

## **IMPORTANCE OF TRANSPARENCY IN PUBLIC-PRIVATE PARTNERSHIPS IN THE PURSUIT OF SDG GOAL 16**

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### **Abstract**

Public-private partnerships (PPPs) have been defined by the World Bank as “a long-term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility, and remuneration is linked to performance.” PPP aims to deliver good quality projects through a transparent and competitive process. However, transparency obligations in a PPP contract are typically subject to a number of limited exceptions in order to protect commercial or sensitive information of the parties and they can also be prone to and be a source of corruption. This paper focuses on addressing transparency as a key tool to implement SDG Goal 16 (Peace, Justice and Strong Institution) through Target 16.5 (to substantially reduce corruption and bribery) in the implementation of the 2030 Agenda for the Sustainable Development Goals (SDGs). This paper uses a qualitative research approach with the use of case studies to highlight the role of transparency in combating corruption and to highlight the factors threatening the transparency of PPP projects. It has been found that confidentiality of commercial information, if over protected, would threaten the integrity of PPPs and foster a lack of trust, unfair competition and unaccountability. It is also important that the PPP process maintains a zero tolerance for corruption since it can damage the quantity and quality of public services at any stage of the duration of a PPP project. For there to be a successful PPP regime, the process must be free of corrupt practices under good governance which demands elements of transparency, equal treatment, and open competition.

**Keywords:** Public-Private Partnership, Transparency, Corruption

### **Methodology**

This paper uses qualitative research approach with the use of case studies to highlight the role of the transparency in combating corruption and to highlight the factors threatening the transparency of PPP projects. A literature review on PPPs has been carried out to understand the important of confidential and transparent nature of PPPs. And it analyzes the important role of transparency in the challenges that corruption pose for an efficient PPP regime using the case study approach. Then it studies the legal framework for PPPs in Myanmar and discuss for the further enhancement of transparency obligations within the PPP framework. This paper uses information collected from both primary and secondary sources which includes international conventions, legislations, government documents, books, academic papers and relevant websites.

### **Findings**

Although Myanmar has made progress with initiatives such as the Project Bank Notification and the PPP Center, but transparency gaps remain throughout the project lifecycle, eroding public trust and investor confidence. Therefore, a specific PPP law that governs all public-private collaborations, should be enacted, incorporating detailed transparency requirements, clearing mandating what kind of information should be disclosed and what will be kept confidential, ultimately guaranteeing the regular disclosure of contracts and project monitoring reports.

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## Introduction

The 2030 Agenda for Sustainable Development adopted by 193 United Nations member countries aims at transforming the world through the implementation of its 17 Sustainable Development Goals in critical areas like infrastructure, health, education, gender equality, and water and sanitation, among others.<sup>1</sup> The United Nations has acknowledged the role of PPPs in achieving the SDG goals where financing is needed for new infrastructure to provide these services. PPPs are becoming increasingly significant as governments attempt to solve the enormous difficulties brought on by pandemics, population expansion, climate change, and economic inequality. PPPs are essential for identifying and implementing innovative and economical solutions by combining public sector resources with the creativity, efficiency, current technology, and knowledge of the private sector.<sup>2</sup>

If PPPs are not properly planned and designed, they may be vulnerable to corrupt activities. Promoting transparency in the bidding, contract award, and implementation processes can help to lower corruption in PPPs.<sup>3</sup> The Sustainable Development Goals (SDGs) are contingent upon the successful combat of corruption. With regard to target 16.5, which attempts to significantly reduce corruption and bribery in all of its forms, goal 16 of the SDGs specifically aims to “build effective, accountable, and inclusive institutions at all levels”. This goal reflects the growing understanding of the significance of addressing corruption for achieving sustainable development. Combating corruption frequently requires bolstering accountable, open, and efficient public institutions.<sup>4</sup> Inclusivity, accountability, transparency, and participation are further institutional principles that the 2030 Agenda has accepted and are critical to the fight against corruption.<sup>5</sup>

## Definition of Public-Private Partnership

There is no commonly acknowledged definition of the term public-private partnership. Public-private partnership (PPP) is the term used to describe the partnership between the public and private sectors.<sup>6</sup> Infrastructure deficit is brought on by financial constraints, competing demands on public resources, and the skyrocketing prices associated with infrastructure procurement. As a result, in order to access resources like finance and experience, the public sector looks to collaborate with the private sector. With the PPP model, a government provide a consortium from the private sector the sole authority to design, build, and/or run an infrastructure project under specific guidelines for a fixed period of time, which is usually long-term.<sup>7</sup> PPPs have been defined by the World Bank as “a long-term contract between a private party and a

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<sup>1</sup> Jane Lethbridge & Pippa Gallop, (2020) *Why Public-Private Partnerships (PPPs) are still not delivering*, EPSU, p-1.

<sup>2</sup> Alexei Zverev, Chris Tassis & Zeynep Boba, (2023) *Public-Private Partnerships for Promoting Sustainable Development Goals*. EBRD, p-74.

<sup>3</sup> PPPLRC, (2022) “Transparency, Good Governance and Anti-Corruption Mechanisms” <https://ppp.worldbank.org/public-private-partnership/overview/practical-tools/good-governance-anticorruption>.

<sup>4</sup> United Nations, (2019) *Sustainable Development Goal 16: Focus on Public Institutions*. p-40.

<sup>5</sup> Ibid, p-xii.

<sup>6</sup> Akogwu Agada, (2019) *Combating the Menace of Corruption in Nigeria: A Multi-Disciplinary Conversation*. Black Tower Publishers, p-131.

<sup>7</sup> Nathan Associates, (2017) *Public-Private Partnerships: A Basic Introduction for Non-Specialists*. EPS-PEAKS, p-11.

government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility, and remuneration is linked to performance”.<sup>1</sup>

Public-private partnerships (PPPs), which aim to improve public services or the management of public sector assets, combine the deployment of private sector capital with occasionally public sector capital.<sup>2</sup> The definition of PPP given by the Organization for Economic Co-operation and Development (OECD) is that PPPs unite the public and private sectors in a manner that shares risks and allows the private partner to use a capital asset to fund and deliver public services. PPPs can provide public services in relation to both infrastructure assets like bridges and highways as well as social infrastructure assets, such as hospitals, utilities, and prisons.<sup>3</sup> In a broader sense, PPPs encompass all forms of collaboration between the public and private sectors. It should be noted that since the relationship between two parties is based on the terms of the PPP contract, it is contractual rather than a partnership in the legal sense.<sup>4</sup>

### **Confidentiality and Transparency in Public-Private Partnership**

PPP contracts are governed by commercial and competition laws, where confidentiality clauses are subject to stricter regulations than those found in public administration. As a result, there is less information about the project and less opportunity for public inspection, which threatens democratic accountability and encourages corrupt behavior.<sup>5</sup> Scholars generally agree that PPP agreements are frequently kept secret from the public and that PPPs suffer from a severe lack of transparency. Furthermore, the contractual agreement frequently contains commercially sensitive information by permitting private actors to provide public services, which may impede transparency.<sup>6</sup> In order to preserve the integrity of the PPP procedures and guarantee competitive, equitable, and transparent private investment, it is therefore essential to keep the proper balance between the requirement for transparency and the protection of commercially sensitive information.<sup>7</sup>

A key component of any PPP contract is the confidentiality of information shared between the contracting authority and bidders. The majority of commercial contracts include clauses requiring the parties to maintain the secrecy of any information disclosed in connection with the contract, including pricing and intellectual property, as well as the terms of the agreement.<sup>8</sup> The fundamental justification for maintaining confidentiality is to protect commercially sensitive information that, in the event that it were made public, may harm the government's finances or those of a rival bidder. In order to prevent bidder from abusing the system and preserve the integrity of the bidding process, confidentiality is necessary to prevent

<sup>1</sup> World Bank, (2017) *Public-Private Partnerships: Reference Guide*. p-1.

<sup>2</sup> Micheal B. Gerrard, (2001) "Public-Private Partnerships", <https://www.imf.org/external/pubs/ft/fandd/2001/09/gerrard.htm>.

<sup>3</sup> OECD, "OECD Principles for Public Governance of Public-Private Partnerships", [https://www.oecd.org/gov/budgeting/oecd-principles-for-public-governance-of-public-private-partnerships.htm#:~:text=Public%2DPrivate%20Partnerships%20\(PPPs\),asset%2C%20sharing%20the%20associate%20risks](https://www.oecd.org/gov/budgeting/oecd-principles-for-public-governance-of-public-private-partnerships.htm#:~:text=Public%2DPrivate%20Partnerships%20(PPPs),asset%2C%20sharing%20the%20associate%20risks).

<sup>4</sup> E. R. Yescombe, (2007) *Public-Private Partnerships: Principles of Policy and Finance*. Elsevier Ltd., p-3.

<sup>5</sup> María José Romero, (2015) *What Lies Beneath? A Critical Assessment of PPPs and Their Impact on Sustainable Development*. Eurodad, p-26.

<sup>6</sup> Sodhi S. I., (2008) "Public Private Partnerships in India: How to Ensure Transparency and Accountability" *Indian Journal of Public Administration*, vol.54 (3), p-675.

<sup>7</sup> Walter Amoko, (2018) "A Matter of Competing Principles: Confidentiality and Disclosure in PPP Procurement", <https://www.oraro.co.ke/a-matter-of-competing-principles-confidentiality-and-disclosure-in-ppp-procurement/>.

<sup>8</sup> World Bank, (2019) *Guidance on PPP Contractual Provisions*. p-155.

bidders from learning the contents of each other's submissions.<sup>1</sup> The private partner is typically the one with the greatest information to protect when it comes to information that could give its competitors a competitive advantage. But in some cases, such as when a PPP contract is related to the defense industry, the contracting authority may also want to keep some information confidential. In certain extremely sensitive projects, the contracting authority may demand that the private partner sign a written promise to be bound by national security laws, as well as other companies and individuals directly involved in providing the service.<sup>2</sup>

Public accountability and transparency have been negatively damaged by the overuse of "commercial-in-confidence" clauses in privatization projects. Restricting or obscuring information that was previously accessible to stakeholders of government decisions exposes governments to significant risk. Specifically, the incorporation of commercial confidentiality provisions into Public-Private Partnership (PPP) agreements significantly restricts citizens' access to publicly owned information, thereby endangering the possibility of well-informed public discourse and positive outcomes related to public accountability.<sup>3</sup> Since PPPs enable private actors to deliver services that are typically delivered by public actors, transparency is crucial to fostering confidence between the public authority and the population. The promotion of transparency and disclosure has been acknowledged internationally under the right to access information<sup>4</sup> enshrined in Article-19 of the International Covenant on Civil and Political Rights<sup>5</sup> and national laws, even though both private and public sector parties may want to keep certain information confidential and it has also become a crucial factor for governments, non-governmental organizations, and international organizations in their operations.<sup>6</sup>

In addition to helping to improve governance and give service users a better understanding of the quality of care they should be receiving, the World Bank states that "there are reasons to believe that significant disclosure can help PPP programs achieve desired value-for-money and better outcomes."<sup>7</sup> Transparency is required in order for the public and the legislature to know who will pay what to whom, when, and from which budget. Studies also indicate that strict transparency requirements are viewed as a potentially effective countermeasures against corruption.<sup>8</sup>

The following situation can be studied as an example of transparency issue which is the Queen Mamohato Memorial Hospital built in Lesotho.<sup>9</sup> The Lesotho government initiated a PPP project in 2006 to build a national hospital to replace the aging and outdated main public hospital, Queen Elizabeth II, and to upgrade the network of urban filter clinics. The 425-bed hospital and a network of renovated urban clinics were designed, constructed, and operated for

<sup>1</sup> Walter Amoko, (2018) "A Matter of Competing Principles: Confidentiality and Disclosure in PPP Procurement", <https://www.oraro.co.ke/a-matter-of-competing-principles-confidentiality-and-disclosure-in-ppp-procurement/>.

<sup>2</sup> World Bank, (2019) *Guidance on PPP Contractual Provisions*. p-155.

<sup>3</sup> Valarie Sands, (2006) "The Right to Know and Obligation to Provide: Public Private Partnerships, Public Knowledge, Public Accountability, Public Disenfranchisement and Prison Cases" *UNSW Law Journal*, vol.29 (3), p-337.

<sup>4</sup> The General Comment no. 34 of the Human Rights Committee, CCPR/C/GC/34, paras 18–19.

<sup>5</sup> Article 19, The International Covenant on Civil and Political Rights (ICCPR).

<sup>6</sup> World Bank, (2019) *Guidance on PPP Contractual Provisions*. p-155.

<sup>7</sup> World Bank Institute, (2013) Disclosure of project and contract information in public-private partnerships. p-16.

<sup>8</sup> Iossa, E., Spagnolo, G., & Vellez, M, (2013) "The Risks and Tricks in Public-Private Partnerships", *Centre for Research on Energy and Environmental Economics and Policy*, p-7.

<sup>9</sup> Oxfam, (2014) "A dangerous Diversion: Will the IFC's flagship health PPP bankrupt Lesotho's Ministry of Health?" *Oxfam Briefing Note*, p-2.

eighteen years by a private sector consortium known as Tsepong. The project is an availability-based PPP model, using performance-based contracts. The Tsepong consortium contributed US\$ 474.665 in equity capital and the Lesotho government contributed US\$ 58 million in direct finance in addition to a US\$ 94.9 million loan from the Public Development Bank of South Africa (DBSA).

Since the Tsepong intends to reimburse the loan with government fees, the loan is recognized as a private sector contribution. Nonetheless, the Lesotho government signed the loan and offered guarantees, meaning that the government would be responsible for payment if Tsepong defaulted. The loan is worth ten times the annual budget of the health ministry, which puts the government at great risk given that the Tsepong is already known to have failed on a number of loan installments. This PPP project is an example of highly risky and costly finance, where the majority of the detailed discussions and calculations were conducted in secret and were covered by commercial confidentiality.<sup>1</sup> This reduces the likelihood of substantive public scrutiny.

Transparency can have a variety of fundamental objectives, including reducing the degree of corruption, boosting private sector investment in infrastructure, raising public awareness and confidence, achieving value for money, promoting competition, and enabling better informed markets.<sup>2</sup> PPP projects may also take into account the public interest, human rights, social and environmental factors, and other aspects in favor of enhanced transparency and disclosure.<sup>3</sup>

Confidentiality and transparency are therefore two fundamentals of PPPs that must be carefully balanced since without information, accountability and transparency are nearly impossible to achieve. Information that is commercially sensitive could put the government and bidders in danger if the flow of information is not monitored, especially during the pre-award and contract execution phases. This might seriously affect the value for public funding and call into question the competitiveness of the entire process.<sup>4</sup>

### **Transparency as a Key in Combating Corruption**

PPP seeks to develop high-quality projects through a transparent and competitive procedure. Transparency is fundamental to and essential for the exercise and protection of human rights. The public cannot properly scrutinize the use of a state's powers if there is insufficient transparency. Understanding the scope and methods of government through data monitoring is crucial for the general public and civil society. PPPs demand transparency at every stage of their implementation, including public tendering procedures, technology deployment regulations, and the effects or outcomes of deployments.<sup>5</sup>

The concept of transparency refers to the facilitation of public access to data regarding the functions, composition, results, and performance of the public sector.<sup>6</sup> Transparency in a Public-Private Partnership (PPP) is defined by the OECD as "efficient access to information throughout

<sup>1</sup> María José Romero, (2015) *What Lies Beneath? A Critical Assessment of PPPs and Their Impact on Sustainable Development*. Eurodad, p-21.

<sup>2</sup> World Bank, (2019) *Guidance on PPP Contractual Provisions*. p-155.

<sup>3</sup> Privacy International, (2021) *Safeguards for Public-Private Surveillance Partnerships*. p-5.

<sup>4</sup> Walter Amoko, (2018) "A Matter of Competing Principles: Confidentiality and Disclosure in PPP Procurement", <https://www.oraro.co.ke/a-matter-of-competing-principles-confidentiality-and-disclosure-in-ppp-procurement/>.

<sup>5</sup> Privacy International, (2021) *Safeguards for Public-Private Surveillance Partnerships*. p-5.

<sup>6</sup> United Nations, (2019) *Sustainable Development Goal 16: Focus on Public Institutions*. p-15.

the PPP procurement process, which benefits public and private partners and enhances project management, accountability, and transparency.”<sup>1</sup> Transparency also ensures that project tenders are fair and that the estimated costs are available for public review. Private companies will have a greater chance of competitive modeling and strong project development if they have access to PPP data, especially from previous bidding and ongoing project assessments.<sup>2</sup> Since transparency is a fundamental component of any public procurement process, the private sector will only be interested in PPP programs if the procurement rules guarantee and uphold transparency and fairness in the selection process, as well as access to relevant data and studies on the projects to help prospective bidders evaluate the opportunity effectively. Governments are responsible for their decisions in PPP procurement, which means that all relevant data, including those about the PPP project’s performance and the process’s fairness, must be accessible for auditing.<sup>3</sup>

A few of the primary issues and challenges concerning transparency are: attracting enough bidders without favoring any of them; choosing the private actor in a transparent manner; establishing clear objectives and guidelines; providing the public with access to information about funding and other subjects; negotiating appropriate terms and ensuring that there are clear guidelines about what information can be disclosed to the public; and managing certain parties with power and influence that impede information sharing.<sup>4</sup> Regardless of the challenges in ensuring transparency, transparency is regarded as one of the most effective means of preventing misappropriation of funds, corruption, procrastination, and poor quality of goods and services. It is essential since it guarantees administrative responsiveness, equity, and equal treatment in all interactions. Additionally, transparency benefits the public by providing a means of understanding and monitoring the PPP process; it upholds equality and growth; it reinforces democratic principles; it provides public and private actors with an incentive to perform well; it improves the legitimacy of the decision-making process; it increases public confidence in public agencies by demonstrating that they are willing to listen to the public’s needs and concerns; and it facilitates the control of corruption in public life and so on.<sup>5</sup>

Being a standard of both anti-corruption and human rights law, transparency is thus linked to the public’s right to know about official procedures and acts.<sup>6</sup> Article 10 of the United Nations Convention against Corruption (UNCAC) highlights the importance of transparency in the fight against corruption which states that “Taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate.”<sup>7</sup> It is widely accepted that the likelihood of discovering corruption is increased when information on a decision-making process is made public and readily verifiable with regard to the rules and the identities of the decision makers. Therefore, transparency discourages corruption by raising the likelihood of being discovered. Furthermore, transparency lowers the

<sup>1</sup> OECD, (2008) *Public-Private Partnerships: In Pursuit of Risk-sharing and Value for Money*. p-125.

<sup>2</sup> Ibid, p-126.

<sup>3</sup> Asian Development Bank, (2016) *The APMG Public Private Partnership (PPP) Certification Guide*. p-101.

<sup>4</sup> Sodhi S. I., (2008) “Public Private Partnerships in India: How to Ensure Transparency and Accountability” *Indian Journal of Public Administration*, vol.54 (3), p-675.

<sup>5</sup> Ibid, p-676.

<sup>6</sup> UNDOC, (2019) *Anti-Corruption Module 6: Detecting and Investigating Corruption*. p-9.

<sup>7</sup> Article 10, The United Nations Convention against Corruption (UNCAC).

information barrier, allowing for examination and monitoring, which enables identification and lessens the possibility of corrupt behavior.<sup>1</sup>

Corruption impedes efforts to fulfill the Sustainable Development Goals. The World Bank discovered that USD1 trillion is paid in bribes annually, and the World Economic Forum calculated that corruption costs at least USD2.6 trillion, or 5 percent of the world's gross domestic product.<sup>2</sup> According to World Bank, high levels of corruption steal between 20 and 40 percent of official development assistance, or USD 20 billion to USD 40 billion every year. The detrimental effects of corruption are numerous and diverse. Corruption promotes poverty in terms of income, distribution of resources, and access to public services. It also hinders economic growth and causes enormous economic losses and reduces innovation. It reduces economic growth directly by raising the price of goods or services, and indirectly by distorting incentives and expenses of economic actors.<sup>3</sup> Corruption weakens both institutional and interpersonal trust and intensifies conflict. It is present at every level of the public service delivery chain, including budgetary planning, policy creation, acquisitions, and procurement. Conversely, it has been determined that one essential element of good governance is the absence of corruption.<sup>4</sup>

PPPs contracts are public contracts that are subject to manipulation in the same way as public procurement contracts, despite the fact that they are not the same as "traditional" public procurement. As a result, it is critical that corruption be treated with zero tolerance within the PPP process.<sup>5</sup> In this sense, a well-designed procurement procedure is intended to be provided by the United Nations Commission of International Trade Law (UNCITRAL) Model Law on Public Procurement. The objectives of this model law are to maximize economy and efficiency, encourage involvement in the process, stimulate competition for the procurement's subject matter, treat all parties fairly and equally, encourage integrity, fairness, and stakeholder confidence in the process, and attain transparency in the process.<sup>6</sup>

The following situation highlights the failure to uphold transparency in the PPP administration as well as the widespread impact of corruption on sustainable development both at the national and international level.

### **Corruption by Odebrecht Company in Brazil**

The Odebrecht corruption emerged as a result of the Lava Jato investigation in Brazil. The Lava Jato investigation started out as a minor investigation of money laundering by doleiros, black market foreign exchange dealers operating through car washes and gas stations. As the Lava Jato investigation progressed, it uncovered a separate corruption scheme run by the construction firm Odebrecht. Odebrecht is one of Latin America's most significant engineering and construction company operating in power, transport, sea, and airports. It has been found that Odebrecht had bribed about 600 politicians and public officials in ten Latin American countries

<sup>1</sup> UNDOC, (2019) *Anti-Corruption Module 6: Detecting and Investigating Corruption*. p-9.

<sup>2</sup> World Bank, (2020) <https://www.worldbank.org/en/events/2020/10/06/early-detection-of-fraud-and-corruption-in-public-procurement-through-technology>.

<sup>3</sup> United Nations, (2019) *Sustainable Development Goal 16: Focus on Public Institutions*. p-40.

<sup>4</sup> Ibid, p-41.

<sup>5</sup> Akogwu Agada, (2019) *Combating the Menace of Corruption in Nigeria: A Multi-Disciplinary Conversation*. Black Tower Publishers, p-141.

<sup>6</sup> United Nations, (2011) UNCITRAL Model Law on Public Procurement, Annex I.

and two African countries to win the public bidding process of large infrastructure projects, and to renegotiate the projects at higher prices after winning them.<sup>1</sup>

The US Department of Justice (DOJ) had jurisdiction in the Odebrecht case and prosecuted Odebrecht under the U.S. Foreign Corrupt Practices Act of 1977<sup>2</sup>, since the company made payments from bank accounts in New York, and held some meetings to negotiate bribes in Miami.<sup>3</sup> On December 21 2016, 77 Odebrecht executives signed plea agreements with the US Department of Justice, as well as with Swiss and Brazilian authorities in exchange for leniency. The plea agreement between the US Department of Justice and Odebrecht has led to judicial investigations in several countries, leading to plea bargains and additional disclosures of political corruption. The former CEO of Odebrecht, Marcelo Odebrecht and two other executives were sentenced in Brazil to 19 years in prison for corruption, money laundering, and criminal association. However, the sentence was later reduced, and Marcelo Odebrecht was instead placed under house arrest.<sup>4</sup>

According to the DOJ plea agreement, the Odebrecht case involved bribes of US \$788 million given to high-level public officials and politicians for more than 100 projects in Angola, Argentina, Brazil, Colombia, Dominican Republic, Ecuador, Guatemala, Mexico, Mozambique, Panama, Peru and Venezuela in exchange for ill-gotten benefits worth approximately \$3.336 billion.<sup>5</sup> In order to manage the large sums of money required to win contracts, Odebrecht established the Division of Structured Operations (DSO), a separate department dedicated to corruption. The actual negotiations took many different forms, such as outright bribes or change evaluations to win contracts and, to avoid arbitration and regulation that could hinder procurement of the contract. For Odebrecht, any increase in renegotiation would allow for a more significant market share. For the people of Brazil, on the other hand, this would simply reduce public funding or ensure lower-quality services or infrastructure that are necessary for urban development.

Odebrecht distorted the firm selection process in various ways. It used bribery to influence subjective bid criteria in order to disadvantage or exclude competitors. The evaluation of the technical expertise of participants was often biased in projects that were tendered competitively. In the event that the technical score was a weighted average of objective and subjective components, the weights would be chosen to favor Odebrecht. As an alternative, Odebrecht might be arbitrarily awarded the maximum technical score, while its rivals would be given a lower score. In other cases, potential bidders were disqualified by imposing technical requirements that only Odebrecht could meet.<sup>6</sup>

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<sup>1</sup> Nicolás Campos, et al, (2021) "The Ways of Corruption in Infrastructure: Lessons from the Odebrecht Case", *Journal of Economic Perspectives*, vol.35 (2), p-172.

<sup>2</sup> The U.S. Foreign Corrupt Practices Act, 1997.

<sup>3</sup> Fergus Shiel & Sasha Chavkin, (2019) "Bribery Division: What is Odebrecht? Who is Involved?" <https://www.icij.org/investigations/bribery-division/bribery-division-what-is-odebrecht-who-is-involved/>.

<sup>4</sup> Nicolás Campos, et al, (2021) "The Ways of Corruption in Infrastructure: Lessons from the Odebrecht Case", *Journal of Economic Perspectives*, vol.35 (2), p-174.

<sup>5</sup> U.S. Department of Justice, (2016) "Odebrecht and Braskem Plead Guilty and Agree to Pay at Least \$3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History" [icij.org/investigations/bribery-division/bribery-division-what-is-odebrecht-who-is-involved/](https://www.icij.org/investigations/bribery-division/bribery-division-what-is-odebrecht-who-is-involved/).

<sup>6</sup> Nicolás Campos, et al, (2021) "The Ways of Corruption in Infrastructure: Lessons from the Odebrecht Case", *Journal of Economic Perspectives*, vol.35 (2), p-177.



The following demonstrates how Odebrecht bribed different individuals as projects progressed. In 2010, a public-private partnership contract was awarded to a consortium headed by Odebrecht to build and operate the Ruta del Sol, a 528-kilometer highway that connects Puerto Salgar to San Roque in Colombia. Odebrecht paid \$6.5 million to Vice Minister for Transportation, Gabriel Garcia Morales, who ensured that the National Infrastructure Agency (ANI), which tendered the project, tailored the auction in the favour of Odebrecht. To this effect, it included a discretionary pass/fail qualification stage that verified a bidder's financial capacity, the fulfillment of legal requirements, and the bidder's experience delivering public-private partnerships. Due to the efforts of García Morales, one of the competitors of Odebrecht failed on the experience requirement, and the remaining bidder failed on all criteria. Presuming to be the sole bidder in the auction, Odebrecht placed a bid that was almost at the highest amount that could be charged.<sup>1</sup>

Moreover, Odebrecht paid bribes in the expectation that it would renegotiate the contract to its advantage after the projects were awarded. An example of renegotiations that added major works to the original project is the hydroelectric plant Pinalito in the Dominican Republic. In order to add a fully independent project to the original contract, Odebrecht bribed the Vice President of the Dominican Corporation of State-Owned Electric Companies (CDEEE). The value of the contract was raised by \$88 million due to the addition of the El Abanico-Constanza road project. The Pinalito contract was eventually renegotiated six times resulting in an increase in total cost from \$131 million to \$231 million.<sup>2</sup>

Sometimes, bribes were given in order to circumvent the regulations designed to stop opportunistic renegotiation. As an example, in the contract between Odebrecht and the Ministry of Transport and Communications for the IIRSA Norte highway, the Peruvian section of an East-West transcontinental highway, Odebrecht also agreed to add \$28.3 million in expenses and additional investments with the head of the unit responsible for public-private partnerships. It is required that the agreement has to be approved by an arbitration panel according to Peruvian law. According to the prosecutors, Odebrecht allegedly bribed two panel members \$110,000 to guarantee that the firm would win the arbitration process.<sup>3</sup>

The Odebrecht corruption had significance economic and political consequences throughout Latin America. In many cases, anti-corruption provisions in contracts have frequently resulted in the suspension or cancellation of significant projects. For example, construction of Gasoducto del Sur, a large pipeline duct in Peru that would transport natural gas from the Camisea fields to the south of the country, was suspended even though the generating plants that would use the gas had already been built. The IMF estimates that the macroeconomic cost brought about by the Odebrecht case in Peru was approximately 0.8 percent of GDP in 2017.<sup>4</sup> Though there are no definitive estimates, several reports speculate that the Lava Jato and the associated Odebrecht case had a significant macroeconomic impact in Brazil as well: for

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<sup>1</sup> Nicolás Campos, et al, (2021) "The Ways of Corruption in Infrastructure: Lessons from the Odebrecht Case", *Journal of Economic Perspectives*, vol.35 (2), p-181.

<sup>2</sup> Ibid, p-179.

<sup>3</sup> Ibid.

<sup>4</sup> International Monetary Fund, (2018) *Peru: 2018 Article IV Consultation-Press Release; Staff Report; and Statement by the Executive Director for Peru*. p-21.

example, the Lava Jato case has generated a suspension of projects worth approximately \$27 billion.<sup>1</sup>

Brazil is an official signatory to the United Nations Convention against Corruption (UNCAC), committed to reducing corruption by prevention, law enforcement, international cooperation, asset recovery, technical assistance, and information exchange. Additionally, in pursuance of governance, the nation has committed to the United Nations Convention against Transnational Organized Crime (UNTOC), the Convention on the fight against the Bribery of Foreign Public Officials in International Commercial Transactions, the Inter-American Convention against Corruption and in coordination with the OECD, the National Strategy against Corruption and Money Laundering (ENCCLA). Brazil is also a signatory to the 2030 Agenda for Sustainable Development Goals but Brazil has systemically obstructed improvements to ending poverty, climate change, the preservation of ecosystems, peace, justice and strong institutions and corruption in the implementation of SDG Goals.

Reducing poverty and inequality is significantly hampered by the drain of corruption on public funding. Thus, the extent of Odebrecht's bribery in public-private partnerships would inevitably act as a catalyst for decreasing opportunities for sustainable development nationally and internationally. Bribes to officials for contracts, lawyers suppressing evidence, and judges dropping charges all contribute to the breakdown of strong institutions and governance for justice. Subsequently, corruption hinders and destroys any potential for social, economic and environmental growth.

### **Legal Framework for Public-Private Partnerships in Myanmar**

Myanmar's infrastructure need is massive and it lags far behind its neighboring countries by various indicators. Therefore, one of the top priorities of Myanmar government is to attract private investors to fund infrastructure projects. PPPs are actually not new to Myanmar; in the past, they were largely associated with the road and electricity sectors and mostly known as BOT (Build-Operate-Transfer). There are both greenfield and brownfield projects in the category of BOTs.<sup>2</sup> Instead of going through competitive bidding process, the majority of the PPPs in the past were based on unsolicited proposals and bilateral negotiations. The public trust in private investments in infrastructure projects has been eroded as a result of these PPPs projects.<sup>3</sup>

Since 2018, Myanmar has made significant progresses in developing a regulatory framework to facilitate Public-Private Partnerships (PPPs). A key development was the issuance of the Project Bank Notification on November 30, 2018, by the Office of the President. The President Office issued the Project Bank Notification (Notification No. 2/2018), with the objective of "ensuring that Government plans for Project development and implementation are predictable and transparent, and are employed as effectively as possible to achieve national development objectives."<sup>4</sup> It set guidelines and procedures for developing projects in accordance with strategies and action plans in Myanmar Sustainable Development Plan (MSDP) using

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<sup>1</sup> Nicolás Campos, et al, (2021) "The Ways of Corruption in Infrastructure: Lessons from the Odebrecht Case", *Journal of Economic Perspectives*, vol.35 (2), p-176.

<sup>2</sup> Jeffrey Delmon, (2010) 'Understanding Options for Public-Private Partnerships in Infrastructure' (Policy Research Working Paper No 513/2010, World Bank) 31.

<sup>3</sup> Sie Sein, (2020) "Legal Development to Promote Public-Private Partnerships System", *University of Mandalay Research Journal*, vol.11 p-56.

<sup>4</sup> Office of the President, (2018) *Project Bank Notification* (Notification No 2/2018) Section 2(a).

multiple financing mechanisms including public private partnership. Moreover, Project Bank, a publicly accessible online portal, has been established to enhance transparency and competitiveness in the open tender system when implementing the projects under Myanmar Sustainable Development Plan.<sup>1</sup> In conjunction with the Project Bank, the government initiated the establishment of a Public-Private Partnership Center (PPP Center) within the Ministry of Planning and Finance (MoPF).<sup>2</sup> The PPP Center is tasked with facilitating and implementing PPP projects, providing a dedicated institutional framework to support private sector engagement in infrastructure development.

According to the Project Bank Notification, 2018, Public-Private Partnership (PPP) means an investment mechanism based on a contractual agreement between an Implementing Government Agency (IGA) and a private party for providing a public asset or infrastructure or service that includes but is not limited to financing, designing, implementing, managing, and/or operating infrastructure facilities and services traditionally provided by the public sector in an effort to reduce the Government's capital and operating expenditures while improving the quality of assets and services.<sup>3</sup>

The Myanmar government is committed to creating an enabling environment for the private sector to engage in PPPs and to use PPPs to deliver infrastructure and services in the future. The government is implementing PPPs in three main sectors: energy, telecommunications and transport.<sup>4</sup> To prevent corruption in the tendering process, there needs to be in place a number of procedures that can address such a problem. These include requirements for preparing in advance feasibility studies, open procedures and known criteria for the award of contracts, and mechanisms which deter and punish offenders.<sup>5</sup> The major legal and regulatory framework governing procurement of Myanmar's states and region governments is Presidential Directive 1/2017, known as "Tender Procedure for Procurement of Civil Works, Goods, Services, Rental and Sale of Public Properties for the Government Departments and Organizations". Directive 1/2017 guides tender processes for the procurement of construction, goods and services undertaken by union, state and region government departments and organizations. It provides detailed information on the process and procedures of public procurement.

The tender procedures include a number of provisions designed to promote transparency, provide a complaint mechanism, and reduce conflicts of interest and opportunities for bribery and corruption. Upcoming tenders must be publicly announced on government notice boards and websites with the method and timeframe varying according to the size of the tender.<sup>6</sup> On the tender opening day, the tender has to be opened in front of the tender bidders in compliance with the procedure, place, and time stated in the tender documents. When opening the tender, names of the tender bidders, bidding price, tender period, and the amount and time period of the tender guarantee have to be publicly announced.<sup>7</sup> The tender winner is then publicly announced in front

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<sup>1</sup> Ibid, Article 1.

<sup>2</sup> Ibid, Article 11.

<sup>3</sup> Office of the President, (2018) *Project Bank Notification* (Notification No 2/2018) Section 1(n).

<sup>4</sup> Kate Geary, (2020) *In the dark: Secrecy and The Myingyan Public Private Partnership Gas Power Plant in Myanmar*. Re-course, p-12.

<sup>5</sup> United Nations, (2004) *Governance in Public Private Partnerships for Infrastructure Development*. p-7.

<sup>6</sup> Office of the President, (2017) *Tender Procedures for Construction, Procurement of Goods and Services, Lease and Sale by the Government Departments and Organizations* (Directive No 1/2017) Paragraph 10.

<sup>7</sup> Ibid, Paragraph 23.

of other tender bidders.<sup>1</sup> This directive also sets out actions that can be taken if there are instances or suspicions of bribery or corruption. These can include the cancellation of the contract and the tender, disciplinary or administrative actions against the employees from the procuring departments and organizations per the existing rules and regulations, and banning the bidders, suppliers, or purchasers from other tenders.<sup>2</sup> Under the Anti-corruption Act 2013, it is provided that “any other competent authority except the person who possesses the political post commits the bribery, on conviction, he shall be punished with imprisonment for a term not exceeding 12 years, and shall also be liable to fine.”<sup>3</sup>

While it is important that bidding processes and contract awards are made public, disclosure of the actual terms of agreement and performance of PPPs is vital. The purpose of the Project Bank is to strengthen the development of Projects that will enable the Government to effectively implement the MSDP, including by publishing government plans for the priority projects needed to achieve national development objectives in a predictable and transparent way.<sup>4</sup> The Ministry of Planning and Finance shall publicize Projects contained in the Project Bank via various means that include but shall not be limited to an interactive, web-based, publicly accessible database.<sup>5</sup> While the database includes information about the name, location, cost, schedule and contact details,<sup>6</sup> vital information such as terms of the PPP contracts and financial information are not publicly available. It is crucial for PPP contracts to be made publicly available, accessible and written in the language of the concerned communities. Mandated proactive disclosure of contracts requires the posting of important project and contract information in the public domain by departments and other public agencies within a given time period after award of contract. It also requires updating for additions, modifications, deletions and variations in the information disclosed from time to time.<sup>7</sup>

The process of disclosure should consider the possibility that disclosing certain information can harm the competitive positions of the companies bidding for or participating in PPPs. However, performance and penalties would not be very useful to stakeholders without essential information on pricing, payments and asset transfers, etc.<sup>8</sup> Consequently, there is a need for clear provision on what kind of information should be kept confidential since the private sector needs to be aware of what specific information will be disclosed and what will be kept confidential before the signing of the agreement. Under the Myanmar Official Secrets Act 1923, “If any person having in his possession or control any secret official code or password or any sketch, plan, model, article, note, document or information to which he has access owing to his position as a person who has held a contract on behalf of the Government or as a person who is or has been employed under a person who holds or has held such an office or contract, willfully communicates the code or password, sketch, plan, model, article, note, document or information

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<sup>1</sup> Ibid, Paragraph 37.

<sup>2</sup> Ibid, Paragraph 45.

<sup>3</sup> Anti-corruption Law 2013, Section 56.

<sup>4</sup> Office of the President, (2018) *Project Bank Notification* (Notification No 2/2018) Section 2(a).

<sup>5</sup> Ibid, Article 8.

<sup>6</sup> Ibid, Article 9.

<sup>7</sup> World Bank, (2013) *Disclosure of Project and Contract Information in Public-Private Partnerships*. p-19.

<sup>8</sup> Ibid, p-25.

to any person other than a person to whom he is authorized to communicate it, he shall be guilty of an offence under Section-5.<sup>1</sup>

Moreover, Article 46 of the Project Bank Notification provides that IGAs shall monitor and supervise PPP Projects to ensure compliance with terms and conditions stated within respective PPP contracts and shall send a copy of monitoring reports to the PPP Center on a 6-month basis.<sup>2</sup> But there is no provision concerning the disclosure of such monitoring reports to the public and these reports should be available for public scrutiny together with the terms of the contract itself. Information on the performance of PPPs should be disclosed on a regular basis to provide service users with an understanding of what levels of service they should be getting. Therefore, contract and project information disclosure may produce more sustainable contracts and benefit both public and private sector by reduced risks of renegotiation. Therefore, a specific PPP law that governs all public-private collaborations, should be enacted, incorporating detailed transparency requirements, clearing mandating what kind of information should be disclosed and what will be kept confidential, ultimately guaranteeing the regular disclosure of contracts and project monitoring reports.

### Discussion

Since PPPs are long-term contractual agreements based on predetermined performance standards, performance monitoring by the public entity is even more crucial to ensure that the terms of the agreement are followed. To achieve this, transparency which is widely understood to be the public's unrestricted access to timely and accurate information on the decisions and performances made in the public sector,<sup>3</sup> has emerged as a central element of accountability and anti-corruption strategies and policies. Transparency is essential in every stage of PPP lifecycle, from procurement and contract making to project monitoring. Contract documents, namely the main agreement identifying any changes made since the contract was originally signed and relevant side agreements including government guarantees should be disclosed proactively by the government with minimal redactions which reflect commercially confidential information. However, it should be remembered that disclosing commercially confidential information might harm the business interests of a party to the contract.<sup>4</sup> Therefore there should be clear provision about what kinds of information of the project are to be kept confidential in order to facilitate the prompt delivery of PPP documents.

Information on the performance of PPPs should be disclosed together with budget documentation on a regular basis to reduce uncertainty for investors, potentially lowering the risk and the cost for the government.<sup>5</sup> Increasing transparency increases the risk of detection of corrupt practices and this can act as a deterrent to future corruption. Even though, the PPP model is structured to discourage corruption, it is possible the process can be manipulated. Where this is the case, it undermines citizens' confidence in public institutions. The effect is that the cost of the provision of the project will be unnecessarily high or its quality will be significantly lower at the expense of end-users and tax payers. By making information public, it is easier for economic and

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<sup>1</sup> Myanmar Official Secrets Act 1923, Section 5.

<sup>2</sup> Office of the President, (2018) *Project Bank Notification* (Notification No 2/2018) Article 46.

<sup>3</sup> Madeleine C. Fombad, (2013) "Accountability Challenges in Public-Private Partnerships from A South African Perspective" *African Journal of Business Ethics*, vol.7 (1), p-15.

<sup>4</sup> World Bank, (2013) *Disclosure of Project and Contract Information in Public-Private Partnerships*. p-16.

<sup>5</sup> International Monetary Fund, (2021) *Mastering the Risky Business of PPP in Infrastructure*. p-38.

social actors to identify evidence of corruption and malfeasance and to act accordingly, punishing corrupt behaviour through market and investment choices. Also, transparency will increase the risks of discovery and the expected costs of corruption, if sanctions are credible.

### Conclusion

Transparency is considered one of the major factors that contribute to the success of PPPs and the transparency and sustainability of the investment are negatively affected by the limitation of public access to PPP documents. The reason that the PPP agreements encompass certain commercial confidentialities, make it impossible for the public to correct and control the risks conditions and quality of services pertaining to the public interest. The lack of transparency could result in the enhancement of corruption. Therefore, the government has introduced measures to promote transparency by creating Project Bank, an official database for providing information on the development of PPPs under the Project Bank Notification. However, there has been certain necessity in the details of conflict of interest disclosure requirements and the degree to which transparency requirements are put into practice. A high level of transparency in the conclusion of PPP agreements are essential for the supervision of the agreement execution by both the partners and the public. Therefore, a specific PPP law governing all partnerships between public and private should be enacted ensuring transparency at every stage of the PPP, where both parties, as well as the general public, could monitor the ongoing performance of the PPP and the outcome of the collaboration. Specifically, information on the utilization of public resources, criteria of decision making, results of decisions, and financial statements should be accessible and available to the partners and the public.

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