
1 GOVERNANCE FOR PEOPLE & NATURE:
2 WHAT ROLES FOR LAW, INSTITUTIONS, SCIENCE & POLICY?

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**THE LEGAL, INSTITUTIONAL AND FINANCIAL FRAMEWORK TO ENABLE
SMALL SCALE SERVICE PROVISION OF RURAL WATER SUPPLIES IN AFRICA**

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ABSTRACT: As governments in Africa seek to diminish their role in the provision and maintenance of rural water supplies and development finance shifts from programme to government budget support, the need to maintain and increase supply coverage is seen to create more opportunity for small scale local service providers through local government financing channels. This transition is said to require the creation of an enabling environment that must address legal, institutional and financial considerations. A research project that is currently underway seeks to develop guidelines for this transition by the participatory involvement of all levels of government as well as stakeholders in three African countries. Country specific and international literature reviews directly addressing legal, institutional and financial aspects have resulted in an understanding of the nature and implications of this enabling environment. A participatory research methodology has been designed to enable governments to develop guidelines to transform existing legal institutional and financial frameworks and enable private sector participation.

INTRODUCTION

Privatisation and private sector participation are not the same thing and this difference is thrown into sharp contrast if we consider their possible roles in the rural water sector in Africa. For several years water sector reform has sought to terminate a government role in the actual provision and maintenance of rural water supplies in exchange for an emerging role in enabling, coordinating and regulating other sector actors to perform such functions.

Sector financing is increasingly being engineered to channel investment through local government and to make it accessible to these new actors at an appropriate local level. This is the significant change to be realised by budget support as opposed to earlier aid policies of sector as well as programme based support.

Of the many elements which have to come together for this mechanism to work, this paper presents information from a DFID funded study² that is currently underway which questions whether in fact there is a private sector ready and able to participate in offering services to the rural water sector at the village level. It is fully recognised that the informal rural private

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sector has in the past made a major, but largely unrecognised contribution to water supply development at the village level, but the concern which now arises is whether these artisans can continue and expand their role as the sector changes. The study is seeking to identify if and how the environment for such participation can be enabled. Assuming that a host of rural artisans are ready and able to rush at the chance of accessing locally available government funding for rural water may represent a failure to examine a significant project risk. If the local private sector do not come forwards, then the sector is left in limbo as to who will take over the role being relinquished by government. The rural population would certainly suffer from this lack of clarity.

This study is therefore taking place in the context of the current transition of roles and responsibilities, the possible negative consequences of which are seemingly to be countered by the creation of an “enabling environment” for the small scale private sector.

The researchers span four countries, with management and technical expertise provided from Water Management Consultants Ltd in the UK and government departments and WaterAid country teams working in Ghana, Tanzania and Zambia. Contact details are presented at the end of this paper.

The team carried out a national and international level knowledge review based upon existing published and grey literature.³ The review sought to establish a baseline of understanding of the role of SME’s [Small & Medium scale Enterprises] in the context of the prevailing financial, legal and institutional environment at both the international and country specific levels. An inception report followed this review,⁴ which sets out the complete study methodology, planning and evaluation strategy together with a summary of initial findings.

The project is presently completing the second – field work – phase of the study. This follows on from training and preparatory work with country teams in Ghana, Tanzania and Zambia in which a range of survey techniques and tools have been developed. These include Supply Chain Mapping,⁵ sub sector analysis⁶ and livelihoods analysis.⁷ These techniques are being used in conjunction with interview based surveys to determine the demand for guidelines on PSP [Private Sector Participation], as well as the capacity of governments, the private sector and NGO’s to provide both the environment and service for PSP in rural water. The field work aims to gather an understanding of the real life concerns experienced by practitioners in the field. This field work element will culminate in country level reports synthesising – but not concluding upon – the findings. The third and final stage of the project will build upon the ongoing participation of sector stakeholders through a formally appointed multi stakeholder working group, whose task it will be to discuss the study findings and to propose guidelines for creating an enabling environment for PSP in rural water. These guidelines will be tested before being launched by the stakeholders. A summary of the research plan is appended.

³ KAR Literature Review Water Management Consultants Ltd (2004) Small Scale Private Sector Participation in the Rural Water Supply Sector: Knowledge Review. Report No. 1788/R1, February 2004, Project No. R8335, Engineering Knowledge and Research Programme, Department for International Development, UK. Available at: www.ruralwaterpsp.org

⁴ Water Management Consultants Ltd (2004) Small Scale Private Sector Participation in the Rural Water Supply Sector: Draft Inception Report. Report No. 1788/R2, February 2004, Project No. R8335, Engineering Knowledge and Research Programme, Department for International Development, UK. Available at: www.ruralwaterpsp.org

⁵ Oyo A (undated) Creating successful private sector supply chains: a resource guide for rural water supply and sanitation practitioners. Water and Sanitation Programme, World Bank, Washington. Available at: www.wsp.org

⁶ See www.actionforenterprise.org/approach.htm#step1

⁷ See www.livelihoods.org and www.waterandlivelihoods.org

A key lesson which has already been widely incorporated in the project design is that the value of any guidelines rests more in the participation of key stakeholders in the process of their production than in the desire to arrive at a document which adheres strictly to the notions of PSP in rural water as presented by the literature. Focusing on the process of identifying guidelines should influence the behaviour of sector stakeholders more effectively than presenting them with guidance to create an idealised vision of an enabling environment.

This paper aims to present three aspects arising out of the study and its findings so far. Firstly, it provides a snap-shot of the current context in which water sector reform is operating. Secondly, it highlights some of the key theoretical factors which are shaping the notion of PSP in rural water supply and thirdly it presents the emerging view from the field of how these theoretical concepts may need to be modified by real conditions. For the purposes of this presentation focus will be limited to legal, financial and institutional aspects and their relation to water governance.

BACKGROUND CONTEXT

It is important to attempt to portray the actual situation in which governments are seeking to create an enabling environment for the small scale private sector in rural water supply, but this goes beyond the bounds of the present paper. By way of an introduction a selection of statistics has been chosen.

Table 1. People without a water supply in the study countries⁸			
	Number of people without a water supply (000's)		Percentage of rural water supplies in working order
	<i>Rural areas</i>	<i>Urban areas</i>	
Ghana	6,355	1,008	35 %
Tanzania	13,048	2,204	70 %
Zambia	2,879	436	72 %
Total	22,282	3,648	

The implications of the un-served rural population being over six times greater than that of the un-served urban population are further exacerbated by the economic status of these people. In 2002, the gross per capita income for Ghana was \$2000, Zambia \$770 and Tanzania \$550 at a time when the equivalent figure for the UK was \$ 25,870.⁹ To experience the economic realities of rural Tanzania, the average Briton would seek a 98% reduction in income. HIV prevalence in the 15-49 age group ranges from 3.6% in Ghana, to 8.1% in Tanzania, to 20% in Zambia. For Zambia this meant the loss of 1,300 teachers in the first ten months of 1998, equivalent to two-thirds of the teachers trained per year.¹⁰ Zambia is the only country for which the Human Development Index was lower in 1998 than in 1975.¹¹

It is against this background that changes in the structures of government and development financing are seeking to address a growing inequality. The fundamental governmental

⁸ WHO and UNICEF 2000. Global water supply and sanitation assessment 2000 report. World Health Organisation and United Nations Children's Fund.

⁹ World Bank. World development report 2004: Making services work for the poor. Oxford University Press, New York.

¹⁰ Statistics on International Development 1996/7 –2000/01. DFID Statistics department Report. 2001 London / Glasgow.

¹¹ Joint Donor Statement – Multi-Stakeholder Consultative Forum for Rural Water Supply and Sanitation- Inaugural meeting 16th April 2003 Lusaka Zambia. *On file with Authors.*

changes in the study countries concern a move towards decentralised local government and the withdrawal of sectoral ministries from responsibilities to construct, operate and maintain rural water supplies, whilst creating a role in facilitating and regulating an environment in which civil society, the public and the private sector can take up these former responsibilities.

The fundamental changes in development financing strategies in the three countries are particularly concerned with the notion of good governance and mark a transition away from donor based sector finance programmes and a move towards budget support, in which donor funds are administered by the national treasury.

This research project is not directly concerned with sector reform, but is undertaken with the recognition that those specific changes that are taking place in the water sector will require new partnerships with the small scale private sector to emerge. In essence, if water supplies are to continue to be built, maintained and operated then there needs to be a willingness and ability on the part of the private sector to access and manage finance and to enter into increasingly formal agreements with partners and local authorities. At present, whilst the private sector is active to a varying but limited degree, they largely operate informally, without formal registrations, contracts or other paperwork and are wary of working with local or central government. It is therefore an assumption and hence a risk that governments, in seeking to meet future requirements of rural water supply in Africa, can rely upon small scale private sector participation.

CURRENT STATUS AND FINDINGS

Legal Framework

It is important that legislation provides local government with powers to enter into contracts with small scale private sector service providers. Significant revisions of Water Acts have been undertaken in all three of the study countries within the past ten years, and principally appear as an Act covering water supply and an Act covering water resource management. Commentators on these revisions suggest that the implementation and enforcement of these revisions has been inadequate.¹² In some cases provision to address the rural population is achieved indirectly through Acts empowering local government, but it is observed that whilst the rural un-served outnumber their urban compatriots by six to one, their situation is not given a proportionate representation in the legislation. Of particular concern is the fact that the legal status of the water users themselves often remains uncertain.¹³ A notable and important exception being in Tanzania, where bylaws have been established to recognise community ownership of water supplies.¹⁴ The present study has recognised the possibility that local legal solutions may represent an easier, quicker and more cost effective means to transpose water policy into law provided there is adequate capacity within local government to implement policy; an observation prompted by a growing body of research on the cost benefit analysis of legislating by statute.¹⁵

Where community ownership is not given legal recognition, there is a possibility of creating a lack of democratic accountability. Much rural water supply development over the past 30 years has been founded upon the notion of community ownership and participation.

¹² Howsam P *et al* (1999) Water law, water rights and water supply (Africa). DFID KaR project R7327 study report. Cranfield University / DFID

¹³ Schouten T and Moriarty P (2003) Community water, community management. ITDG UK.

¹⁴ Van Miert T and Binamungu D (2001) The Shinyanga experience: water users' group concept. SKAT, Switzerland.

¹⁵ The Economist (2004) A survey of risk. Citing the work of John Morrall, Jan 24th edition.

Consequently water users have not only invested their own time and effort in building, maintaining and administering their water supplies, they have also been trained and empowered to act as their own regulator in matters of construction and operation. If in seeking to enable an environment for PSP, government by default ends up regulating it, this may erode the positive aspects of previous decades of community empowerment. Similarly it is difficult to strike a balance between, on one hand, community based customary laws founded in specific oral cultural traditions which generally see water entitlement as free of charge and related to an individuals identity in a particular community and, on the other hand, national water law which recognises a cost and an individual entitlement.¹⁶ Again it is likely to be through local bylaws that such conflicts of law may be resolved.

It is clear that there are many uncertainties surrounding fashioning contracts between local government, water users, private sector service suppliers and other parties who may be facilitators and financiers.¹⁷ Not only are there issues of efficiencies related to scale and management of contracts, but also the legal standing of the parties may not be properly established such that satisfaction and recourse cannot be governed by law. In Ghana, for example, the most efficient form of borehole contract is seen to be to let large numbers of holes to single large scale private sector contractors. This does not create opportunities for the indigenous small scale private sector.

Looking at the wider picture, the current international literature is brimming with justifications for the creation of a new legal framework to address rural water supply. It is not possible to suggest that these opinions represent a consistent understanding of what is expected of the law in relation to rural water, as some 23 proposed elements for this framework were identified in the literature by this study.¹⁸ Whilst the ideas on what a legal framework should “do” runs the full gamut from compliance with human rights, establishing entitlement, and making opportunities for the private sector, it is clear that this notion of a legal framework is not seeking enactment *per se*, but more the establishment of a mechanism for stakeholders to interact and adapt to a situation where the law is at odds in order to keep up with developments on the ground. So it is unlikely that limited and discrete inputs from the legal profession would represent such a framework. What is needed is ongoing, creative partnerships.

The literature review undertaken as part of this study identifies two areas in which a useful contribution may arise from the field research. Firstly, by the identification of priority legal issues which can be addressed at the local level and which are likely to have significant public benefit for a relatively small cost. Secondly, the legal environment to support local level contracting needs to be properly understood by those seeking to modify it. In addition it is noted that the possibility may arise, through local contracting, to include substantive requirements regarding service levels and quantities of supply and which would maintain focus upon adequate service delivery for the target communities.

Institutional Framework

Reviews of the literature from the three study countries indicate that whilst all three are undergoing a process of decentralisation to local administration, the extent to which this has become effective on the ground differs significantly. The capacity of local government to

¹⁶ Howsam. Note 10

¹⁷ de Silva S (2000) Community contracting: a review of stakeholder experience. IBRD/World Bank. Available at http://www.worldbank.org/watsan/rwsstoolkit/rwss_community_key.htm

¹⁸ See Note 1

actively create opportunities for small scale enterprises is clearly critical to the notion that decentralised financing can be translated into rural water supplies. In part the literature review sought to identify methodologies which would be appropriate for the analysis of institutional set ups aiming to facilitate and regulate rural water supply provision.

Three types of methodologies were identified as follows:

- *Governance based approaches*, which seek to unite public interest with the role of the institutions,¹⁹
- *Organisational based approaches*, which seek to analyse working relationships between stakeholders,²⁰
- *Institutional needs based approaches* which seek to examine the capacity of the relevant stakeholders.²¹

Of those methodologies studied, the rural small scale service provider receives only passing attention, and may “lie outside the legal framework but can be essential for meeting local needs.”²² It would be fair to say that their contribution is presently overlooked as they are widely seen as a service provider whose input to the sector is limited to those services specified by short term contract. It is clearly important to begin to see the contribution of the small scale private sector differently if indeed they are to form a significant part of a more formal decentralised institutional framework for supply. Even so four key themes run through most of the methodologies examined and these offer useful guidance in analysing the role of the small scale private sector in the rural context.

- A clear identification of roles and responsibilities
- A clear understanding of how linkages between actors work
- The knowledge requirements of actors is to be identified and addressed
- The purpose, needs and structures for regulation must be established.

Sub-sector and livelihoods analyses adopted by this research lend themselves to addressing these themes.

Regulation in the rural water supply context deserves specific attention, since the advisability of transplanting urban models of regulation to the rural setting in developing countries is questionable.²³ Whilst urban models see the function of regulation being in the hands of a third party in the UK,²⁴ by means of contract in France, and in the shape of responsibilities of municipally owned corporations in Germany,²⁵ it is apparent that the lines dividing the interests of the State, the investor, the public and the service provider in the rural setting are blurred. For example, the rural public invest directly in their own water supplies and may employ one of their own members as a contractor. There is however agreement that the actual function of regulation in the rural context is to ensure that the benefits of an adequate water

¹⁹ GWP/IHE (2004) Toolbox for Integrated Water Resource Management. Available at www.gwp.ihe.nl

²⁰ Saleth R M and Dinar A. Evaluating water institutions and water sector performance: World Bank Working Paper. Available at: http://econ.worldbank.org/files/24973_TP447.pdf and Saleth RM and Dinar A. Water challenges and institutional responses. Available at: http://econ.worldbank.org/programs/rural_dev/topic/23806/library/doc?id=24972

²¹ WASH (1988) Guidelines for institutional assessment of water and wastewater institutions. WASH Technical Report No 37 http://www.dec.org/pdf_docs/pnaaz336.pdf

²² GWP note 17

²³ Hall D *et al* (2003) Public solutions for private problems? - responding to the shortfall in water infrastructure investment PSIRU, University of Greenwich. Available at www.psiru.org

²⁴ Graham C (2000) Regulating public utilities: a constitutional approach. Hart Publishing, Oxford.

²⁵ BMZ (2000) Water - resolving conflicts, shaping the future. Special Report No. 9, Bundesministerium für Wirtschaftliche Zusammenarbeit und Entwicklung, Bonn.

supply reach the public by ensuring that contracted work is completed, and of the right standard and price, and that there is an element of state responsibility in providing this regulation.²⁶

Financial Framework

The old paradox that development aims to reach the poorest of the poor, provided they are able to pay remains alive and healthy in the rural water sector. The fundamental issues to be resolved are to determine the acceptable extent to which the public must contribute to the capital cost of a supply and subsequently the extent to which they must contribute to the full running cost of that supply.

Experience from the three study countries indicates that whilst a nominal contribution to capital cost (of around 5%) may be established in national policy, in practice the wishes of the financiers or contributions in kind through labour and materials prevail. It is therefore a difficult thing for a recipient government to go against the “policies” of a donor agency in this regard.

There is however little doubt that the full cost of operation and maintenance must be met if the supply is to continue working, but arriving at a clear decision on how this cost is to be recovered has often proven intractable. Many of the international statements on the issue contradict themselves. Principle 4 of the – non binding- Dublin Statement required water to be treated as an economic good whilst recognising that people have a right to water at an affordable price.²⁷ A recent interpretation of the concept of the demand responsive approach does not help by stating that “water should be managed as an economic as well as a social good”.²⁸ Formal sources of international law suggest otherwise: where water is “a limited natural resource and a public good”,²⁹ and water is “not a commercial product like any other but, a heritage which must be protected, defended and treated as such.”³⁰

If a small scale water service provider is to operate viably then it must have a secure income stream. Common sense suggests that if the State sets the water tariff and also agrees the remuneration of a water service provider any legitimate shortfall in money becomes the responsibility of the State. Indeed the World Water Council offered the clearest understanding of this dilemma when they said

“The most important policy recommendation we can make is for the adoption of full-cost pricing of water use and services. It will be the basis for promoting conservation, reducing waste, and mobilizing resources. But this can only be done when service providers are accountable and efficient. And it will require a new generation of subsidy programs—ones that

²⁶ See Note 15 de Silva S (2000)

²⁷ United Nations (1991) The Dublin Statement, The International Conference on Water and the Environment. Dublin, Ireland.

²⁸ World Bank and BNWP (2002) Rural water supply and sanitation toolkit for multi sector projects. World Bank-Netherlands Water Partnership. Available at:

http://www.worldbank.org/watsan/rwsstoolkit/material/rwss_pub.pdf

²⁹ UNESCO (2002) General Comment No 15(2002). *The Right To Water*: United Nations Economic and Social and Council. 11-29 November 2002. Geneva. E/C.12/2002/11. Available at

<http://www.unhchr.ch/html/menu2/6/gc15.doc>

³⁰ European Water Framework Directive (2000) Directive 2000/60/EC of the European Parliament and of the Council of 23rd October 2000 establishing a framework for community action in the field of water policy. Document number 300L0060. Official Journal L 327, 22/12/2000

provide subsidies to individuals, are transparent and targeted, and are the responsibility of government”³¹.

It would be useful to explore the extent to which this role of the State in subsidising rural water supply is consistent with the notions of water governance presented at this conference.

The literature is however consistent in seeing a significant financial burden facing small scale PSP; bureaucracy, inefficiencies, excessive taxation, regulation and difficulties of accessing finance conspire to drive the small scale entrepreneur away from any formal systems and registration.^{32 33} This must also be seen against a widely recognised inadequacy in present financing strategies. In short, micro finance is available up to \$100, and ODA funds start at \$10,000, but most small scale rural water supplies fall in between these two finance facilities.³⁴ These facts suggest dimensions of financing that are key factors preventing the growth of a *formal* small scale private sector, because for the present they remain more effective when they operate informally. It is also worth noting that even the most appropriate technologies can be affected by depreciation of the local currency and so whilst local contractors’ payments from clients can depend upon the local agricultural market, their outgoing costs even for cement are dictated by a different market.

SUMMARY

To date this project has gained an understanding of the legal, financial and institutional dimensions of small scale private sector involvement in rural water supply through a review of international and national literature, and developing a research methodology in conjunction with teams in the three study countries. Interaction with these teams thus far promises to yield a practical insight into the real nature of private sector participation in rural water supply. The experience of the country teams has shown that it will be important to engage government in a process of developing guidelines for creating and enabling environment for PSP and not to view government as a passive recipient of an idealistic document.

In relation to the present conference this research contributes a number of questions to the debate on good water governance and its relationship to law, finance and institutions:

- Does enablement through statute and local definition and sensitivity through bylaws represent good water governance?
- To what extent can a local contract become a tool for good water governance?
- How can regulation of the rural private sector environment contribute to good governance?
- In what ways can the presently informal private sector be recognised in a formal institutional framework for good water governance?
- Is it consistent with the notion of good governance for the State to be responsible for legitimate subsidies to water supply O&M costs?

³¹ World Water Council (2000) A Water Secure World.

Available at: <http://www.worldwatercouncil.org/Vision/Documents/CommissionReport.pdf>

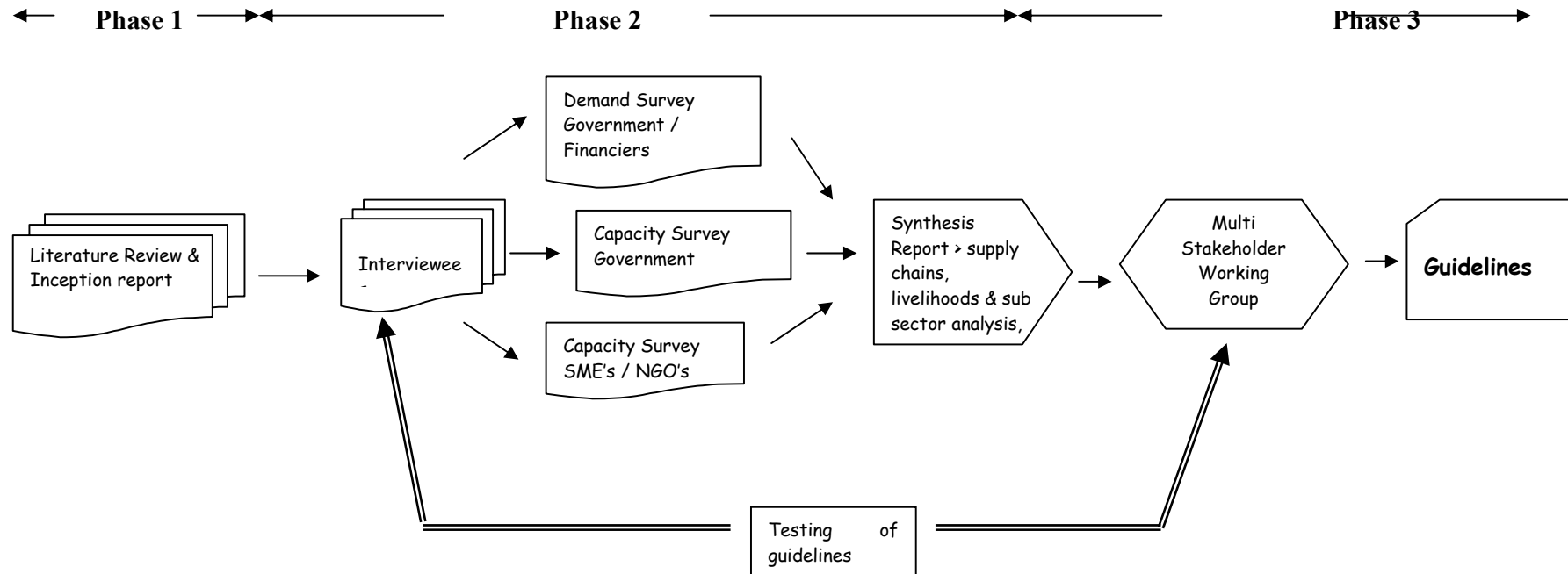
³² Churchill C (2002) Trying to understand the demand for microinsurance. *Journal of International Development*, Vol 14, No.3, p 381-387, Wiley, New York.

³³ Nchimbi M I (2003) Gender and entrepreneurship in Tanzania: comparative analysis of male-female’s start up motivation, individual characteristics and perceptions of business successes. *Un published*.

³⁴ Camdessus M (2003) Report of the World Panel on Financing Water Infrastructure. World Water Council. Global Water Partnership & 3rd World Water Forum. ISBN 92-95017-01-3.

- To what extent does the State have a responsibility to modify market conditions such that the local private sector can contribute to achieving water supply objectives?

Small Scale Private Sector Participation in the Rural Water Supply Sector. DfID KaR R8335. Research Plan.



Additional project information.

Project Website www.ruralwaterpsp.org

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