

9 December 2020

**African Legal Support Foundation PPP Webinar[[1]](#footnote-1)**

**M Moseley Speaking Notes**

**Response to Question 1 from Primah Atugonza of the ALSF, regarding the Global Decline in Public-Private Partnerships**

Thank you, Primah, for that kind introduction, and thanks also to the ALSF for the invitation to join this panel. I have had the pleasure of working with the ALSF for many years, going back to when the ALSF became one of the supporters of the PPP Legal Resource Centre website which I helped to establish when I was at the World Bank.

Primah, you have referred to the global decline in the value of PPP transactions, and this is, sadly, a hard and undeniable truth.

Ten years ago, when the worldwide interest in PPPs seemed to be very high, many of us were optimistic that this method of procurement would drive a significant increase in private sector investment in infrastructure, thereby helping to close the global infrastructure gap – particularly in developing countries and emerging markets. But, unfortunately, this has not happened – and, indeed, the volume of PPP transactions has actually decreased in recent years, even before the onset of the current pandemic.

As you have noted, this decline is evidenced by the recent Global Infrastructure Hub *Infra Monitor* report, with the total value of the worldwide private sector investment in infrastructure declining, since 2010, by more than 30%, to a level of only $106 billion in 2019. And the numbers for Sub-Saharan Africa are similarly discouraging. Of the $106 billion invested in 2019, only $1.9 billion – less than 2% – took place in Sub-Saharan Africa, and that latter number is significantly less than the African investment figures in previous years, such as 2012 and 2013.

So, the issue is – what is causing this ‘loss of confidence’ in PPPs, and how do we address the problem – given that we desperately need to attract much more private investment if we are going to have any hope of achieving the SDG infrastructure targets by 2030.

In my view, it is highly probable that there are a variety of reasons why both governments and the private sector are finding PPPs to be unattractive. These can involve concerns in regard to the complexity of PPPs and the time and effort necessary to properly prepare the transactions. However, I also strongly believe that a key problem area is how we are dealing with the allocation of risk in PPP contracts – and that is because risk allocation is at the very heart of every PPP transaction.

**Response to Question 2, regarding PPP Risk Allocation**

What the pandemic has dramatically illustrated is an issue that has been growing in the minds of both governments and private sector investors for a number of years – namely that the risks associated with PPP transactions can be both extreme and unpredictable, and that our current PPP contracts do not handle risk allocation in a way that is working effectively for all of the concerned parties.

Traditionally, the process for drafting a PPP contract is to develop a so-called ‘risk matrix’ document, which itemises every risk that the lawyers believe might happen during the life of the project, with each risk being assigned to either the public sector or the private sector party. Normally, because government lawyers draft the PPP contract, only a few risks are retained by the public sector, with most of the risks transferred to the private sector Project Company. Traditionally, only a small number of risks are shared.

The basic problem with this arrangement is that it is inflexible. No matter how talented your legal team, they can never predict everything that may happen during the lifetime of a 20- or 30-year PPP highway project or PPP Hospital project. For example, the lawyers might not have thought about what should happen in the event of a global pandemic.

As a result, when an unpredicted (and unpredictable) risk arises, the project is in trouble. And, frequently, this can lead to a dispute between the parties – which, in turn, might well result in an arbitration and the termination of the contract. Alternatively, it might result in one of the parties seeking a renegotiation of the contract – a process that presents its own set of problems.

Against this background, I was recently asked by the Asian Development Bank to look at different contractual models used for infrastructure and other sectors, to see if a better approach might be available. The Asian Development Bank has now published my paper on this topic, and I can provide a link to it on the ADB website if anyone would like to read the paper.

In the paper, I looked at models such as Project Partnering, Alliance Contracting, Integrated Project Delivery and various hybrid PPP models that have been used in different countries. And the conclusion that I reached is that we do **not** need to abandon PPPs – but we should try to make them more flexible. Specifically, we should selectively increase the number of situations where risks are shared between the contracting parties, recognising that PPPs are supposed to be partnership agreements. I also suggested that we take a fresh look at how disputes are handled in PPP transactions – and recommend that greater use be made of so-called Dispute Resolution Boards, which have been successfully employed by the construction industry to quickly and efficiently resolve disputes. Indeed, Dispute Resolution Boards can even help to prevent incipient problems from becoming serious disputes.

My paper was commissioned by the ADB to provide guidance to countries in Asia, but I strongly believe that the recommendations in the paper are equally relevant in Africa.

**Response to Question 3, regarding Priority Sectors for PPPs**

Every country in Africa is going to have its own priorities in terms of what infrastructure projects are best suited to PPP transactions. And, of course, the Sustainable Development Goals and tools such as the GI Hub’s *Infra Outlook* can provide guidance on this subject.

However, if I had to pick one sector on which all governments should focus – both in developing countries and advanced economies – it would be digital infrastructure.

If the pandemic has taught us anything, it has taught us about the critical importance of digital conductivity. We have discovered that communities with strong broadband connectivity can function even during pandemic lockdowns – with people working from home; with students being educated remotely; and even with a variety of health services being delivered by telemedicine. In other words, we may not be using our roads, or our trains or our airports as much as we did before, but we can still function – **if** we are connected.

But the majority of the world does not have reliable and affordable digital connectivity. Indeed, 3.6 billion people lack broadband access to the Internet. And the problem is not just in developing and emerging economies – in my own country of Canada, it is amazing that **60%** of the rural population does not currently have broadband service.

That is why the Government of Canada has recently launched a new digital conductivity initiative. And that is why programs such as the Digital Moonshot for Africa – sponsored by the African Union and the World Bank – are critically important.

This is a sector where increased private sector investment can and should happen, and I would urge governments throughout Africa to participate actively in the Digital Moonshot program.

1. A video recording of the entirety of the webinar is available at [ALSF INFRASTRUCTURE WEBINAR: Charting Africa’s Road to Recovery – Infrastructure Sector Upgrades | ALSF Academy](https://alsf.academy/resources/alsf-infrastructure-webinar-charting-africas-road-recovery-infrastructure-sector-upgrades) [↑](#footnote-ref-1)