

Regulatory Compliance: A Crucial Governance Obligation in Advancing Accountable Public-Private Partnerships (PPPs) under the AfCFTA Agreement

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Abstract

The *African Continental Free Trade Area (AfCFTA)*, once fully implemented, provides the basis for Public-Private Partnership (PPP) projects to become the most appropriate means to facilitate and contribute to meeting the economic development goals of individual African states. However, the agreement emerges against the backdrop of chronic institutional governance failures in matters of public resource management, which continue to affect the service delivery mandate of governments in developing states. Therefore, any such project needs to guarantee accountable, efficient, effective, and result-driven outcomes. This is to safeguard against such initiatives not depriving citizens of benefitting. The article presents regulatory compliance as a crucial component in the role of private and public entities to assist governments to realise developmental goals through suitable joint venture projects.

A case study analysis presents the causal link between governance failures and incidents of governance interventions on such development instruments. The case study approach is appropriate due, largely, to its interpretive and inductive qualities. It uses South Africa as the primary real-life setting to appraise the issue, particularly as certain findings from the Judicial Commission of Inquiry into Allegations of State Capture, Corruption, and Fraud in the Public Sector, including Organs of State, expressed an opinion on instances where joint projects were to ensure that benefits equally accrue to



the citizenry. An ethics theoretical framework facilitates the exploration of the subject matter, more so, as regulatory compliance advances institutional integrity and ethical practices. Findings made also attest to certain limitations in matters of governance oversight. For example, the implementation of regulatory compliance strategies is a concerning part of project governance. Conclusions uphold that even with the extensive nature of regulatory compliance requirements, along with perceptions of the burdensome nature aligned to it, compliance management remains a vital governance component.

Keywords: African Continental Free Trade Area (AfCFTA), ethics, governance, Public-Private Partnership (PPP), regulatory compliance, service delivery

1. Introduction

With the adoption of the *African Continental Free Trade Area (AfCFTA)* agreement as central to advancing the economic development goals of African states, the initiative underscores the African Union's (AU) Agenda 2063 of ensuring the promotion of the economic transformation of the African continent under the slogan "The Africa We Want" (African Union 2022). The paper explains that the drive to give effect to the economic development of African states is also vested in the manner in which joint projects enable such endeavours. Notwithstanding increased concerns that project governance failures of capital-intensive joint ventures between the state and private entities are a worrisome reality (Bekker 2014), the economic growth challenges of developing countries allow for Public-Private Partnership (PPP) projects to provide the necessary means to facilitate the attainment of national development goals. Some of the areas of concern pertain to the disbursement of project funds in an unregulated environment, or the disregard of available legal instruments, as risk-mitigating tools. Irregularities of this nature find placement in case law, with specific reference to the nature and extent of malfeasance (wrongdoings by public officials), misfeasance (improper performance of a lawful act), and nonfeasance (failure or omission to perform an obligatory or compulsory act) (Mishra 2019; Naidoo 2022; O'Regan 2022; Farlam 2005).

Therefore, the extent to which infrastructure and/or resource projects are to facilitate the achievement of the outlined objectives under the *AfCFTA agreement* relies on the degree to which individual countries ensure the creation and sustainment

of conducive investment environments informed by, among others, available legal instruments and enforcement resources aligned to it. This article appraises the emergence of the agreement within the context of the benefits of PPP projects to the socio-economic development goals of AU countries. Further relevance is drawn from the understanding of, specifically infrastructure projects, as involving “blended finance to enable the efficient execution of socio-economic infrastructure programmes and projects” (Development Bank of Southern Africa 2022 para. 2). Benchmarked compliance guidelines for joint venture projects follow best practice standards, with the attached Table 1 serving to highlight this actuality. The content derives from various legal instruments at a national, regional, and international level of, for example, Nigeria, South Africa, the Southern African Development Community (SADC), as well as the G20 High-Level Principles on PPPs (United Nations Office on Drugs and Crime 2022). The inclusion of these guidelines further contextualises the potential of the agreement, as well as finding support through the presence of appropriate legal frameworks at country and regional levels.

The exploration of the subject incorporates an inductive qualitative approach, which is focused on content analysis of official reports, legislation, academic studies, and media articles as the collective and primary basis of inquiry. The inclusion of case studies serves to give credence to the triangulation of information, with specific attention to describe the purpose, nature, and extent of joint projects over time. Particular attention is given to the South African context as various findings of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption, and Fraud in the Public Sector including Organs of State (hereafter Zondo Commission) highlighted the extent of exploitation of joint projects to the detriment of good governance and stakeholder benefit. A rudimentary assessment of public interest in the testimonies delivered at the Commission reflected in the ever-increasing number of viewers on various broadcasting platforms, as new revelations emerged. This, as public access to the commencement and finalisation of the commission’s task, aligns with the view that the entrenchment of transparency only serves to facilitate the means to strengthen “weakened institutions and corruption-enabling loopholes” (Madubela 2022, para. 3).

2. The Africa Continental Free Trade Area (AfCFTA)

The AfCFTA not only represents the largest free trade area involving 55 member states

of the AU but also comprises eight regional economic communities brought together to create a single market for the African continent. This initiative was formalised on 21 March 2018 in Kigali, Rwanda, with the signed protocol, then involving 44 of the 55 African states, ratified on 30 May 2019 and effective since January 2021 (African Union 2018; 2023b). Besides the primary purpose of the agreement as geared towards enabling the free flow of goods and services across the continent, with the associated goal of enhancing the trading position of the continent on the global scene (African Union 2023b), it seeks to promote and attain sustainable and inclusive socio-economic development (Mene 2023). In so doing, the signed protocol, directing the creation of a single market, seeks to:

- Establish a liberal market through multiple rounds of negotiations
- Move towards the establishment of a future continental customs union
- Achieve sustainable and inclusive socioeconomic development, gender equality, and structural transformations within member states
- Enhance the competitiveness of member states within Africa in the global market
- Encourage industrial development through diversification and regional value chain development, agricultural development, and food security
- Resolve challenges of multiple and overlapping memberships (South African Revenue Service 2022, para. 4)

Part of the agreement involved the establishment of a Secretariat, currently headed by South African Wankele Mene as Secretary-General, under a four-year term (01 March 2020 to 31 March 2024). Since 17 October 2020, the Secretariat has been located in Accra, Ghana, having received an initial financial contribution of \$5 million to give effect to the stipulations under the trade arrangement. This was followed by the African Development Bank (ADB), through the African Development Fund, providing an additional \$11 million in 2019 (African Development Bank 2022a). As the African Union Summit of 2023 adopted 2023 as the “Year of AfCFTA: Acceleration of the African Continental Free Trade Area implementation” (African Union 2023a), the World Bank cautions that where the initiative seeks to lift an additional 30 million people out of poverty, its impact may not be uniform in terms of economic benefits that emerge from the initiative (Thomas 2022, para. 16-17). Nonetheless, international institutions, business entities, and scholars alike consider the initiative as best placed

to ensure increased business opportunities and economic growth on the continent. Specifically, promotional views acknowledge that a successful implementation will create a “combined consumer and business spending of \$6.7 trillion by 2030 and \$16.12 trillion by 2050” (Signé 2022, para. 4). It is in this context that PPPs find contextual relevance.

2.1 Opportunity landscape for PPPs

With the 36th AU Summit having outlined 2023 to focus on promoting business opportunities within the tourism, transport, business services, communication, and financial services sectors (African Union 2023c), such new economic opportunities bode well to facilitate investment in human capital (World Bank 2022), as well as reducing poverty on the continent (Abrego *et al*/2019). Most importantly, these business opportunities align with ongoing infrastructure development projects, with any such positioned as key catalysts to facilitate these targeted economic needs for African countries. This, as the post-Covid-19 period, created the necessity for governments to underpin their respective economic recovery plans through infrastructure development initiatives (Ramaphosa 2020a). The approval of a loan arrangement of \$50 million, involving the Organisation of the Petroleum Exporting Countries (OPEC), under its OPEC Fund and in collaboration with the African Finance Cooperation towards meeting the infrastructure needs in Africa, serves as a recent example (OPEC 2021). Concerning Private Participation in Infrastructure (PPI) investments, available data informs that while South Africa attracted an estimated \$826 million in 2021, the Democratic Republic of Congo (DRC) topped the list of Sub-Saharan countries with \$1.1 billion PPI investments, covering three major projects (World Bank 2021a).

Even then, in the South African context, the Auditor-General of South Africa (AGSA) highlighted that public sector infrastructure expenditure and estimates involved an estimated amount of R226 billion for the 2020–2021 financial year (Auditor-General of South Africa 2021a). This extends to the creation of South Africa’s Infrastructure Fund, as announced by President Cyril Ramaphosa in 2018, with an envisaged amount of R1 trillion earmarked for infrastructure projects (Development Bank of Southern Africa 2022). Following this proposal, was the launch of the estimated R84 billion social housing development initiative in Mooikloof, Pretoria, through a PPP model. It is one of many related endeavours to realise the country’s growing housing infrastructure need, underpinned by the government’s spatial integration development model

(Ramaphosa 2020b).

National development plans of the respective African countries further bolster the significance and appropriateness of this continental initiative. As a point of elucidation is the case of Côte d'Ivoire, with its development plan for 2021-2025 emphasising the reconstruction of its economy as a key factor to ensure that the country sustains its post-conflict role in matters of economic, political, and security prominence in West Africa (The Africa Report 2021). The country is also one of the fastest growing economies in the West Africa region (Oluwole 2022), with the African Development Bank (2022b, para. 4) outlining that attention to strategic logistics infrastructure, expanded construction projects, and planned energy projects foresee a projected economic growth 6.8 per cent in 2022 to 7.2 per cent in 2023. Complimentary to this development is an increase in bilateral trade between South Africa and the Ivorian nation (South African Presidency 2022), which further translates into boosted business confidence.

An equally significant and associated development aligned to the implementation of the *AfCFTA agreement* is that the South African Revenue Service (SARS) has been assigned the responsibility of implementation agency for the preferential trade agreements (South African Revenue Service 2022). At best, this responsibility brings into context the significance, confidence, and contributory role South African public entities fulfil in advancing the aims of the AfCFTA initiative.

2.2 Understandings of PPPs in the context of socioeconomic development needs

Writings on PPPs are exhaustive in their description of the concept. For example, a basic search locates 13 000 scholarly publications on a single search platform on the subject. A general definition describes it as a long-term contractual relationship between public and private parties, awarded through a competitive tendering process (Zeidy 2020). An expanded definition used by the South African National Treasury expresses it as long-term contracts between the public and private sectors, intending to ensure the delivery of well-maintained, cost-effective public infrastructure or service, by leveraging private sector expertise and sharing risk with the private sector (South African National Treasury 2015, as quoted in Iwegbuna 2019; Zeidy 2020). The concept is also used to describe various contract types, such as the Private Finance Initiative (PFI) where private companies are involved in the financing, construction, and management of new

public assets (World Bank 2022).

Additionally, it is a contract between a public sector institution and a private party where the private party assumes the substantial financial, technical, and operational risk of the project (Farlam 2005). Moreover, it refers to any arrangement on a spectrum for alternative service delivery arrangements from a simple management contract to a complete concession for a private service provider (Viljoen 2019). In the South African context, the PPP model provides insight into the current administration's placement of infrastructure projects as a central pillar to advance economic and social goals under the National Infrastructure Plan 2050. Overall, the latter plan seeks to target a 30 per cent investment-Gross Domestic Product (GDP) ratio with one-third thereof to be delivered by the government. Of importance is that the cost of delivering infrastructure needs is estimated to exceed R6 trillion between 2016 and 2040, with energy and transport to account for 72 per cent of the expenditure (South African Department of Public Works and Infrastructure 2022, 3). Available data from the South African National Treasury informs that with the introduction of PPPs in 1998, the country was able to register the successful conclusion of 31 PPPs. The overall value of these projects constituted R16.5 billion of the R947.2 billion demarcated for public-sector infrastructure spending (South African National Treasury 2017). Updated data for 2021 outlines that 34 PPPs were finalised, with a combined value of R89.3 billion (South African National Treasury 2021). Although the National Treasury recorded a decline in new PPP transactions from an estimated R10.7 billion in 2011-2012 to R5.6 billion in 2019-2020 (Hadebe, Likhanya and Pierce 2021), such projects remain central to the realisation of the set objectives under the National Development Plan (NDP) 2030.

2.3 Implementation risks to AfCFTA and PPPs

While the post-COVID-19 period has seen the resumption and gradual improvement in economic activities globally, the impact of the Russia-Ukraine conflict, for example, continues to manifest in different ways for African countries. Most evident are food security concerns due to higher energy prices, as well as price increases in basic food products at the consumer end (Vines 2023). These factors pose threats to the internal stability of countries if not managed effectively by governments, more so when the consequence of such international events translates into increased incidents of protests in some African countries. Associated economic pressures on governments may present in incidents of nationalist populism. The case of the Tunisian president

who is on record as blaming illegal migration into, and through, the Tunisian borders as an attempt to change the demographic characteristic of the Tunisian population, which in turn resulted in incidents of violence against Black Africans (Gaidi 2023), aligns with the reasoning.

2.3.1 Associated risks to the AfCFTA protocol

The implications of not giving sustained attention to intra-state conflict indicators such as poverty, human rights violations, and disproportional development programs to benefit all sectors of society in respective AU countries, increase the potential of the continental agreement's primary objectives becoming undermined. For example, most national development plans give attention to youth development, more so as the continent's overall demographic profile consists of 70 per cent of young people under the age of 30 (Mulikita 2022), along with predictions of the number to increase to 75 per cent by 2030 (Perlotto 2019), youth disillusionment (World Economic Forum 2021) due to, among other, lack of access to employment opportunities, makes the sector attractive for recruitment by extremist groupings (Steiner 2022).

Adjoined to such realities are national and regional security threats, characterised by increased violent extremism, political instability, and transnational organised crime (Adeleke and Tayo 2022) as the three main risks to the implementation of the *AfCFTA agreement*. The interconnectedness of these three risks to national and regional security is reflected in, for example, the threat posed by jihadist groups in West Africa. This, as the fear of increased insurgencies across national borders, is accompanied by displacement of people and increased attacks on security forces, which in turn further weakens the available countering resources of West African States (de Rohan Chabot 2023). Compounding the problem even further is targeted kidnappings for ransom demands (Hoinathy and Fru 2022) by insurgency groups to finance terrorist activities. Presently, Nigeria ranks as the top West African country for such threats, with over 3 000 individuals kidnapped in 2021, involving either criminals, insurgents, or terrorist-associated groupings responsible for such acts (Okoli 2021). The recent release of a French journalist and a United States of America (USA) aid worker in Niger, elucidates previous cases, involving a total of 25 foreign nationals that were abducted and held for ransom in the Sahel region since 2015 (Mamane, Tucker and Larson 2023, para. 27).

The impact of climate change complicates the stable outlook for African countries further, with increased periods of drought, as well as torrential rains affecting the ability

to guarantee sustained food production and access to it. Sub-Saharan African countries represent 95 per cent of rain-fed agriculture globally, with seven of the 10 countries most vulnerable to climate change located in Africa (Africa Development Bank 2019, paras. 2-3).

Risks associated with the overall lack of infrastructure in most countries in the spheres of Information Communication Technology (ICT), including resistance to adopting a zero-point tariff change to ensure the effective implementation of the *AfCFTA agreement*, add to the risk profile. In the case of ICT as a risk, it is regarded as a crucial impediment to the development prospects of states, with the need for an estimated \$3 billion annual investment to address the ICT shortcomings (Corrigan 2020).

2.3.2 Risks to PPP projects

Available data informs that PPP projects tend to be managed in a high-risk environment, especially where African states experience the highest capital flight (United Nations Office on Drugs and Crime 2005) with a figure of \$5 trillion attached to the matter since 1970 (Kozul-Wright 2022). Not only do fraud and corruption pose immense risks to the outcome of PPPs (Wood 2019), but the lack of attention on the matter of accountability (Suttner 2016), only serves to increase the risk appraisal of such projects. A particular aspect associated with this risk derives from either the absence or compromise of compliance controls. One of the fundamental principles that define the approval of any PPP project is premised on it being awarded through a competitive tendering process (Zeidy 2020). However, any deviation from this standard practice still warrants that pre-qualification and registration procedures be adhered to (South African Department of Justice and Constitutional Development 2022a, 850). For this to happen and be sustained, requires a functional, effective, and competent public sector to enable an investment environment that is conducive to this venture (Montiel, 2006).

Even then, corrupt practices emerge through attempts to influence public officials in the form of payments of cash bribes (South African Department of Justice and Constitutional Development 2022b, 701), with the intention for trusted accomplices to facilitate a particular outcome in favour of parties that were not supposed to legally benefit from such a transaction (Grobler 2020; Nyaungwa 2019).

3. Some theoretical context

Available literature directs that even where regulatory compliance presents as common language use, it is still under-developed as a practice and business process application in the public sector (South African Department of Public Service and Administration 2022; Ensor 2021). As a root term, compliance also generates different meanings. For example, for the legal professional it would imply the need to obey the law. In the ambit of risk management, the concept emphasises matters of potential liabilities under the law (Giles 2016). Conjoined, regulatory compliance expresses a set of guidelines that the law requires organisations to follow. From an application perspective, it seeks to give effect to the principles of, among others, integrity and safety, as well as ethical behaviour in business processes and practices.

Institutional governance failures that result from non-compliance to set obligatory standards in finance resource management, bring into stark contrast the applicability of theories aligned to corporate governance. For example, a stewardship disposition upholds the view that those entrusted with giving effect to the PPP project, must ensure sustaining the legitimacy of the process, institutional integrity, public trust, and the legacy element of “value for money” (Soyeju 2013). The fact that the theoretical construct of the PPP concept implies such an expectation equally applies to the design and execution phases of such projects. Accountable leadership becomes a key requirement in managing the PPPs, to the extent that it aligns with the legal and ethical expectation of fulfilling a duty of care (Joubert 2017). This, as the virtue ethics theory, promotes moral excellence and good character as key principles. Case law provides clear examples of how ethics have become recognised as integral to corporate governance and business conduct in the delivery of legal judgements (Van Zyl and Visser 2016; Chuene, Demarthe and Mokoena 2020). Essentially, the moral character of a leader or public functionary is on equal footing with the technical acumen of the individual in matters of appointments and governance expectations (Pillay and Jones 2020).

The significance of an ethics-driven approach to project governance finds relevance in the volume of legal cases and incidents where misrepresentation of material facts (non-disclosure of conflict of interests, false statements, or omission of facts) becomes self-evident. The participatory characteristic of PPPs also aligns with the Participatory Governance Theory in matters of intrinsic value (or opportunity element) and the process element of participation. The intrinsic value or opportunity element explains how participatory governance assists stakeholders in achieving the ethics fundamental

of good for self and others. In this instance, “self” and “other” imply the public-private partnership, where the public partner, in the form of a government entity, also serves as representative of the public interest. The associated process element, in turn, denotes how accountable, efficient, effective, and result-driven outcomes are achieved (Osmani 2008: 2).

4. South Africa as a case study: reflection

Case Law argues that the mismanaging of PPP projects results in substantial harm to both municipalities and the public (Case Law 2018). In support is an assessment of the financial viability of most municipalities, where the largest portion of service delivery needs are concentrated and where PPPs are targeted, contrasting with best practice principles in matters of creditworthiness and availability of institutional skills to provide management and oversight (World Bank 2019). The AGSA’s 2020-2021 municipal evaluation informs that in 81 per cent of such cases, the action only occurred after the said institution had issued notifications (Auditor-General of South Africa 2022). A close read of available literature on corruption and fraud at the municipal level, which constitutes the primary area where joint projects are approved and managed (Auditor-General of South Africa 2021a, 2021b; Department of Public Service and Administration 2019; 2021), clearly informs that regulatory compliance challenges persist. Hence, the use of case studies provides insight into the experiential knowledge of an incident, phenomenon, or event as it evolves over time, through descriptive and conceptual analysis (Corcoran, Walker and Wals 2004).

For social scientists, a focus on qualitative case studies assists in theory development, while also providing the basis for “lessons learned” (Rowley, 2002; George and Bennet 2004). The adoption of the method serves to complement the various sources of information used for purposes of triangulation (Kohlbacher 2006). Even where South Africa is placed as a single case, the number of similar incidents related to PPP projects over time, and which George and Bennet (2004: 18) refer to as a “class of events”, validates the adoption and applicability of this descriptive approach. The reference to similar regulatory compliance challenges in the managing of PPP projects in other developing countries asserts the scholarly view that within-case analysis and cross-case comparisons, provide a stronger means of drawing inferences (Rowley 2002; George and Bennet 2004). Therefore, the attention given to various cases of compliance challenges in public entities over time, to date, provides further impetus to reflect on South Africa

as a case reference. With audit findings from the AGSA, the most appropriate included in its 2022-released report on municipalities covering the period of 2020-2021, outlines that identified non-compliance and fraud incidents resulted in material financial losses estimated at R3.9 billion (Auditor-General of South Africa 2022).

4.1 The regulatory compliance framework on PPPs in South Africa

Some studies on PPPs in South Africa inform that the country had developed a robust policy and regulatory framework for such business initiatives, but with an inadequate level of PPP awareness and training, along with a lack of project management capacity to facilitate the expansion of such deals (Nyagwachi 2008). When operational, the country is not utilising PPP resources effectively, with limited PPP initiatives undertaken in certain infrastructure projects (Viljoen 2019). Furthermore, a continental assessment of the absence of specific legislation to address PPP initiatives highlighted that South Africa is not alone. This is evident in a 2017-benchmarked finding, informing that only about 30 African countries have adopted laws relating to PPPs (World Bank 2021b). It is common cause that countries with or without dedicated PPP laws are experiencing similar PPP challenges to attract PPP ventures (Vallée 2018). On regulatory-specific instruments, South Africa uses the Municipal Public-Private Partnership Regulations under the Local Government Municipal Finance Management (Act 6 of 2003), the Revised Public Finance Management Act of 2015, as well as the Preferential Procurement Policy Framework of 2000 as sectoral legislation in advancing PPP regulatory compliance (World Bank 2021b). The enactment of the Critical Infrastructure Protection Act of 2019, in turn broadened the strategic risk mitigation framework on infrastructure development (South African National Treasury 2019). At the time of writing, the envisaged Public Procurement legislation is still a work-in-progress (Metelerkamp 2022).

From a benchmark perspective, Nigeria becomes one of the many countries suited to draw significant correlations. At a glance, it is not only based on the country accounting for 64 percent of South African trade with West African countries (Adekoya 2021) but also due to some of the comparable characteristics to regulatory compliance risks and countering mechanisms (United Nations Office on Drugs and Crime 2019; San 2020). The Nigerian environment adopted its Infrastructure Concession Regulatory Commission Act (ICRCA), passed in 2005, to cater for PPP projects through its Infrastructure Concession Regulatory Commission (ICRC), as established in 2008.

Supportive legislation includes, among others, its Public Enterprises Privatisation and Commercialisation Act of 1999, the Public Procurement Act of 2007 that in turn brought about the Bureau of Public Procurement along with its adoption of the 2007 Public Procurement Regulations (Atoyebi and Samaila 2022).

4.2 Specific risks associated with PPP projects in South Africa

The manner in which regulatory compliance is realised at the various levels of implementation, monitoring, and evaluation, becomes an issue of contention. The prevalence of corrupt practices, along with the absence of robust early warning systems (Irish-Qhobosheane 2022) to detect and deter comprising of such projects, remains a present threat to effective regulatory compliance. To elucidate this inference, the following aspects, directly related to the risk environment, become important to contextualise:

4.2.1 The impact of organised crime and corruption

Most infrastructure projects in the country, with specific reference to the construction industry, have become targets for extortion. Consequently, cases of unethical practices become evident where, for instance, the issuance of payments determines project continuity, to the detriment of good governance practices and ethical conduct (South African Special Investigative Unit 2021; Jika, Nombembe and Hlangu 2022). As a result, an estimated 188 infrastructure and construction projects, valued at R72 billion, remain affected by such criminal acts (Irish-Qhobosheane 2022; Jika, Nombembe and Hlangu 2022). Hence the increased calls for decisive action in dealing with these crimes to promote inclusive growth (Ramaphosa 2020b). That the enactment of the Critical Infrastructure Protection Act of 2019 resulted from the extent of cable theft and the subsequent negative impact on the public purse, economic activities, and associated growth, is a positive development. Reported cases inform on the increased arrests of individuals, inclusive of public servants (Du Plessis 2022; Slater 2022) implicated in such criminal acts, with state and business entities declaring annual losses of R7 billion (Bloomberg 2022).

4.2.2 Public procurement

Although the South African public sector has a dedicated Chief Procurement Officer

located in the National Treasury with the task of managing procurement reforms, maintaining the procurement system, and overseeing the government-private sector business interface (South African National Treasury 2020), continuous cases of tender fraud remain a constant focus area (Auditor-General of South Africa 2021a; Broughton 2022; Chelin 2021). In the cases involving COVID-19 procurement, the Special Investigations Unit (SIU) outlined in its final report that the total amount investigated amounted to R7.8 billion (Koko 2022). Compounding the situation further is the revelation that the procurement system is not only devoid of an overall digitised practice but also characterised by a decentralised process with the existence of 1 000 procuring entities. Most concerning is that the central procurement database consists of 1.7 million registered companies and only 1.2 million are properly vetted (Metelerkamp 2022).

4.2.3 Absence of a proactive compliance management process

Adherence to regulatory compliance involves the adoption of a suitable approach. Despite having sufficient legislation and policy guidelines in place, adherence to regulatory compliance requirements remains a challenge. A holistic regulatory compliance management landscape requires a top-down compliance framework that is characterised by the presence of national and provincial legislation to ensure both business confidence and governance assurance of any PPP project. Legal instruments on joint ventures at the local government level require public officials to ensure that project governance controls allow for end-to-end quality assurance. Factors that must be included, involve the need to conduct assessments on design development and actual approval thereof by the relevant Accounting Officer or Accounting Authority. Congruent thereto is to appraise whether there are adequate capacity and skills in place at the level of the project developer, as well as those assigned to ensure the project is completed in time, on budget, and with the requisite initial specifications approved. Attention to the interests and participation of various stakeholders becomes an additional and important consideration (Auditor-General of South Africa 2021).

5. Findings

An appraisal of a total of over 20 dissertations and theses, covering the period 2003 to 2022, collectively highlights the following conclusions on regulatory compliance of

infrastructural joint ventures, notably:

- PPP projects transcend all three tiers (local, provincial, and national government) of South Africa's administrative landscape.
- PPP projects in the water sector align with international studies that water infrastructure projects present the biggest financing and governance challenges (Khoza 2021; Khuzwayo, 2014; Makhari, 2016; Avello 2022; Pusok 2016).
- Institutional and regulatory administrative reform processes are not fully developed, with a legal and policy framework for municipal PPPs still fragmented (Mabuza, 2016), along with a need to attend to governance and accountable administration processes (Viljoen 2019).
- The Mismanagement of funds, as well as non-compliance with design requirements associated with road construction PPP projects (Mugarura 2019).

5.1 Benchmarked compliance guidelines

While most transactional arrangements and business practices adopt a risk-based compliance approach (Giles 2016), it becomes apparent that a best practice compliance approach becomes a second option that can be adopted concurrently with the former. Specifically, the intention of a compliance approach is by design aimed at being proactive, thus preventative and sustainable (Sadiq and Governatori 2013). Table 1 serves to underline this point.

As a governance standard and ethical value, accountability reflects an overarching aspect that permeates institutional governance challenges (Tandwa 2021). For example, consecutive audit outcomes on PPP projects reveal that in many cases controls over the infrastructure delivery process are not effective. As a consequence, deficiencies akin to inadequate planning, late completion of projects, increase in budgeted cost, poor building quality, and under- or non-utilisation of completed infrastructure assets (Auditor-General of South Africa 2021a) manifest in losses, fruitless and wasteful expenditure, as well as impacting business confidence negatively. The matter of accountability finds placement in the effectiveness of institutional leadership.

The enactment of the Public Audit Amendment Act of 2018 serves as a regulatory compliance instrument that enables the office of the AGSA to impose appropriate sanctions. As an outcome, some municipalities have already adopted consequence

management policies as part of a governance framework under the national department of Cooperative Governance and Traditional Affairs (Cogta). While such strategic initiatives remain commendable, their practical impetus at the levels of task execution becomes a continuous point of concern (Felix 2021; Mavuso 2022).

Public perceptions and/or reported cases of leadership's inability to address regulatory compliance management deficiencies compound the compliance problem. The body of knowledge on regulatory compliance attests that some of the major challenges government entities experience involve:

- (i) a lack of an organised approach to managing compliance
- (ii) compliance strategies are not followed through to the end to see benefits
- (iii) junior-level employees are assigned to project management positions with limited help to be efficient and effective
- (iv) entities that work separately from each other keep introducing new rules and regulations, which further complicates governance (South African Department of Public Service and Administration 2021, 4)

In the case of the AGSA, its 2020 reports stated that there was a need for action on accountability, especially since consecutive findings remain unresolved. To this end, the AGSA proposed that there is an urgent requirement for (1) sustainable solutions to prevent accountability failures, (2) ensuring consequences for accountability failures, (3) prioritising and improving the financial management of auditees, and (4) taking opportunities for progressive and sustainable change (Auditor-General of South Africa 2021b, 1).

A recent and commendable development in the regulatory compliance sphere on infrastructure projects has been the launch of the Infrastructure Build Anti-Corruption Forum (IBACF), jointly launched by the Department of Public Works and Infrastructure (DPWI) and the SIU. The objective is to monitor such projects with appropriate measures in place to detect and prevent corruption (Gilili 2022; Bulbulia 2022).

6. Proposals for consideration

Some of the most fundamental aspects related to the need to ensure that there are concerted efforts to reach the following goals are:

6.1 Implement a dedicated compliance management programme

South Africa had the largest percentage of PPP initiatives compared to the SADC region from 1999 to 2019 (Khatleli 2020), making the need for efficient and effective management of such projects more significant. Hence, the extent of governance challenges in public sector entities justifies the need to embed compliance as a consistent practice, process, and standard.

Benchmarked guidelines and experiences provide the necessary motivation to facilitate a governance environment where sustainable approaches to regulatory compliance, anchor a disposition of “compliance by design” (Sadiq and Governatori 2013). Such a development seeks to promote the notion of a proactive outlook on governance instead of an over-reliance on oversight and assurance entities, like the AGSA, to notify deficiencies in obligatory responsibilities to legislative prescripts where such responsibilities locate in the Key Performance Areas (KPAs) of appointed officials. Ultimately, the role of oversight entities is to conduct work at the output end of projects. A dedicated programme would surely give attention to recommendations by the AGSA.

6.2 Entrench a culture of accountability

The formalising of consequence management into institutional policies, accompanied by a culture of practice that characterises the approach as both punitive and corrective, is a crucial consideration in addressing accountability. The validation for consequence management locates in oversight reviews, informing that the absence of governance and accountability is akin to the lack of management structures (South African Department of Planning, Monitoring and Evaluation 2014). In the end, the objectives seek to (1) uphold organisational integrity through determined actions to minimise fraud and reduce instances of financial misconduct, and (2) enhance the quality of democratic accountability supported by a culture of transparency and professionalism in public institutions (Head 2012).

6.3 Include a Code of Conduct on Joint Venture Projects

Establishing ethical standards affords all concerned parties to understand the importance of ensuring that project outcomes advance the development needs of governments.

The promotion of ethical standards also facilitates awareness of the legal instruments geared toward combatting corruption. The legislation directed at addressing corrupt practices promotes a “zero tolerance” disposition, directed at all parties concerned. As a deterrence, such legislation becomes a basis for public and private institutions to ensure that ethical conduct, practices, and processes are reflected in preventative strategies. An enforceable Code of Conduct aligns with such a process.

In support of the outlined proposals are collated findings and/or recommendations from the appraised academic sources as presented in the attached Table 2. Their applicability enunciates the South African situation on the issues assessed over time.

7. Conclusion

Although slow, progress in operationalising legislative compliance requirements to promote confidence in the management of PPPs is evident. This, as the ability to attract infrastructure investment, relies on the extent to which sufficient attention is located in matters of institutional governance and requisite skills. As a necessity, it then becomes important for countries to ensure constant benchmarking, as part of a due diligence endeavour. The outcomes foreseen are to remedy issues of policy formulation and inherent obstacles to overcome, as well as determine the compliance systems that need to be in place to manage the overall lifecycle of PPP projects for the sustained benefit of a country’s citizenry (Wood 2019; Yescombe 2017).

Equally, the notion of “fit for purpose” requires not only public officials to have the necessary technical skills to do the work, but also the moral compass of all role players entrusted with the stewardship responsibility of serving to improve the economic and social conditions of the citizenry, transcends the hierarchy of formal positions. The effective governance of PPP initiatives is a practical case in point that calls for the acceptance and creation of such an environment.

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Table 1: Regulatory Compliance Guidelines to PPPs

Country/Institution	Nigeria	South Africa	G20 High-Level Principles	SADC
Intention	PPP is promoted as a financial model with privatisation aimed at advancing PPP	Infrastructure investment is crucial to realising the National Development Plan with 21% of the GDP needing to grow to 30% in 2030	Focused on promoting integrity in privatisation and PPPs	Promoting optimal performance of PPPs through strengthening the overall process
Target	Seven Point Agenda	National Development Plan 2050	Nine governance principles	Recommendations on public engagement relating to PPPs
Governance	Infrastructure Concession Regulatory Commission Act (ICRCA) was passed in 2005 to cater for PPP projects through its Infrastructure Concession Regulatory Commission (ICRC) established in 2008	The Revised Public Finance Management Act of 2015, as well as the Preferential Procurement Policy Framework of 2000 as sectoral legislation in advancing PPP regulatory compliance The Infrastructure Build Anti-corruption Forum (IBACF), jointly launched by the DPWI and the Special Investigating Unit (SIU), along with the Public Audit Amendment Act of 2018 as remedial tools	Emphasis on risk management	Strengthen legislative framework

Country/Institution	Nigeria	South Africa	G20 High-Level Principles	SADC
Key PPP principles promoted	<p>Value for money</p> <p>Public interests important</p> <p>Output requirements</p> <p>Transparency</p> <p>Risk allocation</p> <p>Competition</p> <p>Capacity to deliver</p>	<p>Value for money</p> <p>Build and retain skills</p> <p>Integration of various public sector stakeholders in PPP governance</p>	<p>Principle 1: Define clear rationales and frameworks for privatisation and PPPs to reduce opportunities for corruption</p> <p>Principle 2: Ensure transparency and public awareness to build accountability</p> <p>Principle 3: Ensure that the sector's regulatory and competition frameworks are sound to prevent, detect, and respond to corruption risks</p> <p>Principle 4: Ensure clear governance and integrity to address corruption risks</p> <p>Principle 5: Use transparent methods to determine the modes of delivery, transaction, and valuation of assets to help combat corruption</p> <p>Principle 6: Ensure a high standard of participants' integrity</p> <p>Principle 7: Implement mechanisms to promote accountability, transparency, and competition in tendering and sale</p> <p>Principle 8: Establish mechanisms for monitoring and evaluating privatisation and PPPs to promote transparency and accountability</p> <p>Principle 9: Promote stakeholder scrutiny and enable access to information to enhance the effectiveness of anti-corruption measures (UNODC 2020: 2-6)</p>	<p>Ensure public engagement becomes a mandatory process</p> <p>Establish guidelines to cover the scope and procedure of, and approach to participation</p> <p>Pay attention to special groups</p>

Country/Institution	Nigeria	South Africa	G20 High-Level Principles	SADC
Concerns	<p>The ICRC empowers ministries, departments, and agencies but is silent on other government entities that might be affected by such agreements</p> <p>The legislation makes no mention of ownership of infrastructure assets by the private sector. There is no provision for unsolicited proposals nor provision for proper audit or review of public financial management, as well as an absence of an alternative dispute resolution mechanism (Soyeju 2013)</p>	<p>Still to establish a PPP Regulator, along with the need to build PPP capacities across public institutions (South African National Treasury 2017; 2020)</p>	<p>Despite the benefits of such initiatives for G20 countries, they pose inherent risks</p>	<p>As a cross-referenced point, the lack of public participation and interests of special groups correlates with concerns that SME access to PPP initiatives is still lacking in South Africa (Ramaphosa 2022)</p>

Table 2: Selected and collated academic research findings and/or recommendations on PPP projects

Author	Brief source reference	Defined focus	Significant findings and recommendations in matters of:		
			A dedicated Compliance Management Plan	Entrenching a culture of accountability	A Code of Conduct on Joint Venture Projects
Albertus, R.W.	Doctoral thesis, University of Cape Town, August 2016	Information technology	Management and staff of the DOL failed in managing the performance of the consultants and, from the empirical findings, it became clear that critical risk factors were not taken into account (2016, 137).	A weak management structure in the public sector and challenges with maintaining skilled IS resources weakened institutional structures and created a major dependency on EOH/SIS resources (2016, 137).	Nepotism might be rife in the public sector but the private sector is not immune to this governance challenge, hence colluding with consultants has become the norm rather than the exception. Collusion has been to the detriment of achieving the goals and objectives of the organisation (2016, 136).
Binza, M.S.	Doctoral thesis, Nelson Mandela Metropolitan University, January 2009	Local economic development	Recommend the development and enforcement of LED and PPP policies and by-laws (2009, 255).	In a bid to develop an appropriate PPP model, human resources must be given basic work, scientific knowledge, and skills (2009, 254).	
Brink, J.	M-Dissertation, Stellenbosch University, April 2006	Corporate governance	Recommendation number 1: Improved risk management—the manager's responsibility. Risk management in the public sector is a high priority and all government departments are expected to conduct regular identification of risks with subsequent risk-management strategies and fraud-prevention strategies (2006, 136).	Recommendation number 4: The public sector manager must be accountable. This legislation is seldom effectively enforced and too often threats of accountability are but idle words (2006: 140).	PPP as power-sharing involves a relationship that promotes a mutually beneficial sharing of responsibilities, knowledge, and risk and both parties bring something of value to be invested in or exchanged (2006, 125).

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Dirane, P.	M-Dissertation, University of Pretoria, 29 November 2021	PPP projects	It is hereby recommended that a monitoring function should become a permanent feature of South Africa's PPP structure (2021, 74).	Recommends that a PPP Ombud should be established to investigate and make recommendations on matters that are PPP specific (2021, 72).	It is recommended that public officials who are involved with PPP projects undergo a thorough vetting process and/or lifestyle audit to ensure that no unlawful conduct takes place and to serve as a deterrent to would-be offenders (2021, 71).
Igwebuna, J.C.	M-Dissertation, Stellenbosch University, April 2019	Housing sector	The lack of policy direction is primarily responsible for the unnecessary delays in the implementation of a PPP project cycle (2019, 189). The testing criteria for PPP appraisal acceptability is onerous in comparison with other developing economies (2019, 207).	The inadequate capacities of the City of Cape Town (CoCT) to provide effective oversight for affordable housing developments is a key factor that is lacking (2019, 155). The PPP projects in housing should have performance management measures and monitoring systems to strengthen accountability (2019, 250).	Ill-defined criteria for selection to the Bid Evaluation Committee is one of the problems of the procurement processes, which may in appointments to the committee based on nepotism, political interests, or for reasons that do not serve the interests of the success of the project and of the public (2019, 209). Eradicating corruption in the CoCT housing tender processes will require strict law enforcement and policy amendments (2019, 248).
Jabavu, S.W.	M-Dissertation, North-West University, November 2014	Social security	The aspects of risk assessment and risk allocation must be allocated rationally and placed at the most capable partner (2014, 124).	The choice of procurement process: Public procurement must be undertaken in accordance with the policies and procedures of an organisation and context-specific nature of the project (2014, 126).	The legal demands for equal treatment, non-discrimination and transparency define the tender process to acquire a suited project partner (2014, 123-124).

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Khoza, R.B.M.	Doctoral thesis, Walden University, August 2021	Water infrastructure	The PPP concession period needs to incorporate best practice and practical strategies that include performance measurements and apply performance monitoring measures as best practice strategies to optimize concession period agreements and drive infrastructure financial value at post-concession termination (2021, 153).	Key elements that government needs to consider when infrastructure asset transitioned to public use, post-concession termination, is to guarantee that infrastructure retains value for money (2021, 155).	Incorporate performance measures of social value (2021, 151).
Khoza, S.	M-Dissertation, Stellenbosch University, December 2021	Environmental	Risk exposures from previous projects such as the DEA's PPP project should be well documented and quantified from a central platform such as the PPP Unit to avoid future hindrances to effective, viable, and efficient PPP projects (2021: 87).	Contracts should also be discussed prior to signing to forge a way for collaboration, trust, and mutual agreement on the clauses (2021: 87).	Other information lacking in this study was a copy of the DEA'S PPP contract, which was alluded to as inflexible and one-sided (2021: 85).
Mabuza, V.P.	Doctoral thesis, University of South Africa, August 2016	Business sector	Develop a monitoring mechanism for policy implementation (2016, 256). PPP unit to develop a database for PPP projects (2016, 256).	Recommend the development of a policy to foster the use of SMEs in PPP projects: Government needs to introduce an incentive-based policy or a section in the existing policy that will make it mandatory for PPP firms to use SMEs during both the implementation and operational phases of PPP projects (2016, 255).	Award PPP firms that go an extra mile in using SMEs: PPP firms that surpass the minimum requirement on using SMEs should be awarded, while those that only strive to meet the bare minimum requirement should be penalised (2016, 255).

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Madiriza, T.	Doctoral thesis, University of Pretoria, January 2022	Water infrastructure	Frequent monitoring and reviews of the PPP framework (2022, 347).	Review of the Treasury's Views and Recommendation (TVRs) process. To ensure that TVRs are responded to timeously, a period of three months is proposed (2022, 345-346).	Review of the grant system to improve water PPP attractiveness. This as the private partner will be guaranteed of a revenue source while delivering a service to residents (2022: 351).
Makhari, C.L.	M-Dissertation, University of Western Cape, June 2016	Water infrastructure	Results show that municipalities experienced compliance challenges on several measurable KPIs, with each municipality's performance differing from the other (2016, 60).	It is recommended that Water Service Authorities adopt performance strategies used by the CoCT to improve water service delivery (2016, 61).	Studies conducted in Ghana and South Africa indicate that PPPs have produced mixed results, with this study pointing to a need for some improvements in management for the benefit of households (2016, 59).
Makofane, T.S.	Doctoral thesis, University of Pretoria, February 2013	Black Economic Empowerment	It is recommended that a ceiling should be put on the number of times an individual should be eligible for BEE-related bids, especially if it involves huge sums of money (2013, 241).	There seems to be little emphasis on measures of managerial performance in terms of the results achieved (2013, 250).	In dealing with aspects of non-compliance, it is vital that a code of good practice is introduced. The effective implementation of a code of good practice would assist in curbing the high levels of graft and fraud (2013, 237).

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Mashele, M.P.	M-Dissertation, University of Johannesburg, November 2020	Construction industry	It is recommended that no person should be allowed to participate in a PPP project without any knowledge of it to avoid PPP project delays and failures (2020, 183).	It is recommended that any student in a construction-related course should learn about PPP procurement systems in detail so that they know what is expected from them at the stage of implementation and execution of such projects (2020, 183).	
Mugarura, J.T.	Doctoral thesis, Stellenbosch University, April 2019	Road infrastructure	The PPP legal framework must be explicit on how the local government entities (Districts, Town councils, etc.) fit within the country's PPP system (2019, 288).	To avoid unnecessary PPP processes and delays, the team that approves feasibility studies should be the same one to approve a project for public procurement option or to provide a rejection decision, without having to send a project proposal to another team to conduct further evaluations. The approving team on feasibility studies must be knowledgeable in PPPs and public procurement (2019, 288).	
Naidoo, D.	M-Dissertation, University of Kwazulu-Natal, 2018	Water infrastructure	Some of the institutional weaknesses are SCM, procurement, skills deficit, and lengthy compliance protocols (2018, 63).	There must be aggressive campaigning of PPPs in terms of their benefits and applications, public servants need to be properly trained and provided with the best practice guidelines (2018, 64).	The stakeholders identified in the ethical clearance will benefit from this study as many do not know with certainty the perspectives of the other stakeholders (2018: 65).

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Nugent, D.	M-Dissertation, Stellenbosch University, March 2020	Public schools in Western Cape	The major issues with public sector capacity involve a lack of suitably qualified and experienced officials to implement the complex projects contemplated, as well as the attitude to administration and compliance thinking where public sector PPP specialists generally buck the trend of the stereotypical risk-averse (2020, 163).	Officials need to be trained to look to the enabling aspect of policies to unlock the needs of their immediate environment and ensure that an appropriate level of compliance is undertaken balanced against the need to scale up delivery (2020, 169).	With the private partner carrying the full risk of the infrastructure through the funding model, this allows the public sector to limit their exposure to just the off-take agreement for the product (electricity). As a result, the infrastructure is never transferred to the public sector. Part of the solution is to ensure that the private sector complies with the norms and standards for school infrastructure (2020, 171).
Phungula, M.G.	M-Dissertation, University of South Africa, December 2008	Project management	As a part of its project management system, The Agency should issue fundamental policies, procedures, models, tools, techniques, and standards; train project staff in their use; and require their use on all projects (2008, 153).	The Agency should further mandate a reporting system that provides the necessary data for each level of management to track and communicate the risk, quality, cost, schedule, and scope of a project (2008, 153).	
Singh, I.	M-Dissertation, University of Kwazulu-Natal, 2019	PPP project monitoring and evaluation	The M&E unit in collaboration with the Executive Committee should formulate a strategic plan for M&E to be implemented at all levels within the project life cycle of department projects. The objective of the policy framework should offer departmental officials a guideline which implements, monitors and evaluates the project initiatives within the department (2019, 115).	EDTEA must take accountability and completely invest in training and development of all officials through expanding the training budget available within the department so that a constant human resource development framework is available (2019, 115).	

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Taruvinga, T.P.	M-Dissertation, University of Johannesburg, January 2017	Engineering sector	There are inconsistencies in the allocation of risks in South African PPPs (2017, 60).	Risks have to be managed by transferring them to the party with the ability to manage them at minimal cost (2017, 60).	For project success, risk must be allocated to the right party in a project (2017, 58).
Xhala, N.C.	Doctoral thesis, University of the Free State, 2017	PPP infrastructure financing	Recommend that public-sector institutions should develop and implement appropriate policies on risk management strategies, monitoring and evaluation, and project management (2017, 204).	Public-sector officials need to stimulate political, bureaucratic, and methodological support and increase political will by delivering projects successfully by improving project management practices (2017, 203).	Results demonstrated that the monitoring of agents' opportunistic behaviours needs to be standardised through adequate management of contracts to limit post-contractual opportunistic behaviour of agents (2017, 201). The behavioural practices that manifest through agents undermine PPPs' significance in public infrastructure investment and development (2017, 202).