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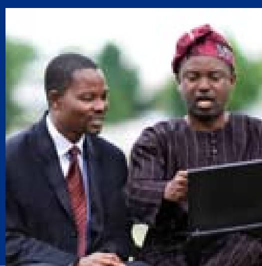
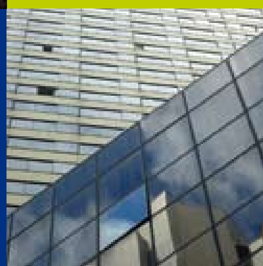
Fostering the Development of PPP Models in the COMESA Region





April 2009

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enabling environment

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Fostering the Development of PPP Models in the COMESA Region

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Submitted by

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RESEARCH & CONSULTING

Abbreviations

AICDO	Africa Infrastructure Country Diagnostic Overview
BoT	Build Operate Transfer
COMESA	Common Market for Eastern and Southern Africa
ICT	Information and Communication Technologies
IFC	International Finance Corporation
MoF	Ministry of Finance
PFI	Private Finance Initiative
POS	Point of Sale
PPI	Private Participation in Infrastructure
PPIAF	Public Private Partnership Advisory Facility
PPP	Public Private Partnerships
PPPI	Public Private Partnerships in Infrastructure
RIA	Regional Investment Agency
SSA	Sub-Saharan Africa

Contents

Executive summary

The project "**Fostering the Development of PPP Models in the COMESA Region**" (the Project) seeks to improve infrastructure service provision through the use of public private partnership (PPP) arrangements in COMESA Member Countries.

The Project's four key objectives are to:

I Capture and synthesize critical elements of an overarching **policy and vision** for effective PPPs in infrastructure sectors

II Analyse and lay out critical elements of an enabling **legal framework** for effective infrastructure PPPs;

III Analyse critical elements of an effective, coordinating **institutional framework** for PPPs in infrastructure sectors; and

IV Analyse where a **regional approach to PPP**s can be helpful, and how COMESA Members should pursue such a regional agenda.

This Desktop Study provides an overview of relevant good practice for a legal and institutional enabling environment for PPPs in infrastructure sectors in COMESA. It also begins to consider how a regional approach can contribute to the growth of infrastructure PPPs (including those of a cross-border nature), as well as the sharing of knowledge across Member Countries, and the building of capacity within them. The adoption at a regional level of common principles for the development of PPP projects and similar mechanisms for their implementation could also contribute to the emergence of domestic private investors in the COMESA region. Such a regional agenda has, it seems, received little attention in earlier analyses, and so we limit ourselves to laying out ideas at this inception stage.

The adoption at a regional level of common principles for the development of PPP projects and similar mechanisms for their implementation could also contribute to the emergence of domestic private investors in the COMESA region.

It is clear that much of the (deskwork) analysis undertaken does not sufficiently take the reality of COMESA countries into consideration. For example, whilst World Bank databases record numerous PPP projects in COMESA members, country officials are sometimes surprised to hear these findings. This is because many large projects are done on a contractual, ad hoc basis, with one-off advice from foreign transaction advisors. A systematic and standardized approach seems to be completely new to most countries, as are the innovative possibilities of smaller scale infrastructure PPPs. To make PPPs happen, it will be important for COMESA members to understand which types are more viable than others, and to share experience and knowledge of what works and what does not. The many issues and possibilities currently arising from our fieldwork will be discussed in the Project's final outputs and workshop, rather than in this desk study.

PPPs in the COMESA region – an overview

PPPs have been undertaken in Africa, as they have worldwide, to bring both efficient management of infrastructure assets, and additional capital investment. In Africa, management / lease and concession type projects have been common in sectors with pre-existing assets. Additionally, there have been many greenfield PPPs in power generation and mobile telecommunications. Mobile telephony has attracted by far the most PPP investment due to its ability to control connections and non-payment.

The World Bank's extensive efforts to create a database of PPP deals worldwide, including all COMESA countries, helps us understand the pattern and scale of PPP deals (broadly defined) in the region. Egypt led COMESA members with 22 PPP deals achieving financial closure between 1990 and 2007, valued at $15.4bn. Over the same period, in terms of deal count, Kenya had 16 deals ($3.9bn), Uganda 15 ($2.4bn), and Mauritius 11 ($0.5bn). Energy and telecoms were the most active sectors.

PPP investments in COMESA Members have essentially been contractual rather than based on a larger legislative framework. Thus, some ministries in some countries have developed expertise in structuring a very specific category of deal, but, for example, the procurement process, dispute resolution and regulation/tariff setting arrangements have generally been based on discretionary, contractual arrangements rather than general and independent laws, regulations and regulators.

Regarding an appropriate legal and institutional enabling environment for PPPs in infrastructure sectors, previous reports and our initial investigations reveal several key points. A successful PPP regime for infrastructure requires strong leadership in PPP strategy, as well as a clear understanding of where it is, and is not, appropriate and feasible. Ultimately, in order to go beyond one-off deals or concentration in one or two sectors (e.g. mobile telecoms), a strong, overarching legal and institutional framework is necessary. Adoption of a framework law, gathering relevant legislation from elsewhere, establishing a PPP Unit and laying down proper procedure, is valuable but not essential, and some successful countries have achieved a good enabling environment through regulations rather than laws (e.g. South Africa).

A successful PPP regime for infrastructure requires strong leadership in PPP strategy, as well as a clear understanding of where it is, and is not, appropriate and feasible.

There are many advantages to pooling general expertise on PPPs in a central PPP Unit, and in sharing knowledge and experience across COMESA, and the larger continent. Some line ministries (again telecommunications and energy) may have become quite effective at designing PPPs, but where deal flow is slower, transactions have to be designed and advised one at a time, involving very expensive and time-consuming preparations. The most successful PPP Units are often attached, especially in countries with weaker governance, to Ministries of Finance or a strong Planning Ministry where they hold sway, crucially, over financial due diligence in addition to other key functions. Key functions of a PPP Unit include: (i) acting as a centre of cross-cutting technical, project management and financial expertise; (ii) gathering and disseminating information and performance indicators; (iii) designing and rolling out training to line ministries and sub-national governments as necessary, and so on. Because of their financial due diligence role they should avoid deal generation.

Two of the larger COMESA recipients of PPP projects in infrastructure, namely Egypt and Mauritius, have, not surprisingly, been more proactive in developing PPP Units, which happen to have been set up inside the respective national Ministries of Finance. Given that our objective is to "build on what we have" in COMESA, provided of course it is a strong foundation, and to apply good practice from around the world to strong local foundations, it is important to visit these two COMESA members for fieldwork. **Uganda** is another proactive and somewhat successful promoter of PPPs attempting a slightly different route, hoping to adapt the Privatization Body (PUSRP) to become a PPP Unit. A new legal framework is in progress and PPIAF at the World Bank is in the middle of a design/feasibility exercise with Uganda. Finally, although not a member of COMESA, **South Africa** should be treated as a valuable model for COMESA members. Not only do many see the PPP Unit and legal environment as one of the best arrangements worldwide (although not all agree), but increasingly investors in SSA/COMESA countries come from South Africa, and South African investors used to the PPP system in South Africa would feel more comfortable encountering something similar in their foreign ventures.

A regional dimension to infrastructure PPPs in the COMESA region

A regional dimension to infrastructure PPPs in COMESA could manifest itself in several ways. On the one hand, there could be regional or cross-border projects in transport or power generation that require regional coordination. On the other hand the training and capacity-building dimension would allow COMESA Members to share knowledge and experience that they have either gained themselves or absorbed from outside COMESA. So far the regional dimension has been extremely limited:

- Any cross-border projects to date are likely to have been contractual, and the sponsor, financiers or international organizations would probably have been the main bridge between countries.
- Sharing of knowledge and experience has been limited to workshops, by for example the World Bank Institute, that have brought English or French-speaking, or Commonwealth countries together for instruction from, for example, English, Australian or South African experts.

There would seem to be vast potential for a COMESA regional community of practice in the area of PPPs (both for larger and smaller-type projects), as well as great need for similar PPP procedural, legal and procurement guidelines in cross-border projects.

Our brief

This Report is the first stage output in the project Fostering the Development of PPP Models in the COMESA Region. It will lead to various outputs, as described below, which will be influenced by a series of fieldwork missions, and further input from other reports treating this very active area of infrastructure development policy.

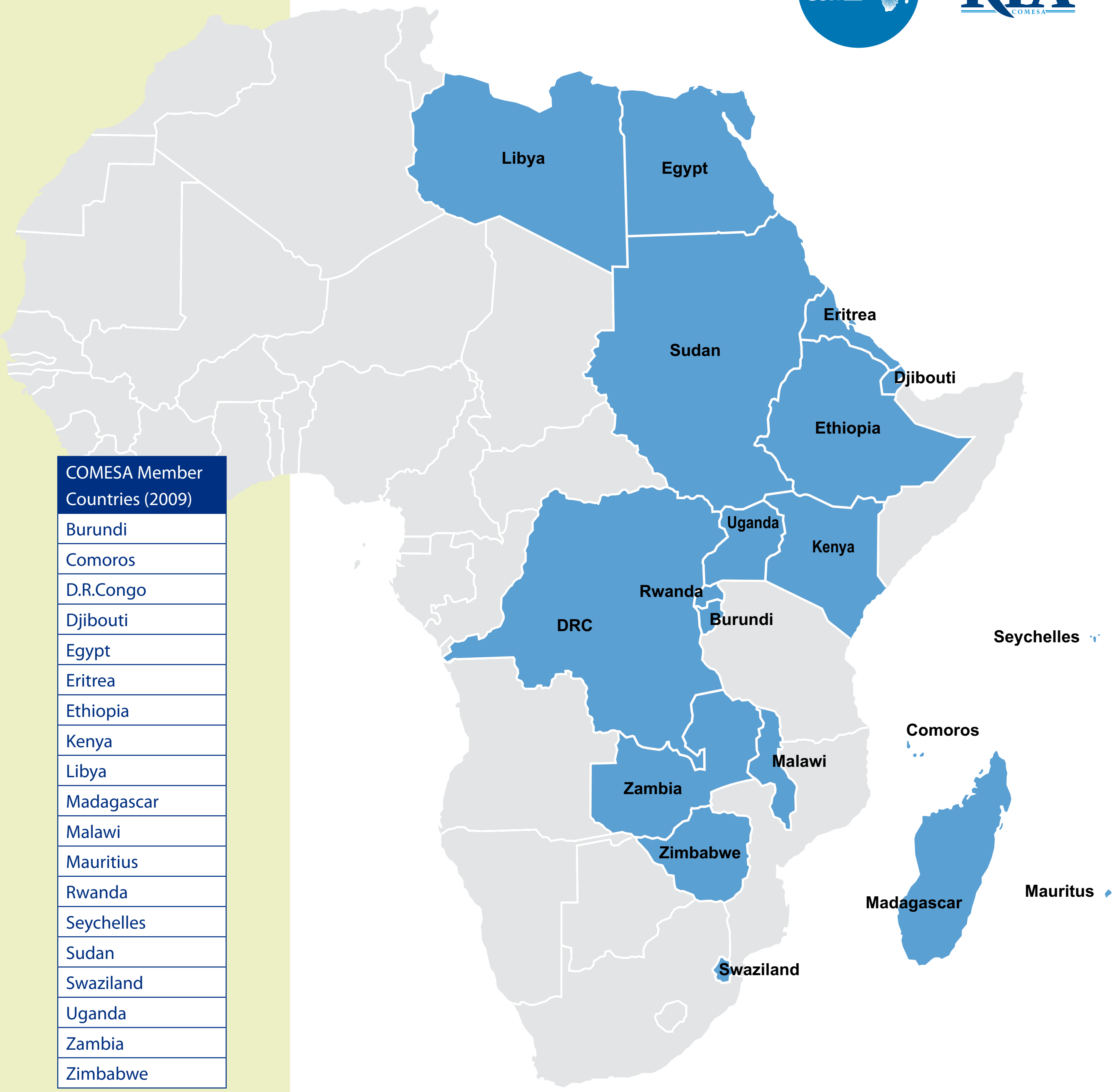
The project's overall objective is to help foster private investment in infrastructure construction and service provision in COMESA countries. Private investment can help bring efficiency to infrastructure projects and service provision through the provision of higher technology and improved management and incentives, as well as financing. The emphasis on accessing the value-added efficiency of the private sector is critical. Overarching legal frameworks and centralized Public Private Partnerships (PPP) units seek to establish an environment for private investment and PPPs, in allowing private companies to profit from the application of efficient methods, sometimes alongside capital financing, in a way that improves public goods and services, and provides the opportunity of a satisfactory return to private investors or operators.

Private investment can help bring efficiency to infrastructure projects and service provision through the provision of higher technology and improved management and incentives, as well as financing.

To this end, the Project will produce certain key outputs that will ultimately assist all COMESA countries to improve their legal and institutional framework for PPPs in Infrastructure.

- **Final Report on Improving Legal and Institutional Environment for Infrastructure PPPs in Africa.** The Final Report will evolve from this Desk Report. It will summarize our main findings and lay out general strategies towards good practice in national legal and institutional frameworks for PPPs in Infrastructure. It will also offer a vision and next steps for a regional approach to PPPs in infrastructure sectors. Furthermore, the Final Report will serve as a framework document for the other outputs and tools of this project as described below.
- **Preparation of standard/model PPP documentation that individual countries would be able to adapt.** We note in advance that this will be challenging, given the different legal systems and range of types of PPI formats in existence. The World Bank Institute's capacity building programs on PPI treat Francophone and Anglophone countries in Africa separately. These model documents must be seen in the context of the self-diagnosis and roadmap outputs, and not as models that if deployed will naturally attract private investment.
- **Self-diagnosis tool.** This tool, ultimately a sort of checklist, will be useful for COMESA country policymakers/officials but also for bilateral and multilateral project officers seeking to design projects or assess proposals. Essentially, this tool will help countries and their supporters to know where they stand in terms of having a suitable legal and institutional framework for PPI.
- **Roadmap tool.** This tool will outline a project cycle approach to, "How do we make ourselves better?" It will rely on good practice in both within COMESA and without, as well as the expectations of private investors. A key point will be that investors are looking for the legal and institutional foundations for transparency, predictability and efficiency in operation.
- The beginnings of a **Community of Practice (CoP) in Infrastructure PPPs** in the COMESA region. The first steps are the workshop attached to this Project, and the project website. Workshop attendees will primarily be Investment Promotion Agency (IPA) representatives (who are present in every country) and some PPP Unit representatives, who exist in only a few. Nevertheless, we hope that the specialized PPP CoP will grow, and that this initiative will find supporters following this project's end.

The 19 COMESA Member Countries



COMESA Member Countries (2009)
Burundi
Comoros
D.R.Congo
Djibouti
Egypt
Eritrea
Ethiopia
Kenya
Libya
Madagascar
Malawi
Mauritius
Rwanda
Seychelles
Sudan
Swaziland
Uganda
Zambia
Zimbabwe

Report objective and structure

The general objective of this Desk Report is to review existing literature on PPI legal frameworks and PPI units, to understand the current state of play amongst COMESA members, and to propose suitable fieldwork destinations given the project's overall objective. The report should also be seen as a work in progress that will be added to over the course of the project, and ultimately provide the context for presenting the tools described above.

I

The **first objective** of this Desk Report is to understand the status quo of PPP activity in COMESA. We will do this based on pre-existing information. Regarding statistics on types and occurrence of PPPs in COMESA, the long-standing and well-funded PPIAF effort to compile a database of information will be the main source. Regarding laws, regulations and institutional structures we have conducted a literature review, but we expect information to continue to appear over the course of this assignment, especially as we meet more individuals in Washington, Europe and Africa. Such additional information can be added for inclusion in a revised version of the desk report, should it prove material, after the fieldwork.

II

The **second objective** is to look at relevant good practice examples of broader legal frameworks for PPI, and the establishment and operation of central PPI units. The World Bank and others have conducted significant research into PPI frameworks and we should not reinvent the wheel. There have also been specific, well-funded feasibility studies regarding the establishment and improvement of PPI units in some COMESA countries that have sought to adapt international lessons to COMESA country situations. At the time of the writing of this report we are trying to access the outputs of that research. We will continue to collect information on international experience and lessons during the project, summarizing and referencing where appropriate, but also seeking to add more value by filtering in the most useful analyses, case studies, sector-specific and general guides, for example.

III

The **third objective** is to begin considering a **regional approach to PPPs** although this is rather about needs and opportunity, rather than any pre-existing foundations or track record.

IV

The **fourth objective**, which is of immediate importance, is to propose the most appropriate countries for the three-country fieldwork phase based upon our early analysis. We also consider briefly the design and timing of the final workshop.

Proposed Fieldwork Countries – (based on PPIAF data and PPI legal and institutional foundations)
Egypt Mauritius Uganda (South Africa) (South Africa is regional good practice, and source of 65% of private investment in SSA that reached financial closure between 1998-2004)

Accordingly, the structure of this report is as follows.

I **INTRODUCTION**

Underlining the rationale for pursuing PPI, the scope of PPI project types to be considered, and the challenges involved in producing a general enabling framework for PPI investment in COMESA, approach to identifying resources and stakeholders;

II **SELECTED GOOD LEGAL AND INSTITUTIONAL PRACTICE (LESSONS / GUIDELINES FOR COMESA) FOR INFRASTRUCTURE PPPs**

a) Legal and regulatory frameworks – relevant experience and models for COMESA

b) Central PPP Unit relevant experience and good practice

III **STATUS OF Infrastructure PPPs IN COMESA**

a) Figures and statistics on extent and distribution of PPP projects in COMESA

b) Overview of legal frameworks for Infrastructure PPPs in COMESA countries (e.g. national and regional policy documents, laws and regulations);

c) PPI Units in COMESA Countries (legal basis, structure, performance)

IV **FIELDWORK COUNTRY RECOMMENDATIONS & WORKSHOP/COORDINATION SUGGESTIONS**

a) Fieldwork country recommendations

b) Workshop/Coordination Suggestions

V **ANNEX**

Annex 1: selected ressources

I Introduction

The rationale for promoting Public Private Partnerships in infrastructure projects is to promote efficiency in the operation and provision of infrastructure. PPPs in infrastructure are about risk sharing, value for money, public service provision and long-term partnerships. They differ in many ways from divestitures and direct public procurement, and it is important to approach them with due diligence, understanding their benefits and risks.

Our working assumption is that COMESA Members, who have implemented a relatively large volume of PPPs on an ad hoc basis, would benefit from a more coordinated and systematic approach to PPPs in their countries, legally, procedurally and institutionally. Furthermore, we believe that taking a regional approach could have many benefits, and this is a focus of our field research and investigations. In particular we will firstly consider how a more systematic approach and a specialized central institution in individual countries could expedite cross-border and multi-country projects. Secondly, we recognize that the sharing of knowledge and experience and the creation of a regional community of PPP practice have huge potential, particularly for medium-sized replicable projects. Through our fieldwork and concluding workshop we hope to help lay the foundations for such a regionally-owned initiative. In many ways the mutually beneficial nature of a regional approach to PPP is clearer than for investment and trade promotion.

We believe that taking a regional approach could have many benefits, and this is a focus of our field research and investigations.

In order to strengthen the enabling framework for PPPs we must begin with a clear understanding of what PPPs are. Our fieldwork is revealing that there are many different views on this, and that a better understanding of PPPs and their different types could make PPP strategy-making much more effective.

1 Definition and Justification of Public Private Partnerships in Infrastructure

The terms Public Private Partnerships (PPPs), Public Private Partnerships in Infrastructure, (PPPI) and Private Participation in Infrastructure (PPI) are used fairly interchangeably to refer to governments collaborating with private companies (domestic of foreign) in various ways to build and/or operate infrastructure facilities.

A public private partnership for infrastructure services has four key characteristics.

- It involves an efficacious sharing of risk between public and private sector,
- It provides a public service;
- It offers value for money; and
- It is a long term partnership over many years.

2 Different Types of Public Private Partnerships

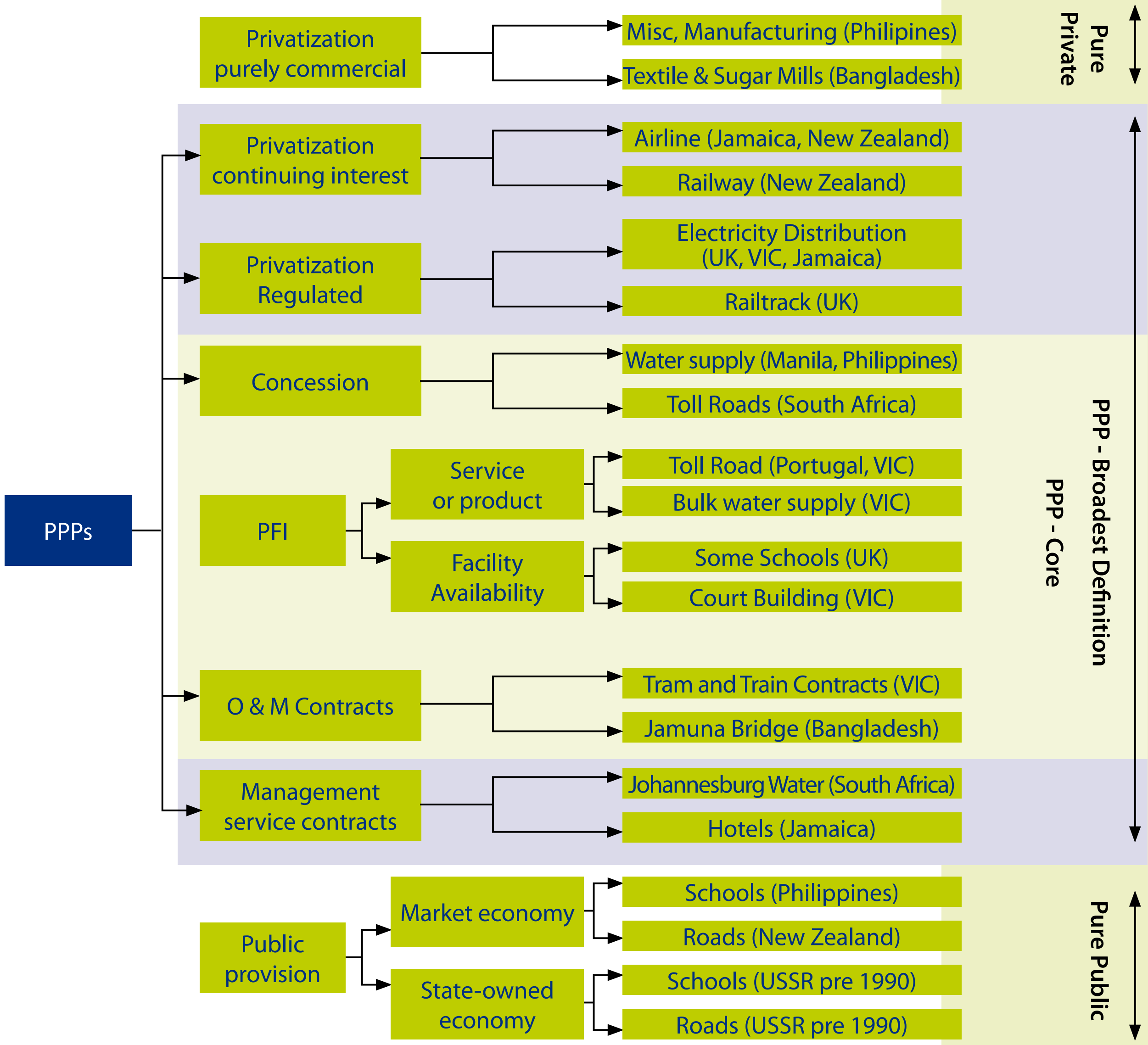
The nature of PPP is determined by what rights, obligations and risks are assumed by the public and private sectors.

PPPs are to be found across the spectrum of infrastructure projects between the extremes of pure private and purely public-funded operations. Under a PPP the public sector retains ultimate accountability to its citizenry for service provision whereas under privatization that responsibility is transferred to the private party. The nature of PPP is determined by what rights, obligations and risks are assumed by the public and private sectors. The PPIAF PPI Database, for example, identifies four types of project: Management and lease contracts; Concessions, Greenfield projects, and divestitures. Divestitures (either full or partial) are not considered PPPs.[1]

- **Affermage contracts** or "management / lease" PPPs. The public sector arranges for the construction of necessary capital investment in a separate infrastructure separately, and the private party is involved only in operation.
- **Concession PPPs.** In addition to risks of design, finance, construction and operation, the private party normally also assumes risk of demand for the use of the asset (e.g. roads, electricity, water). User charges may be laid out in the PPP contract, set by the concessionaire, or set by an (independent) regulator. Key characteristics of concession-based PPPs generally include:
    - Users not public authorities pay charges
    - Private entity takes over existing asset and makes some degree of capital investment
    - Private entity takes over demand risk to some degree
- **Greenfield PPPs.** A private entity or public-private joint venture builds and operates a new facility relating to the provision of a public service for the period specified in a project contract upon the expiration of which the facility may be transferred to the public sector. Significant risk sits with the private or public-private operator although the government usually offers some kind of revenue guarantee.
- **Availability-based PPPs.** Under such PPPs, a subset of Greenfield PPPs, the public authority rather than the user makes payments to the private party, (e.g. schools, hospitals, electricity generation). These "Private Finance Initiative or PFI-model PPPs" (following the nomenclature of its UK origins) are often used for social infrastructure projects, such as hospitals, schools or prisons.

1 - See PPIAF, 2009, p.90 for a useful typology.

Figure 1: Broad and Narrow Definitions of PPI



Source: PPIAF, Public-Private Partnership Units, (Washington DC: World Bank, 2007), p.17.

3 Types of PPPs in Africa

Using the PPIAF typology most PPP projects in Africa are concession-based PPPs where users rather than public authorities pay user charges (PPIAF, 2009, p.30). There are also many *Affermage* contracts in the French tradition. Sectors with a legacy of below-cost pricing can prove difficult due to problems concerning the *level* or *collection* of fees (e.g. water, electricity, passenger rail), which has led to management or lease contracts with limited capital investment in many cases. Liberalization of telecommunications sectors has also led to significant amounts of private investment.

Large greenfield projects have also been common in Africa – particularly in the energy sector. Indeed, many countries only focus on PPPs for megaprojects because of the relative cost of capital, which is more expensive than other sources of financing, especially in developing countries that may have access to concessionary financing. Singapore, for example, only considered PPP in limited cases for projects over S$50mn.

Table 1: Number of projects by region and type (1990-2007)

Region	Concession	Divestiture	Greenfield project	Management and lease contract	Total
East Asia and Pacific	118	39	166	6	329
Europe and Central Asia	23	15	19	9	66
Latin America and the Caribbean	284	8	96	20	408
Middle East and North Africa	11	0	14	7	32
South Asia	106	0	66	6	178
Sub-Saharan Africa	52	3	15	14	84
Grand Total	594	65	376	62	1,097

Source: PPI Database, PPIAF

4 PPPs as a Means of Financing Infrastructure in Africa

PPPs are sometimes valued for their ability to attract capital investment in infrastructure projects. Whilst this is true the cost of this capital is greater than the various forms of concessional financing, and the financiers will expect to recoup these (greater) costs through revenue streams. Judged by the cost of capital alone, private investment in infrastructure is rarely the most cost-effective solution.

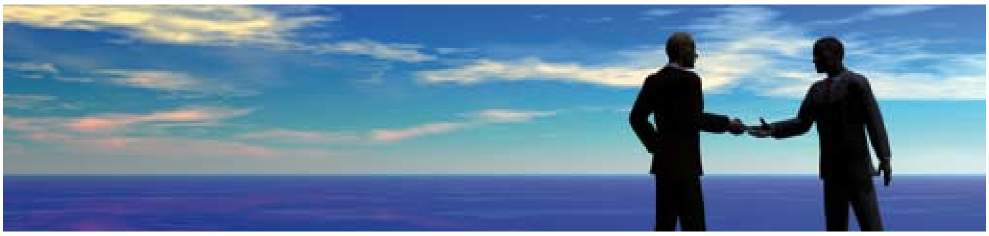
If a project is not well structured, an inflow of capital investment is generally ill-fated. Although some very large projects could not be attempted without major outside capital investment, these projects rarely succeed unless the risks and responsibilities have been appropriately allocated across public and private sector parties to the deal, and technical, economical and financial feasibilty has been accurately assessed and value for money has been assured.

Why might countries prefer to finance infrastructure through PPP arrangements rather than through concessionary or grant funding? The Africa Infrastructure Country Diagnostic Overview (AICD, 2009, p.16) points out that PPI money is more expensive than concessionary money from a variety of overseas sovereign lenders (e.g. China, India, IDA), and clearly more expensive than grants. Obvious as this is, PPPs can provide a package of financing and management expertise that might not be so easily substituted by a turnkey project plus a management contract. In addition, donors' concessionary money might not be available for targeted projects, and sovereign wealth fund-type money might come with unwanted strings attached. Ultimately, a PPP is a partnership where both parties have a common interest in the project's success in contrast to simple procurement contracts.

PPPs can provide a package of financing and management expertise that might not be so easily substituted by a turnkey project plus a management contract.

Paradoxically, in the context of Africa, PPP financing can be cheaper than financing through new taxation streams. The AICD points out that commercial money for infrastructure projects is apparently cheaper than raising a dollar through taxation due to the "cost of the economic distortions associated with levying taxes". In many cases, African countries can therefore take a management/lease route, having built a project with concessionary money.

In this period of global economic confusion, financing and investment prospects could develop in surprising directions. On the one hand, borrowing costs have increased and financing has become scarcer. On the other hand, the relative risk perception of frontier markets vis-à-vis developed markets has improved, with investors potentially interested in lower returns for well-structured projects. Investors are certainly becoming more diligent about the projects they target, and about the operating environments for those projects. Meanwhile, amongst donors and development banks, there is an increased appetite for supporting projects that can demonstrate sustainability over time and value for money.



Often subnational (sub-sovereign) projects have less chance of attracting donor funding.

At the subnational level, other factors making PPP-type financing attractive are at play. Local governments may have no revenue raising powers of their own, or very tight budgets. If they can structure good projects that are self-financing with a revenue stream – i.e. project financing – then local economic development could enter a new dynamic plane. Often subnational (sub-sovereign) projects have less chance of attracting donor funding (which must often go to sovereign i.e. national borrowers), and subnational regions must compete with many of their peers for "trickle down" funding.

5 Categorizing PPPs by Revenue Format

Categorizing PPPs by who pays for the public services provided, and how, is a very useful alternative for our purposes. As we consider smaller and medium-sized PPP projects, thinking about projects by how revenues are paid and collected helps considerably with strategy. It helps to categorize potential projects by viability rather than descriptive management approach. We will develop this idea further in our final outputs, and just make a few key observations at this point:

- The success of mobile telephony is in no small part due to the point of sale (POS) nature of payment capture, and the ease of controlling access to service.
- Revenue-generating user-fee based projects such as water and electricity distribution can be difficult to set up, and there are «leakage" problems, but ultimately there is a transparency benefit.
- Where user fees are involved there are many possible hybrid solutions involving subsidies for service provision from government.
- Another category is projects based on shadow-toll or fee models, but these can be difficult to implement in poor governance environments, due to «inflated" usage or misappropriation. For shadow-fee type projects the public counterpart needs to have the budget to cover the additional payments for these new services.

As central governments go about putting together a PPP strategy, and their line ministries and subnational governments go about preparing a project pipeline, thinking about the revenue aspect of potential PPP projects can help create a more viable set of projects with the chance of being realized more quickly.

6 Size and Sector Considerations in Planning an Infrastructure PPP Strategy

In preparing PPP strategies and pipelines, the viability and importance of projects varies considerably by size and sector.

Historically, the tendancy has been to think of only larger projects as PPPs since they have formal appellations such as BOT and BOOT. Such projects have been handled by the line ministries for energy, telecommunications and other portfolios, and prepared on an ad hoc, contractual basis. Those line ministries may have built up expertise in their niches. In our fieldwork, however, we will be looking for, and expect to find, many examples of small and medium sized PPPs. Many of these may not have been considered PPPs, but in fact fit our four criteria, and should be seen as small-scale PPPs.

Such projects have been handled by the line ministries for energy, telecommunications and other portfolios, and prepared on an ad hoc, contractual basis.

- Smaller projects have great potential, are worth emphasizing for several reasons, and benefit considerably from a central coordinating structure.
- Small projects are may be more "doable" because of lower costs and potentially lower complexity. Municipal markets and small scale power generation, for example, are well suited to PPPs but might not follow this pather if the bar is set too high.
- Small-scale projects, once designed, can be replicable and may be used to provide services in poorer and/or remote areas.
- Municipal authorities, which have smaller budgets and limited fund-raising powers, can be very creative in the use of PPPs. Private provision of street-lighting, services linked with advertising rights, or micro-franchising for water distribution, could be valuable applications of the PPP concept in this context.
- Central coordination and knowledge consolidation is particularly important for smaller PPPs since replicability depends upon designs being consolidated and disseminated, and the costs of project preparation reduced.

COMESA PPI
Project Target
Infrastructure
Sectors

Utilities
Energy
Transport
Ports
Water Supply

Secondary Sectors

Health
Education

7 Challenges in Providing Advice on PPP Legal and Institutional Frameworks to COMESA Members

There are significant challenges in providing a coherent set of advice to the 19 COMESA members on legal and institutional frameworks for PPP. Some of the key challenges are:

- Amongst COMESA's 19 Members there are vast differences in the size of countries, their respective legal and institutional settings relating to the provision of public service, the operation and management of public facilities, and their **sophistication with regard to PPPs**. Egypt and Mauritius seem most advanced in terms of a systematic approach to a legal and institutional framework for PPP. Cross fertilization is difficult but also essential.
- We have been asked to consider six broad sectors and various **types of PPP arrangements**, so an overarching legal framework needs to be sufficiently general / all-inclusive to address the various sectors. A detailed approach to each sector is beyond the scope of this Project, but it is possible to develop more general guidelines that any line ministry or central government body should consider when pursuing a PPP-style project. We will pay particular attention to how overarching PPP legislation and a central PPP Unit can help ensure that sectoral PPP projects take into account the peculiarities of these partnerships, and undergo due diligence at appropriate points of the project cycle.
- COMESA members have very **different legal traditions** (and languages). The World Bank Institute for training and capacity building purposes in PPP, for example, splits Africa into Anglophone and Francophone. In this regard, Mauritius is again a useful example, as a sort of hybrid with Common-style basic laws, and Civil-style implementing laws and regulations.

8 Potential Benefits of an Overarching National Framework for Infrastructure PPPs, and of a Regional Approach

A national framework for PPPs in infrastructure could begin with a national vision for PPPs, demonstrating that the highest authorities in a country encourage the use of this potentially effective and efficient mode of procurement. An overarching vision could lay out sectors and types of projects in which PPPs are encouraged.

Because of the sharing of risks and responsibilities between public and private parties in PPPs, in contrast to simple public procurement or pure divestiture, some aspects of national laws require additional specification to ensure their applicability. Traditionally, the particular requirements of a hybrid approach have been incorporated in contracts, rather than in the general legal system through adaptations to particular laws or through a framework PPP law. This Project will develop guidelines to those areas of the national legal system which need to be strengthened for the promotion of PPPs. A central PPP unit could have many functions, including disseminating these guidelines and ensuring that PPP agreements adhere to them.

A central PPP unit could have many functions, including disseminating these guidelines and ensuring that PPP agreements adhere to them.

A framework law could specify what is meant by a PPP, the varying PPP schemes into which the public sector may enter with private investors, and how line ministries and other public bodies could initiate them, as well as the development and government approval process. Some of the legal improvements could be in the framework law, or it could refer to them where they have been improved in other laws. It could also establish the PPP unit and specify its role in coordinating the country's PPP program.

A central PPP unit could have many potential benefits. Our ongoing fieldwork is revealing a variety of perceptions of such a unit's advantages and disadvantages, which will be elaborated in the final report.

- By developing and overseeing a standardized process, a PPP unit could make the often long PPP implementation process faster and more efficient. Performance criteria could help ensure this.
- It would serve as a repository of technical knowledge on PPPs, and be a conduit for advice and supporting resources for the development of PPP projects in the country.
- This central unit could play an important role in **capturing and disseminating much smaller scale PPP arrangements** than have existed in the past. Historically, PPP projects have been relatively large, with government guarantees, grants of exclusivity for a limited period of time and offtake agreements common. PPP procurement options could help stimulate smaller utility and social infrastructure sectors, and engage even more local and "local foreign" (e.g. South African) investors and operators. In these new sectors there may be little experience to share, and thus a PPI unit can play a very important role.

A PPP hospital project in one country is more likely to stimulate than preclude a similar project nearby, especially if those countries have a comparable enabling environment.

Improving the national enabling framework for PPPs within COMESA member countries (and elsewhere in Africa) should help regional/cross-border projects, and encourage intra-regional investment. If countries involved in a cross-border project are following the same PPP guiding principles, a project is likely to proceed more quickly.

A regional community of practice of PPP units, meanwhile, would provide a network through which PPP experience can be shared. Regional coordination in sharing PPP knowledge and experience is particularly valuable because it is mutually beneficial. A PPP hospital project in one country is more likely to stimulate than preclude a similar project nearby, especially if those countries have a comparable enabling environment. Investment promotion agencies are more likely to be friendly rivals when competing for mobile investment.

Cross-fertilization can be promoted through one-off workshops, including the Validation Workshop for this project, and periodic training by the World Bank Institute, for example. However, a **network system** of local "partners" promoting mutual learning and exchange of lessons learned, as well as cross-border projects, which could also facilitate and maximize the impact of knowledge injections from overseas, and could begin to track regional performance and growth of PPPs, would be even more valuable in due course. Another challenge of this project, therefore, is to consider the need for such a network, potentially around COMESA RIA, and how such an arrangement might be made relatively sustainable.

Let us conclude with three guiding questions to bear in mind as we review COMESA PPP experience and consider relevant models and experience from outside COMESA.

- What general set of laws and regulations is necessary as the enabling foundation for stimulating private sector involvement and investment in infrastructure services through PPPs?
- What central institutional framework would help? Our working assumption is that a central PPI unit is valuable, not least because of the limited number of PPPs in any particular country.
- How can regional coordination help stimulate PPP activity in infrastructure sectors, and how can good national enabling frameworks following good practice guiding principles stimulate PPP projects regionally?

II Global/regional good practice in legal and institutional frameworks for PPPS in infrastructure

An efficient, effective and successful PPP program has four components. This project will focus on the first two. The latter two are beyond the scope of this project, but will inevitably be considered in places:

- A suitable legal framework
- Effective management and institutional structure overseeing the PPI program (aka PPI unit)
- Availability of project finance
- Pipeline of feasible projects

In this section we summarize lessons for COMESA members from other countries in Africa and around the world with respect to both an overarching legal framework and institutional arrangements. In the next section we look at the experience of COMESA in PPP and consider where legal and institutional arrangements for PPP are most advanced within COMESA membership. Given that our intention is to recommend ways of grafting worldwide good practice onto arrangements that already exist, if they are appropriate, this identification of leading countries within COMESA will guide our suggestions for fieldwork destinations.

1 Good Practice PPI Legal Framework

Many emerging countries have developed PPP legislation, often drawing upon UN Legislative Guidelines for Privately Financed Infrastructure Projects. This document provides general guiding principles to set up a legislative framework to support the development and implementation of infrastructure projects partially financed by the private sector. It addresses in particular the principles which govern the selection of the "concessionaire" under the public procurement process and provides recommendations and a code of conduct to handle unsolicited proposals from private developers. Many developing countries have faced the issue of unsolicited proposals for projects and have struggled with the difficulty of attempting both to ensure a fair and transparent procurement process and to compensate the private company which has submitted the original proposal and undertaken the pre-feasibility studies. The UNCITRAL Legislative Guide distinguishes between several types of unsolicited proposals and advises the Governmental authorities to restrict their admission to projects involving new technologies and processes, the acquisition of which will be in the general interest of the host country.

Many emerging countries have developed PPP legislation, often drawing upon UN Legislative Guidelines for Privately Financed Infrastructure Projects.

A Framework Law may partly gather together or refer to other legislation necessary for a successful PPP Enabling Environment that is already in place. A PPP Legal Framework may also have new components - for example, establishing a PPP Unit, specifying the procedures required for approval, and setting out when ministries or authorities must sign off on the agreements. It seems that so-called Civil Law countries where the law tends to specify what is allowed (rather than what is forbidden) are likely to have more extensive legislation for PPPs. Mauritius is a useful example of a "hybrid" country where the Framework Legislation relates more to Common Law, and the implementing regulations are more Francophone in nature.

We feel that it is ultimately unnecessary to treat Anglophone and Francophone countries differently.

We feel that it is ultimately unnecessary to treat Anglophone and Francophone countries differently. This is because, eventually, the definition of a proper legal and regulatory framework for the implementation and enforcement of PPP contractual arrangements depends upon the nature and particulars of the "public service" concerned. A more important distinction relates to the type of PPP arrangement in question - for example, whether it is a concession or availability-based arrangement. Thus, the requirements and the objectives sought by the public authorities with respect to the procurement and management of infrastructure equipment, and the operation and administration of services in the health or education sector may not be comparable.

With these observations in mind, we can distinguish the main features of a suitable legal framework aimed at designing, implementing and monitoring PPP projects in traditional sectors, such as energy and water supply, as well as in less conventional sectors such as health and education, as follows:

- The legal framework should be based upon a clearly defined policy setting out the underlying principles and the criteria according to which PPP schemes should be adopted;
- The different types of contractual arrangements should be defined;
- The legal framework should establish an institutional setting that permits sound administrative coordination;
- In particular, PPP authorities and their respective roles and responsibilities should be identified, and the following should be expressly set forth:
    - may enter into PPP arrangements;
    - advise and assist in setting up the PPP projects;
    - select qualified private sector operators;
    - main terms and conditions of PPP agreements
    - monitor and audit the proper performance of the PPP contracts by the private sector.
- The establishment of specific PPP units, which may assist in the promotion of PPP transactions, and provide information and guidelines on project contractual structure, procurement and project management;
- The law should clearly state the provisions for providing the modalities of financial or economic support to PPP transactions and the relevant authorities which are responsible for doing so;
- A sound transparent and competitive procurement procedure addressing the specificities of PPP contractual arrangements and other forms of delegation of public service;
- Concise terms and conditions governing the different types of PPP transactions and the corresponding modes of remuneration of the private operator;
- Definition of clear rules for tariff setting and revision as well as regulated technical, environmental and safety standards and the establishment of an independent regulatory authority for the sector concerned with resources adapted to arbitrate between the different stakeholders;
- Well-defined standard PPP agreements and other guidance materials should be available;
- The establishment of a clear process for dispute resolution, including the ability to enforce the contract terms and conditions and lenders' remedy in case of bankruptcy or insolvency.

2 Good Practice PPI Institutional Framework / Role of Central PPI Unit

In the last two or three years, a number of analyses of the legal and institutional frameworks for PPI have been conducted, and we draw out the main lessons here. Selected key documents are listed in Annex 1. Drawing on these various global best practice analyses and the resurgence of interest in various models of PPP enabling environment, many PPP enabling environment country studies/ diagnostics/feasibility studies/design projects have been organized. Of particular interest for our purposes are two design projects commissioned by World Bank/ PPIAF for PPP enabling frameworks in Uganda and Kenya, which are about to be finalized.

As with many countries, Uganda and Kenya – both COMESA member states - have generated numerous PPP projects without an overarching legal and institutional framework. They are now seeking to systematize their approach to PPPs through national legislation and a centralized institutional function. The vision, as in other countries, is to increase the volume of PPP infrastructure projects, to develop PPPs in new sectors, and sometimes to initiate smaller scale projects in certain sectors. Many countries have begun by developing a pipeline of potential projects.

The main study on which other general studies as well as country-specific design programs have drawn is a 2007 World Bank-sponsored study of PPP Units worldwide. It investigated the performance of a variety of PPPI units in both wealthier and poorer countries. The countries/regions were: Victoria (Australia), UK, South Africa, Portugal, South Korea, The Philippines, Bangladesh and Jamaica. The main conclusion was that, **"The most successful of the PPP Units surveyed have benefited from a combination of high level political support, and close association with a Ministry of Finance or Treasury".**

High level political support, along with a location within the Treasury, was one of the key success factors for South Africa's PPP Unit, one of the more successful cases considered in that analysis. South Africa is extremely relevant for the purposes of this COMESA project: (a) it is located in Africa if not COMESA, and (b) many of the private investors that might be PPP partners in COMESA countries will come from South Africa, and they will be reassured to find a system similar to that which has previously worked well in their experience.

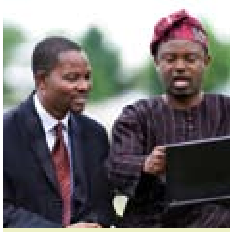
High level political support, along with a location within the Treasury, was one of the key success factors for South Africa's PPP Unit, one of the more successful cases considered in that analysis.

Some of the main findings of the World Bank-sponsored analysis of more and less successful PPI units are as follows:

- There can be no assumption that a PPP Unit will perform well just because it was established with good intentions.
- PPP Units perform better in countries with generally good public sector governance, where line ministries and sub-national guidance look to the Unit for leadership and guidance because they want to, and not because they are forced to.
- Support must be forthcoming from the most senior political levels.

The Ministry of Finance location is often logical given the need for oversight, incurring public sector financial obligations, and so on.

- Public sector (financial) governance is generally good in countries where PPPs/PPP Units have performed well; some analysis of the transparency and competitiveness of public procurement is often instructive.
- In developing countries, where establishing new institutions is particularly difficult (often because they are implemented or imposed, rather than evolving naturally in response to a need), PPP Units have a better chance of success inside existing institutions. The Ministry of Finance location is often logical given the need for oversight, incurring public sector financial obligations, and so on.
- In poorer countries, or those with shorter histories of accountable public sector management, a PPP Unit must take on a quality assurance and technical assistance role, as in the case of South Africa.
- Simply put, in countries with below-average governance credentials, it is best to attach a PPP Unit to an existing government body that has the best governance track record, and must oversee public sector finances, as well as to give it the authority it needs to do its mandated tasks. This government body will most commonly be the Ministry of Finance or Treasury. In some cases, it might commute to a Planning Ministry but this would assume excellent communication between these core ministries/agencies, where the planning ministry has a high-level strategic financial function. Amongst the less wealthy countries with PPI units researched by the World Bank (PPIAF, 2007), South Africa followed the National Treasury/Ministry of Finance route, whilst the Philippines and Bangladesh followed the quasi-independent route – with less success.
- Moreover, where central government funds most of State and municipal budgets, or where public service revenue collection is unpredictable or inefficient, a central financial unit should manage public sector financial liabilities at line ministry level.
- There is an argument for adapting PPI Units from Privatization Units, including where these have been set up as an independent institution. However, these have often been staffed with external experts, affordable because of international donor project sponsorship and concentrated volumes of deal flow. A PPP agenda is longer term, and should be phased.



3 Benefits and Core Functions of PPP Units

Drawing on the main analyses of institutional experience of PPP Units some of the key benefits and core functions of a PPP Unit are as follows:

- Centre of excellence - pool of expertise of several kinds:
  - Technical expertise on project design, handing over to line departments in Phase II of any project development, but acting as a constant advisor. For example, most PPP arrangements require the establishment of a Project Company, and a central unit can most easily gather and consolidate this general expertise that can then be adapted;
  - Project implementation and management as well as PPP contract monitoring and audit
  - Dispute resolution – an indicator of PPP Unit effectiveness is whether it is used to resolve disputes (whether or not it helped originate the project);
  - Financial management expertise.
- Information dissemination:
  - Database on existing projects with basic information;
  - Institutional memory capture of more qualitative experiences;
  - Information absorption from overseas, and domestic dissemination and training.
- Preparation and roll-out of training materials for project teams (implementation).
- Fulfilment of a "checks and balancing" function, and monitoring of project financial and operational performance. In particular it should ensure that PPP financial liabilities are affordable to national government. The financial function is another good reason to have such a unit within the MoF, in order to avoid the creation of another supervisory relationship, whereby the MoF supervises a new outside PPP Unit (India1 p.16).
- Linking together different agencies, parastatals and so on involved in PPP infrastructure projects.
- Politician, consumer, other stakeholder awareness (e.g. Industry Canada's P3 office has six full-timers actively promoted the use of PPPs).
- PPI units can also play a useful role in supporting the project team (PPIAF, 2009, p.50), market sounding (p.54), and liaising with more sophisticated units elsewhere.
- In the case of India, the World Bank notes that the absence (in PPP project proposals) of standard contracts or standard clauses that are approved by the central unit makes bureaucrats in line ministries or sub-national regions more reluctant to sign off on PPP deals. (See World Bank, 2006, Paragraph 4.21).

4 Design Issues and Guidelines for PPP Unit

What, then, are the tentative PPP Unit design lessons/considerations that can be drawn from experience elsewhere? We will use this and other criteria to inform the self-assessment tool, roadmap and various templates that this project will compile for COMESA members.

- Consider whether the creation of a central unit within an existing government agency (e.g. Ministry of Finance) is indeed preferable to a semi-independent, even public-private entity. The separate institution or company route is often more feasible with large volume flow where there is independent viability, and this allows the attraction of better staff, where the unit is transaction-intensive. Where there is low deal volume, where donors are funding to a degree, and where there is a desire to stimulate small and medium-sized PPPs, then a central unit is likely to be preferable. The third option of a new, independent agency is not desirable (4.30)
- How should a central PPP Unit interact with line ministries, sub-national governments, and other public sector institutions?
- Assuming the choice of a central unit located within a government agency, it will be important to consider in due course how the central unit will engage with sub-national governments, both in terms of oversight (required stage by stage approvals under a framework law, perhaps) and training/capacity building (e.g. through satellite training centers in other regions/cities in due course).
- Consider the establishment of a public-private advisory group (e.g. in India – see World Bank, 2006, Paragraph 4.24) to provide additional expertise to the unit.
- In order to ensure that the expertise and other functions of the PPI Unit are applied, approval at various stages should be required (as in South Africa) and this should be included in any framework legislation.
- Project origination function and quality assurance (including financial due diligence) functions should be kept separate. Thus, a unit in the Ministry of Finance (MoF) is clearly separate from an Investment Promotion Agency, a line ministry, or a municipal public works office.
- The central PPP Unit would also serve as source of expertise for subsidy funds – for example, where PPPs are used for the delivery of basic services by municipal governments; this would also be the case for any resources or trust funds that might co-finance feasibility studies. This is another argument for establishing the PPP Unit as part of the MoF.
- The possibility/likely need for project development funds argues for a transparent/accountable unit within the MoF. Project development funds, incidentally, are required for two reasons:
  - PPP projects cost more to prepare than pure public projects (an excess recouped in operating efficiency) – many bureaucrats do not realize this; and
  - Preparing initial projects is more costly.

A unit in the Ministry of Finance (MoF) is clearly separate from an Investment Promotion Agency, a line ministry, or a municipal public works office.

III Status of PPP in infrastructure in COMESA

1 Background and Figures

During the 1980s and early 1990s, PPPI became popular as an extension of privatization activities. Power generation BOT-type arrangements with off-take agreements, for example, drew much attention. Greenfield telecoms investments were also extremely popular. However, this sector concentration did not generally lead to a broader set of laws and regulations overseeing a variety of PPP contract types with applicability to multiple sectors. A multitude of reasons existed for this, including the operational silos of line ministries.

Greenfield telecoms investments were also extremely popular.

There is now a new interest in PPPs after a relatively quiet period in Africa and other regions in the late 1990s and early 2000s.

The PPI database maintained by PPIAF, a multi-donor-funded facility under the World Bank/IFC, is the most sophisticated attempt so far to create a global database of PPI projects. The PPI database does not cover social infrastructure/ PFI-model PPPs. It does cover the energy sector (electricity and natural gas), telecommunications, transport (airports, seaports, railways, toll roads), and water and sewerage (treatment plants and utilities).

Table 2: Distribution of COMESA PPP Projects 1990-2007 (Financial Closure)

COMESA Member	PPP Projects w Financial Closure 1990-2007	Main Sector	Second Sector	Total Investment (all projects, $mn)	# of Greenfield	# of concessions
Burundi	3	Telecom	n/a	54	3	0
Comoros	2	Transport	n/a	1	0	1
D.R.Congo	7	Telecom	n/a	915	6	0
Djibouti	4	Transport	n/a	480	2	1
Egypt	22	Telecom	Energy	15,352	15	2
Eritrea	1	Telecom	n/a	40	1	0
Ethiopia	0					
Kenya	16	Telecom	Transport	3935	10	1
Libya	0					
Madagascar	9	Telecom	Transport	216	4	3
Malawi	6	Telecom	Transport	133	3	0
Mauritius	11	Telecom	Energy	549	9	0
Rwanda	5	Telecom	Energy	206	2	0
Seychelles	3	Telecom	n/a	94	3	0
Sudan	7	Telecom	Water / Sewerage	2101	5	1
Swaziland	1	Telecom	n/a	53	1	0
Uganda	15	Telecom	Energy	2352	7	5
Zambia	6	Telecom	Energy	944	2	1
Zimbabwe	5	Energy	Telecom	841	4	0

Source: PPIAF Database, World Bank.

2 Sectoral Comments on Infrastructure Provision in COMESA

Research conducted by Vagliasindi and Nellis for the Africa Infrastructure Country Diagnostic Project (AICD) provides an overview of the state of PPI in African infrastructure sectors. This analysis is for Sub-Saharan Africa rather than COMESA, but the disaggregated data will be released in due course, in the context of the AICD project report, and appears to have more detail than the PPIAF database alone. Table 3 gives a summary of the impact and achievements of PPI in Africa.

The AICD project focuses on Africa's infrastructure financing gap, and how to fill it. In that context it considers the possible role of PPI. Findings are only just being released, and country- and sector-specific breakdowns will be available shortly. Early general conclusions include:

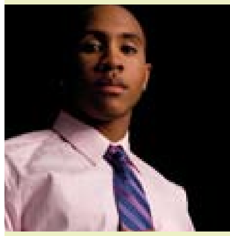
- PPI provides overall twenty percent (or $4.8bn) of current annual expenditure on infrastructure capital investment (ICT, Power, Transport and WSS) in SSA. Of this, a full $3.1bn is in the telecom sector (57 percent of annual $5.4bn Capex) (pp. 8-9);
- World Bank estimates an annual funding gap (Capex and maintenance) of $40bn per annum, but notes that there is a minimal funding gap for telecoms, which is partly correlated with the private sector's willingness to finance much of the needed investment. Needs clearly remain in the more public goods areas of fiber-optic backbones, submarine cables and the like, but the track record so far is good;
- Eighty percent of the financing gap is still in power. The biggest financing gaps are in the energy and transport sectors of fragile states;
- African countries typically manage to spend only two-thirds of the budget allocated to infrastructure investment, suggesting that there is an expertise gap - a strong argument in favour of a technical infrastructure project management unit allied with a PPI Unit function;
- Collection of billed utility charges represents a major challenge, with both government agencies and consuming individuals failing to make payments. Clearly, "point of sale" (POS) billing solutions are the most effective option (e.g. mobile phones).

The biggest financing gaps are in the energy and transport sectors of fragile states.

Table 3: Overview of PPP Experience in Infrastructure in SSA

	Extent of PPI	Nature of experience	Prospects
ICT			
Mobile telphony	Over 90 percent of countries have licensed multiple mobile operators	Extremely beneficial with exponential increase in coverage and penetration	A number of countries still have potential to grant additional licenses
Fixed telephony	60 percent of countries have undergone diverstiture of SOE telecom incumbent	Controversial in some cases, but has helped to improve overall sector efficiency	A number of countries still have potential to undertake divestitures
Power			
Power generation	34 IPPS provide 3,000 MW of new capacity investing US$2.5 billion	Few cancellations but frequent renegotiations, PPA have proved costly for utilities	Likely to continue given huge unsatisfied demands and limited public sector capacity
Power distribution	16 concessions and 17 management or lease contracts in 24 countries	Problematic and controversial with one quarter of contracts cancelled before completion	Movement toward hybrid models involving local private sector in similar frameworks
Transport			
Airports	4 airport concessions, investing <US$0.1 billion, plus some divestitures	No cancellations but some lessons learned	Limited number of additional airports viable for concessions
Ports	26 container terminal concessions, investing US$1.3 billion	Processes can be controversial but cancellations have been few and results positive	Good potential to continue
Railroads	14 railroad concessions, investing US$0.4 billion	Frequent renegotiations, low traffic and costly PSOs keep investment below expectations	Likely to continue but model needs to be adapted
Roads	10 toll rad projects almost all in RSA, investing US$1.6 bn	No cancellations reported	Limited as only 8 percent of road network meets minimum traffic threshold
Water			
Water	26 transactions mainly management or lease contracts	Problematic and controversial with 40 percent of contracts cancelled before completion	Movement toward hybrid models involving local private sector in similar frameworks

Source: AICD, 2009, p.18, adapted from Vagliasindi and Nellis, 2008.



3 COMESA PPI Legal Framework Overview

The following COMESA countries have enacted or are in the process of enacting a suitable PPP legal framework according to the main criteria, as described above.

In **MAURITIUS**, the Public Private Partnership Policy Statement, dated May 2003, describes the rationale and the framework within which PPP transactions may be used. It sets out the priority sectors where PPP transactions may occur (public utilities - water and energy, transport, waste management, health, education and vocational training and ICT) and provides for the institutional organization. This encompasses a PPP unit composed of members of the Ministry of Finance and Economic Development, in charge, amongst other things, of approving proposed projects and providing advice to the Government on administrative procedure for PPP projects and best practice guidelines.

PPP transactions may occur (public utilities - water and energy, transport, waste management, health, education and vocational training and ICT) and provides for the institutional organization.

Following this, a piece of PPP legislation (Public Private Partnership Act 2004) was enacted in March 2005. This defines several modes of remuneration of private parties to the PPP agreement by means of compensation from a revenue fund, direct collection of users' charges or a combination of compensation or fees. The Act does not expressly define the different types of PPP arrangements to be used by the contracting authorities, which must select arrangements based on the Government's policy in a specific sector and the potential value for money generated from the chosen type of contractual arrangement.

The Act also provides for the bidding process and sets out minimum requirements for terms and conditions of the PPP agreement.

However, despite these provisions, the approval process for PPP agreements remains unclear, with the PPP unit, the Central Tender Board and the Cabinet of the Government each having some responsibility in the process.

In **UGANDA**, there is no specific legal and institutional framework for PPP. However, the country went through a vast programme of privatization and divestiture in the mid 90's and has established regulatory authorities in numerous sectors (including electricity and telecommunications). Uganda has also been actively involved in the development of PPPs in the health sector in Africa, carrying out pilot PPP projects aimed at improving drug access to four tropical diseases and HIV/AIDS (ref: Pilot study under the Initiative of Public Private Partnership for Health funded by DFID) and in the agribusiness sector (oil palm industry, commodities).

A PPP Central Unit was recently established within the MoF in accordance with the Government's Public Private Partnership Programme.

The Ugandan Procurement and Disposal of Assets Act of 2003 governs the procurement of works and services under PPP schemes and established a Procurement and Disposal of Assets Authority, with the responsibility to "advise Central Government, Local Governments and statutory bodies on all public procurement and disposal policies, principles and practices and monitor and report on the performance of the public procurement and disposal systems in Uganda and advise on desirable changes". Moreover, this Act does not permit negotiations between the potential bidders and the contracting authority, except by regulation - precluding any consultative phase in the bidding process and potentially preventing the optimal allocation of risks and transfer of technology.

EGYPT has been promoting PPPs in connection with major infrastructure projects over a number of years, and as a result has developed substantial experience in this area, despite the fact that there is no specific PPP legislation (it is under preparation). A PPP Central Unit, responsible for the coordination of the PPP national program across ministries and public bodies under the authority of the Ministry of Finance and the supervision of the PPP Ministerial Committee, was recently established within the MoF in accordance with the Government's Public Private Partnership Programme. The PPP arrangements are currently governed by the applicable rules and regulations relating to each sector and the Procurement Law 89 of 1998, which may need to be revised to respond to the specifics of PPP procurement under the new PPP law in preparation.

The case of **SOUTH AFRICA**, as mentioned above, is of particular interest for our purposes, even though it is not a member of COMESA. South Africa does not have a specific PPP Framework Law. Rather, the Treasury's Public Finance Management Act regulates and sets out the responsibilities to ensure efficient and effective government financial management. Meanwhile, the Treasury's PPP Manual lays out the required approvals, responsibilities and detailed guidance. (PPIAF, 2009, p.14)

4 COMESA PPP Institutional Framework Overview

PPP Units have been regaining popularity in recent years in Africa. PPIAF observes that over the 2006-07 period PPP units were established (or formally labelled as such) in **Egypt, Malawi, Mozambique** and **Tanzania** (PPIAF, 2007, p.1). Long-standing units exist in **Mauritius** (est. 2002) and **South Africa** (est. 1999). In some cases, these units have grown out of Privatization Units, or aspire to do so. **Uganda** and **Kenya** both seem to be in the process of formalizing PPP units.

PPIAF notes "good practice" PPI Units in Africa/COMESA as follows, in addition to the Infrastructure Consortium for Africa (ICA) as a regional body. ICA was the institutional author of the PPIAF 2009 report on Attracting Investors to African PPPs:

- Egypt: MoF PPP Unit (http://pppcentralunit.mof.gov.eg)
- Mauritius: MoF PPI Unit (www.gov.mu/portal/sites/ncb/ppp/index.htm)
- South Africa: National Treasury PPP Unit (www.ppp.gov.za/)

South Africa is not in COMESA but is of extreme relevance to COMESA, as already noted.

These three PPP Units share the fact that they are all units within the Ministry of Finance of their countries. As discussed earlier, this has distinct advantages in particular in the context of countries with weaker governance, although it is a sensible approach in many countries. Although countries such as Uganda (and possibly Zambia) are considering reinvigorating privatization agencies, the danger is that the same institution will eventually be in charge of both generating projects and carrying out financial due diligence.

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South Africa is now considered a sophisticated PPP country, with a legal and institutional framework that was established in 1998 and has since been further consolidated.

The PPIAF-sponsored investigation of PPI Units in 2006-07 (PPIAF, 2006) focused on 10 successful and unsuccessful cases in developed and developing countries. South Africa's PPI Unit was the only one considered in Africa. Specifically, in addition to being a successful model for PPP legal and institutional arrangements, according to PPIAF research, South African infrastructure investors are incredibly important for COMESA members, especially those in sub-Saharan Africa.

Over the period 1998-2004, over 65 percent of private infrastructure investment in Africa came from firms in developing countries, whether local or foreign. Much of this came from South African investors. This is an important point, because although South Africa is not part of COMESA, those investors will expect and value a PPP experience that is similar to that of their home country. South Africa is now considered a sophisticated PPP country, with a legal and institutional framework that was established in 1998 and has since been further consolidated.

That said, a survey report commissioned by the Presidency and the Business Trust of South Africa, involving interviews with the private sector (users), implementing agencies (line ministries, municipalities), and the National Treasury and its PPI Unit itself, was less positive about the PPP experience. This project's final report will provide valuable input to our project. Nevertheless, we believe that it is worthwhile to treat the case of South Africa as an integral part of our fieldwork.
The fieldwork for this project will allow us to look into the success of different PPP Unit models in COMESA and nearby.

IV Fieldwork country recommendations & workshop/coordination suggestions

1 Recommendations for three Target Fieldwork Countries

Criteria for country selection are:

- Experience with PPP, and existence of successful cases
- Capture diversity of PPP countries.

The pattern and distribution of PPP projects in COMESA, based on information from the PPIAF PPI database, is shown in Table 2 above. The database contains all Energy, Water, and Transport sector projects that achieved financial closure over the 1990-2007 period. It does not cover social infrastructure projects of a capability/Private Finance Initiative type. The main COMESA member countries with a track record of PPP investments in various sectors are Uganda, Kenya, Egypt, Madagascar and Mauritius. Based on volume of deals, and diversity across sectors and type of deal, these are clearly the main candidates for fieldwork.

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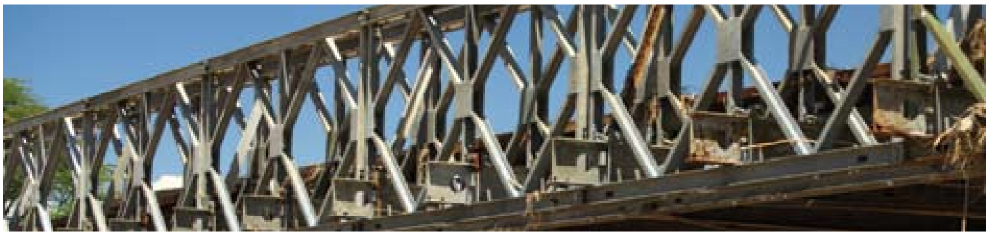
Table 4 shows the five COMESA countries with the largest aggregate PPI-type investments as collected by the PPIAF database, along with various legal, institutional and geographical characteristics.

Table 4: Legal / Institutional Characteristics of Five Short List COMESA Members for Fieldwork

COMESA Member	Legal System	PPI Unit Exists?	Large, Medium OR Island / Small	WB Gov. Reg. Quality Percentile	Ease of Doing Business Ranking (WB)	Total Investment (all projects, $mn, PPIAF DB)
Egypt	Civil	Yes	Large	43.2	114	15,352
Kenya	Common	Being Considered	Large	47.1	82	3935
Madagascar	Civil		Island/Small	49.0	144	216
Mauritius	Mixed Common/ Civil	Yes	Island/Small	68.0	24	549
Uganda	Common	Privatization Unit Being Considered	Medium	48.5	111	2352

Source: World Bank, PPIAF PPI database.



The next level of criteria includes:

- Existence of suitable legal framework
- Existence of central PPI unit that has developed (through whatever means) some capacity as a central coordinator and expert.
- Diversity of Civil/Common law legal systems
- Diversity of continental, landlocked and island countries

We propose to visit COMESA countries that have an established, somewhat diversified track record of investment; that have diverse geographical and legal backgrounds; that are relatively advanced in terms of their systematic legal and institutional approach to PPPs; and where there is evidence of pro-activity towards stimulating PPP for efficiency purposes. Our recommendations are as follows.

Given the Egypt Unit's pro-activity and the RIA's coordinating function, we believe that Egypt is a sensible first stop, since this will help to consolidate introductions and interviews in other fieldwork countries.

Egypt. Egypt has an established PPP Unit within the Ministry of Finance, and has PPP framework legislation in process. Egypt also has the largest volume of PPP deals by far, and is known for its pro-activity in PPP deals despite often difficult administrative circumstances (in the 43rd percentile on the World Bank's aggregate regulatory quality governance rankings, and 114th in the overall Ease of Doing Business ranking by the World Bank). In logistical terms, the COMESA Regional Investment Agency (RIA) and project direct beneficiary is in Cairo, and for both project strategy and information gathering purposes, and as a leading example of effective PPP arrangements in difficult circumstances, we propose Egypt as a fieldwork country. Given the Egypt Unit's pro-activity and the RIA's coordinating function, we believe that Egypt is a sensible first stop, since this will help to consolidate introductions and interviews in other fieldwork countries.

Uganda. Uganda has, as yet, no specific legal or institutional framework for PPP, but has a significant and sectorally varied track record of deals. The Privatization Unit has been involved in many of the more successful transactions, and in countries with relatively weak governance it is usually better to work with what exists rather than create new institutions from scratch. Recent PPIAF-commissioned PPI Unit feasibility and design work in Uganda points out that Uganda, like South Africa, may not in fact require specific PPP legislation, or could make do with a very simple framework law. The Privatization Unit (PUSRP) may well aspire to become a formal PPP Unit, and the fieldwork should bear that possible bias in mind, but this also translates into a valuable pro-activity, and we will be comparing and contrasting Uganda's proposed set-up with other possible arrangements.

Mauritius. Mauritius has specific PPP framework legislation and accompanying regulations that combines Francophone and Anglophone legal traditions (although we suspect that this might not ultimately be a critical distinction). The PPI Unit is long established and well-respected, and has experience across a variety of sectors. The small size of the country means that Mauritius has both one of the most intensive experiences of PPP projects, and experience of implementing smaller-scale projects that could be relevant to other countries as they try to expand their reach downwards to smaller projects.

Proposed Fieldwork Countries
Egypt Mauritius Uganda (South Africa)

South Africa. South Africa, whilst not a member of COMESA, is particularly relevant to this study for reasons already noted. As the country's legal and institutional PPP enabling environment is well documented on their website and in objective studies, it may not be necessary to visit this country as part of the fieldwork. Given that South Africa is generally regarded as an example of global best practice in many regards, and given further that many private investors in PPPs elsewhere in Africa are likely to come from South Africa and expect something similar where they invest, we should seriously consider engaging them in the concluding workshop in Swaziland. In addition, if time permits en route, and perhaps as a last stop on the fieldwork, it could be useful to experience the South Africa facilities and model first hand, and to conduct a few key meetings.

2 Update on Scheduled Fieldwork Countries

The fieldwork countries ultimately selected and approved were South Africa, Mauritius, Rwanda and Uganda. Egypt was not included in the fieldwork at the request of COMESA RIA, since many studies had already been undertaken, and since COMESA RIA will be present at the Validation Workshop to present the Egypt PPP Framework case study. Rwanda was selected to replace Egypt because the government was seen to be actively seeking to develop a PPP framework.

Egypt was not included in the fieldwork at the request of COMESA RIA.

V Annexe

Annex 1: Selected Resources

Briceno-Garmendia, C. et al. 2008. *Financing Public Infrastructure in Sub-Saharan Africa: Patterns, Issues and Options.* Africa Infrastructure Country Diagnostic (AICD) Program, Washington, DC: World Bank. Unpublished Background Paper.

AICDP (World Bank). 2009. *Africa's Infrastructure: A Time for Transformation. Summary of Main Findings.* Washington, DC: World Bank.

PPIAF. 2007 (October). *Public-Private Partnership Units: Lessons for their Design and Use in Infrastructure.* World Bank: Washington, DC.

PPIAF. 2009 (January). *Attracting Investors to African Public-Private Partnerships: A Project Preparation Guide.* World Bank: Washington, DC.

Sanghi, Apurva, Alex Sundakov, and Denzel Hankinson. 2007. "Designing and Using Public-Private Partnership Units in Infrastructure: Lessons from Case Studies around the World." *Gridlines* Note 27. World Bank, PPIAF: Washington, DC.

Gassner, Katharina. 2008. Does *Private Sector Participation Improve Performance in Electricity and Water Distribution.* Washington, DC: World Bank, 2008.

Schur, Michael et al. 2006 (April). "The role of developing country firms in infrastructure." *Gridlines* 3. Washington, DC: World Bank.

World Bank. 2006 (June). *India: Building Capacities for Public Private Partnerships.* Washington, DC: World Bank, Energy and Infrastructure Unit and Finance and Private Sector Development Unit (South Asia Region).

This Report also benefited from discussions with experts in Washington at the World Bank and PPIAF. It was pointed out that feasibility studies and design work are currently ongoing in Kenya and Uganda regarding the formalization of PPP policies, legal frameworks and institutional structures. We hope to be able to draw on these documents over the course of this assignment.

Towards a private sector enabling environment

A Facility financed by the European Development Fund

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