Civil Society statement on Rethinking PPPs

This statement was developed by civil society and academia during a side event held at the sidelines of the Tanzania – Business Forum which took place from 5th - 6th September 2019

Civil Society Statement to inform the Discussions at the PPP Forum Africa Inaugural Conference in Kampala, Uganda from 16th-18th September 2019

5th September 2019: We the undersigned civil society organizations in Tanzania and Uganda wish to commend the governments of the United Republic of Tanzania and the Republic of Uganda for the effort they have taken in strengthening their bilateral relations, and more specifically, convening the first ever, Tanzania-Uganda Business Forum.

The Tanzania-Uganda Business Forum was organized to create an enabling platform that allows the Uganda and Tanzania private sectors to share experiences, create business to business networks, and identify opportunities and challenges of on-going trade and investment.

We commend the two governments for their effort to further support and strengthen their collaboration in the area of business. Indeed the private sector can contribute to enhancing production and productivity, value chain development, employment creation and economic development; and in view of globalization, the need for collaboration between states such as Tanzania and Uganda cannot be overemphasized.

While taking note of the various development issues discussed during the Business Forum, we specifically take note of the commitment of the two parties to promote efficiency in transport, logistics value chain and trade in the region through improving the transport routes by enhancing railways, roads and waterways. To this ends, there is currently keen political interest to leverage private finance through Public Private Partnerships (PPPs) in order to finance health, education and largescale infrastructural development and energy projects by the two governments, just like in many other developing countries.

PPPs are long-term contractual agreements between the public and private sector for the provision of public services.

Although the involvement of the private sector in public service provision is not new, most recently, governments such as Tanzania and Uganda have made changes to their mode of public procurement by adopting various PPP frameworks. Donor governments and financial institutions, such as the World Bank Group (WBG) and other Multilateral Development / Investment Banks (MDBs), have set up multiple initiatives to promote changes in national regulatory and institutional frameworks to facilitate PPPs, as well as to provide advice and finance for PPP projects.

The proponents, who have argued in favour of PPPs note that they are necessary, given the high level of public debt in many developing countries like Tanzania and Uganda, which has grown tremendously since the macro-economic dislocation of the 1970s and 1980s; the challenges of a water-tight budget which has limited the capacity of most governments to provide basic amenities and effective public services for its citizens; the high standard in management and delivery by private sector; the fact that private sector are abreast with the latest technology, innovation, technical know-how and expertise to maximize the potential of any sector it is involved in; and that PPPs allow for risk sharing between the private and public sector. It has been argued that in the event of any loss, liability is shared between both parties unequivocally. There are five types of risk namely: construction risk, which involves design problems and project delays; financial risk, which involves interest, exchange rates; performance risk, which involves availability of an asset, continuity and quality of service provision; and demand risk, which involves the need for the services.

Consequently, the EAC partner states i.e. Tanzania, Uganda, Rwanda and Kenya have put in place PPPs laws, policies and regulations in order to tap into this new public sector financing mechanism. However, they contain a number of gaps. For instance, some of the legal frameworks define PPPs as a commercial transaction and yet PPPs in the context of African states and other developing countries are meant for provision of public/ social services. The laws don't include a provision that curtails or regulates private parties' activities for example in terms of prices, production capacity and/or quality of services. Some legal frameworks allow the private investor to sue the public sector if they feel that their rights have been violated. These legal frameworks are also silent about key democracy tenets such as transparency, accountability and justice as they often disregard environment and human rights concerns of the citizens, especially those who live within the project areas.

We, the undersigned civil society organizations wish to register our concerns about PPPs. Specifically, we are concerned that:

a) PPPs risk a country more fiscal distress: Under PPP arrangements, projects often cost the host countries almost twice the amount they would have otherwise had to spend if the contract was directly awarded to the public sector works and not to a private entity. While they are viewed as more efficient, this financing and investment model risks causing these countries fiscal distress in the future.

The costs that are often associated with PPP funded projects include costs of capital, profit expectations by the private partners and transaction costs associated given that PPPs involve the negotiation of complex contracts. The reason for these high costs stem from the fact that unlike the national governments, private sector borrowing from International Financial Institutions/ Development Financial Institutions are sought at higher interest rates due to greater default risks. Consequently, because national governments guarantee private sector loans under PPPs, poor countries are attracting higher rates on loans and increasing their host state's fiscal distress.

b) PPPs are associated with indirect-contingent liabilities: The costs of PPPs do not only result from the direct liabilities as stated in the contractual arrangements, but also from the indirect-contingent liabilities. These could include financial obligations whose timing and magnitude depends on the occurrence of some uncertain future events outside the control of the partnering government. For example, if events such as a fall in the exchange rate of a host state's currency, or if the demand for a requested service or facility falls below a specified level, or during economic crises result into a reduction in the demand for a certain service or product being supplied by the PPP project, the private sector would demand compensation. It is for this reason that many governments have been lured into guaranteeing such projects in order to attract private investors. In such cases, substantial guarantees including loan repayments, guaranteed rates of return, minimum income streams, guaranteed currency exchange rates and guaranteed compensation, should new legislation affect an investment's profitability, are offered to firms to make the PPPs look bankable.

c) PPPs lack transparency and public scrutiny: there is a risk to PPPs not fulfilling requirements on transparency and limited public scrutiny, which can lead to poor decision-making resulting from less oversight and accountability, and can increase opportunities for corrupt behavior.

Risks are associated with higher costs due to poor transparency including in accounting for PPPs throughout the project cycle, often reinforced by confidentiality clauses. This is unlike the negotiation process of Bilateral Investment Treaties (BITs) in which the negotiation processes for some countries often allow for a wider consultation with the public and key stakeholders such as civil society, and scrutiny by the parliament before ratification. While this is not stated to support the negotiation and signing of BITs whose credibility in fostering increased FDI inflows and their attendant benefits into a host country is still under question, it is important to note that the contracts to which our governments are increasingly committing to under PPPs are marred with secrecy. Yet the lack of transparency leads to less informed fiscal policy decisions and encourages governments to go ahead with projects even when they can create fiscal problems in the future. To further cover this up, governments have adopted accounting practices which allow them to keep the costs and liabilities of PPPs off-balance sheets to avoid such costs being reflected as budgetary constraints. However, shifting public debt to government-guaranteed debt does not reduce governmental debt liabilities. Rather, it disguises accountability and hinders scrutiny by parliamentarians and the public.

d) PPPs lack democratic accountability: Conversely, the lack of transparency decreases democratic accountability and inclusiveness; and curtails the participation of citizens and parliaments to hold the actors in PPP projects responsible regarding who will pay what, to whom, and when, as well as hold them accountable to human rights and environment protection obligations, which are often left out during the contractual process. The high level of secrecy which not only undermines government's capacity to undertake due diligence on a potential private sector partner and to effectively monitor the project's implementation, also undermines the communities' involvement in the project. This is despite the fact that a public project just like any other project established within a community also relies on social legitimacy, trust and credibility for its success.

e) Most PPPs contracts contain the problematic Investor State Dispute Settlement (ISDS) provision: PPP contracts are highly complex in nature due to their complicated portfolio-construction and risk management techniques, and yet not all proposed PPPs are rigorously evaluated or that not all of them have been

designed in line with the appropriate structure. The increasing financialization of infrastructure investments as an asset class, involving hedge funds and institutional investors, further complicate the relationship between the state, other stakeholders, and PPP investors and the ability of the state to participate in and/or effectively regulate infrastructure investments. It is thus easy for a dispute to arise during the implementation of a given project, even in circumstances where it may be a result of an action by the public sector to regulate the private sector in the public interest. However, while a dispute can easily be resolved within the host state, most private sector actors use the ISDS provision included in the contracts to take the dispute to international courts. This, however, comes with its own challenges including the high costs that could be required during the arbitration. To avoid disputes, a lot of governments step aside and do not regulate the investments made under PPP arrangements. This is despite the fact that in order for PPPs to function, the government must play a central and effective regulatory role. This is especially given the long-term and public nature of infrastructure investments which necessitates the need to ensure that the benefits, protection and power related to the investment flow in a balance towards the private party on the one hand and communities, the environment, and taxpayers on the other. We take note of the fact that for PPPs to work, it depends on the type of PPPs a given public sector/ institution will adopt. Although seldom discussed or explicitly provided for in the national legal frameworks, there are three major legal types of PPPs that exist, namely: the Concession[1]; the Contractual[2]; and the Institutional[3].

We therefore wish to propose the following key recommendations for your consideration:

- Halt the aggressive promotion and incentivizing of PPPs for social and economic infrastructure financing, and publicly recognize the financial and other significant risks that PPPs entail.
- Support countries in finding the best financing methods for public services in social and economic infrastructure, which are responsible, transparent, environmentally and fiscally sustainable, and in line with their collective and individual human rights obligations. Prioritize tax revenues, whilst augmenting them with long-term external, and domestic, concessional and non-concessional finance, where appropriate.
- Ensure that PPP projects are subject to democratic governance and control. This should be done through informed consultation and broad civil society participation and monitoring, including by local communities, trade unions, and other stakeholders. Uphold the right to free, prior and informed consent, and ensure the right to redress for any affected communities. The rights of affected communities should be taken into account.
- Ensure that rigorous transparency standards apply, particularly with regard to accounting for public funds — the contract value of the PPP and its long-term fiscal implications must be included in national accounts. Contracts and performance reports of social and economic infrastructure projects should be proactively disclosed. The public interest ranks higher than commercial interests.
- Engage with International Financial Institutions such as the World Bank, African Development Bank, European Investment Bank, and other financial institutions/ lending agencies to include in addition to their social and environmental safeguard mechanism, fiscal and macroeconomic safeguards. This can be an important approach to addressing the current impacts of PPPs in increasing fiscal distress.

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[1] Concessions are in two forms, service concession and works concessions. The main characteristics of a concession, includes the contracting authority entrusting to a third party total or partial management of services (which constitute economic activities) for which that authority would normally be responsible and for which the third party assumes the economical, operational and financial risk. In this case, it leaves the public authority function and powers of the grantor untouched. A public concession is a revenue generating PPP, which involves an infrastructure or a service, the use of which necessitates the payment of fees by end users of this service and any function arising from the sale, rent or exploitation of public land or buildings.

[2] The contractual model assumes that the private sector partner is responsible for providing funds for the completion of the project and in turn the public sector would pay back through ''service or unitary charges'' which is a reflection of payment based upon usage volumes or demand (e.g. Tolls or public lighting).

[3] The Institutional PPPs involve the establishment of a separate legal entity that is jointly held by public and private partners i.e. the Special purpose vehicle. The joint entity is poised with the responsibility of financing and delivering the service or infrastructure for the benefit of the public. This entity has a distinctive legal personality that allows the public partner, through its presence in the body of shareholders and in decision making of the joint entity, to retain a high degree of control over the development and delivery of the project. The entity can also allow a situation, where the public partner develops its own experience of running and improving the public service and still have recourse to the private partner. An institutional public private partnership can either be set up by creating an entity that would be controlled by public and private partners or by the private sector taking control of an existing publicly owned company, which has obtained contracts or concessions.