

Vance Center Virtual Workshop

P3 Considerations in Ethiopia



Professional training workshop hosted by Orrick and the Vance Center

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Law Office

In cooperation with

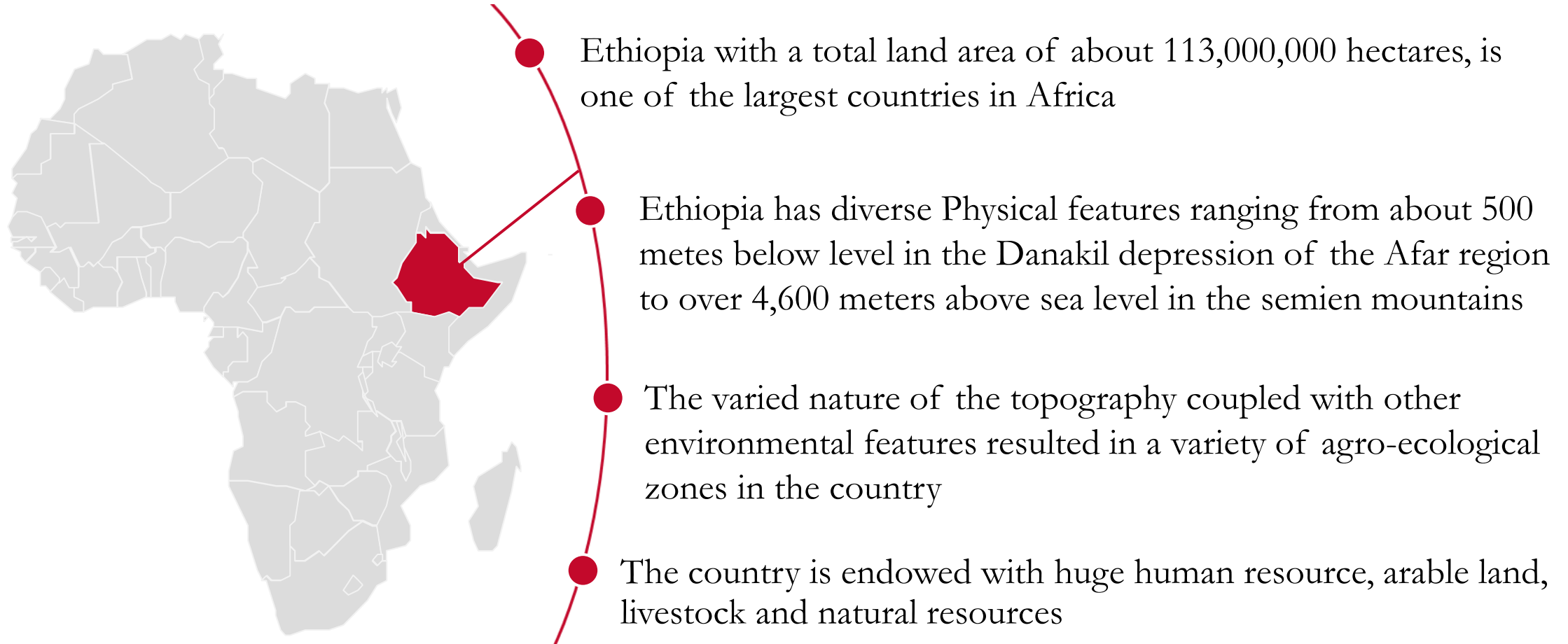
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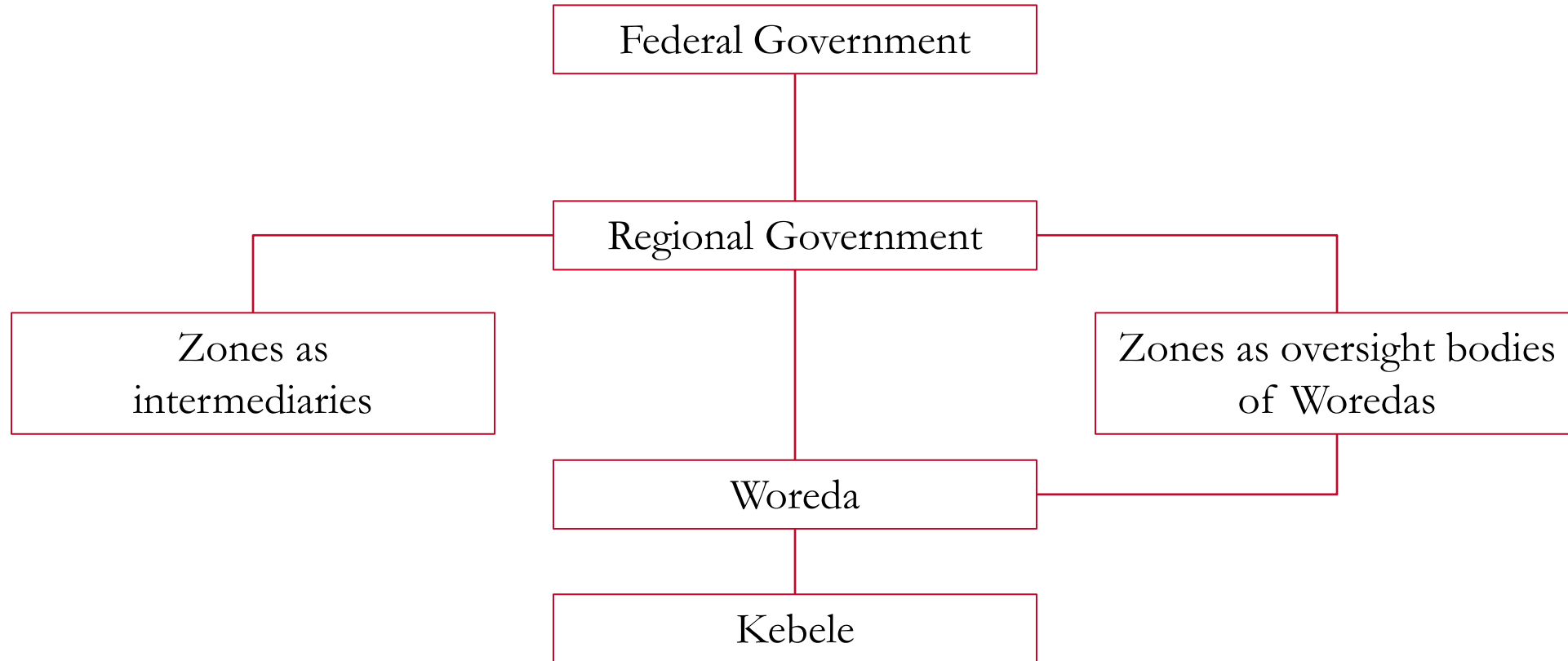
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Overview and structure of the Ethiopian Economy



Ethiopian federalism Government structure

Ethiopia decentralized governance structure



Public-Private Partnership under the Ethiopian Jurisdiction

The Law and Practice

What is Public-Private Partnership?

A long-term agreement between a Contracting Authority and a Private Party under which a Private Party:

- ▶ undertakes to perform a Public Service Activity that would otherwise be carried out by the Contracting Authority;
- ▶ receives a benefit by way of: compensation by or on behalf of the Contracting Authority; tariffs or fees collected by the Private Party from users or consumers of a service; and a combination of such compensation and such charges or fees;
- ▶ is generally liable for risks arising from the performance of the activity or use of the state property in accordance with the terms of the Project Agreements.

Public-Private Partnership scheme objectives

- ▶ Create a favorable framework for promoting and facilitating the implementation of privately financed project to support Ethiopian economic growth
- ▶ Enhance transparency, fairness, value for money, efficiency and long-term sustainability
- ▶ Improve quality of public service activity; and
- ▶ Maintain macro-economic stability by reducing growth in public debt

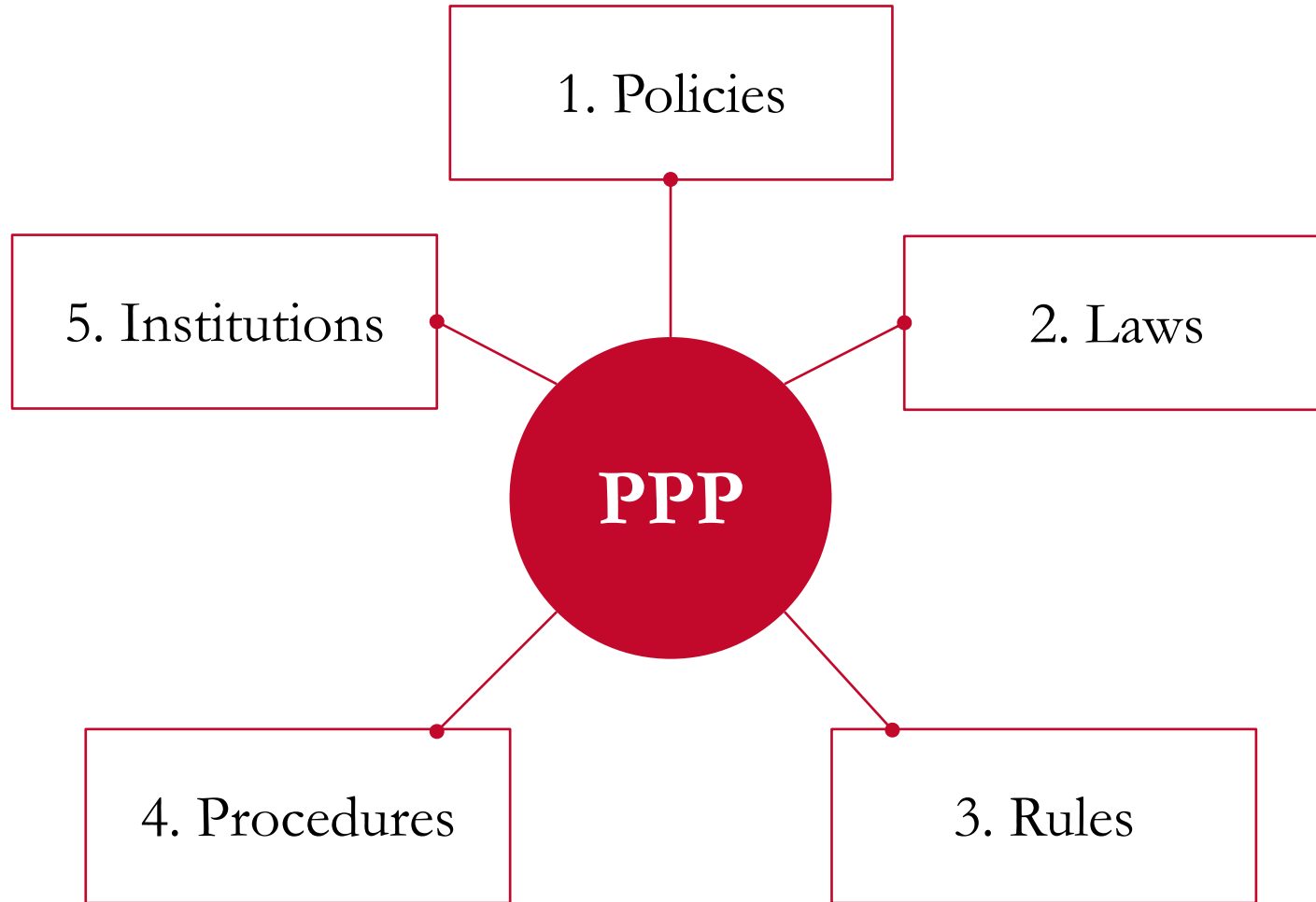
Projects implemented through P3

- ▶ The design, construction, financing, maintenance or operation of new Infrastructure Facilities
- ▶ The rehabilitation, modernization, financing, expansion, maintenance or operation of existing Infrastructure Facilities
- ▶ The administration, management, operation or maintenance pertaining to new or existing Infrastructure Facilities

Why PPP's are preferred?

- ▶ As a solution to address infrastructural gaps resulting from a limited capacity of government
- ▶ Due to their effectiveness in delivery good Value for money
- ▶ The private sector is believed to have a strong incentive to manage infrastructure project properly

1. Ethiopian PPP Framework



1.1 Ethiopian Public-Private Partnership Policy (1/2)

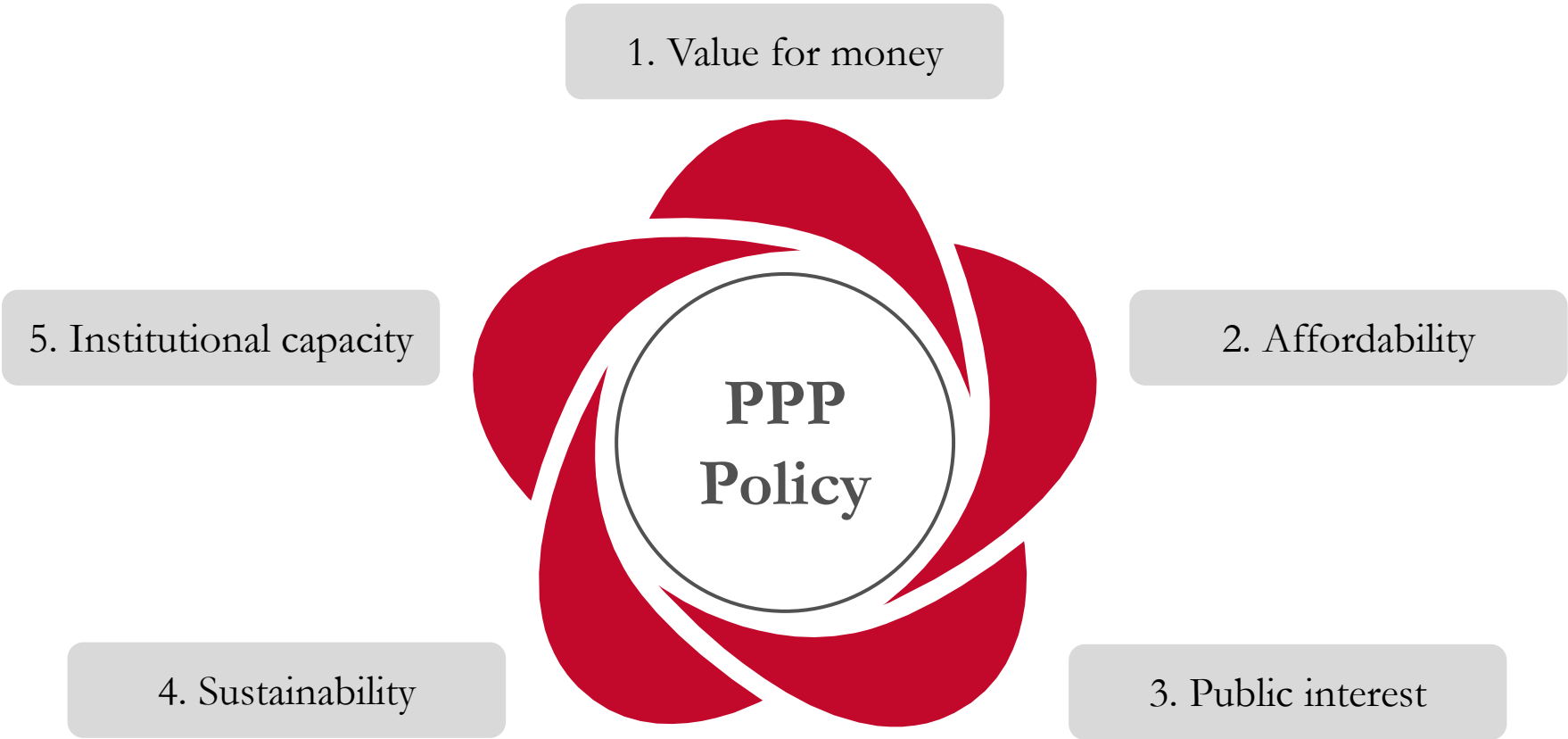
In establishing a PPP Framework, the first step for the government is to articulate PPP Policy



- ▶ PPP policy is used to communicate intention of the government to the public in general and potential investors in particular
- ▶ The Ethiopian PPP Policy reveals that the use of PPP in the country has two-fold objectives:
 - i. to increase the financial resources available for the development and delivery of infrastructure services in the country through leveraging private sector investment; and
 - ii. to capture the benefits of private sector involvement in infrastructure development through aligning public and private sector incentives and using appropriate risk sharing

1.1 Ethiopian Public-Private Partnership Policy (2/2)

The PPP policy provides five key criteria



1.2 Governance (1/2)

PPP Board and a PPP Unit within the Ministry of Finance and Economic Cooperation will be established as a responsible governance institutions

PPP Board

- ▶ The PPP Board will assume the responsibility:
 - i. to approve PPP project prior to tender and award
 - ii. Will also have the power to instruct a contracting authority to make use of PPP delivery approach for projects
- ▶ The Board will be chaired by the Ministry and composed of other relevant ministers, public officials and representatives from the private sectors.

1.2 Governance (2/2)

PPP Unit

The PPP Unit within the Ministry (PPP Directorate General) will have responsibility such as:

- ▶ Supporting the Ministry in the management and development of the PPP framework
- ▶ Supporting the development of the PPP framework and individual PPP projects through provision of assistance to the PPP board and contracting authorities in: i) the identification, ii) analysis, iii) evaluation, iv) approval, v) development, vi) implementation, and vi) monitor of the PPP projects, and promoting the participation of the private sector in the delivery of infrastructural services
- ▶ The designation of a project as PPP and this will be done in consultation within the National planning commission of the country; and
- ▶ The approval of any proposed government support to a private party, particularly any request for the provision of a guarantee for payment of obligation of a contracting authority

2. Structuring a PPP Contract (1/2)

Steps to undertaking before the start of the project



- 1 Contracting authority whom intends to implement a project through a public-Private partnership shall be responsible for conceptualizing and administering the contract of the project
- 2 Preliminary approval of the board before undertaking an in-depth analysis of the project
- 3 Feasibility study of the project for the purpose of:
 - i. Determining the viability of the project; and
 - ii. Ensuring that a public private partnership approach is the most economically advantageous to contracting authority
- 4 Proceed to tender, if the board is satisfies that the project meets the desired expectation of viability and value for money

2. Structuring a PPP Contract (2/2)

- ▶ All projects shall be procured through an open bidding process with prequalification
- ▶ A bidder who intends to bid for a project shall complete and submit a technical proposal and a financial proposal and enclose each proposal in a separate sealed envelope as may be specified in the request for proposal

3. Implementation of a Public-Private Partnership project

- ▶ The successful bidder establish a project company incorporated under the laws of the Federal Democratic Republic of Ethiopia whose sole purpose shall be to execute and implement the public private partnership Agreement and other project Agreement, if any
- ▶ Duration of the contract shall be set forth in the project
- ▶ The private party receives financial compensation by way of: compensation on behalf of the contracting authority (tariffs or fees collected by the private party from users or consumers of a service provider to them)

3.1 Rights related to the project sites

- ▶ Any compulsory acquisition of land that may be required for the implementation of the project shall be carried out in accordance with the relevant law relating to expropriation
- ▶ The private party may possess land and use it for the purpose of the implementation of the project
- ▶ The private party shall have the right to mortgage the immovable property developed under the project in order to obtain loans from financial institutes

3.2. Operation

- ▶ The private party shall have the right to issue and enforce rules governing the use of the facility, subject to the approval of the contracting authority or any other authorized public entity
- ▶ Performance Guarantee and security interests may and will be part of the operation guarantee that will be implicated towards the private party

Ethiopian Corruption Law

The Law and Practice

Laws and regulations (1/2)

- ▶ The Criminal Code Proclamation No. 414/2004
- ▶ The Criminal Procedure Code 1961
- ▶ The Revised Federal Ethics and Anti-corruption Commission Establishment Proclamation No. 433/2005; The Revised Anti-corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005
- ▶ Assets Disclosure and Registration Proclamation No. 668/2010
- ▶ Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation No. 699/2011
- ▶ Prevention and Suppression of Money Laundering and the Financing of Terrorism Proclamation No. 657/2009
- ▶ The African Union Convention on Preventing and Combating Corruption Ratification Proclamation No. 545/2007; The United Nations Convention Against Corruption Ratification Proclamation No. 544/2007
- ▶ IGAD Convention on Mutual Legal Assistance in Criminal Matters Ratification Proclamation No. 732/2012

Laws and regulations (1/2)

- ▶ Regional Ethics and Anti-corruption Commission Establishment Proclamations (8 of the nine regions have such laws); Office of the Federal Auditor General Establishment (as amended) Proclamation No. 669/2010
- ▶ Federal Courts Advocates' Licensing and Registration Proclamation No. 733/2012
- ▶ Customs Proclamation No. 622/2009
- ▶ Licensing and Supervision of Banking Business (Ethiopian National Bank Directive No. SBB/46/2010 Customer Due Diligence of Banks) and Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 691/2010
- ▶ Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation 434/2005
- ▶ Corruption crimes proclamation 881/2015

Is it one agency in charge of coordinating Anti-Corruption efforts across agencies? (1/2)

- ▶ Ethiopia is a federal state. Regions have, therefore, a constitutional right to establish their own anti-corruption institutions which are independent from the Federal Government. However, the Federal Ethics and Anti-corruption Commission of Ethiopia is responsible for preparing a national report on anti-corruption efforts across the country. It also solely represents the nation on external communications.
- ▶ Federal Ethics and Anti-corruption Commission of Ethiopia
- ▶ Federal High Court shall have first Instance Jurisdiction over corruption offences falling under the Jurisdiction of the Federal Government

Is it one agency in charge of coordinating Anti-Corruption efforts across agencies? (2/2)

- ▶ The Regional High court Shall have first Instance Jurisdiction over corruption offences falling under the jurisdiction of the Regional government
- ▶ Appellate can be made to the supreme court and cassation division courts
- ▶ Annually, 3,403 corruption cases reported, 922 files investigated and 809 cases handled in court

Federal Ethics and Anti-corruption Commission



Functions



Research, prevention investigation prosecution



Permanent staff



308



Prosecutors



32



Investigators

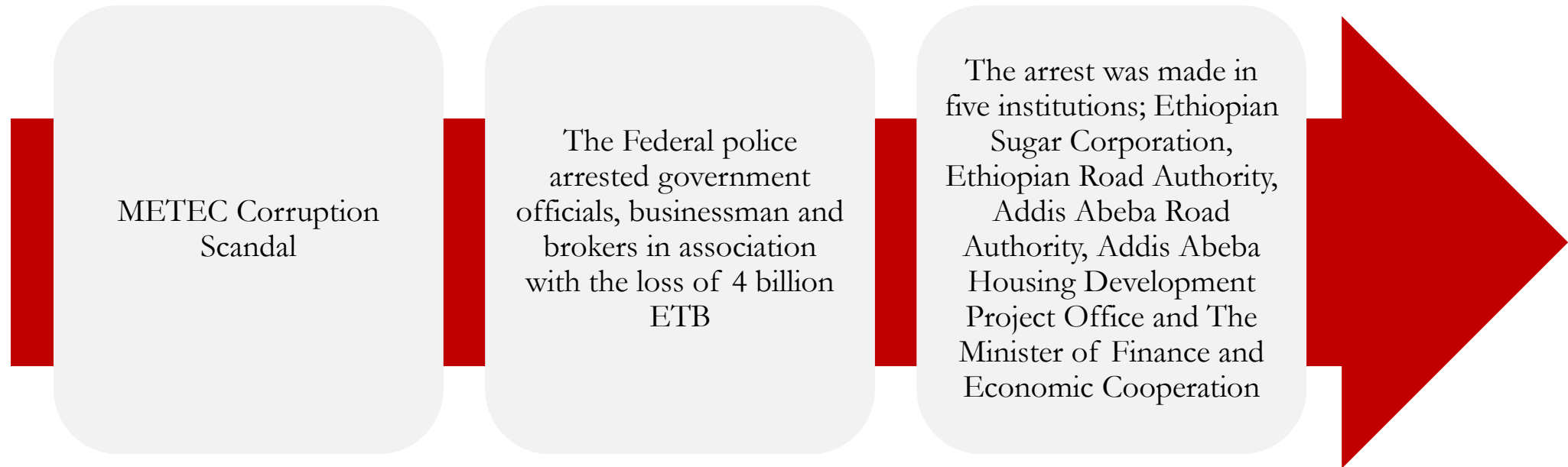


32 (17 of them are support staff)

Prevention methods

- ▶ Clear and easy Assets Disclosure and Registration procedures for public servants
- ▶ Transparency
- ▶ Transparent and public procurement processes
- ▶ Removing stereotypical quotes from the culture ‘ሲኾም ያልበላ ሲኾር ይቆጩዋል’ it is translated to ‘whoever does not eat (steal) while in power will regret it when that power is taken away.’

Recent corruption crackdown in Ethiopia: what can we learn from it? (1/5)



Recent corruption crackdown in Ethiopia: what can we learn from it? (2/5)

- ▶ METEC which forms a part of the defense industry complex was established with ETB 10 Billion (310 Million Euro)
- ▶ Soon became involved in mega infrastructural projects across the country such as the hydroelectric segment of the Grand Ethiopian Renaissance Dam (GERD) as well as ten huge sugar factories to mention a few
- ▶ METEC could not live up to its contractual obligations none of the sugar factories were completed but METEC was paid more than 90% to some sugar projects in addition it took ETB 11 billion (340 million euro) a total cost of a fertilizer project
- ▶ Regarding the electromechanical contract it took at GERD, considered as a flagship project of the state, METEC has already collected 65% of the total ETB 25 billion (776 Million Euro) but has done no more than 25% of the work

Recent corruption crackdown in Ethiopia: what can we learn from it? (3/5)

- ▶ In another case according to police investigation, It is alleged that METEC carried out local procurements worth ETB 205 billion (6.3 billion euro) without a bidding process. It also paid multiple times for a single procurement. It was allegedly engaged in repeated procurements from single suppliers without competitive bidding, which is against the law
- ▶ The investigation revealed that between 2012 and 2018 METEC made international procurement to purchase goods worth ETB 37 billion (around 1.1 million Euro these were purchases without following proper bidding processes
- ▶ After a change in government, a number of high-profile arrests were made, including 23 senior METEC officials in 2018

Recent corruption crackdown in Ethiopia: what can we learn from it? (4/5)

- ▶ The extent and the seriousness of the investigations on METEC took many by surprise since the efficiency and effectiveness of the fight against corruption in the country has always been a case in question
- ▶ METEC has long been the focus of corruption suspicions. In fact, in recent years many media reports revealed various problems surrounding the company's major projects including GERD, Sugar corporation and Yayu fertilizer
- ▶ Moreover, the auditor General's annual reports often expose massive financial mismanagements and inadequate performance at federal and state level
- ▶ Similarly, different reports indicated that there is widespread corruption within the defense and security establishments

Recent corruption crackdown in Ethiopia: what can we learn from it? (5/5)

- ▶ Ethiopia charged the former head of military-run industrial conglomerate METEC with corruption in January 2019, nearly two months after his arrest, Kinfu Dagne was charged with four counts related to the procurement of tractors, said a judge at the Lideta High Court in Addis Ababa
- ▶ He is the most senior official to be charged after dozens from METEC and the security services were arrested since November over graft and rights abuses
- ▶ The government also cancelled numerous METEC contracts
- ▶ About fifty (50) people are facing corruption charges
- ▶ Some cases have concluded with the accused facing 6 plus years in prison

Implications and lessons

- ▶ Lack of jobs is becoming a serious concern in Ethiopia, and with previous student led protests that led to the coming to power of the current prime minister, taking strict measures to prevent and avoid similar grand corruption is not a matter of choice but a necessity
- ▶ So far, large-scale corruption in Ethiopia have violated human rights, prevented sustainable development and fueled social exclusion
- ▶ Corruption pose a treat to peace
- ▶ Need for a check and balance system
- ▶ Transparent procurement procedures

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