To develop a process for PPP projects, ranging from the identification, implementation and monitoring, as well as ensuring that the process is followed;
- Assist contracting authorities to design, identify, select and prioritise PPP projects; and
- Put in place measures to eliminate the challenges that prevent the realisation of the benefits that are expected from PPP projects.

[3]The details of these two institutions are discussed later.

**b) Public Private Partnerships Committee (PPP Committee)**

The PPP Committee is established under section 5 of the Act. It is composed of critical government institutions which have a role to play in PPP projects, including the legal aspects, as follows:

- The Attorney General or representative;
- The Permanent Secretary of the Ministry responsible for finance or representative;
- The Permanent Secretary in the office of the Prime Minister or a representative;
- A representative of the national Planning Authority;
- The Permanent Secretary of the Ministry responsible for lands or representative;
- The Permanent Secretary of the Ministry responsible for local government or representative;
- A Director of the PPP Unit (secretary of the PPP Committee); and
- Four other people from the following institutions appointed by the Minister of Finance:
    - A representatives of the Private sector Foundation;
    - A representatives of the Uganda Investment Authority;
    - A representatives of the academia;
    - A retired judge.

The PPP Committee was established to generally provide the oversight that is needed to guide the PPP Unit. The specific functions of the PPP Committee include the following:

- Formulate policies on PPPs;
- Approve project proposals from contracting authorities;
- Authorise allocations from the Project Development Facilitation Fund, established to fund the activities of the PPP Unit.
- To formulate standards, guidelines and regulations for PPPs;
- To review the legislative framework for PPPs; and
- Approve the structure of the PPP Unit.

**c) Contracting authorities**

Contracting authorities, which are government Ministries or departments mandated to act as the public authority in PPPs, also play an important role in the implementation of the projects. Under section 12 of the Act, contracting authorities should identify, appraise, develop, procure and monitor a PPP. The contracting authorities can also participate in the financing of the project by making a monetary contribution to the capital or concessioning its asset to the private sector. The contracting authority might also participate in the implementation of the project, although the specific role to be played needs to be specified in the invitation to tender.

**d) Public Private Partnerships Project Team (PPP Project Team)**

Under section 15, a contracting authority that intends to enter into a PPP arrangement with the private sector needs to establish a PPP Project Team. The PPP Project Team has to be composed of officials with the required technical skills from the staff of the contracting authority.

The functions of the PPP Project Team include to identify, screen and prioritise projects based on guidelines issues by the PPP Committee and to ensure that the parties to a PPP comply with the provisions of the Act. The PPP Project Team should also submit annual reports and any other reports to the PPP Unit and maintain a record of all documentation and agreements entered into by the contracting authority relating to the PPP project.

### 3.1.2 PPPs done to date

Uganda has some significant level of experience with PPPs, as PPP contracts have been concluded for provision of services such as solid waste collection, street parking management and street lighting (Nsasira, Basheka and Oluka, 2013). Examples of projects that have been done over the years include the following:

- The Bujagali Hydro Power project PPP
- Kalangala Infrastructure Services Project
- Electricity for Rural Transformation (ERT) project-Management of power lines and distribution
- Nakawa-Naguru housing project
- Provision of Education services (UPE, USE).

A discussion of selected projects from this list can be given as follows**:**

#### a) The Bujagali Hydro Power project PPP

The details of the Bujagali Hydro Power PPP Project are outlined in the Independent Review Mechanism (IRM) (2008). In the face of energy problems, the Government of Uganda contracted a privately owned consortium, Nile Power (AESNP) to construct and operate two inter-linked projects: the Bujagali Hydropower Station (BHP) and Bujagali Interconnection Project (BIP) in 1999. BHP is a 250MW power plant, powered from the river while BIP is a power transmission line linking the power plant to the national grid. However, AESNP withdrew from the project before construction could begin, even though it had completed economic, social and environmental assessments of the project and the resettlement programme for the affected communities had commenced. About 8,700 people (about 1,288 households) had either been resettled or had lost assets for which they were entitled to compensation because of the project. The following is aerial pictorial view of *Bujagali Hydro Power station under construction in* Uganda.


*Construction of Bujagali Hydro Power station* under PPP project in Uganda

After the withdrawal of AESNP, the government decided to go ahead with the project, but split it into two (BIP and BHP) interlinked projects which had to be operated by independent contractors. In 2005, the BHP project was awarded to Bujagali Energy Ltd (BEL), which is a Ugandan company that had been established as a special purpose consortium by Sithe Global Power; Industrial Promotion Services (Kenya); Jubilee Investment Company; and the Aga Khan Fund for Economic Development. This was a BOOT type of PPP, comprising of

- a 30 meter high dam wall with a small reservoir (388 ha);
- a main spillway gate and an auxiliary siphon spillway;
- a powerhouse with a total installed capacity of 250 MW (five units of 50 MW); and
- a switchyard.

The total costs for the BHP project at the time of appraisal was about US$ 735.5 million, with the African Development Bank (AfDB) giving out a loan of US$ 110 million. The project loan agreement with the AfDB project was signed with BEL on December 14, 2007 (IRM, 2008).

The BHP project was expected to have a number of benefits, which include the following:

- producing least-cost power for domestic use and export to neighbouring countries;

- enhancing the efficiency of Uganda's power sector through an increased role for the private sector;
- increasing rural households access to electricity;
- creating jobs and business opportunities for local enterprises;
- upgrading community social services, boreholes, clinics, and schools; and
- contributing to government revenues through the phasing of the subsidisation of the tariff by about 4.8US cents per unit (IRM, 2008).

*Bujagali Hydropower plant, established through a unique public-private partnership*

Interviews with stakeholders also revealed that BEL holds a 30-year BOOT contract with the Uganda Electricity Transmission Company Limited (UETCL) (on behalf of Government). A number of incentives were given to attract the private sector players into the project. For example, the government gave a guarantee to meet any costs for UETCL obligations and any other losses arising from the contract. In addition, the government also gave a guarantee for UETCL to purchase all the power generated by the project into the national grid. A government guarantee of the commercial loans undertaken by the project through the private consortium was also assured. Thus, the private sector consortium would also recoup their investments through repayments by UETCL for the power generated from the power dam.

The implementation of the project was also characterised by some challenges, which were fortunately all resolved. For example, the environmentalist fought to stop the project, resulting in significant delays to the implementation of the project. It had to take the President's intervention to whip the parliamentarians spearheading the concerns into line. However, this also helped as BEL had to undertake the necessary Environment Impact Assessment leading to alleviating some of the concerns. There was also risk that quality could be easily compromised, which saw an independent consulting firm being established to supervise the works. The consultant was engaged by the government although the consultancy fees are embedded in the project costs.

**b) Kalangala Infrastructure Services PPP Project**

This PPP project involves the development of infrastructure in Kalangala District comprising of two passenger ferries, road upgrade and water supply system, as well as power generation, transmission and distribution. The project saw the establishment of the implementing institution; KalangaIa Infrastructure Services (KIS) Ltd, a subsidiary of Infra Co Ltd (54% stake), which is based in the UK. The project was financed through equity and debt from Infra Co, Nedbank from South Africa, Emerging Africa Infrastructure Fund (EAIF); a debt joint guarantee from USAID and Guarant Co; as well as an Output Based Aid (OBA) grant.

Just like the BHP project, there was no formal bidding process to identify the private sector players. This was mainly spurred by development partners, who were interested in developing the Island. The PPP, which is a BOT, also has several incentives for the private Lake Victoria and tax waivers on specified machinery inputs. KIS is also the contracting agency to execute all the project investments, which include:

- Road Works: Rehabilitation, expansion and upgrade of the 66km Main Island Road
- Ferry Service: Build two new ferries to provide ferry transport services between Luuku and Bukakata;
- Power Supply Systems: Development of a power generation plant, and construct a distribution network throughout Bugalaisland; and Water Supply Systems: To rehabilitate and expand the Kalangala Town Council water supply system and construct water supply systems for 5 major fish landing sites.

In order for the private sector to recoup its costs, it collects fees from the ferry services, and tariffs for the power and water supplied to the Island. The Government also compensated previous land owners who lost their land to enable the road construction and leeway to power lines and water pipes.

The period in which the PPP would be operational before being transferred to government could not be established, even among the government officials interviewed. However, at the end of the period, all the assets will be transferred to the government, even though Kalangala Infrastructure Services shall be maintained as a special purpose vehicle for developing Kalangala.

The KIS PPP project has already had some demonstrable impacts on the ground. It has enhanced living standards of the people of Bugala Island in Kalangala District. Villages where KIS water supply is provided are also having a decrease in waterborne diseases. Electricity generation has also increased business hours, as they can now run till late. There has also been a noticeable trend where temporary structures that were common before the project are being replaced by permanent homes. Government has also benefited from the project, as taxes have been paid from the project in the first five years, including from ferry VAT and ferry license fees.

Currently the expertise to run the PPP is mostly resident in international firms and personnel. However, programs are already underway to build local capacity. Local personnel are now being trained to drive the ferries and to manage the water supply chain. Local staff is also being provided with advanced training, both onsite and off-site, with delegated responsibilities of senior management functions to local personnel also being done to ensure that there is scope for skills retention and technological transfer at the end of the partnership.

**c) UMEME Electricity Distribution PPP project**

Umeme PPP is a 20 year LDO concession that commenced in 2005. It involved a process where Uganda Electricity Distribution Company Limited (UEDCL), who owns the electricity distribution network on behalf of government, leased to Umeme Ltd the electricity distribution system in Uganda. Umeme, the company that was formed as a result of the PPP, was originally owned by Globeleq Holdings (Conco) limited, with 56%, together with the national electricity generating company of South Africa, Eskom (44%) (Harper, 2015). However, UMEME is now listed on the Uganda Stock Exchange, with Umeme Holdings (14.3%) and National Social Security Fund (14.27%) being the largest single shareholders as at 31 December 2015[4]. Loans for investment in Umeme to Globeleq were underwritten through World Bank Guarantees. At the end of the concession, UMEME shall return the control of the distribution assets, including any new investments, to UEDCL.

In order to attract the private sector, the government committed to providing subsidies by meeting part of the energy costs incurred by the consumers. In addition, Umeme also received tax waivers on qualifying imported material inputs, with a full lease of the distribution and supply network. In addition, all the stock of materials that was prevailing at the time of the concession was transferred to UMEME. At the inception of the Concession, the government also took on all the liabilities, including UEDCL loans that were outstanding.

Under the terms of the PPP, the role of UMEME was to supply electricity within 1.0 km beyond the existing grid. Based on interview results, the firm also had to make 60,000 new connections in the first five years and 25,000 new connections per year thereafter. The firm was also tasked with the repair, upgrading and expansion of the electricity distribution system within Uganda and collection of revenues from customers based on a tariff set by the Electricity Regulatory Authority.

The investors recover their costs through tariffs from users. The tariff set by the Electricity Regulatory Authority also recognizes the operational costs incurred by UMEME to ensure that there is a profit. There was also a large stock of uncollected bills that had been accumulated over a long period of time before the concession. UMEME successfully collected over 90% of these arrears.

Based on the interview results, the Umeme PPP has brought some benefits to the Ugandan economy which includes the following:

[4] As reflected on Umeme's annual report for 2015

- UEDCL used to have high electricity system losses (35% to 40%); now losses were reduced to 27%;
- UEDCL used to have low revenue collection rates (less than 70% prior to the concession), but now revenue collections are at almost 100%;
- UEDCL had high accounts receivable (7 months of sales in 1997), now accounts receivable are only at 1 month of sales;
- Frequent power outages and system breakdowns in past. This has reduced substantially
- Electricity accessing population was at only 5%; now over 10% of population are accessing power.

To ensure that local expertise is developed to take over after the end of the PPP, the UMEME management team is blended between local and international personnel, the majority being Ugandans. There is also a clear succession policy, with the current CEO, who is a Ugandan, having already replaced a foreign expert.

However, as outlined by Harper (2015), the electricity concession project had a lot of problems for the average Ugandan, which could also help reveal some lessons on how such projects need to be managed. Just one month after the agreement was signed, in April 2005, Uganda's Electricity Regulation Authority approved a 24% increase in domestic tariffs, to enable Umeme to make a return on the substantial investment it was making into the sector. In 2006, the major investor, Globeleq indicated that it would terminate the concession as it was becoming unprofitable, which saw a further 37% increase in tariffs for domestic users and 58% for businesses. The Uganda Electricity Users Association challenged price rises in the courts, while the Kampala City Trades Association petitioned the Inspector General of Government to launch an investigation into Umeme.

A committee set up in 2009, established that Umeme had been overcharging by 44%. An ad hoc committee on energy established in 2011 also produced a report in 2013 indicating that the government had been forced to subsidise the cost of electricity by 55% to lessen the burden on the people, such that between 2005 and 2012, cumulative subsidies of $660 million had been paid out. An additional sum of nearly $300m had also been paid to Umeme in rebates for technical and commercial losses to Umeme. The committee actually recommended the company's contract should be terminated. Due to such pressure, by 2014, Globeleq had reduced its shares to only about 14% (Umeme Holdings), after Umeme had become a public company in 2012 (Harper, 2015). This also shows that despite the positive contribution, the PPP also had its own challenges, pointing at the need to safeguard private sector interest in PPPs involving monopoly utilities.

### 3.1.3 Policy Recommendations

The Ugandan PPP experience can be used to suggest some policy recommendations. Given that the legislative framework is now in place, there is need for the more involvement of local personnel and firms in structuring of the PPP projects. This will give them the necessary experience to develop specific PPP procedures and processes for each sector. Each sector has unique attributes and requirements such that applying the PPP Act across all sectors without due regard to some specific issues could be counterproductive. The experience in the electricity sector, where it is the government that had to bear much of the costs through subsidies is a case in point.

There is also too much dependence on external financing for PPPs. There is need for government to also try to mobilise local investment, which would be less costly. Local investors would also be easier to deal with and regulate without threatening to terminate the project as was the case with the Umeme main investor.

## 3.2 Tanzania

Tanzania has a fairly long history of implementing PPPs, with the experience dating back to the 1990s when the privatisation initiative was started (Economist Intelligence Unit, 2015). Tanzania has mostly implemented PPPs that involved concession arrangements for running existing enterprises, with those involving rehabilitation and new investment being limited. Faith Based Organizations have also implemented PPPs in education, health and water sectors (Government of Tanzania, 2009), although prior to 2010 PPPs were affected by a number of factors including the following:

- Lack of comprehensive policy, legal and institutional frameworks that provide clear guidelines and procedures for development and implementation of PPPs;
- Lack of realistic and comprehensive technical, socio-economic and commercial feasibility analysis which leads to poor project design;
- Inadequate enabling environment which includes lack of long-term financing instruments and appropriate risk sharing mechanisms; and
- Insufficient capacity of negotiations, procurement, implementation and management of PPPs (Government of Tanzania, 2009).

### 3.31 Policy and Institutional framework

*PPP Policy*

The policy framework for PPPs in Tanzania is anchored on the National Public Private Partnership (PPP) Policy of 2009. The main objective of the policy is to promote private sector participation in the provision of resources for investment capital, managerial skills and technology. The specific objectives of the policy include the following:

- To develop an enabling legal and institutional framework to guide investments in PPPs;
- To implement effective strategy showing specific obligations and rights for various stakeholders;
- To introduce fair, equitable, transparent, competitive and cost-effective procurement processes for PPPs;
- To adopt operational guidelines and criteria for PPPs;
- To attract resources for development of PPPs;
- To develop institutional capacities for technical analysis and negotiation of PPPs and associated contracts; and

- To enhance efficiency and quality in implementation of PPPs (Government of Tanzania, 2009).

The key policy provisions of the PPP policy include putting in place an enabling policy, legal and institutional framework for PPPs. They also include putting in place an enabling environment to generate and mobilize adequate financial and technical resources for PPPs as well as to give special incentives to promote PPPs in geographically and economically disadvantaged areas.

*PPP Legislation*

In line with the policy pronouncement, Tanzania also enacted a legislation to spearhead the implementation of PPPs in the country. The Public Private Procurement Act, 2010 (PPP Act), as amended in 2014, is the main legislation governing PPPs in Tanzania. The law had to be amended in 2014 due to a number of challenges that had been witnessed over the course of its implementation. For example, changes were brought to the institutional and regulatory structures governing PPPs to reduce the bureaucratic processes that were being experienced by private-sector companies. This saw two institutions that had a role in PPPs implementation; the Coordination Unit and the Finance Unit, being merged into the Public Private Partnership Centre. In addition, the amendments to the Act saw a new fund to finance feasibility studies and other costs incurred by contracting authorities being established. This was after recognition that some previous feasibility studies had not been sufficiently comprehensive in terms of technical, socio-economic and commercial considerations, which led to poor project design (Economist Intelligence Unit, 2015). The amendment was also done to deal with corruption arising from unsolicited proposals in PPPs. Before the amendments, unsolicited proposals were not mandatorily subjected to a competitive bidding process (Economist Intelligence Unit, 2015), a situation which had to be corrected through the amendment.

The main objective of purpose of the PPP Act, 2010 (as amended) is to provide for institutional frameworks for the implementation of PPPs and to set rules, guidelines and procedures governing PPPs.

Also critical in PPP is the Public Procurement Act, 2011. Sections 79 to 82 of the Public Procurement Act deal with procurement with respect to PPPs. Provisions covered under these sections include applicability and approval procedures for procurement done under PPPs; process to be followed for submitting unsolicited private partnership proposals; the requirements to be followed if a transaction advisor or manager is to be appointed for the purposes of ensuring that a public private partnership implementation process runs smoothly and procedures to be followed in selecting the private party to the PPP and the choice of procurement method to be used.

*Institutional framework*

The following institutions were created specifically to deal with PPPs:

**a) The Public Private Partnership Centre (PPP Centre)**

The PPP Centre was introduced under section 4 of the PPP Act, 2010 (as amended). It is constituted within the Office of the Prime Minister. At the beginning of each financial year, the PPP Act requires every contracting authority to submit a list of potential public private partnership projects to the PPP Centre.

Under section 5 of the Act, the main functions of the PPP Centre include to:

i) mobilize resources for project development and Government support to public private partnership projects;
ii) develop a mechanism to ensure that all ministries, Government departments and agencies and local government authorities integrate public private partnership into their sector strategies and plans;
iii) develop operational guidelines for contracting authorities;
iv) design and implement a fair, transparent, competitive and cost effective procurement process;
v) deal with fiscal risk allocation and other financial matters of all public private partnership projects;
vi) advise contracting authorities on all matters relating to public private partnership projects;
vii) provide technical assistance to ministries, Government departments, agencies, local government authorities and private sector in planning, managing and appraising public private partnership projects;
viii) examine requests for proposals to ensure conformity with the approved feasibility study;
ix) monitor, review and evaluate implementation of Public Private Partnership Facilitation Fund;
x) ensure relevance and adequacy of proposals submitted to it by contracting authorities;
xi) monitor and evaluate the performance of the public private partnership projects and prepare periodic performance reports;
xii) design and implement programmes for public private partnership capacity building to public and private sectors;
xiii) develop and implement programmes intended to promote public awareness on public private partnership issues; and
xiv) undertake research on public private partnership matters.

The PPP Centre is not the final authority as far as PPPs are concerned. Within 15 days from the date of receiving projects and feasibility studies from a contracting authority, the PPP Centre has to forward its decisions on the project proposals to the Public Private Partnership Technical Committee (PPP Committee). This makes the PPP Committee a critical institution as far as PPPs are concerned.

**b) Public Private Partnership Technical Committee**

The PPP Committee is established under section 7 of the PPP Act, 2010. Its membership generally comprises of different public sector institutions as follows:

- the Permanent Secretary of the Prime Minister's Office who shall be the Chairman;
- the Permanent Secretary of the Ministry responsible for finance;
- the Permanent Secretary of the Ministry responsible for lands;
- the Deputy Attorney General;
- the Executive Secretary of the President's Office- Planning Commission;
- the Executive Director of the Tanzania Investment Centre;
- the Executive Director of the Tanzania Private Sector Foundation;
- the Commissioner General of Tanzania Revenue Authority;
- One person from private sector nominated by the Minister on recommendation of Tanzania Private Sector Foundation.

In addition, the Permanent Secretary of the sector Ministry whose project is the subject of deliberation is also expected to attend meetings of the PPP Committee.

As provided under section 7A of the Act, the main functions of the PPP Committee include the following:

- To review policy, legislation, plans and strategies pertaining to the promotion, facilitation and development of public private partnership and to advise the Minister accordingly;
- To advise the Minister on matters relating to implementation of the National Public Private Partnership Programme;
- To consider public private partnership project proposals and agreements and make recommendations to the National Investment Steering Committee for approval;
- To recommend to the National Investment Steering Committee for allocation of funds from Facilitation Fund or the Treasury; and
- To assign to contracting authorities terms and conditions for utilisation of the Facilitation Fund.

The PPP Committee is also not the final authority as far as PPP project implementation is concerned. After receiving recommendations from the PPP Centre, the PPP Committee has to make recommendations to the National Investment Steering Committee within fifteen days from the date of receipt. In the event that the PPP Committee fails to forward the recommendations within 15 days, the concerned project proposal shall be deemed to have been rejected; hence the PPP Committee is expected to make a report to the National Investment Steering Committee to that effect.

**c) National Investment Steering Committee**

The National Investment Steering Committee is chaired by the Prime Minister and performs the role of investment policy formulation and solving problems of investors in general. The Investment Steering Committee also performs a role in PPP projects. Under section 7A and 7B of the Act, where the project to be undertaken requires public financing, it is the National Investment Steering Committee that has to direct the PPP Committee to initiate the funding process. In addition, the National Investment Steering Committee needs to be appraised of developments with respect to PPPs so that it can prepare and submit to Cabinet on the implementation of PPP programmes.

**d) The Public Private Partnership Facilitation Fund (the Facilitation Fund)**

Section 10A of the Act provides for a facilitation fund, the Public Private Partnership Facilitation Fund to be established. The PPP Centre has to open an account with a reputable investment bank into which all funds constituting the Facilitation Fund would be kept, with the PPC Director being the accounting officer of the Facilitation Fund. Approval from the National Investment Steering Committee is required for the use of funds from the Facilitation Fund.

The Facilitation Fund is financed from different sources, including money appropriated by Parliament for that purpose, funds mobilized from development partners, public entities, and social security funds. Any use of the funds from the Facilitation Fund has to be approved by the PPP Committee, and the funds can be used for financing the feasibility studies and other project preparation costs for PPP projects. It can also be used for providing resources to enhance the viability of projects which have high economics benefits that have demonstrated to be of limited financial viability.

**e) The Public Procurement Regulatory Authority (PPRA)**

The PPRA has oversight on all public procurement activities carried by all public bodies in Tanzania. As already explained, sections 79 to 82 of the Public Procurement Act, which PPRA enforces, have provisions governing the operations of PPPs. Thus, while the PPRA is not involved in the implementation of PPPs, it ensures that all public procurement to be undertaken is in line with the provisions of the Public Procurement Act, 2011.

### 3.3.2 PPPs done to date

Clyde and Co (2013) identified the following as examples of PPP projects whose implementation were ongoing in 2013 in Tanzania as follows:

- Chalinze super highway in Dar es Salaam;
- Arusha to Moshi Toll Road;
- Mbegani Port project in Bagamoyo;
- Mwambani Port project in Tanga;
- Kisarawe Cargo Freight Station;
- Expansion of the Mtwara Port;
- Improvement of the Kilwa Port;
- Expansion of Kasanga and Kigoma Ports.

Although the policy and institutional framework for PPPs in Tanzania were established following the PPP Policy of 2009, there are many projects that had been implemented without the policy framework. Examples include the Kilimanjaro International Airport (KIA) PPP Project, where the airport and its estate were awarded to Kilimanjaro Airports Development Company (KADCO) for 25 years in 1998 through a concession (Axis Consulting, 2013). This includes both those which succeeded and those which failed. One example of a successful PPP project is the Tanzania International Container Terminal Services Ltd (TICTS) container terminal concession in the Port of Dar Es Salaam in 2000 (Box 1). Failures include the Tanzania

City Water Services Limited (CWS) PPP Project (Box 2) and the central railway corridor concession in 2007 where concession for operation of passenger and freight services granted to M/s RITES of India (Axis Consulting, 2013). The absence of a clear policy framework can be attributed to several PPP project failures that have been witnessed in Tanzania.

Box 1: Tanzania International Container Services Ltd (TICTS) PPP Project

The details of the TICTS PPP project are provided extensively by Harding (2009). After a decision had been made to have the container terminal handed to the private sector through a concession, the concession contract was prepared in 1998 through a World Bank loan. Following an international bidding process, the concession contract was signed in 1999 with a consortium consisting of International Container Terminal Services, Inc (ICTSI) of the Philippines and Vertex Tanzania. The initial concession was for 10 years, but with a review after five years in the event of greater-than-expected traffic volumes. One of the concerns with the contract terms was that the contract did not offer exclusivity to the concession for container handling. This is also attributed to the low response to the Call for Bids.

A local company was formed, the Tanzania International Container Terminals Services Ltd (TICTS) to implement the project, of which International Container Terminal Inc-Philippines held 70% of shares and Vertex Financial services of Tanzania had 30%. TICTS began operations in September 2000 with a ten year contract. During the course of the implementation, Hutchison Port Holdings (HPH) of Hong Kong purchased a proportion of ICTSI's worldwide interests, so that the shares in the concession are now held by HPH with70% and Harbour Investment Limited (HIL), a "sister company" to Vertex, with 30%.

As per the contract terms, the contract was renegotiated in the fifth year of the concession, in 2005. This was after traffic had been seen to be increasing strongly and the terminal productivity was at its highest. The extended contract was for an additional 15 years, such that the total operational period was now 25 years in total. There were some modifications to the initial contract, as the extended contract now required the concessionaire to make substantial investments. The concessionaire was also awarded additional berth space and an extended back-up area. The concessionaire was in addition given exclusivity for the handling of container vessels, which was to remain in force until a level of 650,000 Twenty-Foot Equivalent Units (TEUs) per annum had been reached (or the terminal had expired). TEU is a measure a ship's cargo carrying capacity. In 2009, the level was about 360,000 TEUs per annum, showing that there was still a long way before the imposed ceiling was reached.

Performance targets for the PPP project were also set when the contract was signed. The target crane moves per hour for example were at 20 per hour up to the year 2004 and 25 moves per hour thereafter. However, a look at the performance of the PPP project (Table 2) shows that crane moves per hour were able to surpass the target only in 2004, with the target not being met in the other periods. However, the performance was very close to the target in all cases, with a noticeable upward trend up to 2005. Since then, there is a decline, which can be explained by the congested conditions on at the terminal outside the control of the concessionaire (Harding, 2009).

**Table 2: Crane moves per hour for the TICTS PPP project**

| | **2001** | **2002** | **2003** | **2004** | **2005** | **2006** | **2007** |
|---|---|---|---|---|---|---|---|
| **Actual** | 14.7 | 17 | 19.5 | 20.1 | 23.5 | 21.6 | 18.5 |
| **Target** | 20 | 20 | 20 | 20 | 25 | 25 | 25 |

*Source: Harding, 2009*

Performance can also be shown by the average dwell time for import container. This was about 37.7 days in the year 2001, which was reduced to only 16.7 in 2004, but rose again to 22.2 in 2006 (Table 3). Although this increase is worrying, by 2007 this was still lower than what was the case when the PPP project began to operate.

**Table 3: Average import dwell time (Days per Container) under the TICTS PPP project**

| | **2001** | **2002** | **2003** | **2004** | **2005** | **2006** | **2007** |
|---|---|---|---|---|---|---|---|
| **Container dwell time** | 37.7 | 25.9 | 16.7 | 16.7 | 20.2 | 22.2 | 19.8 |

*Source: Harding, 2009*

As outlined by Tito (2011), the decision to have a PPP project in the railways sector was part of the implementation of the Privatization Policy, where the Government tried to commercialize the

Tanzania Railways Corporation (TRC) through concessions or joint ventures. The project was concluded in September, 2007, with M/s RITES of India being awarded the tender to take over the operations of TRC. This saw a new company, Tanzania Railways Limited (TRL) being formed to take over ownership of TRC, being owned by RITES and the Tanzania Government on a 51% - 49% shareholding respectively. TRL was given a mandate to operate railway transport services for a period of 25 years. However, the implementation of the project was characterised by challenges, which eventually saw the agreement between the Government and RITES being terminated in 2011. The operations of TRL were handed over to a Local Interim Management Team on the 26th, July 2011.

The case of the CWS project is outlined in Box 2.

Box 2: Tanzania City Water Services Limited PPP Project

The details of the City Water Service (CWS) PPP Project are outlined by Triche (2012). This project, which was established in Tanzania in 2003, involved the engagement of a private operator by the Dar es Salaam Water and Sewerage Authority (DAWASA) to provide water supply and sewerage services in Dar es Salaam. The subsequent process was followed by a long process of about six years as attempts were being made at identifying a suitable private sector partner, with the differing expectations and objectives of the various interested parties also contributing to the delay. The efforts were spearheaded by a team, known as the DAWASA Divestiture Team, which comprised of representatives from the Parastatal Sector Reform Commission (PSRC), DAWASA, the Ministry of Finance and the Ministry of Water. In 1998, the DAWASA Divestiture Team, with the assistance of the World Bank, explored various options of possible PPP models to adopt for the project, before settling for a lease contract, where the operator would provide equity for working capital while most of the investment capital would be provided by donors.

The PPP contract was awarded to Biwater Gauff Tanzania Limited (BGT) and a Tanzanian investor, Super Doll Trailer Manufacture Company Limited (STM). These two created a firm through which the PPP would be implemented, known as City Water Services Limited (CWS), with BGT owning 51% shareholding and Super Doll with the remaining 49%. Under the terms of the contract, DAWASA was the asset holder and Leasor while CWS became the Operator. A contract, running for 10 years, was then signed between DAWASA and CWS (the Operator) in February 2003 before CWS began operations in August, 2003.

The terms of the agreement were such that DAWASA leased the existing and new assets to the Operator for use and maintenance during the term of the contract, although the ownership of all the assets, including small equipment remained with DAWASA. DAWASA's employees, excluding certain directors that had been recently appointed, were also made available for employment by CWS, even though DAWASA remained responsible for their pension programs as well as all the costs of the employees that were not hired by CWS.

In terms of the operation framework, CWS assumed the exclusive right and obligation to provide water supply and sewerage services and maintain assets within its area of operation. CWS was also responsible for maintenance and repair of some specified assets (for example, water pipes up to 300 mm in diameter and six meters in length), replacement of small equipment, and purchase and replacement of operating equipment such as vehicles, operating tools and office equipment). To cover as well as recover its costs, CWS would charge users for water and sewer services through a regulated tariff.

One of the reasons for the failure of the project is that when CWS assumed operations, its target could only be met if it identified and regularized thousands of unregistered connections, introduce a new billing system, reduce water losses from an estimated 70% to 44% in the first three years, and increase monthly collections from Tshs 720 million (the amount collected in August 2003) to Tshs 1.8 billion within 12 months (Triche, 2012). This was a difficult task, for it called for a change in culture on the part of the operating staff and many of the customers. However, CWS was unable to create these conditions, as it failed to meet many of its obligations almost from the start and, by December 2003, was already facing serious cashflow problems.

The performance of CWS was also poor relative to expectations; its average monthly collections in 2004/05 reached only 52% of projections and were 21% lower than what DAWASA had been able to achieve in 2002/03 (Table 4). One biggest problem was Government arrears for water and sewerage services, which had amounted to US$ 1.5 million by May 2005, equivalent to about 40% of CWS's total billing.

Table 4: Average monthly billed and collected: Comparison of DAWAS and CSW performance

| | DAWASA | CWS | |
|---|---|---|---|
| | 2002/03 | 2003/04 | 2004/05 |
| Ratio: Amount Billed to amount collected | 0.78 | 0.55 | 0.61 |
| Ratio: Amount collected to amount projected | 0.79 | 0.70 | 0.52 |

CWS also failed to fulfil several of its contractual obligations, which included failing to pay the rental fee to DAWASA. During the first year, payments of the rental fee were irregular before they ceased altogether after June 2004 as CWS funded its own operating costs. DAWASA responded by imposing a penalty for non-remittance of the rental fee in April 2004 after it was also facing serious cashflow challenges, but CWS could also not afford to pay for the penalty. By June 2005, CWS owed DAWASA Tshs 3.2 billion[5] in rental fees and leasor tariff revenues. By March 2005, accumulated losses by CWS amounted to about US$ 12.3 million. A decision was made to terminate CWS services, which saw the government quickly creating a new public operating company, the Dar es Salaam Water and Sewerage Corporation (DAWASCO), to take over from CWS. The engagement of DAWASCO was done on new terms, marking the collapse of the CWS PPP project.

*Source: Triche, 2012*

### 3.3.4 Lessons from the experience

The Tanzania experience with respect to PPPs can bring important lessons on how they should be properly structured to manage risks. For example, the original contract for the TCTS project was primarily a short term operating contract, which could explain why there was limited interest among the bidders when the initial call was made in 1999. There is need to ensure where substantial investment is involved, a long period is needed as 10 years is too short for the concessionaire to recover costs (Harding, 2009).

Triche (2012) also identifies important lessons from the CWS experience. These include the following:

- Sector reform efforts under PPPs can be easily undermined if there is a weak accountability framework.
- There is need to ensure that user preferences and attitude are adequately captured at project design stage. Consultation with users for an assessment of willingness to pay might have resulted in the design of a realistic program for the CWS PPP project.
- There is need for vested interests to be assessed early in the reform for explicit strategies to be developed to counter them.
- For PPP projects that involve water and sewerage, proven experience in introducing culture change and using performance incentives should be a pre-requisite for managers who are hired to turn around a non-performing water supply and sewerage utility.

[5] About US$ 2.9 million

- Where data is unreliable such as the case in the CWS project, it is important to recognize the need for verification when performance targets are being set to avoid a situation where the operator fails to meet the targets that were based on faulty base data.

## 3.3 Lesotho

### 3.3.1 Policy and Institutional framework

Lesotho has a Draft PPP Policy which elaborates the vision, the rational, the measures to ensure successful implementation of the PPP policy, contractual structures, sectors for application, and core guiding principles for PPPs. The draft PPPs Policy envisages the following key institutions for the development, procurement and management of PPPs:

**Procuring Unit**: the "owner" of a PPP and holds the lead role and interest in a potential PPP Project.
**PPP Unit**: the unit will fall under the Ministry of Finance and be responsible for the proper review and clearance of PPP projects submitted to it by the Procuring Unit. The PPP Unit is the preliminary review and clearance body and an advisory agency for PPPs providing technical support to Procuring Units on matters related to PPP project identification, development, evaluation and implementation. Specifically, the Unit will have the following responsibilities:

- Coordinating the implementation of the PPP Policy, monitoring and reporting to Cabinet on its progress.
- Regulating the PPP scheme ensuring that the PPP pipeline and the projects are developed in accordance with the principles and procedures set out in this Policy.
- Supporting with identification of projects appropriate for PPPs, including unsolicited proposals.
- Providing technical assistance and advisory services to Public Partner/Procuring Unit in structuring and evaluating PPPs, procurement and tender process and appointment of suitable and skilled transaction advisors. It reviews procedures and documentation submitted by bidders throughout the tender process.
- Contributing substantively to development of PPP pipeline under the guidance of the PPP Steering Committee and Public Partner/Procuring Unit to make sure that the necessary approvals from PSIC and Cabinet are taken into account of. It prepares an annual plan for identification and clearance of candidate PPP projects; and recommends their prioritization to the PPP Steering Committee.
- Promoting PPPs in Lesotho and internationally, and ensuring public awareness among all stakeholders as well as facilitating capacity building across various Public Partners/Ministries.
- Being a repository of knowledge and skills and continually build knowledge about identifying, developing, evaluating, implementing, and managing PPPs; including compiling and archiving information on PPP projects, and providing best practice and lessons learned.
- Liaising with funding agencies and international development partners as well as private sector to obtain financial and technical support for PPPs.
- Serving as the Secretariat to the PPP Steering Committee

**Steering Committee**: a gateway and authorization body for PPP Projects to be pursued based on a PPP Pipeline to be developed and submitted by the PPP Unit.

**Ministry of Finance**: oversees the PPP Unit. It bears fiscal management responsibilities, and is charged with the coordination, evaluation, and management of the fiscal implications of PPPs ensuring that the overall fiscal impact of PPP projects is consistent with Lesotho's fiscal constraints and that the risks are identified and managed appropriately. Specifically the responsibilities of the Ministry of Finance will be to:

- participate during all stages of the PPP process through its representative;
- weighting fiscal impact of, and prioritizing candidate PPP projects, and scrutinizing negative fiscal impacts;
- Identifying, properly calculating, and highlighting in studies and other decision documents the 'expected' and 'worst case' values of any fiscal commitments on PPPs submitted to Steering Committee.
- making proper economic and financial analysis and giving the analysis appropriate prominence in decisions relating to PPPs;
- Ensuring that fiscal commitments related to PPPs are appropriately budgeted for, appropriated, and reported;
- Identifying all fiscal commitments required by candidate PPP Projects early in the process;
- Liaising with relevant groups within MOF—such as the departments responsible for budget and debt management—providing a single point of contact between MOF and Public Sector/Procuring Unit;
- Monitoring fiscal risk across Government's portfolio of PPP Projects including receipt and assessment of risk reports from Public Partner/Procuring Unit

### 3.3.2 PPPs done to date

There is scant publicly available information on the PPPs that have been done in Lesotho. The available information indicates that in the past the country has engaged in two PPPs - one in the energy sector and the other in medical waste management. Another project was implemented in integrated healthcare delivery, which triggered criticism from the non-profit sector[6]. Boxes 3 and 4 give the perspectives on PPP projects that have been implemented in Lesotho from the private sector and government respectively.

**Box 3: The case of Tšepong in Lesotho**

The private sector partner, Tšepong, was selected through a bidding process in a hospital Design, build, equip and operate (DBEO) PPP project which began in 2008 and is to last for 18 years up to December 2026, after which the assets will be handed over to government, should the government opt not to renew the contract. There are no incentives which were given to the private sector. Apart from the design, build, equip and operate, the private sector role has to do with funding and operational support. On the other hand, the government acts as the project manager and also co-finances one-third of recurrent and capital costs. The method used to recoup private sector costs included charging of a fixed unitary fee based on patient volumes paid monthly to government and collections from patients go straight to the treasury (not part of the funding model). The main sources of finance for the project were

[6] https://pppknowledgelab.org/countries/lesotho

equity and debt.

There is no legal framework governing PPPs in the country and the Ministry of Finance is in the process of developing a PPP policy. The Ministry of Finance plays a regulatory role for PPPs. The office of the Contracts Manager in the Department of Private Sector Development of the Ministry of Finance is responsible for government PPPs. The Ministry of Health also has a PPP unit which is responsible for the ministry's PPPs.

In the PPP project, the Government has made no recognisable positive interventions that have influenced the implementation. The lack of its intervention in the following areas has affected the performance of PPPs: non-payment of unitary fees, which has resulted in the operator being unable to consistently service debt to the DBSA; non-integration of the project into the entire health system of the country (isolation); and lack of leverage on the technical expertise.

Lack of a legal framework and clarity in the financing model and has resulted in the inconsistent and retrospective application of different taxes (company tax, VAT, Witholding tax, Fringe benefit). The issues that need attention with respect to the legal system governing PPPs are there is need to enact a legal framework because currently the country does not have one, resulting in challenges on the taxation of the project and lack of proper understanding of the PPP contract.

The environment for the uptake of PPPs in the country tends to obstructive instead of supportive. It leaves the project isolated instead of it being integrated into the whole health care system. With the advent of the new government in 2012, the government wanted to close down the project. However, this problem has since improved with the new government coming in 2015..Despite having the World Bank sending more than one mission to teach the government on how the PPPs works, but there has been no improvement.

The project has a fully-fledged accounting system and budget for everything including contingent liabilities. The project submits items for inclusion into the government budget but some of them (and important ones sometimes) are either not funded or insufficiently funded.

Despite the challenges that the project faces, it is considered successful because it has been able to achieve what it set out to achieve and investment into the project has grown. Issues that cropped up during project design and implementation stage which affected the viability of the project include the Gateway clinics which were not part of the project from the onset. These are clinics which were opened at the gate on the main Tšepong hospital. Thus, there was a change in the scope of the project. The other change involves the measurability whereby measurement of the project in terms of benchmarks is not implementable anymore e.g. the number of participants always exceed what was initially agreed upon. These viability threatening challenges were not envisaged at the begging of the project.

The government seriously lack capacity for implementing PPPs. The government engages consultants to capacitate officials from the ministry on the PPP operations but due to staff turnover, necessary skills have not been retained. Sometimes trained staff gets moved and no effort are done to retain institutional memory.

The risk of cost overruns and delays in the implementation of the projects are managed through transferring them so that they are be borne by the private sector. Other parts of risks are managed by completing the project on time and within the initially stipulated budget. Construction and operational risk were all transferred to the private operator. The risk that service providers would compromise service quality and delivery is managed through instituting an independent monitor whom the private operator pays for, who measures the service of the private party against 304 service specifications, and applies financial penalties for any non-conformity. The risk of demand falling is extremely small because demand for health services offered is always exceeding what was initially agreed would be a maximum intake per day.

The necessary expertise and capacity to deliver PPPs projects is resident in locals. Efforts have been and are still being made to transfer expertise to locals. Contract terms stipulate the number of locals who should be employed; and how much should be spent on training locals and there are penalties applied for non-compliance.

To ensure that there is skills retention and technological transfer at the end of the project, the contract terms and conditions specifically include clauses to that effect, and these are measured quarterly. Country specific factors that have contributed to the success or failure of the project include the changes in the political environment which changes the government’s attitude the PPP project.

To improve the operational environment of PPPs in Lesotho, it is recommended that the legislation and policy framework be put in place. The financial framework for the PPPs projects should be in put in place as well. The government should be capacitated in all aspects of PPPs projects. A strategy to create institutional memory should be put in place so that when people leave, there is no gap left.

*Source: Interview Results*

Queen ’Mamohato Memorial Hospital constructed under PPP Project

**Box 4: Findings from interview with Lesotho’s Ministry of Health, Department of Planning on PPPs**

The examples of PPP projects that have been implemented in Lesotho include Queen ’Mamohato Memorial Hospital project and Ministry of Health Headquarters project. The Queen ’Mamohato Memorial Hospital project is a Build, Operate and Transfer including an element of design and finance which will last for 18 years, after which assets would be handed over to the government. No specific incentives were offered since what motivates the private sector player is profits. The role of the private sector in the project was to: design, finance and operate (i.e. staffing, medical equipment provision and maintenance) the project. To recoup the costs of investment incurred by the private player, there are unitary payments made. In addition, there was supposed to be revenue accruing from operating a private ward which would be shared between government and the private player. However, the private ward never came into existence. The government’s role in the project is to: repay the private player by way of unitary payments, co-finance the project and monitor the PPP agreement. The sources of finance for the project are: loans sourced from DBSA, government counterpart contribution and private financing from Tšepong.

The Ministry of Health Headquarters project is a Design, Finance, Construction, and Maintain PPP which is to last for a period of 18 years after which the assets would be transferred to the government. The incentive to the private player is the return on investment. The role of the private sector player is to partially finance the project and manage and maintenance the project. The private player recoups investment from monthly rental payments which are prepaid at the beginning of every month. The role of government was to finance the construction work. Funds for the project came from the government and private sector.

The institutional arrangements for governing the implementation of PPP projects are not very effective. The government has inadequate capacity and skills in the PPPs and high staff turn-over is a major obstacle to the effectiveness the PPPs implementation process. There is no proper PPPs Unit at the Ministry of Finance. The current arrangement is that the Contracts Management Unit at the Ministry of Finance works directly with the PPP Unit at the Ministry of Health. The Ministry of Health is the implementing agency while the Ministry of Finance is the custodian of the project. The PPP Unit at the Ministry of Health plays a monitoring role. There is also a Liaising Committee which is chaired by Permanent Secretary of the Ministry of Finance and the Tšepong Executive also sits in the committee. Parliament does not play any part except that the parliamentarians have only been sensitised about the arrangement.

The Contracts Management Unit at the Ministry of Finance acts as the PPP Unit. The Unit is not established by an Act. The Unit reports to Tsepong, and from there it reports to the government on monthly basis based on indicators agreed upon. An independent body monitor the performance of the operator and reports to the government and private player on a quarterly basis. The Liaising Committee sits and reports to the government on a quarterly basis.

Some of the interventions that have been made by government institutions in the course of implementation include several interventions by the Attorney General as an arbitrator between disputing parties of the PPPs. The Ministry of Trade, at one time had deregistered Tšepong because they had breached some of the provisions in their contract. Thus, some of the challenges that have been encountered in the implementation of the project include: disputes between Tšepong and government; breach of PPP provisions by Tšepong; government’s lack of capacity in PPP projects; and cost escalation beyond levels initially projected.

Currently Lesotho does not have a legal framework for governing PPPs. The country does not have a PPP policy either; it only has a draft PPP policy. The issues that would need attention include: interpretation of the provisions of the PPP contract; clarity on the roles of each player; and clear dispute resolution mechanisms.

The Queen ’Mamohato Memorial Hospital project has been viable and has achieved its intended objectives. Some of the benefits, direct or indirect, of the projects include: reduced maternal mortality rate; reduced infant mortality due to the establishment of the neo-natal care (including neo-natal intensive care unit); establishment of a new durable structure of the referral hospital better that the old Queen II hospital; and the acquisition of new modernised and advanced medical equipment such as CT Scan and MRI scan, among others. However, the escalation of operational costs is one of the main challenges that cropped up during project implementation and had not been anticipated initially, giving rise to the realisation of contingency liabilities to be borne by government.

The expertise in PPP projects resides in the private sector. Currently, there is no mechanism to retain skills as shown by high staff turn-over. A few people who were trained in PPPs could not be retained within government. The International Financial Corporation had offered to train individuals but government did not provide people for training and therefore government did not benefit from the offer. To improve the implementation of PPPs the PPP Policy framework needs to be finalised. The PPPs legislation needs to be established to govern the PPPs implementation. In addition, a formal and well-capacitated PPPs Unit needs to establish within the Ministry of Finance.

### 3.3.3 Opportunities and challenges

Lesotho has untapped potential for public–private partnerships (PPPs) in many sectors, particularly in energy[7].Infrastructure in Lesotho is relatively undeveloped with poor coverage and low quality services. Given the untapped potential for PPPs in many sectors, particularly in energy, multilateral development banks support the development of the necessary legal and institutional regimes, while concurrently improving the government's technical capacity to engage in PPPs. The need to establish implementation and post-transaction oversight capacity is

[7]African Development Bank Group (2013). Country Strategy Paper 2013-2017

deemed to be of paramount importance if the Lesotho government would like to embrace an overall strategy for private participation in infrastructure.

There is no overall framework to provide guidance and clarifications to the public and private sectors on all key aspects of PPPs. Fragmented efforts in the development and promotion of PPPs creates uncertainty and lack of confidence. The PPPs have all along been guided by traditional procurement processes, despite that PPP and traditional procurement arrangements are significantly different. While the relationship between government and the private sector is simple in a traditional procurement (buyer and seller), the relationship is complicated in a PPP arrangement, and therefore in order to provide guidance regarding these complexities and related risk allocation mechanisms, it is necessary to adjust the procurement regime accordingly. Some of the constraints to implementing PPPs in Lesotho include:

- A tight financial sector environment which constrains potential appetite for local investment.
- Lack of political will to finalise the draft PPP Policy framework
- Insufficient Institutional Framework (low implementing capacity) necessary to design and institutionalize a PPP Unit;
- Insufficient legal framework;
- Low level of local private sector participation;
- Insufficient training in PPPs and limited continuous education on PPP transaction process.
- Limited continuous education of the public in matters related to PPPs.[8]

### 3.3.4 Policy Recommendations

- Finalize the national PPP policy to enable coordination in the development and promotion of PPPs;
- In order to implement the Policy, Ministerial Regulations may be recommended as a possible presage to a potential PPP legal Framework.
- Prepare PPP related procurement documents and procedures.

## 3.4 Malawi

### 3.4.1 Policy and Institutional framework

Malawi has a Public Private Partnership (PPP) Policy Framework document which was approved by the country's cabinet on the 18th of May 2011. The PPP Policy Framework document sets out the policy framework for initiating, designing and implementation of PPPs in Malawi. Specifically, the policy document explains the concept, scope, goals and benefits, eligible areas, key principles and the legal and institutional framework of PPPs, among others. The PPP Act No. 27 of 2011 which was gazetted on 23 December 2011 sets the legal framework for PPPs in Malawi. The Act clearly defines PPPs, lays out their objectives, and provides for the establishment of the Public Private Partnerships Commission (PPPC). The Act also provides for

[8] XS-Axis Consulting (2014). PPP Country Paper: Lesotho. Southern African Development Community-Development Finance Resource Center PPP Network (SADC3P).

PPP arrangements, procedures for awarding contracts and divestiture and commercialization of state assets, among other things.

In the PPP Policy Framework document, the Government of Malawi indicates that the key institutions involved in PPPs program are: the Office of the President and Cabinet (OPC), Ministry of Economic Planning and Development (MEPD), Ministries and Contracting Agencies (MCAs), Ministry of Finance (MOF), PPPC, and Utility Regulatory Authorities (RAs). The roles of these institutions are as follows (although the Government notes that they may change over time):

**OPC**: providing broad policy leadership and overall direction of the PPP framework and directly overseeing the PPPC.

**MEPD**: ensuring that PPP projects fall in line with the national planning process and or the national infrastructure plan, as well as being consistent with the country's developmental goals.
**MCAs**: playing an ownership role (i.e. they own PPP projects) and leading the identification, selection and monitoring of PPP projects in their sectors. Their objective is to ensure that a list of bankable infrastructure projects is presented for the sector and that the projects are capable of attracting private sector investments and in so doing reducing the cost of developing and implementing infrastructure projects.

**MOF**: through the Review and Authorisation Unit, carries out PPP Review and Authorization function which largely entails coordination of the review and screening of PPP projects in the interest of protecting the public interest, and assessing the relevant PPP project financial risk exposure to the government. Specifically, MOF's two roles are that of assessing the long-term fiscal impact of the PPP project (direct or contingent, explicit or implicit) and determining whether it is acceptable, given other national priorities; and confirming the appropriateness of the project for sovereign guarantees (debt or specific-event) or other kinds of government support.

**PPPC**: implementing agency for PPPs responsible for providing advice and support in the following: development of infrastructure sector policies and strategies, project identification, feasibility studies, procurement process, negotiation, contract management, liaison with PPP Review and Authorisation Unit, promotion and capacity building and liaising to obtain financial support. The PPPC is also responsible for developing guidelines on best practices to assist sector ministries in the roll-out of their PPP projects.

**RAs**: liaising with the Contracting Authorities (CAs) and the PPPC to ensure that the terms and conditions as they relate to service standards and tariff (or any other regulatory matter) are consistent with the terms of the contract between the CA and the private party.

### 3.4.2 PPPs done to date

According to the PPPs Knowledge Lab, as of June 2015, Malawi had two PPP projects in the energy and transport sectors which had reached closure since 1990 and one active project[9]. The

[9](https://pppknowledgelab.org/countries/malawi)The data for the number of PPP projects and investment is obtained by conducting custom queries in the PPI database. The database records contractual arrangements with and without investments in which private parties assume operating risks in low- and middle-income countries (as classified by

total investment committed to PPPs since 1990 in Malawi is US$6 million. Other infrastructure projects in the pipe line or recently signed are as shown in Table 5.

**Table 5: Malawi PPP projects in the pipe line or recently signed**

| **Project** | **Current Stage** | **Value ($MM)** | **Sector** |
|---|---|---|---|
| Toll roads O&M project | Project in planning | | Transport |
| Public universities student accommodation PPP project | Project in tender | | Social & Health |
| UNIMA student accommodation PPP project | Project in planning | | Social & Health |
| Njakwa-Livingstonia-Chitimb road PPP project | Project signed | 80 | Transport |

Source: http://infrapppworld.com/pipeline-html/projects-in-malawi

For detailed examples of PPP projects carried out in Malawi, see Boxes 4 and 5.

**Box 5: Case of Central Eastern African Railways**

In December 1999, the Central Eastern African Railways (CEAR) consortium won the right to operate the Malawi railway network after responding to a call for tender by the Privatization Commission in the local and international press. The PPP project was a full privatization project of Malawi Railways where the government issued the company a concession agreement for period of 20 years to buy off all movable assets and run the railway network. The concession was renewable subject to parties being satisfied with the progress made during the initial 20 years. All non-movable assets such as the stations and building, rail line and houses were not sold in the first place but the concessionaire was allowed to use them and pay rent. Under the circumstance that the concession was not renewed, all the movable assets were to be revalued and sold to the government. In terms of incentives given to the private sector, the government offered a source of funding to be used in the rehabilitation of the movable assets such as locomotive, wagons and rail lines through a government guarantee loan with the Office of the President and Cabinet.

The role of the private sector in the PPP project was to run the day to day operations of the Malawi Railways and to bring in private sector business skills and expertise to improve the performance of Malawi Railways. The CEAR was going to recoup its investments in the organization through the profit the company was going to be generating.
The role of government in the PPP was to act as government controllers to monitor whether all the terms and conditions agreed in the concession agreement were being adhered to. Investor's capital was used to finance the project.

The concession agreement was the main legal document guiding the PPP project, in line with the constitution of the country and all the law applicable in Malawi. The regulatory framework was laid down in the concession agreement

the World Bank).PPP projects and investment are defined as management contracts, lease contracts, concessions, and greenfield in the following sectors: Energy, transport, telecom, and water and sewerage. Merchant and divestiture projects are excluded. This definition may differ from national definitions. With few exceptions, the investment amounts in the database represent the total investment commitments entered into by the project entity at the beginning of the project (at contract signature or financial closure), not the planned or executed annual investments. For projects that involve investments, the database figures reflect total project investments encompassing the shares attributable to both the private and the public parties. The database draws its information exclusively from publicly available sources.

between government and CEAR and the Privatization Commission and railways department in the Ministry of transport were the main regulators. The institutions mandated with the management of PPPs conduct constant monitoring of operations and finances through operations and financial reports. Key personnel from investors of the project also undertake visits to monitor progress on the ground.

Some of the challenges that have been encountered in the implementation of PPPs include the public misunderstanding of the process which led to a lot of vandalism to the rail line. The legal framework for PPPs in the country is adequate. The environment is very conducive in terms of peace which results in very little disruption in operations. However, the economic environment has not been very conducive because of high interest rates and very volatile exchange rates which led to high exchange losses. There has been consistency and respect of contracts for the PPPs on the part of both government and the private sector resulting in the success of most of the PPPs project, with very few cancellations.

The accounting mechanisms that have been put in place to formally account for the contingent liabilities and costs generated by the PPP projects regulations of the Concessionaire through the Companies Act and requirements to comply with IFRS and IAS and to have a big four Auditor. In addition, the government reviews these audited accounts. However, the PPP project has not been economically viable so far as the company is still making losses 17 years later after privatization. Among other issues that cropped up during the PPP project design and implementation which affected economic viability of the project was poor quality of the infrastructure, and this affected service delivery. This had not been anticipated at design stage. The capacity of government institutions to negotiate PPPs is fair.

CEAR avoided the local banks and borrowed internationally because of low interest rate. However, this opened up exposure to exchange rate risks. To minimize the risk that the performance of service providers could compromise availability and provision of quality services, CEAR only contracts reputable and established organization to carry its services. To minimize the risk that the demand of the service would fall after completion resulting in failure to recoup costs, proper feasibility study was done to ensure that the project was viable.
In terms of residence of the necessary expertise and capacity to deliver the PPP project objectives, both local and international firms have the necessary expertise. However, in terms of management the locals are very experienced and capable of running the institution.

As a mechanism to ensure skills retention and technological transfer over the duration of the implementation of the PPP, all key positions are filled by the locals and international supervisors are employed to assist the locals to improve their work. After training, the locals then takeover from the international supervisors.

The main policy intervention that can be recommended to improve the operational environment for PPPs is to control the interest rates and their volatility.

The country specific factors have led to the success in the implementation of the PPP project is high demand for rail transport which emanate from the exports of the country's agro-based economy high agricultural.

### 3.4.3 Opportunities and challenges

The PPPs legal framework of Malawi has a number of strengths which include the following:

- It establishes clear and complete procurement procedures for award of PPP contracts;
- It credibly defines /safeguards the rights and responsibilities of public and private sector bodies; and
- It establishes clear and complete guidelines concerning procurement control by public sector.[10]

[10]XS-Axis Consulting (2013). PPPs Country Paper: Malawi. Southern African Development Community-Development Finance Resource Center PPP Network (SADC3P).

However, the weaknesses of the framework were that:

- It does not have clear guidelines and procedures on the content of tender process/documents; and
- It does not introduce credible guidelines on post award PPP implementation.

In addition, there are serious capacity constraints among the PPPs implementing agents in public procurement, risk quantification and allocation, financial viability analysis and structuring financial models to benchmark private sector models submitted to procuring entities.

### 3.4.4 Policy Recommendations

- Strengthen the regulatory framework by developing and implementing clear guidelines and procedures on the content and tender/documents and developing credible post award guidelines.
- Strengthen capacity of PPP implementing bodies through continuous training in public procurement, risk quantification and allocation and financial modelling for PPPs.


*Mota-Engil Managing Director Jose Dinis received a Life Bouy at the handover of the operations and management of major shipping ports on Lake Malawi to the newly incorporated Malawi Ports Company, a subsidiary of Mota-Engil.*

**Box 6: Case study of Mota Engil PPP project in Malawi**

Mota Engil won a competitive bid to provide inland shipping and water transport services under Lake Malawi

Services in a BOT arrangement to rebuild shipping facilities. The project started in 2010 and is expected to last for the duration of 35 years, after which all the assets will be handed over to the Government of Malawi. No incentives were provided to Mota Engil to provide its services. However, the company has been negotiating for waiver on road/fuel levy but the Government has not granted the waiver. The roles of Mota Engil in the PPP arrangement are: to provide improved water transport services through rehabilitation of vessels and procurement of three passenger vessels, as well as to provide concession fees to the Government. On the other hand, the role of Government is to rehabilitate the Port. It also plays a regulatory role through the Marine Department. The costs incurred in the project are recouped through user fees from passengers and cargo haulage. However, due to issues to do with affordability, the user fees only cover part of the costs. For example, Mota Engil procured a passenger vessel called Chilembweat a cost of US$8.5 million, in line with the PPP investment programme, but due to issues of affordability, the user fees might not cover the costs. The sources of finance for the PPP project are mainly project finance, but in the event of incurring funding shortfalls, the project is cross-subsidized funds from other projects run by MotaEngil (e.g. road construction projects) are used to fill in the gap.

The principal legal instrument for governing PPPs in the country is the PPP Act which was enacted in 2011. The Marine Department under Ministry of Transport is the main government institution which plays a regulatory role in the implementation of the PPP project and certifies marine personnel and provides patrol services. The Ministry of Finance is responsible for providing funds for port rehabilitation. The PPP Commission provides technical support and plays supervisory role together with Ministry of Transport. The Ministry of Finance together with the Ministry of Transport are the Concessioning Authorities. These two institutions have made insufficient budget allocations for the maintenance of the ports and this has negatively affected the performance of the PPP project.

Some of the challenges that have been encountered in the implementation of the PPP include failure of the Marine Department to fulfil its obligation due to lack of funding, resulting in poor service delivery and inability to rehabilitate ports. In addition, climate change has negatively impacted the water levels such that some of the ports are not usable as before, for example, Chipokain Salima. Other ports were affected by heavy easterly winds and now can no longer handle cargo.

The environment for the up-take of PPPs is conducive. The Government and the PPP Commission are willing to support the projects. The enactment of the PPP Act has also positively contributed to the conducive environment. Generally, there has been some consistency and respect of PPP contracts by both the Government and the private sector. However, some shortfalls still exist in the form of weak institutional frameworks for institutions that oversee PPPs, e.g. the Marine Police does not have sufficient resources for law enforcement.

Accounting mechanisms applied to the Mota Engil Group Company are applied to the PPP project to account for contingent liabilities and costs generated by PPP projects. The economic viability of the project is so far mixed; the project has two components namely shipping and ports concession and the former has been viable while the later has not been viable. The other issues which have cropped up during the PPP project design and implementation and have affected economic viability of the project include climate change which has reduced water levels of Lake Malawi and storms which have sunk the crane at one of the ports (Nkhata Bay), thereby rendering the port unusable for cargo handling. Such viability threatening challenges were not envisaged at the conception and designing stage of the project. The capacity to negotiate PPP contracts exist within government Ministries. Training programs within the country are conducted regularly to create local expertise and therefore expertise at both operational and policy levels are resident within the country. The Marine Training College also trains sea going personnel and this ensures skills retention and technological transfer at the end of the partnership.

In order to manage financial risks from volatilities prices (e.g. in interest rates, exchange rates, inflation), user fees are inflation adjusted. The risk that the performance of service providers could compromise availability and provision of quality service is mitigated through strict standards for water transport certification. To manage the risk that the demand of the service would fall after completion, resulting in failure to recoup costs, is managed through maintaining lower fees for the passenger vessels. Most of the passengers are fish mongers and with fish stock depleting and high user fees this would lead to low patronage of the passenger vessels hence for one ship user fees are maintained at affordable levels.

In Malawi, the success of PPPs has been partly attributed to the close collaboration among different stakeholders including Government, PPP Commission and other parties involved. However, failures of PPPs are partly attributed to a weak economic environment which militated against the sealing of huge investment deals such as those required for infrastructure projects. At regional level, information on good practices has been shared and needs to continue to be shared. However, translating the ides into action remains a challenge among countries in the region that needs to be addressed.

In order to improve the operational environment for PPPs it is recommended that a National Port Authority is establishment. It is hoped that the Authority would effectively operate the ports, and be able to generate revenue just like Roads Authority.

## 3.5 The Kenyan Case

Kenya has one of the most developed PPPs legal and policy frameworks in the region. The country's Vision 2030 envisages a country with high quality services and facilities that prioritize investment in infrastructure facilities that are necessary to drive growth and development (GOK, 2011). In light of its limited public resources for infrastructure investment, the Kenyan Government has strategically incorporated and embraced the role of the private sector in financing and building infrastructure through PPPs. With increased momentum of delivering Vision 2030 flagship projects, there is interest in using PPPs by various sectors within Government. The government recognizes that the success of the PPP model is dependent on the institutionalization of the framework and systems under which PPP projects are prepared, procured and implemented. Thus, the Government of Kenya has developed a robust legal and institutional framework, as well as strengthening public sector capabilities to effectively and successfully implement PPP projects (GOK, 2011).

### 3.5.1 Kenya's PPP Policy and Institutional framework

Outside the guidelines enshrined in its constitution, Kenya did not have a PPP specific legal framework until 2009, with all the projects falling under this financing model regulated by contract (PPPU, 2015). However, the progressive liberalization of the Kenyan economy since the early 1990s has seen the country experiencing commendable participation by the private sector in the country's economic infrastructure sectors including energy, transport, water and sewerage, demonstrating private sector interest in infrastructure development even without a governing PPP policy or legal framework. As a result, some of the early PPP transactions took longer to prepare, approve and implement, while the key elements of PPPs in terms of value for money and risk transfer were not properly and effectively incorporated into PPP appraisals. Once PPP contracts were executed, there were significant cases of re-negotiations, litigation and arbitrations (PPPU, 2015).

In 2009, Kenya's first PPP regulations (PPP Regulations (2009)) were issued under the Public Procurement and Disposal Act (PPDA), 2005 whose object is "to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities" (GOK, 2011). The Public Procurement and Disposal Act, however, did not adequately accommodate the requirements of an effective and proper PPP regulatory framework since it did not directly provide for PPPs, except where it allows for the use of concessions and design competition. Thus, the existing legal framework was not comprehensive enough to provide legal certainty to PPP investors over the entire PPP project life cycle. To address these gaps, the Government of Kenya announced a formal PPP policy in 2011, articulating its commitment to PPPs and providing the basis of the enactment of the PPP Act in 2013. Since then, all PPP transactions in Kenya are guided and regulated by the PPP Act 2013. The Act's objective is to facilitate the participation of private sector in financing the construction, development, operation, or maintenance of public infrastructure or to develop projects through concession or contractual arrangements. The Act establishes a set of general principles and rules for PPPs based on best practices and all public entities are expected to comply with the principles and rules for purposes of ensuring high degree of consistency in PPP approaches across sectors.

#### 3.5.1.1 The PPP Policy Framework

Kenya's 2011 PPP Policy Framework articulates the Government commitment to Public Private Partnerships (PPP) and provided a basis for the enactment of the PPP Law (the PPP Act 2013) to strengthen the PPP Regulations, 2009 under the PPDA, 2005. The Policy Framework also provided the foundation for the establishment of the PPP Unit, an institution which champions the PPP agenda in the Republic of Kenya. The key elements of the 2011 PPP Policy Framework are (GOK, 2011):

i. to establish central institutions that champion the PPP agenda, which are the PPP Steering Committee, consisting of senior officials and guide policy and promote awareness; and the PPP Secretariat as a resource centre of expertise and best practice;
ii. to mobilize domestic and international private sector investment in PPPs and creating a level playing field and clear rules for implementation of PPPs. This includes, establishing a clear process for project selection, preparation, procurement and implementation, strengthening of the existing legal and regulatory framework established under sector laws and policies as well as the PPP Implementing Regulations; and implementing a clear, transparent process for allocating Government support, including guarantees; and
iii. to support Ministries, Departments and Agencies (MDAs) and encouraging them to develop PPP projects that provide value for money for Kenya, through appropriate project preparation and facilitating easier access to Government support, and technical assistance from the PPP Secretariat to assist MDAs in selection, development, procurement and implementation of PPPs.

Through the Policy Framework, Government established an institutional framework for implementing PPPs, consisting of the PPP Committee, responsible for developing and implementing PPP policy initiatives; the PPP Unit to act as a national centre for PPP expertise; PPP Nodes in the public entities responsible for the development and management of PPP projects; and a Project Facilitation Fund providing government support to PPP projects. The country's PPP framework also entailed the enactment of the PPP Act, 2013.

#### 3.5.1.2 Legislative Framework

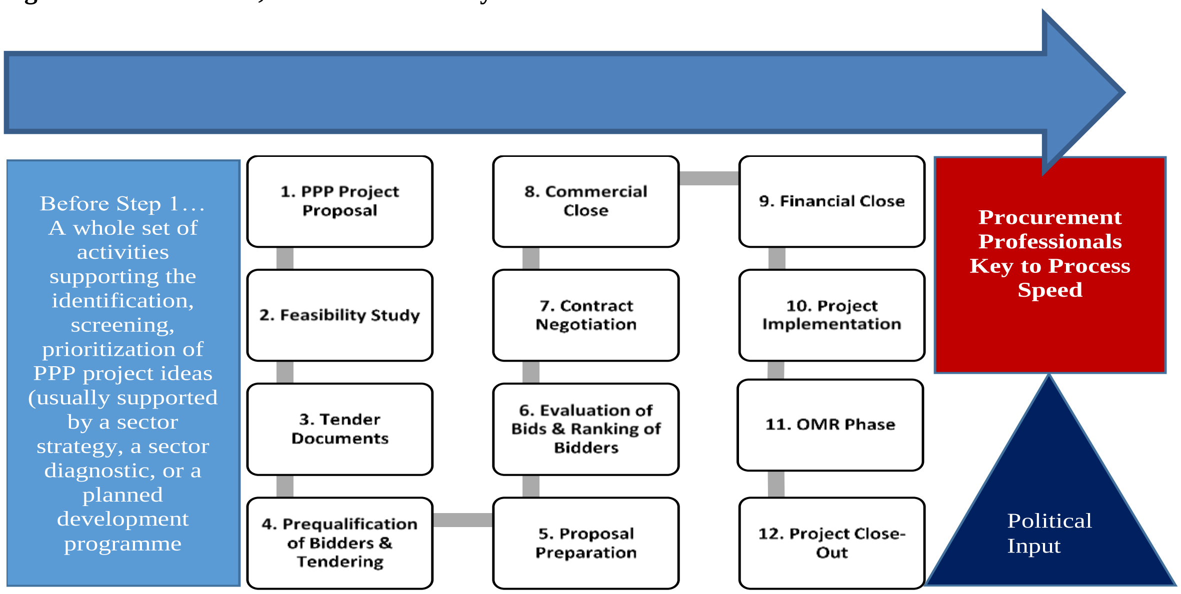
The PPP Act, 2013 sets the operational and regulatory guidelines under which Kenya's PPPs are implemented. This includes roles and responsibilities of various institutions involved at the PPP projects cycle The Act legislates the PPP concept in Kenya and defines it as an arrangement between a public entity and a private entity based on the performance of a public function for a consideration or compensation and transfer of risk (PPP Act, Section 65). Thus, through the Act, a PPP is given a legal relationship whose effect creates reliance and contractual expectancy with systems of hard claims on both government and the private companies involved.

The Act has and or does the following with regard to PPP Projects:

i. Establishes regulatory and project development institutions and systems, including disputes management systems;
ii. Suggests the PPP Project Cycle and its various sequential stages, including the articulation of the stage-specific requirements of the projects;
iii. Establishes the system for assessing the FCCLs arising from a PPP project;
iv. Prescribing appropriate procurement methods for the PPP projects and regulating their tendering, contracting and implementation processes; and
v. Providing for the necessary Government Support Mechanisms at the various stages of the PPP projects life cycle.

Before any PPP project is initiated, a number of activities in respect of project identification, screening, prioritization in line with sector and MDAs strategies, diagnostics and priorities are carried out through a project feasibility study. The PPP Act, 2013 generic PPP Project cycle is as illustrated in Figure 3.

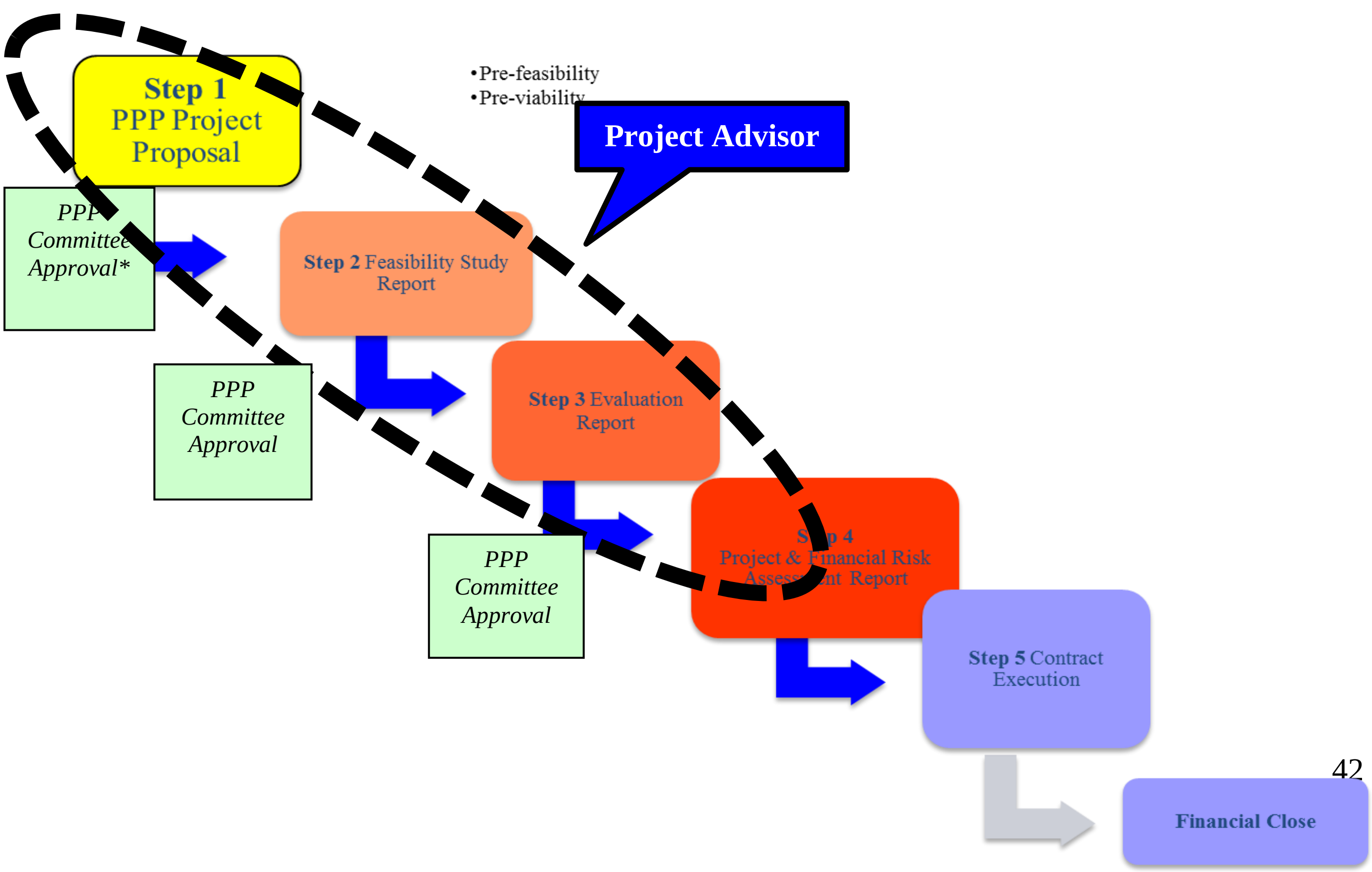
**Figure 3: The PPP Act, 2013 Prescribed Cycle**




*Source: PPPU (2015)*

Before the execution of any PPP contract, Kenya's PPP Act, 2013 prescribes a monitoring structure that ensures the PPPs are approved and implemented in a transparent, cost effective and most beneficial manner. Thus, at each and every stage from PPP project proposal to contract execution, gate keeping analyses and reports are carried and approved by the PPPs Committee before the proposal escalates to the next stage as shown below:

Figure 4: Kenya's Structured and Sequential PPP Process (*Source: PPPU (2015)*



The PPP Act, 2013 has provisions for both the Solicited and the Privately Initiated Investment proposals. The Solicited tendering system is, however, deemed to be more competitive and transparent and has the advantage of optimizing the country's value for money in the PPPs; while the Privately Initiated Investment tendering is less transparent and unlikely to be as cost effective as the Solicited system given that it does not allow for open competition.

Over and above the provisions of the PPP Act, 2013 and the 2011 PPP Framework, the Government of Kenya has a number of other specific supporting Acts that complement the implementation of PPPs in the country. These were, however, laid down prior to the PPP Act, 2013 as preceding steps in the designing and adoption of the official framework of policies, laws, regulations, institutions and procedures of public private partnerships. They include:

i. The Water Act [2002];
ii. The Privatization Act [2005];
iii. The Energy Act [2006];
iv. Amendment of Public Road and Tolls Act (Cap 407) in 2007;

The Government of Kenya has also facilitated and deployed a wide range of instruments to support PPPs, including extending Viability Gap Finance to projects that are socially desirable but are either not implementable wholly by the private sector, providing liquidity sources to meet unexpected contingent liabilities extended to PPP Projects during operations, and facilitating issuance of guarantees for PPP contracts with International Development Finance Institutions or other institutions involved in insuring country and project risks.

### 3.5.2 Kenya PPP Projects to Date

Since 1996, Kenya has implemented a number of PPP projects across various sectors in Transport and Infrastructure; Education, Science and Technology; Energy and Petroleum; Environment, Water and Natural Resources; Housing and Urban Development; Health; Tourism and Commerce; Industrialization and Enterprise; Agriculture, Livestock and Fisheries and ICT. In total at least seventy one (71) PPPs had been initiated or implemented by end of 2015, with the majority being in Transport and Infrastructure; Education, Science and Technology; Energy and Petroleum; and Environment, Water and Natural Resources sectors. The country's PPPs and their various stages of implementation are as tabled below:

**Table 6**: **Kenya's PPP Projects Since 1996 (As at October, 2015)**

| | | | |
|---|---|---|---|
| **TRANSPORT & INFRASTRUCTURE** | | **ENERGY SECTOR** | |
| 1. | $2^{nd}$ Nyali Bridge – TA | 21. | 400MW Menengai - 60MW RFQ |
| 2. | Nairobi Southern Bypass – TA | 22. | 800MW Menengai Ph 2 - CONCEPT |
| 3. | Nairobi - Thika Road - TA | 23. | 800MW Bogoria-Silali Phase 1 - CONCEPT |
| 4. | Nairobi - Nakuru Road - TA | 24. | 800MW LNG, Dongo Kundu – CANCELLED |
| 5. | Mombasa - Nairobi Highway - TA | 25. | 560MW Geothermal Project at Olkaria - TA |
| 6. | Phase 1 - Road Annuity Program - TA | 26. | 980MW Coal Plant in Lamu - AWARDED |
| 7. | JKIA Terminal 2 (Greenfield Terminal) - CONCEPT | 27. | 300MW Geothermal Suswa - CONCEPT |
| 8. | Inflight Catering Kitchen , JKIA - AWARDED | 28. | 40MW Solar at Muhoroni - CONCEPT |
| 9. | Food Courts at JKIA - AWARDED | 29. | 960MW Kitui Coal – FEASIBILITY STUDY |
| 10. | Government Flying School - TOR | 30. | 400MW Wind Plant at Meru - CONCEPT |
| 11. | Kisumu Sea Port - TA | 31. | Off Shore Jetty - TA |
| 12. | Mombasa $2^{nd}$ Container Terminal Phase 1 - TA | **EAST AFRICAN AFFAIRS, COMMERCE & TOURISM** | |
| 13. | Development of Shimoni Port - CONCEPT | | |
| 14. | Conversion of berth 11 - 14 into container terminals | 32. | Hotel at Bomas of Kenya - CONCEPT |
| 15. | Lamu Port Development project - CONCEPT | 33. | Mombasa Convention Centre - TA |
| 16. | Multi Storey Terminal at Likoni - TA | 34. | Development of Marina in Shimoni - CONCEPT |
| 17. | Nairobi Commuter Rail Services - TA | | **ICT** |
| 18. | Nairobi multi-storey car parking & commercial facility | 35. | National Data Centre - RESTRUCTURED |
| 19. | Mombasa Multi-level car park facility - TOR | 36. | National Land Information Management & National Spatial Data Base - CONCEPT |
| 20. | Integrated Marine Transport System - TA | | |
| **ENVIRONMENT, WATER & NATURAL RESOURCES** | | **EDUCATION SECTOR** | |
| 37. | Nairobi Solid Waste Management - TOR | 55. | KU Hostels - NEGOTIATIONS |
| 38. | Mombasa Solid Waste Management - TOR | 56. | Moi University Students Hostels - TA |
| 39. | Nakuru Solid Waste Management - TOR | 57. | Embu University Students Hostels - TA |
| 40. | Murang'a Water Supply Project - CONCEPT | 58. | Egerton University Students Hostels - TA |
| 41. | Nairobi Bulk Water Supply - CONCEPT | 59. | SEKU University Students Hostels - TA |
| 42. | Mwache Multipurpose Dam - FEASIBILITY | 60. | Maseno University Students Hostels - TA |
| 43. | Turkwel Downstream Irrigation - FEASIBILITY | 61. | JKUAT University Projects **(6No.)** - TA |
| 44. | Arror Multipurpose Dam - FEASIBITY | 62. | Kenya School of Government , Embu - TA |
| | | 63. | University of Nairobi Student Hostels - CONCEPT |
| 45. | Munyu Multipurpose and Greater Kibwezi irrigation | 64. | Machakos Uni. College Projects **(5No.)** - CONCEPT |
| 46. | Tana Delta Irrigation - FEASIBILITY | 65. | Pwani University projects - CONCEPT |
| 47. | Tana Delta Irrigation Sugar project - FEASIBILITY | 66. | Kenya Technical Teachers College - CONCEPT |
| 48. | Nandi Forest Multipurpose Dam - TA | **INTERIOR & COORDINATION OF NATIONAL GOVT** | |
| 49. | Magwagwa Multipurpose Dam - TA | 67. | National Police Housing - TA |
| **HEALTH SECTOR** | | 68. | Prison Housing - TA |
| 50. | ICT Services at Kenyatta National Hospital - TA | **INDUSTRIALIZATION AND ENTERPRISE DEVP** | |
| 51. | 300 Bed Hospital at KNH - TA | 69. | Special Economic Zone (SEZ) - FEASIBILITY |
| 52. | Oxygen Plant – RESTRUCUTURED | **LAND, HOUSING & URBAN DEVP.** | |
| 53. | Kenya Medical Training College (KMTC) projects | 70. | Civil Servants Housing Project - TA |
| 54. | Medical Equipment Lease - TA | 71. | Export Quarantine Station & Livestock Export Zone - TA |

Concept Stage (32%); TA Procurement Stage (18%); Feasibility Stage (37%); Tender Stage (6%); Negotiations Stage (4%); and Operational Stage (3%).

*Source: PPPU (2015)*

The picture below shows the aerial view of Nairobi South bypass PPP project under construction.

*Nairobi South Bypass road in Kenya under construction*

### 3.5.3 Opportunities and challenges

In its 2011 PPP Policy Framework, the Government of Kenya affirmed its commitment to encouraging PPP in as many areas as possible including in power generation, water and sanitation, irrigation, transport, solid waste management, health, education, housing, sports facilities, information communications technology, tourism, land reclamation projects, land swaps, industrial estates, business process outsourcing, wholesale and retail markets, abattoirs, mining and other infrastructure and development projects. Opportunities for PPPs exist and are encouraged at all levels of Government and public institutions, including, County Governments (CG), Local Authorities and State Corporations.

The PPP Unit has, however, noted the following current challenges with respect to the implementation of PPPs in Kenya:

i. Not easy to identify projects that satisfy the three co-principles of PPP in terms of value for money, cost effectiveness and risk transfer. It is difficult, for example, to ascertain the value for money in a PPP project, especially with Private Initiated Proposals;
ii. The prevalence of corruption, usually triggered by public officials is difficult to do away with;
iii. Many of the proposed PPP projects require Government support in terms of supplementary resources and technical expertise, which is not always easily available;
iv. Unavailability of project land as some land requirements (e.g. Nyali Bridge Project) exceed project cost;

v. Shallow domestic money and capital markets from which to raise financial resources for implementation of PPPs;
vi. Existing PPP Pipeline is national-government-level concentrated, with few sub-national PPP projects included; and
vii. In some cases the PPP transactions costs are heavy and onerous for counties and sub-national entities;

In addition, sub-national institutions and government systems among the MDAs face a number of PPP implementation challenges, which include, lack of adequate information on PPPs, procedures and modalities, weak revenue base, narrow technical capacity and preference by many private investors to deal direct with central government to minimize project risks.

### 3.5.4 Policy Recommendations

The Kenyan case suggests a number of policy handles for the country and other countries in the region. First, it is apparently clear that successful PPPs require a well-developed, detailed, clear and transparent legal, institutional and operational system to be in place. Such a system does not only ensure PPPs' implementation effectiveness and efficiency but it also fosters and incentives the private sector to participate in the PPP arrangement. This has resulted in the wider use of PPPs as a common infrastructure funding model in Kenya than in most of the countries in the region.

However, the country's case also suggest that there is need to address issues of financial and technical capacity at all levels of government, including central government, local government and government departments and parastatals that deal with and implement the PPP projects.

## 3.6 The Zimbabwean Case

Zimbabwe's current long term growth strategy is spelt out in the Zimbabwe Agenda for Sustainable Socio-Economic Transformation (ZIMASSET) blue print (GoZ, 2013). The blue print was crafted after the country had just emerged from almost a decade long economic crisis, hence its major tenets are in respect of the country's turnaround strategy initiatives. Like Kenya's Vision 2030, ZIMASSET embraces the critical need for a well-functioning and enabling infrastructure, among other objectives on development and enhancement of quality of life. The blue print presents opportunities for domestic and foreign investors in the Zimbabwean economy. It calls for and embraces the importance and possible interventions that can be bridged through PPPs in infrastructure development and maintenance. For example, the flagship projects under the ZIMASSET cluster on Infrastructure and Utilities are targeted to be funded predominantly through PPP model (GoZ, 2013).

The scope for infrastructure development through Public Private Partnerships (PPPs) in Zimbabwe is enormous in view of the existing extensive infrastructure gaps, coupled with plummeting aggregate demand and binding fiscal space constraints. The World Bank (2011) estimated that Zimbabwe would need to spend at least $2 billion a year for over a decade to close its infrastructure deficit[2]. Whilst, some progress has been made in the rehabilitation of the country's trunk roads which include the Plumtree - Harare – Mutare Road, electricity and water supply, overall infrastructure quality and limited airline connectivity are still problem areas in the country[3]. Despite encountering challenges such as bureaucracy, adverse performance variances and corruption, local authorities by and large have successfully worked on a number of bankable investment projects (PPPs) mostly in property development and the servicing of residential stands.

### 3.6.1 Policy and Institutional framework

Zimbabwe's legislative, regulatory and policy framework is generally considered to be inadequate. In view of the large sums of money, and the long term nature of contracts involved with PPPs, investors want policy certainty and assurance that contracts are enforceable at law. A robust regulatory, legislative and policy framework is critical in boosting investor confidence. Attempts at coming up with a legislation on PPPs took some time in Zimbabwe. Policy documents: Public-Private Partnership Guidelines, 2010; Public Private Partnership: Legislative Review for Zimbabwe, 2010; and the Institutional Framework, Public- Private Partnerships, 2010 were crafted[5].

On the 12$^{th}$ of February, 2016, the Joint Ventures Act [Chapter 22:22] was gazette. The Act came into force in May 27, 2016 following the passage of Statutory Instrument 53 of 2016 to operationalise it. The Act classifies PPPs within joint ventures and defines a joint venture as an agreement between a contracting authority and a counter party, in terms of which the counterparty undertakes to perform a contracting authority's function on behalf of the contracting authority for a specified period; and the counterparty receives a benefit for performing the function by way of-

- compensation from funds appropriated by Parliament; or
- funds obtained by way of loan by the contracting authority; or
- user levies; or
- revenue generated from the project; or
- any combination of the foregoing.

For the avoidance of doubt, Part II of the Schedule to the Act lists and defines the various types of PPPs as falling under the purview of the Act.

In addition to the Joint ventures Act, Section 49 of the Procurement Act [22:14] also deals with the application of the Act to BOOT or BOT contracts and it defines a BOOT or BOT contract as "a contract or other arrangement under which a person undertakes to construct an item of infrastructure for the State, a local authority or a statutory body in consideration for the right to operate or control it for a specified period, after which period he will transfer or restore ownership or control to the State, the local authority or the statutory body concerned.

The Joint Venture Act also provides for the institutions that are tasked with the implementation of the Act. The institutions include the following:

**a) Joint Venture Unit (The Unit)**

A Joint Venture Unit, which is a department of the Ministry of Finance under the control and supervision of the Secretary, is established under section 3 of the Act. Its core functions include:

- Considering project proposals submitted to it and assessing whether they are affordable, provide value for money and also provide for the optimum transfer of technical, operational and financial risks to the counterparty and are competitive.
- To examine requests for project proposals to ensure they conform with the approved feasibility studies; and
- To advise Government on Joint Venture projects generally; and
- To develop best practice guidelines in relation to all aspects of joint ventures; and
- To assist the Joint Venture Committee to formulate policy in relation to joint venture projects; and
- To develop awareness of joint ventures in Zimbabwe as a vehicle for economic development and delivery of public services; and
- To undertake monitoring and evaluation of joint venture projects and where necessary, to make appropriate recommendations concerning such projects to the Committee and contracting authority[6].

The Act also outlines some obligations which the Joint ventures Unit has in the implementation of the Act. For example, within 40 days after the end of each year, the Unit has to submit an annual report to the Minister of Finance outlining matters that it has dealt with, which the Minister has to lay before Parliament. The Unit also has some powers that are vested in it for the successful discharge of its duties. Under section 11 of the Act, the Unit has the power to use and retain consultants to assist it on an *ad hoc*, part-time or full-time basis as well as to request the accounting officer or Chief Executive Officer of the contracting authority to furnish any information relating to a project. Any person to whom a reasonable request is made by the Unit and refuses to comply or wilfully gives false information will be liable to a fine or to imprisonment for a period not exceeding three years, or to both such fine and such imprisonment.

**b) Joint Venture Committee**

Section 4 of the Act establishes a Joint Venture Committee, which consists of

- the Secretary of the Ministry of Finance, who shall chair the Committee;
- the Secretary of the ministry responsible for industry and commerce;
- the Secretary of the ministry responsible for transport and infrastructural development;
- the Secretary of the ministry responsible for energy and power development;
- the Secretary of the ministry responsible for local government;
- the Secretary of the ministry responsible for justice;
- the Secretary of the ministry responsible for economic planning;
- a representative of the Attorney-General, at Director level; and
- the Director of the Unit.

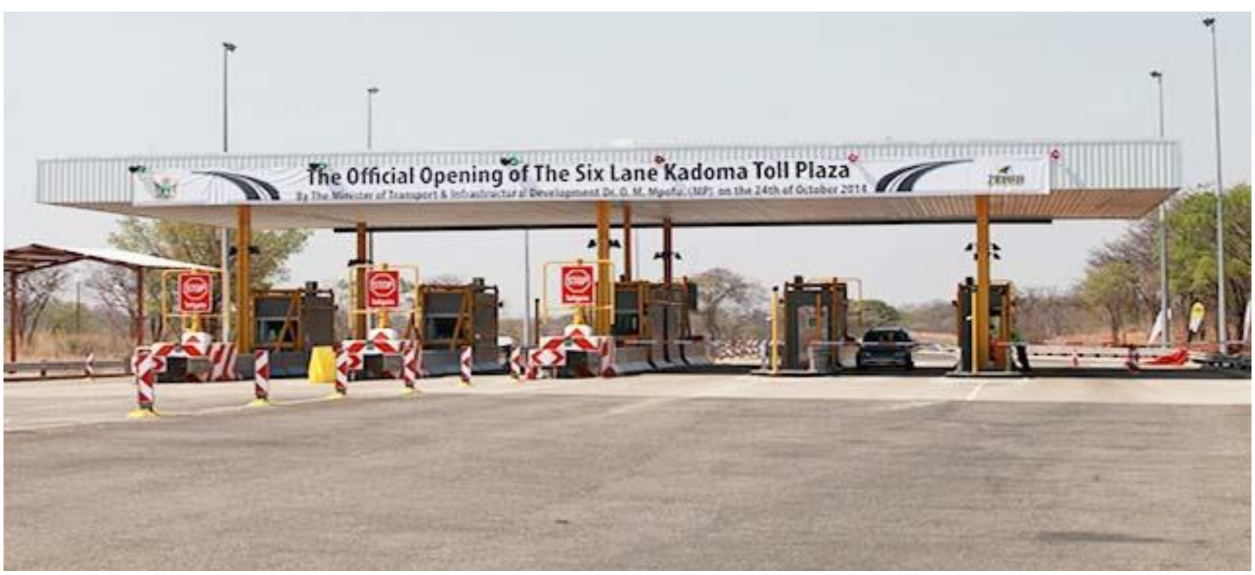
The functions of the Joint ventures Committee include assisting the Minister to formulate policy guidelines on joint ventures; to ensure that all projects are consistent with the national priorities specified in the policy on joint ventures; and to make recommendations to Cabinet as to whether to approve or reject project proposals submitted to it by the Unit.

**c) Cabinet**

Cabinet is also an important institution with a deterministic role in the conclusion of PPP agreements in Zimbabwe. Under section 13 of the Act, no contracting authority shall award a project or sign a joint venture agreement relating to the project unless the joint venture agreement has been approved by the Cabinet. Any agreement that is entered into without the approval of Cabinet shall be null and void. A joint venture which has been agreed based on tenders for the project in accordance with the law relating to public procurement, even under the directive of cabinet, can still be nullified by Cabinet at any time before the execution of the Project if the Cabinet deems it to be in the national interest to do so.

### 3.6.2 PPPs Implemented in Zimbabwe to Date

Delays in instituting a robust PPP legal and institutional framework, has resulted in slow uptake and conclusion of PPP projects in Zimbabwe. Earlier projects include the Beitbridge Railway (BBR), the New Limpopo Bridge and the Newlands By-Pass in Harare. All the three projects were done on build and transfer basis (BOT). The Limpopo Bridge was awarded to a private investor in 1993 by the Governments of Zimbabwe and South Africa. The Beitbridge Railway project involved the construction of a 350km railway line between the South African border and Bulawayo. More recent projects include the Infralink Road Project involving the re-construction and rehabilitation Zimbabwe's highway roads and other Local Government projects such as the City of Harare Easy Park Project. The Zimbabwe Power Company (ZPC) has also engaged several private investors on several power generation expansion projects, including the Kariba South Power Station, which was awarded to Sino Hydro, a Chinese-owned entity. Below is one of the Toll Plazas on the Plumtree to Mutare road constructed under a PPPs framework.




*ZINARA Infralink Toll Plaza PPP project*

Table 7 shows PPP projects done in Zimbabwe over the years were most of the projects are in the transport and water sectors.,

**Table 7: PPP Projects done over the years in Zimbabwe**

| **PROJECT** | **SECTOR** | **STATUS** | **TYPE OF PPP** | **Project Description** |
|---|---|---|---|---|
| | | | | |
| Beitbridge Bulawayo Railway | Transport | Completed | BOT | Construction of 350KM railway line linking Beitbridge and Bulawayo. |
| Newlands Bypass | Transport | Completed | BT | Four-lane highway bypassing Newlands Shopping Centre in Harare. |
| New Limpopo Bridge | Transport | Completed | BOT | Construction of a toll bridge over the Limpopo River |
| Plumtree – Harare – Mutare Road | Transport | Completed | BT | Rehabilitation of Plumtree - Harare-Mutare Rd, Installation of 9 toll gates. |
| Damafalls Development Water Augmentation Project | Water | Completed | BOT (25 years) | Bulk water supplies to Damafalls |
| Donnybrook Water Augmentation Project | Water | Completed | BT | Bulk Water Supplies to Ruwa |
| Zimre Properties Water and Sewer Treatment Plant | Water | Completed | BT | Bulk Water Supplies to Zimre Park |
| Development of Chiremba Road | Roads | Completed | BT | Construction of Chiremba Road by private investor T. C Hardy |
| ZB Water Augmentation Project | Water | Completed | BT | Bulk Water Supplies to Ruwa |
| ZESA/Zent | Energy | Ongoing | BT | Manufacture of Electricity meters |
| Sunway Housing Development | Property | Completed | BOT | Servicing of Residential stands in Harare. |
| Muzhu Dam Rehabilitation | Water | Completed | BOT | Bulk Water Supplies in Chiredzi. |
| Tongatt Hullets | Water | Completed | BOT | Rehabilitate Chiredzi Water Treatment Plant |
| Chitungwiza General Hospital PPP | Health | Ongoing | ROT | A five year PPP with Baines Imaging Group in 2012 for the rehabilitation of theatre, renal, radiology, mortuary and pharmacy. |

### 3.6.3 Opportunities and Challenges for PPPs in Zimbabwe

*Opportunities*

The ZIMASSET has four strategic developmental clusters all of which have opportunities for PPPs. These are: Food Security and Nutrition; Social Services and Poverty Eradication; Infrastructure and Utilities; and Value Addition and Beneficiation.

**Infrastructure gaps should be seen as business opportunities**. The critical aspect would revolve around structuring PPPs to ensure that performance targets are met and private business receives a reasonable and acceptable rate of return. For possible specific PPPs, parastatals that frequent Government policy include transport, post and telecommunication entities such as TelOne, NetOne, Zimpost, the National Railways of Zimbabwe, Air Zimbabwe and the Zimbabwe United Passenger Company, which are currently having serious operational challenges. Other parastatals include the Grain Marketing Board and the National Oil Company of Zimbabwe.

**The use of reserve currency (United States Dollar)** - The adoption of the multi-currency system in 2009 has made the country an attractive investment destination. The widespread use of the reserve currency, the United States dollar that is also stable and has wide acceptance across the world has given the country some edge in terms of business competitiveness.

**Skills exposure** - Despite the fact that Zimbabwe has a highly skilled and technically competent labour force, there is need to forge alliances with regional countries that have significant exposure to PPPs, in order to tape from their experience.

**One Stop Investment Shop** - Government initiatives to introduce a One Stop Investment Shop could streamline bureaucratic bottlenecks that tend to cripple business initiatives and advance the nation's ease of doing business especially in public bodies or parastatal organizations.

**Access to improved technological advances** - Access to advanced technology is another major opportunity PPPs bring.

*Challenges*

However, there remain a number of challenges to implement and operationalize the PPP financing model in Zimbabwe. Although the Joint ventures Act has now been passed, the implementation framework is yet to be put in place, including the key institutions that are supposed to play the significant role. Other challenges include the following:

**The Adverse Operating Environment** - Zimbabwe's operating environment that has continued to spiral for over a decade remains the major challenge for business. Characterized by declining aggregate demand, high unemployment, a shrinking manufacturing base, and a highly regulated business environment, the country suffers from high cost of doing business driven largely by energy and labour charges, heavy taxation, and a strong currency. This has significantly undermined the country's ability to attract Foreign Direct Investment (F.D.I).

**Contract Negotiation Skills** - The capacity to negotiate contracts that involve many stakeholders and at times with competing interests is limited especially in the public sector. Major PPP contracts are generally long term in nature and involve large sums of money. Chances are high that business conditions could change over time and without room to renegotiate contracts; public good is usually not guaranteed. The performance of private partners particularly in the provision of long-term capital assets is a challenge that should be closely scrutinized. As is the case with Damofalls Water Augmentation Project (Ruwa Town Council), the quality of equipment which was installed to augment the Council's water supplies would did not last for ten years when the project was supposed to run for twenty five years. There is therefore need to regularly review PPP contracts and monitor the performance of private partners.

**Lack of Experience and Knowledge to Manage PPPs** - There is a skills gap in Zimbabwe especially in the public sector as the exposure to complex PPPs is very limited. The country has experienced massive brain drain of highly skilled and technically competent personnel mostly to neighbouring countries particularly South Africa. Even though many qualified and skilled people remain in the country, there is need to place the right people in the right positions. ZINARA observed that Zimbabweans currently living and working in regional countries are now being seconded to come back and implement PPP projects particularly on road rehabilitation in the country.

**Quality of Project Appraisals and Feasibility Studies** - Another challenge associated with the quality of skills is the quality of feasibility studies and project appraisals undertaken. ZINARA for instance had to agree to new terms with its private partner Group Five when it observed that the volume of traffic passing through the installed toll gates along the Plumtree-Harare-Mutare road was inadequate for it to recover its outlay over the agreed period. Similarly, the twenty five year water augmentation contract between Ruwa Town Council and a private developer Damofalls Developers, is reported to be controversially giving the private investor windfall profits for a number years to come, despite the already dilapidated equipment the private partner installed.

**High Country Risk** - Due to negative political perceptions abroad, the country is struggling to access finance at reasonable interest rates. Government investment in gross fixed capital formation has declined over the years reflecting the country's difficult fiscal position. Foreign investors who could potentially partner with government to finance public infrastructure remain wary of the perceived high country risk. This has resulted in punitive interest rates being applied by financiers on PPP investment loans. DBSA reportedly charged ZINARA exorbitant interest rates as compared to what it charges elsewhere for the loan it obtained to rehabilitate the Plumtree - Harare – Mutare Road.

**Legislative and Institutional Framework** - The institutional and legislative framework in Zimbabwe is not as robust as it is in other countries surveyed in this study that have a PPP policy and legislative framework that have been operational for a longer period. The Joint Venture Act which covers PPP transactions was enacted in February 2016.

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**The Use of Antiquated Equipment** - The manufacturing sector by and large is using antiquated equipment that has high maintenance costs and is operationally inefficient. This undermines the competitiveness of bids by local firms who would like to partner with Government on infrastructure projects.

**Regulations on Tariffs** - Tariff regulations for public utilities such as ZESA and ZINWA are considered to be major obstacles to PPPs. Sub-economic tariffs have been highlighted as one of the major factors undermining the uptake of Energy and Water projects. However, it is also imperative that overall cost structures for public entities such as ZESA and ZINWA are rigorously scrutinized with a view eliminating waste and managing its major cost drivers.
**Cost of Doing Business** - Zimbabwe is a highly taxed country compared to its comparator countries in the region. The average tax rate in Zimbabwe is about 35%, second highest from Kenya with an average tax rate of about 44% while Zambia has a relatively low tax rate of about 15%[7]. The heavy tax regime is a cost to business which significantly undermines the country's potential as an investment destination, including PPP investment ventures. Questions have also been raised over charges levied by the Environmental Management Agency (E.M.A), which are considered to be too high at 1.5% of project costs.

**Corruption** - Corruption is has been identified as one of the factors that are increasing project cost in Zimbabwe resulting in some cases in budget overruns or changes in project scope during the implementation phase. Corruption frustrates and disenfranchises both existing and potential PPP partners as it erodes profits and confidence. Institutional reforms that foster transparency and enforcement of contracts have been identified as some of the strategies that will complement the efforts of the anti-corruption commission.

**Bureaucratic Delays** – Delays in approval of PPPs proposal due to bureaucratic delays has undermine the implementation of PPP projects. For example, the City of Harare noted that has several investments proposals that await approval from various government departments. The country's systems, processes and procedures relating to approval of PPP projects need to be streamlined to avoid delays in project implementation.

The challenges and concerns raised by the private sector operators interviewed during the study, including both those who are already involved in PPPs and those in potential sectors, can be summarised as in Box 6.

**Box 7: Challenges identified by stakeholders as critical in PPPs enforcement in Zimbabwe**

Stakeholders raised a number of challenges in the PPP landscape for Zimbabwe. These include the following:

- The lack of properly developed and packaged projects that attract private sector funding.
- Protracted negotiations that involve many stakeholders with at times competing interests.
- Absence of a clear operational legal framework on PPPs.
- Lack of proper development planning capacity at national level.
- The use of antiquated equipment that is operationally cost inefficient.
- Sub-economic regulated tariffs that undermine the bankability of identified PPP projects.
- Organizational structural and cost structural reforms imperative for the institution to operate profitably.
- Poor quality of feasibility studies and project appraisals.
- Government bureaucracy and corruption hindering smooth operations on identified PPP projects.
- Poor access to low cost finance.

### 3.6.4 Policy Recommendations

Whilst the passage of the Joint ventures Act of 2016 is a huge milestone; there is still a lot of efforts that are needed to ensure that the legislation is effectively implemented. Thus, the implementation of the Act needs to be prioritised, including setting up and resourcing the key institutions that need to play significant roles in the implementation process. In addition to operationalisation of the legal and institutions framework for PPPs, the following also constitute critical recommendations for an effective PPPs environment in Zimbabwe:

**Institutional Strengthening**– Institutions responsible for managing and implementing PPPs need be resourced and strengthened with requisite capacities. Lessons can be drawn from other countries review in this study, particularly from Kenya, Uganda and Tanzania. Institutional reforms targeted at reducing bureaucratic delays and corruptions that increase project costs and frustrate investors also need to be implemented. There also need for alignment of laws investment and promote policy and institutional complementarity to create a PPPs supportive rather than an obstructive policy environment.

**One Stop Investment Shop** - Efforts are currently underway to expedite the processing of all relevant business registration stages under one roof. However, in order for this endeavour to bear fruit, there is need to empower officer seconded to the one stop shop. There is also need to create and information sharing platform between the One Stop Investment Shop and the Joint Venture Unit whose operations are similar to the PPP Unit in other countries surveyed in this study.

**Incentives for Investors**–Private Investors are lured by the profit motive; hence there should be incentives to invest, that are not limited tax breaks. The passing of the Special Economic Zone (SEZ) Bill into law creates opportunities for PPP projects in the provision of infrastructure in the SEZ. Provision of infrastructure can be used as a non-tax incentive to attract investors in the SEZ.

**Skills Training and Development** – A competent staff is able to negotiate the best PPP contracts; Identify projects that should be procured through PPPs and adequately monitor and evaluate performance. There are specialized skills required for instance in contract negotiations of PPPs, projects design and implementation which are not resident in procuring authorities. Government has taken a policy position to decentralise public procurement to procuring authorities which include government ministries; local authorities and public enterprises. These institutions require capacity building in general procurement processes but more specifically on PPP transactions. The newly established Joint Venture Unit also requires resourcing with personnel with the requisite capacities to manage PPPs transactions. Synergies with established international organizations that have enormous experience on PPPs would improve the quality of local skills.

## 4. CROSS CUTTING ISSUES ACROSS THE COUNTRIES

### 4.1 Policy and Institutional framework

The study has revealed varied country experiences and institutional and legislative frameworks for the management of PPPs projects. However, one common feature that private investor who seek to partner government is the credibility, predictability and sustainability of the policy environment and the institutional framework. Investor wants to partner governments that have transparent and predictable rules governing PPP contracts. In this regard the existence of robust and transparent PPP policies and legislative frameworks that govern the implementation of PPP projects is critical for the adoption of the PPP framework as a financing model of choice for infrastructure projects.

The legislative should also be informed by the policy, which also helps shape the piece of legislation in line with the country's main objectives.. An assessment of the policy and legislation environment for the six countries (Table 8) shows that Zimbabwe and Lesotho do not have policy frameworks for PPPs. Zimbabwe does have PPP guidelines (2010) and a 2016 Joint Venture Act that covers PPP transactions, while Lesotho has a draft policy and is yet to enact the legislation. The table also shows that the promulgation of PPP policies and enactment of PPP legislation is recent phenomenon starting in 2009 for PPP policies and 2010 for PPP Acts. Other countries in the region that have opted for standalone PPP legislation, in the region, are Mauritius (PPP Act, 2004) and Zambia (Public-Private Partnership Act, 2009).

We observed in the Kenyan case for example, that the early PPP transactions took longer to prepare, approve and implement, while the key elements of PPPs in terms of value for money and risk transfer were not properly and effectively incorporated into PPP appraisals due to lack of a clear policy and legislative framework for PPPs. PPP contracts that were executed, under these condition resulted in significant cases of litigation, arbitrations and contracts that needed to be re-negotiated. Furthermore, the absence of a clear policy framework has been attributed to several PPP project failures that have been witnessed in Tanzania. It can therefore be concluded that the low uptake of the PPPs as a financing model within the surveyed countries can be explained in part from the lack of robust policy anchored on the country's long term vision or development plan as well a clear PPP legislative framework to guide prospective investor seeking to partner government in PPP projects.

**Table 8: PPP policy and legislative frameworks for the six countries**

| Country | Policy | Legislation |
|---|---|---|
| Kenya | PPP Policy Framework, 2011 | PPP Act, 2013 |
| Lesotho | None (Only Draft) | None |
| Malawi | PPP Policy Framework, 2011 | PPP Act, 2011 |
| Uganda | Public-Private Framework Policy of 2010 | PPP Act, 2015 |
| Tanzania | National PPP Policy, 2009 | PPP Act, 2010 |
| Zimbabwe | None | Joint Ventures Act, 2016 |

The effectiveness of the institutions that implement the legislation is often judged by some level of independency in decision making processes. Most of the countries surveyed as shown in table 9 have independent government agencies, which are not a department of a Ministry. Zimbabwe has a Joint Venture Unit which also handles PPP transactions which is a department in the Ministry of Finance.

**Table 9: Implementing institutions in the six countries and independence**

| Country | Implementing Institution | Operationally Independent from Ministry |
|---|---|---|
| Kenya | PPP Unit | Yes |
| Lesotho | Government Ministries | Not applicable |
| Malawi | PPP Commission (PPPC) | Yes |
| Uganda | PPP Unit | Yes |
| Tanzania | PPP Centre | Yes |
| Zimbabwe | Joint Venture Unit | No |

## 4.2 PPPs implementation experience

All the countries have some experience in implementing PPPs in different sectors of the economy. Kenya, which has an experience of at least 71 PPP projects, one of the most developed PPPs legal and policy frameworks wider experience in managing PPPs in the six surveyed countries in terms of sector diversity (Table 10). Lesotho and Malawi have the least experience. The Kenyan experience can thus be used as a critical input for a regional framework on PPPs.
In particular stakeholders in Malawi highlighted that the country has serious capacity constraints among the PPPs implementing agents in public procurement, risk quantification and allocation, financial viability analysis and structuring financial models to benchmark private sector models submitted to procuring entities. These capacity challenges have also been observed in the other countries. The problem is further compounded by the shallow capital markets in these countries which inhibit mobilisation of capital to finance PPPs in the domestic market. Acquisition of foreign currency denominated loans from international capital markets also introduce exchange rate risks which need to be managed in the PPP transactions.

**Table 10: Sectors where PPPs have been implemented across the six countries**

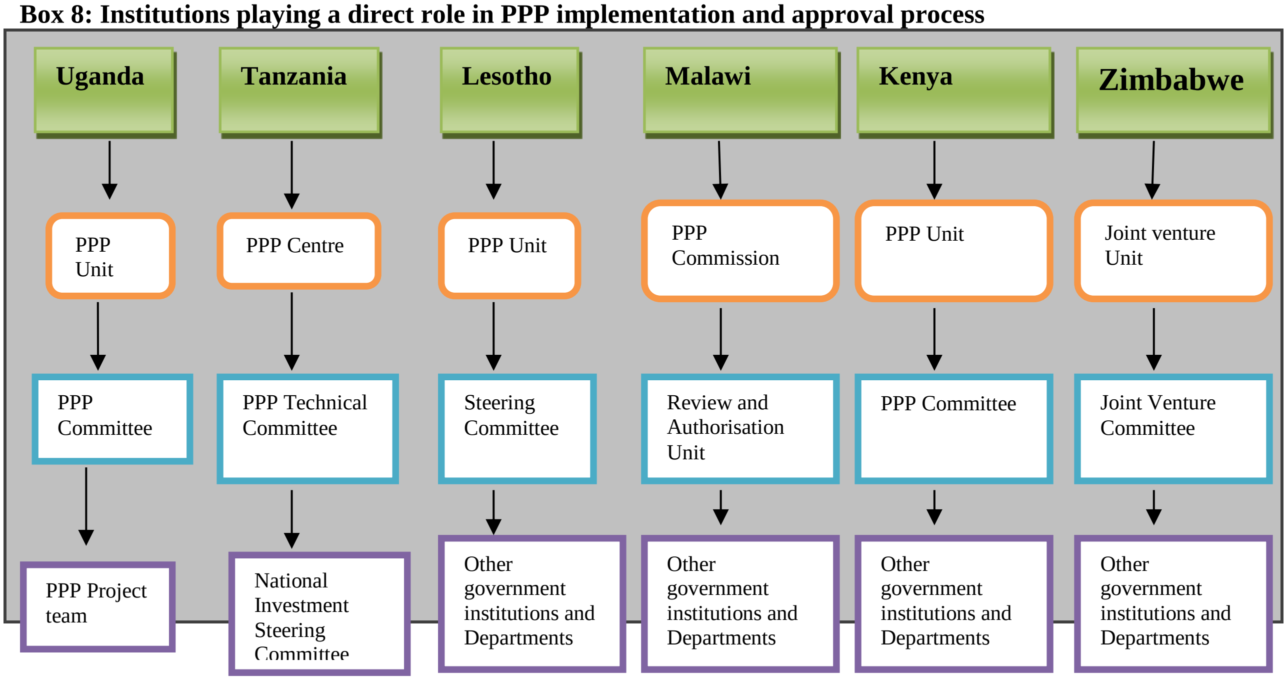
| Country | Sectors implemented |
|---|---|
| Kenya | Transport and Infrastructure; Education<br>Science and Technology<br>Energy and Petroleum Environment<br>Water and Natural Resources Housing and Urban Development<br>Health<br>Tourism and Commerce Agriculture<br>ICT |
| Lesotho | Energy<br>Medical waste management |
| Malawi | Energy |

| | |
|---|---|
| | Transport |
| Uganda | Electricity<br>Transport<br>Housing<br>Education |
| Tanzania | Transport<br>Port<br>Water |
| Zimbabwe | Transport<br>Water<br>Energy<br>Properties<br>Housing<br>Medical (hospital) |

### 4.3 Bureaucracy in PPP approval process

Bureaucracy in the approval process is normally considered a critical issue by potential investors in PPP projects. The number of institutions that have to play a role before a PPP project is implemented can be used as a measure of bureaucracy in each country. The situation in all the six countries is generally similar, as all of them (except Uganda and Tanzania) only have two institutions directly involved, although other government institutions such as the Cabinet or the Office of the President are also involved in all the countries (Box 6). The number of institutions is higher in Uganda and Tanzania compared to other countries (although in Lesotho this is not yet the official position as the enabling law is yet to be enacted). Given that the involvement of all these other government institutions also has bureaucracy imbedded,  with less than three institutions directly having a role before the process is subjected to general government approval.

**Box 8: Institutions playing a direct role in PPP implementation and approval process**




### 4.4 Opportunities and challenges

The countries’ experience has shown that all countries have infrastructure deficits which present opportunities for using the PPP framework as a funding model for the development of infrastructure projects. The fact that all the countries, except Lesotho, have the necessary PPP legislative frameworks demonstrates the countries’ readiness and commitments to adopting PPPs as a funding model to close the existing infrastructure gaps. What remains is to smoothen the implementation hurdles and acquisition of the necessary capacities to enable effective negotiation and management of PPP contracts. Infrastructural gaps in many sectors, of the economies in Eastern and Southern Africa particularly in energy, transport and water, which are among the key economic enablers. In this regard infrastructure deficits are key impediments to economic growth and development.

Thus, PPP framework has been adopted as one possible and viable funding model there still a myriad of challenges that still characterise the operational environment. The challenges include capacities to negotiate; structure and manage PPP contracts; identifying projects that satisfy the three co-principles of PPP in terms of value for money, cost effectiveness and risk transfer; establishing legislative and institutional frameworks that are fit for purpose; reduction of bureaucracy and corruption in the PPP approval and implementation process; and shallow domestic capital markets.

While the number of projects implemented reflects experience in implementing PPPs, skills transfer to ensure that expertise is resident among the local private sector players is still a challenge. There is need to ensure that there is more involvement of local personnel and firms in structuring and implementation of the PPP projects rather than overreliance on international consultants and firms. Government also loses out if the project is not properly contextualised, as happened in Uganda when the government had to constantly subsidise the PPP project. This is also due to capacity constraints among the regulating institutions in risk quantification and allocation and financial viability analysis. Such capacity constraints exist in all the six countries.

The experiences also show the importance of ensuring that the anticipated benefits from the project are correctly captured, especially data on users as well as their capacity and willingness to pay. It is critical to ensure that data availability is improved in designing PPP projects, including identifying vested interests, which can threaten project viability. The experience from Tanzania, where the project had to be cancelled due to unrealistic projections is a good learning experience.

Allegations of corruption were made all countries. Corruption increases project costs; delays implementation; leads to changes in project scope, budget overruns during implementation, erosion of profits and confidence among the investors. This is also worsened by the fact that in addition to the institutions that play a regulatory role, general government institution are also involved with the final approval authority. Thus, the bureaucratic process also further fuels corruption, calling for the need for stronger anti-corruption institutions and Parliaments to play a strong oversight role.

## 5. Conclusion and recommendations

The study generally gave an overview of the PPPs regime and experiences in the six countries. The study established that all the countries have benefited from PPP projects, through the improvements in infrastructure provisions in energy, water, transport, housing and ports. However, there are still a lot of infrastructural gaps that exists in these countries, which would call for further PPPs given the budget limitations that the countries face in funding for such projects.

To facilitate PPPs, reforms needed include legislative and institutional reforms, and a supportive policy environment anchored on a long term development vision or plan. The diverse experiences and projects implement in these six countries demonstrates the scope for peer learning and knowledge sharing. For example, Lesotho and Zimbabwe, which are yet to complete the policy and institutional framework for PPPs can draw lessons from the other countries with a view to avoid the pit falls they encountered. In Lesotho, the legislation for PPPs is not yet in place, even though there is a draft policy framework. In Zimbabwe, there is a recently passed legislation, even though the institutions provided for under the legislation are not yet in place. This shows that the policy and institutions reform agenda is not yet complete and capacity building is inevitable.

Although all the countries have a history of PPPs implementation, most of the projects were done without the necessary PPP enabling legislation. For example, although the legislation reform is not yet complete in Zimbabwe, the country has already implemented about 17 PPPs in different sectors of the economy. Lesotho has already done about two PPP projects without a legislation specifically focusing on PPPs. This also applies to other countries with fairly new legislation but a long history of PPPs implementation. For example, although Kenya has implemented over 70 PPP projects, its legislation on PPPs was only perfected in 2013. In addition, Uganda’s legislation on PPPs was also completed in 2015 although the country has had a number of PPP projects. PPPs were all done using normal government procurement regulations before the enactment of the legislation on PPPs.

The absence of enabling legislation or weak enforcement capacity also saw some PPP projects that were implemented being characterised by challenges in some countries. Examples, include in Tanzania, where the Tanzania City Water Services Limited PPP Project had to be terminated before its set time frame due to operational challenges; and UMEME Electricity Distribution PPP project in Uganda which is characterised by operational challenges. However, many of the projects in the countries operated well even though the enabling legislations were not yet in place.

There are a lot of similarities in the institutional set ups for PPP project regulation across all the countries with legislations. This includes an institution that directly plays a regulatory role and a committee, which is an inter-ministerial body that plays a direct oversight role. However, cabinet or the office of the President in each country also plays a role in ensuring that PPP projects are approved. This also ushers in some bureaucracy which needs to be properly handled to ensure minimal delays. In Tanzania, the legislation imposes time frames for the PPP Unit and the PPP Committee to handle the PPP application process, and if such time frames elapse, they would be deemed to have approved. Imposing timelines can also be adopted as a good practice for all the countries to eliminate bureaucratic delays.

Some cross cutting recommendations that can be made from the study include the following:

- There is need for the finalisation of the policy and legislation framework where this has not yet been completed;
- PPP projects need to continue to be prioritised as the economies are still characterised by infrastructural deficits among the key enablers, which also affects production;
- Countries should try to ensure that in the design of the PPPs, skills transfer to ensure that at the end of the project, local private sector players would also have gained some experience from the projects. Overreliance on foreign suppliers and consultants limits replication possibilities of the models in other sectors;
- The PPP projects design stage needs to ensure that accurate data is used in projecting future income streams from the projects as well as demand projections. Overestimating demand is mostly at the expense of government, which ends up subsidising the PPP for losses as was the case in Uganda in the electricity sector;
- There is need to use authentic data sets and verification of data when performance targets are being set within the PPP contract. In some cases private players may have more accurate information than public officials leading to contracts that are skewed in favour of private investors;
- There is need for intensive training programs on PPPs among the regulating institutions to properly exercise their mandate in monitoring risk as well as project viability. PPP projects are often implemented when the oversight institutions lack the necessary regulating capacity.
- Based on the Tanzanian experience with respect to PPPs one key recommendation is that countries need to invest in building capacity to properly assess, structure and manage risks in the implementation of PPP projects.

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