

Institutional and Regulatory Framework for PPP Projects: Creating a Conducive Environment for PPPs in Developing Countries

Patrick Mabuza

African Development Bank (AfDB), Abidjan, Ivory Coast

Email address:

P.mabuza@afdb.org

To cite this article:

Patrick Mabuza. Institutional and Regulatory Framework for PPP Projects: Creating a Conducive Environment for PPPs in Developing Countries. *Science, Technology & Public Policy*. Vol. 6, No. 2, 2022, pp. 72-80 doi: 10.11648/j.stpp.20220602.13

Received: June 27, 2022; **Accepted:** September 8, 2022; **Published:** October 18, 2022

Abstract: Public private partnership (PPP) projects like any infrastructure projects have large sunk costs and are area specificity, meaning once constructed they cannot be reallocated and used in a different area as they are only useful in the area where their services are needed. Due to these characteristics, PPPs have high risk of opportunistic behaviour embedded in them. These traits increase investment risks on the part of the private investor. Before any investor decides to participate in an infrastructure project like PPPs, it needs assurance that certain institutional requirements for PPPs in the country in question exist. Existence of such conditions bring about comfort to the investor that the investment will be a success. This expectation is a legitimate one given the high risk associated with infrastructure projects. Once an investment in infrastructure has been made, the investor's bargaining power declines due to area specificity of such projects and that increases the investment risk for the investor. Hence, the existence of robust regulatory and legal frameworks is imperative for private sector investments in infrastructure projects as they seek to create a level playing field for all parties involved. The objective of this paper is therefore, to discuss these institutional and regulatory requirements from the perspective of a PPP project.

Keywords: Public Private Partnerships, Institutional Arrangements, Regulatory Frameworks, Legal System, Corruption

1. Introduction

Public private partnership (PPP) projects have large sunk costs, low mobility and are area specificity. This means once constructed they cannot be reallocated and used in a different area for a different purpose as they are only relevant in the area where their services are needed. By their nature, PPPs have a high risk of opportunistic behaviour embedded in them because of the area specificity character they possess. To protect themselves against this risk, private investors require that a country meets a certain level of institutional and regulatory standards. Such standards are meant to protect the interests of both parties and to create a level playing field for all those involved in a PPP project.

As Wildridge, Childs, Cawthra, & Madge [24] assert, the theory of obsolescing bargain means that at the beginning of an investment undertaking, a private sector investor may receive favourable investment terms from a country that needs investments. Such investment terms may incentivise

the private investor to locate its businesses or investments to that country. Due to large sunk costs and low mobility of infrastructure projects, the bargaining power of the host country suddenly increases after the investment has been made. The host country finds itself in a better position to renegotiate the initial terms of the investment with the private investor which has now lost its bargaining power against the host country. Such risks are even higher when the investment is area specificity with high sunk costs, as is the case with PPP projects. Therefore, the existence of robust regulatory and legal frameworks in a country provide comfort that, private sectors' interests will be protected.

An ideal PPP environment is one that includes the existence of good institutional, legal, and regulatory frameworks that are conducive for private sector investments. This includes the existence of a clear government policy on PPPs. Lack of such a policy would render it difficult for any country to attract private sector investments in PPP projects.

The paper addresses elements that constitute a good PPP

environment and is organized as follows; section two discusses the institutional requirements for PPPs, section three, discusses institutional frameworks for PPPs, while the fourth section discusses importance of regulations for PPPs, and the fifth section concludes and makes recommendations.

2. Institutional Requirements for a Vibrant PPP Market

As mentioned earlier, infrastructure projects are characterised by high risk of opportunistic behaviour which is exacerbated by the incompleteness of long-term contracts. Strong institutional frameworks that protect investors' interests, such as a strong legal system is paramount for creating a vibrant PPP market as outlined below.

2.1. A Strong Legal Environment

A strong legal framework is important for creating a conducive environment for investments in general and PPPs in particular. A weak legal environment characterised by poor law enforcement creates uncertainties and hinders private sector investments in infrastructure projects [7]. Countries with weak legal systems are less likely to attract private investors in PPP projects [43].

A weak legal system results in high transaction costs, which may hinder competition for the PPP market [48, 28]. When a country's laws are uncertain, corruption becomes prevalent and conflict of interests remain unpunished, thus giving rise to high transaction costs for PPPs projects [36, 20]. Empirical analysis based on international experience found that there is a high correlation between countries that effectively enforce the rule of law and respect private property rights and economic growth as measured by GDP. It concluded that countries that respect the rule of law and property rights grow three times the rate of societies in which such rights are not respected, and they are two and a half times more economically efficient [48].

A strong legal system that is transparent contributes to enhanced overall returns on investment [7]. This may be true given the fact that countries that make their procurement processes transparent, fair and open to public scrutiny are likely to result in low transaction costs for investments in general and PPPs in particular, thus resulting in low prices for the product provided through the project.

2.2. Transparent and Fair Regulatory System

Transparent and well-established regulatory institutions coupled with clear infrastructure investment policies, help countries receive a higher volume of private sector investment in infrastructure projects [46, 50]. Case studies conducted by Cook [13] show that if countries are to achieve the largest social and economic gains, they need to pay more attention on improving regulations rather than privatisation, as efficient regulations have more social and economic benefits to all stakeholders, including both the public and private sectors. This is not surprising because a good

regulatory system enables entities to raise finance at low interest rates and encourages private investors to be more efficient and innovative.

Regulatory frameworks should strive to minimise regulatory risks by improving transparency in regulatory processes [18]. Minimizing regulatory risk, requires effective regulatory agencies.

An effective regulatory agency is one that is guided by good regulatory principles. The United Kingdom Better Regulation Task Force and the Victoria Consumer Affairs [2], identify these regulatory principles as follows: (i) Effectiveness and targeting: regulations should achieve their objectives with minimal negative impact on the economy, (ii) Transparency and consultative: regulations should be designed in a transparent and consultative manner, (iii) Proportionality: regulatory interventions should avoid overreach but be proportional to the problems they seek to address, (iv) Consistency and predictability: decisions should be predictable, consistent with other policies, laws and agreements affecting regulated parties, and (v) Accountability: regulators must be accountable for their decisions and be subjected to public scrutiny.

As Carino [12] argues, regulatory agencies that aim to reduce regulatory risks, that result in litigations, public resistance against PPP projects, and project cost overruns due to implementation delays as a result of inefficient regulations, need to understand the political and technical details of the industry they regulate and the demands on the public interests as this can significantly reduce regulatory risks. High regulatory risks may have negative effects on the development of a vibrant PPP market in a country.

2.3. Robust Economic Performance

A strong legal system coupled with a robust regulatory framework are both necessary although not sufficient for attracting private sector investment in PPP projects. The performance of a country's economy has a positive impact on private sector investments in PPPs. Good performing economies are more likely to attract private investors in PPPs than poorly performing economies [32, 45]. Some of these economic factors are discussed below.

Stable macroeconomic system. A stable economy is an important factor that attracts private investments into a country's PPP programme. A highly unstable economy leads to high inflation and currency volatility and both have a negative effect on the value of a company's investment. The severity of this is more pronounced in emerging economies where currency volatility is normally high, and it significantly affects the ability of consumers to pay for services provided by the project [34].

The importance of a stable macroeconomy for infrastructure investment cannot be over emphasised. Although there are differing empirical conclusions on this issue, for example, an empirical analysis conducted by Banerjee et al., [7] found that a higher exchange rate has a negative effect on private investment flows, while Osinubi and Amaghionyeodiwe [38] findings were contrary to those

by Banerjee et al., [7]. Yet, Osinubi and Amaghionyeodiwe's [38] work which summarised several studies on the relationship between exchange rate and investment inflows, found mixed results on how exchange rate volatility affects FDI's flow. It appears that the issue is not about a weaker or stronger exchange rate but is about the stability of the local currency compared with other currencies. A more volatile local currency makes it difficult for investors to accurately predict their expected returns from their investments.

Vibrant domestic debt market: A vibrant domestic debt market is vital for enticing both foreign and local investors to invest in PPP projects. A deep and active debt market increases the availability of long-term finance (LTF) on competitive terms that are needed for infrastructure projects [23]. Although external funding for PPPs is equally important, however, it is likely to be expensive compared to local sources given the high returns expected by foreign financiers of infrastructure projects [4]. However, the availability of LTF remains a challenge for many economies and is more so in developing compared to developed countries [23].

Market size: Private sector investors prefer bigger markets than small markets if they were to invest in a country. Bigger markets mean high demand for services and that may lead to higher profits for private investors. Several empirical studies including the one by Botric and Skuflic [10] which analysed geographical and sector distribution of FDI's between 1980–2003 in South-eastern Europe countries found that the market size as measured by the population size and GDP per capita has a positive correlation with private infrastructure investment inflows.

Fiscal reforms: Important measures include introducing inflation targeting regimes, tax reforms and medium-term expenditure framework (MTEF) or its version to improve investor confidence thus increasing the possibility of attracting more private sector investment in PPPs [44, 16, 27]. Countries whose objective is to attract private sector investors in PPPs have a duty to create stable macroeconomic environments. Other important reforms include giving regulators more independence in tariff decisions by making sure that such decisions are independent of political influence. A track record of impartial application of the country's laws and honouring commitments is also imperative for attracting private sector investments in PPPs.

2.4. Institutional Reform Necessary for PPP Projects

Reforming domestic institutions to create a vibrant PPP market is imperative. Chief amongst them being the proper governance of public resources, which is mostly influenced by the political environment. Some of these institutional reforms include reforming the political institutions and transparency and easy access to information which are briefly discussed below.

2.4.1. Reforming Political Institutions

Reforming the political landscape of a country is imperative in attracting private investors in PPP projects.

Weak political institutions may increase political risks. When a country's political institutions are weak, it may be more susceptible to civil wars, civil strife, and ethnic tensions. All of these have a high potential to weaken competition, hinder foreign firms from repatriating their profits, increase the possibility of arbitrary changes to a country's investment policies and lead to governments expropriating investors' assets without compensation [8, 5]. Transparency in the public-sector decision-making process should be exercised consistently to gain private investors' trust. It is important for investors to know how a country's laws, policies and regulations are made. Ambiguity on how the country's laws are made and enforced may pose a high risk to investors [29, 33]. Transparent bureaucratic institutions tend to enhance private investors' confidence which is necessary for a country to develop a vibrant infrastructure market [8].

As Dethier, Ghanem & Zoli [15] assert, private enterprises favour democracies than other forms of governments as democracies are more conducive to private enterprises. Democracies tend to support the adoption of market-oriented reforms, checks and balances that are necessary for business development. These reforms give assurance to private investors that their investments will be safe. The above argument is supported by empirical work by Isham et al. [29] and Dethier et al. [15] which also found that, projects operating in countries with strong civil liberties have an economic rate of returns that average between 8 and 22 percentage points higher than those in countries with weak civil liberties. This finding suggests that democracy incentivises greater efficiency in the way the public sector operates. Fight against corruption gives comfort to investors that their interests are protected. The International Monetary Fund's [27] empirical work, concluded that a common law system tends to protect investors' rights.

Governments that allow their political institutions to deteriorate breed corruption and unethical activities which impact private sector infrastructure investments negatively. Corruption hinders economic progress in that it distorts allocation of scarce resources thus lowering economic growth. Political corruption, by politicians, is the main deterrents to private investment in infrastructure projects [17, 16]. Corruption introduces inefficiencies in the economy and private investors tend to avoid corrupt environments to minimise investment risks which may result in increased costs of doing business [21]. Wei's [30] empirical analysis concluded that, indeed corruption does reduce the flow of inwards investments. Cumbersome and dishonest bureaucracies are the main tools that corrupt individuals use to delay the issuance of permits to potential investors, thus forcing them to perform corrupt activities [33].

2.4.2. Improved Transparency and Access to PPP Information

Improved transparency in accessing PPP information is paramount for the development of a vibrant PPP market and the participation of private sector investors in PPP projects. Countries that encourage easy access to information by civil

society and potential PPP investors at all stages of PPP procurement, tend to have vibrant PPP markets compared to those that do not promote transparency. Transparency improves accountability, thus contributing to improved investor confidence [42].

In the United Kingdom [52], for example, it is mandatory to make PPP information public. All PPP agencies are required by law to publish information on: (i) future payments for each PPP scheme; (ii) the value of PPP contracts signed by government; (iii) record of completed projects and their performance against expectations; (iv) reports on performance evaluation of on-going projects and (v) return on equity achieved by private-sector investors. In Australia, it is mandatory for all public authorities to make public all information pertaining PPP contracts within three months of signing the contract [36]. Such information include but not limited to: (i) a brief summary of the contract content, (ii) a report on value for money (iii) details on the assets to be transferred to the private sector; (iv) total cost and basis for future changes in price; (v) contract renegotiation provisions; (vi) risk-sharing details in the construction and operational stages of the project; (vii) guarantees made by both parties; and (viii) details of the public sector comparator. Disclosure of such information improves public confidence and gives comfort that, the government has the public interests and those of the private investors at heart and that improves investor confidence.

3. The Importance of a Robust Institutional Framework for PPPs

To build sustainable partnerships between PPP counterparties, there should exist a clear legislative framework, specifying the roles and responsibilities of each party. It should clearly clarify all areas of cooperation to achieve effective partnerships at the onset. Countries that are implementing PPPs for the first time should be flexible in the way they apply their infrastructure procurement laws, especially in the early years of their respective PPP programmes. This is imperative in that it encourages experimentation, innovation and ensures that PPP public agencies that have the capacity to implement PPPs are not delayed while institutional capacities are being developed in other spheres of government [42]. The following section discusses some of the different elements that make up an effective institutional framework for PPPs.

3.1. Development of an Effective PPP Legal Framework

The incompleteness of PPP contracts requires the existence of a legal system that is trusted by both the private and the public sectors. Although a robust legal system will not eliminate all the risks associated with PPPs, however, it is imperative that it discourages opportunistic tendencies that negatively affect infrastructure projects.

Table 1. Commonly used disputes resolution mechanisms.

Method	Description
Arbitration	Involves the use of an Arbitrator to resolve disputes. This is the oldest dispute resolution method, that has always existed in one form or another in every country.
Fast-track arbitration	Under this mechanism, the government can promulgate fast-track arbitration rules and appoint an arbitrator to mediate the dispute within a given time frame.
Conciliation or mediation	In anticipation of a dispute between two or more parties, the parties involved agree to appoint one or more independent persons either at the time of making the agreement or immediately after the agreement has been made. Should a dispute arise, the appointed party is expected to bring about a settlement between the disputing parties through consensus by employing persuasive techniques.
Mini-trial	Here a neutral advisor brings together the senior management of the parties involved in the dispute. After studying the dispute, the advisor will then advise the senior management about the strengths and weakness of the case so that the parties can decide on the appropriate steps going forward.
Expert assessment (Engineers)	In anticipation of disagreements during the course of a long-term contract such as in construction projects, parties involved in such contracts appoint experts for the resolution of disagreements or disputes. These experts are always available to deal with disputes as they arise. In most cases these experts are engineers that understand the industry very well.
Dispute Review Board	After the contract has been signed, the parties involved in the contract, immediately establish a Dispute Review Board. Solving disputes through this board has the advantages of being fast, inexpensive and avoid disruption of construction work.
African customary system of dispute resolution	As it is generally practised and accepted in many African communities, customary law is used to resolve disputes as it is generally an accepted norm of usage in many communities.
Negotiation	Here the disputing parties agree to discuss the dispute and reach a mutually acceptable agreement. Normally this is a voluntary and informal process agreed by the two parties.
Early neutral evaluation/fact finding	Here an independent third party is appointed by the disputing parties to investigate the dispute and submit a report or give evidence at another forum like a court or arbitration. The outcome of the independent party is not binding but the result is admissible for use in a trial or other forum if needs be.

Source: Owasanoye [39].

The development of a comprehensive PPP legal framework which provides confidence that private sector contracts will be respected cannot be over-emphasised. The process of developing such a legal framework should ensure that all stakeholders likely to be affected by the legislation

are represented from the onset [25]. The development of such a legal framework may sometimes require changes or additions to existing laws to ensure that new legislations are not in conflict with the country's constitution. Ideally, such a process should be done in parallel with the introduction of

both public finance and political reforms. Political reforms are important to ensure that PPPs are embraced by all social and political partners. For example, Italy, Spain, Chile, and Brazil overhauled their legal frameworks to ensure there were no conflicts between their PPP legislations and the countries' constitutions. In these countries new enacted legislations aimed at securing creditors' rights by assuring investors that the governments would honour all future PPP commitments [35].

Having a legal framework is not enough if it is not effective. For it to be effective it needs to be supported by a clear, credible, and efficient dispute resolution mechanisms. Table 1 gives a summary description of the different dispute resolution mechanisms that can be employed by different governments to deal with disputes arising from PPP projects. Please note that, it is not the intention of this paper to go into a detailed discussion on this topic.

Countries can adopt one or more of these disputes' resolution mechanisms. It is important for countries to establish an equitable legal system that ensures investors that any dispute can be resolved without delay [50].

An effective and independent judicial system is imperative for government's ability to credibly commit to contract terms. It needs to be noted that an independent judicial system only exists in a democratic environment that is free of political interference. Bergara et al.'s [8] empirical work supports this assertion and concluded that, an independent and respected judiciary with a track record of successfully ruling against government is an important prerequisite for government's ability to credibly commit to contract terms. The presence of democracy allows for the existence of other non-market institutions meant to fight all forms of corrupt activities.

3.2. Development of PPP Expertise Within the Public Sector

Governments that want to develop a vibrant PPP market, need to invest in PPP skills development. Such skills include but not limited to procurement skills, bidding/auctioning, contracting, contract negotiation and project monitoring. Unavailability of such skills within the public sector puts it at a disadvantage when negotiating PPPs deals with the private sector partner which is endowed with such skills [1]. The existence of such skills within the public sector is important because, it helps improve efficiency in implementing PPPs while lack thereof could undermine the mutual benefits that PPP projects could deliver to the public and hinder private sector investments [3].

Youssef, Noorbakhsh and Alberto's [22] empirical work supports this argument as it concluded that DFIs inflows are positively correlated with availability of skills in a country. Therefore, countries that want to increase DFIs inflow need to invest in skills development programmes, to increase not only the volume but also the quality of available skills to meet the sophistication required by PPP projects. As Adei [1] asserts, many African governments still lack most of the skills necessary for the implementation of PPPs.

3.3. Fine-Tuning Project Appraisal and Prioritisation Criteria

Project appraisal and prioritisation criteria that maximise value for money are important for PPPs. An increasing number of countries are adjusting their procurement and prioritisation processes to accommodate procurement of PPP projects. Such countries include but not limited to; South Africa, the United Kingdom, Mauritius, Chile, Portugal and South Korea, to name a few [37]. The main step taken by these countries was to establish a PPP unit with the relevant government departments to manage PPP projects. These PPP units are responsible for collecting, analysing, drafting PPP appraisal guidelines, legislation, and dissemination of information on PPPs. It is, therefore, important to ensure that these units have the required expertise as they are expected to provide guidance and technical assistance to line ministries and government agencies in relation to the selection, feasibility, and management of PPP projects [37]. They also ensure that future fiscal implications of PPPs are aligned with medium-term debt sustainability of the country.

By contrast, other countries have laws that allow unsolicited bids for PPP projects, whereby the private sector proposes projects to be undertaken as PPPs. For this approach to work well requires clear guidelines on how and when unsolicited bids should be allowed. Such laws or guidelines will help prevent corruption and bias in identifying projects as PPP candidates. In this case, it is imperative that a comprehensive cost-benefit analysis is undertaken to quantify all possible costs and benefits that may accrue to the public to ensure that value for money is achieved.

3.4. Reforming the Public-Sector Procurement Requirements

Traditional public sector procurement processes proved not to work properly for PPP projects due to their bureaucratic requirements which take time to complete. For PPP to work properly, it is imperative that government introduces reforms in the public sector procurement frameworks. These reforms are necessary because once a PPP policy has been adopted it sometimes conflicts with existing laws, and that may delay implementation of PPPs if not addressed with immediate effects. For example, it may be difficult to accommodate a PPP contract within the existing procurement policies because of its unique features, that combine activities such as finance, design, build and operate a public facility over a 20-year period in one contract. To accommodate the unique structure of PPP projects, governments need to adjust their procurement policies to ensure that PPP projects' processing is not affected by the long procurement processes that characterize public sector procurement [9]. For example, the government of Kenya developed and gazetted the PPP Bill in 2021 and the National Roads Toll Fund (NRTF) Regulations in March 2022. The PPP Bill is meant to harmonize institutional frameworks for the implementation of PPP projects, while the NRTF

regulations are meant to regulate funds received through tolls from PPP projects under the Kenyan roads programme [51]. Such regulatory reforms are necessary for PPP projects to thrive in the Kenyan regulatory environment.

The use of PPPs to provide public services introduces a new phenomenon to the consumer “*the user pays principle*”. The public is not accustomed to the user pays phenomenon and that brings new challenges to governments, in teaching the public about the advantages of the user pays principle. One way of preparing the public about the *user pays principle* is to involve the public as early as possible in the implementation of PPP projects. Getting the public’s views through a public consultation process and making them aware of how they are going to pay for the services provided through a PPP project is important. Many PPP projects failed because of the failure of the public partner to engage with affected stakeholders as early as possible and only to be rejected by the public when the project starts operating. To accommodate the “*user pays principle*” in PPPs, governments must reform themselves and gradually introduce it to the public while at the same time teaching the public that the era of *free services* has come to an end and explain the reasons why users must pay directly for the services [3].

3.5. Developing PPP Monitoring Frameworks

The importance of developing an effective PPP monitoring framework to create a conducive environment for PPP projects, cannot be over-emphasised. Countries such as the United Kingdom, New Zealand, Australia and the Netherlands which achieved success on the PPP front are where there are because they took actions early to put in place all the important building blocks necessary for developing a vibrant PPP market. These building blocks include but are not limited to; (i) a standardised PPP assessment and selection process, (ii) availability of high-level PPP expertise across the public sector (iii) an open, transparent and accountable procurement process, and (iv) strong government support for PPPs. All these building blocks enabled easy monitoring of PPP projects from procurement to operation stage in these countries.

However, many countries, especially in the developing world do not have the expertise to develop such comprehensive PPP frameworks. Countries that have embraced the PPP model have no choice but to develop expertise in the different aspects of PPP projects if they are to compete effectively for private sector investments. Such expertise is necessary within the public sector because it is needed to ensure that PPPs operate efficiently and meet the minimum service level agreements and operate in line with the broader governments’ policy objectives [42]. Such frameworks are meant to help safeguard the interests of the public sector by ensuring that, PPPs indeed meet public expectations.

3.6. The Creation of a PPP Unit

Establishing effective PPP units is critical as it help

facilitates the strengthening of the institutional governance structure for PPPs. Such units are best established within the Ministry of Finance or within any relevant government department depending on the country’s administrative structure. The primary objective of PPP units is to regulate PPPs in accordance with constitutional and statutory requirements, which include but are not limited to; transparent, competitive, and equitable distribution of PPP projects at different spheres of government. PPP units should act as centres of knowledge and expertise, that provides technical assistance and to keep a watchful eye on departments’ management of PPP projects [11]. It is paramount that such units are also mandated to develop PPP regulatory policies in order to create a conducive environment for the development of a PPP market [19]. All PPP legislations and policies should complement other existing government legislations such as Public Finance Management Acts, whose objective is to create a good governance structure for the procurement of goods and services by the public sector [6].

4. Regulation and Public-Private Partnerships

Successful implementation of PPPs depends on the existence of sound regulatory framework that strikes a good balance between the expectations of the public and the private sector counterparties. Such a framework should clearly define the relationship between government agencies and private actors. Countries that lack such a framework may be characterised by a high number of disputes during both project implementation and operations and may even cause delays or termination of the project if not addressed. A well-balanced regulatory environment is imperative for the successful implementation of PPP projects. The following section discusses the importance of regulations for PPPs.

4.1. The Importance of Regulations in PPPs

A well-balanced regulatory framework is one that satisfies the interests of both the public and private sector investors. In most cases, these interests are in conflict and difficult to satisfy as they are ever-changing with time [26]. A regulatory framework for PPPs should strike a balance between establishing a system of regulation, while at the same time ensuring accountability of partners and avoiding over-regulation. Over-regulation is bad for any business as it stifles innovation [47].

PPP regulatory frameworks should be designed such that they are able to protect both the interests of the public and the private sector [41]. An empirical study by Pargal [40] that assessed the importance of a regulatory framework as a determinant for private-sector investment in infrastructure, concluded that the most important determinant of private investments is the passage of legislation liberalising the investment regime of a country. Regulatory frameworks should provide assurance to the private sector that the

regulatory system will protect investors against expropriation and provide comfort that arbitration of commercial disputes, respect for contract agreements, and legitimate recovery of costs and profits reflective of the risks undertaken will be fairly adjudicated in a court of law [25].

A properly framed regulatory framework results in optimum resource allocation within the regulated sector, and increased access to services while protecting the interests of both the private investor and the public sector alike [42].

4.2. *Avoid over or Poor Regulation in PPPs*

Although regulation is important for the development of a vibrant PPP market, however, over-regulation may have negative impact on the development of a PPP market. Over-regulation restrains economic growth and can negatively affect the ability of firms to grow and remain competitive both in the short and long-term. Regulatory compliance should be proportional to the challenge it intends to address and avoid regulatory overreach. Unfocused regulatory interventions may result in increased operational costs for regulated firms due to increase in unnecessary compliance requirements and this may hinder private sector investment in PPPs [17]. Over-regulation is more likely to happen in environments where regulators are overly concerned with consumers' welfare at the expense of the service provider.

Over-regulation distorts market signals and reduces businesses' profitability. It disincentivises market entry, investment, innovation, and business growth and reduces economic activities, thus negatively affecting the poor. This means, that after regulations have been designed, there should be an independent evaluation of their impacts to the wider economy before they are enacted, and where impacts are found to be significant, regulations should be adjusted accordingly. Before regulations are enacted, it is imperative that they go through a public consultation process, where the views of all stakeholders affected by the regulations are taken into consideration.

Poorly crafted regulations¹ can result in projects that were once financially feasible becoming financially and operationally unviable [31]. For example, due to poor regulation, several PPP projects faced challenges in Australia. The projects failed because the Australian government did not pay enough attention to improving transparency, considering commercial warnings related to project viability and on properly managing public relations [14].

5. Conclusion and Recommendations

If properly implemented, PPPs may provide a solution to financially constrained governments with increasing demand for services. It is therefore recommended that governments that want to develop a viable PPP market, must create a conducive environment for PPPs. This calls for governments to eradicate corruption, stabilize their macroeconomic environments, and skill their public sector personnel

responsible for the implementation of PPPs etc. All these contribute to developing a healthy PPP market.

The paper has also discussed the relevant statutory, regulatory, and institutional factors that affect the successful implementation of PPP projects and found that for PPP to thrive there is a need to introduce certain reforms in the procurement legislation and ensure that PPP procurement legislation is not in conflict with the constitution of the country. If there is no alignment between the two, governments will find it hard to accommodate PPP within the existing legislation. It is recommended that governments that want to create a vibrant PPP market, introduce the required reforms in the existing legislation to accommodate the requirements by PPP projects.

Lastly it discussed the importance of regulations for PPP projects and found that implementation of PPPs is dependent on a sound regulatory framework that is not inclined towards over-regulation of the PPP market as this can be the greatest deterrent to private-sector participation in infrastructure investment. In most cases over-regulation happens when regulations are limited in scope, unclear in operation and inclined towards micro-management. It is, therefore, recommended that governments that want to develop their PPP markets, develop regulations that are clear and accommodative to both private and public sectors' requirements, and that avoid regulatory overreach, but are focused and proportional to the problem they seek to address.

Declaration

The findings, interpretations, and conclusions expressed in this paper are entirely those of the author and do not necessarily represent the views of the African Development Bank Group, its Board of Directors, or the Bank's shareholders.

References

- [1] Adei, S. (2009). State and non-state actors' partnership and collaboration: The implications for capacity building in public service: Paper presented at Africa service conference on Ministers of Public Service, Dar-Es-Salaam, Tanzania, 17–18 June.
- [2] The United Kingdom Better Regulation Task Force and the Victoria Consumer Affairs. (2008). Research paper No. 14, May. Available from: <file:///C:/Users/MPA105698/Downloads/Better%20business%20regulation%202008.PDF>. [Accessed on 06 September 2022].
- [3] Allan, R. J. (1999). 'Public-private partnerships: a review of literature and practice. Saskatchewan Institute of Public Policy'. Public Policy Paper No. 4, fourth quarter. Unpublished.
- [4] Asian Development Bank. (1999). 'Private sector participation and infrastructure investment in Asia: The impact of the currency crisis. Volatility opportunity', Paper prepared for APEC Finance Ministers meeting by Asian Development Bank. March.

¹ Poor regulation may mean either over-regulation or under-regulation.

- [5] Atalla, A. and Hakim, T. n. d. Joint ownership: A new approach in public-private partnerships [online]. Available from: <http://paiman.jsi.com/Resources/Docs/review-of-public-private-partnership-models.pdf> [Accessed on 22 October 2013].
- [6] Republic of South Africa. (2004). National Treasury, PPP Manual Module 1: South African Regulations for PPPs. National Treasury Practice Note No. 02. Pretoria: National Treasury.
- [7] Banerjee, S.G., Oetzel, J.M. and Ranganathan, R. (2006), Private Provision of Infrastructure in Emerging Markets: Do Institutions Matter? *Development Policy Review*, 24: 175-202. <https://doi.org/10.1111/j.1467-7679.2006.00321.x>
- [8] Bergara, M. E., Henisz, J. W. & Spiller, T. P. (1998). 'Political institutions and electric utility investment: a cross-nation analysis', *California Management Review*, (40) (2): 18-35.
- [9] Bloomfield, P. (2006). 'The challenging business of long-term public-private partnership: Reflections on local experience', *Public Administration Review*, (66) 93: 400-411.
- [10] Botric, V. and Skuflic, L. (2005). Main determinants of foreign investment in the South-East European countries: Challenges for employment and growth in the European Union. Paper prepared at the 2nd Euroframe Conference on Economic Policy Issues in the European Union "Trade FDI and Relocation. Vienna, Austria, 3 June.
- [11] Burger, P. (2006). 'The dedicated PPP unit of the South African National Treasury'. A paper presented at the Symposium on Agencies and Public-Private Partnerships, organized by the OECD and the Intervention General de la Estado (IGAE), in collaboration with the Secretary-General of Budget and Expenditure, held in Madrid, Spain, 5-7 July.
- [12] Carino, L. V. (2008). 'Towards a strong republic: enhancing the accountability of the Philippine state'. *Public Administration Quarterly*, (32) (1): 59-92.
- [13] Cook, P. (1999). 'Privatization and utility regulation in developing countries: The lessons so far'. *Annals of Public and Cooperative Economics*, (70) (4): 549-587.
- [14] Dahdal, A. (2010). 'The dissolution of public private partnerships: an Australian case study of the political costs involved'. *International Review of Business Research Papers*, (6) (2): 1-11.
- [15] Dethier, J., Ghanem, H. & Zoli, E. (1999). Does democracy facilitate the economic transition? An empirical study of Central and Eastern Europe and the Former Soviet Union. Paper presented at a seminar at the World Bank, June.
- [16] Economic Commission for Africa, (2005). African governance report: economic governance and public financial management. Addis Ababa, Ethiopia.
- [17] Emery, J. (2003): Governance, transparency and private investment in Africa. Encouraging modern governance and transparency for investment: Why and How? Global forum on international investment. OECD-Africa Investment Roundtable. Johannesburg, South Africa. Hosted by the South African Government, African Union and Economic Commission for Africa. 17-18 November.
- [18] European Commission. (2003). Guidelines for successful public-private partnerships. Brussels: European Commission.
- [19] Farrugia, C. R. and Orr, R. J. (2008). 'Public-private partnership agencies: A global perspective [online]. Stanford University Working Paper No. 39, August. Available from: http://www.nawc.org/uploads/documents-and-publications/documents/document_02445830-0b21-4f61-8b65-bad5f5989467.pdf [Accessed on 21 August 2014].
- [20] Fitch-Ratings. (2003). 'Public-private partnerships: the next generation of infrastructure finance'. *International Public Finance Special Report*, January.
- [21] Fjeldstad, O., Kolstad, I. & Nygaard, K. (2006). 'Bribes, taxes and regulations: business constraints for micro enterprises in Tanzania'. CHR Michelsen Institute (CMI) WP. 2006: 2. Available from: <http://www.cmi.no/publications/file/2124-bribes-taxes-and-regulations>. [accessed on 22 October 2013].
- [22] Youssef, A., Noorbakhsh, F., Alberto, P. and. (2001). Human capital and FDI inflows to developing countries: New empirical evidence. *World Development*, (29) (9): 1593-1610.
- [23] FSD- Africa, GIZ, AfDB, MFW4A, and CAHF, (2019). Long-Term Finance in Côte d'Ivoire: Country Diagnostic Report / September 2019.
- [24] Wildridge, V, Childs, S, Cawthra, L & Madge, B. (2004). 'How to create successful partnerships? A review of the literature', *Health information and Libraries Journal*, (21): 3-9.
- [25] Harris, C. (2003). 'Private participation in infrastructure in developing countries: Trends, impacts, and policy lessons'. *World Bank Working paper*, No. 5. Washington DC. April.
- [26] Hirschhausen, C., Beckers, T. & Brenck, A. (2004). 'Regulation and long-term investment in infrastructure provision-theory and policy'. *Public Sector Management and Regulation Working Papers. Utilities Policy*, Vol. 12, No. 4, pp. 203-210.
- [27] International Monetary Fund. (2003). 'FDI to Africa: the role of price stability and currency instability'. *IMF Working Paper*, WP/03/10.
- [28] International Monetary Fund. (2006). 'A principal-agent theory approach to public expenditure management systems in developing countries'. *IMF Working Paper*, WP/06/204. Washington: IMF.
- [29] Isham, J., Kaufmann, D. & Pritchett, H. L. (1997). 'Civil liberties, democracy, and the performance of government projects'. *The World Bank Economic Review*. Vol, 11 No. 2, pp. 219-242. Washington DC. World Bank.
- [30] Wei, S-J. (2000). 'How Taxing is corruption on international investors', *Review of Economics and Statistics*, (82) (1): 1-11.
- [31] Kintanar, N. (2009). How to meet the challenges of PPP development in the current financial and economic crisis. A paper delivered at the International Experts Meeting on Public Private Partnerships, UN ESCAP, Bangkok Thailand, February.
- [32] Mabuza, P. (2019). Is the Public Private Partnership Model the Right Vehicle for Public Infrastructure Delivery in Developing Countries? *Journal of Economics and Behavioural Studies*, 2019, vol. 11, issue 1, 211-222.
- [33] Mauro, P. (1995). 'Corruption and growth', *The Quarterly Journal of Economics*, (110) (3): 681-712.

- [34] Mwilima, N. (2003). Foreign direct investment in Africa. Social Observatory Pilot Project. Africa Labour Research Network. Labour Resource and Research Institute (LaRRI), September.
- [35] OECD. (2006). Review of the national policy, legislative and institutional environment necessary for the establishment of municipal public private partnerships (PPPs) for public service delivery and local development in the Europe and CIS region. UNDP Capacity 2015/PPPUE-Public private partnerships programme. March. OECD.
- [36] OECD. (2008). Public private partnerships: in pursuit of risk sharing and value for Money. OECD publishing. Available at: [www.sourceoecd.org/finance/ 9789264042797](http://www.sourceoecd.org/finance/9789264042797). [Accessed on 15 November 2011].
- [37] Orissa. (2007). Orissa public private partnership policy 2007. Planning and Co-ordination Department, resolution No. 12711 / PPP 38/2006.
- [38] Osinubi, T. S. and Amaghionyeodiwe, L. A. (2009). 'Foreign direct investment and exchange rate volatility in Nigeria', *International Journal of Applied Econometrics and Quantitative Studies*, (6) (2): 83–116.
- [39] Owasanoye, B. (2000). Alternative dispute resolution methods: Paper written following a UNITAR Sub-Regional Workshop on arbitration and dispute resolution, 11–15 September 2000. Document series No. 14. Geneva, March.
- [40] Pargal, S. (2003). Regulation and private sector investment in infrastructure: evidence from Latin America. World Bank Policy Research Working Paper No. 3037, April.
- [41] Parker, D. and Hartely, K. (2002). 'Transaction costs, relational contracting and public private partnerships: a case study of UK defence'. In Grimsey, D. and Lewis M. K. eds. *The Economics of Public Private Partnerships*. Cheltenham: Edward Elgar publishing. 303–314.
- [42] Pongsiri, N. (2002). 'Regulation and public-private partnerships', *The international Journal of Public Sector Management*, (15) (6/7): 487–495.
- [43] Ramamurti, R. and Doh, J. P. (2004). Rethinking foreign infrastructure investment in developing countries. *Journal of World Business*, (39): 151–167.
- [44] Republic of South Africa. National Treasury. (2007). *Medium-Term expenditure Framework (MTEF)*. Pretoria: National Treasury.
- [45] Rives, J. M. & Heaney, M. T. (1995). Infrastructure and local economic development. *Regional Science, Perspectives*, 25 (1), 58–73.
- [46] Rodrik, D. (1990). 'Policy uncertainty and private investment in developing countries', *Journal of Development Economics*, (36) (1991): 229–242.
- [47] Scandizzo, S. (2007). Public-private partnerships and the infrastructure challenge in Latin America. *Latin America Emerging Markets Forum*. November.
- [48] Scully, G. W. (1988). 'The institutional framework and economic of development', *Journal of Political Economy*, (96) (3): 652–662.
- [49] SPAID. (2007). Key Challenges to Public Private Partnerships in South Africa: Summary of Interview Findings. An initiative of the presidency of the republic of South Africa and the Business Trust. Report No. 1, April.
- [50] Tam, C. M. (1999). 'Build-operate-transfer model for infrastructure developments in Asia: reasons for successes and failures', *International Journal of Project Management*, (17) (6): 377–382.
- [51] The Republic of Kenya. (2022). *The Public Finance Management (National Roads Toll Fund), Regulations*, 2021.
- [52] United Kingdom (Her Majesty Treasury). (2003). *PFI: meeting the investment challenge*. London: Her Treasury.