1.5 Legal and regulatory coherence, including at regional level

More generally and beyond these core standards of investor protection, the clarity and predictability of the infrastructure investment regime may require legal and regulatory harmonisation. Introducing a PPP law is an option, not a requirement, for developing a PPP programme: Indonesia, Thailand, and Brazil have such laws, while for example Botswana, the UK, Australia, South Africa, and Mexico do not. Nevertheless, dedicated PPP laws can help regulate more specific elements necessary to ensure the success of PPP contracts, as long as they are made 'user-friendly' so as to avoid excessive complexity which can otherwise deter public entities from adopting the PPP route. In countries newly seeking to attract investors to PPP projects, the elaboration of a PPP Policy and PPP Law can also be a useful mechanism for guiding procurement agencies, raising awareness, and reflecting the government's policy stance with respect to private participation in infrastructure (as an additional form of "commitment technology").

Yet as PPPs are a nascent form of procurement in many countries, pre-existing legislation on investment, procurement and concessions is not always entirely consistent with the new laws. The definition of PPPs, relative to other forms of infrastructure procurement, can especially be subject to confusion for both public and private actors. The conditions for undertaking a PPP may also be too restrictive and give excessive preference to less innovative forms of procurement. For instance Article 14 of Tunisia's draft PPP law sets the condition that PPPs are to be undertaken only under three conditions: if the contract is too complex (financially or technically) for the public authority to shoulder it; under matters of urgency; or in case of failure or underperformance of similar projects having espoused different contractual forms in the past.

Regulations at sector level may likewise come into conflict with the new PPP or procurement regime. Alongside, some institutional overlap may also occur regarding which authorities are responsible along the different steps of the infrastructure project's life cycle. Mauritius has for instance sought to overcome this risk by establishing Memoranda of Understanding among the different agencies tasked with the oversight of concession procedures and of infrastructure sectors: MoUs thus exist among the Competition Commission, the Public Procurement Office, and various sector regulators.

Legal and regulatory harmonisation also has implications for projects undertaken at the regional level. Countries can for instance make progress towards common criteria for bid selection and for evaluation of value-for-money and PPP viability. Joint projects could also be facilitated via shared standards for transparency of the procurement process, as well as shared rules on project cancelation and compensation. To avoid 'free-rider' risks during project implementation, it is moreover crucial for the governments of all countries involved to commit ex-ante to a sufficient allocation of budgetary resources, and to agree on shared development priorities that should be upheld throughout the course of the project. Country collaboration could be further supported by inter-country Memoranda of Agreement, as well as by mechanisms for regular dialogue between the public parties involved.

1.6 Key policy take-aways

- Changes in government positions on private sector participation in infrastructure (within a single administration but also across election periods and beyond party lines) can severely shake investor confidence. Where they take place, they should be clearly explained and delineated in the interest of preserving future policy predictability. Moreover clear and holistic long-term infrastructure and development plans (which firmly emphasise the role of private sector participation) can help regain investor confidence.

- The legal framework for investment (including such as is established through international agreements, IIAs) must contain a sound, clear and detailed provision that lays down the obligation for compensation in the event of an expropriation. Other core standards of treatment include a well-defined fair and equitable treatment provision, and a right to resolve through arbitration any disputes that may arise in the course of the project operation. Parties to cross-border projects should agree on a framework for dispute resolution and contract re-negotiation.

- By clearly delineating investment protection principles, countries can also better protect themselves from costly cases of international arbitration. Large discrepancies between what is provided for in the domestic regime and the country's international commitments should be avoided in the interest of clarity and reliability for investors and host governments alike.

- PPP laws can help manage the transition towards greater private participation in infrastructure. PPP laws should usefully include: the definition and scope of a PPP (contractual attributes, size and duration of PPP contracts); the principles by which PPP contracts will be structured, procured, managed, and reported; the modalities by which projects risks will be allocated; and the institutional structure and processes established for managing and overseeing PPPs.

- In order to give optimal results, PPP legislations must also be consistent with pre-existing and broader-spectrum legislations on investment. They should also be made 'user-friendly' for procuring entities; procurement manuals, tailored to country context, can provide valuable help in this regard.

2. ENSURING SUCCESSFUL AND LONG-LIVED PROJECTS: MITIGATING PROJECT RISKS AND OBTAINING VALUE-FOR-MONEY

2.1. Upstream contract preparation: national investment plans and feasibility studies

Once national infrastructure development strategies are in place, the next stage is infrastructure investment programming, whereby a preliminary list of priority projects is developed. Colombia and Mauritius provide useful examples of how to embed infrastructure projects within broader public sector investment plans. Colombia's National Development Plan (NDP) includes a multi-year Investment Plan, the main tool for determining the country's investment needs in infrastructure. To monitor the NDP's objectives, a dedicated information system keeps track of the life cycle of the country's public investment projects, from their formulation to budget programming, execution and monitoring (Colombia 2012). Similarly, the Mauritius Public Sector Investment Programme (PSIP) serves as a basis for Performance Based Budgeting (PBB) by government agencies, identifies possible areas for private domestic and international investment, and highlights policy changes required for encouraging inflows into these areas (Mauritius 2014). Beyond keeping track of public spending, well-organised infrastructure investment programming ensures the coherence of long-term infrastructure development plans, and helps delineate the respective roles of public procurement and private participation in this regard.

Before they are included in finalised public sector investment plan however, and regardless of the degree of private investment, priority projects must be evaluated using such tools as benefit-cost analysis, to ensure that the social, environmental and economic benefits justify the use of public funds, and that the annual costs fit within the budgetary envelope. The evaluation process for each project begins with a pre-

feasibility study, followed by full appraisal for projects that survive an initial screening. The latter should consider all relevant aspects of sustainable development, including the environmental and social repercussions of large-scale infrastructure projects. In China, Environmental Impact Assessment (EIA) is a requirement for all development projects under the EIA Law 2002. This law also provides for a strategic environmental assessment to complement the project-oriented EIA process in regional and sector plans and programmes (China 2008). Finally these evaluation procedures need to be complemented by financial sustainability analysis.

Feasibility studies are particularly useful tools to determine the extent and desirability of public participation in a given infrastructure project – that is, whether the project is amenable to private sector involvement or whether it would be better suited to traditional infrastructure procurement (based on the "design-bid-build" approach). The feasibility study should therefore include a complete risk analysis. Indeed the greater the degree of private sector involvement, the larger the transfer of risks from the public to the private actor (see Figure 2.1). As further detailed in the next section, this large spectrum of risks (from design and construction risk, through demand risk, and to early termination risk[2]) must be appropriately allocated among public and private parties. The *OECD Principles for the Governance of PPPs* provide guidance on how governments can help secure value-for-money (VFM) when making these infrastructure investment decisions, from the project prioritisation and pre-feasibility stages through to the operational phase.

Careful upstream project preparation is resource-intensive, and dedicated sources of finance can be a useful way of meeting these costs. India, for example, has established the India Infrastructure Project Development Fund (IIPDF), a revolving fund with an initial budgetary outlay of 1 billion rupees, replenished through fees earned from successful bidders. The IIPDF ordinarily assists up to 75% of project development expenses in the form of interest-free loans (India 2009).

Figure 2.1. Spectrum of private participation and risk transfer in infrastructure provision

	Low → Extent of private sector participation → High → Increasing share of risk shouldered by private partner →				
Form of procurement	Traditional public procurement (TIP) & SOE provision		Private Participation in Infrastructure : Concessions & PPPs		Open competition by private operators
Type of contract	Work and service contract (often 1-3 years)	Management and maintenance contracts (3-8 years)	Concessions & PPPs (Operation and maintenance / Build operate transfer / others) where the main source of revenue for the private partners is government (10-30 years)	Concessions & PPPs (Operation and maintenance / Build operate transfer / others) where the main source of revenue for the private partners are user charges (10-30 years)	Full privatisation

[2] Key project risks include: design and construction risk; operation risk; demand risk; maintenance risk; residual value risk; exchange rate risk; interest rate risk; contractor failure risk; renegotiation risk; early termination risk; force majeure (civil disturbance/ war/ security); technology risk; expropriation risk; breach of contract / non-honouring of sovereign financial obligations.

Source: OECD, adapted from: Straub, S. (2009). Governance in Water Supply. Thematic paper for the Global Development Network project.

Project preparation should also involve adequate consultations with end-users and other stakeholders prior to the initiation of the project, preferably at the planning stage. Indeed private participation in infrastructure is unlikely to be successful unless authorities have assured themselves beforehand that the envisaged undertakings are in the public interest and are acceptable to consumers and other stakeholders. Among the countries considered in this report, Colombia, Indonesia, Malaysia, Mozambique, Nigeria, and Zambia have all made use of BOT modalities to encourage private sector investment in highways financed by tolls. Not all of these projects have met expectations, in part due to weak communication ex-ante which resulted in public resistance once the roads and their tolls became operational. Particularly where newcomers are expected to address long-standing problems of inefficiency or mismanagement, or if the transfer of infrastructure services to the private domain is linked with the introduction of user fees or reduction of subsidies, public consultations can help establish a realistic expectation of what the private sector can achieve.

2.2 Risk allocation

According to the OECD *Principles for Private Participation in Infrastructure*, infrastructure project risks should be allocated to the party who can best control it or bear it at least cost. The private partner is best suited to assume the commercial risk (linked to variations in demand and revenue from users), while the public partner is better able to assume the legal, regulatory and political risks. The balance of risks differs across infrastructure sectors. When a sector is politically sensitive, as the case with water and sanitation for instance, the revenue risk (due to variability in user fees and government subsidies) and sub-sovereign risks (due to management at local level where capacity may be weak) are greater. When the quality of the existing infrastructure cannot be adequately assessed (e.g. water mains), the possible hidden costs of maintenance and rehabilitation can represent important contractual risk.

There are four broad types of PPP modalities: management contracts, lease contract, concessions, and build-operate-transfer (BOT) schemes and its many variants. Figure 2.2, adapted from the website of Nigeria's Infrastructure Concessions Regulatory Commission, illustrates how these different forms of project delivery vary in terms of asset ownership, risk transfer, contract duration, and the share of responsibilities among public and private parties. The Government of India likewise provides a good explanation of these modalities in its on-line toolkit for solid waste management. As these different project types consist in various risk-sharing arrangements that all have their own costs and benefits, it is crucial to ensure that the choice among them will arrive at the most cost-effective option of infrastructure provision that provides the most value for money for end-users.

Figure 2.2. Forms of PPP Delivery: differences in asset ownership, risks, and contract duration

Contract type & duration	Asset ownership	Capital investment	Commercial risk	Responsibility for O&M	Service & payment to private provider
Service contract (1-3 yrs)	Public	Public	Public	Public & private	Definitive fee paid for technical service by Gvt to private provider
Management contract (3-8 yrs)	Public	Public	Public	Private	Private sector manages operation of Gvt service & receives direct fees from Gvt
Lease contract (5-10 yrs)	Public	Public	Private	Private	Private actor manages, operates and/ or maintains a public service to specified stds; user fees charged & rent paid to Gvt. for use of facility
Concessions & PPPs (BOTs, BOOs etc) (10-30 yrs)	Public & private	Private	Private	Private	Private actor manages, operates, maintains and/or invests in infrastructure to specific outputs & stds; fees charged to users; may also pay concession fee to Gvt.

Source: OECD, adapted from: Nigeria Public-Private Partnerships Manual, "Overview of PPP Delivery Models". Nigeria Infrastructure Concessions Regulatory Commission (ICRC, 2012).

This choice on the extent of private participation in infrastructure can be facilitated by transparent public procurement and PPP frameworks, and should be based on assessing the comparative advantage of each potential actor in providing the service. This can include calculating a Public Sector Comparator (PSC), which estimates the hypothetical risk-adjusted cost of a project if it were to be wholly financed, owned and implemented by government and any relevant SOE. *ProInversión* has also developed risk matrices to identify, assign and mitigate possible risks related to concession agreements based on the principle that risk should be assumed by the party that can manage it better (Peru, 2008). The public sector's participation in infrastructure project finance should also be fully reflected in the government budget.

In most countries, bid evaluation procedures as well as value-for-money and fiscal viability assessments are explained in guidance manuals provided by a central body, while the actual procurement is usually decentralized to the relevant ministry or local authority. These guidance manuals cover every step of the contract preparation and bidding process, and can easily draw on those developed by international financial institutions. The 2008 'Manual on Standard Operating Policies and Procedures' of Botswana's Public Procurement and Asset Disposal Board (PPADB), and the 2006 PPP Guidance Manual released by the Mauritian PPP Unit, are two useful – if somewhat dated – examples of such manuals.

In the interest of legibility and relevance for public authorities, this guidance must carefully be tailored to individual country specificities. For instance Nigeria's Infrastructure Concession Regulatory Commission (ICRC) makes a very user-friendly website available to public authorities, adapted to both federal and state-level infrastructure procurement needs in Nigeria. In addition the Lagos State Office of PPPs details the conditions under which various forms of tendering can take place – from international and national competitive bidding, to two-stage bidding, restricted or selective bidding, single source procurement or framework contracting – together with the recommended timeframe for each method.

2.3. *Financing infrastructure programmes*

According to the World Economic Forum, an estimated USD 60 trillion needs to be invested in global infrastructure between 2013 and 2030 to support growing population needs. Of this amount, only about USD 24 trillion is currently earmarked for the infrastructure sector (WEF, 2013). In developing countries, filling coverage gaps and sustaining growth will imply a doubling of current infrastructure investment levels (EIB, 2010). Although private participation in infrastructure has fallen in recent years due to the global financial crisis, with appropriate incentives it could be returned at least to the previous levels. Alongside these private inflows, public sector investment itself should be increased and better allocated.

On the private sector side, bank financing is difficult in many developing countries due to the narrow, concentrated and illiquid nature of the domestic banking sector. High interest rates and financial regulations can reduce the attractiveness and availability of this form of financing as well. Nevertheless some countries have successfully made use of bank lending secured by companies' balance sheets: such 'asset finance' has been the second biggest contributor to renewable energy financing in Malaysia. Since the financial crisis began, bank finance has nevertheless been much more difficult to obtain.

Provided that a stream of revenues from the project can be estimated within a reasonable degree of accuracy, project financing is another option. Since the underlying assets of infrastructure projects are long-lived, these projects lend themselves to long-term financing which usually takes the form of bonds or long-term institutional investment (on behalf of pension funds and insurance companies, or by establishing Special Purpose Vehicles for instance). Malaysia's Employees Provident Fund (EPF) is the sixth largest sovereign pension fund in the world with over a third of its investment portfolio in loans and bonds, used in part to finance infrastructure projects. Malaysia also released its first infrastructure-related bonds in the mid-1990s (Malaysia 2013). Meanwhile Namibia has successfully issued corporate bonds, South Africa has issued municipal bonds and equity, and Mozambique, Uganda and Zambia among others have issued bonds for power sector projects (EIB 2010).

On the downside however project financing often requires an 'investment grade' credit rating (be it at the project or country level); this can be particularly difficult to secure for developing countries, of which only a minority are comprehensively assessed by international credit rating institutions. Regulations can also complicate the ease for institutional investors such as pension funds to invest in infrastructure markets outside of their home countries. On the host country front, different markets in the non-banking financial sector of many African countries (capital, pensions, and insurance) are either overseen by the central bank, or regulated by separate supervisors (such as external agencies, or even the ministry of finance or independent securities commissions). Unless the institutional supervision framework for different financial markets falls under a single unified regulator (such as in Botswana, South Africa and Namibia, but few other African countries), this multiplicity of oversight agencies can complicate the landscape for project financing. To tackle these different obstacles, home country regulations would need to be reviewed and modernised, while host-countries could make progress on oversight of the non-banking sector, as well as on minimising restrictions (regarding access to local markets and obstacles to international capital movement) where they exist.

On the public sector side and to complement private inflows, finance can be provided by government budgets, bilateral or multilateral development finance institutions, export credit or guarantee agencies, and development assistance agencies. Public sector finance can also be used to leverage private sector finance, so as to support a portfolio of infrastructure projects substantially larger than if all the finance had to come from the public sector and development partners. For example to address the financing needs of infrastructure PPP projects, the government of India has established the India Infrastructure Finance Company Limited (IIFCL) to provide long-tenor debt to infrastructure projects. The government has also

launched a scheme for financial support to PPPs to provide "viability-gap" funding to PPP projects that would otherwise not be financially viable (India 2009).

2.4. Project monitoring

During project roll-out, it is necessary to regularly check to what extent the assumptions made during project preparation align with reality. Ensuring quality delivery during project roll-out requires dedicated staff. They may be a temporary team drawn from the agency in charge of procuring the project or they may be in a permanent unit of government that can be drawn upon for this purpose. For instance India has an independent project monitoring unit in the Ministry of Statistics and Programme Implementation, which can provide monitoring services to other units of government based on MoUs. In the case of PPPs, project monitoring may be done in a dedicated PPP unit. Given the variety of oversight options available, the legal regime for public procurement needs to specify who will be responsible for monitoring project implementation.

For effective monitoring, the procurement contracts themselves must also specify timelines, deliverables, and metrics with enough precision for the monitoring unit to validate the performance of the contractor. In cross-border projects these must be agreed upon by all public parties. Among other methods, contracts can be settled through performance-based procurement (PBP). Under PBPs payments are made based on the quantity delivered during specified time periods subject to a quality standard. In the bidding process the inputs are not specified, as it is up to the contractors to specify how they intend to achieve the desired results. Payments to private providers often take the form of fixed monthly payments plus a variable amount based on performance standards set in the contract. Some contracts also call for retention of payments if results fall short of the quantities specified, or for premium payments in the inverse case. Various developing and emerging economies have attempted PBP contracts relatively early on (for instance Venezuela in 1997 with Aguas de Monagay, or Jordan in 1999 with Aman Water and Sewerage Management). By contrast more traditional forms of infrastructure procurement tend to include detailed technical specifications, with less room for innovation (but also less risk transfer) for the private party (see Figure 2.2 above).

The advantages of PBP are their greater cost-effectiveness, and scope for technological innovation. However, there are disadvantages. The need for higher performance security (shifting risk for delivery of outcomes to the private partner) may mean higher project costs and thus may result in fewer qualified bidders; the preparation of functional specifications may require sector-specific specialised training; and the evaluation of options using different engineering specifications may require hiring external expertise. Section 3.2 below addresses in more detail the importance of adequate public sector capacity for managing private participation in infrastructure projects, from conception to contract termination.

2.5. Key policy take-aways

- Investment projects and infrastructure priorities should be developed in co-operation with local and regional authorities, involve public consultations, and be aligned with the strategic needs of specific sectors of the economy. These national strategies and plans should clearly identify the expected role for private investors to play across different infrastructure networks.

- Investment projects should be carefully evaluated by first requiring pre-feasibility studies, and – after screening – be subject to full project appraisal including cost-benefit analysis and sustainability impact analysis to ensure value for money. The public expenditure component of infrastructure investment projects should also fit within the government's budget envelope.

- Risks should be allocated appropriately between the contracting parties in public private partnerships, as well as among countries in regional projects. The contract modality chosen for a particular project will have implications in terms of asset ownership, project duration, and the degree of technological innovation required in the project. It should also to a large extent determine the degree of risk transfer.

- Sources of finance for infrastructure projects should be as varied as possible, and governments should make optimal use of national and municipal bonds (among other innovative sources). Home countries have a role to play in creating a more enabling regulatory framework that can allow investment by pension funds and other institutional investors overseas. Meanwhile host developing countries can seek to create more avenues for infrastructure bank financing, by improving the liquidity and breadth of domestic financial markets.

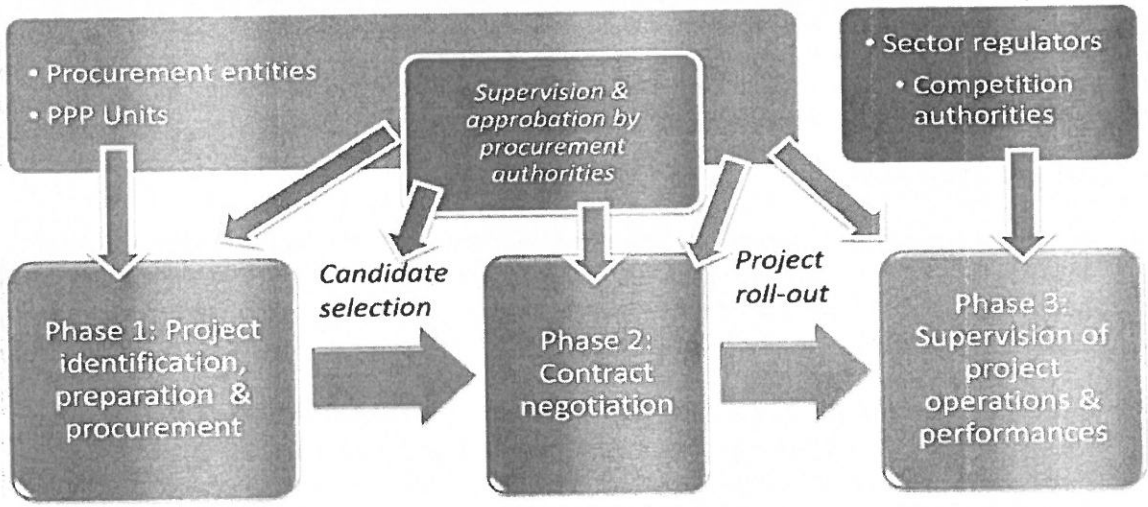
- Monitoring project roll-out requires skilled and dedicated staff in dedicated PPP Units, or other agencies responsible for project monitoring. Performance criteria can be specified in the contract and be associated with a system of penalties and rewards based on the level of performance.

3. INSTITUTIONAL ENVIRONMENT FOR SOUND PRIVATE PARTICIPATION IN INFRASTRUCTURE MARKETS

3.1. Role of PPP Units, procurement entities, and privatisation authorities

The shift towards private sector participation in infrastructure places new demands on government agencies and involves the responsibilities of multiple bodies (see Figure 3.1). Most countries have established a public authority for co-ordinating public procurement at the national level, as well as authorities for receiving appeals of procurement procedures and for overseeing privatisation processes. Many have also established specific PPP units, although with differing levels of capacity.

Figure 3.1: Implication of public agencies in the roll-out of public procurement infrastructure projects



Source: NEPAD-OECD Africa Investment Initiative

Together with Ministries of Finance, various oversight and management authorities are frequently established in order to secure an efficient use of public funds, and to ensure that public procurement is carried out in a fair and transparent manner. Most frequently this includes: central procurement authorities, which approve the award of contracts by procurement entities, and channel and re-direct all tendering and bidding from line ministries and local government (established in most countries); procurement appeal authorities with complaint and dispute resolution functions (such as the Mauritius Independent Review Panel, or Botswana's Independent Complaints Review Committee); and privatisation authorities, to oversee procurement that takes the form of outright or partial divestiture, and to monitor the performance of public entities once they have been privatised. The latter authorities tend to have a mixed track record in developing countries, with limited visibility and effectiveness relative to the line ministries responsible for initiating the divestiture process. Tanzania's Consolidated Holdings Corporation (CHC), and Tunisia's *Commission d'assainissement et de restructuration des entreprises à participation publique* (CAREP), for instance both operate very much on the sidelines of restructuring and privatisation processes regarding infrastructure companies.

In addition to the above agencies, actual procurement is carried out by the procurement entities in line ministries. The line ministry or the procuring entity's accounting officers and staff retain overall responsibility for identifying, developing, implementing, monitoring, and managing infrastructure projects in their relevant sectors – relying, in the case of PPPs, on the technical guidance of PPP Units. Both procurement entities and PPP Units are thus involved from the outset of project. Project teams are also often created from among line ministry and other government entity staff, as well as external advisors to develop and procure specific PPP projects.

While there are several institutional options for implementing a PPP programme besides establishing a PPP Unit, this has been the preferred route for many countries. Dedicated PPP Units are most often located within Ministries of Finance, which are well-placed to co-ordinate and support efforts of each line ministry. This also places the PPP projects under close supervision of budget officials and of the Auditor General who can assess the fiscal feasibility and value-for-money of projects. Other approval bodies, including the Cabinet and Parliament, must also ensure that proposed PPP projects are in line with the budget and policy priorities. Passing all projects through the Ministry of Finance for approval of their fiscal implications moreover lowers the risk that PPP Units are bypassed in procurement processes (Tunisia 2012). When PPP Units are independent of the Ministry of Finance (Bangladesh, Philippines) they can be side-lined or over-ruled.

The institutional roles and responsibilities of agencies responsible for design, negotiation and roll-out of infrastructure procurement (whether using the traditional procurement, the PPP, or the privatisation route) must be well defined and delineated. On the legal front, this requires full alignment of all relevant legal and regulatory frameworks and the administration (notably to ensure consistency with former regulations on concessions and procurement, and to align line ministries and regulatory bodies against common infrastructure development objectives).

3.2 Building public sector capacity for managing private participation in infrastructure projects

On the practical level, multiplication of the number of agencies should be avoided as this can blur lines of accountability. It is equally important that governments provide these agencies (including PPP Units) with sufficient resources to attract top-level staff with the necessary expertise. In developing countries, PPP Units are seldom adequately staffed and trained: they face difficulties in ensuring a prudent and coherent procurement process, and in negotiating and monitoring infrastructure contracts on an equal footing with private investors. In 2011 Botswana's PPP Unit comprised only two part-time staff-members, which considerably weakened the credibility of the country's PPP pipeline; by contrast the Lagos Office of PPPs brings together highly trained staff with considerable private sector expertise, which provides

guidance to all other states in Nigeria. It will be involved in supporting the establishment of equivalent branches across the country.

Beginning with a pipeline of small-scale, low-risk 'pilot' PPPs can also help build the necessary public capacity and experience. Similarly, training workshops can help enhance public sector familiarity with PPPs and other contract modalities, as long as these trainings are well tailored to country specificities. Making sure that capacity exists within contracting authorities at local level is also essential. In India, in order to meet the capacity requirements of public institutions for preparing a pipeline of bankable PPP projects and for responsibly managing the project process, state governments and central ministries are being provided with technical assistance in the form of in-house financial/risk experts, management information system (MIS) experts and access to a panel of legal firms. To intensify capacity at state and municipal level, a curriculum for training at state administrative institutes and a "Training of Trainers" programme are also being developed. India has also rationalised procurement and concession procedures, which can likewise help meet the capacity challenge. Standardised sector-specific model concession agreements and bidding documents have also been prepared (India 2009).

3.3. Key policy take-aways

- PPP Units, procurement entities and privatisation authorities should be located in appropriate ministries, and equipped with sufficient numbers of well-trained staff with experience in the private sector.

- These agencies must be given clear mandates and sufficient resources in order to both: ensure a prudent and coherent procurement process; and negotiate and monitor infrastructure contracts on an equal footing with private investors, in view of protecting the interests of society. Multiplication of the number of agencies should be avoided so as to avoid blurring lines of accountability.

- Where possible, capacity-building efforts (and the expertise of PPP Units) should be extended to the local government level in order to facilitate private participation in small-scale infrastructure projects. Beginning with a pipeline of small-scale, low-risk 'pilot' PPPs can also help build the necessary public capacity and experience.

- Dedicated authorities can facilitate oversight of procurement processes and enhance investor confidence. Procurement boards, agencies tasked with dealing with procurement complaints, and bodies which can monitor the performance of former SOEs once they have been divested or privatised, must be granted the requisite political clout and technical capacity to facilitate (and to assess the impact of) private participation in infrastructure networks.

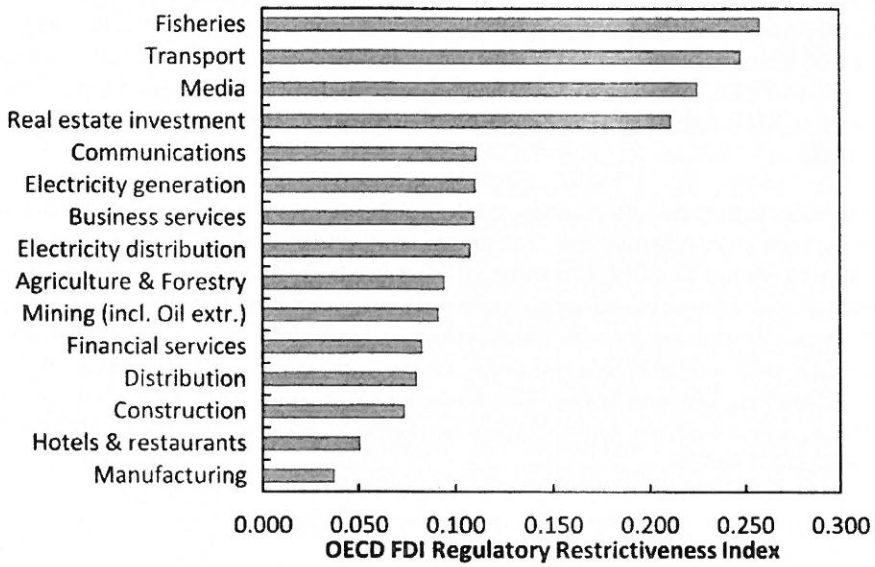
- Regional infrastructure projects require shared standards for oversight and transparency of infrastructure procurement processes, including common criteria for bid selection, and co-operation across procuring entities.

4. ACCESS TO MARKET: TACKLING SECTOR RESTRICTIONS AND ENSURING FAIRNESS AND TRANSPARENCY IN THE PUBLIC PROCUREMENT REGIME

4.1. Tackling FDI restrictions in infrastructure Sectors

Restrictions on private ownership are still relatively common in strategic infrastructure sectors across countries. These can involve a blanket restriction on any form of private participation, whether it be domestic or foreign; or restrictions that are specifically imposed on foreign direct investment (see Figure 4.1). Foreign equity restrictions are by far the most important type of restriction in infrastructure sub-sectors, and can take different forms: sometimes the scope is limited to only acquisitions and sometimes to both acquisitions and greenfield projects; sometimes it applies only to listed companies or to investments in a specific company, most notably in former state monopoly holders; sometimes there is an overall cap of foreign investment in the entire sector, allowing foreign investors to compete in the marketplace, but only up to a certain limit. Regardless of the type of measure, these restrictions usually aim to foster linkages with the domestic economy or to protect national interests (OECD, 2014).

Figure 4.1 OECD FDI Regulatory Restrictiveness Index for secondary and tertiary sectors, 2014[3]



Source: OECD FDI Regulatory Restrictiveness Index database, 2014. http://www.oecd.org/investment/fdiindex.htm.

Most of the 22 countries covered by OECD investment policy reviews since 2006 have made large strides towards opening their economies, including infrastructure sectors, to domestic and foreign private investment. In most cases where FDI is not allowed, the sector or sub-sector involved is closed to private domestic investment as well, with a SOE enjoying a public monopoly. This is often the case for: fixed line telephone services; transmission and distribution of energy, especially grid-based electricity; railroads,

[3] The OECD FDI Regulatory Restrictiveness Index covers only statutory measures discriminating against foreign investors (e.g. foreign equity limits, screening & approval procedures, restriction on key foreign personnel, and other operational measures). Other aspects of an investment climate (e.g. the implementation of regulations and state monopolies among others, which can be important in infrastructure sectors) are not considered.

airports, and maritime ports; and improved drinking water. The transport sector, particularly air and maritime transport sectors, including airport and port operations, tends to face greater restrictions.

The OECD's FDI Regulatory Restrictiveness Index includes seven infrastructure sub-sectors and has been compiled for 15 of the 22 countries considered here. In developing countries in particular, these sector restrictions on foreign investment are frequently combined with clauses within public procurement legislation establishing preference margins for domestic bidders to infrastructure contracts (Botswana 2013, Mozambique 2013, Tunisia 2014). Many countries (such as Mauritius or Botswana) also establish preference margins for SMEs to encourage their participation in infrastructure projects that are often dominated by large firms. Where they are used, it is important to ensure that such schemes are well-targeted and do not compromise the quality of the procured product or service. The more effective schemes include caps based on the volume and technical complexity of projects, and are accompanied by supply-side efforts to enhance the capacity of domestic suppliers so that they can offer truly competitive bids.

Such restrictions clearly impose a first-order limitation on the level of private participation in infrastructure markets. While these measures may actually be justified and serve the purposes of public policy, the overall effect on investment can be quite important and not only limited to the equity threshold allowed, since potential foreign investors may shy away from entering the market if majority control is not possible. Domestically-owned companies may also operate with higher levels of debt than they would wish if greater levels of FDI were permitted (OECD, 2014). Rather than excluding foreign participation outright, participation in infrastructure sub-sectors could be accompanied by business linkage and training programmes, as well as SME financing schemes to promote greater involvement of domestic suppliers in infrastructure projects.

Should sectoral restrictions be left in place, they must be clearly set out and delineated in an easily accessible document, such as a "negative list" that groups all such restrictions. In Indonesia for instance, a new Negative List was issued in 2010 (Presidential Regulation 36/2010) which offers both increased sectoral liberalisation and an improved presentation of what was previously a confusing array of overlapping restrictions. Foreign equity restrictions still vary greatly by sector, as Mmnistries have been largely free to set their own equity limits, but most are now set either at 49% or between 51 and 95%. Some electricity sub-sectors, drinking water, toll roads, and ICT subsectors have all been substantially liberalised (Indonesia 2010). Such an approach greatly improves legibility of the investment regime for prospective infrastructure investors.

4.2. Transparency and predictability of the procurement regime

The degree of transparency, fairness and predictability of public procurement regimes also has a strong impact on whether private investors can operate in infrastructure markets on a competitive footing with incumbent operators (frequently state-owned), and more generally with other bidders for infrastructure projects. A 2012 OECD review of public integrity in Tunisia suggests that some of the largest opportunities for corruption prior to 2011 indeed resided in public procurement procedures, notably involving large-scale concession projects. A clear and transparent public procurement framework can help avoid such risks, and ensure that project proposals are assessed in a neutral and fair manner. The procurement regime can also help verify that bids (especially in the case of PPPs) are selected with adequate attention to risk-sharing, budgetary oversight and value for money. Savings from more competitive procurement practices are estimated to be as high as 8% of total project development costs. However to realise savings of this magnitude, the optimal number of bidders reaches seven in the road and water sectors and three in the electric power sector (EIB 2010). This in turn increases the need for a greater number of qualified staff in procurement agencies.