

Public private parntership in Africa: juridical definition and concrete perspectives

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I. Introduction

It is well established that the pace of development in Africa has been very slow due to the scarcity of available financial resources by many African countries. African citizens continue to live in deplorable conditions without their basics needs such as education, food, water, sanitation, infrastructure, health and transport despite the continent large quantity of natural resources and its ecosystems.

To counter these challenges, the African Union ¹Member States have committed through several initiatives aiming to accelerate the economic growth and to achieve more inclusive society with the focus on the infrastructure development, transport, energy, information and communications technology, education, health, employment, nutrition, water, sanitation, agriculture. In this regard, public–private partnership (PPP) is seen as the primary vehicle to attract private capital for Africa’s infrastructure development.

More importantly, the UNCTAD Report 2016 on *Economic Development in Africa* clearly underlines the importance of Public Private Partnership (PPP) as complementary modalities of development finance that may contribute to meeting Africa’s financing needs, especially in the African context where the Africa’s external debt stock is rapidly increasing despite the initiative on the Heavily Indebted Poor Countries and Multilateral Debt Relief Initiative over the past two decades.²

In the same connection, in order to accelerate the development of its members, The Southern African Development Community (SADC)³ has set up a Public-Private

¹African Union is an intergovernmental organization established in Addis Ababa in 2002. Its main objective is to promote unity and solidarity among African states, to spur economic development and to promote international cooperation.

²UNCTAD Report 2016, *Economic Development in Africa: Debt dynamics and development finance in Africa*. p2.

³SADC is an intergovernmental organization composed of 16 African countries. Its main mission is to promote sustainable and equitable economic growth and socio-economic development through efficient, productive systems, deeper co-operation and integration, good governance, and durable peace and security; so that the region

Partnership platform with the aim to exchange information and experience surrounding PPPs. It aims to develop capacity in this field helping its members to align policies with best practices and therefore creates a more favorable environment for the emergence of PPP.

Studying Public-Private Partnership therefore becomes very crucial. It is important to evaluate whether African countries have made sufficient efforts to implement the Public private partnership as well as to determine to what extent Public-Private Partnership has come to respond to the very diverse needs of African countries.

This paper objective is to get a depth and practical understanding of the legal system governing the public private partnership in South Africa, the Democratic Republic of Congo (DRC) and Nigeria with the main focus on the PPP legislative framework including principles and relevant norms as well the definition and available opportunities under which PPP is promoted.

This study will go through a selective approach based on the prestige of PPP modal and the success PPP projects that have been realized. In particular, South Africa is the country with a well advanced PPP modal which are used as an example by many other countries. The Democratic Republic of Congo has however experienced successful PPP project in telecommunications sectors while Nigeria, the biggest country economically and demographically, has a mixed record of private investment in infrastructure.

It results from our study that African countries in particular DRC, South-Africa and Nigeria have different approaches and perspectives. Each country pledges to give its own definition and set down norms, general principles as well as procedures. In this regard, there is no harmonization of PPP framework in all African countries.

It has been noted that the lack of the inadequate legal regulatory and institutional framework and weak capacity and low level of participation by private sector are the key challenges for PPP in Africa. These issues were also identified during the African Public Private Partnership Network Inaugural meeting⁴.

Arguably, the lack of PPP legal framework could be due to the lack of capacity from public side. Without skills and sufficient knowledge on the PPP, governments have difficulties to establish an appropriate and strong policy for PPP. Therefore, Capacity

emerges as a competitive and effective player in international relations and the world economy.

⁴ Dominic C.M.U -. Ezeabasili A.C.C -.Okoro B.U -.Dim N.U -.Chikezie G.C , *review of public private partnership on some development projects in Nigeria* , IJAIEM ,volume 4, Issue 3, March 2015,p.4

building and training programs are the prerequisite for the success and development of PPP in Africa.

This particular study is also relevant in the way that it provides an important overview aiming to support the thesis research on “*Public.-Private Partnership as a mean for agricultural development in Africa and in particular in the Democratic Republic of Congo: overcoming poverty and malnutrition*”

In fact, the agriculture forms a significant portion of the economies of all African countries. Investing in Agriculture can therefore contribute towards major continental priorities such as eradicating poverty and hunger, boosting intra-Africa trade and investments, rapid industrialization and economic diversification, sustainable resources and environmental management, and creating jobs, human security and shared prosperity.⁵ Therefore, investing in Agriculture will therefore help many African countries to overcome their current challenges and simultaneously contribute to achieve sustainable development goals.

By the same token, it is noted that agribusiness and agro-industry have the potential to contribute to a range of economic and social development processes, including increased employment generation (particularly female employment), income generation, poverty reduction and improvements in nutrition, health and overall food security⁶.

In this regard, in the African context, African Union members states have committed by 2063 to increase the agricultural productivity in synergy with science, technology, innovation and indigenous knowledge aiming to eradicate poverty and malnutrition. Given this objective, there is therefore a justification to explore through the thesis research the PPP instrument within the Agricultural sector in the Africa in general and DRC in particular, which is one among other African countries enriched with important resources for the agricultural production.

Our work will be divided into three parts. Each part is dedicated to one specific country by providing the definition of PPP, the rules as well procedures that govern the PPP with an additional glimpse on PPP challenges and business opportunities available for each specific country.

⁵ NEPAD, *agriculture in Africa* : Transformation and Outlook ,p.3

⁶ Yumkella K.- Kormawa M. – Roepstorff M. – Hawkins M, *agribusiness for Africa Prosperity*. UNIDO,2011, p.51

II. **Public Private Partnership in Africa: A Cross-border legal analysis and comparison.**

1. The Democratic Republic of Congo (DRC).

Located in the central part of Africa, the Democratic Republic of Congo (DRC) is the second largest country in Africa and has a population of 80 million⁷. As player of international market, the Congolese economy decreases dramatically at 2.5 % due to the decline in world prices of its main exports and by a volatile political and security climate. Nevertheless, its economic outlook still looks good. The Country is expected to rebound to 5.2% in 2018, given the expected rise in prices of the country's raw materials.

The Country possesses an avalanche of minerals resources used in many technology products as well as immense resources for the agricultural production. DRC is estimated to have a total mineral wealth of around US\$24 trillion. This includes the vast bulk of the world's coltan, a mineral used in most electronic devices⁸ but because political instability, the country remains underdeveloped.

DRC suffers from poor governance and weak basic services including healthcare, food, education, ongoing conflict and one of the longest-running humanitarian crises in the world. With subsequent conflicts which have left more than 2.1 million people internally displaced the country hosts over 450,000 refugees from which 4.4 million remain food insecure. The infrastructure is poor, most of the rail network in disuse and disrepair since the 1960s and roads often impassable of which the access becomes extremely difficult due to the large number of rural population⁹.

1.1 PPP Legal framework : principles and norms

On February 11, 2014, the Democratic Republic of the Congo (DRC) enacted the Law No 14/005 creating tax, customs and parafiscal system of non-tax revenues and

⁷ World bank data DRC population : <https://data.worldbank.org/country/congo-dem-rep>

⁸House of commons 5th Report 2016-2017, *Fragility and Development in the Democratic Republic of Congo*,p.7

⁹ House of commons , Cit p.6

exchange control system applicable to Cooperation Agreements and Cooperation Projects. It demonstrates the will of the Congolese government to implement PPP aiming to leverage private capital for the development of core infrastructures such as hydro-electric power station, electric, road and railway network, forest and agriculture.

The adoption of Congolese PPP law was supported by the strategy development programme 2011-2015 adopted by the Congolese government with the main priorities such as the acceleration of the economic growth, improvement in the delivery of basics services, creation of jobs, protection of the environment as well as to reinforce good governance and peace.

This PPP Law creates a special legal environment and a special tax, parafiscal, customs and exchange rate control system applicable specifically to investment projects in resources and development sectors for the country, considering the significance of funds to be raised. However, this law neither provides detailed rules and procedures nor it establishes an institutional arrangement with the task to regulate and manage PPP. Therefore, it is important for the Congolese government to reform its legislation which must specify with clarity institutional roles as well clear rules and procedures. The establishment of clear PPP regulation is the prerequisite for the success of PPP.

In addition to the Law No 14/005 creating tax, customs and parafiscal system of non-tax revenues and exchange control system applicable to Cooperation Agreements and Cooperation Projects, PPP in DRC is governed by the Public procurement Act which is *loi n°10/10 du 27 Avril 2010 relative aux marches publics*. This law contains detailed rules and procedures regulating the public procurement in the DRC.

Furthermore, there are also some specific sectors legislations such as the investment code, the agricultural law, mining code, forestry code which present some investments opportunities under which PPP is promoting as important route for financing development projects.

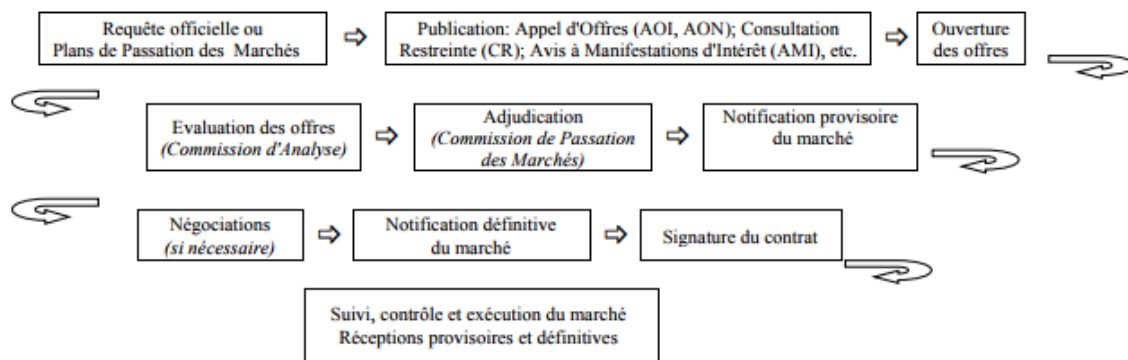
The main principles governing PPP are embedded in the Article 1 of the public procurement Act : *principe de liberté d'accès à la commande publique(1) , principe de prise en compte de l'expertise et des compétences nationales(2) , principe d'égalité de traitement des candidats(3), principe du respect des règles d'éthique(4) , principe de transparence¹⁰*. In addition, the procuring authority is bound by *les principes d'économie, d'impartialité, de transparence et d'efficacité.*¹¹

¹⁰ Article 1 loi n°10/10 du 27 avril 2010 relative aux marches publics

¹¹ RDC, manuel de passation des marches et procédures techniques, 2001p.11

The procurement process is divided into three stages. The first stage is related to period prior to the publication of the project. It includes the preparation of project and the approval of public procurement supervisory body. The second stage is linked to the publication of public tender and the award of the contract. The third stage concerns the post period of the awarding of contract which is characterized by follow up, tracking and execution of contract.¹²

The following chart summarizes the procurement procedures in DRC:



From an institutional point of view, DRC has not institutionalized a specific regulatory body for PPP. In this perspective, it is important to mention that DRC has a decentralized system of governance to the extent that provinces and other territorial entities are allowed to carry out infrastructure projects.¹³ Provinces have their budget but also they benefit from 40 % of national budget which must be withheld at source under article 175 of Congolese constitution. This has never happened in practice¹⁴. While at national level, each sector ministry can set PPP guidelines which vary from one specific sector to another and all project finance activities is carried out by the ministry of finance.

¹² RDC, manuel de passation des marches et procédures techniques, 2001p.11

¹³ <https://pppknowledgelab.org/countries/congo-democratic-republic>

¹⁴ RDC, *étude sur le découpage*, Rapport No. : 50675-ZR, p.2

1.2 Definition of PPP and types of Contracts.

With regards to the definition of PPP, the article 2 of Law N° 14/005 defines PPP as “un **mode de financement par lequel la puissance publique fait appel à des prestataires privés, dans le cadre d'une convention de collaboration pour financer et gérer des projets publics d'infrastructures, de construction d'ouvrages, d'équipement ou tout autre investissement nécessaire au service public sur une longue durée**¹⁵

It can be argued that this definition is not satisfactory in the way that PPP is defined broadly as it is demonstrated by the following analysis.

PPP is defined in general term as **a method of financing and not as a contractual arrangement (1) where only public authorities can call on private operators(2) and it does not include the unsolicited proposal coming from the private operator who may want to finance project at the time when public authority did not trigger a public tender(2), to only finance and manage(3) but not to maintain, build, design, rehabilitate and operate public infrastructures , construction work and equipment (4) and also without specifying whether it concerns existing asset or new assets (4), for a long period (5) without any indication of period of contract .**

Moreover, there is no reference of the transfer of risk from the public to private, the output requirements as the quality standards, the payment mechanisms and even more without any indication of the public interest in the way that it is not clear whether PPP will be used for the purpose to respond to the general public needs or to only satisfy to the request of public authority to be financed by the private operators as it has been proved that the current president uses along his friends, family, and closest advisors the foreign aid and to their DRC natural resources for their personal financial advantages without substantial benefit for Congolese peoples¹⁶ .

¹⁵PPP is a method of financing by which the public authorities call on private operators , under a collaboration agreement to finance and manage public infrastructures projects , construction work , equipment or any other investment necessary for the public service over a long period(translated by the author).

¹⁶ <http://africanworldpolitics.site.wesleyan.edu/2016/10/20/foreign-aid-economic-growth-and-corruption-in-the-drc/>.

It could be argued that the difficulty to define properly the PPP can be due to the lack of insufficient knowledge of PPP and the lack of skills from the public Agent. This problem is further exacerbated by the lack of global definition for PPP. The fact that there is no well-established definition of PPP, many African countries and in particular the Congolese government undergo enormous challenges to orient properly their policies.

As regards to the types of contracts, the PPP law does not list the types of contracts. However, in practice the Congolese government refers to the types of contract that are included under the law N° 08/008 on the disengagement of Congolese government¹⁷ in states owned enterprises. The objective of this law was to improve the quality of services of public enterprises which are featured by lack of performance and inefficiency by liberalizing the activity through the involvement of private operators to support financially or manage public asset. This law constitutes a general framework allowing the implementation of PPPs in the sphere of businesses activities of Portfolio¹⁸. It includes contracts such as **concession, contract de gestion and contract de sous-traitance**.

Additionally, an official document of the Congolese ministry of portfolio¹⁹ lists some others forms of PPP contracts such as **Affermage, contrat exploitation, contrat de service, assistance technique** but does not further provide in more details the definition of each contract. Moreover under the public procurement law, PPP contracts can take the form of **Délégation de service public** and **Régie intéressé**.

In addition to these types of contract, it is important to mention that other modalities are also used in practice as it is shown in the sicomines agreement which is a deal signed with between the Congolese government and a consortium of Chinese companies. In this agreement, a joint venture company was created to deliver the project. This shows that it is very difficult to give a comprehensive list of all types of contract used in the DRC since the law does not enumerate them and in practice other forms are used.

Overall, in the Democratic Republic of Congo, PPP contractual modal include: Concession²⁰, Délégation de service public²¹, Contrat de gestion²², contrat de sous-

¹⁷Loi N° 08/008 DU 07 juillet 2008 portant dispositions générales relatives au désengagement de l'Etat des entreprises du portefeuille.

¹⁸Businesses portfolio covers the activities undertaken by state-owned companies and/or companies where the government has made any investments in terms of capital totally or partially.

¹⁹RDC, Ministre de portefeuille, *la politique du gouvernement en matière de partenariat public-privé dans le secteur du portefeuille de l'Etat cadre général*. mars 2014.p.5-6

²⁰Concession: The private obtains from the government the right to manage and operate an existing asset or any kind of activity against the payment of concession fee

traitance²³, Affermage²⁴, Contrat exploitation²⁵, Contrat de service²⁶, Assistance technique²⁷, Régie intéressée²⁸ and joint-venture.²⁹

to the public and bears totally or partially the risk associated to its investments. At the end of operating contract, the asset will be transferred to the public.

²¹Delegation de service: a particular public service is delegated to private party by the public and the payment of private operator is linked to its performance and the output requirements.

²²Contrat de gestion: the public entity transfers partly or totally to the private party the management of an existing or new asset and receives a payment from the public entity based on its performance including financial and technical performance and the ownership of the asset remains for the public.

²³ Contrat de sous-traitance: a public or private entity delegates to another private party some parts of its tasks and responsibility to be executed as a particular input in regards to its responsibility under the PPP contract and pays the private subcontractor for the delivery of its service.

²⁴ Affermage: the public authority retains ownership and responsibility for investment but contracts with the private partner to manage an existing public asset and to deliver the services to customers and in return the private party will pay fee to the public for operating a public asset. The private operator collects the tariff revenue and is paid on agreed –upon affermage of each unit distributed or produced(example water or energy supply) and pays also an additional surcharge charged from customers to the awarding authority to go towards investments that the awarding authority makes/ has made in the infrastructure.

²⁵ Contrat exploitation: the private party operates an existing public facility and in return the private receives the payment from the public entity against the output requirements and the performance standards and bears all risk associated to its investments.

²⁶ Contrat de service: A private operator, under contract, is allowed to provide a specified service for a specified period and receives a payment for the delivery of its service. Ownership of the asset remains with the public entity.

²⁷ Assistance technique: The public entity contract with private partner to provide technical service to the public and receives the payment of delivery of its service.

²⁸ Régie intéressé: the private operator is delegated to manage a public facility or asset and receives a payment from the public authority against the results of its service in terms of revenues generated, productivity gain and in the improvement of quality of the service provided.

²⁹ Joint venture is an organizational form which consists in the creation of new company by both partners in particular between the Congolese government and private operators to join all resources such as financial, technical and natural resources relevant for the realization of project embedded with the function to exploit them for the interest of both partners. The ownership of the asset depends on the choice of corporate form under Congolese corporate law which are “ la société en commandite simple, la société en nom collectif, la société coopérative, la société privée à responsabilité limitée et la société par actions à responsabilité limitée”.

As regards to the definition, PPP is considered as a long- term contract and by implication does not include others contractual arrangements which in practice are used. Therefore, there is a need of clear policy with detailed on types of contracts as well as the need for a new the definition in taking into consideration all above remarks.

1.3 Opportunities and challenges.

DRC has yet a history of PPPs in the water and power sectors dating back to colonial rule³⁰ and many successful PPP projects have been realized in the telecommunication sector³¹. Some examples PPP projects include the project between DRC government and South Africa for development of the Grand Inga Hydropower between DRC which has the potential to be the hub of the DRC power generation industry and can supply energy to as many as five million households across Africa and the sicomines agreement, which signed in April 2008, grants mineral concessions in Katanga province in exchange for infrastructure investments.

It is important to mention that the Country has made important steps toward the industrialization by implementing industrial policies and strategies to help the country on the path toward a sustainable and inclusive economy. Nevertheless, the implementation of these strategies and programmes remains limited, notably due to the lack of financial resources. PPP is therefore an important financing method for the economic development of DRC.

The country presents some important opportunities for PPP in almost all the sectors of the economy such as the agriculture, forestry, Energy, mining, infrastructure, transport, education, health and Information and telecommunication technology, food, energy, water sanitation health, Education.

However, Investing in DRC currently presents some challenges for private operators. It is noted in the DRC PPP country paper³² that the Congolese government has not moved on to officially consider private sector resources and knowhow as a potential or alternative source of procurement and financing.

It may be argued that there should be for the success of PPP a political will from Congolese government to officially express their interest for private capital. Without any official commitment, many investors including national and foreigners will be at risk to finance projects. This particular behavior has contributed as mentioned in the House of Commons report *on Fragility and development in the Democratic Republic of Congo*,

³⁰ Axis-Consulting, DRC PPP country paper, 2013. p.7

³¹ W.B. *Public-Private Partnership in Telecommunications Infrastructure Projects*, the case of Democratic Republic of Congo, 6870.

³² Axis-Consulting : DRC PPP country paper,2013 p8

to widespread corruption which along with poor state revenue and budgetary management constrain social expenditure and harm the business climate³³. It is noted that corruption undermines the democratization, rule of law, the consolidation of market economies and is a threat to the international economy.³⁴

Furthermore, the House of Commons report on *fragility and Fragility* goes on emphasizing that the Congolese people and local communities have never benefited from projects due to the fact that the business environment “is characterized by few large and often politically connected players and a multitude of small, often informal private sector³⁵. This clearly shows that there is a lack of participation local communities and citizens have not been involved in the process.

Another important concern for DRC is the conflict in the eastern region. This has left institutions, governance and the rule of law weak; and has led to DRC facing some of the highest levels of sexual violence in the world, especially in the context of the ongoing conflict.³⁶ The World Bank study clearly underlines that conflict in the eastern provinces has weakened macroeconomic performance and complicated the implementation of macroeconomic policies as well as destroyed the already limited infrastructures including networks, hospitals and schools³⁷.

The third important element is the political risk. President Joseph Kabila’s second term as president was due to end in December 2016 according to the Congolese constitution which mandates a two-term limit for the president. The president has been accused through it’s a strategy of “glissement” to extent its power and to delay the elections which until now have never been organized.³⁸

Arguably, with the high level of corruption, impunity and higher level of political uncertainty, it must be very difficult for investors to operate in. Hence, it is very important for the development of PPP that Congolese government to make efforts to strength their legal system, to respect the rule of law as well as to tighten its budgetary policy.

One of the most interesting opportunities for the application of PPP is the agriculture. It constitutes one of the main parts of Congolese economy and employs 70 percent of the

³³House of commons 5th Report 2016-2017, *Fragility and Development in the Democratic Republic of Congo*,p.35

³⁴ Williams-Elegbe S. *fighting corruption in public procurement :A comparative Analysis of Disqualification or Debarment Measures*, Oxford and Portland ,Oregon 2012, p2

³⁵ House of commons Report Cit , p.37

³⁶ Op cit , p 6

³⁷ World Bank, *Public-Private Partnership in Telecommunications Infrastructure Projects*. The case of the Democratic Republic of Congo, 6870. p.4.

³⁸ House of Commons Report , Cit p.13

total work force for which the majority of producers are women. They produce food for small-scale or subsistence purpose because of the deterioration of market infrastructure caused by war and Commercial agriculture is limited.³⁹ Therefore, developing the agriculture through PPP will contribute eradicate poverty and to reduce the hunger and malnutrition as well as create more jobs for the local communities.

Importantly, The DRC is endowed with considerable natural resources, vast hydropower potential and an annual rainfall of 1 000 mm ideal for cultivation. The country has over 120 million ha of land suitable for farming or breeding but only an estimated 10 percent is currently used (3 percent for agriculture; 7 percent for breeding). The flora and fauna are among the richest on the continent and the Congolese Forest comprises 45 percent of Africa's total forest area: the largest reserves in the world of tropical timber.⁴⁰

This subject will be further developed under the thesis on *Public.-Private Partnership as a mean for agricultural development in Africa and in particular in the Democratic Republic of Congo: overcoming poverty and malnutrition*". Throughout this study, we will explore the possibility to develop the agricultural productivity in the Democratic Republic of Congo through public private partnership scheme.

With regards to the types of PPP for the agribusiness, FAO study provides a study with some examples of PPP modal for the agribusiness aiming to provide some guidance to FAO member countries on how to establish effective partnerships within their system. These models include the PPP for value chain development (1), PPP for innovation and technology transfer (2), PPP for developing agricultural market infrastructures (3) and PPP for delivering agribusiness development services (4)⁴¹. It is therefore important for the Congolese government to draw practical lessons to better carry out the PPP for the agribusiness development.

³⁹ FAO, DRC foreign Agricultural investment country profile : Democratic Republic of Congo , 2012 p.3

⁴⁰ FAO, Cit, p.7

⁴¹ FAO , Public-Private Partnership for Agribusiness Development

2. SOUTH AFRICA

Ranked by the World Bank as an upper middle-income country, South Africa is the second largest economy and has a population of 55.9⁴² Million. Despite its economic development, the majority of people living in township and rural communities remain poor and with a very high level of Youth unemployment.⁴³

The Country has an advanced industrial sector, a robust financial systems, a progressive legal framework. It has diverse economy with key sectors roughly contributing to GDP including agriculture, manufacturing, mining, electricity and water. The South African economy shrinks by 0.7 % in the first quarter of 2017⁴⁴ and the World Bank estimates that its economy is expected to grow lower than Nigeria at 1.1 percent in 2018⁴⁵. This is due to political uncertainty which presents a higher risk for investors and in return weighs heavily on the investment.⁴⁶

2.1 PPP Legal framework : Principles and norms

Historically, the first democratic election in South Africa in 1994 caused a shift in the philosophy of the South African State, from “government” to “governance”, and new mechanisms such as concessions, PPPs and privatization emerged in the second half of the 1990’s⁴⁷. In this regard, a legislative framework has been developed at national provincial and municipal level. Since then, the numbers of partnerships between the public sector, the private sector, communities and civil society have grown steadily.⁴⁸

⁴² <https://data.worldbank.org/country/south-africa>

⁴³ <http://www.statssa.gov.za/?p=10334>

⁴⁴ <http://www.statssa.gov.za/?cat=30>

⁴⁵ <http://www.worldbank.org/en/region/afr/brief/global-economic-prospects-sub-saharan-africa>

⁴⁶ World bank , South Africa economic update ,p 19

⁴⁷ Burger P. *The dedicated Public- Private Partnership unit of the South African*. 2006 p.1

⁴⁸ Mitchell D. 2007, Capacity Development in for partnership in South Africa: *Increasing service delivery through partnerships between private and public sector*. p.5.

South Africa is the country with a most developed modal of PPP in the SADC region and few others countries like Lesotho and Zimbabwe are still lagging behind on the South Africa procurement practice with each of them not having a PPP law⁴⁹.

Various instruments regulate the PPP in the South Africa. At both national and provincial level, PPP is governed under the Public Finance Management Act (1999) (PFMA) and Treasury Regulation 16 while at local level, the municipalities in South Africa are allowed to execute PPP projects according to Municipal Finance Management Act (2003) (MFMA) and its regulations, and the Municipal Systems Act (2003) (MSA) for the delivery of public services such as clean drinking water, solid waste disposal, the provision of social and low-cost housing, and electrification.⁵⁰

Furthermore, the PPP Manual which was issued by PPP Unit and the Standardized PPP Provisions are among important regulations providing detailed instructions and guidelines for government departments and provinces for the PPP market in South Africa.

In addition to legislations, it important to note that PPP procurement in South Africa also is regulated according to the provision §217 on procurement embedded in the constitution which stipulates :*"when an organ of state ...contracts for goods or services , it must do so in accordance with the a system which is fair , equitable, transparent, competitive and cost effective"* .

PPP Unit was established in 2000 within the National Treasury. It is a center of knowledge and expertise that provides technical assistance during the creation of a PPP⁵¹.Its main function of the South African PPP unit is to ensure that all PPP agreements comply with the legal requirements of affordability, value for money and sufficient risk transfer. By fulfilling these functions, the PPP unit must guide government departments and provinces to follow international best practices that will ensure the successful creation of PPPs.⁵²It doesn't actively set up new projects, which remains under the initiative of the government departments or the provinces⁵³. The PPP unit formal role is advisory only but in the reality it benefits from a high level of influence and credibility and therefore effectively has the last word on PPP projects.⁵⁴

⁴⁹ Dominic C.M.U - Ezeabasili A.C.C. - Okoro B.U. - Dim N.U. - Chikezie G.C. , *review of public private partnership on some development projects in Nigeria* , IJAIEM , volume 4, Issue 3, March 2015,p.4

⁵⁰ PPP Unit, *Introducing Public-Private Partnership in South Africa*, p.14.

⁵¹ Burger P. *the dedicated PPP Unit of the South African National Treasury*. 2006. p.5

⁵² Burger P, Cit. p.9

⁵³ Burger P, Cit. p.15

⁵⁴ World Bank, *Public-private partnerships units: lessons for their design and use in infrastructure*, 2007,p.49.

More precisely, from historical point of view, the rationale of the creation of PPP Unit was to prevent line ministries from undertaking PPPs that would enable them to avoid formal budget limits, as happened in the late 1990's. It was therefore implemented to prevent fiscally irresponsible PPPs from being set up and to maintain investor confidence in the viability of such partnerships⁵⁵. Transfer of risk to the private sector and achieving a greater efficiency were secondary goals, at least initially.⁵⁶

There are three mandatory tests to be complied with which are the affordability⁵⁷, Value for Money (VfM)⁵⁸, and appropriate risk transfer⁵⁹. Before deciding to pursue PPP project, the procuring institution needs to carefully proceed by the three tests which are completed along with PPP project cycles. The project has four distinct phases and the institution must apply these tests throughout project cycle phases which must be followed by specific treasury approvals.

The projects cycles phases consist of inception, feasibility, procurement, and PPP agreement management⁶⁰.

The inception phase: The procuring institution registers the project with National Treasury's PPP Unit and also needs to inform the PPP unit of their available expertise. Afterwards, the procuring institution appoints a project officer and transaction advisor.

⁵⁵World Bank, Cit, p.48

⁵⁶ World Bank, Cit, p.32.

⁵⁷ Affordability is the analysis that allows verifying whether the institution pursuing the PPP can afford the project fee given its available budget or can meet the relevant treasury's future budgetary projections

⁵⁸ The value for money is the difference in the cost between the two scenarios (the traditional procurement and PPP). The main reason for this test is that PPP should deliver better value for money than traditional procurement in terms of cost, price, quality, quantity and risk transfer. If the value for-money test shows that the traditional procurement method is more cost effective, the PPP option will not be pursued

⁵⁹ Substantial risk shall be transferred to the private sector. This is always linked to the payment. If the private sector does not complete construction on time and within budget, it will not be paid by the procuring institution. This principle also applies to the provision of services. If the agreed upon services are not available or do not meet the agreed upon standards, the private party faces financial penalties.

⁶⁰ National Treasury PPP Unit Presentation, p.16

Under the second phase, the project officer must conduct feasibility study⁶¹ which should illustrate the needs analysis which includes the verification of the project with the institution strategic objectives and output specification, options analysis, project due diligence, value assessment, and economic valuation. Once the feasibility has been assured, a public tender is triggered.

Procurement which is the third phase may proceed with the consent of the Treasury. The procedure must ensure that the PPP arrangement is fair, equitable, transparent, competitive and cost-effective, and in line with BEE ⁶²(Black Economic Empowerment) standards. The procurement phase includes prequalification, request for proposals and the selection of best offer and the preparation for money report.

The Phase 4 is the PPP management cycle and includes the negotiation with the selected bidder, finalization of a management plan and the signing of PPP agreement.

Briefly, the phase 1-2 represents the pre-contract or project preparation period .while the phase 3 concerns the selection and the award of contract or project term and the phase -4 concerns the post period of the awarding of contract.

⁶¹ The feasibility study is the analysis that demonstrates the comparative advantage of the proposed PPP project in terms of the strategic objectives and government policy in the way to determine whether the proposed PPP is in the best interests of an institution, by specifying the nature of the institutional function concerned and the extent to which this institutional function, both legally and by nature, may be performed by a private party in the case of a PPP involving the performance of an institutional and In the case of a PPP involving the use of state property, a description of the state property concerned including the three tests (affordability , value of money and the proposed allocation of financial, technical and operational risks between the institution and the private party.

⁶² Black Economic Empowerment (BEE): is an important policy instrument aimed at stimulating further economic growth and creating employment. It was developed to redress the inequalities of Apartheid by giving certain previously disadvantaged groups African citizens economic privileges.

The following chart summarizes PPP procedures in South Africa:



It is important to underline that the BEE⁶³ standards must be applied through the entire process from the appointment of transaction advisor to the final procurement of private party. These standards are based in terms of equity, management and employment subcontractor support, and local and social economic impact. Private partner as well must comply with BEE standards through the special purpose vehicle (SPV) which is the business entity created with the purpose to deliver the project.

⁶³ PPP Unit, *Introducing Public Private Partnerships in South Africa*, p15.

In term of equity, the project must achieve meaningful and beneficial direct ownership of substantial equity interests by black people, black women and black enterprises. With regards to management and employment, the private party and its subcontractors must achieve effective participation of black people and black women into the management control. In other words, it gives the power to black peoples to monitor the manager of enterprise to be ensured that their interests are pursued. The third BEE standard is related to subcontractor's partners in the way that the SPV should subcontract with black people, back women and black enterprises. Lastly the project shall promote a positive local socio-economic impact to the benefit of SMMEs, the disabled, the youth and nongovernmental organizations within a targeted area of the project's operations.

2.2 Definition of PPP and contracts

PPP is defined in South African law as a “**contract between a government institution and a private party, where the private party performs an institutional function and/or uses state property in terms of output specifications, [where] substantial project risk (financial, operational and technical) is transferred to the private party, [and where] the private party benefits through unitary payments from the government and/or user fees**”⁶⁴

This definition presents some important elements that need to be interpreted in order to evaluate whether the definition is satisfactory to be a PPP definition. The following analysis will be focused on very key elements of the definition

As a first element, PPP is defined as **contract not as a mode of financing** (1) between a **governmental institution** (2) and private party. In this second element, there is not any clarity on what governmental institution is referred to as it does not specify explicitly whether provinces and municipalities are included as governmental institution, where the private **performs an institutional function**(3), without specifying which function is concerned. It may be asked whether this element refers to the provision of commons goods and/or public interest, and/ or **where the private uses state property** (4) **in term of output specifications** (5). The fourth element is too overstated. It may indicate a concession contract as it mentions the use of state property while the output specification is a positive element in the way it highlights the standards set forth by the public and which is connected to the payment of private partner to the extent that if the private does not meet these requirements, he will be penalized by a non-payment, *where] substantial project risk (financial, operational and technical)*(5) **is transferred to the private party**.(6) the transfer of the risk is a positive aspect which is also considered in the Eurostat decision ⁶⁵as an important feature of PPP. But it is not

⁶⁴PPP Unit- National Treasury, presentation on PPP in South Africa p.12.

⁶⁵Eurostat , New decision of on deficit and debt

clear what substantial risk would mean. Is this the majority or a share of risk or if not what is the threshold of level of risk that is transferred to the private, *[and where] the private party benefits through unitary payments from the government(7) and/or user fees(8).*⁶⁶ The unitary payment element is considered to be a risk for the public as there is no limitation in the amount of contribution from the public to private since this would cost huge public debt. In this regards, instead for the PPP to ease the payment cost for the public sector, it will rather have a huge impact on the public finance.

Moreover, this may also be contradictory with the purchase of services by the government under public procurement mechanism since the government bears the responsibility to pay the private operator for the delivery of service. This idea does not exclude that the fact in some cases, the government is supposed to pay for a particular work such as in the case of the construction of hospitals or schools but what is important to say is that the users but not the government should be first liable to pay the service that is delivered to them.

In the same connection, we consider that the approach followed by the Eurostat with regards to the impact of PPP on government deficit/surplus and debt is so relevant. In order to limit such impact on PPP, the Eurostat decision considers that the assets involved in a public-private partnership should be classified as nongovernment assets if the majority of risk is transferred to private party. Or in this case, if we consider that the majority of risk should be transferred by the private, it is reasonable for the users to pay for the service otherwise the government will have to pay very high package to the private operators because if the project is too risky then the return is of course very high.

To end this discussion, we believe that the user's payment should be the first payment rule and exceptionally the unitary payment by the government

However , with regard to the institutional function , it is not clearly what institutional function the private operator is allowed to carry out , even though in practice this analysis of any particular task is executed through the feasibility study in order to determine whether the private operator can be allowed to perform a particular public service. Therefore, it must be clearly at least in the definition the idea of what the private can be allowed to do as the definition itself does not make any reference to the option by the private to build, design, maintain and operate a public asset.

Furthermore, the institution function is stated in a broad way to the extent that it may include some aspect of activities that should be exclusively provided by the government and shall not in any case be delegated to private operators. This includes activities like the international relationship, military, defense and security.

⁶⁶PPP Unit- National Treasury, presentation on PPP in South Africa p.12.

This idea is also supported by the lack of policy direction for PPP as mentioned in the SPAID report⁶⁷. It is not clear whether PPP is used for specific sector or for all sectors.⁶⁸ It must be noted that there is no a policy that explicitly underlines the use of PPP. PPP unit website mentions some list of sectors such accommodation, energy, education, water, transport, tourism, water but it is not clear whether the list is exhaustive or not since no clear oriented policy exists. In this regard, there is a need of clear policy elaborating on why and under what circumstances PPPs should be used.

From a contractual point of view, it is important to note that the South African PPP law does not enumerate the types of contracts for PPP. We have selected some examples of contracts through some PPP projects that have been realized, the contractual modal for PPP in South Africa includes DFBOT⁶⁹, DFO⁷⁰, DBOT⁷¹, and Equity Partnership⁷². Moreover, it is listed in the South Africa PPP country paper some forms of PPP contracts such as the BOOT⁷³(build-operate-own -transfer), BOO⁷⁴(build, own ,operate),BOT⁷⁵(Build-operate -transfer) and Lease contract⁷⁶ but excludes other forms like privatization, divestiture, and performance based management contracts, services contracts and public provision.

⁶⁷Support Programme for Accelerated Infrastructure Development

⁶⁸SPAID report, *Key challenge to Public –private Partnership in South Africa*, 2007. p2

⁶⁹DFBOT: The private party designs, finances, constructs a new facility and operates the facility over long period. The private partner transfers the facility to the public entity at the end of the lease term.

⁷⁰DFO: the private designs, finances and operates for a specified period and the ownership of the asset remains with the public entity.

⁷¹DBOT: the private operator designs, builds, operates for a long period and transfers the property to public entity

⁷²Equity partnership: private investors or financial companies and/or institutional investors finance the project by providing the initial capital investment and subsequently can own equity shares given that they bear higher risks.

⁷³BOOT: the private builds, operates, owns and transfers the property to the public entity.

⁷⁴BOO: the private builds, operates and owns the property.

⁷⁵BOT: the private operator builds, operates and transfers the asset at the end of the contract by the public entity.

⁷⁶Lease contract: the private manages and operates a public facility. The private will collect the revenues from the user's payment and at the same time pays a portion of the receipts as a lease fee to the awarding authority from being the owner of the assets and the remaining receipt is retained by the operator. At the end of the contract, the private operator has the option to purchase the asset at a price which is expected to be sufficiently lower than the fair value at the date the option.

It is important to see that compared to DRC and Nigeria that South Africa is the only country that has very limited number of contracts for PPP. For instance, the service contracts are excluded as PPP contract while DRC and Nigeria consider them. But since the PPP law does not indicate types of contracts for PPP, it is important for the law to be improved by including of specific contracts for more policy certainty and clarity including a change of the definition by taking into considerations all above remarks.

2.3 Opportunities and challenges.

Some examples of successful PPP projects have been realized in the sectors services like health, road Toll Roads, ICT, head office accommodation, roads, education, health, eco-tourism and fleet management. For instance, we have the Drive toll road, Polokwane hospital renal dialysis and Universitas and Pelonomi hospital.

From now, as mentioned previously, The South African government is willing to implement PPP projects in the sectors like health, accommodation, energy, education, water, transport, ICT, tourism, and waste sector. There is therefore a room for private investment. But as stated by the World Bank, political instability constitutes currently a big challenge for the South African to the extent that if the south government does not make any effort to overcome it; it will heavily impact on its economy. It is therefore necessary for the Government to avoid situation that may pose large political risks to investors.

Despite the highly and developed South African PPPs modal, data⁷⁷ have shown from 2001 to September 2017 that only 25 PPP deals have been concluded. This clearly shows that the pace of the implementation for PPP is relatively slow.

Many scholars have underlined some factual elements as causes that justify this low level of development. They believe that this is primarily due to the lack of institutional incapacity in department and provinces.⁷⁸ In the same regards, it is argued that the institutional incapacity lies in the narrow application of the definition of PPP's as provided by most literature. In fact as by definition, PPP is considered as an arrangement of cooperation where consideration is given to the private partner as the only party that has the capacity and this in return limits the capacity of the public partner.⁷⁹

⁷⁷ <https://www.gtac.gov.za/Pages/homepublications.aspx>

⁷⁸ Burger P. the dedicated PPP unit of the South African national treasury, 2006 p8 and Mitchel, Capacity Development in for partnership in South Africa: *Increasing service delivery through partnerships between private and public sector*. 2007 p.13

⁷⁹ Mitchel, Capacity Development in for partnership in South Africa: *Increasing service delivery through partnerships between private and public sector*. 2007 p.13

In the South Africa, the institutional incapacity is further encountered at municipal level, which is mainly as it is shown in the south Africa PPP paper due to the complex legislations and procedures⁸⁰. More precisely, the feasibility study in terms of Section 78 of the MSA takes approximately 2 years. Conducting a MFMA feasibility study takes on average a further 6 months. In addition, the level of detail regarding exactly what a feasibility study should entail is largely absent.⁸¹

In this regard, it may be argued that with higher bureaucracy cost, it will be difficult for both parties to come into an agreement. PPP become onerous and time consuming, causing obstacle to both partners.

By the same token, the PPP Unit argues that challenges faced by municipalities are further linked to the different legislations governing PPP at municipal level. The fact is that Municipal outsourcing, including PPPs, are governed by different pieces of legislation - the Municipal Systems Act (MSA) (1) and the Municipal Finance Management Act (MFMA) (2) - and at least two sets of MFMA regulations - Regulations 309 (dealing with PPPs) (3) and 868 (dealing with municipal procurement)(4).

Additionally, Provincial Governments have a more streamlined process in procuring the National Treasury funds in that once the PPP Unit approves a project and an allocation is made by National Treasury while municipalities rely on Treasury allocations through conditional shares or equitable grants, which are specific Governmental allocations designed to uplift municipalities and their communities which are more discrete and once off in nature. Moreover, municipalities also rely on municipal tax revenues or fees collected directly from users of basic services e.g. water and electricity. This increase consequently the inability of municipalities to pursue PPP projects since they depend on governmental allocations and collection of municipal revenues tax⁸².

Another important concern is political mistrust of private involvement. Labor unions have a fundamental ideological opposition to PPPs, viewing them as a threat to job creation. they perceive PPPs as a form of privatization of state-owned assets since they believe that more people will lose their jobs through PPP. This attitude is exacerbated to the fact that the unemployment figure is estimated approximately around 26%.⁸³

Therefore, an active communication with the diverse stakeholders is prerequisite for the success of PPP and needs to be set up in the early stage of the PPP development

⁸⁰Axis consulting South Africa ,PPP country paper , p18

⁸¹Axis consulting , Cit, p.19

⁸²Axis-consulting , South Africa ,PPP country paper,2013.p.19.

⁸³Idem

project process. There may be a fear in the public sector of losing state sovereignty over public asset.⁸⁴ Hence; stakeholder's communication is very crucial for this development of PPP.

Furthermore, it is also believed that the difficulty related to design of the contract is another challenge for PPP in South Africa⁸⁵. This issue is linked to the lack of institutional capacity. Due to the lack of capacity of one partner, it becomes difficult to design properly the contract.

The design of the PPP contract must be founded on the respective skills sets and capacity of the partners concerned and specify with clarity roles and responsibilities of both public and private partner. Any lack of clarity within the contractual arrangement can result in a slowing down of the delivery process, or in the disintegration of the relationships between the partners.⁸⁶

In this way, the ultimate output is potentially optimized even before implementation begins. The realization of the potential rests in the successful management of the relationship between the parties, and the systems of monitoring that should both be explicitly spelt out in the details of the contractual arrangement⁸⁷.

3. NIGERIA

Situated in West Africa, Nigeria is a federal constitutional republic composed of 36 States. The most populous country with a total of 185 million of inhabitants⁸⁸, it is ranked at 152 out of 185 countries with human index value of 0.527 in 2015 which put the country in the low human development category.⁸⁹ It is the Africa's largest producer of oil and the sixth largest oil producing country in the world.

In 2016, the Nigerian economy slipped into recession for the first time in more than two decades reflecting adverse economic shocks, inconsistent economic policies, and deepening security problems in the north east and Delta regions⁹⁰. In particular, this shock was due to the continued decline in oil prices, foreign exchange shortages, disruptions in fuel supply and sharp reduction in oil production, power shortages as well as low capital budget execution rate (51%)⁹¹.

⁸⁴Price Water House Coopers: public private partnership: the US perspective, p 13.

⁸⁵ Mitchel D. Capacity Development in for partnership in South Africa: *Increasing service delivery through partnerships between private and public sector*. 2007p.15

⁸⁶ Idem

⁸⁷Burger D. *the dedicated PPP unit of the South African national treasury*,2006 p.15.

⁸⁸World bank , data population

⁸⁹UNDP , Nigeria Human Development Index

⁹⁰ Nigeria economic outlook , African Development Bank

⁹¹ idem

However, Its economy is expected to increase faster than South African economy by 1.2 percent growth rate in 2017, gaining speed to 2.4 percent in 2018, thanks by a rebound in oil production, as security in oil producing regions improves, and by an increase in fiscal spending but the increased militant activity continues to be a serious risk for the Nigerian economy⁹².

Despite the effort of the government to restore the peace in the Nord East and in the Niger Delta, militants in particular the insurgent Boko Haram continue to pose serious threat to Nigeria causing high wave of displacement with a total of 1.9 million in 2015 and committing serious violations of Human rights including kidnapping and killing.⁹³

In order to exit the country from this crisis, the Nigerian government has developed the Nigeria Economic Recovery and Growth Plan (2017-20). The plan focuses on five key areas, namely: improving macroeconomic stability; economic growth and diversification; improving competitiveness; fostering social inclusion; and governance and security. Private investments are a key policy priority, aimed at driving economic diversification through entrepreneurship and industrialization in the lead sectors of agribusiness, manufacturing and mining.

3.1 PPP Legal framework: principles and norms

Initially, from a historical point of view, the PPP in Nigeria is considered to be born after the 1999 reform. In fact the post 1999 reform initiated by the Obasanjo presidency represents a fundamental economic ideological shift from the socialist character of the Nigerian economy to a full-blown free market economy with neo-liberal policies such as deregulation, privatization, monetization and right-sizing of public bureaucracy featuring prominently on the policy agenda of the government.⁹⁴

Due to the gross deficiencies and wide funding gaps observed in the Nigeria's infrastructural spheres, it is argued that that Privatization and PPPs were adopted as a way to leverage limited public resources to help address the nation's growing infrastructure needs.⁹⁵

⁹²<http://www.worldbank.org/en/region/afr/brief/global-economic-prospects-sub-saharan-africa>

⁹³Confederation Suisse, *The Boko Haram insurgency and internal displacement*: Presentation by Medinat Abdulazeez (Nigerian Defence Academy) at the SEM, July 2016 P6- 8

⁹⁴Adekunle A.M. *Public-Private Partnership as a Policy Strategy of Infrastructure Financing in Nigeria*, 2011, p6

⁹⁵Dominic C.M.U - Ezeabasili A.C.C. – Okoro B.U. -.Dim N.U – Chikezie G.C. , *review of public private partnership on some development projects in Nigeria* , IJAIEM ,volume 4, Issue 3, March 2015,p.2.

It is also believed that the two basic assumptions underpinning the PPP initiative in Nigeria are more efficient social services delivery by the private sector which is imbued with better risk management and declining revenue accruing to government occasioned by economic crisis currently troubling the global economy.⁹⁶

In the same connection, the Nigerian government has adopted the infrastructure concession regulatory commission (ICRC) Act with the aim to accelerate the investment in national infrastructure through private sector funding by assisting the Federal Government of Nigeria and its Ministries Departments, and Agencies (MDAs) to implement and establish effective Public Private Partnership's procurement.

This act provides for the participation of private sector in financing the construction, development, operation, maintenance of infrastructure or development projects of the Federal Government through concession or contractual arrangements and establishes the infrastructure concession regulatory Commission to regulate, monitor and supervise the contracts on infrastructure or development.

The ICRC Act however does not contain detailed and specific rules for PPP procurement. By implication, the rules and procedures under the Nigerian public procurement law apply to PPP agreements. In addition, as mentioned previously, the law creates the commission which is empowered to regulate and manage PPP. So it means that in practice, the commission will set some rules and guidelines to be applied in order to fill the gap the law. However, the compliance of the provisions could be difficult since the commission lacks the power to supervise concession and enforce compliance with its provisions.

Additionally, as Nigeria is federal country. Each state exercises relatively its autonomy in implementing projects and, therefore, each state makes and enforces its own laws and regulations. Nevertheless some State PPP projects may require Federal Government guarantee in order to earn the confidence of major financiers⁹⁷.

Overall the PPP legal framework in Nigeria includes the infrastructure concession regulatory commission Act, the public procurement Act 2007, regulations issued by ICRC governing the PPP process and the state laws as described in each state's PPP policies.

The fundamental principles of PPP procurement are contained in §16 of public procurement act which are *competition, transparency, value for money, economy and efficiency*. In addition the Act outlines under §57 that all parties including a procuring

⁹⁶Adekunle A.M. Cit, p6

⁹⁷Essia.U- Yusuf.A.: *Public-Private-Partnership and Sustainable Development of Infrastructures in Nigeria*, 2013 p4.

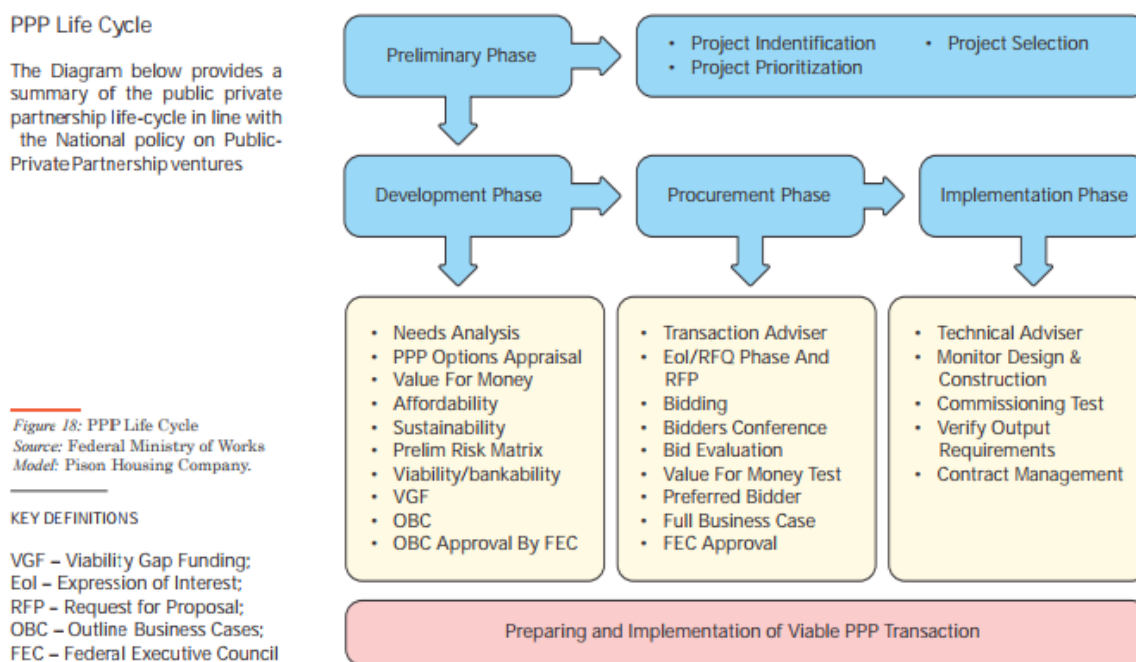
entity, supplier, contractor or service provider shall at all times be governed by *principles of honesty, accountability, transparency, fairness and equity.*

Additionally, the ICRC indicates some other key principles that are applied to the PPP projects in Nigeria which are *Public interest, Output requirements, Transparency, Risk allocation, Competition Capacity to deliver*⁹⁸.

In Nigeria, PPP projects cycle is captured into four stages. The first stage is the project development and appraisal which includes some steps such as project identification and preparation, options appraisal and cost benefit analysis, prioritization of economically worthwhile projects and securing project approval while the second stage is the procurement. It is composed of four steps: preparation of tender documentation, tendering prequalification and full tender, tender evaluation, selection of preferred bidder.

The third stage concerns project implementation. It comprises the award of contract, Implementation of project, monitoring compliance with contractual requirements. The four and last step is the project maturity. It includes commissioning, monitoring and maintenance of completed project formal post-project evaluation.

The following chart summarized the PPP cycle in Nigeria:



⁹⁸ <http://www.icrc.gov.ng/ppp/>.

3.2 Definition and contracts

The Nigerian *National Council for Public Private Partnerships* defines Public-Private Partnership *as a “contractual agreement between a public agency (federal, state or local) and a private sector entity. Through this agreement, the skills and assets of each sector (public and private) are shared in delivering a service or facility for the use of the general public. In addition to the sharing of resources, each party shares in the risks and rewards potential in the delivery of the service and/or facility.*⁹⁹

The definition clearly indicates that PPP is a **contractual agreement (1)** and not as method **of financing between a public agency (2) (federal, state or local) and private sector entity but not governmental institution** as compared to the South African definition... through **which the skills and assets of each sector (public and private) are shared (4) in delivering a service** or facility for the **use of the general public (5)**.. The sharing of skills and assets is positive aspect of PPP in the way it shows a sort of synergy of skills from both partners and it includes the general public as the main beneficiary of the service and**each party shares in the risks(6) and rewards potential (7)** in the delivery of the service and/or facility. It is not clearly from the definition how the risk is shared between the partners at which limit. Does it include the majority or a share of risk transferred from the public to private and how practically the reward of potential will be executed? Is this reward done beyond the payment by users or by the government payment and also no indication of any specific situation in which this reward can be operationalized.

Moreover, the definition does not explicitly include the objective of the contract between the public and private operator as it does not explain the activities that should be carried out by the private operator as well as no reference of the output specifications. Therefore, definition is more problematic and need to be improved.

From contractual perspective, despite the fact that the ICRC Act refers to concession agreement as it focuses on elements of the build, finance, operate and transfer model of PPPs, it actually includes others contractual agreement .The contractual PPP modal in Nigeria are Design- Building or Turnkey contract¹⁰⁰, Service provision contract¹⁰¹, Management contract¹⁰², Lease and operate contract¹⁰³, Design-Build-Operate-Finance

⁹⁹ <http://www.icrc.gov.ng/ppp/>

¹⁰⁰Turnkey contract: the private sector designs and builds infrastructure to meet public sector performance specifications, often for a fixed price. The cost of overruns is transferred to the private sector.

¹⁰¹Service provision contract: a private operator operates a publicly owned asset for a specified period. Ownership of the asset remains with the public entity.

¹⁰²Management contract: a private entity contracts to manage a Government owned entity and manages the marketing and provision of a service.

(DBOF)¹⁰⁴, Build-Operate-Transfer (BOT)¹⁰⁵, Buy-Build –Operate (BBO)¹⁰⁶, Build-Own-Operate¹⁰⁷, Build-Own-Operate-Transfer (BOOT)¹⁰⁸, Operating License¹⁰⁹, and Finance Only¹¹⁰.

These models are distinct from each other as a result of the level and nature of risks that are shifted from the public sector to the private sector. The choice of contract modal is adequately determined upon proper evaluation of the project features and proper scrutiny taken in any of the chosen objective as regards its relevance, purposefulness and specificity¹¹¹.

It is not clear from the definition whether or not PPP in Nigeria is a long or short term contract but practice has shown that the two approaches are combined. Therefore, not all types of contract can be valid for PPP in the sense that these types of contract may contradict with types of contract under the public procurement mechanisms, so it is important for the Nigerian government to improve the law by determine very specific contracts for PPP as well as to improve the PPP definition.

¹⁰³Lease and operate contract : a private operator contracts to lease and assumes all management and operation of Government owned facility and associated services, and may invest further in developing the service and provides the service for a fixed term

¹⁰⁴Design –Build –Operate-Finance (DBOF): The private sector designs, finances and constructs a new facility and operates the facility under a long term contract.

¹⁰⁵Build-Operate-Transfer (BOT) : a private entity receives a franchise to finance, design, build and operate a facility (and to charge user fees) for a specified period, after which ownership is transferred back to the public sector

¹⁰⁶Buy-Build –Operate (BBO): a form of asset sale that includes a rehabilitation or expansion of an existing facility. The government sells the asset to the private sector entity, which then makes the improvements necessary to operate the facility in a profitable manner for a specified period of time. Private operator has no obligation to transfer ownership back to the government.

¹⁰⁷Build-Own-Operate: the private sector finances, builds, owns and operates a facility or service in perpetuity without transferring ownership to the public sector. Legal title to the facility remains in the private sector, and there is no obligation for the public sector to purchase the facility.

¹⁰⁸Build-Own-Operate-Transfer (BOOT): this is an extended version of the BOT model where the private sector builds, owns and operates a facility for a specified period as agreed in the contract and then transfers to the public.

¹⁰⁹Operating License: a private sector receives a license or right to build and operate a public service, usually for a specified period. It is similar to BBO arrangement

¹¹⁰Finance Only: a private entity, usually a financial services company, funds a project directly or uses a mechanism such as long term lease or bond issue.

¹¹¹Dominic C.M.U - Ezeabasili A.C.C. - Okoro B.U. - Dim N.U. -.Chikezie G.C , *review of public private partnership on some development projects in Nigeria* , IJAEM ,volume 4, Issue 3, March 2015,p.3

3.3 Opportunities and challenges

PPPs have been used for delivery of services in sectors like, power, education, roads, and aviation and even in some specific segments of defence services like facility maintenance and simulators procurement/training. Some examples of PPP projects that have been developed through the PPP model in Nigeria are the Lekki Toll road, the Second Niger Bridge and the Domestic terminal at Murtala Muhammed Airport.

The country has some of interesting opportunities as provided for under the ICRC Act 2005 which exist in virtually every sector of the economy such as power plants, highways, seaports, airports, canals, dams, hydroelectric power project, water supply, irrigation, telecommunication, land reclamation, environmental remediation and cleanup projects, housing, interstate transport systems. Industrial estates or township development, housing, government buildings, tourism development, trade fare complexes, warehouses, solid waste management, satellite and ground receiving stations, ICT networks and database infrastructure, education facilities, health facilities, sewerage, drainage, dredging infrastructures.¹¹²

However despite the Nigerian government willingness to harness the private capital, there still remains a number of risks under which investors may be reluctant to finance projects. It is noted that corruption, lack of transparency, improper conduct, lack of competition and innovation are the major challenges for the development PPP in Nigeria¹¹³.

Indeed, these issues such as corruption and lack of competition and transparency have been proved on the basis of an empirical study executed in Nigeria .The first case was an investigation on the concession of ports. It results from the study that on the total of 25 concession agreements, only 13 of these concessions have been successful ¹¹⁴and the other agreements have failed due to the lack of transparency and competitiveness.¹¹⁵ Moreover, an additional study has shown that the political instability, multiples taxation, economic instability are the other key challenges for PPP in Nigeria¹¹⁶.

¹¹² §26, Infrastructure Concession Regulatory Commission 2005

¹¹³ Dominic C.M.U - Ezeabasili A.C.C. – Okoro B.U. -.Dim N.U -.Chikezie G.C , *review of public private partnership on some development projects in Nigeria* , IJAEM ,volume 4, Issue 3, March 2015,p.6

¹¹⁴ Kruck , port reform and concession in Nigeria , p 16

¹¹⁵ Dominic C.M.U -. Ezeabasili A.C.C – Okoro B.U. – Dim N.U. – Chikezie G.C, Cit p.6

¹¹⁶Ugwu, A. *assessing the viability of public – private partnership (ppp) as an option for infrastructural development in Nigeria: a study of Enugu state 2007 – 2012*.P55-58

In the same connection, according to the ICRC commission the lack of a strong legal and policy framework for PPP constitutes the main obstacle for PPP in Nigeria. More specifically, the commission notes in the PPP Review Detail draft (2012) that the success or failure of PPP is traced back to the initial design of PPP policies, legislation and guidance because of the lack of detailed provisions under ICRC Act.

In this regards, the commission further argues that that due to the lack of detailed provisions under ICRC act, the process for planning and procuring projects becomes unduly lengthy and cumbersome and increases the cost of the PPP process.¹¹⁷ By conclusion, the commission opines that the government must establish comprehensive framework for PPPs by amending the ICRC Act with more clarity on the full roles and responsibilities of all parties and stakeholders involved in PPPs.

Therefore, the political will to reform the business environment is the key determining factor for success of PPP.¹¹⁸ Arguably it is important for the Nigerian government to establish a clear policy for PPP to the extent that PPP often involves higher transactions cost, without any precise and clear legislation, the cost of doing business become higher and it is difficult for parties to come into an agreement.

Additionally, the ICRC has also listed some important factors ¹¹⁹that have contributed the failure of PPP projects in Nigeria which incorporate the information asymmetry between the public and private partners, poor feasibility analysis, particularly in terms of forecasting demand for the infrastructure service, lack of skills including managerial technical, human, conceptual and design skills; and lack of experience to deliver the infrastructure service from private operators, weak enforcement capacity of the public sector, lack of a proper contract management and monitoring by the public, political pressure and increase of tariffs for the use of infrastructures and macroeconomic shocks such as the world financial crises or foreign exchange fluctuations.

Furthermore, it is also noted that the political interference; limited operational autonomy; inadequate accountability and transparency; poor workers' morale; inappropriate economic settings; inadequate capital and lack of appreciation of the free interplay of the market forces of supply and demand are among other the causes for the obstacle of PPP in Nigeria.¹²⁰

¹¹⁷ ICRC Nigeria PPP Review Detail, p.2

¹¹⁸Essia.U-Yusuf.A.: *Public-Private-Partnership and Sustainable Development of Infrastructures in Nigeria*, 2013.p3

¹¹⁹ <http://www.icrc.gov/ng/ppp/>

¹²⁰Idris.A.-Kura.M.S.-Bashir.U.M. *Public Private Partnership in Nigeria and Improvement in Service Delivery: An appraisal*, IOSR-JHSS, Volume 10, Issue 3,2013,p.3

Moreover, the public perception by communities is another concern for PP, Nigerians view PPP as indicative of the secret and conspiring relationship between the government and big businesses.¹²¹ This attitude may be linked to lack of transparency and participation of the communities in the process. It is therefore important for the success of PPP to involve the community in an earlier stage of the process.

Lastly as mentioned by World Bank, the insecurity is currently a big concern in the country and will heavily affect the Nigerian economy if the conflict continues¹²².

III. CONCLUSION.

From this analysis, it can be concluded that African countries in particular the Democratic Republic of Congo, South Africa and Nigeria have made important steps to implement PPP in their national system but there is still a need to improve the regulations and policies coping with PPP since the PPP law presents some loopholes as regards to the definition, procedures, rules and types of PPP contracts. Therefore political will is the key element for the success of PPP. It is for the interest of to the African government to both avoid situations that may constitute higher risks for investors as well as to improve their business environment by looking to the international experience on PPP. This will in return increase the confidence of the private operators that their contracts will be enforced and the government will respect their commitment and at the same time will give to private operators more predictability and long term perspective in making their long term business decisions.

In this regards, it is very crucial for the Africa Development bank¹²³ to finance African countries through *the programme of African development fund* as well as the international financial institutions in particular the world bank to support capacity building and technical assistance programmes helping African countries to improve their skills to better orient and develop their PPP policies as well as to manage of PPP projects. At the national level, it is also important for each country to establish in their

¹²¹Oluwasanmi O.O-Ogidi, N.O: Public Private Partnership and Nigerian Economic Growth: Problems and Prospects, IJSS, Vol. 5, No. 11; October 2014 p.7

¹²²<http://www.worldbank.org/en/region/afr/brief/global-economic-prospects-sub-saharan-africa>

¹²³ AFDB: The African Development Bank (AfDB) Group is a regional multilateral development finance institution established to contribute to the economic development and social progress of African countries. The overarching objective of the African Development Bank (AfDB) Group is to spur sustainable economic development and social progress in its regional member countries (RMCs), thus contributing to poverty reduction. The Bank Group achieves this objective by: mobilizing and allocating resources for investment in RMCs; and providing policy advice and technical assistance to support development efforts.

system a specific PPP body dedicated to provide technical assistance to public institutions involved in the sphere of PPP at all levels.

However, it may be argued that will be difficult for all African countries to have a standardized and harmonized PPP framework due to the fact that each country has its own legal system which is the common and civil law system and because the nature of the legal framework for PPP depends heavily on the type of legal system in place.

In civil law countries, the operations of government are usually tightly prescribed in administrative law. This typically establishes legal rights and processes that apply to PPP contracts while Common law systems are typically much less prescriptive, with fewer provisions implied into a contract by law¹²⁴ and also the law evolves from pragmatic case by case thanks to the intervention of the court which plays a proactive role in the development of law in the common law jurisdictions so that it is not evident for all countries to have a standalone PPP legal framework.

Additionally, in both civil and common law jurisdictions , there may also be specific laws that apply to PPP process such as public procurement law, environmental law and regulations, public financial management law and specific sector laws, tax rules, employment law , environmental laws and regulations ,laws governing land acquisition and ownership.

Regarding to the PPP definition that we have deeply criticized, it can be concluded that it is difficult to give a common PPP definition for all African countries given that each of them belongs to one specific legal system. Nevertheless, with regards to the analysis we have made through this study, it is important draw some lessons by making a proposal on the new definition of PPP for each country that will take into consideration of all above remarks. But before going deeper to this, we would like to touch some important key points or features of the PPP.

The first element is the risk transfer. Indeed, the risk allocation is critical factor for the success of PPP projects and therefore it is important to be included in the PPP definition. If all the risk is shifted to the private partner, on one side then the project will be deemed too risky and there will be no interest for the private partner or any banks prepared to finance it. On other hands, if all the risk remains to the public partner, then there will be a limited incentive for the private partner to innovate and perform efficiently so it is important to create a right balance in allocation of risks between partners by taking into account their skills and expertise in managing the risks efficiently.

In this regards, it will be important at the early stage to start in the project development process by an identification of the risks that are associated to the PPP project because the risk depends on every particular project and then to allocate them to both parties based on the capacity of each partner to control them. In this case, the PPP may offer any added value compared to the public procurement mechanisms.

¹²⁴ PPP reference guide version 2.0. p 78

As regards to our proposed definition , we have considered the two possibility on the transfer of either majority or a portion of risks from public to private since the risk depends on the type of project to be delivered and is linked to the activity that of each partner should carry out, meaning their obligations under a particular PPP contract. For instance if the obligation for the private operation is only to build a new public asset, then the private operator does not bear for instance the residual value or demand risks but only bears construction risk. Therefore, it is reasonable to consider the two approaches in our proposed PPP definition even if our position is for the side of transfer of majority of risks to be shifted to the private because the more private operators have risks, the most they are incentivized to innovate and to perform efficiently and in this case, PPP will deliver a very higher level of efficiency.

Arguably, another reason behind this argument is that assuming that **the responsibility for financing, construction, exploitation operation and maintenance rests in whole with the private partner**, there is a tendency that the assets will be owned by the private operators given the private partner bears the majority of the risks. If the project is too risky then the return should be very higher otherwise private operators will never invest in this kind of project. In this regards, PPP could be controversial with the privatization and divestiture since the asset tend to be privatized by private sector. Hence it is therefore important to also consider this both approaches in our proposed given that in the context we envisaged two kind of PPP modal where either the public sector is the owner of the Asset or private sector as well.

However, with regards to the duration of the contract, it is difficult to determine the period of PPP contract in our proposed definition because the period depends on the will of parties that will have to estimate under the terms of contract the duration of the contractual relationship even if this could change in the case of contingency event but what is important to say is that this duration of the contracts is very important element of PPP and should be specify in each PPP contract. The duration could be estimated on the basis of the types of the investment meaning the activities to be executed

PPP may involve long term and short term relationship. Arguably , If PPP is long term contract and in the duration of business cooperation with the private operator is not clearly specify, this will result in the monopolization of the market by private operator given them more position and power in the market losing competition in the market. Without any competition in the market, there will be no incentive for innovation and technology and the cost of products and services will be higher price for consumers as well. Therefore, it is important for the public sector has to play regulatory function to introduce the competition in the market and assuring that the private operators comply with the rules and the terms of the contract to the extent that if they don't meet the standards then they should be penalized.

Another important reason is that if the period of PPP is not specified, communities may fear the government to lose their sovereignty and corrective power in the sense that they may believe that the government will cease to impose fine or penalties to private operators given that the foundation of the contractual relationship between public and private partners is the cooperation. In this regards, citizens will lose their confidence to government and could lead to public protests. This could be further exacerbated by the fact the PPP deals are hardly published in almost all African countries. Therefore, local communities should be involved early in the project development process and also it is important for parties to create a communication channels such reporting system where the public could be informed and will also enable the capacity of public entity to monitor the activity carried out by private operators.

As regards to the payment mechanism, it constitutes also an important feature of PPP and so should be included in the definition of PPP because PPP is not a philanthropic activity but rather profit activity where private operator do not tend to maximize its own profit but they are cooperating with public entity to maximize the common profit or benefit.

Proposal 1: the Democratic Republic of Congo.

Le partenariat public- privé est un contrat par lequel l'autorité contractante confie à un prestataire privé une mission ayant pour objet la gestion, le financement, la construction, l'exploitation ou la maintenance des d'équipements, d'ouvrages existants ou tout autre investissement nécessaire au service public pour une période déterminée. Aux termes de ce contrat, les compétences des secteurs public et privé sont non seulement partagés mais aussi les risques sont repartis, en totalité ou en partie, entre les deux basés en fonction de leurs capacités respectives. Ce dernier pourra en contrepartie être rémunéré sur base de tarifs payés par les usagers ou dans certains cas par l'autorité publique à l'issue de résultat de sa performance et les critères de qualité.

Proposal 2: South Africa

Public Private Partnership is a “contract between a public entity and a private party whereby the private party is awarded to finance, build, design, maintain or manage existing or new public assets for the use of the general public over a specified period. Under this contract, the skills and assets of each sector (public and private) are shared and the financial, operational and technical risks are transferred, in whole or in part, to both partners based on their respective capabilities. In return the private operator receives a benefit through charges or collected fee from the users of the infrastructure and in some cases through unitary payments from the government in terms of output specifications and quality standards.

Proposal 3: Nigeria

Public-Private Partnership is a “contractual agreement between a public agency (federal, state or local) and a private sector entity whereby the private party operates, manages, builds or maintains existing or new public assets for the use of the general public over a specified period. Through this agreement, the skills and assets of each sector (public and private) are shared in delivering a service or facility for the use of the general public. In addition to the sharing of resources, the financial, operational and technical risks are transferred, in whole or in part, to both partners based on their respective capabilities and the return on the investment for the private operator is collected through the payable fee from the users of the infrastructures and in some cases through unitary payments from the government in terms of output specifications and quality standards.