



Draft Regional Strategy Paper SADC-DFRC

**Towards a Common PPP Framework concerning
Policy, Institutional Arrangements and Legal
Frameworks**

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Contact

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List of Abbreviations

ADB	Asian Development Bank
AfDB	African Development Bank
AICD	African Infrastructure Country Diagnostic
BBO	Buy, Build, Operate
BLT	Build, Lease, transfer
BOT	Build, Operate, Transfer
BROT	Build., Rehabilitate, Operate, Transfer
CGP	Partnership Steering Committee
CP	Contrat Partenaire
DBO	Design Build Operate
DBSA	Development Bank of South Africa
DFRC	Development Finance Resource Centre
EIB	European Investment Bank
EPEC	European PPP Expertise Centre
EU	European Union
FONADIN	Fonds Nacional de Infraestructure
GIZ	Deutsche Gesellschaft für International Zusammenarbeit
IGP	Institut de la gestion delegue
MAPP	Mission d'appui aux partenaire public-prive
NIP	National Infrastructure Program (Mexico)
OECD	Organization for Economic Cooperation and Development
O&M	Operation and maintenance
PPP	Public Private Partnership
PwC	PricewaterhouseCoopers
SADC	South African Development Community
SADC3P	South African PPP Network
VfM	Value for Money

Executive Summary

This Regional Strategy Paper has been drafted based on the recognition that Public Private Partnerships (PPPs) are an important source of procurement for delivery of infrastructure assets and public services in many countries across the world and the Southern African Development Community (SADC). Most countries with a successful track record of PPPs have built their schemes on the basis of an explicit and a solid framework next to fostering sectoral PPP programs. The idea of this draft Regional Strategy Paper is to identify lessons learned from the review of other countries' PPP policies, institutional settings as well as the legal issues and to learn about the individual implications for SADC Member States. The overall objective is to develop and formulate a practical set of recommendations concerning PPP frameworks for governments across SADC as a common point of departure for all those institutions, public bodies and entities involved in the implementation and promotion of PPPs. Overall, this is a strategic paper for SADC governments in their attempt to refine and develop and ultimately harmonize as far as possible their PPP policies, legal frameworks and institutional arrangements across the region.

The draft Regional Strategy paper begins with a discussion of the overall rationale behind the need to define and institute clear policy, institutional as well as legal frameworks. The definition of a PPP framework as used in this paper is derived from the World Bank and implies "...policy, procedures, institutions and rules that jointly define how PPPs will be implemented." A solid framework is not only a prerequisite for developing efficient PPP markets, but is essential for having an effective communication of government's political commitment to the promotion of PPPs. Straight-forward PPP frameworks assist public sector agents and governments as public decision makers to ensure that proper PPP projects are identified and projects are affordable, and ultimately that they provide "Value for Money" (VfM), and fiscal risks are limited. During the last decade governments in SADC and across the world have increasingly recognized that PPPs not only serve as alternative means of financing, but primarily help to improve VfM next to delivering the service in a better quality and in a timely and efficient manner.

It is important to note that PPP frameworks do not develop in isolation, but evolve over time along a PPP maturity curve that often responds to various challenges faced while actually implementing PPPs in specific legal and procedural and institutional settings. Credible PPP programs have in a number of countries been established after first having embarked on relatively straight forward PPP projects before applying that experience to more complex projects.

This paper examines the current status of PPP frameworks across 15 Member States to classify SADC countries into four categories as far as their level of maturity of PPP frameworks is concerned. An increasing number of countries have moved along a PPP maturity curve to introduce explicit PPP policies, institutional arrangements and legal frameworks. A few countries such as Madagascar and Democratic Republic of Congo have only small-scale experience with PPPs. Others like Zimbabwe and Swaziland have shown commitment indicating a pro-PPP approach by either setting the stages to introduce a PPP policy or being about to come up with draft of policies or laws. There are an increasing number of countries in SADC to actually have established a PPP policy and/or a PPP Law aimed at the promotion of their PPP schemes. These countries include Malawi, Mozambique, Botswana, Tanzania, Angola and Zambia. At the highest level of the maturity curve, both South Africa and Mauritius are regional champions and have had wide ranging experience with implementation of their PPP programs advancing their frameworks to attract private sector innovation and investments in their countries.

The paper takes a closer look at the definition of the term PPP since experience across countries shows that lack of a common understanding of what a PPP typically encompasses does indeed result in poor implementation of PPP schemes. Overall, the term PPP in this paper is derived on the basis of the amount of risk carried by private sector and defines the term as a long-term

arrangement between public sector and one or more private partners based on a clear output specification on behalf of public sector according to which private sector delivers a service to meet public sector objectives and align them with its own profit objectives. PPPs are based on the idea of bundling of functions with an underlying payment structure to private sector over the entire life-cycle of service delivery --the effectiveness hinges upon the alignment of and a sufficient transfer of risk to the party that can best carry it. To make the term more clear, this paper considers PPPs as concessions, BOTs, DBFOs and similar long-term contracts independent of the underlying payment structure (user charges, fees paid by government or a combination of these) and excludes a wide range of arrangements such as short-term management or service contracts and all those arrangements where non-profit organizations or civil society are involved in the development and delivery of public services.

Recognizing the positive contribution of PPPs, this paper lays out the benefits of PPPs such as efficiency in provision and VfM as a desired positive outcome of a PPP compared to traditional forms of procurement. In addition, PPPs create a project discipline rendering benefits such as innovation and cost efficiency. There are also arguments about potential risks associated with PPPs including higher financial costs due to higher cost of borrowing and return on equity expectations that public sector does not have. On top, quite often there is higher transaction costs associated with buying a PPP compared to traditionally publicly procured projects. In addition, there may be hidden fiscal costs due to unforeseen events that may not have been borne in mind during the contractual design phase.

PPP projects with successful track records render high quality infrastructure assets and services to the public and the government at costs that are significantly lower than those available through public procurement. They are, however, not an end in itself, and they are not innovative policy tools by definition. The sustainability and attractiveness of PPP schemes hinge upon a number of different factors such as the macroeconomic condition of a country, its investment climate, lending capacity as well as institutional and financial frameworks, capacity and expertise. This paper undertakes an examination of key contributing factors such as consistent political support, stakeholder dialogue and availability of a strong PPP pipeline as drivers of PPP projects. As far as political commitment is concerned, there is agreement among Member States that political will of governments is one of the main drivers of viability of PPP schemes, especially if and when there is commitment between line Ministries to have a common strategy for promotion of PPPs and it overarches from medium to long-term. On top, it is favorable to create a national consensus on the relevance of PPPs to assure that PPPs as long-term and complex projects have a mandate beyond one or two election periods and party lines. Given the key role that a thorough planning and examination of PPPs play in their success, the paper discusses the need for SADC public agents to ensure PPP investments are economically justified, thus applying VfM as a relative measure to get “the best possible outcome at the lowest possible price.” Other key conditions to be met by public sector relate to affordability and sufficient transfer of risk to the party that can manage it best.

This paper provides a systematic discussion based on a cross-comparative analysis of frameworks in five selected SADC countries including South Africa, Angola, and Mauritius, Tanzania and Zambia and five comparators from the rest of the world including Mexico, India, Brazil, France and Australia. It then consolidates both best practice and the learning lessons studied to get a common point of departure for all SADC Member States to develop, review or amend their policies, regulatory frameworks and institutional arrangements. The country specific analysis highlights that if PPPs are to be promoted and succeed in terms of their wide-spread application across sectors and the region, then SADC countries need to institute proper and solid PPP frameworks.

Although the experience across comparators and SADC countries is varied and there is no unique formula for developing a sound PPP framework, there are some commonalities and good practice lessons related to key ingredients of a solid and transparent PPP framework. These include clear policy statements, competent and enabled institutions that can appropriately identify, procure and manage PPPs, and efficient oversight procedures as well as proper legal frameworks. In this context, the paper also highlights the importance of the contribution of sectoral reforms and their

role in developing and supporting PPP schemes. In a number of countries sectoral institutions, for instance, power sector regulators have had an important role as far as the promotion of IPPs and investment in the power sector are concerned. It is in this context that Member States with a low level of PPP maturity should be aware of the relevance of sectoral institutions in terms of their contribution towards developing PPPs over time and across various sectors. Nevertheless, sectoral PPPs must also best be supported by setting up efficient and proper frameworks at the national level. The Indian and Mexican cases both illustrate very well that PPPs are not an ad hoc outcome of developing institutions, but a result of a pilot set of projects at the same time as institutions and policies are developed.

This paper identifies the following three essential components of good PPP frameworks. An explicit PPP policy is fundamental to clarify the rationale for the usage of PPPs, define the term PPP, and to set out the objectives associated with their introduction, the scope and relevant guiding principles such as VfM, affordability and risk transfer. Sound objectives must be formulated to send the proper signals to the market and government agents as to why the government aims at introducing a PPP scheme. Countries have adopted both strategic and operational objectives in their PPP policy statements to convey their goals associated with the pursuit of PPPs. The cross-country comparison shows, however, that countries quite often set out broad objectives, but in practice follow primarily the policy rationale of using PPPs as a substitute for public sector finance. A number of countries have in the past been following PPPs primarily to attract private capital for service delivery. PPPs, however, have a number of contributions to make including timely delivery, cost efficiency, contribution to innovation and the economy and the society in the broader context. Thus, it is important that SADC governments clearly identify the potentials of PPPs and convey the expected goals associated with them in a firm PPP policy statement.

The cross-country analysis shows that defining the term PPP is an important contribution for public sector agents to gain clarity about what a PPP is and what it is not. If the term is defined too wide, then misconceptions concerning the proper application come up. It is in this context that this paper recommends to follow the definition provided above and apply the use of PPPs to types such as BOTs, BTOs, BTLs, and DBFOs including also short-term contractual types such as management and service contracts as long as there is some sort of risk transfer included in the contractual structures. However, privatizations conceived as total private provision with ownership transfer to private sector are excluded from the term since they are covered quite often by a separate privatization law or the general law of the countries. Sectorally, it is better not to limit the application to achieve a broad-based PPP scheme across various sectors. Only through a wide spread use and a strong pipeline, is it possible to have a convincing case for PPPs. Proper PPP policies have guiding principles such as VfM, affordability and risk transfer to measure the benefits of PPPs. These guiding principles have in many countries such as Australia and South Africa been used at various levels as “gateways” to exclude poorly designed PPPs from being awarded.

Based on the analysis, the paper comes up with some key characteristics of effective PPP policies derived from country experiences including clear, country-specific explanations of goals and objectives of the PPP policy, clear definitions of the term PPP and other key PPP-related terms and concepts, including VfM, affordability. This paper recommends focusing on practical solutions to help PPP transactions get completed, while generally trying to minimize new administrative, reporting, or review burdens that delay or stop proposed PPPs. Also it is helpful to allow for practical PPP lessons to be learned, especially at the sectoral level and then to introduce periodic improvements to the PPP policy framework and avoid being overly-detailed, prescriptive, and inflexible, and encourage private sector innovation.

Establishing a functioning and strong institutional framework is another important learning lesson derived from the comparative analysis in this paper. The institutional framework relates to the organizational structure of the institution on the one hand, and the roles of the institutions involved on the other hand. Both must be functioning in interaction and across entities to make PPPs work. For PPPs to render success, this paper highlights the need to have a PPP Unit dedicated to the promotion of PPPs across the nation and the region. The Unit may best be

located at the central level in the Ministry of Finance to streamline the functions across the country and sectors, to ease oversight, and accountability. The performance of the work of the Unit may be overseen by a higher level of government. It must, however, be mentioned that this paper could not deduce an empirical and clear link between location and performance of PPP Units.

This paper undertakes an examination of PPP Units' roles and recommends assigning clear roles and bearing a number of explicit functions that are not undermined by other entities. The most important functions include acting as adviser to various entities (technical and administrative) throughout the PPP process and also at times after award of the PPP contract, disseminating PPP relevant materials and information, formulating and shaping PPP Policies and spreading best practice lessons throughout the country and across sectors and regionally. PPP Units must be able to issue detailed toolkits, policy manuals and help in standardisation of tools for public entities. Another learning lesson is that across all countries studied, PPP Units do not actively engage in the actual procurement of PPPs. This task is with the Contracting Authority (CA); however, PPP Units do provide advisory services to CAs. This clear distinction between policy and implementation roles is important to bear in mind.

Acquisition of proper staff for PPP Units has also posed quite a challenge in many countries since PPPs are complex and require multidisciplinary set of skills in technical matters, legal issues, economics, procurement and accounting. In terms budget, this paper finds that PPP Units are mostly financed by public revenue; and recommends providing sufficient funding to endow the Units with proper resources.

This paper recommends introducing a clear dividing line between the regulatory and oversight functions and the actual procurement of PPPs. The approval relates to the decision of whether the PPP is worth investing and the oversight role encompasses the actual control function as to whether the right process is used. It is important to establish clear appraisal and regulatory procedures in the PPP institutional framework. Quite often, the CA identifies the PPP projects and does the planning. It is in charge of conducting the feasibility studies needed and also the tender process is organized by the CA.

The establishment of a legal and regulatory framework is determined in large by a country's cultural and historic context as well as its existing legal structure. Across the countries studied, there are a number of legal systems ranging from civil, common, to Islamic and African laws. Among these, the most examined are common law and civil law legal traditions. The "PPP legal and regulatory framework" can be thought of as all the laws and regulations that control whether, or how, PPPs can be implemented. These laws and regulations can include PPP-specific legislation, public financial management laws and regulations, and sector-specific laws and regulations.

The lessons learned indicate that there is no need for cross-cutting PPP laws; some countries allow governments to enter into PPPs under general laws. The Legal framework must, however, sufficiently define the roles and powers of the awarding authorities, procuring agents, regulating bodies and approval entities. By granting procuring authorities clear powers to enter into long term PPPs, investors will be reassured of the legality of the contract. In a number of countries, there is an approval process which must be completed prior to the public authority entering into the contract. Some countries have also the benefit of legal frameworks which are well developed and suitable to govern the PPP contract process and documentation. Ultimately, the legal framework must be developed in consistency with bilateral investment treaties and backed by investor-State dispute settlement to avoid long lasting dispute settlements and to provide security to investors.

1. Introduction

1.1. Background

In February 2011, the Southern African Development Community (SADC) inaugurated the SADC Public Private Partnership (SADC3P) Network with the idea of establishing a joint assistance initiative to serve as a centre of PPP excellence providing assistance to relevant entities in Member States, the SADC Secretariat and Public Private Partnership (PPP) practitioners across the region. The overarching objective of SADC3P is to contribute towards capacity building across SADC Member States aimed at implementing PPP projects and programs, as well as improving PPP planning processes. SADC3P shall contribute to the spread of best PPP practice among various countries in the region ultimately strengthening the regional infrastructure and promoting competitiveness of SADC economy.

The SADC3P shall become a regional incubator and a centre of expertise for PPPs --assigned to share, collate, and synthesise, analyse as well as disseminate information across Member States. In addition, SADC3P shall not only spread and promote international, regional and national PPP best practice know-how, but also upon request, facilitate and provide policy, programme, and capacity building support to public sector. Its mandate will be implemented along the relevant rules and laws of SADC and decisions taken by the PPP Steering Committee.

In March, 2012 when the first Steering Committee meeting was held, the SADC3P Network had received nominations to the Steering Committee from all Member States, with the exception of Mauritius and the Democratic Republic of Congo (DRC). Mauritius did not participate, whereas the DRC had not yet submitted its nomination, and was nevertheless represented by the DRC Embassy in Pretoria, South Africa. The SADC3P Network has achieved quite a number of milestones, for instance training programmes in PPPs in the health sector (Video conference in November, 2011) and preparing bankable projects in December 2011.

The March Steering Committee Meeting of the SADC3P Network agreed to procure a Regional Strategy Paper aimed at developing a regional base line for Policy, Regulatory Frameworks and Institutional Arrangements. This paper will be refined and accepted by the Steering Committee for submission to Ministers of Finance of the Member States. The paper will be a major deliverable of the Development Finance Resource Centre (DFRC), a SADC subsidiary institution and the SADC3P Network. The next Steering Committee meeting was held in September 2012 and had working discussions of the draft Framework for Policy, Regulation and Units next to obtaining an update from Member States on Policy, Units and related issues and the challenges faced. On top, there was a presentation of the draft Framework to the Steering Committee, its adoption, and discussion of the next steps ahead. Furthermore, Steering Committee Member States agreed jointly to work within the working group on a regional Policy framework and implementation and design of practicable PPP pipelines.

1.2. Objectives and Structure of the Regional Strategy Paper

SADC's 15 Member Countries include small, isolated economies with island nations, a mix of low- and middle-income countries, and larger countries with large economies. According to African Development Bank (AfDB, 2011, p.49) demand for public service delivery and infrastructure investment remains enormous across the entire region. Public sector finance is not sufficient to cover the investment requirements in SADC, thus access to private capital, especially procurement and financing via various types of PPPs is an option which a number of SADC governments are increasingly choosing to speed up the delivery of public infrastructure. The promotion and attraction of private sector investment across the region, however, hinges not only

upon factors such as political stability, the maturity of financial markets and private sector appetite to invest, but also the institutional as well as regulatory performance and PPP record of countries.

SADC3P Member States have recognized PPPs as complex instruments that require solid and transparent policies, strong institutional and regulatory bodies with capacities to be in place and proper legislative frameworks. To date, Member State progress in development and implementation of PPP policies, strategies and frameworks has been uneven. Some countries record a solid history of PPP procurements and project financings of service delivery. These countries have reached an advanced stage of development in PPP implementation; they have renewed shown their long-term political will and commitment to the promotion of PPPs. South Africa, for instance, is not only a regional champion, but certainly among the leading countries in the world having established an efficient PPP Unit to drive forward its PPP policy and program; it has introduced relevant institutional arrangements as well as an enforceable legal framework. But as in most matured PPP countries, also in South Africa the PPP framework has evolved over time in response to a number of different challenges. Other SADC countries have just begun to gain a better understanding of PPPs, their benefits, pitfalls and tradeoffs. They realize that PPPs are cost-efficient means of delivering services, but they are more than a one-roll off financial transaction with private sector and thus need to be based on firm policy foundations and solid institutional structures and rules to govern enforcement.

Based on this context, this draft Regional Strategy Paper aims at providing an overview of PPP policies, institutional arrangements and legal frameworks across the SADC region by taking into account the uneven pace of development and drawing lessons from the rest of the world. The idea is to identify good practice and lessons learned from the review of other countries' PPP policies, institutional settings as well as the legal issues and to learn about the individual implications for SADC Member States. The main objective of this document is to serve as a strategic paper for SADC governments and ministries in their attempt to refine, develop and ultimately harmonize as far as possible their PPP policies, legal frameworks and institutional arrangements across the region. Preparation and implementation of regional PPPs will soon become a concrete reality and PPP practitioners across SADC, together with national PPP policy frameworks need to be prepared for this challenge.

The Regional Strategy Paper is comprehensive providing a broad overview of PPPs with a set of recommendations considering the disparity in terms of PPP development across the SADC region. Its objective is to offer a common point of departure for each member state to develop, review or amend its policies, regulatory frameworks and institutional arrangements. This paper considers, where appropriate, pertinent issues such as manageability, risk transfer, finance, value for money (VfM) considerations, simplicity and ease of implementation to facilitate the assessment and optimization of the use of PPPs in a consistent and effective manner.

Although SADC Member State response to challenges of developing efficient PPP markets is to be addressed using lessons learned from the actual practice of other countries outside and within the region, it must be borne in mind that the direct application of learning lessons faces its limits since the actual formulation of a country policy and framework always hinges upon the country-specific setting and legal fundamentals, its government institutions and capacity. This paper is based on publicly available information. No surveys have been conducted to learn about the country specific challenges and experiences, the drivers or key issues related to improving and further developing PPP frameworks for specific countries.

The assessment of the institutional and regulatory environment and drivers of successful PPP frameworks is conducted by taking a look at good practice in five comparator countries outside the SADC region. France, Brazil, India, Australia and Mexico are selected based on their successful PPP environment, and their unique experience with PPPs; on top they provide an adequate geographic representation. Australia, for instance is considered number one by Deloitte (2012, p.6) in terms of innovations to PPP models and in bringing new deals and concepts to market. France has a highly developed PPP market and has a cultural tradition that welcomes private financing of services. The country provides for a solid institutional and legal framework

and the case provides useful insight into how the market developed. India has advanced implementing PPPs and there are issues related to leveraging large levels of private investment in infrastructure. Also Brazil is an interesting case, especially since not all forms of PPPs are considered as such and the market is in the process of maturing and evolving. As for Brazil, it must be borne in mind that the Federal structure in the country raises jurisdictional issues between the Union (Central Government) and the States thus posing hurdles to promotion of PPPs. This condition is not quite applicable to countries in the SADC region; nevertheless there are other interesting lessons that will be drawn from the country experience.

The cross-country analysis of PPP frameworks and readiness for promotion of PPPs is also conducted for SADC Member States. First, the paper takes a broad look at all 15 Member States to get an understanding of where each country stands as far as progress and the implementation of PPP policies, institutional arrangements and legal frameworks are concerned. Then there is a thorough examination of five countries including South Africa, Mauritius, Tanzania, Angola and Zambia all of which have designed specific PPP schemes and instituted to varying degrees frameworks to attract private capital for service delivery. Mauritius and South Africa both have an excellent track record pursuing PPP projects and adapting their PPP schemes as they evolve. Zambia, Angola and Tanzania have all recently opted to institute PPP frameworks to support their PPP programs, thus serving as learning experience for other countries in the region as they decide to implement more PPPs and improve their institutional and legal settings.

Chapter 2 starts with a review of the rationale for instituting PPP frameworks and the reasoning behind the introduction of clear and explicit policies, institutional and legal frameworks. There is an analysis of the application of private financings in the region and an introductory discussion of PPP experiences of all 14 Member States in SADC. This discussion is important to gain a common understanding of where countries stand. Towards gaining a common understanding of the use of the term of PPP, there is an analysis of what it means and how comparator governments within and outside SADC have been using it. Next, the paper takes a glance at some key drivers for PPPs to better thrive including a discussion on the necessity to show political commitment in a firm manner and what various stakeholders such as private sector are asking for prior to investing in a PPP project.

The actual cross-country comparative assessment of PPP frameworks is conducted in chapter 3. This chapter contains a comparative analysis of frameworks across 10 countries outside and inside the SADC to look at their policies, institutional arrangements and the regulatory regimes, structures and challenges -as far as public information was available. Last but not least, the last chapter aims at deriving an optimal framework for SADC based on the analysis conducted in the previous chapters, foremost the cross-country comparative analysis and learning lessons learnt from the experiences of other countries.

2. Importance of PPPs and a sound Framework

2.1. Rationale for a sound PPP Framework

PPPs are becoming increasingly an important source of procurement for delivery of infrastructure assets and public services in SADC. They may be implemented on an ad-hoc basis for buying into a specific project without an already existing policy framework. However, according to the World Bank (2012, p. 60) most countries with a successful track record of PPPs have built their schemes based on an explicit and a solid framework. The definition of a PPP framework as used in this paper is derived from the World Bank (2012, p. 61) and implies “... policy, procedures, institutions and rules that jointly define how PPPs will be implemented.”

OECD (2007, p.14) emphasizes that its Member States may best develop their PPP markets by laying the proper foundations for clear policies along with a well-organized institutional framework and efficient laws and regulation. A solid framework is considered not only a prerequisite for the development of efficient PPP markets, but is also needed for an effective communication of government’s political commitment to the promotion thereof. On top, straight-forward PPP frameworks assist public sector agents and government as public decision makers to ensure that proper PPP projects are identified and projects are affordable, that they provide “Value for Money” (VfM), and fiscal risks such as contingent liabilities are limited. Last but not least, public sector has a variety of investment decisions to make and it is important to opt for PPPs when they render the highest return to the society as a whole. It is in this context that public sector needs to balance the risks to be taken by private investor and those to be kept by public sector, and needs to have a functioning framework of implementation, guiding principles along which to make the best decision for its economy and community.

It is important to note that PPP frameworks develop and evolve over time, along a PPP maturity curve that often responds to various challenges faced while actually implementing PPPs in specific legal and procedural and institutional settings. EIB (2011, p.9) concludes –in its comparative analysis conducted for countries within the Mediterranean and outside the region--

PPP progress along the maturity curve varies that credible PPP programs have in a number of countries been established after first having embarked on relatively straight forward PPP projects before applying that experience to more complex projects. This was the case, for instance in Mexico where the contractually more complicated social infrastructure PPPs such as hospitals and universities were introduced after the country had successfully launched PPPs in internationally well understood sectors such as roads and power generation. Similarly South Africa first embarked on straightforward PPPs in roads, prisons and head office accommodation sectors before applying that experience to more complicated PPPs and across other sectors (World Bank, 2012, p.70).

The World Bank (2012, p.61) provides a comprehensive overview of what a typical good practice PPP framework contains (see Chart 1). Accordingly, a PPP framework encompasses first of all a solid policy consisting of a government’s formulation of its objective to use PPPs, the scope of the PPP program and the implementing principles. The operational framework related to the implementation of PPP processes and the institutional responsibilities underpins the national PPP scheme. In addition, the legislature and entities participating in the PPP program are an integral part of any good framework as well as the public financial management approach. Ultimately, PPP programs must be backed up by prudent laws and regulations enabling public sector to enforce and implement PPPs and set the boundaries within the contractual context. In this paper, the focus of the comparative analysis will be on looking at PPP policies, institutional responsibilities and the legal framework. Thus, matters related to PPP program governance and public financial management (see grey area in chart 1) will not be dealt with in detail in this paper

and only be discussed broadly as they relate to policy, institutions and regulations. A lot work has been conducted in this area, for instance the IMF has a publication on Public Investment and PPPs (World Bank, 2012, p.63) providing an overview of articles which can be read to learn more about PPP accounting, reporting and auditing rules and guidance.

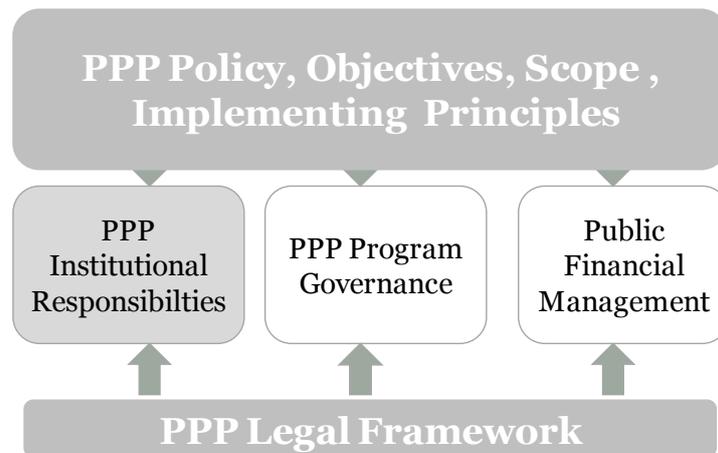


Chart 1: Overview of Frameworks, Source: World Bank (2012, p. 61)

This chapter discusses next the increasing infrastructure needs in the region and looks at the record of private sector involvement in financing the region's infrastructure bottlenecks to get an understanding of the need for infrastructure and service delivery across the region. Then, the actual practice of PPP schemes in all 15 SADC Member States will be laid out to get a common point of departure regarding the current state of PPPs across the region. Next, the term PPP will be defined and also the key issues driving sustainable PPP schemes will be discussed.

2.2. Increasing Application of PPPs in SADC Today

Bearing 16,7% of the continent's population, and 40% of Africa's gross domestic product (GDP), the 15 member countries of SADC compose a substantial market. The region is well endowed with natural resources and has huge potentials economically. Politically, the region has achieved stability in a number of countries over the last decade. Nevertheless, there are uncertainties in countries such as Zimbabwe and Madagascar posing a threat to peace and stability. A key feature of the region is its economic diversity -- the mixture of middle, low-income and land-locked countries. A few strong-performing economies spearhead as growth drivers. AfDB (2011, p. 5) regional analysis indicates that South Africa accounts for 71,5% of regional GDP and is the economic driver of the region. Mauritius had the highest regional per capita GDP in 2009 and is an economic champion regionally. With the exception of a few countries (Zimbabwe, Lesotho, Swaziland and Madagascar), average real GDP growth rates were high at 3,5% to 4,5% in 2000-2009. Foreign Direct Investment (FDI) is a key driver of growth in the region. Angola has the highest share of FDI flows (55%) followed by South Africa (28%) and Zambia (4%) (AfDB, 2011, p.8).

A sound public infrastructure --including both economic and social infrastructure-- is another crucial driver of the region's economic growth perspectives. The World Bank (2011, p.viii) estimates that investing and preserving the region's infrastructure requires a considerable annual spending of USD 2.1 billion over the next 10 years with the greatest need for regional spending on power, and then the transport sector in second place. The largest investment requirement is seen by the World Bank (2011, p.viii) in the Democratic Republic of Congo with USD 961 million a year in infrastructure assets. Also with spending needs of \$265 million per year, Mozambique -- investment requirement in power sector--keeps up with demand in Democratic Republic of Congo. A number of countries have investment needs between 1 and 5 percent of their country's GDP for infrastructure. The World Bank (2011, p.viii) reminds that even 2 percent of GDP for a country like Zambia may imply an insurmountable challenge.

AfDB (2011, p.42) examines various options to finance the region's infrastructure. Although it finds that it is in a better position than other regions on the continent to face the spending requirements via public financing, nevertheless yearly demand for investment in roads, power and ICT of roughly USD 1.7 billion --as estimated by African Infrastructure Country Diagnostic (AICD) - requires that all sources and alternatives to financing the infrastructure bottlenecks be considered. Most of the countries in the region --with the exception of South Africa-- do not have the financial and capital markets to exhaust all possible financings means. Next to development finance, "resource-for-infrastructure" deals have for instance increased across SADC, especially in resource rich countries such as Angola.

In addition, SADC countries have turned to private sector resources for financing as a mechanism to develop their infrastructure facilities and increase operational efficiencies in the provision of public services. World Bank data indicates a strong growth of private sector investments in the 1990s with a slow-down thereafter with the exception of 2002 (AfDB, 2011, p.49). Many projects were implemented in South Africa which ranked first in terms of the number of private sector projects (27%) and then Mozambique ranked second in terms of number of projects.

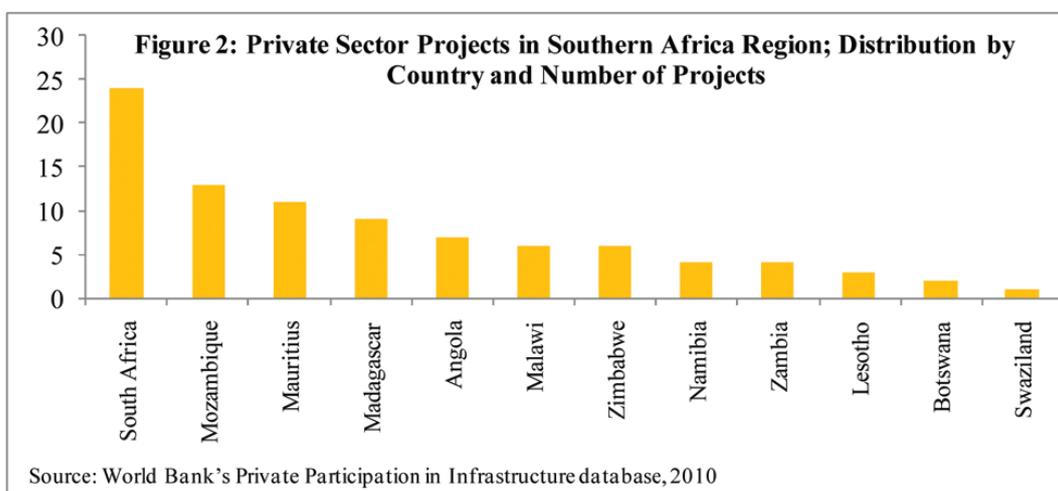


Chart 2: Private Sector Projects in Southern African Region: Distribution by Country and Number of Projects, Source: AfDB, 2011, p.42.

Private sector financed projects are possible in nearly all sectors where public authority bears the accountability for provision of public infrastructure services. Examples of sectors in which PPPs have been completed in SADC are telecommunication, energy, transport, water, health, and education. Sector analysis of the World Bank (2010, Data base) shows for SADC that private sector investment has been mostly in the telecommunication sector receiving 75% of total private investments between 1994 and 2008. Then, transportation received 18% and the energy sector follows with 7%. In recent decades, many governments have opened their telecommunication markets for private involvement. As a result, in this market private companies invest and support public sector to provide high infrastructure standards. Also in terms of return on investment, telecommunication sector allows stable cash flows expected to be paid by users. However, as examined by PwC (2011, p.64) most privately financed telecom projects are implemented as "green field" and privatizations and only 5% are PPP projects. The road and energy sectors have been slower in attracting investments requiring larger investments and being rather sluggish in terms of return on profit.

There are a number of other reasons for why the actual implementation of PPPs in many sectors has been quite underrepresented so far. Most prominent is, however, the need for proper capacities and creation of a certain level of awareness and consciousness for PPPs among the various groups of stakeholders. It is often necessary that relevant experience is provided as well as financial and technical support. On top, many projects where private sector involvement would be enriching risk to fail because of the absence of an adequate regulatory and institutional framework. Section 2.4 examines some key drivers needed for PPPs to succeed.

2.3. Overview of PPP Frameworks in SADC

Countries in SADC have reached various degrees of maturity in terms of the implementation of PPP projects and development of PPP frameworks. A few SADC countries have no PPP policies and frameworks in place (see charts 3&4). On top, they have not embarked on a PPP path to raise private capital for financing of their services. These countries include Democratic Republic of Congo, Madagascar, and Seychelles. In some of these countries, the government has adopted small-scale PPPs, so for instance in Madagascar, there are examples of PPPs in the water sector. However, the PPPs procured by private sector are quite small and still not based on specific national legislation supporting the implementation thereof.

The Democratic Republic of Congo - made its first stride towards mobilising the public dialogue on economic liberalization via a PPP forum. To date, there is no explicit policy statement on the promotion of PPPs although there are some case study reports of PPPs in the mining and health sectors. In 2012, the World Bank had some efforts to increase Congo's capacity to improve and expand urban water via PPPs in Congo. As a result, Congo began to install 175 new standpipes to increase clean water supply in poor urban areas. The World Bank assisted also in improving public sector monitoring and evaluation capacity for PPPs. The focus was on improving public sector capacity, specifically to prepare public agents for a rapid shift in working organization and culture towards performance-oriented strategies and to develop a cooperative relationship between public sector and the service contractor. The ultimate idea has been to increase buy-in of water sector stakeholders outside public sector to facilitate PPPs. Other private sector projects have been observed in the health sector with donor supported activities. There is record of a PPP between the Ministry of Energy and independent power producer (Zongo II HEP) (SADC, 2010, p. 85).

Madagascar - has to date no large-scale PPP projects to draw upon in terms of prior PPP experience. There is no formally introduced PPP framework since infrastructure provision relies primarily on public sector and development finance. However, there is some pro-PPP policy at the official level with a National PPP Steering Committee being put in place. On top, the road sector has been identified as the principal PPP priority of the government. There is, however, a little track record of small-scale PPPs in the water sector where private sector has been assigned to construct and manage piped water systems in rural Madagascar. Three case studies show that PPPs have proven effective at increasing service levels in three geographically diverse settings. Four key factors including political will, size and geographic location, demand, and donor support have contributed to make the PPP model work. Madagascar has a long way still to go in terms of unifying the PPP approach and introducing proper frameworks (Jonathan Annis, Gerald Razafinjato, 2011)

Seychelles - is an independent Democratic Republic with a stable political environment and benefits from government policies which actively foster local and foreign investment. It has as of today no explicit PPP policy, legislation or institutional frameworks established to commit to PPPs. In the ICT sector, there has been a firm government commitment to promotion of the technology by introducing statements and policies and proper legislation related to integration of private sector. Also in the tourism sector there has been focus on working jointly with private sector, however, the promotion of these areas is of strategic national relevance and does not imply positive signs towards the actual procurement of large-scale PPPs across other sectors.

Another category of countries has adopted elements of a pro-PPP policy either setting the stages to introduce a PPP policy or being about to come up with draft of policies. Most of these countries have shown commitment by, for instance, establishing an entity like a Committee to promote the cause of PPPs and/or are on the verge of formulating more concrete steps such as a preliminary legislation, so for instance in Namibia. Countries included in the second category include Namibia, Swaziland, Zimbabwe and Lesotho (see charts 3&4.).

Swaziland - has adopted elements of a pro-PPP policy at the national level by investigating paths of increasing private sector integration in provision of service delivery and appointing

experts to assist with the formulation of PPP manuals. The expectations for PPPs among senior Swazi officials seems to be high aimed at attracting private investment, thus reducing costs and delivering a better service (BizClim, 2009). However, a problem relates to a lack of awareness concerning the need to create an enabling and supportive environment for PPPs. The privatisation policy seems to serve as the overarching umbrella policy for PPPs. There is no PPP explicit framework for promoting or adjudication of PPPs and no agency that will take overall responsibility. There is the Public Enterprises Unit which has formulated the privatisation policy, and there has been a cabinet memorandum to launch a pilot project in the outsourcing field. There is also a new set of procurement regulations -- adopted in 2010 and a procurement bill drafted and there has been a track record of various types of private sector involvement reaching from service contracts and privatizations, but formal PPPs as defined in this paper have not been implemented. Bizclim identifies a number of sectors ranging from roads, education and health where PPPs could provide support to public sector delivery. The rationale of the Swaziland government to initiate the formulation of a PPP policy has its origins in four considerations: a) increasing fiscal constraints partially due to the global financial crisis, and b) a growing concern that the quality of service delivered to the people is not up to standard despite the high costs associated with the provision of some of the services and the use of PPPs to ensure VfM, c) the use of PPPs to attract additional foreign investment (Bizclim, 2009).

Namibia - has taken initial steps to create a PPP friendly environment. However, there is as yet no wide-ranging PPP experience in the country. Cabinet decision on PPPs in the mining sector is based on the mandate of the Namibian Constitution. The PPP in the mining sector seeks to enhance a win-win partnership aimed at a shared growth and shared risk in exploration, mine development and mining business. There is a track record of concession policy in the wild life sector with the concession policy being approved in 2007. A Concession Unit was established in Ministry of Environment and Tourism and 22 concessions were awarded by tender, unsolicited applications, and direct awards as of 2009. There has been consultation by Ministry of Finance on the way forward concerning PPP Policy. The Ministry of Finance currently awaits the process of approval to be passed by Cabinet. Several projects in the water and health sector are under way.

Lesotho - in September 2010 Lesotho developed a formal PPP policy with the assistance of advisers. Tenders were issued and were in adjudication in 2010 (SADC PPP Baseline Overview, 2010, p.85). Although Lesotho indicates positive signs of promoting PPPs, the government does not have a formal statutory declaration on the adoption of PPP as a country strategy. Infrastructure projects are primarily development finance based and publicly financed.

Zimbabwe - in August 2010, the government of Zimbabwe was about to launch a national PPP legal framework recognizing that it had reached a stable economic and political setting and that there is need to engage private sector to undertake and assist in its massive infrastructure development. PPPs were to be explored and harnessed for the benefit of the country since the solution to Zimbabwe's quest for development is as recognized by the government and stated by a Cabinet Minister in 2010 "...a win-win marriage between public and private sectors. Collaboration and active participation of the private sector in infrastructure development is key to success". Already in 2009, there was a forum on PPP for Economic Development and there are some documented case studies on PPPs in the education sector. Nevertheless, as of today the legal framework has not been enacted yet and the country still has a way to go for PPPs to be instituted as efficient means of procurement as well as financing.

The third set of countries has advanced to actually have established a PPP policy and/or a PPP Law aimed at the promotion of and providing support to their PPP schemes in the country. These countries consist of Malawi, Mozambique, Botswana, Tanzania, Angola and Zambia some of which will be subject to the comparative study in this paper (depict from charts 3&4).

Botswana - In the 2002/2003 Budget speech and the National Development Plan 9, the Government of Botswana announced that PPPs would be used extensively as a form of procuring and financing infrastructure projects in the public sector. Subsequently, Government adopted a PPP Policy framework through Presidential Directive Cab 18(B) of 2009 to provide a clear guidance on adopting PPP as a method of procuring some of public infrastructure and services.

Implementation commenced through the construction of an office building to accommodate offices of the Ombudsman and Land Tribunal (PLOT 21) and it was successfully completed. Furthermore, there are plans to undertake maintenance and rehabilitation works through an Output and Performance Based Road Contract (OPRC) and the project is currently at design stage. Although an Implementation Framework for PPPs was elaborated in 2009, Government interest in PPPs seems to have lost momentum based on interviews conducted by OECD in the country. The experiences of Plot 21 and the SADC headquarter were more expensive for public finances than expected and this has put a brake on subsequent government efforts in pursuing PPPs. Thus, the 2009 PPP guidance has not yet been translated into a PPP Act, and the PPP Unit established under the Ministry of Finance remains far from operational (OECD Interview).

Malawi - has taken steps to create a PPP friendly policy environment. It established a PPP National Steering Committee comprising several government stakeholders to promote PPPs and develop a proper framework already in 2010. The national PPP policy framework was approved by cabinet in May 2011 and therefore sets out the policy framework for initiating, designing and implementation of PPPs in Malawi. The Government of Malawi (GoM) is committed to promoting infrastructure investment in Malawi, as one tenet of spurring economic growth, thereby improving the quality of life through reduction of poverty. Also progress has been made in terms of defining a legal and institutional framework in Malawi. GoM intends to enact a new legislation, which will encompass both PPPs and divestiture so as to provide further concrete evidence of Government's commitment to the PPP policy framework. The new Act will codify the general principles set out in its policy framework including rules for PPP procurement. SADC3P will assist with capacity building in the country and a PPP Investor Conference has been planned.

Mozambique –in 2011 a new Law on PPPs, large scale projects, and business concessions was passed with the idea "...to guarantee an equitable share-out of the benefits expected from each undertaking between the contracting parties, the state, the national economy, civil society and the local communities". The Law also intends "...to prevent and mitigate economic and financial risks and those arising from conflicts of interest". The main principles include user pay structure, risk sharing, especially of financial and social benefits. There is a detailed section dealing with risk mitigation in PPPs stating that risks "inherent to, or arising from, technical, professional, technological, commercial or management capacity" and which impact on the contractually agreed objectives are the responsibility of the private partner. On the other hand, political and legislative risks, or risks arising from institutional conflicts or interests, are the responsibility of the Mozambican government or public institutions, which must bear their consequences. Among the economic and financial risks which are the exclusive responsibility of the private partner are the financial and exchange rate risks inherent to the undertaking, fiduciary risks arising from the undue use of financial resources, and risks that debt incurred in the undertaking will prove unsustainable. The country plans on introducing small scale PPPs at the municipality level.

Tanzania – has enacted the National PPP Policy in 2009 and the PPP Act was established in 2010. On top, the country puts a strong strategic direction towards the role of PPP placed by instituting two PPP Units – the Finance Unit is under the Prime Minister's Office bothand the PPP Coordination Unit is hosted by the Tanzania Investment Centre (the national investment promotion agency) under the Ministry of Finance in charge of different issues related to PPPs. Tanzania has some project finance experience applying a concession in the Tanzanian rail sector. Tanzania has prepared a PPP manual for the PPP - Finance Unit in the Ministry of Finance, a PPP strategy and operational guidelines. A PPP Policy (2009), PPP Act (2010) and regulations (2011) and PPP draft Procurement regulation are in place. The country plans on organizing stakeholder awareness workshops in October 2012. The case of Tanzania is studied in more detail in this report.

Angola – demonstrated its commitment to promote PPPs in 2011 by the enactment of Law No. 2/2011 on PPPs. The law published in January, 2011 shall boost the State's ability to take advantage of the private sector's management capacity, improve the quality and quantity of public services and generate savings in the use of public resources. This general framework still

needs to be complemented with the necessary regulations. Provision was made for this to happen within 60 days of the publication of the PPP Law and this would have allowed all aspects to be more precisely defined by the time the PPP Law came into force. However, as of 2011, those regulations had not been published. Provisions are made for the Executive (through the Ministry of Finance) to set up a special public fund called the PPP Guarantee Fund to make provision for possible financial liability on part of the State. The case is studied in more detail in this report.

Zambia –is another country with an explicit commitment to use PPPs as means of accelerating service delivery and mobilising private capital. It has not only introduced PPP Act in 2009, but also set the stages for a framework and is about to identify a PPP pipeline. This case is also subject of a thorough analysis. OECD work indicates that through PPPs, the country is notably addressing energy deficits by facilitating private investment in new hydro-electricity energy generation plants and in the rehabilitation and expansion of major road networks. Specialised units have been established to promote and facilitate PPP projects, including the Office for the Promotion of Private Power Investments.

The most advanced nations in SADC include Mauritius and South Africa both of which have reached a high level maturity and have throughout the past decade worked on improving and further developing their PPP programs. This paper will get into the details of these two country experiences since they both deliver quite an interesting perspective of what the strengths and weaknesses of their PPP frameworks are. The next chart illustrates in a rough matrix the four groups of SADC countries in terms of level of maturity of their PPP framework and their PPP maturity defined as PPP projects implemented and in the pipeline. Interesting is the move of an increasing number of countries towards instituting frameworks for PPPs.

PPP Pipeline, Maturity

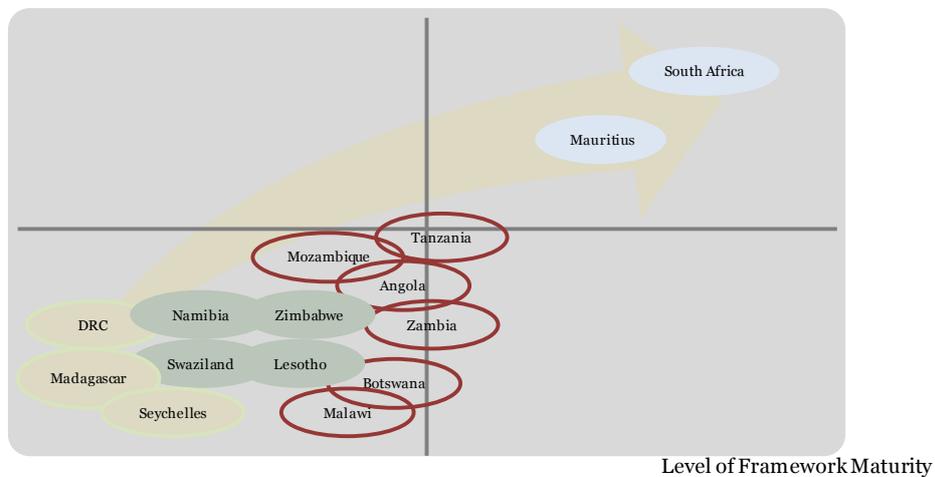


Chart 4: Matrix of SADC Countries' PPP Maturity

Broad Overview of PPP Framework and Schemes in 15 SADC Countries

<p>1 Angola:</p> <ul style="list-style-type: none"> Law on PPPs (No. 2/2011) and sector regulation in Energy & Telecom (2008), Water and Transport (2012) Strategic Plan shall be published in 2012 PPP Unit is in the Ministry of Economy PPP investment in roads, ports, airports, sanitation and energy are planned 	<p>6 Malawi:</p> <ul style="list-style-type: none"> PPP national steering committee comprising several government stakeholders to promote PPPs and proper framework The national PPP policy framework was approved by cabinet in May 2011. GOM intends to enact legislation, which will encompass both PPPs and divestiture so as to provide further concrete evidence of Government's commitment to the PPP policy framework 	<p>11 South Africa:</p> <p>A world leader in PPP schemes has a state of the art PPP framework:</p> <ul style="list-style-type: none"> Public Finance Management Act (Act 1 of 1999). PPP Unit constituted in 2000 Municipal Systems Act (Act 32 of 2003) (MFMA) Municipal Finance Management Act (Act 56 of 2003) Treasury Regulation 16 (2004) and PPP Manual PPPs implemented across all sectors (roads, justice...)
<p>2 Botswana:</p> <ul style="list-style-type: none"> Presidential Directive (CAB 1/2004) indicates government commitment to use PPPs Government adopted a PPP Policy framework through Presidential Directive Cab 18(B) of 2009 	<p>7 Mauritius:</p> <ul style="list-style-type: none"> Advanced PPP country with PPP Policy issued in 2003 and PPP Act in 2004, promulgated in 2005 and amended in 2008 Public Procurement Act in 2006 and Procurement Regulation in 2008. The Finance Act 2008 brought two major amendments to the PPP Act 2004, namely, the process for managing unsolicited proposals for PPP projects and the setting up of a PPP Committee PPPs took place in roads, wind parks, water, housing 	<p>12 Swaziland:</p> <ul style="list-style-type: none"> To date, there is no explicit policy, legislation or guidelines on PPP in Swaziland Regulations on Public Procurement, 2010 There is documented case study of PPP opportunity in Construction & Materials/Oil & Gas sectors
<p>3 Democratic Republic of Congo:</p> <ul style="list-style-type: none"> There are no explicit policy, legislation or guidelines on PPP in DRC There are documented case studies of PPPs in Mining, HEP and health sectors In 2000, DRC's first public dialogue on economic liberalization through a PPP Forum 	<p>8 Mozambique:</p> <ul style="list-style-type: none"> In 2010, Preliminary Draft Law on PPPs. Move towards establishing a PPP law by September 2010 A new law was passed in 2011 and associated regulations were passed in 2012 	<p>13 Tanzania:</p> <ul style="list-style-type: none"> National PPP Policy was introduced in November 2009 PPP Act 2010 and supplemented in 2011 PPP Units established under Prime Minister's Office and Tanzania Investment Centre with different roles to be assumed. There is a Coordinating Unit acting as promoter of PPPs and a Finance Unit in charge of advising, gate keeping and regulating PPPs
<p>4 Lesotho:</p> <ul style="list-style-type: none"> PPP Policy Draft (based on PPIAF support) There is no formal statutory declaration on the adoption of PPP as a country strategy 	<p>9 Namibia:</p> <ul style="list-style-type: none"> Currently, there is no institutional framework for PPPs There is no PPP Unit established and no enabling legislation for PPPs 	<p>14 Zambia:</p> <ul style="list-style-type: none"> PPP Act, No. 14 introduced in 2009 Zambia Development Agency (ZDA) aims at identifying PPP Projects and promoting PPPs to potential investors Documented case studies of PPPs in the Agricultural and Transport sectors
<p>5 Madagascar:</p> <ul style="list-style-type: none"> There is no PPP Policy formulated There is no PPP Unit – a steering committee has been established A few and small-scale PPP activities in the water sector; road sector is in the focus for PPP priority government 	<p>10 Seychelles:</p> <ul style="list-style-type: none"> There is no explicit PPP policy Legislation on guidelines on PPP in Seychelles There are some documented case studies of PPP in the Tourism sector 	<p>15 Zimbabwe:</p> <ul style="list-style-type: none"> PPPs were first introduced in 1998 as means of financing infrastructure and public services In 2004 the government issued a PPP policy document Expected launch of a national PPP legal framework in August 2010, however, it has not been enacted yet

Chart 3: Overview of SADC PPP Laws and Frameworks based on Real Consulting Paper on SADC PPP baseline Overview (2010)

2.4. Towards a Common Definition of the Term “PPP”

Governments across the world and their policy makers have used an ingenious array of acronyms to describe PPPs since there is no universally recognized definition of the term. To all those who use the term PPP, it can be interpreted in different ways, but often involves public and private sector to provide and/or finance public assets or services through investments being made and/or design, operation, or management being undertaken.

Creating a common terminology is not easy, but an important contribution to facilitating the dialogue between policy makers and practitioners in SADC. This section lays out the wide range of definitions applied across the countries within and outside the SADC in order to become clear about what governments look for, why they are partnering with private sector and what forms of partnership they have in mind. The OECD (OECD 50, p.3) derives a definition to determine a PPP as “a long-term agreement between government and a private partner where service delivery objectives of the government are aligned with the profit objectives of the private partner.” The actual effectiveness of the contractual arrangement depends on sufficient and appropriate risk allocation between these partners. Public sector specifies the quality and quantity of the service. The private partner may be assigned to design, construct, finance, operate and manage an infrastructure asset and deliver a service to the public. It gets a financial return through payments over the life cycle of the contract from the users, from the public sector or from a combination of the two.

Common to all PPP terms is their determination of rights, obligations and risks to be allocated between the two parties within a partnership. Both concessions and government pay or availability-based contracts are principal forms of PPPs fulfilling three important parameters allocating rights, obligation and risks related to scope, function and payment structure of the underpinning arrangement between private and public sector.

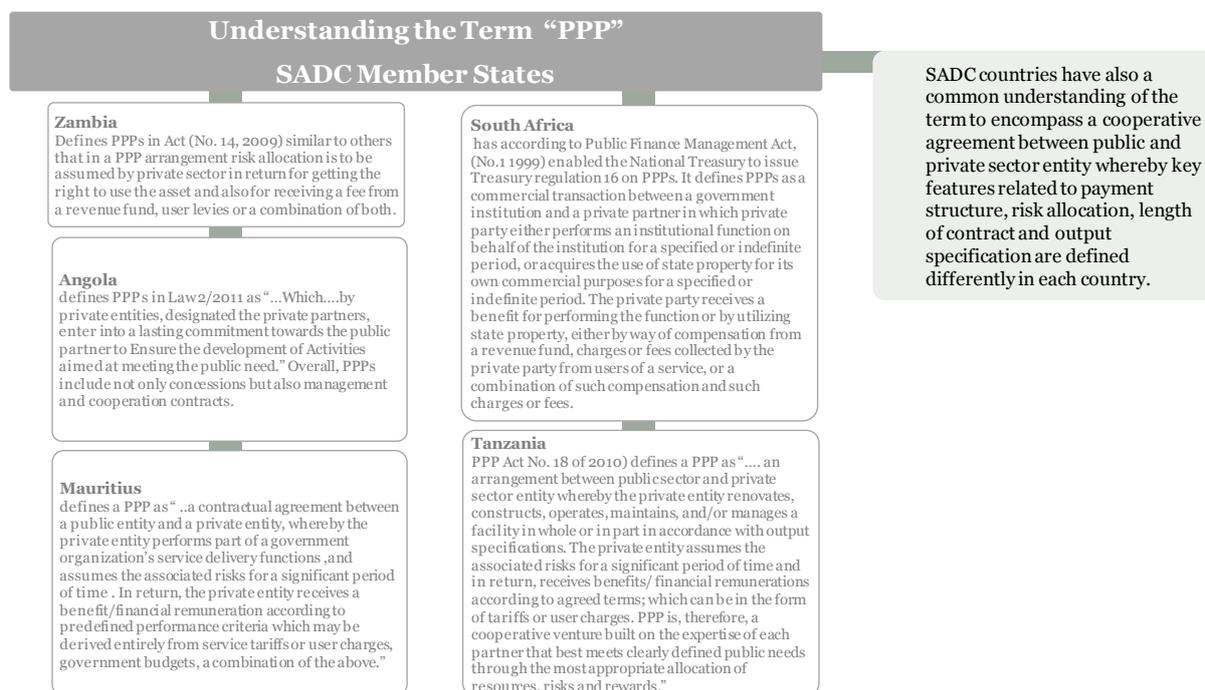


Chart 5: Overview of the Term PPP in SADC

The scope of PPPs usually relates either to whether a new infrastructure asset or public service is delivered (“green field” project) or an already existing service or asset is maintained (“brown field” project) (World Bank, 2012, p.20-30). The functional allocation between private and public sector can relate to a range of activities. Private party may assume simply the management of a service or a wider scope including the design, building, rehabilitating, financing, maintenance

and operation of the underlying asset or public service (there is a wide range of acronyms for these functions (BOOT, BOO, DBFO), see chart 7). Overall, one of the main features of a PPP is to bundle processes implying different choices to transfer functions to private partners. It is quite common to view a PPP over its entire life-cycle. Design implies developing the project from the initial concept and output requirements to construction ready design specifications. Build or rehabilitate relates to new infrastructure assets requiring private party to construct the asset. Rehabilitation will be in the focus of an existing asset or service. Private party usually is allocated the obligation to finance the underlying asset either in part or for all. Operation and Maintenance (O&M) encompass the assignment of responsibility to maintain and operate the asset or the associated service. Transfer refers to a change in ownership of the assets as may occur at the end of the PPP contract period and may occur at book value or no value of the asset and may occur earlier in the event of the failure of the PPP contract.

Significant risk transfer to private partner is an important feature of a PPP and a highly complex matter. In principle, PPPs are designed such that risks are allocated to the party best in the position to manage them. Risks include operational risks, construction, demand risks, financial and political risks and force majeure. Generally, most construction and operational risks -such as design risk, price increase, and technical risks- in the operation phase are transferred to the private sector. However, risks that are beyond the control of the private party – so the risks of a general change in law – tend to be retained by the public sector. Other risks are usually shared, including specific change in law, archaeological risks, force majeure or judicial challenge of the contract (EIB, 2011, p. 15).

The decision for the right payment structure largely depends on the selected PPP model, the sector, the project and of course the legal framework. In terms of risk, private party may assume the revenue and market risk and be in charge of collecting user fees from service users. There are projects, however, which are capital intensive, where cost coverage through user payments is nearly impossible. An availability based payment mechanism may then be determined such that demand risk remains with the public authority. A combination of these two payment structures is also possible.

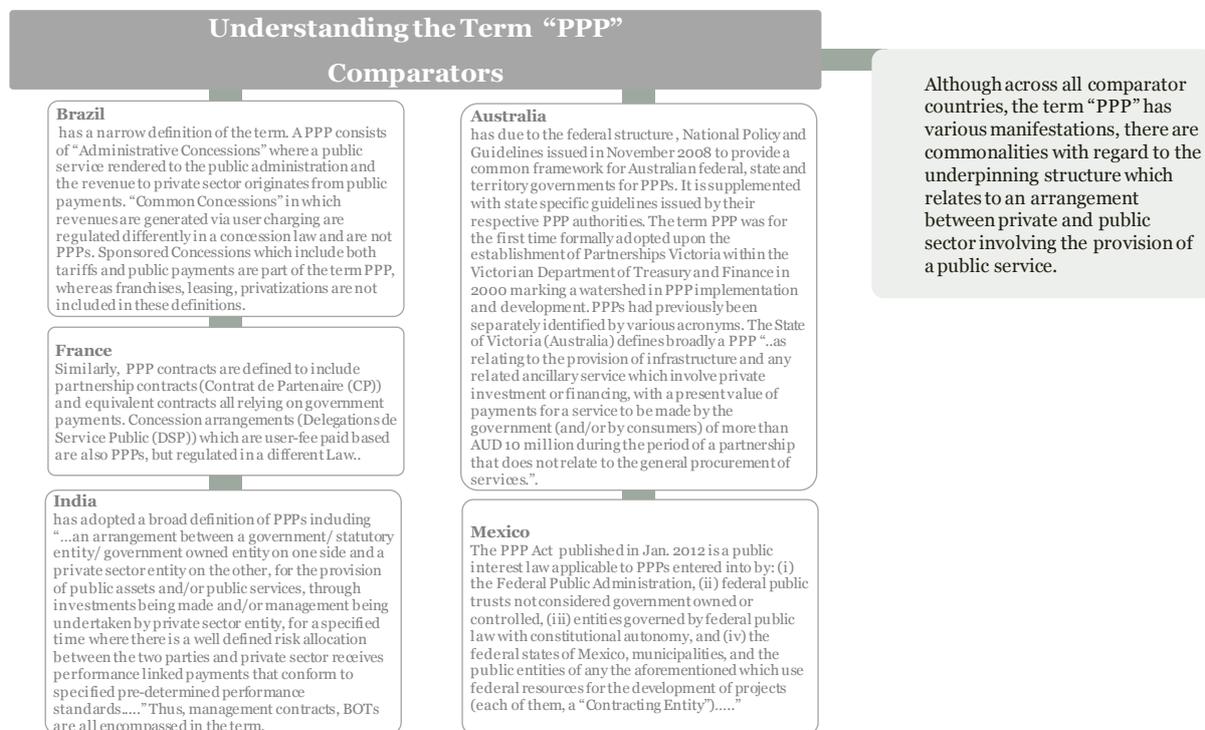


Chart 6: Overview of the Term PPP: Comparators

The practical implementation of PPPs in many countries lacks behind expectation partly due to different perceptions of the term PPP. In a number of countries, there are different views

between the different entities engaged throughout the PPP process, so for instance in Mauritius between the PPP Unit and line ministries, contracting authorities, and leaders from the private sector as to what falls within the meaning of a PPP arrangement (IP3, 2010, p.38). Charts 5 and 6 provide an illustration of the various terms used across the SADC and the comparator countries.

The definition of PPPs used in this paper goes along the illustration provided in chart 7. It excludes a wide range of arrangements where non-profit organizations or civil society are involved in the development and delivery of public services. Furthermore, traditional procurements and privatisations are not within the scope of PPPs in this report especially where a private entity provides a service entirely independent of the public service and based on the general law or regulation rather than contract. Management and service contracts related to operation and maintenance (O&M) are considered as PPPs as long as there is some level of risk allocation to private sector.

For the purpose of SADC discussions, once again, there is a summary of the main characteristics of PPPs. Projects have to fulfil the following requirements to qualify as a PPP:

- **Long-term relationship** since PPPs are usually targeted towards projects with a long-term lasting relationship of for instance 20 years above.
- **Provision of a public service** since a PPP is usually set up in a public sector area, where it is favourable or necessary that public authority retains ultimate accountability. This is an important difference to a privatisation.
- **Substantial risk transfer** requires a proper allocation of risks to the partner who can carry it best.
- **Bundling of processes** relates to composing the PPP based on the specific output required.
- **Output specification** requires the public authority to determine at the outset the output of the project, so the functional specifications of the service. Therefore, private partners have the flexibility to opt for the most efficient technology and path of providing and realising the predetermined output.

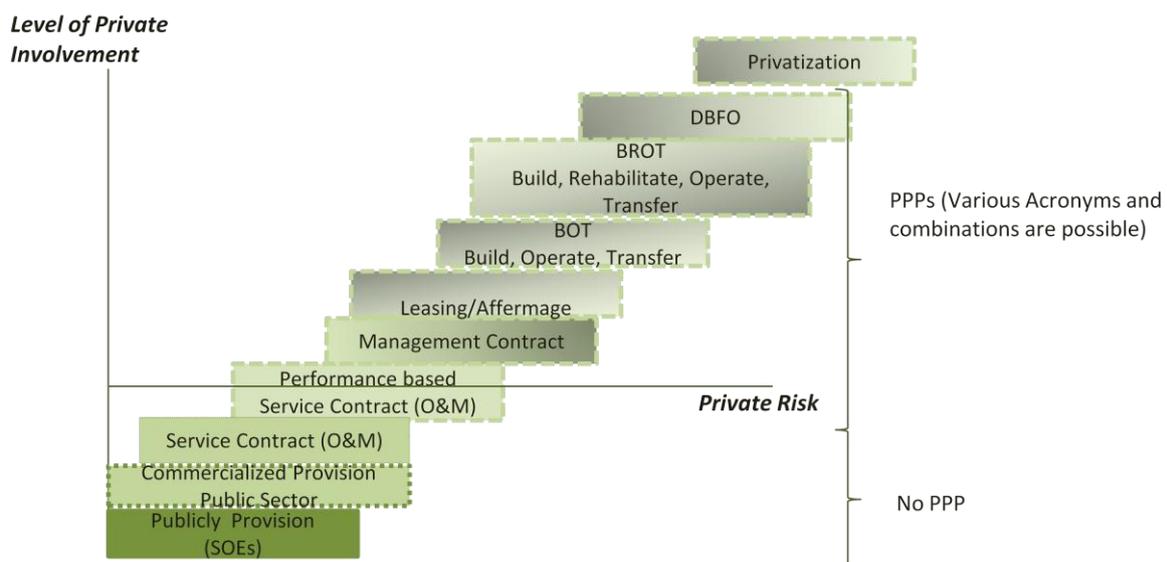


Chart 7: Overview of Range of PPPs partly based on PwC (2011)

One of the main reasons behind the application of PPPs is the life cycle approach which combines the whole life view with the delivery of the asset or a service. The rationale is that a service can be

rendered more efficiently and VfM is a desired positive outcome of a PPP compared to traditional forms of procurement. PPPs can create a project discipline that leads to a number of benefits such as innovation and cost efficiency. On top, PPPs as mutually beneficial relationships between public and private sector - are an effective way to bridge funding gaps and gaps between demand and resources, quality and accessibility, and timely delivery. The ability to share risk, tap external financial resources, and profit from private sector investments and intellectual capital, gives public-sector policymakers greater flexibility in allocating both human and financial resources (see chart for an overview of benefits and risks of PPPs).

However, there are also risks associated with PPPs including higher financial costs due to higher cost of borrowing and return on equity expectations that public sector does not have. The competitive tender process and its preparation are long-lasting requiring lots of resources and good planning processes. Thus, transaction costs associated with buying a PPP are usually higher than in traditional publicly procured projects. In addition, there may be hidden fiscal costs due to unforeseen events that may not have been borne in mind during the contractual design phase. Also PPPs may be used to bypass borrowing limits due to the off-balance sheet nature of PPPs. PPPs do not involve an upfront payment by government, however, have instead a stream of expenditures for government during the life cycle of the project. Most PPPs according to international accounting rules (World Bank, 2012, p.23) do not require PPPs to be included on the balance sheet of public sector. Furthermore, VfM can only be achieved when through good planning and project selection. Lack of sound planning and issues such politics or “personal gains are referred to by the World Bank (2012, p.24) that interfere with a careful project selection. Also governments tend to accept too much fiscal risks when committing to PPPs. The case of Mexico and its bailout program indicate that PPPs also bear costs to society if not planned well. Last but not least, PPPs render only VfM if and when competition is introduced during their acquisition. Thus, efficient and transparent tender processes are a prerequisite for a good outcome in terms of risk allocation and VfM in the final contract.

The next section takes a closer look at a number of key conditions that need to be met and be in place for a PPP to be successful.

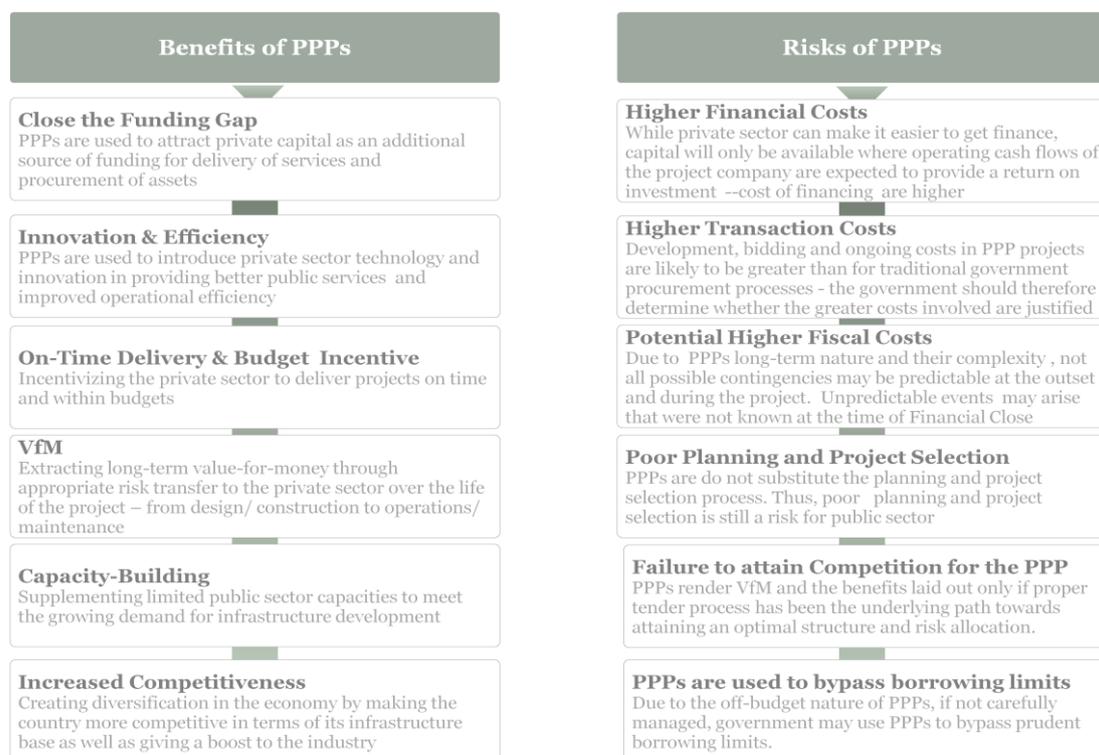


Chart 8: Benefits and Risks of PPPs

2.5. Key Drivers of Sustainability for PPPs

PPP projects with successful records render high quality infrastructure assets and services to the public and the government at costs that are significantly lower than those available through public procurement. PPPs are, however, not an end in itself, and they are not innovative policy tools by definition. The sustainability and attractiveness of a PPP scheme hinges upon a number of different factors such as the macroeconomic condition of a country, its investment climate, lending capacity as well as institutional and financial frameworks, capacity and expertise. A recent survey of PPP Outlook conducted by Deloitte (2012, p.7) looks at major PPP drivers and the largest challenges facing the global PPP market in the next year. Respondents of the survey (Deloitte, 2012, p.6) state consistent political support, availability of affordable debt and lack of government funding as some important factors affecting PPP projects. Many governments are not willing to introduce, for instance, large PPP projects as austerity measures are introduced and those that do are struggling to secure financing and to close the deals.

The OECD (2007, p.13-17 and 2012 recommendations) discusses key measures which national authorities need to consider as they implement PPP schemes and promote sustainability thereof. Public authorities need to ensure that a PPP investment is economically justified thus representing VfM –it is a relative measure used in a many countries to get “the best possible outcome at the lowest possible price” and to assess whether a project provides can give greater net benefits than a traditional procurement. The most compelling source of VfM arises from the bundling of services which makes private sector to deliver services, including the infrastructure asset, more efficiently than the public sector can since private money is at risk. Quite often, a public sector comparator (PSC) as a risk-adjusted cost comparison between PPP and traditional procurement options for delivery of the same service is conducted. However, the quantitative application of a PSC is not always easy and the proper assessment hinges upon a number of input parameters such as risk transfer, output specifications, performance incentives which all need to be taken account of and quantified to get the risk-adjusted cost of public delivery. Thus, in many cases, EPEC (2011, p.7) finds governments to consider qualitative aspects such as non-financial benefits including accelerated or enhanced delivery and wider social impacts. The French PPP Unit (MAPPP) has, for instance, developed an interesting approach towards measuring the VfM based on accelerated benefits which may depicted in the EPEC publication (2011, p.9).

On top, many countries look at affordability as a key feature to support PPPs. OECD (2008, p.20) defines a project as affordable if government expenditure related to the PPP can be accommodated within the intertemporal budget constraint of a government. In Australia, the State of Victoria, the decision about how a project is funded is separate from the decision about how it is to be delivered. Potential PPPs compete with other capital projects for limited budget funding to ensure that they fall within what is considered affordable. Funding is approved on the preliminary PSC (OECD, 2008, p.21). The OECD (2007, p.14) notes that having a PPP is not in itself sufficient to ensure VfM; there is also need to transfer risks efficiently. Thus, proper risk allocation is a contributing factor towards attaining sustainable PPP projects. Risk allocation is, however, case-specific depending on the contractual stipulations regarding service commitments, maintenance, coverage, financial obligations and a number of other considerations bear on the allocation of risk. While risk transfer is the driver of efficiency and VfM, competition and contestability for the PPP project (tender) is another factor ensuring effective risk transfer.

Other key drivers of sustainable PPPs include the policy framework for investments and adequate capacity at all levels of government to implement agreed projects. Proper policy frameworks not only refer to the legislation and regulation of PPPs themselves, but also include other elements supportive of good public governance such as integrity and ex post controls, audit and reporting (World Bank, 2012, p.61). Also building of proper capacities within the government is a major challenge for public sector to develop sustainable PPP schemes since they require a number of different skills from public sector agents such as economics, legal issues, and technical skills. In SADC, a number of countries report their insufficient capacity as a major bottleneck to the promotion of their schemes.) In its recent comparative analysis, EIB (2011, p. 20) also confirms that PPPs need different preparation, tender and post-award management requirements which in

many country cases along the Mediterranean is lacking. The next chart illustrates key success and challenges as faced in South Africa.

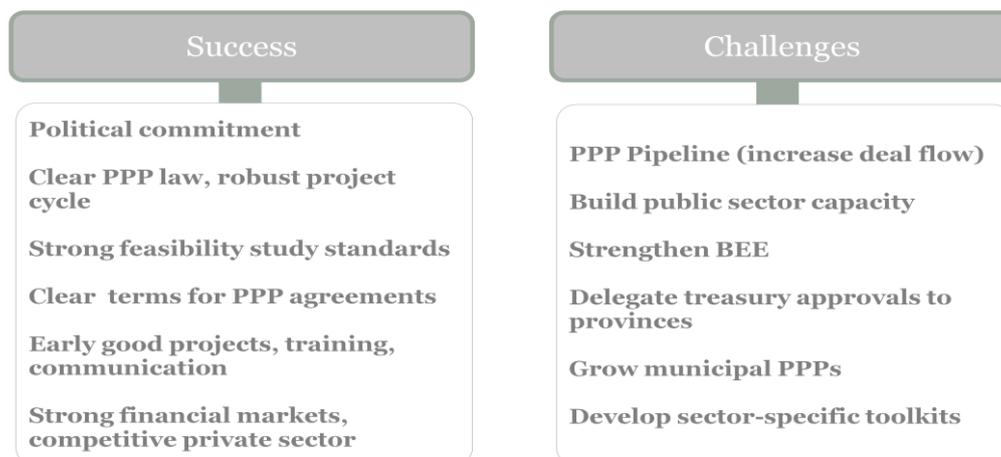


Chart 9: Key drivers in South Africa, Source: PPP Unit, South Africa

Having a significant pipeline for PPPs without being unrealistic and overly ambitious is another factor for PPP schemes to develop successfully over time. EIB (2011, p.11) analysis shows that both in France and South Africa, investors have been attracted once they saw that there is a potential recoup of their investment from a losing bid in future (in terms of time and money). Deloitte Outlook on PPPs (2012, p.5) reports for Europe that for the first time France has the longest pipeline overtaking Spain and the UK as the largest European markets by value size accounting for 57% of the overall market value. France implemented two of the largest PPP deals in Europe with the January 2011 closing of the €204m Nice Eco Stadium and the closing of the €5.4bn Tours-Bordeaux high-speed railway project five months later.

Mexico is also in the midst of implementing its National Infrastructure Program (NIP) 2007-2012 with a major national road-building initiative (EIB, Vol. 3, p.20). The EIB review of the Mexican framework shows that the NIP includes approximately 400 projects with a combined value of Mexican Peso (MXN) 2.5 trillion (EUR 154 billion). The NIP, Fondo Nacional de Infraestructura (FONADIN) and Fideicomiso de Apoyo al Rescate de Autopistas (Commission for Financial Assistance to Rescue Highways) (FARAC) are strong indicators of the federal government's intentions and political will to pursue a structured and strategic infrastructure development program.

Also Brazil has a strong pipeline as it is looking to enter into PPPs with European companies. Deloitte (2012, p.6) indicates that Brazilian PPPs have in the past lacked transparency, thus the hurdle for successful PPPs has been high. However, the government is committed to creating a stable, long-term and credible PPP market. The challenges are mainly due to having multiple

A strong PPP Pipeline is a major sign to the market & investors

legal frameworks between the states. In India, there is also a huge PPP market. Deloitte (2012, p. 6) estimates that around 60 different PPP transactions are being procured parallel at a time. The challenge concerns in India the implementation since non-domestic companies have difficulty entering the market. Overall, EIB (2011, p.17)

summarizes that PPP pipelines take time to evolve and many governments have gone through various stages of development to evolve their PPP programs. First, they design a PPP scheme to attract investors, the success of pilot projects then attracted other funders which then expanded the scope for private sector competition improving price and terms for public sector.

2.5.1. Political Commitment towards PPPs

Since PPPs are complex and long-term in their nature, they will endure usually longer than one or two election periods. It is important that political commitment and support to PPP schemes is

genuinely provided over and above election periods and party lines. Upredictability in the government approach to PPPs considerably undermines investor confidence and can move potential bidders away from future PPP projects. On top, political commitment from the highest government authorities is vital for assuring private investors that institutional and regulatory issues are being addressed and they are consistent in the long-run and risks are minimized. OECD (2008, p.119) lays out potential consequences of weak political support to PPPs implying first of all that governments do not reinstate their intent to introduce the necessary legislative changes to create stronger PPP frameworks. Secondly, private sector will hesitate and lose confidence to invest and participate in PPPs and in the end if any issues come up affecting the substance of the contract, then the society bears the costs since private sector will ask for compensation of all costs that political and institutional instability creates.

Next to creating private sector confidence, politicians need to convince the public about the benefits to be derived since PPPs are in many cases not well understood and confused with privatizations. They face quite often opposition in the population. PPPs involve the provision of a public good, they therefore create suspicion about private sector involvement in supply of a natural monopoly and arguments concerning economies of scale may be doubted and not be properly understood. The OECD (2008, p.120) adds to bear in mind that government officials represent often conflicting interests within various Ministries and bodies. Thus, governments must convey their consistent commitment over time and tackle issues such as cross-sector coordination among various bodies and the lack of capacity.

On top, governments need to adopt a convincing communication path for managing employees' expectations (OECD, 2008, p.119) in case the provision of the public good relates to a service that has already been rendered by government itself. In that case, employees can be transferred to the private entity (often time it is a Special Purpose Vehicle (SPV)). Such transfers need to be communicated and be conducted in a satisfactory manner in order to reduce resistance among employees. In some countries, legal guidelines for such transfer of civil servants have been imposed.

Political commitment must based on ADB experience (2008, presentation) be expressed in actions as well as words, it must be reflected by creation of an appropriate PPP enabling environment, and commitment not just to attracting private capital for infrastructure but to deliver a transparent and equitable process for all stakeholders involved. Political commitment is shown also by establishing transparent and predictable policies to attract private capital and reduce the need for sovereign guarantees.

2.5.2. Stakeholder Dialogue

PPPs are unlikely to be successful unless governments reassure themselves beforehand that the identified PPP projects are in the public interest and are acceptable to consumers and other stakeholders. Thus, as part of the PPP process, consultations with all affected parties and establishing a realistic expectation of what the private sector can achieve are both important. The interests of different stakeholders in a PPP-process naturally vary since stakeholders are different parties affected by a PPP project voluntarily or involuntarily.

At the very beginning of a PPP process, it is important to identify potential stakeholders, their needs and their role throughout the process. Major stakeholders include the procuring agents, and all government institutions involved in the process, the private investor, employees, unions, financing agents such as banking institutions and donors and the advisors (PwC, 2011, p.48). Stakeholder management is an important activity throughout the PPP process, for both the project team and the project board. Failure to achieve the buy-in of stakeholders until late in the process --and then trying to convince them of the merits of previous decisions-- may extend and complicate the PPP-process and may definitely influence stakeholders' attitude to the project negatively. Transparency is another key factor that must be considered by all stakeholders working on the promotion of PPPs --the ultimate objective is to create VfM to all stakeholders.

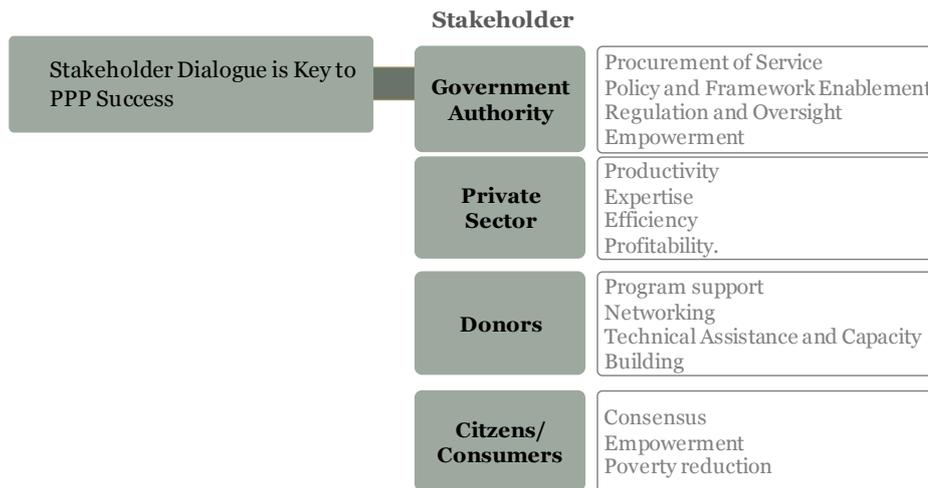


Chart 10: Overview of Collective Effort via Stakeholder Dialogue in Zambia

The Government of the Republic of Zambia may be considered as good practice for involving stakeholders to develop its PPP framework. The government started the PPP reform process by engaging the private sector in dialogue. The private sector was allowed to drive the process through active participation in policy and regulatory reforms (Mukela, p.4). The donor community was the initiator providing the support to the private sector reform program. The stakeholders and general public provided the consensus required moving the process forward at each stage and ultimately, through collective effort, the PPP scheme was established.

Similarly, in Mauritius there was an extensive involvement of private and public sector in drafting of PPP Act which was enacted on March 1, 2005 to provide the legal and administrative framework for the implementation PPP agreements in Mauritius. The legislation was prepared after wide consultation with all relevant local stakeholders.

3. Comparative Analysis and Assessment of Frameworks

3.1. Establishing the PPP Framework

This section reviews the experience of five selected countries in SADC as well as the experience of five comparator countries in establishing PPP framework documents to support their PPP programmes. The World Bank (2012, p.65) lays out three different options which governments have selected across the world to establish PPP frameworks noting that their practical implementation certainly hinges upon the country specific norms and legal systems. In practice, governments have adopted the following routes for setting PPP frameworks:

1. Policy Statement – sets out the objectives, scope and implementing principles of the PPP program. PPP Policies may also outline procedures, institutions and rules by which the objectives and principles of PPPs will be implemented.
2. Laws and Regulations – PPPs are established either by a dedicated PPP law, a component of broader public financial management law, subordinate legislation such as executive orders, presidential decrees or regulations or a combination is adopted in a number of civil law and common law countries.
3. Guidance Manuals or Laws – some countries supplement their policies and laws by additional material such as manuals, guidelines or handbooks to further establish PPP procedures and/or supplement PPP policies statements or legislation. These guidelines are not legally binding, but serve to promote the development and pipeline of PPPs

A recent comparative analysis of PPPs shows that a number of countries have evolved over time first applying a sector based PPP framework prior to coming up with a cross-sector PPP policy and creating the overarching PPP framework for all sectors (EIB, 2011, Vol. 1). These countries are quite often at a more advanced stage of PPP development.

Comparator Countries

In Australia, a national PPP policy statement has been introduced setting out the objectives, scope, the assessment of PPPs and their guiding principles. It has on top complemented its published policies with further guidance material to provide more detailed procedural tools for application by practitioners. The Ministry of Finance and the Department of Economic Affairs in India has published a range of guidance material and tool kits which are publicly available on the PPP website.

On the other hand, a number of comparator countries have used the existing legislation to cover PPP related issues or enact specific PPP legislation. Examples of these countries include France, Brazil, and Mexico. The Government of Mexico passed in 2012 a PPP law (Ley de Asociaciones Publico Privadas) setting out the principles, scope, institutional framework, contracting mechanisms, approval procedures, PPP registry, fiscal management that make up the Federal PPP Policy in Mexico. France has a specific PPP law on PPPs introducing the “Contrat Partenaire” in 2004 and additional decisions to create a PPP Unit.

SADC Member Countries

Most SADC countries have introduced and published targeted PPP policies to set out their objectives associated with the introduction of PPPs and clarify the scope and guiding principles associated with the implementation framework. Tanzania, Mauritius and Zambia all have formulated the rationale behind their PPP programmes in appropriate PPP Policies. Their vision, mission and goals are set in these policies and the envisioned institutional framework.

In South Africa a strategic framework for PPPs was formulated first in 1999 before the National Treasury issued regulations for PPPs in April 2000. PPP objectives, scope and other relevant matters are then also published in various manuals and tool kits that are all available publicly on the National Treasury's web site. Treasury Regulation 16 issued in 2004 identifies PPPs as procurement means and provides the needed regulatory framework at national and provincial levels. Also in Angola, PPPs are regulated in Law No. 2/2011 on PPP defining general rules covering PPP processes and their overall operation. The government expects the approval of its first Strategic Plan for PPPs in 2012, in conjunction with the Sector Plans Executives of the Ministries. The Strategic Plan which shall be the underpinning pipeline of potential PPP projects shall be developed from 2013 onwards.

3.2. PPP Policy

The objectives that a government seeks to achieve with the implementation of PPPs and preserve in the interest of national community are quite often declared and articulated in a PPP Policy. A PPP Policy defines also the scope of PPP projects and the guiding principles concerning how PPPs shall be implemented. The World Bank provides guidance on what PPP policies usually include:

- PPP Program Objectives --responds to the question of why the government aims at introducing a PPP program
- PPP Program Scope –stipulates what types of PPP projects shall be pursued
- Guiding Principles for PPPs –how PPP projects shall be implemented to ensure the PPP program meets its objectives.

As will be discussed next, without a clear foundation provided by a PPP policy, uncertainties about the definition of PPP, the reasons for pursuing them, the roles and responsibilities of each institution, the process of trying to complete PPP transactions becomes uncertain, prone to disagreements, and subject to delays. In a number of countries unclear PPP policy statements have not delivered the promise of promoting PPPs adequately.

3.2.1. PPP Policy Objectives

Government goals to adopt PPP programs vary and depend on specific economic and country circumstances. In some cases, PPP programs have been introduced to deal with financing bottlenecks in certain sectors. In others, broader objectives are attached to attracting private capital in the provision of assets and services. Overall, the comparative analysis indicates that many governments opt for broader PPPs program objectives when formulating PPP policies. These may entail strategic and operational objectives. Strategic objectives include harnessing private sector capital, enabling more investment in infrastructure or stimulating growth and development of the country. Operational objectives include affordability, improving services and accountability in the provision of infrastructure and services, focusing on life-cycle approach and achieving value for money and innovation.

Comparator Countries

Looking at why comparator countries introduced their PPP programs, in Australia PPPs have been supported by both strategic and operational objectives. They shall according to the National PPP Policy Framework of 2008 (#1, p.3) “...deliver improved services and better value for money, encourage innovation greater asset utilization and an integrated who-life cycle management underpinned by private financing.” Similarly in India, the draft National Policy sets the objectives for PPPs aimed at “.. ...harnessing private sector efficiencies in asset creation, maintenance and delivery, providing focus on life-cycle approach to development of a project, creating opportunities to bring innovation and technological improvements and enabling affordable and improved services to users..” The World Bank (2006, p.25) notes that in India a number of states have developed policies that promote the use of PPPs with an understanding and a policy rationale that is by and large one of using PPPs to substitute for capital investments by the state.

In Brazil, the objective is not explicitly defined in Brazil’s PPP law, but at decentralized levels. For instance, the state of Sao Paulo states in Law 11688 issued in 2004 its operational objectives of promoting, coordinating, regulating and auditing the activities of private sector agents who implement public policies aimed at development of the state and the collective wellbeing. A few comparator countries have rather the objectives formulated indirectly, so for instance in Mexico the objective is to increase social wellbeing and investment levels in the country as a means of achieving the objectives of sustainable development that are stated in the National Development Plan – Plan Nacional de Desarrollo (PPP Journal, Issue No.1, 2005). In France, there is no explicit stated objective in Contrat de Partenariat (CP) which was introduced by a law in 2004 and launched the modern PPPs in France. The European PPP Expertise Centre (EPEC, 2012) provides an insight in its summary of PPP Units and related institutional frameworks into why the CP was introduced. The idea was to optimize the performance of both the public and private sectors in order to implement projects within the best timescale and cost structure.

SADC Member Countries

Most SADC comparator countries have a statement of their objectives articulated in specific PPP policy statements. Mauritius has, for instance the objectives articulated in its PPP Policy Statement including both strategic and operational goals such as fostering economic growth, encouraging crowding-in of private and/or foreign investment and at the same time PPPs give the opportunity for government to realize efficiency gains and better utilize assets, etc..

Tanzania has quite a detailed statement of vision, mission and objectives underscored by specific measures to be taken by the government towards the achievement of these goals. The National PPP Policy published in 2009 has as its main objective to promote private sector participation in the provision of resources for PPPs, enterprises in terms of investment capital, managerial skills and technology. There is, however, a subset of other goals which explicitly discuss the need to develop an enabling legal and institutional framework. This policy statement is underscored by measures that will be taken to fulfill the objectives. Also Zambia has explicitly stated policy objectives in its draft policy statement of Ministry of Works and Supply. Herein, the government goals are to promote the efficient use of resources in infrastructure development and provide infrastructure according to international standards, and promote sustainable socio-economic development of infrastructure. On top, the goal is to obtain value for money and promote efficiency and innovation and create an enabling environment for Zambians.

SADC countries have formulated sound objectives in their policies and manuals

South Africa is amongst the leading countries in the world in establishing proper laws, policy and systems for PPPs. Next to standardized PPP provisions, the PPP manual formulates the PPP objectives of South Africa as an “..ongoing quest to tackle poverty and grow our economy. Where the transfer of financial and operating risk to a private partner through a PPP gives an affordable, cost-effective solution for a service, South Africa will pursue it.” In Angola, the aim of PPPs is stipulated in Article 4 in Law on PPP which was published in January, 2011 and is defined as

follows: “.. improve efficiency in allocating public resources, enhance the State’s ability to carry out investments, and qualitative and quantitative improvement of service through effective controls enabling their permanent evaluation by potential users and the public partner.”

3.2.2. PPP Scope

The scope of PPPs in many cases relates either to the type of PPPs or contracts that are desired, the sectors across which they may be applied and/or the size of PPPs which are to be pursued. As already mentioned in section 2.4, there is no universally and internationally accepted definition of the term PPP. Thus, PPPs are applied in a wide array of acronyms and contractual types ranging from short-term service or management contracts to concessions and DBFOs, etc. According to the World Bank (2012, p.71), PPP scopes go usually along with the objectives of government and their infrastructure needs, and are also defined in terms of what they are not and what the government does not aim at pursuing with their procurement.

Comparator Countries

All comparator countries define the types of contracts that shall be supported by their PPP programs. In India, the draft National PPP Policy (2011) regards both user-fee and annuity based BOT models, performance based management and maintenance contracts and turnkey contracts as PPPs. Mexico’s PPP Law (Ley de Asociaciones Publico Privadas, 2012) published in the Federal Official Gazette determines generically long-term contracts no longer than 40 years as PPPs. Also it defines that PPPs cannot be applied in certain setors, so for instance in the oil industry.

EPEC provides an overview of the French PPPs introduced in 2004 as CPs to encompass building, maintenance, operation and finance of public assets and services over a long-term against a payment made by government. The delegation de service public (DSP) is also part of the PPP program of the government, but user-fee based covering concessions, affermage for services and regie interesse. There are sectoral PPPs used in the health sector. According to Bail Emphyteotique Hospitalier (BEH) there is a strong focus on maintenance and facility management and other BEA are used in the defence, justice, and police sectors. Thus, in France the various types of PPPs are regulated in various legal provisions.

Brazil supports in the National PPP Law 11079 issued in 2004 (#2, Article 2, §4) only two types of contracts as PPPs. Sponsored concessions where payment is user-fee based and government transfers as well as administrative concessions where all payments are from government

Types of PPPs are always defined; few extend the scope to stipulate also sector and size of PPPs

transfers. Concessions not requiring government transfers are not considered PPPs and in terms of length they must at least be 5 years. Furthermore, Brazilian Law defines also the project size used for projects over 20 million reais (USD 12.5 million). The sectors are roads and other transport infrastructure, transportation services, sanitation, health, and education. Also

Australia in its Policy Framework (#3, page 5) defines both scope and size. In terms of scope, PPPs do not involve contractor involvement, alliances, managing contractor and traditional procurements and private provision of services with no public infrastructure element or private investment in infrastructure where government does not have a direct interest in the provision of the public service. PPPs are deemed to likely add value for money using projects with a capital value exceeding USD 50 million. PPPs may, however, be smaller in size in case they indicate sufficient value for money.

SADC Member Countries

Most SADC countries have clarified the scope of their PPPs, so for instance Mauritius has a sectoral application in its Policy Statement issued in 2003 (#5, page 4) whereby in the early stages, the government deems the focus to be in areas such as transport, public utilities (water and energy), solid and liquid waste management, health, education and ICT. However, the

current PPP policy framework in Mauritius has not produced significant meaningful results in terms of PPP activity in the years since the Concessions Project Act 1997 or the years since the PPP Policy Statement 2003. There is still a need to address fundamental policy issues such as the scope to get an understanding of what the term PPP implies, and other issues such as why PPPs can play a beneficial role, and what changes are required to the implementing machinery and measures to enable PPP to provide improved infrastructure facilities and services (IP3, 2010, p.38).

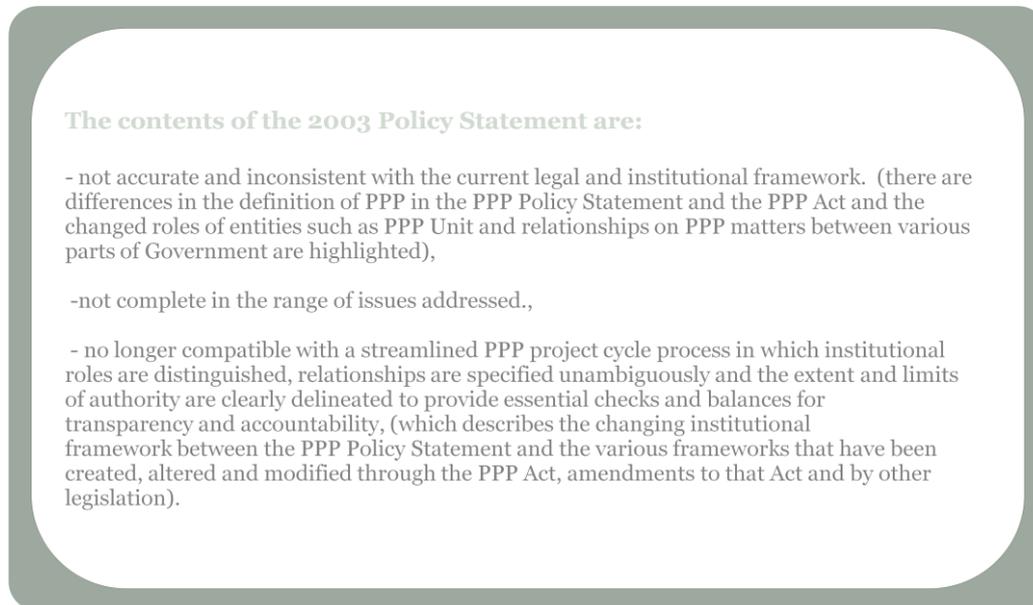


Chart11: Inconsistency Policy issues in Mauritius (IP3, 2010)

Zambia has a definition of the type of PPPs. The spectrum (PPP Policy) includes the entire range reaching from short-term contracts such as a service contract and management contracts to BOTs and also encompassing privatizations. Tanzania lays out both the types of PPPs to be used and the sectors. Accordingly, The National PPP Policy dated November 2009 stipulates that PPPs may take place in both productive and socio-economic service sectors, and PPPs range from Design, Build (DB) contracts to DBOs, Build, Lease, Transfer (BLTs) and Buy, Build, Operate (BBOs).

Similarly, Angola defines PPP type and size of PPPs in Law No. 2/2011 whereby collaborative relationships between public and private entities may consist of concession contracts for public works and services, supply and service and management contracts. PPPs may also involve entirely and partially, and non-onerous concessions to the State. The Law also stipulates what shall be excluded from the scope of PPPs. These include public works, public supply contracts and all PPPs below Kwanzas 500 million (USD 5,2 Mio.) and duration less than 3 years. South Africa clarifies the term PPP in Treasury Regulation 16 (Gazette # 25915, 2004), although there is no concrete discussion of the types and sectors PPPs shall be applied to or a limitation in terms of size.

3.2.3. Guiding Principles

Governments formulate important principles according to which PPPs will be put in place; they are usually supplemented by additional regulations and concrete processes to ensure that the guiding principles are exercised. According to the OECD (2007, p 15.) clear implementing guidelines are a positive signal to the market conveying the underpinning standards against which those responsible for putting PPPs in place may be held accountable. These include VfM and affordability and appropriate risk transfer.

Comparator Countries

Almost all comparator countries have determined key principles in the application of their PPPs. In Australia, both the national and Partnerships Victoria policies and guidelines define seeking VfM, innovation, market competition as key principles whose application shall render a positive outcome in the implementation of PPPs. A number of state-specific objectives are identified in Victoria's policy framework. These include maximizing social and economic returns from government expenditure, promoting growth and employment opportunities for the whole of Victoria and managing contracts in a proactive, practical and constructive manner. Australia may be exemplified as good practice in terms of various procedures set up, the so-called "gateways" to control the application of these principles such as VfM.

Also India is a good example where broad principles have been stipulated in the draft National PPP Policy section 2, so for instance fair and transparent framework, competitive process for selection of private partners, protecting the interest of end users. Some of the gaps in PPP guiding line in India include the tendency for the policy rationale of PPPs to be limited to the use of PPPs as a source of investment capital when the public sector lacks funds; little systematic compilation and dissemination of information, even within the public sector on PPPs implemented to date, including contractual approaches and their results; and not much use of rigorous ex-ante or ex-post assessments of the performance of PPPs versus traditional public options (World Bank, 2006, p.20). Tools such as PSC have not been used systematically in India so far, even on a simplified basis.

As for Brazil, article 4 of the Brazilian PPP law regulates the principles that must be observed at all stages of the process to select private partner: efficiency, respecting the interests and rights of users and private entities responsible for service delivery; retaining in the public sector the regulatory functions, the exercise of police power, and other strictly state tasks; fiscal responsibility in the contracting and implementation of partnerships; transparency of procedures and decisions; objective sharing of risks between the parties; and financial sustainability and socioeconomic benefits of partnership projects. Thus, in Brazil affordability is a determinant of viability of PPPs. Project studies must include a fiscal analysis for the next ten years. In addition, the commitment of the federal budget to PPP projects is limited by law to 1% of the net current revenue of the government (OECD, 2008, p.21). It is important to mention that expenditure limits with PPPs should be handled with care so as not to discourage meritorious projects for a fiscal inflexibility. In Brazil, States and municipalities have often ignored the limitations since there were no effective sanctions against offenders. The CP contracts in France regulated by joint PPP Laws of 2004 (PPP Ordonnance) and following amendments of 2008 and 2009 (EPEC, 2012, p.9) stipulate that a CP can be procured by the authority if the arrangement provides VfM, the so-called *efficience economique* criteria, and the project is urgent and complex.

EIB (2011, Vol. 3 p. 21) provides an overview of the Mexican framework where clear guidelines on how to conduct a cost-benefit analysis are an integral part of the underlying principles. No project is approved as a PPP unless it passes a detailed risk analysis, affordability appraisal and legal and environmental checks. This is partly due to Mexico's early experience in the road sector with negative results, especially those PPPs procured in the 80s and 90s (52 projects (25 competitively tendered) was awarded (largest PPP toll road program)). One problem related then to the contractual terms stipulating the shortest concession period would win (max 15 years), thus causing very high toll levels for investors to get an adequate return on investment. But

another problem was lack of application of proper tests. A massive bail out by Mexico's government was the only way out of the poorly designed PPPs in the 90s.

SADC Member Countries

Member States have recognized the need to adopt and formulate clear and transparent guiding principles in statements or laws. Both Zambia and Mauritius define implementing principles to clarify the key matters according to which PPPs will deliver a successful outcome. In Zambia, for instance chapter 4 of the draft Policy on PPPs lays out the guiding principles including feasibility and bankability of PPPs for financiers and developers, VfM, risk allocation, economic and social benefits, and citizen's empowerment. Mauritius has some key considerations that are pertinent for a positive outcome of PPPs. These are set out in the PPP Policy Statement (2003) and include affordability, the legislative environment, institutional arrangements and capacity building. However, a full understanding of both the spirit and intent of what government seeks to achieve with the application of principles formulated is important for rendering good results. For instance, the term VfM is defined as the provision by which the contracting authority's functions under an agreement shall result in a net benefit to the consumers in terms of cost, delivery, price, quality, quantity or risk transfer, or a combination thereof. IP3 comments that the definition fail in capturing the concept of VfM obtained in procurement by comparing the PPP arrangement with traditional public procurement as a PSC (IP3, 2010, p.194).

In Tanzania, within the scope of feasibility studies (National PPP Policy, 2009, p.9), there are operational guidelines to ensure that PPPs consider public interest matters such as accountability, and sustainability, but also render value for money, risk transfer and bankability. On top, it aims at establishing specific guidelines soon. Angola has defined in Article 6 the "prerequisites" as guiding principles stated in the Law on PPPs. Thus, next to risk allocation, it is stated that a PPP shall render benefits to alternative ways of accomplishing the same aims. South Africa describes in its manual the principles according to which the process shall be assessed. Projects must pass regulatory test of affordability, VfM and risk transfer.

SADC has guiding principles close to OECD such as VfM, risk transfer, affordability

3.3. Institutional Responsibilities for PPPs

Creating proper institutional capacities to identify, procure, evaluate and manage PPP projects is quite important for the promotion of efficient PPP programs. Many governments have set up the institutional responsibilities for PPPs to clarify which agency will play what role at various stages of the PPP process. Institutional arrangements vary widely from country to country depending on PPP schemes applied and the existing institutional structures and capacities. The World Bank (2012, p. 81) emphasizes that there is "...no internationally agreed upon correct architecture for allocation of functions when pursuing PPPs." Nevertheless, it deems that many governments with successful PPP programs have introduced PPP Units. Also PwC (2005, p.45) studies relevant best practice across the EU and finds that a large number of countries in the EU have reinforced their institutional capacities by making use of existing PPP Units or countries are in the process of establishing such Units.

This chapter will discuss the rationale for having a dedicated PPP Unit and examine its role in more detail drawing lessons from both comparator and SADC countries. Then, there is a discussion on some generic responsibilities for PPPs that governments need to allocate to various entities to have a well-organized PPP scheme. Quite broadly, the World Bank (2012, p.90-05) classifies the functions to be assumed within a PPP process to include regulation of the process, approval thereof and implementation.

3.3.1. Organizational Structure with a focus on PPP Units

An effective organizational structure for the institutional management of PPPs is an essential element of any PPP scheme. There is no straight-forward way to organize a PPP scheme with its

complexities and demands on public sector skills and competencies. PPPs are complex and require a set of multidisciplinary competencies in accounting, procurement; economics, law and technical skills for public agents to be able to assess VfM and proper risk allocation. In order to respond to these challenges, dedicated PPP Units have been widely spread throughout the practicing world to provide support throughout the PPP process and to be an anchor-point for public sector as reviewer and central repository of best practice.

There is no internationally agreed upon definition of the term PPP Unit. The Asian Development Bank (ADB, 2008, see in OECD 2010) defines a dedicated PPP Unit as a point of co-ordination, quality control, accountability and information on PPPs for one or more sectors. These Units are created as a new agency or within a ministry such as the finance ministry, which is seen to be at arm's length from the sector buying the PPP as a service delivery mechanism. The ADB outlines the respective benefits of a dedicated Unit such as being able to disseminate information and provide specialised management advice to the procurement process, and ensure transparency and consistency.

OECD (2010, p.) regards a PPP Unit as any organisational structure with full or partial assistance of the government to assure that necessary competencies to manage third-party provision of goods and services are made available and clustered within government. Although a relatively recent phenomenon, in 2009 over half of all OECD member countries reported the existence of a dedicated Unit of some kind (OECD, 2008). PPP Units play a major role based on a recent review conducted by OECD (2008, p.). Due to the off-budget character of a PPP, there is the danger of public sector agents to not fully respond to the budgetary implications of PPPs. It is important that public sector does not falsely assume that PPPs allow governments to increase expenditure since private sector is in charge of the initial capital investment. Public sector agents need to be guided in order not to overextend the financial budget of their governments. Furthermore, a PPP Unit can assist to avoid the typical "free-rider" problem, thus acting as a supervisor within the PPP process. Usually the procuring entity is not the same as the ministry that ultimately finances the project. Thus, there is an inherent potential also here to commit the overall government budget too much to PPPs. A dedicated Unit can help to prevent such problem by asking procurement departments to show that future payments will fall into their budgetary planning. Third, a PPP Unit can serve as a knowledge centre for various government agencies and for the process itself. It also may be involved in regulating the creation of PPPs by government departments and other entities to ensure they fulfil the guiding principles such as affordability, value for money and risk transfer. Most importantly, a PPP Unit is helpful for achieving a certain separation between policy related issues and practical implementation of PPPs.

EPEC (2012) conducted a comparative analysis of 18 countries within EU to look at various issues related to PPP Units --their functions and proper locations and also funding mechanisms. Accordingly, there are enormous differences among various Units in terms of their mandate, functions, coverage, staffing and funding. Most of PPP Units across the EU are in the Ministry of Finance or organized as a Public Limited Company or act as an Executive Agency. The Units surveyed report difficulties in attracting staff with PPP expertise; however, the turnover is low. In terms of funding, the public budget is the dominate sources of funding across the EU for PPP Units. Then the EU participates in the funding and user fees are also a common funding mechanism. In terms of functions assumed, the Units sit quite often in the Steering Committee of or Oversight Committee of the PPP project and in many countries they even take a place on the project team. In over half of the countries, they assume approval roles for the final contract and potential renegotiations. They also have a strong share in developing PPP policies and promoting best practice; a smaller share of countries has assumed a role in providing training. Overall, PPP units are introduced as a response to institutional gaps to manage PPP programs and must take into account the needs, capacity, culture, legal and administrative traditions (EPEC, 2012, p.15).

The question of where to locate a PPP Unit has been discussed by a number of practitioners. The OECD (2010, p.37) lays out three models whereby a dedicated Unit may be integrated within the regular departmental structure of the Ministry of Finance. This is the case in Victoria, Australia,

and South Africa. A dedicated Unit may also be an independent government agency like in Mexico that collaborates with a secretariat in the Ministry of Finance (or equivalent), or it may be an individual line ministry that is predisposed in its functions to use PPPs, such as an infrastructure ministry. Dedicated PPP Units receive funding from either the government budget, through user charges or a combination of both.

Comparator Countries

The comparative analysis shows that PPP Units play a vital role in developing the local PPP markets by disseminating best practice and acting not only as bodies of expertise, but at times also assuming an advisory role throughout various stages of the PPP procurement process. Common to all PPP Units is that they do not operate in isolation from the rest of a country's regulatory framework. Units engage with other agencies at lower levels of government, and private parties and they are not directly involved as procuring agent being in charge of actually managing the PPP projects and negotiating the term, etc.

The French Mission d'appui aux partenaire public-privé (MAPPP) was inaugurated in August 2005 as a dedicated PPP Unit within the Ministry of the Economy, Industry and Employment to provide expertise on the feasibility and management of PPPs. EPEC (2012, p.22) studies the role of MAPPP which is responsible for the mandatory preliminary evaluation of all partnership contracts that are considered by the French national government. In addition, MAPPP provides support to public sector entities in the preparation, negotiation and monitoring of CPs and informs and promotes CPs. The MAPPP regularly consults with a committee comprising stakeholders from local and central government as well as the private sector. Public authorities and local governments can access services of the MAPPP for free. Advice is provided at all levels of a PPP project formation. It is not compulsory for public authorities to engage the services of the MAPPP for a PPP project. The MAPPP is made up of ten people who are experts from the public and private sectors. It is headed by a president and a secretary general and financed by government budget. According to Deloitte (2012, p. 5), the dedicated Unit has assisted in overseeing the introduction of new legislation, and facilitate the implementation of PPP projects in a range of sectors.

Prior to MAPPP, the Institut de la gestion déléguée (IGD) was established in April 1996 as an independent, non-profit, private organisation to promote different types of PPPs. Its membership comprises representatives from both the public and private sectors. The IGD is headed by a president, who submits an annual report to the general assembly of the IGD (2...006). The Centre d'expertise français pour l'observation des partenariats public-privé (CEF-O-PPP) was set up on 27 June 2006 by the IGD and the MAPPP to carry out analysis of PPP projects, exchange ideas and experience, and issue recommendations. The CEF-O-PPP is currently situated within the official premises of the IGD and is operationally managed by the IGD.

In Australia, due to the federal structure, a number of authorities are involved in procuring PPPs; however, only three state/territory governments (New South Wales, South Australia and Victoria) have established dedicated Units. Partnerships Victoria is, for instance, the PPP Unit in Victoria providing the overall policy framework for the Victoria State government in the provision of public services through PPPs. Partnerships Victoria is also the centre of expertise for PPPs and its role is to be in charge of not only the development of the policy framework, but also to help building with key competencies in the PPP area. OECD (2008, p. 111) sums up the primary roles of Partnerships Victoria to be: i) developing policy; ii) playing an advisory role in project implementation; and iii) setting policy and giving advice on contract management. For individual projects, Partnerships Victoria provides commercial expert advice, ensures that policy issues are identified and addressed, monitors budgetary issues, maintains the integrity of its policy framework, and facilitates Treasury approval of good projects.

Queiroz and Motta (2012) examine the institutional framework of PPPs in Brazil. Several agencies at the federal level are responsible for different aspects of the PPP scheme including the Ministry of Planning, Budget, and Management, the Partnership Steering Committee (CGP), the

Ministry of Finance, and a Technical Committee. The PPP Unit provides administrative and technical support to the CGP and plays an advisory role with regard to third parties. In a recent presentation, Souza (2010) from the PPP Unit refers to weaknesses that are agreed to be tackled. These include consolidating the PPP Unit and providing support to sector Units and other levels of governments. Furthermore, the PPP Unit aims at institutionalizing the PPP methodology and assisting in structuring projects.

In Mexico, the General Congress of the United States of Mexico (2012), the Ley de Asociaciones Publico Privadas (PPP Law) defines the process and institutional responsibilities when implementing a PPP in Mexico. There is an Investment Unit within the Ministry of Finance with responsibility for PPPs. The Unit is in charge of coordination and planning of all government investment projects. Also India realizes in its Draft National PPP Policy the necessity of instituting a well defined structure as a cornerstone for developing a sustainable PPP scheme. World Bank (2006, p.24) examination of the Indian PPP framework shows a wide range of institutional structures and capacity approaches to make PPPs happen across states and central agencies --all of which have had some level of success. At the state level, three options have consisted of combining dedicated institutions with cross-cutting legislation; establishing and using cross-sectoral PPP advisory Units to help line departments in the absence of overarching legislation; and relying on line departments and sectoral agencies to build capacities.

SADC Member Countries

Across SADC, all countries have recognized the important role of PPP Units while being aware that roles and responsibilities may change over time as institutions evolve, and the government's experience with PPPs grows.

South Africa is a good example for the evolution of PPPs and its Unit which was established in the South African National Treasury in 2000 to bear a range of responsibilities within the context of developing PPPs. First of all, the idea behind creating such a Unit was to have a mechanism to oversee the creation of PPPs at the national and provincial government levels and be in charge of avoiding fiscally irresponsible projects while retaining investor confidence in the government's PPP program. The creation of the PPP Unit followed the Treasury's concerns over a specific project, a 30-year build-operate-transfer contract for two prisons proposed by the Ministry of Public Works. In considering intervening and establishing a precedent of arbitrary intervention in PPPs by the National Treasury, the government decided to create a dedicated Unit (OECD, 2010, p.31).

Within the procurement process, the departments and provinces must inform the PPP Unit at the inception stage of their goal to pursue a PPP. Then a feasibility study is conducted to assess affordability, VfM and risk transfer. The PPP Unit is involved to apply the test in what is called Treasury Approval I after the feasibility study has been conducted by the procuring agent. This approval is needed for the department or province to continue with the procurement. Furthermore, the PPP Unit approves the procurement documentation and the draft contract; hereafter the procuring agent may proceed. Before the contract is signed, the PPP Unit just issues Treasury Approval III wherein it confirms the requirements of meeting affordability, value for money and risk transfer. Thereafter, there is no more approval needed from the Unit.

Tanzania's PPP Law (The United Republic of Tanzania, PPP Act 2010 and its Supplement 2011) create and outline the responsibility for a new PPP Unit describing the responsibility of each actor and stakeholder. Accordingly, there are two Units endowed with different roles. One is under the Prime Minister's Office as a national institution responsible for all projects in all sectors. The Finance Unit is under the Ministry of Finance and headed by a Commissioner. The Coordinating Unit is a PPP promoter, whereas the Finance Unit is a gatekeeper, adviser and regulator within the Ministry of Finance. It reports directly to the Permanent Secretary. The Unit appraises, approves proposals passing the tests of VfM, affordability, risk allocation, and monitors as well as evaluates PPP operations. The Unit does not do procurement of PPPs.

Most SADC Units play a role as PPP policy drivers, advisers, and coordinators

The Angolan PPP Unit bears the status of the National Directorate under the Ministry of Economy. Angola has a decentralized model of implementing PPPs whereby the PPP Unit of the Ministry of Economy has the responsibility for all activities of support and advice to Sectorial Ministries and the Ministerial Committee for the Evaluation of PPP (CMAPPP). In Mauritius, the role of the PPP Unit within the Ministry of Economic Development, Financial Services and Corporate Affairs (MEDFSCA) is set out in the Policy Statement (2003, p. 6). The Unit shall be the driver of PPP Policy and responsible for its development and refinement over time. The Unit shall ensure effective stakeholder engagement, market interest and momentum of the process. Also the Unit shall provide support to ministries and public bodies for appraising their projects; it shall develop guidelines on best practice to assist the sector Ministries in their roll out of PPP projects.

IP3 analysis of Mauritius PPP frameworks shows that currently the PPP Unit does not have the status, resources or authority within the public administration and is not conceived to have the power and influence to implement government decisions (IP3, 2010, p.195). As a result, the PPP Unit is not considered by private sector to be a major player on behalf of government in PPP matters. While the PPP Unit is not a decision-making body, (major PPP decisions are taken by government and intermediate decisions are taken by the PPP Committee), it must have status and respect if it is to function as an advisory body and as the interface between the private sector and Government on PPP matters generally.

Zambia defines the institutional role to be played by its Unit in The PPP Act (2009 #14). The Unit is within the Ministry of Finance and National Planning to coordinate, administer and monitor PPPs and shall work jointly with Ministry of Finance departments to assess PPP affordability, VfM and feasibility and contingent liabilities associated with PPPs. Funding is based on general revenues.

3.3.2. Regulating, Approving and Implementing PPPs

Most countries have a functional separation between the actual procurement of a PPP project and the approval role which relates to the decision of whether the PPP is financially worth investing as well as the oversight role to ensure that the right PPP process is applied. Thus, in many cases, the actual decision on whether to pursue a PPP is subject to approval and oversight by a different entity than the contracting entity. The World Bank (2012, p. 85) analysis indicates that the regulating role is often implemented via well-defined “gateways” applying throughout the PPP process. In many countries, the Ministry of Finance or a Planning agency is assigned the role of a gateway keeper.

An important role of the regulating body may be to make sure that the required review from other government agencies are submitted on time. This may include sign-off from Attorney General or other agencies with a regulatory mandate. PPP specific rules concerning the approval of the PPP investment are instituted by creating several levels of decision-making to avoid high risk PPP projects to pass through and implemented. The actual responsibility for identifying the deal, actually conducting the feasibility study and initiating the procurement process falls usually to the entity that is in charge of delivering the service or asset. Often, this entity is referred to as the Contracting Authority.

Comparator Countries

All countries have a clear autonomy allocated to the Contracting Authority as the entity initiating PPP projects and managing them. Countries have an explicitly defined distinction between regulatory and approval roles and the implementing function within the process. The State of Victoria in Australia presents a good example of its controlling and approval process in the PPP Guidelines (2010). The State defines that all major investments need to involve a panel of experts. All “high value or high risk” projects go through a “gateway approval” process established by the Department of Treasury and Finance. A panel of independent experts carries out reviews at various “gates” consisting of strategic assessment, business case, readiness for

market, readiness for service and benefits evaluation (#27, p. 5-6). The approval takes place at four stages: project selection, before issuing expressions of interest and the contract and prior to its final execution. The World Bank (2012, p.94) presents the role of oversight through the Public Accounts and Estimate Committee in the Parliament of Victoria in terms of governance, risk allocation, accountability and value money considerations.

Similarly, in India the promotion of PPPs goes along with the establishment of clear appraisal and regulatory as well as audit procedures that are set out in the Indian Draft National PPP Policy (2011, p. 23). The Committee on Economic Affairs of the Government has created the PPP Appraisal Committee (PPPAC) comprising various Secretaries to oversee every PPP even though it may not require a subsidy. The PPPAC encourages the utilization of standardized contractual documents. The Audit mechanism remains as per applicable legislation. Independent regulators would oversee, where there is no specific regulator the contractual implementation.

EPEC (2012, p.18-23)) provides useful insight into the French institutional roles and structure. Project identification, preparation, procurement, implementation, monitoring and contract management are all tasks of the relevant procuring agency including, for instance, line ministries, local authorities, hospital bodies, universities. These entities are in charge of determining their investment needs. The MAPPP created by decree in 2004 acts as an approval body for State CPs prior to the actual initiation of the tender process. On top, MAPPP is in charge of recommending CPs before they are signed. Except in extraordinary cases, the MAPPP is not involved in the negotiations and procurement.

Queiroz and Motta (2012, p.5) look into the Brazilian institutional arrangements. The Ministry of Planning, Budget and Management evaluates and monitors potential PPP projects which have been identified as priority by the Partnering Steering Committee (GCP). The appraisal role is within the Ministry of Finance for all proposed projects making sure that the maximum limit of 3 percent of net current revenues as defined in the Constitution of Brazil is not exceeded. The National Treasury Secretariat verifies the proposed spending according to Fiscal responsibility Law. The PPP Steering Committee works under the Ministry of Planning and Budget is another body approving the projects and PPP contracts, authorizing the start of the bidding process, develops standard bidding documents and authorizes the use of resources of PPP Guarantee Fund. Monitoring is with the Government Auditor General for the bidding process and contract award.

The Mexican institutional framework for PPP at the federal level has several positive features, including clarity, technical rigour and fairness. The use of a detailed cost benefit analysis as a basis for project selection and justification is a particularly rigorous approach to the development of business cases. In Mexico, once the tender process is introduced, the Ministry of Public Function (MPF) assumes responsibility for overseeing the proper application of procurement rules and regulations. The MPF also supports and guides the contracting authority and is in charge of ruling on challenges to the procurement process and can act as a mediator. The Ministry of Environment also plays an important role in ensuring that the necessary consultations and studies are carried out and environmental approvals obtained. EIB (2011, Vol. 3, p.21) outlines several key features of the Mexican institutional framework for PPP at the federal level including clarity, technical rigor and fairness.

SADC Member Countries

All comparator countries have a separation between the actual Contracting Authority (CA) and those entities assuming the regulatory and oversight role. In South Africa (Public Finance Management Act and Treasury Regulation 16, 2004, #24, p.8-10), the institutional responsibilities for PPPs are shared among the national and provincial departments, or the municipalities, the accounting officer and the National Treasury's PPP Unit. The national and provincial governments are directly in charge of the implementation of PPPs under the Public Finance Management Act. The approval of PPPs is within the scope of the Treasury. PPPs are submitted for approval to the Treasury at four stages after the feasibility study has been carried out, the bid documents prepared and bids have been received and evaluated and finally once

negotiations have been closed and the PPP contract is in its final stage. The accounting officer or authority manages the project budget, reviews and approves the documents needed for Treasury approvals during various stages of project development. As mentioned previously, the PPP Unit supports the relevant entity throughout the procurement cycle including the project term for instance and helps in applying for funds through the National Treasury.

Also in Angola there is a provision in the Law on PPPs (No. 2/2011) concerning who launches a PPP and which entities are in charge of approval and regulation. Sectorial Ministries identify

SADC countries distinguish between various functions related to oversight, regulation, and implementation

and propose PPP projects to Ministry of Planning (MOP). MOP decides whether to opt for a PPP or rather follow traditional project procurement. Sectorial Ministries prepare the tender and are in charge of the procurement process. PPP projects are reviewed and approved by the Ministerial Committee for the Review of PPPs (CMAPPP)

composed of the Ministry of Economy as the Coordinator, Ministry of Finance and Planning. However, budgetary approval is with the Ministry of Finance. The actual monitoring of the PPP later on is also with CMAPPP.

Similarly, the Tanzanian PPP Law (2010) determines the process of control, regulation and procurement whereby the Contracting Authority is the entity in charge of project identification, feasibility study and design and implementation of the PPP contract. There are various levels of oversight and control to make sure that the PPP project is in line with government's priorities. A Committee of Experts studies the feasibility report and advises the Contracting Authority on whether to implement the project or not. Then, a Regulatory Authority gets involved in the approval of the selection of the PPP. Once the approval is obtained, the Coordination Unit receives a formal application by the Contracting Authority concerning the PPP which in turn submits the projects with its own recommendations for approval to the Finance Unit. This Unit evaluates once again the project to consider value for money, affordability and other financial matters. The Financial Unit is in charge of recommending the PPP to the Minister responsible for financing. The actual procurement by the Contracting Authority is then tendered. In Tanzania, the Contracting Authority needs also to submit the final draft of PPP contract for approval by the Attorney General prior to the actual execution of the contract.

OECD interviews related to procurement entities and ministries show expressed concerns concerning the procedures established. They process are considered to be too burdensome and lengthy, and therefore certain ministries have preferred to go for traditional procurement rather than PPPs since the enactment of the PPP Law. According to OECD, Tanzania has since been developing a PPP Implementation Strategy (still at draft stage) clarifying the specific process of PPP implementation and providing more hands-on guidance for procurement entities. This Strategy notably identifies several pilot projects (based on proposed PPP pipelines communicated by different government agencies) which would be reasonable – in terms of scale, risk-transfer and duration – for PPP implementation in the short-term. The idea is to begin with less ambitious pilot projects before applying the PPP law and regulations to more ambitious projects. This is in alignment with the hypothesis on PPP maturity presented earlier in the paper. Clear communication and a stepped-up (or phased) strategy of PPP development are therefore very important in order to ensure proper and realistic utilization and roll-out of a country's PPP framework.

The Zambian institutional structure is similar to Tanzania where the PPP Act (2009) assigns the role of identifying and managing the PPP to a Contracting Authority which is in charge of the feasibility study --using the advice of the PPP Unit. A Technical Committee reviews the proposal concerning its affordability, value for money and risk transfer criteria and then submits it for approval to the Council. The Unit has a broad level of involvement as an approval body being in charge of reviewing the bids and the entire process.

In Mauritius, the actual procurement of PPPs is rendered by the CA who identifies projects, conducts a feasibility study and prepares the bidding documents to be sent to Central Procurement Board (CPB) who then manages the competitive tendering process. CA invites the

bids, and bids are then evaluated and approved by CPB. The approval body for the feasibility study is a PPP Committee. The PPP Unit is consulted on behalf of CA about a specific project. IP3 highlights in its analysis of Mauritius' PPP policy framework that the government's PPP Policy Statement has not succeeded in providing a common, clear understanding of principles, roles, and responsibilities and has not dealt with many other issues that are essential to a streamlined PPP process, promotion of competition among potential partners and implementation of successful transactions. The PPP Act 2004, as enacted, was substantially different from the contents of the PPP Policy Statement, making the policy-making and policy consultation processes largely redundant. The PPP Act 2004 has been amended substantially since proclamation in 2005 indicating that the policy formation process or the law making process were not properly designed (IP3, 2010, p.39).

3.4. PPP Regulatory Framework

Regulation does not occur in a vacuum, and the establishment of a legal and regulatory framework is determined in large part by a country's cultural and historic context as well as its existing legal structure. EPEC highlights that legal and regulatory frameworks usually support PPPs as a means of facilitating investments in complex and long-term PPP arrangement, reducing transaction costs, ensuring appropriate regulatory controls, and providing legal and economic mechanisms to enable the resolution of contract disputes.

The conception of law and legal systems differ from country to country and is often rooted in perceptions based on customs, culture, religion, and politics. For example, in certain countries, law is viewed as a "model code of behavior," while in others it is considered an "instrument of compulsion" (ICT Regulation Toolkit, 2012, Module 6). Today, there are a number of legal systems around the world: civil, common, socialist, Islamic, Hindu, and African, to mention a few. Among these, the most prominent in modern times are common law and civil law legal traditions. The law of civil law countries derives from a set of written rules or a civil code. By contrast, in common law jurisdictions such as the USA and Australia, the common law (meaning case law and precedents rather than a civil code) forms the fundamental basis of all commercial transactions and from which the principles underpinning the allocation of risk have developed.

Common and civil law jurisdictions have different approaches to many issues relevant for PPPs. EIB (2011, p. 23) provides insight into the specific differences, thus civil law jurisdictions have written laws and PPP projects rely on express legal authority. The contractual provisions entered into by the procuring authority and private sector and the interpretation of them are based on legislation. Common law jurisdictions have, in contrast, a less prescriptive approach than civil law jurisdictions. The absence of a specific law does not, however, imply an absence of a structured framework for PPPs. By regulating projects on a contractual basis there is scope and flexibility to foster contractual and financial innovation. This approach also enables the development and dissemination of good practice by developing standard contractual clauses common for similar PPP projects. According to EPEC (2011, p. 51), PPP arrangements in many civil law countries are governed by administrative law. Administrative law sets out fundamental principles which, in many cases, cannot be derogated from or overridden by agreement of the parties. As such, it provides the framework within which PPP contracts must be negotiated.

Key Features of Legal Framework

Both investors and lenders will require the following elements in the legal framework:

- Clarity of laws;
- Comprehensive laws;
- Due process and certainty of outcome; and freedom to contract.

Lenders will additionally require:

- Availability and enforceability of security; and
- Certainty of the powers of the authority to enter into the contract and certainty for payment of compensation on termination.

Chart 12: Key issues related to the legal framework, EIB, 2011, Vol. 1, P. 22-23

EIB (2011, p.26) provides insight into some essential factors that both investors and lenders ask for when they look at PPP legal frameworks. These are illustrated in the next chart. This section examines the regulatory structure and framework across the selected countries.

Comparator Countries

The majority of comparator countries are civil law jurisdictions. The foundation of the legal systems in Brazil, France, and Mexico are built upon the principles of civil law. In contrast, India has a mixed system based on civil and common law and Australia has a common law regime. EIB (2011, p. 22) mentions the enactment of specific PPP laws as a major contribution towards the process of developing PPPs. Specific PPP laws have for example, been enacted in France (the 17 June 2004 Ordinance) and in Mexico where proposals for a federal specific PPP law were introduced to the legislature in late 2009 and early 2010 and are still under discussion. In civil code countries, certainty of written laws is quite important and the existence of a specific PPP law introduces the required element of certainty to the legal framework surrounding PPPs. Australia is a common law jurisdiction and thus the experience to date has been to place greater emphasis on and to derive certainty from the contractual provisions. There is no specific PPP legislation (WBI, 2009). The regulation is integrated in existing service networks and procurement framework both of which need to comply with national and state legislation. Sector regulation applies to setting service and licensing standards.

By granting procuring authorities clear powers to enter into long term PPPs, investors will be reassured of the legality of the contract. Such powers may be derived from laws specific to PPPs, for example the 17 June 2004 Ordinance in France), alternatively they may be derived from more general laws governing delegation of powers by public authority bodies (for example, Ley Organica de la Administración Pública Federal (Public Administration Organisation Federal Law) in Mexico (EIB, 2011, Vol. 1, p.26).

France's legal system is a good example of a sound legal framework for PPPs. France has a developed civil law system, based on written law. Sources of interpretation – case law and doctrine – are also an important part of the regime. As a Member State of the European Union (EU), EU legislation has primacy over French national law. European legislation is quite relevant when it comes to PPP procurement procedures and rules (EIB, 2011, Vol. 3, p.15). EIB analysis shows that the wide availability of written laws and published decisions provides clarity, consistency and flexibility. French law has in recent years introduced amendments/acknowledgements to encompass a broader range of PPP models (such as CP). PPPs are administrative contracts under French law and can only be concluded by public legal entities.

As for finance contracts, the PPP legal framework in France is well established and French law governs PPP financing contracts in other jurisdictions (EIB, 2011, Vol. 1 p.24). Thus, the French market has achieved sufficient level of maturity and created a broad experience base such that lenders participating in PPP projects in other countries insist that their finance contracts (not the PPP contracts) are governed by French law. Lenders insist on such choice of law as they require certainty that adequate security for their rights is available and can be enforced if required. This is particularly an issue in relation to project finance structures where lenders require a range of security to protect their rights against the Project Special Purpose Vehicle (Project SPV) (notably rights to receive payments against the loan and rights in the event of other default by the Project SPV such as insolvency or non-payment to subcontractors). The other comparator countries also have the benefit of legal frameworks, which are well developed and are suitable to govern the PPP contract documentation. Financing contracts in Mexican PPPs tend to be governed by the law of the country.

PPP contracts may include court proceedings as the final forum for dispute resolution where the local court process is efficient and has the benefit of judges experienced in complex commercial disputes. In France, PPP disputes are primarily resolved in the courts as recourse to arbitration is generally prohibited for public entities, except where permitted by a specific law which is the case in the Ordinance on Contrats de Partenariat (EIB, Vol. 3, p.15). Public authorities are likely to

prefer dispute resolution in the courts as the courts are part of the institutional framework to which they belong and provide consistency as their other contracts are likely to provide for dispute resolution by the courts. Making the court process apply to PPP contracts may be beneficial from the public sector's view as a matter of policy – it will allow the courts to build up experience in such disputes. However, this may present difficulties from an investor's point of view.

Mexico is another example of a country that is still in the process of evolving its legal framework. The Mexican federal legal system is based on the civil law tradition, thus the country has a multiplicity of laws applicable to PPPs. There are laws for procurements at the federal level, within the capital city (Mexico City) and in each of the 31 states (EIB, Vol. 3, p.20). Currently, PPPs are procured at the federal level in accordance with general public procurement law (the Ley de Adquisiciones, Arrendamientos y Servicios del Sector Publico (enacted in 2009) and the Ley Organica de la Administracion Publica Federal) or sector specific-laws (for example, for highways PPPs, the Ley de Caminos Puentes y Autotransporte Federal). The EIB (2011, Vol. 3, p.20) review of the legal and procurement framework in Mexico highlights some relevant measures that need to be taken to reduce existing complexities in procurement, implementation and negotiation of PPPs. Overall, EIB finds the Mexican legal framework for procuring federal PPPs to be fragmented. There is need for enactment of specific legislation to cater for PPP procurement and implementation. Proposals for a specific federal PPP law were introduced to the Mexican legislature in late 2009 and early 2010, and are still under discussion. Whilst some States have laws which cater for PPPs, there is no single framework at the federal level. Another value-added of a new law could be to introduce an appropriate procedure for the resolution of PPP disputes. Currently, PPP contracts typically provide for informal and formal methods of dispute resolution (EIB, Vol. 3, p.22).

In India both the national government and state governments have been able to do PPPs without the need for a cross-cutting PPP law. Sector specific legislation has of course been used to restructure industries, introduce competitive markets and set up new institutions, such as sector regulators. However some states, such as Gujarat, Andhra Pradesh and Punjab have passed PPP legislation to clarify approaches to project selection and procurement and this provides possible models for other states.

Being a civil code country, the Brazilian PPP Law 11.079/04 establishes the general rules for competitive bidding and contracting private sector at both national and sub national levels. This Law complements the concession laws (Laws 8.987/95 and 9.074/95) and the procurement law (Law 8.666/93). Queiroz and Motta (2012, p.11) provide recommendations for improving the PPP law although generally they consider the legal regime to be satisfactory. Public disclosure is a matter whose disclosure is desirable in a PPP process. On top, the renegotiation of contracts is quite often the case in PPP projects, thus the PPP Law should be supplemented to consider proper renegotiation mechanisms.

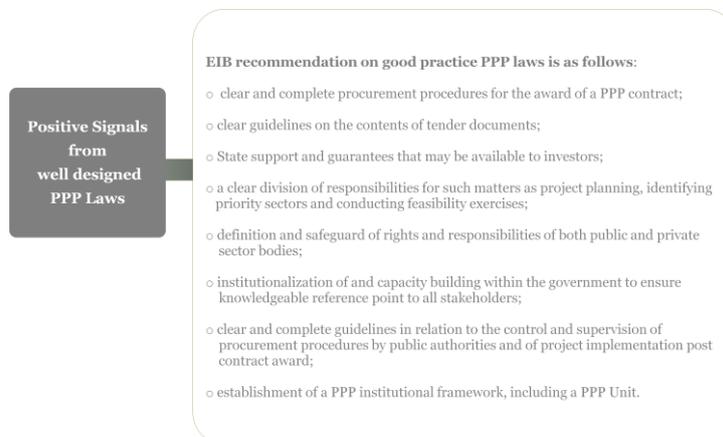


Chart 13: EIB recommendation on proper PPP Law, EIB, Vol. 1, p.22

Overall, the examination of legal frameworks shows that not all countries have developed specific new PPP legislation, however, nearly all have seen the necessity to have some sort of regulation, if only to clarify that public entities have the needed powers to implement services based on PPPs. Comprehensive PPP legislation has been used more extensively in countries that operate under the civil code. Where used, it often covers aspects such as specifying which sectors PPPs can operate in, the role of different institutions in a PPP program, procurement of PPPs, and dispute resolution procedures (World Bank, 2006, p.21.). Even where not necessary, such legislation can consolidate existing provisions into one act, clarify processes for approving and procuring PPPs, and create new institutions that will play a key role in the PPP process. EIB reaffirms the benefits of well designed PPP Laws which may improve the legal framework applicable to PPPs by explicitly formulating a number of essential issues as laid out in the chart (EIB, 2011, Vol. 1, p.24).

SADC Member Countries

The enactment of specific PPP laws in most SADC countries underscores the political commitment towards the promotion of PPP schemes and projects. South Africa is considered by many as a sophisticated PPP country, with a legal framework that was established in the late 90s and has since been further consolidated. Secondary legislation and regulations have been developed in South Africa to use existing laws as a framework for PPPs. The national government developed new regulations under the existing public financial management legislation to introduce central government oversight and approval of PPPs being developed and signed by the provinces. This was a major action to respond to national government's concern over the provinces use of PPPs as a means of off-balance sheet financing to get round budgetary constraints (World Bank, 2009, p.15).

With its hybrid legal system, South Africa has the benefit of Treasury Regulation 16, but has also closely followed the Australian example of comprehensive guidance and contracting specifics. The South African Treasury Regulation 16, together with the supporting PPP guidance jointly (the Treasury Practice Notes and Standardized PPP Provisions) indicates the government reaffirmation of promoting PPPs as a means of delivering public infrastructure. Investors are also reassured legal certainty by not only relying on Treasury Regulation 16 issued pursuant to the PFMA (which applies to national and provincial bodies in South Africa), but also at municipal level, the Municipal Systems Act 2000 and Municipal Finance Management Act 2003 (which apply to municipalities in South Africa)) underscore the application concerning lower levels of government.

As for Tanzania, the laws and regulations must become effective in enforcing and supporting both the process of procuring PPPs from a proposal to a project, and the development, operation, and hand-over of the assets back to the public sector (Mhilu, 2012 presentation to SADC3P). In Tanzania, weaknesses of legal framework relate to various stages of PPP process from procurement to implementation. There is lack of appropriate policy guidelines and corresponding legal and institutional framework, thus there is critical need for adopting a PPP policy. The next chart illustrates planned actions which the government wants to introduce to strengthen the current PPP framework (white boxes in chart 13).

Mauritius is another example of a hybrid with common-style basic laws, and civil-style implementing laws and regulations thus combining both Anglophone and Francophone traditions. The current legal framework for PPPs in Mauritius is broader than just the PPP Act. IP3 (2010, p.53) examines the current legal framework of Mauritius. Since the current PPP Policy was issued in 2003 and the PPP Act 2004 was promulgated in 2005, additional legislation has been enacted on public procurement, public debt management and other subjects and there are changes in practices that are relevant to PPP. The PPP Act 2004 was amended in 2008 to establish functions of the PPP Committee and to provide for unsolicited proposals. The Public Procurement Act 2006 and the Public Procurement Regulations 2008 have come into force and both the Act and the Regulations were subject to amendments in 2008 and 2009. The PPP Act as legislation has been prepared after wide consultation with all relevant local stakeholders, including public and private sector representatives (SADC News Letter).

There is an important need to improve Mauritius' PPP Act. PPP legislation must be seen as manageable by public sector officials implementing PPPs. IP3 (2010, p.50) examined in detail the bottlenecks faced currently in Mauritius and finds "the overall legal framework for PPPs in Mauritius (including PPP Act, implementing Regulations, the Public Procurement Act 2006 (amended), and the Public Finance Act, etc.) is disjointed, incomplete, repetitive in parts and yet not comprehensive." Accordingly, the specific constraints within this legal framework are both delaying the implementation of current PPP projects in Mauritius as well as limiting to the ability to implement PPPs in the future. Mauritius' public bodies need to become more familiar with successfully procuring PPPs, and the PPP Unit needs more resources and institutional clout. The recommendation of IP3 (2010, p.59) relates to these weaknesses of the current PPP legal framework, and on top, it sees two options for implementing these changes to the PPP legal framework. One is to design, draft, discuss and pass a New PPP Act, and the other is to issue ministerial amendments to the current PPP Act through administrative procedures.

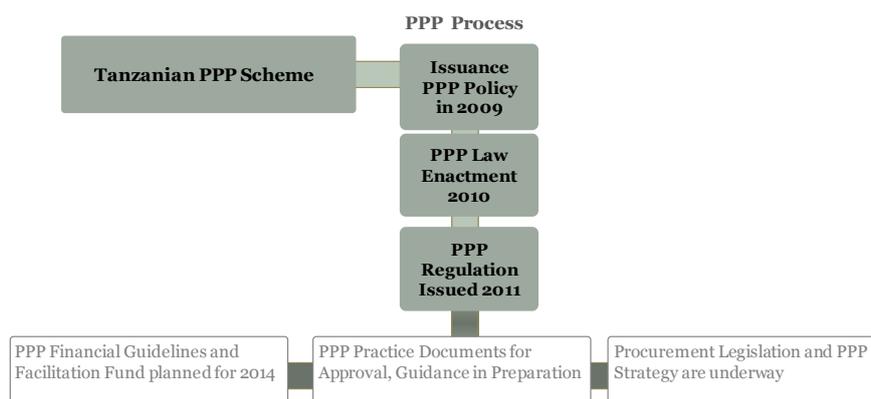


Chart 14: Overview of Tanzanian Framework

Similarly, Zambia faces challenges to work out its regulatory structure. There was draft policy for PPP (2006) from the Ministry of Works and Supply which was promulgated in 2007 and launched in November 2008. In addition, the PPP Act, No. 14 was established in 2009. The Zambia Development Agency (ZDA) was introduced to identify and package PPPs and to promote these to potential investors. Nevertheless, like Tanzania and Angola, the legislative framework needs to be strengthened through concrete regulatory measures and capacity building. In Angola, Law No. 2/2011 on PPP Law serves as a general framework, for instance providing for the financial rebalancing of the PPP when there is significant change in the financial conditions of the PPP. A recent analysis by legal experts in PLMJ International Legal Network indicates the necessity to improve the legal setting. First of all, the general framework needs to be complemented by specific regulations. Provisions were introduced to make this happen within 60 days of the publication of the PPP Law. However, these regulations have not been published yet. Some relevant aspects of the Law 2/11 (PPP Act) require greater detail. These relate in particular to the need of establishment and operation of the Guarantee Fund of PPP; the process of routing and scoring of projects developed in the form of Expression of Interest from the private sector. Other challenges for PPPs in Angola relate to capacity building such as provision of technical staff in ministries, agencies regulators and supervisors (Pires, 2012).

4. Recommendations towards a common Framework

The main objective of the comparative analysis has been to identify lessons learned concerning PPP policies, institutional arrangements and legal frameworks based on the review of the actual practice across countries within and outside SADC. The examination of country specific PPP frameworks, especially the analysis of their PPP policies, institutional arrangements as well as their regulatory frameworks provides now the basis for developing a common framework with the idea of being able to develop a set of recommendations for PPP practitioners and governments across SADC. This chapter consolidates both best practice and the learning lessons studied to get a common point of departure for all SADC Member States to develop, review or amend their policies, regulatory frameworks and institutional arrangements.

Developing and instituting a common approach towards the implementation of PPP policies, institutional and legal frameworks is an important step for SADC Member States in their attempt to move towards a common regionally and economically integrated market. The successful promotion of PPP schemes requires a number of enabling measures including adequate institutions for coordinating and supporting the overall legal, organizational and policy framework for PPPs. EPEC (2011, p.5) highlights in its concept note on SADC3P Network that "Most SADC countries are developing, or are in the process of developing such programs, but limited experience, expertise and organizational resources put their successful implementation at risk in large parts of the region." It is in this context that systematic weaknesses to the implementation of PPPs are to be addressed at both national and regional levels since poorly designed PPPs result not only in project failures, but also lead to private sector lack of confidence to invest in PPPs.

The comparative analysis shows that an increasing number of governments are turning to private sector capital as means of providing services and large-scale infrastructure assets. The motivation behind pursuing PPPs in many countries is rooted primarily in existing fiscal constraints faced by governments who consider mobilizing private finance as an alternative to traditionally publicly procured projects. This was the case, for instance, in India some years ago where the policy rationale for PPPs was limited to their use as a source of investment capital since public sector had been lacking funds. Also across SADC, a number of countries focus on private capital primarily for financing reasons although there is an increasing awareness that PPPs are more than just means of financing serving as effective instruments and offering innovation in infrastructure delivery and improved project delivery.

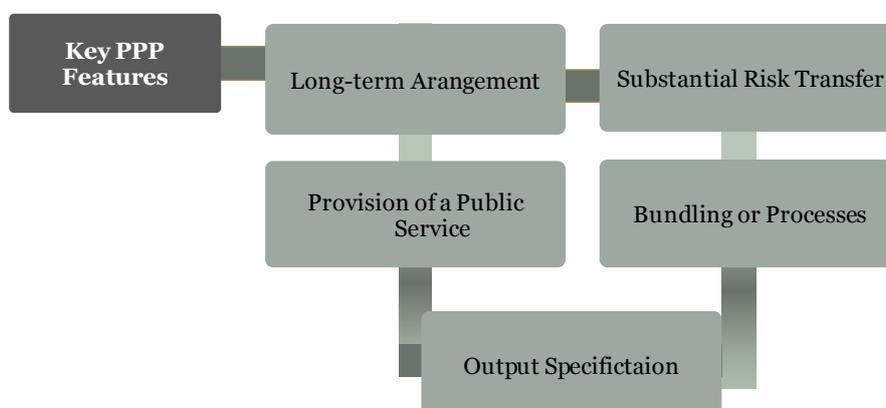


Chart 15: Key characteristics of PPPs

Since PPPs have various manifestations and there is no standard definition of what a PPP is, a number of countries regard the entire range of private sector involvement from management contracts to privatizations as a PPP. Zambia and India, for instance, allow in their Laws and PPP Policy Statements for all ranges of PPPs to be considered. Lack of PPP success and the experience of countries like Mauritius clearly indicate that the actual implementation of PPPs hinges upon a common understanding of what they are. Quite concretely, IP3 finds in Mauritius confusion existing among various bodies as to what the scope of PPPs shall be. Thus, for the purposes of SADC discussions, some key characteristics of PPPs are presented in the following chart. Accordingly, typical BOTs, DBFO and BROT projects are considered PPPs, whereas, privatizations do not fall under this definition.

The experience to date across comparators and SADC countries indicates that there is no unique formula for developing a sound PPP framework. More specifically, the development of a common framework for SADC needs to take into account the economic and political context of countries, their historically grown institutional and legal structures --for instance, both South Africa and Mauritius have hybrid legal structures grown out of their historical context -- as well as the actual experiences with PPPs so far, with some countries having made considerable strides and others having made very little progress, and some none at all. Nevertheless, if PPPs are to work and render the expected results, the comparative analysis clearly shows that PPP frameworks must bear a number of key features related to policy, institutional structures and legal framework (see next chart).

SADC Framework Roadmap

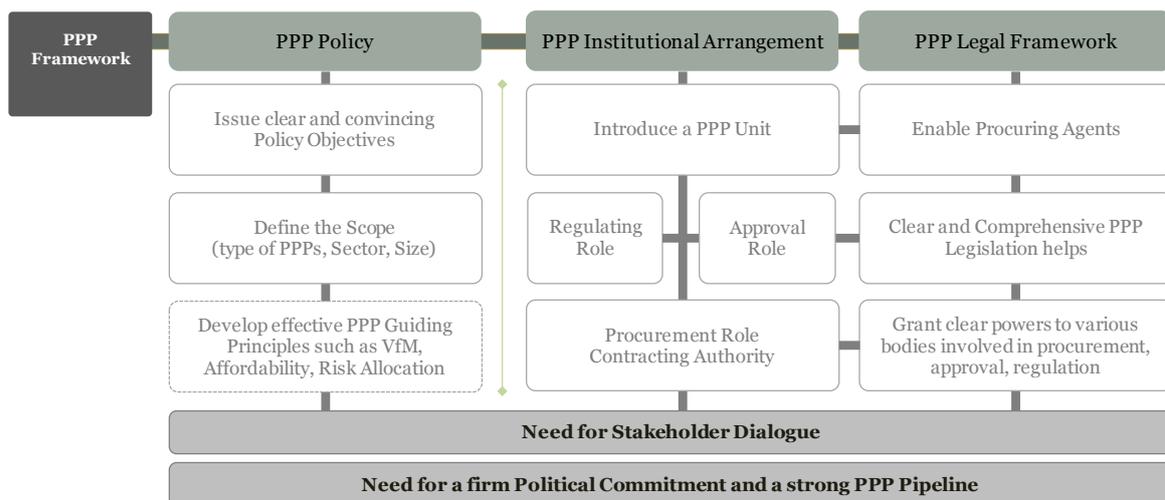


Chart 16: Overview of an optimal PPP Framework

Successful PPP schemes are characterized by clear policy statements, competent and enabled institutions that can appropriately identify, procure and manage PPPs, and efficient oversight procedures as well as proper legal frameworks. Nevertheless, it must be borne in mind that firm political commitment, stakeholder dialogue and a number of other factors such as a sound and strong PPP pipeline are important contributing factors for the promotion of PPPs in a larger context. It is also important to be aware of the contribution of sectoral reforms and their role in developing and supporting PPP schemes. In a number of countries sectoral institutions, for instance, power sector regulators have had an important role as far as the promotion of IPPs and investment in the power sector are concerned. It is in this context that Member States with a low level of PPP maturity should acknowledge the relevance of sectoral institutions in terms of their contribution towards developing PPPs over time and across various sectors --which are however best supported by setting up efficient and proper frameworks at the national level. The Indian and Mexican cases both illustrate very well that PPPs are not an ad hoc outcome of developing institutions, but a result of a pilot set of projects at the same time as institutions and policies are developed. Country experience also clearly shows that sectoral entities/ministries shall not select

and design PPPs in isolation. Large concern has arisen due to lack of expertise to structure efficient and cost-effective PPPs. Also there are concerns over PPP contracts rushed into at sectoral levels which are not in the best interest of the national government. Thus, ad hoc actions can have disastrous consequences as repeated failures will discredit PPPs in total and provide ammunition for general resistance on behalf of private and public sectors. Best practice frameworks have three essential components as summarized next.

Introduction of a clear PPP Policy: a policy statement addressing both the rationale and also the limits to the use of PPPs helps to give the PPP scheme a clear political mandate and may be used to introduce the institutional framework for PPPs. While broad policies provide an important signal of political commitment, experience shows a translation into a concrete action plan and the formulation of policies for individual sectors give a more precise orientation thus encouraging ministries and agencies to pursue and implement PPP programs. Quite concretely, Deloitte Outlook shows clearly that the PPP pipelines in India, Brazil, France and Mexico all provide signals to the market that their PPP policy statements will be put into action.

Good practice PPP policies set out the objectives associated with PPPs, but also define the scope of PPPs in terms of types of PPPs to be adopted, size and sectors across which they are desired to be applied. Many governments have the core transportation infrastructure in mind as they decide to opt for PPPs. Primarily, it is the road, port, airport and rail sectors but also water, sanitation, justice and social infrastructure sectors have been identified as priority PPP areas in many cases. Important is, however, to bear in mind that as PPPs evolve over time, governments get more sophisticated with their implementation. Thus, quite often like in Mexico and South Africa PPPs were initiated in one sector and learning experiences from one type of PPP was then applied to other sectors and broadened over time to other areas. Since in SADC, over half of all countries have yet had almost no experience introducing and applying PPPs, it is recommended to start the application of these projects to sectors where there has been internationally and regionally some good experience. This includes the road sector, for instance.

Most successful PPP policies have guiding principles formulating that PPPs will only be pursued where benefits can realistically be expected. These benefits are derived in many countries across SADC and outside by applying tests related to VfM, and affordability and also determining proper risk allocation. Affordability and VfM are both common benchmarks for determining the viability of PPPs. Quite concretely, VfM is a relative measure which is applied to assess whether a PPP renders the best possible outcome at the lowest possible price. Hereby governments consider a PSC as a comparator to a PPP to see whether the project provides more value than a traditional public procurement. If quantification of VfM is difficult, then the French example shows that it is also possible to consider qualitative criteria when applying VfM tests to take account of non-financial benefits such as accelerated and improved delivery with wider social impacts.

Affordability is another important test to consider due to the off-balance sheet nature of PPPs-- as noted earlier, the use of PPPs has led to misconceptions regarding the impact on the affordability of projects. Confusion stems from the impression that because government is not responsible for the acquisition of the asset, a PPP may be cheaper than traditional procurement – this is considered a fallacy by OECD. In principle, affordability is about whether or not a project falls within the long-term (intertemporal) budget constraint of government. Proper risk allocation to the party that can best carry it is another key factor driving PPPs and VfM. It may best be achieved by introducing competition for the PPP project via a transparent, non-discriminatory tender process. Overall, the actual practice in a number of countries including India and Mauritius shows that a consistent approach and a common understanding of important guiding principles such as VfM, affordability and risk transfer are some of the key challenges to make PPPs work and should be considered by SADC countries no matter how sophisticated they are in terms of their experience with PPPs.

Developing detailed toolkits assist in standardizing processes and approaches towards structuring and implementing PPP principles such as VfM, proper risk allocation and affordability. The standardization of common procedures is good practice in a number of countries such as Mexico, South Africa and Australia to introduce an acceptable public sector risk

profile and create certainty in the market. It also helps to promote a common understanding of the technical, operational and financial risks that are typically faced while procuring PPPs. In sum, some key characteristics of effective PPP policies may be derived from country experiences including the following (IP3, 2010, p.44):

- Clear, country-specific explanations of goal and objectives of the PPP policy,
- Clear definitions of the term PPP and other key PPP-related terms and concepts, including VfM, affordability, and other PPP related terms,
- Focus on practical solutions to help PPP transactions get completed, while generally aim at minimizing new administrative, reporting, or review burdens that delay or stop proposed PPPs,
- Allow for practical PPP lessons to be learned and for periodic improvements to be made to the PPP policy framework and avoid being overly-detailed, prescriptive, and inflexible, and encourage private sector innovation.

Establishment of a functioning and strong Institutional Framework: The institutional framework relates not only to the organizational structure in which PPPs are instituted and promoted, but encompasses also the establishment of an efficient structure for oversight, approval and implementation of PPPs.

First of all, most countries engaged in a broad-based PPP scheme have developed a PPP Unit acting as a focal point to disseminate good practice on PPPs and relevant information to public and private sector. A central Unit within the Ministry of Finance is ideal for streamlining the functions across the country and sectors, easing oversight, and accountability and performance of the Units work overseen by a higher level of government. There seems, however, to be no direct linkage between the location of a Unit and PPP performance (World Bank, 2006). More centralized Units such as the Unit in South Africa where a national level entity has a prominent role in sub-national PPPs works well in South Africa’s country setting. However, in federally organized nations such as Australia or India, Units may be located decentralized.

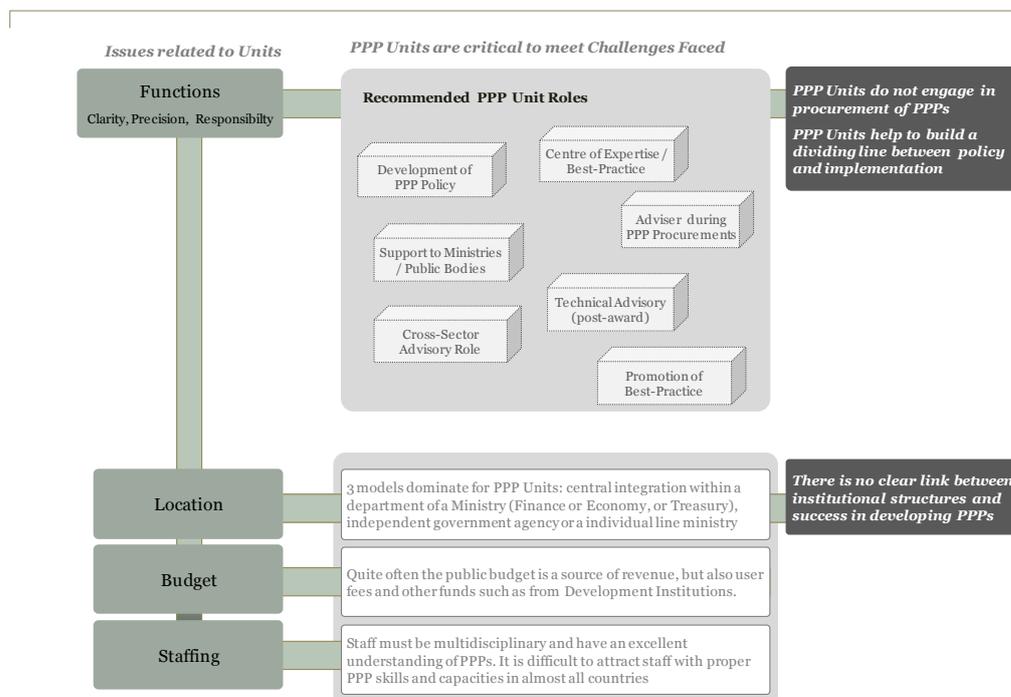


Chart 17: Key Issues related to PPP Units

PPP Units must assume a number of central roles acting as a promoter, an advisor and serving as a pool of expertise to transfer lessons and experiences across their country and various sectors. Units should serve as key drivers to assist in formulating PPP Policy and improve the quality of PPPs by bringing to bear better technical skills. In a number of countries like in South Africa, France and Australia PPP Units assume approval roles, thus not only being involved in policy formulation and providing technical support during various stages of implementation, but they are also in charge of “green lighting” of PPPs. OECD analysis of the adequate dividing line for PPP Unit roles shows the necessity to have a clear Chinese walls to avoid conflict of interest between the provision of technical support and the “green lighting” of projects when a PPP Unit is responsible for both technical support and green lighting projects (OECD, 2010, p.39). For SADC, the recommended roles and functions to be assumed by PPP Units are presented in the next chart. Thus, the assumption of “green lighting role“ is not recommendable for SADC countries which are at the early stages of development of their institutional frameworks since they can avoid erosion throughout the PPP decision making process by having a clear distinction between policy and implementation.

The cross-country analysis provides insight into the problems arising when PPP Unit roles and functions are kept general. The roles of PPP Units must be clear, precise and responsibility needs to be allocated properly to create certainty for all entities in charge and the role of the Unit shall not be limited to a scope and authority that makes it ineffective. The PPP Unit in Mauritius shows the bottlenecks coming at hand where the PPP Act stipulates that the Unit shall “..deal with matters relating to a PPP project” referred to it by the PPP Committee (Section 3 of the PPP Act.) According to IP3, this definition of the role is not precise enough, and the PPP Unit does not have power to act on its own initiative. On top, The PPP Unit does not have a separate budget for expenditure (IP3, 2010, p.195). Ip3 states that “..while PPP Units should not be considered as decision-making bodies, they must have status and respect if they are to be effective as an advisory body and as the interface between the private sector and government on PPP matters generally.”

Proper staffing is quite a problem in many countries, thus a major challenge for PPP Units is to recruit relevant expertise from private sector. PPPs are complex and require a set of multidisciplinary competencies in accounting, procurement; economics, law and technical skills for PPP Units to be able to assist other entities in assessing VfM and proper risk allocation. Thus, for PPP Unit staff to be able to act as a repository of PPP expertise and advisers to various entities, it must have a full understanding of the scope and structure of PPPs, the off-balance sheet nature and the PPP process with its life-cycle approach, as well as its core attributes such cost savings, timely delivery, efficiency in provision and risks such as contingent liabilities to be able to assess the benefits and risks associated with PPPs.

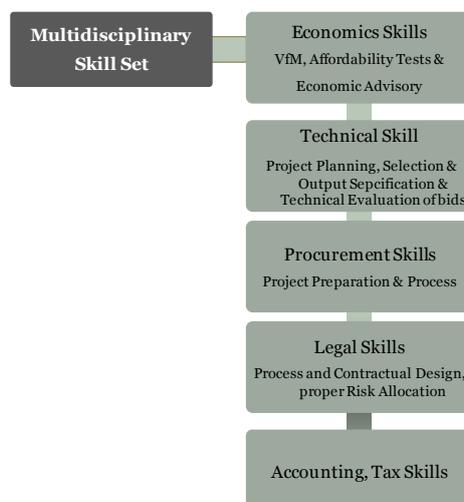


Chart 18: Recommended Skill Set for PPP Units

PPP Units can only provide technical assistance to CAs and evaluate VfM tests submitted for review or approval if they have a multidisciplinary team on board to cover the diverse set of skills required. In terms of funding, PPP Units are best funded via public sources of revenue. However, to attract people with the right skills, including people from the private sector, Units have to be able to offer attractive packages to both permanent staff and short-term consultants. Rigid public sector salary systems may render this difficult (OECD, 2010, p.42).

Next, the institutional framework must clearly define the generic responsibilities that government needs to allocate to various public bodies in three major areas: regulation of PPPs, their approval and the process of PPP implementation. The actual practice across all countries shows a clear distinction between the bodies in charge of procuring the PPP --quite often the CA is in charge-- and the regulatory and approval entities. The Australian best practice shows quite well the split in these roles between the controlling and approval agencies on the one hand and the implementation entity on other hand. The so-called “gateway” approval process has been a positive contribution to sort out high risk PPPs. Also in South Africa, there are several Treasury approval stages (see chart) to avoid poorly selected and designed projects to move on.

Roles of South African PPP Unit

In 2000, South Africa set up a PPP Unit to serve as a major centre to coordinate and manage the nation’s PPP program. The PPP Unit reports to the Budget Office of the National Treasury and may be considered as **good practice** being located within Treasury department as a central organization assuming a wide range of roles, both advisory and mandatory related to PPPs. South Africa’s PPP Unit has quite wide ranging tasks including:

- formal approval at 3 stages of PPP procurement ensuring compliance with Treasury regulations;
- administrative and technical assistance to departments throughout the PPP project cycle
- promotion and development of PPP policy, and guidelines including the PPP Manual and standardization of PPP Provisions (contract terms);
- assistance in training courses and workshops,
- promotion of public awareness of PPPs through publications, conferences; and
- management of the Project Development Facility that provides funding for the government’s transaction costs.

Chart 19: Role of South African PPP Unit

Clarity and Security of Legal Frameworks-- the establishment of a legal and regulatory framework is determined in large by a country’s cultural and historic context as well as its existing legal structure. Across the countries studied, there are a number of legal systems ranging from civil, common, to Islamic and African laws. Among these, the most examined are common law and civil law legal traditions. The case studies show that there is no need for cross-cutting PPP laws; some countries allow governments to enter into PPPs under general laws. For instance, in Australia with the common law jurisdiction there is no specific PPP legislation (WBI, 2009). The PPP regulation is integrated in existing service procurement. Nevertheless, a number of civil Law regimes have introduced cross-cutting legislation consolidating relevant legal provisions into one law, and regulating the use of certain processes for the procurement, development and oversight of PPP projects which may be better enforced if given the force of law.

Overall, the legal framework must sufficiently define the roles and powers of the awarding authorities, procuring agents, regulating bodies and approval entities. By granting procuring authorities clear powers to enter into long term PPPs, investors will be reassured of the legality of the contract. In a number of countries, there is an approval process which must be completed prior to the public authority entering into the contract. This is the case in South Africa, Mauritius, Brazil, Mexico, and France. Good practice countries such as France and Mexico and South Africa have also the benefit of legal frameworks which are well developed and suitable to govern the PPP contract process and documentation. Financing PPP contracts in Mexico and South Africa

tend to be governed by the law of the country. Key requirements of lenders and investors for a legal framework need to be addressed to attract private capital into the delivery of services. These include next to assigning clear role to the procuring agent also clarity of laws, enforceability and security of laws. Chart 20 provides a short overview of the legal requirements concerning PPPs.

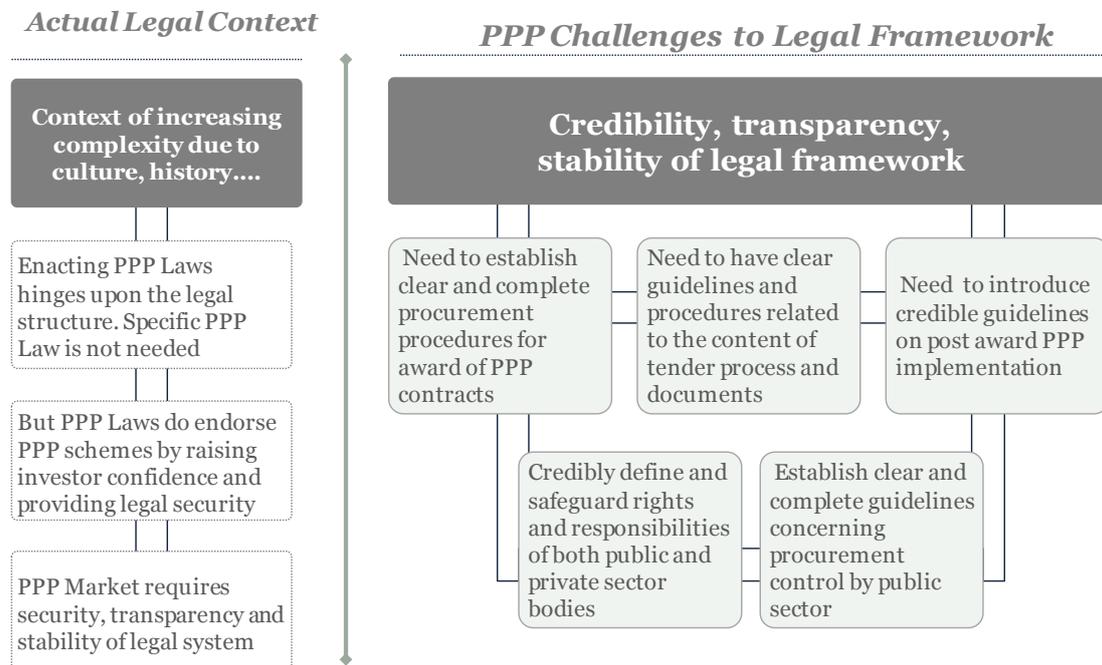


Chart 20: Overview of Requirements on Legal Framework

The example of Mauritius shows that the process of drafting PPP legislation is critical to determining its effectiveness and to promoting the much-needed acceptance and understanding of it. PPP legislation must be seen as practicable by the officials and public sector bodies affected by it and with responsibility for implementation. A full understanding of both the spirit and intent of what the government seeks to achieve through PPP legislation is essential not only for legislators, but also for key public sector bodies including the PPP Unit.

5. Conclusion

PPPs are becoming increasingly an important method to procure and finance infrastructure assets and public services in SADC. They may be implemented on an ad-hoc basis for procurement of a specific project without an already existing policy framework. However, according to the World Bank (2012, p. 60) most countries with a successful track record of PPPs have built their schemes based on an explicit and a solid framework. The definition of a PPP framework as used in this report is derived from the World Bank (2012, p. 61) and implies “... policy, procedures, institutions and rules that jointly define how PPPs will be implemented.” A solid framework is not only a prerequisite for the development of efficient PPP markets, but is also needed for an effective communication of government’s political commitment to the promotion of PPPs. On top, good PPP frameworks assist public sector and government as public decision makers to ensure that proper PPP projects are identified and projects are affordable, that they provide “Value for Money” (VfM), and fiscal risks are limited. PPP frameworks, however, need time to develop and evolve along a PPP maturity curve that often responds to various challenges faced while actually implementing PPPs in specific legal and procedural and institutional settings.

SADC countries have turned to private sector resources for procurement and financing as a mechanism to develop their infrastructure facilities and increase operational efficiencies in the provision of public services. Private sector financed projects are possible in nearly all sectors where public authority bears the accountability for provision of public infrastructure services. Examples of sectors in which PPPs have been completed in SADC are telecommunication, energy, transport, water, health, and education. However, PPP implementation has not been a success in every sector and across all countries. There are a number of reasons for why the actual implementation of PPPs in many sectors has been quite underrepresented so far. Most prominent is the need for proper capacities and creation of a certain level of awareness and consciousness for PPPs among the various groups of stakeholders. On top, many PPPs have failed because of the absence of an adequate regulatory and institutional framework.

Countries in SADC have reached various degrees of maturity in terms of the implementation of PPP projects and development of their PPP frameworks. A few SADC countries have no PPP policies and frameworks in place. This paper categorizes the SADC countries in terms of their maturity into four levels. A few countries like Seychelles, Madagascar and the Democratic Republic of Congo have not instituted any PPP policies or frameworks, and they have no solid track record of PPPs in their countries. The second set of countries shows positive signs of a pro-PPP policy and is setting the stages for developing a proper PPP policy. These include for instance Namibia, Lesotho, Zimbabwe, and Swaziland. The third set of countries has advanced to actually have established a PPP policy and/or a PPP Law aimed at the promotion of and providing support to their PPP schemes in the country. These countries consist of Malawi, Mozambique, Tanzania, Angola, Botswana and Zambia. The most advanced nations in SADC include Mauritius and South Africa both of which have reached a high level maturity and have throughout the past decade worked on improving and further developing their PPP programs.

There is no harmonized understanding of the term, scope and role of PPPs. Governments and their policy makers have used a wide array of terms to describe PPPs. To all those who use the term, it has been interpreted in different ways, but involves in the end some key characteristics including a long-lasting contract involving the procurement of a public service with a proper risk allocation to the partner who can carry it best and a clear output specification related to the functions to be assumed by private sector. In the end, PPPs bundle processes throughout the life-cycle of the service and thus result in a number of benefits such as timely delivery, innovation, and cost effectiveness. On top, PPPs are efficient methods of procurement to bridge funding gaps. However, there are also risks associated with PPPs including higher financial costs due to higher cost of borrowing and higher transaction and potentially unforeseen fiscal costs. Other risks may occur when the selection and planning process is not implemented properly and no competition

is achieved to get an optimal risk allocation and good price for the service. A recent survey conducted by Deloitte (2012) highlights some key drivers for PPPs to work. These include the need to provide firm political commitment to PPPs, to have proper capital markets, institutional and legal frameworks instituted and a strong PPP pipeline. Also stakeholder dialogue is a key contributing factor towards sustainable PPPs.

The cross-comparative analysis of frameworks was the focal point of this report. The analysis was conducted for five countries outside and five within the SADC region. Mexico, Australia, France, Brazil and India were taken a closer look at due to their PPP experience and their various levels of maturity, and their geographic representation. On top, these countries reflect quite well good practice lessons to be learned for SADC countries. Within SADC, the pool of countries included the most advanced countries and also three from the third category with PPP policies being introduced and/or PPP Laws enacted.

Overall, the cross-country analysis shows that if PPPs are to be promoted and succeed in terms of their wide-spread application across sectors and the region, then SADC countries need to institute proper and solid PPP frameworks. Although the experience across comparators and SADC countries is varied and there is no unique formula for developing a sound PPP framework, there are some commonalities and good practice lessons related to key ingredients of a solid and transparent PPP framework. These include clear policy statements, competent and enabled institutions that can appropriately identify, procure and manage PPPs, and efficient oversight procedures as well as proper legal frameworks. Good frameworks have three essential components:

- Clear PPP Policy lays out the rationale for the usage of PPPs, clarifies the term PPP, sets out the objectives of PPPs, its scope and relevant guiding principles such as VfM, affordability and risk transfer.
 - Sound objectives must be formulated to send the proper signals to the market and government agents as to why the government aims at introducing a PPP scheme. Countries have adopted both strategic and operational objectives in their PPP policy statements to convey their goals associated with the pursuit of PPPs. The cross-country comparison shows, however, that countries quite often set out broad objectives, but in practice follow primarily the policy rationale of using PPPs as a substitute for public sector finance. India and a number of SADC countries follow primarily PPPs to attract private capital for service delivery. PPPs have a number of contributions to make including timely delivery, cost efficiency, contribution to innovation and the economy and the society in the broader context. Thus, it is important that governments clearly identify the potentials of PPPs and convey the expected goals associated with PPPs in a firm PPP policy statement.
 - Governments have determined the scope of PPPs along with their objectives and infrastructure needs defining not only the types of PPPs to be adopted, but also quite often defining the size and the sectors across which they may be applied. The cross-country analysis shows that defining the term PPP is an important contribution for public sector agents to gain clarity about what a PPP is and what it is not. If the term is defined too wide, then misconceptions concerning the proper application come up. It is in this context that the recommendation in this report is to follow the definition provided in section 2.4 and apply the use of PPP to types such as BOTs, BTOs, BTLs, DBFOs, etc. excluding rather short-term contractual types such as management and service contracts and also privatizations conceived as total private provision with ownership transfer to private sector and covered quite often by a separate privatization law or the general law of the countries. Sectorally, it is better not to limit the application to achieve a broad-based PPP scheme across various sectors. Only through a wide spread use and a strong pipeline, is it possible to have a convincing case for PPPs.

- Last but not least SADC countries should have a clear dividing line between the regulatory and oversight functions and the actual procurement of PPPs. The approval relates to the decision of whether the PPP is worth investing and the oversight role encompasses the actual control function as to whether the right process is used. It is important to establish clear appraisal and regulatory procedures in the PPP institutional framework. Quite often, the CA identifies the PPP projects and does the planning. It is in charge of conducting the feasibility studies needed and also the tender process is organized by the CA.
 - The establishment of a legal and regulatory framework is determined in large by a country's cultural and historic context as well as its existing legal structure. Across the countries studied, there are a number of legal systems ranging from civil, common, to Islamic and African laws. Among these, the most examined are common law and civil law legal traditions. The "PPP legal and regulatory framework" can be thought of as all the laws and regulations that control whether, or how, PPPs can be implemented. These laws and regulations can include PPP-specific legislation, public financial management laws and regulations, and sector-specific laws and regulations.

This paper shows that there is no need for cross-cutting PPP laws; some countries allow governments to enter into PPPs under general laws. The Legal framework must, however, sufficiently define the roles and powers of the awarding authorities, procuring agents, regulating bodies and approval entities. By granting procuring authorities clear powers to enter into long term PPPs, investors will be reassured of the legality of the contract. In a number of countries, there is an approval process which must be completed prior to the public authority entering into the contract. This is the case in South Africa, Mauritius, Brazil, Mexico, and France. Good practice countries such as France and Mexico and South Africa have also the benefit of legal frameworks which are well developed and suitable to govern the PPP contract process and documentation. Ultimately, the legal framework must be developed in consistency with bilateral investment treaties and backed by investor to State dispute settlement to avoid long lasting dispute settlements and to provide security to investors. Investor-State dispute settlement provisions reduce the risk of protracted investment disputes, as they limit the need/possibility of investors to refer disputes to international courts for settlement. Therefore, investor-State dispute settlement provisions that are consistent with international investment obligations both provide greater security to investors, and protect the State party from potentially very costly and lengthy international arbitration procedures.

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