

Comments on World Bank’s “A Framework for Disclosure in Public –Private Partnerships” (“the Framework”)

February 2016

We welcome the opportunity to comment on this document, and the fact that the World Bank has opened it up for consultation. We hope future guidelines or similar documents on Public Private Partnerships (PPPs), whether commissioned by the Group of 20 (G20) or otherwise – including those that have already been submitted to the G20 – will also be open for consultation. We would further like to request that future consultations happen before, rather than after, submission to the G20, as an endorsement by such a powerful group of countries, even in principle, may project the impression that consultations with other stakeholders are a mere formality devoid of a real chance of impact.

National legislation on PPPs seems to have remained the basis for the review on which the “Framework for Disclosure in PPPs” draws. However, in our view, there are a number of frameworks relevant to disclosure unjustifiably left out of the pool of experiences to draw upon. These include the Extractive Industries Transparency Initiative, Publish What You Pay, Open Contracting Partnership and Construction Sector Transparency Initiative. While not all of these focus solely on infrastructure, they do represent approaches to disclosure and an additional set of lessons and ideas to be identified.

In the following pages we provide comments on the suggested framework according to the sequence presented in the document. We explicitly decided not to frame our submission around the questions that guide the consultation as we fear that would constrain our ability to comment on several segments and aspects of the framework we feel necessary to address.

1. General comments

- 1) We agree with the drivers of disclosure listed in the document. In our view, however, the document fails to mention that a robust framework for disclosure is a primary and necessary – if insufficient – safeguard against some of the risks raised by PPPs. Such risks have to do with social and environmental impacts, respect for human rights, democratic accountability and macroeconomic problems, including hidden public indebtedness, arising from PPPs. The need for such safeguards is particularly acute in the light of the G20’s recent policy decisions to encourage so-called “transformational” projects, which we understand as increased support for megaprojects. This naturally raises a red flag in terms of designing, implementing and monitoring projects. According to a study by Bent Flyvbjerg from Oxford University’s Said School of Business¹, the risks and complexities multiply along with the scale of the projects.
- 2) The document should contain a section on disclosure guidelines for a certain portion of the pre-procurement stage. It currently ignores the period in the pre-procurement stage in which a certain public interest or need is identified and matched with an appropriate project. This period

¹ Flyvbjerg, Bent. (2014). *What you should know about megaprojects and why: An Overview*. Project Management Journal. See: <http://ssrn.com/abstract=2424835>

lasts until the point of deciding that the project will be undertaken through a PPP. This is a crucial stage at which dissemination of information and public consultation will be essential to build support and overcome distrust should a PPP be pursued at a later stage. In our experience, the omission of disclosure at this stage often generates unwarranted costs through the pursuit of projects that the public does not perceive to be in its interest, or PPPs where other forms of delivery may be more warranted. Lack of consultation at this stage may contribute to the perception that the use of PPPs as a delivery format was based on non-transparent, private lobbying by groups or companies that stand to draw a benefit.

- 3) The document should point out that in many countries the development of data banks, carrying out and disclosing impact assessments is already mandated for many public interventions (for instance, in the social sector), of lower length and much lower cost than PPPs. It should not be acceptable to do any less for PPPs.
- 4) In general, we agree with the challenges pointed out in part I of the document (p. 19-20), however, the benefits are not very well identified. For instance, full disclosure of contracts and of performance/ monitoring reports is essential to allow for democratic accountability of the implementation process. This empowers government officials to put pressure on private sector companies to comply with contract clauses, and discourages corrupt practices.
- 5) We appreciate that the document decidedly supports disclosure and endorses recommendations on how to implement it. But we are concerned that it is not completely clear about the extent to which such recommendations are to be seen as requirements rather than simply how jurisdictions have decided to implement disclosure. A list of diverse individual examples may be read as justifying as positive the lowest as much as the highest standard in such lists. Moreover, in many cases lack of a certain level of disclosure would be in contradiction to normative commitments undertaken by countries on these areas, in which case disclosure would be a legal obligation. However, the document does not explicitly state that minimum standards for a disclosure framework are not a choice but a mandatory requirement without which PPPs should simply be discouraged. The Bank's – or other institutions that may choose to follow this Framework in their support of PPPs – own behaviour is not clear. For instance, will the Bank still support PPPs in countries that do not have such threshold of disclosure? Other public or semi-public development banks (such as KfW and the European Investment Bank) are increasingly involved through their respective blending schemes. The respect to standards needs to be assured; otherwise unsustainable debts may emerge, even if the World Bank acts in a more restrictive manner.
- 6) The analysis of users and use of information included in the document is relevant. However, it leaves out people and communities potentially affected by PPP projects. Although these people are part of the general public, they have particular interests to be considered when it comes to disclosing information that enables their meaningful understanding and effective monitoring. The document needs to make explicit references to the relevance of the disclosure for these

groups, and as a consequence consciously make provisions – even if such provisions are not in some of the jurisdictions whose legislation the Bank reviewed – to ensure PPPs will be disclosed in a way that effectively, meaningfully and in a timely manner enables the perspective of such people and communities to be heard. It should require that PPPs be disclosed to them and that their interventions be disclosed for purposes of accountability and awareness of other stakeholders, including investors, as well as to point out consequences when such requirements are not followed.

- 7) We find that the elements proposed for disclosure tend to omit disclosure of key financial information – such as cost/benefit analysis of PPPs over the lifetime of the project, taking into account the full fiscal implications over the long-term and the risk comparison of different financing mechanisms, particularly with regard to the debt sustainability of the recipient country, as well as risk assessments to explicitly measure the risk of hidden contingent liabilities.
- 8) We also find that they omit critical non-financial elements such as environmental, social and human rights risks during the construction and operation of proposed projects, as well as mitigating measures proposed to deal with them. Feasibility studies should already be disclosed in the pre-procurement phase and should include data disaggregated by sex and analysed from a gender perspective. Guidelines on disclosure of performance should at least extend to dimensions of coverage, quality, impact and efficiency and also include sex-disaggregated and gender-analysed data. The disclosure of all of these will certainly contribute to legitimate public authorities' decision and strengthen the effective monitoring of development results.

2. Points to be supported and reinforced

We would like to support and reinforce the following points in the document:

- 1) The special challenges posed by unsolicited projects (p. 33 -37) and the reasons (p. 34) why the level of information should be higher than for projects initiated by the government. We do not, however, agree with an option for requirements being “as high as that for projects initiated by the government”). It should be noted that PPPs should fit into a nationally-owned development plan and a privately-initiated PPP, likely initiated to promote a private company's objective, is, by definition, less likely to fit such a plan. It should be subject to a rigorous test to demonstrate it, including the disclosure of a value for money analysis and an impact assessment study.
- 2) The decision not to recommend a lower level of disclosure where non-standard contracts are involved, upon the argument that “the lack of transparency in the absence of public disclosure in these cases has the potential to become even higher,” (p. 38) and upping the ante for the government requirement to justify why specific or different parameters are adopted on key issues (e.g. contingent liabilities). In our view, though, the framework could be stronger and send a signal in the right direction if it were phrased as, “Governments should be opened and transparent...” instead of “Governments need...” as these are key issues that can have a high impact on the accountability of outcomes of selected PPP projects.

- 3) All elements of financial information whose disclosure is recommended in Tables 9, 10 and 15. On Table 10, however, we do not consider warranted the qualifications under “financial information” that needs to be disclosed. Things like estimates and actual revenues earned are important to know even when the government does not offer a minimum revenue guarantee or receives a payment from the Special Purpose Vehicle (SPV). They may affect tariff structures or the balance of other benefits in the contract that were relevant to the negotiation and evaluation of performance or the extent of risk and benefit-sharing between public and private parties. Further, there is a generalized tendency of bidders to overstate benefits and understate costs of projects. It is thus critical that information on performance, renegotiations and consequences, including sanctions for non-compliance with the initial terms of PPPs and the impacts of the new contract in the tariffs of services, also be disclosed.
- 4) The category “Government support” is key. However, the framework should make an explicit endorsement of “on balance sheet” and transparent accounting of PPPs, in line with International Public Sector Accounting Standards (IPSAS) – Standard 32 and 19. PPPs should be included in national accounts, i.e. the costs of PPPs should be registered as a government debt, and therefore be part of a sustainability analysis, rather than being “off balance sheet”. This will allow for a higher level of transparency on the true costs of PPPs for the public purse.
- 5) The presumption of disclosure (Tables 12 and 16). However, we also believe that the general exemption of commercial confidence, without further qualification, could easily undo the benefit of such a presumption. There are key questions that remain unanswered in the Framework. For instance: a) who determines what is commercially confidential; b) how this is placed against the “public interest”; c) which criteria should be used to determine what is and is not “public interest”; and d) how much power the public authority has to determine the period during which key information may remain confidential. In addition, for the commercially confidential argument to be valid, there is a need for concrete evidence of the potential harm that would be caused as a result of disclosure.
- 6) The recognition that supply-side and technology issues play a role of overall importance in information disclosure in general (p. 24 and Table 2). But it is not credible to mention this problem without acknowledging that in practice it may render whole portions of the Framework useless. The Framework should include guidelines on this, not just for countries undertaking PPPs, but for countries in a position to support the transfer of technology, systems and instruments that support building, processing and disseminating the required data in adequate form in such countries.

3. Specific concerns

We want to share the following specific concerns:

- 1) The mention of the Chilean example on disclosure of fiscal and financial information (Box 5) is accompanied with the caveat that “not all countries involved in PPP assess, manage or measure liabilities to the extent Chile does and therefore may not be in a position to disclose in a similar manner.” We call for a more forceful indication that it is desirable to have such methods of detailed assessment, management, measurement and transparent reporting/disclosure of contingent liabilities.
- 2) There is a critical reference to a number of jurisdictions where information is kept confidential during the bidding process to maintain the competitiveness of the bidding, but where confidentiality is maintained until signing of the contract (Figure 7). We would argue disclosure in the period after close of biddings and before signature of the contract is certainly healthy to the process while there is no risk it can compromise the process as no more biddings are allowed at that point. We regret that the Framework’s position on what to disclose during this period suffers from some ambiguity.
- 3) In terms of what parts of the recommendations are applicable to countries, the document distinguishes between countries with “low” and “intermediate or moderate” capacity (p. 49), suggesting more requirements for the latter. In our view, though, if countries have low capacity to pursue a robust threshold of disclosure measures, PPPs should be discouraged as a financing option until these countries have built their capacity. We find it especially troubling to assert that “disclosing full contract documents would mean a fairly high level of disclosure without a high level of skills.” (p. 49) In countries where the skills for disclosure are not up to speed, most likely the skills for negotiation are such that a PPP is not a viable option and the Bank should unambiguously state so.
- 4) The Framework fails to emphasise the relevance of its recommendations to subnational entities, an area of particular concern where issues of capacity tend to play an even bigger role than at national or federal levels.
- 5) The Framework fails to make recommendations on the sensitive area of disclosure oriented to ensure scrutiny of potential conflicts of interest of officials and civil servants involved in decisions regarding PPPs, especially members of PPP units. Such requirements are an important portion of measures to prevent corruption, overcharges and inefficiencies and could include, for instance, requirements for them to disclose their CVs, any kinship or family connections and beneficial interests in companies that are or may become parties to PPP contracts.

We remain at your disposal for any further discussion of these comments and would appreciate opportunities to further engage with you on them, or other aspects of the Framework you might like to discuss.

Signatories:

International organisations

ActionAid International
Association for Women's Rights in Development
Christian Aid
Heinrich Boell Foundation
IBON International
International Presentation Associations
International Rivers
Public Services International
Society for International Development
Transparency International
World Future Council

Regional organisations

Africa Development Interchange Network (Africa)
Access Info Europe (Europe)
Counter Balance (Europe)
Disaster Risk Reduction Working Group, UN Major Group for Children & Youth, Regional Focal Point for Latin America and the Caribbean (Latin America)
European Network on Debt and Development (Europe)
Red de Educación Popular entre Mujeres de América Latina y el Caribe (Latin America)
Red Latinoamericana sobre deuda, desarrollo y derechos – Latindadd (Latin America)
Sisters of Charity Federation (North America)
Southern and Eastern Africa Trade Information and Negotiations Institute (Africa)
Tax Justice Network-Africa (Africa)

National organisations

11.11.11- Coalition of the Flemish North-South Movement (Belgium)

AfroLeadership (Cameroon)

Alliance for Development (Ghana)

Article 19 (UK)

Bank Information Center (USA)

Both Ends (Netherlands)

Bretton Woods Project (UK)

CAFSO-WRAG for Development (Nigeria)

Campaign 2015+ International (Nigeria)

Campaign for Human Rights and Development Sierra Leone (Sierra Leone)

Center of Concern (USA)

Centre for Human Rights and Climate Change Research (Serbia)

Center for Women's Global Leadership, Rutgers University (USA)

Centre national de coopération au développement – CNCN (Belgium)

Congregation of Our Lady of Charity of the Good Shepherd (USA)

Consortio para el Dialogo Parlamentario y la Equidad (Mexico)

Coordination office of the Austrian Bishop's Conference for international Development and Mission (Austria)

Debt Justice Norway (Norway)

Development & Integrity Intervention Goal Foundation (Nigeria)

Erlassjahr – Jubilee Germany (Germany)

The Finnish NGDO Platform to the EU (Kehys) (Finland)

Fundación Mexicana para la Planeación Familiar, A.C. (Mexico)

Gender Equity: Citizenship, Work and Family (Mexico)

Gestos (Brazil)

Initiative for Social and Economic Rights (Uganda)

Jubilee Debt Campaign (UK)

Kenya Debt Relief Network (Kenya)

Missionary Oblates of Mary Immaculate (USA)

National Alliance of Women (UK)

Platform London (UK)

Religious of the Sacred Heart of Mary (USA)

Rural Area Development Programme (Nepal)

Society of Catholic Medical Missionaries (USA)

Ulu Foundation (USA)

Urgewald (Germany)