PUBLIC PRIVATE PARTNERSHIP CONTRACTS IN MOZAMBIQUE AND SOUTH AFRICA:

MANAGING RISKS AND ENSURING SUSTAINABILITY

by

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CHAPTER 1: RESEARCH PROBLEM, CONTEXT AND APPROACH

Introduction

This PhD thesis investigates risks and risks management strategies in Public Private Partnership contracts in Mozambique and South Africa and is introduced in this chapter. It is a comparative study involving these two countries. The rationale for choosing these jurisdictions is explained later in the course of the chapter. The aim of this introductory chapter is to: (1) provide the background of the research; (2) present the research problem; (3) introduce the research question; (4) explain the motivation and significance of the research; (5) establish the boundaries of the investigation; (6) identify a theoretical framework to aid the research; (7) discuss the applicability of transaction cost theory framework in PPP; (8) conceptualise PPPs; (9) present the research methodology; and (10) advance the guide to the thesis.

1.1 Background

The last two decades of the twentieth century witnessed many transformations of political and economic systems, including the coming into existence of constitutional democracies and liberal forms of economic management. An important innovation in respect of the management of the public sector was the emergence of a new juridical entity whose fundamental characteristic is the conjunction between state or public agencies and private actors with the intention of efficiently delivering economic and social infrastructures that otherwise would be impossible to realise.[1] This new juridical entity came to be known as a Public Private Partnership (PPP). This involves public and private sector actors working together to achieve a specific purpose or towards the attainment of mutual objectives.[2] A PPP is said to offer benefits, including being a mechanism for financing public infrastructure development, that help to achieve efficiency and effectiveness and generate value for money

[1] Susan L Robertson, Karen Munday, Antoni Verger et al (eds) *Public Private Partnerships in Education: New Actors and Modes of Governance in a Globalizing World* (2012) at 21.
[2] Weiwu Zou, Mohan Kumaraswamy, Jacky Chung et al 'Identifying the critical factors for management in PPP projects' (2014) 32 (2) *International Journal of Project Management* at 18.

by transferring risks and costs from the public to the private sector.[3] As it is well known, many countries in the Global North suffer from a debt crisis, or are at risk of financial shocks because of the bloated debts of their private sectors. At the same time, concern is growing about the possibility of a new debt crisis in the Global South.[4] This means that PPPs will continue to play an important role in the public domain in the future. This is to say, with the world's total debt-to-GDP ratio having reached nearly 250 per cent, up from 210 per cent before the global economic crisis nearly a decade ago,[5] the risk of another debt crisis is a possibility. It has been argued that as PPPs originated as an accounting trick — a way round the government's own constraints on public borrowing — they will remain an attractive option for governments to conceal their true liabilities by moving them 'off-balance-sheet'.[6]

Economic relations between Mozambique and South Africa date from before Mozambique's independence, with massive numbers of Mozambicans employed in the South African mining industry. Nowadays, these relations have increased to include a trade in staple, commodity and capital goods and investments. Since the demise of apartheid, South African investments in the country have increased and are expected to grow further with peace and stability in Mozambique. Some of these investments may take the form of PPPs. With this in mind, a comparative study of the PPP contracts law and regulatory frameworks of the two jurisdictions is of relevance since both countries have, in the last ten years, enacted their PPP legislation. Of special interest are the processes of formation, implementation, performance monitoring, termination, and mechanisms of settling disputes involving PPP partners. The two countries' joint experience with this entity dates back to the 1990s when they agreed to develop several projects in the Maputo Corridor. The first of the projects, in 1996, related to a R2.6 billion PPP on the N4 toll road that provides the connection between the port of Maputo in Mozambique and South Africa. Although privately financed, the debt

[3] HK Yong (ed) *Public Private Partnerships Policy and Practice: A Reference Guide* (2010).

[4] Tim Jones & Jubilee Debt Campaign *The New Debt Trap: How the Response to the Last Global Financial Crisis Has Laid the Ground for the Next* (2015) at 15, available at *<http://jubileedebt.org.uk/wp-content/uploads/2015/07/The-new-debt-trap_07.15.pdf>*, accessed on 10 March 2016.

[5] Kemal Dervis, *Why Another Debt Crisis Might Be Looming* (2017), available at *<https://www.weforum.org/agenda/2017/12/we-could-be-facing-a-major-debt-crisis>*, accessed on 13 Nov 2019 at 1.

[6] David Hall *Why Public Private Partnerships Don't Work: The Many Advantages of the Public Alternative* (2015) at 7.

on this transaction was guaranteed by both the governments of Mozambique and South Africa.[7]

PPPs are not, however, a panacea for all the ills facing a variety of economic and social sectors but instead are simply a tool to be used to unlock critical bottlenecks that cause a chronic deficit in the quality of public service delivery.[8] Attached to PPPs are risks sometimes not adequately evaluated, either because they do not come to the fore during negotiations or because they are simply overlooked and neglected. The Mozambican and South African law and regulatory frameworks anticipate some of the risks in PPPs. Nevertheless, there are other risks that are rarely recognised as such. These have the potential, if they were to materialise, of negatively affecting the performance of a PPP project. A wide range of poor governance issues presents serious risks that can limit the ability of PPPs to deliver the desired outcomes. For example, a poor regulatory framework, an institutional weakness, a lack of transparency, an absence of an adequate accountability system, widespread and pervasive corruption,[9] and a greater non-acceptance by social or political stakeholders who are sceptical of, if not downright hostile to PPPs, [10] are risks which are not generally thought about at the negotiating table, thus leading to incomplete contracting and, hence, can later emerge during the contract implementation process. This will drive the need for contract renegotiation. Incomplete contracting analysis suggests that the choice between PPPs and a conventional provision turns on whether it is easier to draft contracts on service provision than on building provision.[11]

Unsurprisingly, one of the major concerns of opponents of contracting PPPs is about the loss of control associated with giving private providers certain contractual rights and powers (the concession contract involves transferring some state powers to the

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[7] ER Yescombe *Public-Private Partnerships: Principles of Policy and Finance (*2007) at 47; Ian Taylor,' *The Maputo-Witbank Toll Road: Lessons for Development Corridor* (2000).

[8] Arslan Aziz, Deepa Karthykeyan, Anket Kumar et al *Public Private Partnerships in India: Lessons from Experiences* (2012) at 44, available at <*https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/186989/Report-PPPLessonsFromExperiences270812*>, accessed on 10 March 2016.

[9] Madeleine C Fombad 'Enhancing accountability in public-private partnerships in South Africa' (2014) 18 (3) *Southern African Business Review* at 68.

[10] Tony Bovaird 'Public-private partnerships: From contested concepts to prevalent practice' (2004) 70(2) *International Review of Administrative Sciences* at 213.

[11] Oliver Hart 'Incomplete contracts and public ownership: Remarks, and an application to Public-Private Partnerships' (2003) 113 (486) *The Economic Journal* at 75.

concessionaire to act on behalf of the public authority). The fear is that the perfect contract can never be created and that, even if it could, performance cannot be perfectly monitored. Two negative implications follow: first, the contract's incompleteness means that when changing circumstances necessitate changes in the behaviour of the private firm, it will have to be negotiated (or renegotiated) and this could be costly; and secondly, the imperfect monitoring means that the private partner can cheat on quality or some other non-contractual elements.[12]

Given the long-term nature of the PPP projects and the complexity associated with them, it is difficult to identify all possible contingencies during the project conception and development, and events and issues may arise that were not anticipated in the contract documents or by the parties at the time of signing the contract. It is more likely than not that the parties will need to renegotiate the contract to accommodate these contingencies. It is also possible that some of the projects may fail or may be terminated prior to the projected completion of the project for a number of reasons, including changes in government policy, failure by the private operator or the government to perform their obligations or due to external circumstances such as *force majeure*. While some of these issues can be addressed in the PPP agreement, it is likely that others will need to be managed during the course of the PPP project.[13] For instance, there are studies showing that, despite their growing popularity, megaprojects — large-scale, complex projects delivered through various partnership schemes between public and private sectors — often fail to meet cost estimations, time schedules and project outcomes. Further, some PPPs are motivated by vested interests that operate against the public interest.[14] For this reason, risks in PPPs need to be diligently assessed and dealt with adequately during the conception, preparation, contract drafting, negotiation, implementation, and performance monitoring processes. Any PPP contract

[12] Jean-Etienne de Bettignies & Thomas W Ross 'The economics of Public-Private Partnerships' (2004) *Canadian Public Policy* 30 (2) at 144.

[13] World Bank Group *Public-Private-Partnership Legal Resource Center Government Objectives: Benefits and Risks of PPPs*, available at <*https://ppp.worldbank.org/public-private-partnership/overview/ppp-objectives*>, accessed on 5 July 2017.

[14] Alfons van Marrewijk, Stewart R Clegg, Tyrone S Pitsis et al 'Managing public-private megaprojects: Paradoxes, complexity and project design' (2008) 26(6*) International Journal of Project Management* 1, available at < *https://www.academia.edu/4526718/Managing_public_private_megaprojects_Paradoxes_complexity_and_project_design* >, accessed on 1 July 2017.

should be informed by an in-depth analysis of the technical, financial, social and legal aspects of the project.[15] All the above issues are considered and discussed in chapters 3 and 4.

In the concluding chapter 6, it is reflected and recommended in the research that budgetary constraints and economic and social infrastructures development — expected to be resolved with PPPs — will not be met if inherent risks are not adequately addressed or if the institutional capacity needed to ensure the accomplishment of PPP objectives is lacking. In this case, it is emphasised that it will be more cost effective for the public agency to develop public goods or services 'in house' (sometimes outsourcing specific specialised works/activities from the market) or even engage in the traditional concession contract model where the public agency does not get any shareholding position that could be susceptible to generating conflict of interests and thus compromising or undermining its public authority in the governance of the project. In a situation where risks are high, public sector capacity and expertise is weak or even non-existent to deal with such complex legal and administrative work that PPP entails, the best alternative should be the recourse to the traditional concession model in which the concessionaire develops and manages a project at its full cost and risk, with the public sector (as administration) maintaining its regulatory and oversight functions over the quality of services being provided by the private operator.

1.2 Research problem

Mozambique and South Africa, two Southern African Development Community (SADC) countries, have over the past 25 years embraced PPPs for the development of economic projects, some of them undertaken and serving both countries (for example, the Maputo to Witbank N4 toll road, the Maputo Port Development Company (MPDC), and the Ressano Garcia Rail Network). The main arguments for these countries to undertake PPPs are the same as found elsewhere: financial constraints and a search for efficiency and effectiveness in the delivery of public goods especially at the level of public infrastructures.

Under the presumption of market incentives, PPPs seem to be more appropriate than hierarchical command relationships or adversarial regulatory processes. Also, policy-makers

[15] Cornelius Ruiters & Maselaganye P Matji 'Public-private partnership conceptual framework and models for the funding and financing of water services infrastructure in municipalities from selected provinces in South Africa' (2016) 42 (2) *Water SA* 293, available *at <file:///C:/Users/IAGD/Downloads/134895-362023-1-SM%20 (1).pdf>*, accessed on 17 July 2017.

argue that PPPs are good because the private sector is a cheaper source of financing than the public, a strange argument since it is hard to imagine an agent that is able to borrow more than the government with its enormous powers of taxation.[16] Nevertheless, the successful implementation of a PPP depends to a large extent on the development of sound agreements and contracts that clearly define the relationship between public agencies and private firms. Without thoughtful and professionally conceived frameworks and contracts, disputes are likely to occur and projects can and will be delayed, or even terminated without delivering their expected objectives.[17]

The literature review (chapter 2) shows that PPPs are not a panacea for all the ills facing a variety of economic and social sectors but are instead simply a tool to be used to unlock critical bottlenecks that cause a chronic deficit in the quality of public service delivery.[18] They are not miracles for solving all the problems of public infrastructures. Attached to PPPs are risks, sometimes not adequately evaluated either because they do not come to the fore during negotiations or because they are simply overlooked and neglected. Risk refers to those circumstances that, in the assessment of the parties, may have a negative effect on the benefit they expect to achieve with a project. While there may be events that would represent a serious risk for both parties (for example, in a case of the physical destruction of a building by a natural disaster), each party's risk exposure will vary according to its role in a project.[19] Risk can be defined as the measurable probability that the actual outcome of a project will deviate from the one expected, due to the occurrence of objectively or subjectively ascribed factors or events.[20]

Given its long-term nature, many of the risks of a PPP contract come from the complexity of the arrangement itself in terms of documentation, higher procurement costs (including the cost of specialised legal and financial advisers),[21] technical details, taxation

[16] Hart *op cit* note 11 at 75.
[17] Nutavoot Pongsiri 'Regulation and public-private partnerships' (2002) 15(6) *The International Journal of Public Sector Management* at 489.
[18] Aziz, Karthykeyan,,Kumar et al *op cit* note 8 at 44.
[19] UNCITRAL *Legislative Guide on Privately Financed Infrastructure Projects* (2001) at 38.

[20]OECD *Public-Private Partnerships: In Pursuit of Risk Sharing and Value for Money* (2008) at 48.

[21] Yescombe *op cit* note 7 at 26.

and sub-agreements involved, [22] as well as to any uncertainty as regards the occurrence of certain events and their impact on the project. Different events, such as a change in government policy over time, a decline in demand for the infrastructure service, macroeconomic risks and changes in the political environment, and opportunistic behaviour, for example, can all have negative implications on a PPP project.[23] For example, the PPP legal frameworks and contracts aim to reduce opportunistic tendencies and to align the interests of the parties. However, both opportunistic behaviour and the fear of the same between the partners reflect a negative departure from the full range of cooperative relationships maintained by organisations. Opportunistic behaviour is influenced positively by the benefits from such behaviour and is negatively related to safeguards, such as regulatory controls and contract performance monitoring.[24]

Thus, in managing risks the first step is to identify and determine all risks relevant to a PPP. This is the work that is carried out tentatively during the analysis of formation, implementation, and performance monitoring of a PPP contract. How Mozambican and South African law and regulatory frameworks approach risks in PPPs is reviewed in chapters 3 and 4. Both governments have anticipated and considered, in their respective laws and regulatory frameworks, some of the risks associated with PPPs and have (in theory) allocated them to different centres of responsibility (of both the contracting parties).

At this stage it is necessary to record that it suffices to mention that attached to PPPs are some risks rarely recognised by the parties. For example, a wide range of poor governance issues presents serious risks that can limit the ability of PPPs to deliver the desired outcomes. These include poor regulatory frameworks, institutional weaknesses to ensure proper search, procuring, implementation, and performance monitoring of PPP contracts, lack of transparency, weak accountability systems, widespread and pervasive corruption.[25] All these are risks not generally thought about at the negotiating table but which can emerge at any time in the PPP lifecycle as challenging factors hindering the sustainable development of a

[22] Darrin Grimsey & Mervyn K Lewis 'Evaluating the risks of public private partnerships for infrastructure projects' (2002) 20 *International Journal of Project Management* at 109.
[23] Yong *op cit* note 3 at 15.
[24] Pongsiri *op cit* note 17 at 490.
[25] Fombad *op cit* note 9 at 18.

PPP project. For this reason, they need to be diligently assessed and dealt with adequately. These issues are examined in chapters 3, 4 and 6.

Another daunting issue for potential PPP investors pertains to the juridical nature of the PPP contract. Some have analysed the PPP as a hybrid governance arrangement for the provision of collective goods.[26] As a contract with all its legal implications, however, this hybridisation of the PPP entity raises questions as to whether it is a public or private contract and, consequently, which jurisdiction shall be competent for the resolution of conflicts once they arise. Any response to this will have implications for the perception, behaviour and positioning of potential investors, especially the international ones. This issue is further dealt with in chapter 2.

1.3 Research question

Analysed in this research is how to manage risks and ensure sustainability in PPP contracts. It is a comparative study between Mozambique and South Africa. As is substantially discussed, inter alia, in subs 1.4, these two jurisdictions were chosen because both countries are members of the SADC region that aims at economic integration. Also considered is, on the one hand, the role of South Africa as an economic powerhouse in the region that played a key role in Mozambique's impressive growth in investment inflows and, on the other, was the belief that more South African investment will continue flowing into Mozambique. With the above in mind, it is very likely that the comparative study may be an invaluable tool for prospective private investors in PPP projects. It is acknowledged that SADC economic integration encompasses the harmonisation of national norms, rules and laws in the region. As the academic debate over the harmonisation of laws in the region has already started, [27] this research, in contributing to the regional effort, is a timely exercise.

The question that this thesis attempts to answer is: how can risks be managed in PPPs contracting in Mozambique and South Africa to ensure their sustainability? The formulation of a response to this has given rise to subsidiary questions. These relate to the legal definition of PPP, arguments for global prominence and typology of PPPs (chapter 2); the processes of

[26]Philipp Pattberg, Frank Biermann, Sander Chan et al 'Introduction to partnerships for sustainable development' in Philipp Pattberg, Frank Biermann, Sander Chan & (eds) *Public Private Partnerships for Sustainable Development: Emergence, Influence and Legitimacy* (2012) at 3.

[27] Armando C Dimande, Gilles Cistac & Charles E Minega (eds) *Regional Integration, Rule of Law and Development: Lessons from SADC Experiences* (2012) at 20.

formation, implementation, performance monitoring and termination of PPP contracts and mechanisms for partners' conflicts resolution, anticipated (by law) and non-anticipated risks, and strategies for risks mitigation with view of ensuring sustainability of PPP projects (chapters 3 and 4). Equally important, provided in the comparative discussion (chapter 5), are insights for a better understanding of the similarities and differences of the juridical norms and institutes of the two jurisdictions as regards PPP regimes. Further advanced in the discussion are ways in which these differences shall be interpreted from the perspective of harmonising their general understanding. Finally, found in chapter 6 are concluding remarks, reflections and recommendations as regards the issue under discussion.

1.4 Motivation and significance of the research

Academic, economic, and legal motivations inform this research. First, the academic motivation is anchored on the premise that this is part of the work requirement for the PhD programme at the Law Faculty of the University of Cape Town. The central theme is risk management and sustainability of the PPP contract in Mozambique and South Africa. It is a comparative study involving these two countries. These two jurisdictions are chosen, taking into account the purpose of the comparison[28] while economic and legal interests inform the choice.

Secondly, this research contributes to the body of knowledge about Mozambique and South Africa. It also offers an opinion informed by research on the PPP regime and by experience with the practical objective of substantiating the argument that governments' budgetary constraints and economic and social infrastructures development — which are expected to be resolved by contracting PPPs — will not be overcome and met if risks associated with them and other context-specific challenges are not adequately addressed; more so if the governance weaknesses that are revealed in the literature review are not appropriately dealt with to ensure the accomplishment of PPPs goals.

[28] Danny Pieters *Functions of Comparative Law and Practical Methodology of Comparing: Or How the Goal Determines the Road* (unpublished LLM thesis, KU Leuven/University of Tilburg, 2009), available at *<https://www.law.kuleuven.be/personal/mstorme/Functions% 0of%20comparative%20law%20and%20practical%20methodology%20of%20omparing.pdf>*, accessed on 20 June 2016 at 14; Dário Moura Vicente *Direito Comparado* 3 ed (2014) at 43.

Thirdly, is the economic argument deriving from the fact that South Africa has played an important role in Mozambique's impressive growth in investment inflows over the past two decades, with close to USD2 billion in approved projects from 1992 to 2009.[29] In the years 2013 to 2015, South African investment in Mozambique totalled around USD805 million,[30] and in the years to come and using the PPP regime, there is a belief that more South African investment will continue to flow into Mozambique. Further, as was mentioned in subsection 1.2, PPPs have been recommended by financial institutions, particularly the International Monetary Fund (IMF), World Bank, African Development Bank (AfDB), and by SADC leaders, as financing mechanisms for developing public infrastructures in the region, including Mozambique and South Africa where PPPs are already being used. There is a strong belief that they will continue shaping economic and social development in the years to come, not only in these two countries, but also in the whole SADC region.

Fourthly, and the overarching motivation of this research, there is the comparative perspective. Mozambique's legal regime is based fundamentally on the Roman-Germanic system, also known as Civil Law, while South Africa's legal system is characterised by 'complex hybridism',[31] due to the historic influence of Roman-Dutch law, common law and African customary laws. However, the extent of their effective differences will be of academic interest for examination. South Africa is taken as the most significant representative of the hybrid legal system and Mozambique represents the civil law family, in a region with diverse political and legal cultures and influences but formally dominated by civil, common and hybrid systems of law. Thus, the result of the study in a form of synthesis of comparison and identifying the similarities and the differences,[32] may contribute to future debates over the harmonisation of laws in the SADC region.

In fact, the comparative law interest of the research is founded on the premise that the two countries are members of the SADC region whose integration is directed at the harmonisation of national norms, laws and legal institutions in the region as a whole. The academic debate over harmonisation of laws in the region has already commenced.[33] The

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[29] UNCTAD *Investment Policy Review Mozambique* (2012) at 20, available at <*http//www.unctad.org/en/PublicationsLibrary/diaepcb2012d1_en.pdf*>, accessed on 18 June 2016.
[30] Centro de Promoção de Investimentos *Relatório Projectos Aprovados* (2013) at 5.
[31] Carlos Ferreira Almeida & Jorge Morais *Carvalho Introdução ao Direito* Comparado (2013) 3 ed at 2.
[32] Vicente o*p cit* note 28 at 43.
[33] Dimande, Cistac & C Minega (eds) *op cit* note 27 at 20.

research aims also to contribute to this debate. Indeed, the construction and effective functioning of the SADC as an economic region through, for example, the implementation of the signed protocols, especially on trade (1996), trade and services (2012), transport, communications and meteorology (1996), facilitation and movement of persons (2005), finance and investments (2006), legal affairs (2000), and the more recently endorsed Agenda 2063, encompasses the need for harmonisation of the norms and legal institutes in the region.

This comparative study between Mozambique and South Africa touches, for example, on two of the SADC protocols: on Legal Affairs and on Finance and Investments. Some of the objectives of the Protocol on Legal Affairs are to assist State Parties in developing legal capacities and expertise in specific areas of concern, promote the harmonisation of administrative and legislative measures, and facilitate research and development into legal issues of common concern.[34] One of the objectives of the Protocol on Finance and Investments, moreover, is to secure State Parties' co-operation on policies and other related issues encouraging and facilitating the use of PPPs to ensure economic and social development in the region'.[35] For trade and liberalisation measures to be successful, they must be accompanied by efforts to harmonise fiscal policies in order to promote economic cooperation and integration, a process which should involve the harmonisation of financial laws, regulations, trade documents and procedures with respect to banking, finance, and movement of capital and goods.[36] This research also responds to these SADC policy agendas.

Also of significance are the findings of the comparative analysis in the form of the conclusion of the comparison, spelling out the existing similarities and differences [37] (chapter 5). The result may be relevant for both countries under study and for other SADC academics, policymakers, and the wider public. The point of departure, however, is that at the heart of the study are two jurisdictions belonging to two different legal systems: the civil law family

[34]Southern African Development Community Protocol on Legal Affairs (2000) art 2 (c), (i) and (j).
[35] Southern African Development Community Protocol on Finance and Investment (2006) Annex 1 art 4.
[36] Muno Ndulo *African Integration Schemes: A Case Study of the Southern African Development Community* (1999) at 23, available at <*http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1057&context=facpub*>, accessed on 17 July 2017.

[37] Vicente *op cit* note 28 at 41.

and the hybrid. Despite the differences between the two legal systems,[38] the result of the comparison is expected to shed light and contribute to promote better mutual understanding of the 'rules of the game' — especially for prospective investors from both countries — and bridge possible areas of difference.

All the above arguments are both significant and motivating. Equally motivating is the possibility of envisaging the contribution that can be made towards the building of a legal critical knowledge at the national level in both countries and in the SADC region. The result of the investigation may develop into an invaluable tool for future policy reviews and contribute to more streamlined and better harmonised legal and regulatory frameworks in the jurisdictions under study and, also, in the SADC region.

1.5 Delimitation

The fundamental idea expounded in this research is that contracting a PPP will only be justifiable if three dimensions are present, these being that governments resort to PPPs because they are financially constrained, are in great need of economic or social public infrastructures, and see partnerships with the private sector actors as a window to help them to attain their goals. This study takes these three factors as the bedrock for the justification for a state or public entity to enter into a PPP contract. This said, contracting a PPP is not justifiable in any situation in which these three dimensions are not present, and thus shall not be discussed here.

1.6 Theoretical framework

PPPs are divergent phenomenon in terms of the theoretical models available for understanding and evaluating them. There is no one unified body of theory.[39] However, PPPs involve contracting between government and the private sector under conditions of imperfect information. Such activity takes place in a particular institutional framework, and without institutional infrastructure, thus making transactions impossible. It is that, therefore, what

[38] Because Mozambique follows a Roman-Germanic system and South Africa a hybrid one, the Administrative Tribunal intervention in PPP processes in Mozambique is stronger than it is in South Africa. This is due to the fact that in Mozambique the administrative court is a specialised court in the application of administrative law, adjudicating all cases involving government/state (institutions and public officials) and private party (individuals and juridical entities). This is not the case of South Africa where common courts also deal with cases involving public administration.

[39] Stephen Osborne *Public-Private Partnership: Theory and Practice in International Perspective* (2000) at 3.

makes the study of institutions in PPP contracts matter.[40] The last twenty years or so have seen a growth in the 'economics of contracting' literature and its main findings are also very relevant to an understanding of the strengths and weaknesses of any PPP deal. The economics of the contracting literature is based on transaction costs[41] that are an interdisciplinary undertaking that joins economics with aspects of organisation theory that overlap extensively with contract law. The importance of transaction costs to economic activity entails matching governance structures with these transactional attributes, though the world of contract is enormously complex.[42]

This said, over the course of thirty years the 'contract' has become a central notion in economic analysis, giving rise to three principal fields of study: 'incentives', 'incomplete contracts' and 'transaction costs'.[43] While it shall be recognised that handling the thesis inquiry into the use of a single theoretical framework would not be sufficient, clearly, there is one issue that dominates the whole study — the transaction costs theory (TCT). Other

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[41] David Parker & Keith Hartley 'Transaction costs, relational contracting and public private partnerships: A case study of UK defence' (2003), *Journal of Purchasing and Supply Management* at 9

[42] Oliver E Williamson 'Transaction-cost economics: The governance of contractual relations' (1979) 22 (2) *Journal of Law and Economics* at 233−261.

[43] Eric Brousseau & Jean-Michel Glachant *The Economics of Contracts: Theories and Applications* (2004) at 3.

theoretical frameworks that over the course of the investigation will be called in include public choice,[44] principal-agent,[45] principal-principal [46] and institutional frameworks.[47]

Transaction costs arise from the costs of seeking out buyers and sellers and arranging policing and enforcing agreements in a world of imperfect information or under conditions of imperfect and asymmetrically distributed information.[48] Risks in PPP contracts are examined in this research and the conceptual framework appropriate to evaluating PPP projects is that which aids the investigation to determine what happens in the processes of formation, management, and performance monitoring of such contracts.

TCT is based on the assumption that agents taking part in a contract have limited abilities to calculate the costs and risks involved and, further, that they operate in a universe in which they do not know, a priori, the structure of the set of problems that may arise. They are confronted with uncertainties, that render them unable to compose complete contracts and contractual incompleteness that has another source, namely, institutional failure. TCT facilitates an analysis of how economic agents combine commitment constraints — designed to guarantee the realisation of specific investments with flexibility constraints that are needed

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[44] James M Buchanan's public choice theory argues that 'governments are not purely altruist entities that effortlessly correct market imperfections. Instead governments are aggregates of individuals pursuing private rather than public interests through regulations and tax laws. These private interests create wasteful lobbying efforts known as rent seeking' in Bob McTeer 'The creation of Public Choice Theory', *Economic Insights,*.8(2), available at *https://www.independent.org/news/article.asp?id=11648*, accessed 31 July 2021.

[45] A principal-agent problem may arise if agent and principal have different interests and the agent has more information than the principal. In this case the principal cannot ensure that the agent is acting in the principal's best interest. Then, moral hazard and conflicts of interest may arise. The solution is to ensure the provision of appropriate incentives so agent acts in the way principal wishes' in Jose A Garcia, Rosa Rodriguez-Sanchez, & Joaquin Fdez -Valdivia 'The principal-agent problem in peer review' (2014), 66(2) *Journal of the Association for Information Science and Technology* at 298, *<DOI: 10.1002/asi.23169>.*

[46] The principal-principal problem refers to the conflict that takes place in the process of corporate governance. The conflict is between the controlling (majority) shareholders and the minority shareholders. The controlling shareholders may indicate affiliated managers including who is on the board of directors, putting less-qualified family members, friends and cronies in key positions. Controlling shareholders may exploit their dominant position by appropriating the value from the minority shareholders, which refers to the transfer of value from the minority shareholders to the majority shareholders. The expropriation may include below-market value asset transfers to the controlling shareholders' firm, and engaging in strategies which advance personal, family, or political agendas at the expense of the firm. See Michael N Young, Mike W.Peng, David Ahlstrom et al 'Corporate governance in emerging economies: A review of the Principal-Principal perspective (2008) 45(1) *Journal of Management Studies* (2008) at 200.

[47] S Ping Ho & Chun-Wei Tsui 'The transaction costs of Public Private Partnerships: Implications on PPP governance design' (2009) 3 in *Lead 2009 Specialty Conference: Global Governance in Project Organizations* at 5–7, available at <*http://academiceventplanner.com/LEAD2009/papers/Ho_Tsui.pdf*>, accessed on 29 June 2017.

[48] David Parker & Keith Hartley 'Transaction costs, relational contracting and public private partnerships: A case study of UK defence' (2003) 9 (3) *Journal of Purchasing and Supply Management* at 99.

because of the impossibility of perfectly foreseeing the coordination modes that would be optimal *ex post*. TCT assumes a broader approach, in that it simultaneously deals with the efficiency of adjustments *ex post* and constraints on the performance of contracts. It defends safeguards to protect each party from the potential for opportunistic behaviour and provides incentives to commit to the transaction. In this regard, it emphasises the manipulation of costs of breaking the agreement — using security deposits (hostages) or irreversible investments and the length of the commitment. The longer the duration, the more difficult it becomes to predict efficient future adjustments. It thus becomes necessary to redefine the parties'obligations over the course of the performance of the contract. As commitments are open-ended and specific, TCT also insists on private conflict resolution mechanisms. Conflict resolution cannot be efficiently ensured by outside authorities. Under these conditions, the contracting parties must agree beforehand on bilateral procedures for resolving disagreements.[49]

Owing to the bounded rationality [50] of the agents who design and implement the contracts,[51] all these bilateral coordination devices, however, remain imperfect and are costly to devise and manage. This means that the contracting parties will, as much as possible, fall back on collective provisions emanating from an institutional framework. In this sense, institutional framework plays two essential roles. First, it provides a basic set of coordination rules, freeing the agents from the need to invent, or reinvent, all of the rules within their contractual relationship. For example, external technical standards eliminate the need to compose a voluminous specification manual, while 'common knowledge' specific to a profession dispenses with the requirement to formally describe the criteria defining certain characteristics, or behaviours, as 'standard' or 'fair'. Secondly, the institutional framework

[49] Brousseau & Glachant *op cit* note 43 at 13.

[50] Herbert A Simon 'Theories of bounded rationality' (1972) in C B McGuire & Roy Radner (eds) *Decision and Organization* at 361, available at <*http://innovbfa.viabloga.com/files/Herbert_Simon___theories_of_bounded_rationality___1972.pdf*>, accessed on 9 July 2017.

[51] 'Bounded rationality reflects individuals' inability to process a large amount of information as well as their difficulty in assigning probability values to the occurrence of future events. Individuals seek to make rational decisions but within the limits of their imperfect cognitive abilities and in conditions of imperfect information' quoting Rodrigo Martins, Fernando Ribeiro Serra, André da Silva Leite et al in *Transactions Cost Theory Influence in Strategy Research: A Review through a Bibliometric Study in Leading Journals* (2010) at 8, available at <*http://globadvantage.ipleiria.pt/files/2010/03/working_paper-61_globadvantage.pdf* >, accessed on 29 June 2017.

lends credibility to sanctions guaranteeing the performance of contractual obligations. Reputation, the self-regulations systems of some professions, and public authorities' power to regulate and coerce, all provide further support for the contracting parties.[52]

According to the TCT, the transaction costs emerge because there are limits to human cognition. In sum, 'although we expect people to behave rationally we need to incorporate a bounded rationally constraint in that expectation, due namely to the difficulties in gathering and processing information that hinder on how individuals actually behave'. [53] The limited capacity of individuals to plan for the future given the complexity and pace of change of the environment and lack of knowledge are sources of uncertainty and incomplete contracts. Moreover, one needs to consider the difficulties in enforcing contracts for the parties to a transaction are exposed to opportunistic behaviour. To prevent those behaviours or protect the parties from them, firms and individuals seek the best institutional arrangements to minimise the costs involved in a transaction by, in some instances, carrying out the transactions internally and, in others, relying on the markets.[54] This discussion is at the heart of this research: the construction of arguments to put forward to decision-makers as whether to engage in a PPP initiative or to resort to traditional forms of public provision.

To conclude, the TCT framework has been often applied to a study of the boundaries of a firm discussion of the rationale for deciding on such an essential matter as to make or to buy.[55] With some adaptation the TCT framework can also be used in deciding whether to enter or not in a PPP contract or, otherwise, to have recourse to an alternative solution, for example internal state/public production or full private sector development. The way TCT has been presented earlier in this work suggests it to be the most appropriate theoretical framework capable of aiding this research.

1.7 Applicability of the TCT framework in PPP

Due mainly to the limited financial resources of governments, PPPs have emerged as one of the important ways of delivering public goods. Compared to traditional delivery approaches, PPPs bundle complex investments and service provisions together with different entities in

[52] Brousseau & Glachant *op cit* note 43 at 14.
[53] Martins et al *op cit* note 51 at 20.
[54] Martins et al *op cit* note 51 at 21.

[55] Ibid at 14.

a single long-term contract. Because of the special characteristics of PPP, many transactions happen during the life cycle of the PPP contract, resulting in an increase in the 'transaction costs' of the project. Transaction costs are known in economics as the costs associated with executing projects, such as searching, negotiating, contracting, performance monitoring, and enforcing contracts.[56]

There are several reasons why transaction costs in PPPs would be high, especially compared to traditional public investment projects. The main sources of higher transaction costs in PPPs are their long-term character, ownership, financing structures, and risk-sharing features. Due to these reasons the degree of contractual incompleteness is high in the case of PPPs, and attempts to reduce that contractual incompleteness give rise to correspondingly high transaction costs. Negotiating a contract is especially costly, not least due to the high cost of advisory services. Such costs are not limited to the pre-delivery phase, as renegotiations are almost inevitable in contracts that stretch over decades.[57] In Mozambique, for example, the duration of a PPP depends on the type of project undertaken and shall not, in any case, exceed 30 years for greenfield projects (projects being developed by the first time). This period may be extended by up to 10 years in the case of mega-projects.[58] While in South Africa the Standardised Public-Private Partnership Provisions do not determine the term of a PPP, they do, however, indicate that the PPP agreement must specify its duration and the choice of duration should be considered in the light of, among other factors, the requirements of the public entity in relation to the services, the possibilities of alternative uses of the project assets, the affordability of the services involved, the need for any major refurbishment or replacement programmes, the term of the debt, etc.[59]

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[56] Morteza Farajian & Qingbin Cui *Transaction Cost in Public-Private Partnerships* (n.d.) at 2, available at <*http://si.umd.edu/Publication/14.%20TRANSACTION%20COST%20IN%20PUBLIC-PRIVATE-PARTNERSHIPS.pdf*>,accessed on 29 June 2017.

[57] Gerti Dudkin & Timo Valila 'Transaction costs in Public-Private Partnerships: A first look at the evidence' (2006) 1(2) *Competition and Regulation in Network Industries*, available at <*https://journals.sagepub.com/doi/abs/10.1177/178359170600100209?*>, accessed on 29 June 2017.

[58]Lei das Parcerias Publico-Privadas, Projectos de Grande Dimensão e Concessões Empresariais) (Lei n.º 15/2011) art 22 (hereafter PPP Law).

[59] National Treasury *PPP Manual and Standardised Provisions* (2004), available from <*http://www.ppp.gov.za/Legal20Manual/Module2001*>, accessed on 18 August 2015 (hereafter National Treasury Standardised PPP Provisions).

Apart from the direct costs related to searching, tendering, contract drafting, negotiation, and performance monitoring, the long contract period also indirectly gives rise to the economic cost. The enforcement of a long-term contract can be difficult because of the threat to contract termination that can only be used if the public agency is committed to buying out the asset at a fair value in case of termination. Otherwise, expropriation risk would need to be factored into project costs. Also, a PPP established for service provision using privately owned assets and management might entail higher monitoring costs than in-house public provision of the same service. The provision of most services is relatively difficult to measure and monitor, especially in terms of quality. While in-house provision, too, necessitates quality control, it can be argued that private asset ownership implies higher monitoring costs for the public sector. After all, if the asset were in public ownership, the public sector could always ensure the desired service quality. It is therefore more costly to maintain the desired service quality under private asset ownership and management.[60]

Thus, the transaction costs can have the potential to erode the cost savings achieved (or thought of to be achieved) through a PPP structure. Apart from their direct negative impact on the financial and economic viability of the project, the high costs of bidding constitute an obvious hurdle for potential bidders to enter the bidding process. This, in turn, undermines the power of *ex ante* competition, which is in many public sector infrastructures and services the only form of competition that can exist. The inability to harness the power of *ex ante* competition to support the quest for productive efficiency will, in turn, deter the creation of value for money (VfM) through a PPP. Besides, the design of the bidding process so as to avoid inefficiencies due to collusion, or opportunistic or corrupt behaviour, is difficult in general, and, in particular, in the case of long-term contracts.[61]

To sum up, the main sources of higher transaction costs in PPPs are their long-term character, ownership, financing structures, and risk-sharing feature. Due to all of these reasons, in PPPs the degree of contractual complexity is high. Attempts to reach agreements increase the costs associated with a PPP transaction. Consequently, the search (tendering and bidding), contracting, and performance monitoring processes become more resource consuming — both in terms of budget and time — than in traditional methods of procuring

[60] Dudkin & Valila *op cit* note 57 at 5.

[61] Dudkin & Valila *op cit* note 57 at 5

public projects. This also creates many challenges for researchers regarding the definition of cost-breakdown structure for transaction costs to consider from the accounting system perspective.[62] There can be also other costs deriving from political, social and institutional environment functions which are difficult to attribute to a monetarist metric but that can constitute serious risks affecting the cost structure of a PPP project.

The specific responses that different parties in PPPs manifest depend on whether the environment is certain or uncertain. Because of the characteristics of PPPs, such as the rare occurrence of contracts, the long life cycle of the agreements, the complex revenue streams and traffic volume studies, and the environments associated with PPPs that are relatively more uncertain than those associated with traditional methods, all this increases the searching cost. Meanwhile, in a PPP model the different entities have different goals. The public sector partner tries to maximise the social benefits and minimise the political costs, while the private agency tries to maximise the rate of return (RoR) on its investment and minimise the capital costs. Therefore, high opportunism from both sides is embedded in PPPs, which makes the negotiations between both sides more expensive. In addition, PPPs are associated with high levels of complexity of actor composition, with wider stakeholders' behavioural and environmental uncertainties, and institutional fragmentation and complexity. The fact that PPPs have to connect to the decisions from various arenas and networks increases the risks for actors and the chance of failure. The strategic choices of public and private actors must be taken into account as public actors want to minimise implementation costs and be sure of having a political influence on the projects, while the private actors look for certainties to recoup their investment and minimise political risks.[63]

At this stage, it is appropriate to explain a little about the relationship between risk and cost. While the risk is a foreseeable or unforeseeable event whose occurrence is capable of endangering or jeopardising the course of an activity or the attainment of a defined objective, the materialisation of such risk may definitely translate in additional financial or

[62] Farajian & Cui *op cit* note 56 at 678.

[63] Erik-Hans Klijn & Gerrit R Teisman 'Institutional and strategic barriers to Public Private Partnership: An analysis of Dutch cases' (2003) 23(3) *Public Money & Management* at 137–146.

non-monetary costs. This is why the TCT framework was chosen to aid in evaluating risk management and sustainability in PPP contracts.

1.8 Conceptualising PPPs

The definition of PPP varies, depending on the degree of ownership of assets and capital expenditure by the private partner. For example, in the case of management contracts the private partners have very limited or no capital expenditure. In the case of a design, built, own, and operate, however, the private partners are responsible for the design, development, building, operation, and financing of a capital asset. In such a PPP, private partners receive payment from either the government, at regular intervals, or from user charges, or both, for delivering the services. Thus, there can be many variants of PPP schemes, depending on the separation of asset ownership, financing, and risk-bearing between the public and the private sector actors.[64]

Three critical conditions characterise the conception of PPP. These are: (i) the relationship between the public and private sector organisations is a long-term, rather than a one-time, relationship such as might occur in a conventional contract for a good or service (such as office supplies); (ii) the private sector cooperates in both the decision- making as to how best to provide a public good or service and or the production and delivery of that good or service, which normally have been the domain of the public sector; and (iii) the relationship involves a negotiated allocation of risk between the public and private sectors, instead of government bearing most of the risk.[65]

Partnership approaches have received widespread support from across the political spectrum, including from policy makers, public officials and local communities. They are likely to remain high on the policy agenda at all levels. There has been, at national level in many countries, government pressure to move away from public provision of services towards joint PPP or greater private provision; while at the local level, continued or greater involvement in partnership approaches is likely between public and private bodies and non-

[64] KS Jomo, A Chowdhury, K Sharma et al *Public-Private Partnerships and the 2030 Agenda for Sustainable Development: Fit for Purpose?* (2016) at 2, available at <www.un.org/esa/desa/papers/2016/ wp148_2016>, accessed on 7 July 2017.

[65] John Forrer, James Edwin Kee, Kathryn E Newcomer et al 'Public-Private Partnerships and the public accountability question' (2010) 70 (3) *Public Administration Review* at 476.

governmental organisations because of pragmatic factors, such as resource constraints and those more ideological in nature.[66] These factors include a belief in the overall advantages of the partnership approach; the move towards enabling local government; a recognition that any one local actor often does not have all the competencies or resources to deal with the interconnected issues raised in many policy areas; and a greater agreement that urban regeneration should include the genuine participation of the local communities.[67]

The theoretical and empirical validity of these views over PPPs, however, do need further analysis. Indeed, in order to fully understand the behaviour and policies of organisations involved in economic development and regeneration, it is necessary to consider the nature of their relationships networks with partnerships between other actors, including the flows of resources, power, and information within these networks. While each partnership is a function of particular historical, economic, social and political contexts, there are many common trends. One broad context for the growth of PPPs is the transformation of central-local government and changing state-private sector relationships, in which partnerships may be the result but in other cases the cause — of such changing relationships. The reality is that these partnerships cloud accountability, unless the partnerships are carefully designed and operated.[68]

Thus, to sum up, the conceptualisation of PPP is that it is a generic term used to describe myriad structures that facilitate the participation of the private sector in the provision of public infrastructures and services that operate on a continuum between full privatisation and traditional government direct provision. PPPs have been used as vehicle of crowding in investment and expertise from the private sector for the delivery of public works and services.[69] They are internationally emulated especially for providing an important platform enabling governments to ease budgetary constraints and bridge the demand–supply gap of

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[66] Ibid at 475.

[67] R W McQuaid 'The theory of partnership: Why have partnerships?'(2000) in Stephen P Osborne (ed) *Public-Private Partnership: Theory and Practice in International Perspective* (2000) at 9.

[68] R W McQuaid *op cit* note 67 at 9.

[69] Samuel Colverson & Oshani Perera 'Sustainable development: Is there a role for Public-Private Partnerships?' (2011) *Policy Brief October 2011*, available at <*http://www.iisd.org/pdf/2011/sust_markets_PB_PPP.pdf*>, accessed on 18 March 2016.

public infrastructure,[70] promoting efficiency and value for money in the delivery of public goods. PPPs have been recommended by financial institutions, particularly the International Monetary Fund (IMF), [71] the World Bank,[72] and the African Development Bank (AfDB), [73] and by SADC leaders,[74] as financing mechanisms for infrastructure development at the disposal of governments and for overcoming financial resources shortages while avoiding public indebtedness.

The author's concept of PPP: Regardless of the form, type or variant, a PPP may take (including those forms listed in s 2.4.1), for the purpose of this thesis the author adopts the definition of the PPP as follows

> PPP is a long-term contract between the state/public entity and private operator whereby the private party designs, funds, operates/manages a public asset on behalf of the state/public entity, for the provision of public infrastructure or service and, in return, the private party gets payment directly from the state/public entity or through user-charges or through a combination of both.

1.9 Research methodology

Method is a set of principles and procedures of inquiry in a particular field.[75] In the case of comparative law, it is a strategy identified by the techniques by which comparisons are carried out.[76] However, there is no a single exclusive method that comparative law research must follow. The best approach is always the adaptation of specific terms appropriate to the specific purpose of the research.[77] Nevertheless, it should be said that comparative law has but one method that is to compare and contrast norms, institutions, cultures, attitudes, and

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[70] Nilesh A Patil, Dolla Tharun & Boeing Laishram 'Infrastructure development through PPPs in India: Criteria for sustainability assessment' (2016) 59 (4) *Journal of Environmental Planning and Management*, available at <*http://dx.doi.org/10.1080/09640568.2015.1038337*>, accessed on 10 March 2016.

[71] International Monetary Fund *Public-Private Partnerships* (2004) at 4, available at <*htt://www.imf.org/np/fad/2004/pifp/eng/031204.pdf*>, accessed on 10 May 2015.

[72] World Bank *Attracting Investors to African Public-Private Partnerships: A Project Preparation Guide* (2009) at 2.

[73] African Development Bank *Private Sector Development Policy of the African Development Bank Group* (2013) at 1, available at <*http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/Private%20Sector%20Development%20Policy%20of%20the%20AfDB%20Group.pdf*>, accessed on 22 June 2016.

[74]SADC *Strategic Indicative Development Plan 2005−2020*, available at <*http://www.sadc.int/documents-publications/show-818*>, accessed on 18 August 2015.

[75] Pieters *op cit* note 28 at 12.

[76]Vernon Valentine Palmer 'From Lerotholi to Lando: Some examples of comparative law methodology' (2004) 4 (2) *Jurist Frontiers* at 2.

[77] Ibid at 29.

even an entire legal systems.[78] In this research, three distinct phases of comparative law methodology are used: description (this is especially what happens in chapters 2, 3 and 4), understanding and comparing [79] (chapter 5). In fact, in chapter 5, comparison follows from the knowledge of the phenomena to be compared, for one can only compare what one is acquainted with.[80] In this sense, the comparative study of laws or legal institutes needs to take into account the review of other factors, such as legal-historic, economic, social or religious developments that may have been determinant in the creation of the norms, laws or the juridical figures being analysed.[81] The results of the review from chapters 2, 3, and 4 provide substantial information that have been gathered and systematised. This information is also situated within its own context, within what belongs to the essence of the researcher's scientific activity, with the researcher aiming to establish similarity and differences and to understand and explain them.[82]

It is within the above methodological theories and frameworks that the research develops. It is based on desk research, reviewing academic and development literature, national laws and regulatory frameworks from the countries that are the subject of the study, international and regional instruments, foreign laws, regulations, statutes and cases, and, where applicable, policy documents and reports, as detailed below:

(a) Academic literature: There is a great deal of academic literature including books, journals, peer-reviewed articles and conference proceedings that discuss PPPs and their contemporary prominence in global development thinking and practice.

(b) International and regional instruments: There are international instruments (ie the United Nations 2030 Agenda for Sustainable Development, United Nations Commission on International Trade Law (UNCITRAL), United Nations Industrial Development Organisation (UNIDO), World Health Organisation (WHO), etc.), as well as those that are regional (ie the 2063 Agenda, SADC's Regional Indicative Strategic Development Plan or RISDP of 2015 to 2020) that address PPP issues for the development of public infrastructures and/ or services.

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[78] Ibid.
[79] Pieters *op cit* note 28 at 13.
[80] Rodolfo Sacco 'Legal formants: A dynamic approach to comparative law' (1991) 39(1) *The American Journal of Comparative Law* at 1–34.
[81] Vicente *op cit* note 28 at 42.
[82] Vicente *op cit* note 28 at 14.

(c) Foreign laws: National laws and regulatory frameworks of the countries that are the subject of the study constitute the most important primary sources of the research. However, in a comparative study, the review of laws and regulations governing similar subjects from other jurisdictions has sometime become indispensable in clarifying arguments.[83] It is with this in mind that other countries' laws may be considered and used to complement the main discussion of the comparative study between Mozambique and South Africa.

(d) Mozambican legislation: Of paramount importance for the research is the introduction of Mozambique legislation, regulations, policy documents and cases in developing the comparative study between the Mozambican and South African PPP legal regimes.

(e) South African legislation: South African legislation, regulations, policy documents and cases available are also used in the comparative study between Mozambican and South African PPPs.

1.10 Chapter outline

This chapter (chapter 1) has introduced the thesis and summarised its contents and the arguments contained therein. The thesis proposal is outlined as follows:

The focus of chapter 2 is to understand the PPPs and their prominence in current development thinking. The literature review in it seeks to understand what a PPP is and the reason for its existence and compares the legal definition of the PPP in Mozambique and South Africa; identifies types of PPPs; and reviews arguments behind the upsurge and prominence of PPPs in development thinking and practice. The PPP contract in Mozambique is covered in chapter 3. The legal regime of the PPP in Mozambique is explained, with a focus on the processes of the formation, implementation, performance monitoring, and termination of PPP contracts. Also identified and discussed are the life cycle risks arising in each stage of the PPP and their management strategies, as well as the legal mechanisms for conflict resolution.

In chapter 4 the PPP contract in South Africa is discussed. The legal framework of PPPs in South Africa is examined, particularly their formation, management and performance monitoring, as well as the extinction of PPP contracts. It discusses in every stage

[83] Almeida & Carvalho *op cit* note 31 at 33.

of the South Africa PPP contract lifecycle, its potential risks and their mitigating strategies, and the legal instruments available for conflict resolution are also discussed.

A comparative analysis of PPPs in Mozambique and South Africa is developed in chapter 5 in which are distilled the most significant differences of the key juridical norms and/or institutions that emerged from the investigations in chapters 3 and 4. The discussion takes account of the legal contexts and developments, the key elements on the formation, implementation and termination of PPP contracts, and dispute settlement mechanisms, especially the international arbitration. The SADC perspective and the international law angle are also approached and discussed. The summaries of the findings, reflections, conclusions, and recommendations are contained in chapter 6. These reflections and conclusions are based on the evidence gleaned from the investigation and analysis developed in the preceding chapters, the theoretical contribution to the PPP practice, the overall conclusions, and the limitations of the research are here presented.

CHAPTER 2: UNDERSTANDING PPPs AND THEIR PROMINENCE IN CURRENT DEVELOPMENT THINKING

Introduction

As argued in chapter 1, the last two decades of the twentieth century witnessed many transformations of political and economic systems in Africa, including the coming into existence of constitutional democracies and liberal forms of economic management. An important innovation in respect of the management of the public sector was the emergence of a new juridical entity whose fundamental characteristic is the conjunction between public entities and private actors with the intention of efficiently delivering economic and social infrastructures that otherwise would be impossible to realise.[1] This new juridical entity came to be known as a PPP.

The excessive weight of state control over society and its unsustainable public debt, with no proportional increase in the quality of public services provided to citizens, led to the need for a reassessment of the role of the state in the economy and a rethinking of the best ways of satisfying collective needs. The reduction of the size and scope of the state, associated with its fiscal constraints, had a negative impact on public services financing, particularly in big projects of infrastructure development. It was within these circumstances of severe financial difficulties for public financing, on the one hand, and the overarching need for infrastructure development, on the other, that a partnership with the private sector came to be considered.[2] However, it is advised that the decision to use a PPP against other alternative methods of providing a service should be preceded by a comparative calculation including all costs and potential risks of the project. This chapter aims at (1) presenting a brief historical background of the PPP; (2) providing governments' arguments for their resorting to PPPs; (3) reviewing the context and reasons behind the upsurge of PPPs in development thinking; (4) presenting types of PPPs; (5) comparing the legal definition of

[1] Susan L Robertson, Karen Mundy, Antoni Verger et al (eds) *Public Private Partnerships in Education: New Actors and Modes of Governance in a Globalizing World* (2012) at 21.

[2] C M Barros *Parceria Publico Privada: Um Breve Estudo Sobre a Experiencia Internacional Recente* (2005).

the PPP in Mozambique and in South Africa; and (6) discussing the rationale behind the use of public sector comparator (PSC) and VfM analysis in PPPs.

2.1 Brief historical background of PPPs

PPPs are, however, by no means a novel phenomenon. Before taking centre stage in respect of global governance in the early 2000s, PPPs enjoyed sustained attention in public policies in areas ranging from infrastructure development to urban services.[3] In fact, concessions, the most common form of PPPs, date back thousands of years. During the time of the Roman Empire they served as legal instruments for road construction and the operation of public baths and of markets. A famous example of such an entity that dates back to the Middle Ages in Europe is when as early as 1438 a French nobleman, Luis Bernam, was granted a river concession to charge fees for goods transported on the Rhine.[4] Since the turn of the seventeenth and eighteenth centuries, examples abound of water channels, roads and railways in Europe and later in America, China and Japan, being privately funded under concession contracts. [5] It is recognised that the British Project Finance Initiative (PFI) programme, aimed at extending the benefits and practices of privatisation to core public services and utilities which could not be privatised, laid the ground for the modern PPP phenomenon.[6]

2.2 Governments' arguments for PPP

The goal of PPPs is to exploit synergies in the joint innovative use of resources and in the application of management knowledge, with the optimal attainment of the objectives of all parties involved, where these objectives could not be attained to the same extent without the other parties.[7] PPPs are internationally emulated for providing an important platform enabling governments to ease budgetary constraints and bridging the demand-supply gap

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[3] Philipp Pattberg, Frank Biermann, Sander Chan et al 'Introduction to partnerships for sustainable development' in Phillip Pattberg, Frank Biermann, Sander Chan et al eds) *Public Private Partnerships for Sustainable Development: Emergence, Influence and Legitimacy* (2012) at 2.

[4] S Jomo, A Chowdhury, K Sharma et al *Public-Private Partnerships and the 2030 Agenda for Sustainable Development: Fit for Purpose*? (2016) at 2, available at *www.un.org/esa/desa/papers/2016/ wp148_2016*, accessed on 7 July 2017.

[5] Ibid.

[6] Benjamim Pequenino *'O Contrato de Parceria Público Privada em Moçambique* (2017) at 32.

[7] Jomo, Chowdhury, Sharma et al *op cit* note 4 at 3.

of public infrastructure[8] and promoting efficiency and value for money in the delivery of public goods. PPPs have been recommended by financial institutions, such as the IMF, [9] World Bank,[10] and the African Development Bank (AfDB), [11] and by SADC leaders,[12] as financing mechanisms for infrastructure development at the disposal of governments and for overcoming financial resources shortages while avoiding public indebtedness.

Thus, many governments are turning to the private sector to design, build, finance, and operate infrastructure facilities hitherto provided by the public sector. As previously mentioned, PPPs offer policy makers and governments an opportunity to improve the delivery of services and the management of public infrastructures. The other benefit is that of mobilising private financing, for the demand for investment in public services is growing while at the same time funding resources are falling far short of the amount required. For this reason, access to private sector involvement can speed up the delivery of public infrastructure, [13] enhance the efficiency of the public administration and public service provision, and reverse the previously alleged crowding out of the private sector by state-owned enterprises. [14]

PPPs, as noted earlier, are not a panacea for all ills facing a variety of economic and social sectors, but instead are simply a tool to be used to unlock critical bottlenecks that cause a chronic deficit in the quality of public service delivery.[15] They are not a miracle cure for all the problems of public infrastructure finances. Attached to PPPs are risks sometimes not adequately evaluated, either because they do not come to the fore during

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[8] Nilesh A Patil, Dolla Tharun & Boeing Laishram 'Infrastructure development through PPPs in India: Criteria for sustainability assessment' (2015) 1 *Journal of Environmental Planning and Management*, available at <*http://dx.doi.org/10.1080/09640568.2015.1038337*>, accessed on 10 March 2016.

[9] International Monetary Fund *Public-Private Partnerships* (2004), available at <*htt://www.imf.org/np/fad/2004/pifp/eng/031204.pdf*>, accessed on 10 May 2015.

[10] International Bank for Reconstruction and Development *Attracting Investors to African Public-Private Partnerships: A Project Preparation Guide* (2009) at 2.

[11] African Development Bank *Private Sector Development Policy of the African Development Bank Group* (2013) 1, available at <*http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/*> *Private%20Sector%20Development%20Policy%20of%20the%20AfDB%20Group.pdf*>, accessed on 22 June 2016.

[12]Southern Africa Development Community *Strategic Indicative Development Plan 2005–2020*, available at *http://www.sadc.int/documents-publications/show-818*, accessed on 18 August 2015.

[13] World Bank *Financial Systems and Development: World Development Report* (1989) at 2.

[14] Jomo, Chowdhury, Sharma et al *op cit* note 4 at 2

[15]Arslan Aziz, Deepa Karthykeyan, Anket Kumar Chatri et al *Public Private Partnerships in India: Lessons from Experiences* (2012) at 44, available at <*https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/186989/Report-PPPLessonsFromExperiences270*812>, accessed on 10 March 2016.

negotiations, or because they are simply overlooked and neglected. Risk identification and management in PPPs contracts are discussed in chapters 3, 4 and 5.

2.3 Context to the upsurge of the PPP in development

It is important to reflect on the international historical circumstances and processes that led to public sector reforms to understand the context in which the PPP emerged and gained centre stage in development thinking and practice. In the north these were aimed at resolving the fiscal crisis, on the one hand, and to respond to citizens' dissatisfaction with the worsening quality of public services, on the other. In the south the 1982 Mexican default symbolised the crisis of the state. It was realised that the crisis should be tackled globally to avoid its spread, since developing countries were experiencing similar problems of unsustainable public debt and poor economic performance. To resolve the fiscal crisis, reduce public over-indebtedness and improve the quality of public services, the world started to hear words such as 'Next Step', 'Executive Agencies', and 'Project Finance Initiative' in the United Kingdom (UK); 'Reinventing Government' in the United States (US); and 'Structural Adjustment' in developing countries. [16]

The excessive weight of state control over society and its unsustainable public debt with no proportional increase in the quality of public services provided to citizens led to the need for a reassessment of the role of the state in the economy and the rethinking of the best ways of satisfying collective needs. The reduction of the size and scope of the state associated with its fiscal constraints had a negative impact on public services financing, particularly in big projects of infrastructure development. It was within these circumstances of severe financial difficulties for public financing, on the one hand, and the overarching need for infrastructure development, on the other, that a partnership with the private sector came to be considered. [17]

2.3.1 *Pressures for change in the north and problems in the south*

Financial and ideological pressures worked for change in the north. First, rising public expenditure accompanied by poor economic performance led to financial difficulties and brought questions of the effectiveness and role of the state in economic development. There

[16] Jan-Erik Lane *New Public Management* (2000) at 224.
[17] Barros *op cit* note 2.

was also a view that government was unwieldy, too expensive and, sometimes, intrusive. Secondly, in respect of the public service, there was growing dissatisfaction among the citizenry over the poor quality of public services delivered by state bureaucrats, despite the rise in taxation. Thirdly, a pragmatic shift took place in North America and parts of Western Europe in the form of an ideology based on the public choice theory, according to which neo-liberals see public officials pursuing their own interests rather than those of society.[18]

Thus, beginning with the US during the presidency of Ronald Reagan ably assisted by British Prime Minister Margaret Thatcher and helped along by Canadian Prime Minister Brian Mulroney, a profound shift in social values and ideological transformation followed. What was called neo-liberalism or neo-conservatism came to the fore in the mid-1980s and flourished as the world's most advanced nations' dominant ideology.[19]

Widespread administrative inefficiencies and corruption, overstaffing, low productivity, the absence of a culture of service to citizens, authoritarianism and unaccountability all characterised the public administration in the majority of the countries in the south[20] all of these ills resulted in poor economic performance, a decline in the quality of public services delivered to citizens, inefficient tax revenue collection and poor resources allocation.

Efforts to deal with fiscal and debt crises, respond to citizens' demands for a better quality of public services, improve economic management and reduce the overextended state led to the rethinking of the role of the state and the redrawing of its boundaries. Subsequently, reforms were undertaken focusing not only on tackling the fiscal and debt crises and improving economic performance but also — and more critically — on modernising the whole state. Modernisation, liberalisation, deregulation (the idea of markets' self-regulation through high competition), privatisation and the emergence of a

[18] Martin Minogue 'Changing the state: Concepts and practices in the reform of the public sector' in Martin Minogue, Charles Polidano & David Hume (eds) *Beyond the New Public Management: Changing Ideas and Practices in Governance* (1998) at 19−20.

[19] HA Doughty 'Book review *Transcending New Public Management: The Transformation of Public Sector Reforms'*, by Christensen T and Laegreid P (eds) (2007), UK, Ashgate' (2009) 14 (1) art 9*) The Public Sector Innovation Journal* at 2.

[20] Minogue *op cit* note 18 at 33; Richard Batley & George Larbi *The Changing Role of Government: The Reform of Public Services in Developing Countries* (2004) at 3.

new paradigm of public administration, especially the New Public Management were decisive processes that informed and reinforced the emergence and prominence of PPPs ,[21] and are worthy of a brief review.

2.3.2 *Governments reforms in response to the fiscal crisis*

To resolve the fiscal crisis of the state, in the north, the overarching objective was to correct the structural imbalance in the balance of payments. This would mean that government apparatuses would have to be downsized and costs cut by reducing public expenditure. At the same time, public officials were asked to work more efficiently.[22] In pursuing the cost-cutting strategy, public administration reforms would also consider liberalisation with the view that new liberalised market entrants would drive competition and hence induce efficiency gains and improve service quality. With deregulation, markets would regulate themselves, therefore not needing state bureaucrats' intervention. Finally, the privatisation of state-owned commercial enterprises, especially the loss-making ones, became the norm, except in instances where privatisation would not be possible. Therefore an arrangement between public and pivate sectors was sought with a view to delivering public goods or services in a more cost-effective way, with a lesser financial burden for the state.[23]

A cocktail of market-oriented policies was formulated and prescribed for developing countries in the south facing economic hardship to deal with administrative inefficiencies and poor economic performance of states. This was the case in Mozambique from the second half of the 1980s. The policy orientation and frameworks transferred to developing countries came to be known as Structural Adjustment Programmes (SAPs) that aimed at correcting macro-economic imbalances — both fiscal and external deficits — thought to be the consequence of inefficient resources allocation. A move towards more private sector involvement, as opposed to the public sector form of production of public goods and services, gained centrality in the public policy agenda of developing countries. This would involve a reduction in government's role or simply a withdrawal from the

[21] Lane *op cit* note 16 at 128–129; Minogue *op cit* note 18 at 18–34.
[22]Minogue *op cit* note 18 at 18.
[23] World Bank *op cit* note 13.

economy and a curb on spending on the civil services, on subsidies, and on state-owned enterprises.[24]

2.3.3 *Liberalisation and privatisation*

In the aftermath of World War II until the end of the 1960s, government intervention in the economy was increasingly accepted by citizens as they gradually won social and economic rights, and came to expect more public financing in health care, education and other social services. From the early 1970s, however, economic troubles began to increase as the average wage of workers started to flatten and occasionally to deteriorate.[25] These were the warning bells of the coming of hard times.

Thus, apart from the liberalisation and deregulation of sectors that earlier were considered a state monopoly, the reform process proved to be deep, with extensive privatisation programmes being placed on policy agendas, some of them attached to aid conditionality for some countries of the south.[26]

Nickson[27]observes that three arguments were advanced for private-sector participation in the direct provision of public goods. First, it was considered that private participation could potentially increase the productive and operational efficiency that was being wasted by public bureaucrats. Secondly, such private-sector participation could contribute to reducing the fiscal imbalance of the public administration by reducing state subsidies, increasing tax revenues, and reducing the public debt, with governments borrowing to improve public services. Thirdly, private participation could promote equity by charging the users of public goods and services, and using the revenues acquired to support other most-deprived sectors.[28] In conclusion, the argument used to explain the dismantling of state enterprises by privatising them was based on the assumption that private sector provision would promote market competition at the same time that the ending monopoly would lead to better resources allocation and achieve productive efficiency and effectiveness in the delivery of public goods and services.

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[24] World Bank *op cit* note note 13.
[25] Doughty *op cit* note 19 at 1.
[26] Benjamim Pequenino *Is Aid Conditionality a Force for Good Governance? The Case of Mozambique* (unpublished M.Sc. in Governance and Development Management University of Birmingham, 2002).
[27] Andrew Nickson 'The public-private mix in urban water supply' (1997) 63 *International Review of Administrative Sciences* at 168.
[28] Ibid.

However, not all economic sectors could be eligible for privatisation. There were sectors or services which, for poor commercial attractiveness or for legal and political constraints, would not, in the first instance, be privatised. These were sectors either requiring huge capital investment but with recognised potential positive externalities in the economy as a whole, or those areas then considered natural monopolies. Examples of such sectors were urban water supply, roads, railways, telecoms and electricity infrastructures.[29] Again, in respect of these sectors of the economy, governments were encouraged to embrace some forms of collaborative arrangement with the private sector for the full exploitation of the resources to the benefit of their people.

2.3.4 *New Public Management paradigm*

Another set of public sector reforms that originated in the late 1970s and early 1980s worth reviewing is one that academics labelled as New Public Management (NPM). It emerged from practices in the UK under the Thatcher premiership [30] and in the US under the Reagan administration, with New Zealand and Australia joining the movement later.[31]

Commonwealth OECD countries were pushed into the NPM by fiscal crises due to their growing public debt and taxpayers' resistance to higher taxes. In addition, demanding consumers have expected better service quality in the public sector comparable to that in the private sector.[32] Public choice theorists who had voiced an opinion that bureaucrats pursued their own aims and acted according to their preferences, were said to have provided neoliberals with an academic argument for comprehensive public administration reform haulage, now under NPM.[33]

NPM considered that contracting could be employed in all branches of government from allocation, redistribution to regulation.[34] Elements of NPM include: (i) marketisation — developing internal markets, contracting out, charging user fees, vouchers, customer orientation and changing employment relations in the public sector; and (ii) managerialism

[29] Andew Nickson *op cit* not 27 t at 167.
[30] ER Yescombe *Public-Private Partnerships: Principles of Policy and Finance* (2007) at 16.
[31] Gernod Gruening 'Origin and theoretical basis of new public management' (2001) 4 (1) *International Public Journal.*
[32] Sanford Borins 'Lessons from the New Public Management in Commonwealth nations' (1998) 1 (1) at *International Public Management Journal* at 53.

[33]Gruening *op cit* note 31 at 1.
[34] Lane *op cit* note 16 at 129.

— executive agencies (steering not rowing), decentralisation of management authority, devolved budgets, downsizing and performance-based pay.[35]

Allen Schick has, however, been sceptical of the applicability of NPM everywhere. He has opined that

> the NPM model had attracted interest in developing countries over the promised gains in operational efficiency, as these countries are dominated by informal systems and markets, they should, in the first place, embrace basic reforms by strengthening rule-based administrations and pave the way for robust markets.[36]

In the second half of the 1990s in Mozambique the tentative introduction of NPM-inspired reforms can be traced to the establishment and operation of an executive agency with technical assistance from the British Crown Agency. This was the case of the General Directorate of Customs that aimed at improving the efficiency and effectiveness of this body charged with the responsibility of collecting public revenues from taxes. The process was abandoned by the government that succeeded the Chissano presidency.

NPM was later renamed New Public Governance (NPG). This focused on citizens' involvement and participation — from policy making, implementation to monitoring processes — thereby deepening the general perception and understanding of the positive role of the private actors in economic and social development.[37]

Nevertheless, neither the NPM paradigm nor NPG could help much in the development of public infrastructures requiring substantial capital. The NPM perspective looked at internal markets, managerial contracting and results-based pay, while the NPG advocated, among other things, citizens' engagement and participation in development processes, locally, nationally and globally.

Perhaps a combination of elements of both NPM and NPG could help in exerting the practice of transparency and accountability in public processes, and hence contribute to sustainable projects implementation. This, however, could not alone resolve the

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[35] Minogue *op cit* note 18 at 21; Gruening op cit note 31 at 2.

[36] Allen Schick 'Why most developing countries should not try New Zealand reforms'. (1998) at 13 (1) *World Bank Observer* at 123.

[37] Christopher Pollitt & Geert Bouchaert *Public Management Reform: A Comparative Analysis New Public Management, Governance, and the Neo-Weberian State* (2011) at 7; Enrique Cabrero 'Between New Public Management and New Public Governance: The case of Mexican municipalities' (2005) 6 (1) *International Public Management Review* at 95.

overarching issues that hindered the development of economic and social infrastructures, these being the state's financial constraints and the public debt crisis.

Unsurprisingly, governments' financial constraints and unsustainable public debt, on the one hand, and the paramount need for economic and social infrastructures development, on the other, were, during both the past 20 years and currently, the driving factors for seeking private sector involvement by joining resources and capabilities of both public and private sectors and forming partnership. Partnership has now become a dominant slogan in the rhetoric of public sector reforms towards good governance, arguably capturing that status from privatisation that held similar dominance in the 1980s and 1990s.[38]

2.3.5 *The need for a developed infrastructure in the SADC region*

The financial constraints and the unsustainability of public debt experienced by developing countries around the globe did also affect Africa, compromising African governments' ability to invest in infrastructure projects, specifically the development of large-scale projects (LSP) contributing to regional integration. Regional economic integration is generally seen by many development economists as a vehicle for enhancing the economic and social development of African countries in general, and of the SADC region in particular.[39] SADC integration strategy considers the development of infrastructure crucial for the overall regional integration objective. This explains the SADC focus on long-term infrastructure development reflected in its Regional Infrastructure Development Master Plan (RIDMP) which calls for USD 500 billion in capital requirement to finance regional projects.[40] And one way of delivering such economic infrastructures and services is by embracing PPP arrangements. It is in this perspective that art 4 of the SADC Protocol on Finance and Investment (PFI) provides that

> State Parties shall co-operate on policies and other related issues that will encourage and facilitate the use of PPPs to ensue development in the Region.

[38] Ole Helby Petersen 'Public Private Partnerships as converging or diverging trends in public management? A comparative analysis of PPP policy and regulation in Denmark and Ireland' (2011) 12 (2) *International Public Management Review (IPRM*) at 2.
[39] Muna Ndulo *African Integration Schemes: A Case Study of the Southern African Development Community* (2001) at 4.
[40] Ibid at 6.

In effect, a number of SADC countries have, in recent years, begun to develop legislation and dedicated PPP capacity, mainly mirroring South African best practice as well as frameworks and toolkits developed by multilateral institutions such as the World Bank. PPP has, thus, become an alternative instrument for overcoming infrastructure financing constraints in the SADC. Further discussion on PPP regulation and experience in the region is offered in chapter 5(section 5.10) under the SADC perspective.

2.4 Types of PPPs

There are many types of PPPs to fit various construction, operation, management, ownership, and revenue-generating scenarios. For example, PPPs can take the shape of either purely contractual arrangement between government and or the private entity, or could be a company structure consisting of private and public shareholding. PPPs can also be used in the form of special purpose vehicles (SPVs), where ownership and/or control could rest with both parties and, therefore not subject to the public budget. There is also the option of bundling – or vertical integration – that takes the form of a consortium that brings together project designers, managers, financiers and construction companies.

PPPs can also be classified by the legal nature of private sector involvement in a project, using expressions such as build, operate, and transfer; design, build, finance, and operate; and other variants. The expressions mainly reflect the point at which legal ownership for the facility is transferred from the project company to the public authority, or, if the project company is never the legal owner of the facility, the nature of this legal interest, such as a property lease or merely a right to operate. Such distinctions are legal technicalities and do not affect the commercial and financial reality that PPP facilities are public sector assets which cannot normally be sold off to the private sector.[41]

2.4.1 *PPPs for economic and social infrastructures development*

Primarily, and stimulated by government's needs, PPPs were advanced for the development of economic and social projects, especially in the domain of infrastructures. Thus, it may be useful to classify PPPs based on the nature of the service and risk transfer inherent in a PPP contract. On this basis, PPPs can be split into two main categories: usage-

[41] Yescombe *op cit* note 30 at 13.

based and availability-based PPPs, the latter being split in three main subcategories: accommodation; equipment, systems or networks; and process plant(s). The usage-based PPP model, also known as the concession model with user-paid tolls, fares or usage fees for facilities such as roads, bridges, and tunnels, ports, airports, trams and light rail networks, is the prime example of PPP where usage risk is transferred to the private partner. The accommodation-based projects are those such as hospitals, schools and prisons for which payment is generally made for making a building available for use by the public authority. Equipment, systems or networks-based PPPs are based on the British project finance initiative (PFI) model, and payments by the public authority in such cases are also based on a form of availability. Examples are the design, build, finance, and operate (DBFO) of road projects, in which instead of payment being dependent on usage it is dependent on the road being available. Finally, the process-plant PPP, commonly based on the build, operate, and transfer model, is suitable for power generation, water and waste-water treatment plants, and waste incinerators. The key difference between these and the other types of projects set out above is that they involve clearly measurable processes.[42]

Mozambique classifies PPPs in two types: business concession (BC) and large-scale projects (LSP)**.** Both types can take one of the following modalities:

(i) Build, operate and transfer (BOT);
(ii) Design, build, operate and transfer (DBOT);
(iii) Build, own and operate (BOO);
(iv) Design, build, own and operate (DBOO);
(v) Rehabilitate, operate and transfer (ROT); or
(vi) Rehabilitate, operate and own (ROO). [43]

South African legislation distinguishes between two types of PPP. One involves the performance by a private party of an 'institutional function' and the other takes some form of 'use of state property' by a private party for its own commercial purposes. The concept of 'institutional function' is defined broadly as a service, task, assignment or other function (or any part or component thereof) that an institution performs in the public interest or on behalf of the public service generally; or any service, task, assignment or other function performed in support thereof. In the case of a PPP that involves the 'use of state property' for the private party's own commercial purposes and where the private party will not be

[42] Yescombe *op cit* note 30 at13 and 14.
[43] Lei das Parcerias Publico-Privadas, Projectos de Grande Dimensão e Concessões Empresariais) (Lei n.º 15/2011) (hereafter PPP Law) art 30 (2).

performing an institutional function on behalf of the public institution, it may include a variety of use forms of public assets recognised in South African law.[44]

2.4.2 *Product Development Partnerships*

Apart from the partnerships for economic or social infrastructure development, the world is presently witnessing the growth of another sort of partnership, ie those devoted to good causes — the so-called Product Development Partnerships (PDPs). PDPs were launched by doctors at Médecins sans Frontières (MSF) who were frustrated with the lack of medical technology to treat patients suffering from the so-called Neglected Tropical Diseases (NTDs). Following its award of the Nobel Peace Prize in 1999, MSF recommended, and participated in, the formation in 2003 of a PDP, the Drugs for Neglected Diseases initiative (DNDi), to coordinate a new collaboration between private sector, academia and the public sector.[45] PDPs are non-profit organisations involving partners from academic, public research institutions, private sector, governments and civil society organisations and stimulating medical research and development of appropriate and affordable innovative products for populations affected by the so-called 'Poverty-related and Neglected Diseases' (PRNDs). These diseases include tuberculosis (TB), HIV/AIDS, malaria and other NTDs.[46] PDPs are nowadays characterised as a 'fledgling' industry dealing with fundamental questions about the relationship between Intellectual Property (IP) and drugs and vaccines development, addressing public health needs in the developing world.[47] This study, as it focuses on PPP projects where private actors participation is commercially motivated, will not elaborate much on PDPs. The objective here was to introduce this new

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[44] National Treasury Standardised PPP Provisions *op cit* note 36 at 8.

[45] Julia Tuttle *Drug Development for the Neglected Tropical Diseases: DNDi and The Product Development Partnership (PDP) Model* (unpublished Honours thesis Duke University, Durham, North Carolina, 2016) at 3–5, available at *<http://cissct.duke.edu/uploads/media_items/drug-development-for-neglected-tropical-diseases.original.pdf >*, accessed on 20 June 2016.

[46] Deutsche Stiftung Weltbevoelkerung *Product Development Partnerships* (n.d.) at 1, available at *<http://www.dsw.org/uploads/tx_aedswpublication/1408_PDP_UK_A4_web.pdf>*, accessed on 20 June 2016.

[47] Jon F Merz *Intellectual Property and Product Development Public Private Partnerships: Final Report World Health Organization Commission on Intellectual Property Rights, Innovation and Public Health* (2005) at 17, available at *<http://www.who.int/intellectualproperty/studies/Merz%20WHO%20report.pdf>*, accessed on 20 June 2016.

and increasingly relevant sort of partnership arrangement devoted to developing health technologies used, or to be used, in tackling health challenges facing the poor.

2.5. Legal definition of PPP in Mozambique and in South Africa

Before delving into the legal definitions of the PPP in Mozambique and South Africa, some definitions offered by different institutions and authors who have written on the subject will be reviewed briefly. There is no a single, clear, unified and internationally accepted definition of PPP. The literature offers several possibilities. For example:

(i) The Guidelines for Implementing PPPs in SADC (Policy Briefing 193 of 2020) defines PPP by indicating that

> PPP refer to a legal and /or contractual relationship between a government and a private business venture that is aimed at delivering basic amenities and public services.

(ii) The UNCITRAL *Legislative Guide on PPPs* points that

> The term PPP is used in practice to refer to a wide variety of contractual arrangements or joint ventures through which the public and private sector cooperate towards a common purpose, and there is no internationally acknowledged legal definition covering all variants. The *Guide* uses the term PPPs to specifically refer to long-term arrangements between public authorities and private entities contributing to the financing of public infrastructure in broad sense.[48]

The Guide indicates further that PPPs are not a special new category of government contracts. In fact, they may use various well-known contractual structures (leases, concessions, service contracts, turnkey contracts, design-build-finance-operate contracts).[49]

(iii).The consortium including The World Bank, Asian Development Bank, and Inter-American Bank takes a broad view of a PPP as

> A long-term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility, and remuneration is linked to performance.[50]

(iv).The Organisation for Economic Cooperation and Development (OECD) defines a PPP as

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[48] UNCITRAL *Legislative Guide on Public Private Partnerships* (2020) at 5.
[49] Ibid.
[50] World Bank, Asian Development Bank & Inter-American Development Bank *'Public-Private Partnerships: Reference Guide, Version 2.0'* (2014) at 14.

> an agreement between the government and one or more private partners (which may include the operators and the financiers) according to which the private partners deliver the service in such a manner that the service delivery objectives of the government are aligned with the profit objectives of the private partners and where the effectiveness of the alignment depends on a sufficient transfer of risk to the private partners.[51]

(v). For the Secretariat of Commonwealth:

> PPPs are long-term contractual arrangements between the public and private sectors for the delivery of public services, where there is a significant degree of risk-sharing between the two parties.[52]

(vi). Jeffrey Delmon defines a PPP in the following terms:

> PPP is an arrangement for the private sector to deliver infrastructure services for the public sector or to assist the public sector in its task of delivering infrastructure services to the public.[53]

(vii). Yescombe has preferred to define a PPP by presenting what he calls key elements that include:

> (i) a long-term contract (a 'PPP Contract') between a public-sector party and a private-sector party; (ii) for the design, construction, financing, and operation of public infrastructure (the 'Facility') by the private-sector (party); (iii) with payments over the life of the PPP contract to the private-sector party for the use of the Facility, made either by the public-sector party or by the general public as users of the Facility; and (iv) with the Facility remaining in public-sector ownership, or reverting to public-sector ownership at the end of the PPP Contract.[54]

From the above definitions it is possible to conclude by summarising that the PPP is a long-term commercial contract (typically from 10 to 30 years) between the public and private sectors; which involves a transfer of risk from the public to the private sector. It is a partnership where both parties have mutual interest; and whose assets remain property of the public entity and for this reason cannot generally be privatised.

In s1.8 in fine, the author has adopted its definition of PPP. The discussion of the distinctive features of PPPs is later offered in chapters 3 and 4. The literature overview of the

[51] OECD *Public Private Partnerships: In Pursuit of Risk Sharing and Value for Money* (2008) at 17.
[52] H K Young, *Public Private Partnerships Policy and Practice: A Reference* Guide (2010) at 8.
[53] Jeffrey Delmon *Public Private Partnership Projects in Infrastructure: An Essential Guide for Policy Makers* (2011) at 7.
[54] ER Yescombe *Public Private Partnerships: Principles of Policy and Finance* (2007) at 3.

definition of the PPP presented above is now followed by an explanation of the legal definition of PPP in Mozambique and South Africa.

2.5.1 *PPP Mozambique*

Mozambican Law (Act 15/2011 of 10 August) defines a PPP as

> an undertaking in an area of public domain,[55] under contract and with full or partial financing of the private partner, that partner undertakes, vis-à-vis the public partner, to accomplish the necessary investment and to operate the respective activity, for the efficient provision of services or goods the availability of which to users is the responsibility of the State to guarantee.[56]

The legal provisions exclude the establishment of a PPP project for the exploitation of petroleum and mineral resources.[57] The main purpose of the PPP undertaking is to ensure an efficient, qualitative and quantitative provision of public goods or services to the users. [58] In return, the private party shall observe the user-payer principle, ensuring that the price paid for the service provided compensates for the costs incurred and provides a profit margin. [59]

The Mozambican PPP Law attributes to the central, provincial and district governmental institutions and to the local municipal bodies the powers to initiate, decide on and monitor the implementation of PPP projects.[60] However, prior to entering into a PPP contract, the state external auditor, the Tribunal Administrativo, [61] must exercise its *ex ante* control and oversight functions, to ensure the conformity of the project with the laws and the principles governing public accounts management in the country. This situation creates the impression that the PPP is a public contract.

There are two distinct types of PPPs governed by the Mozambican legislation: (i) large-scale project (LSP) and (ii) business concessions (BC). LSP is the undertaking of investment authorised or contracted by the government, the value of which exceeds, as of

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[55] For the Constituição da Republica de Moçambique (hereafter Constitution of the Republic of Mozambique), areas of public domain, under the control of the state, include: Mozambique's exclusive maritime zone and air space, archaeological assets, natural protected zone, hydraulic and energetic potential, roads and railways, and natural mineral deposits.
[56] PPP Law art 22.
[57] Ibid.
[58] Ibid art 12.1.
[59] Ibid art 12.2.
[60] Ibid art 3.1.
[61] Ibid art 4 (k).

1 January 2009, the sum of MZN 12.5 billion (approximately USD 433.5 million). The object of BC is the prospecting, exploration, extraction and/or use of natural resources or other resources or national property assets, carried out under the terms of a contract or other means of creating rights granted by the government in the scope of that undertaking. [62] The main purpose of BC is to develop a national capacity for the efficient operation and use of natural and labour resources and other national properties with a view towards the provision of goods or services to meet internal or external market needs and enable the generation or saving of financial and foreign exchange resources for the country. [63]

BC contracting is subject to compliance with the rules and contracting modalities provided in the sector-specific legislation, as well as with the general principles applicable to public contracts.[64] As a rule of procedure, the general legal regime for contracting a PPP is the public tender. [65] However, for reasons of public interest, and once the requirements legally provided are met, the contracting of a PPP may take the form of pre-qualification, preceded by a limited call for tender, or two-stage tender. Exceptionally, in duly reasoned circumstances and as a last resort subject to government approval, contracting a PPP can take the form of direct negotiation and award,[66] though this can jeopardise the whole concept of transparency in public tendering. This matter is discussed in depth in chapter 3.

2.5.2 *PPP South Africa*

South Africa's Treasury Regulation 16.1 defines a PPP as

> a commercial transaction between an institution and a private party in terms of which the private party –
> (a) performs an institutional function on behalf of the institution; and/or
> (b) acquires the use of state property for its own commercial purposes; and
> (c) assumes substantial financial, technical and operational risks in connection with the performance of the institutional function and/or use of state property; and
> (d) receives a benefit for performing the institutional function or from utilising the state property, either by way of:
> (i) consideration to be paid by the institution which derives from a revenue fund or, where the institution is a national government business enterprise or a provincial government business enterprise, from the revenues of such institution; or

[62] PPP Law art 2.2 (c).
[63] Ibid art 29.
[64] Ibid art 30(1).
[65] Ibid art 13(1).
[66] Ibid art 13(2)(3).

(ii) charges or fees to be collected by the private party from users or customers of a service provided to them; or
(iii) a combination of such consideration and such charges or fees.

As mentioned above, South African legislation distinguishes between two types of PPP. One involves the performance by a private party of an 'institutional function' (public institution) and the other involves some form of 'use of state property' by a private party for its own commercial purposes. The concept of 'institutional function' is defined in Treasury Regulation 16.1 as

(a) a service, task, assignment or other function that an institution is entitled or obliged to perform –
(i) in the public interest; or
(ii) on behalf of the public service generally; or
(b) any part or component of or any service, task, assignment or other function performed or to be performed in support of such a service, task, assignment or other function.

The PPP involving the 'use of state property' for the private party's own commercial purposes and where the private party will not be performing a public institution function or on behalf of such public institution, may include a variety of use forms recognised in South African law, including the use of movable and immovable property belonging to the state as well as intellectual property rights. While the definition of a PPP in the Treasury Regulation does not exclude or limit the types of use of state property, certain types of use are not regulated by Treasury Regulation 16 but rather by other provisions of the Public Finance Management Act 1 of 1999 (PFMA) and the Treasury Regulations 13.2 and 32.2.[67]

2.5.3 *Brief comparative discussion on the legal definition of the PPP contract*

This work's intention, in the form of a micro-comparison of the PPP juridical institution, is to be a comparative study between Mozambique and South Africa. The purpose of the comparison is, primarily, to acquire a better knowledge of the legal institutions involved,[68]

[67] National Treasury Standardised PPP Provisions (2004) *op cit* note 56 at 11.
[68] Rodolfo Sacco 'Legal formants: A dynamic approach to comparative law' (1991) 5 (1) *The American Journal of Comparative* Law at 1–34.

and of different rules that are compared [69] for the further task of their interpretation. [70] To the question as to what is to be compared, the central theme, as indicated above, is the study of the PPP. In this subsection, however, the focus of the analysis is on the legal definition of the PPP contract.

Upon an examination of the definitions provided by the laws from the two jurisdictions being studied,[71] it can be concluded that a PPP is a modern form of concession contract of public works that have, traditionally, fallen under the responsibility of the state. Currently, this contract is awarded to and executed by private partners.[72] In the light of this the question to be answered is what sort of contract a PPP is and whether it is public-administrative or private contract?

To answer such a question, the study will, first, identify existing similarities and differences. The similarities existing in the definition of the PPP contract in both jurisdictions is that public 'institutions' are the ones charged with the responsibility of driving the PPP processes. Another common element is that both countries consider public private partnerships to be the involvement, on the one hand, of a public (state/municipal) institution and, on the other, a private actor working together to achieve agreed goals.

The differences which derive from the legal definitions of the PPP are that while South Africa defines it as a 'commercial transaction', Mozambican legislation is mute on this matter. This has prompted some to think of PPP as being an administrative contract and, hence, a public contract.[73] But is this the case? It must be remembered that state institutions are there to pursue the public interest.[74] This includes a regular and continual provision of services to meet the collective needs of the security, cultural, economic and social wellbeing of the members of the polity which constitutes the *raison d'être* of the state.[75]

Taking this approach, would it be appropriate to conclude that the South African PPP is a private contract due to the fact that Treasury Regulation (TR) 16 indicates that a

[69] Rodolfo Saco *op cit* note 68 at 5.
[70]Giuditta Cordero Moss *Lectures on Comparative Law of Contracts* (2004) at 9−10, available at *<http://folk.uio.no/giudittm/PCL_Vol15_3%5B1%5D.pdf>*, accessed on 22 June 2016.
[71] Mozambique and South Africa.
[72] Lei n.º 11.079, de 30 de Dezembro de 2004, Republica Federativa do Brasil.
[73] B Pequenino *O Contrato de Parceria Público Privada em Moçambique* (2017).
[74] Constitution of the Republic of Mozambique art 249.1
[75] Diogo Freitas do Amaral*Curso de Direito Administrativo* (2010) at 48.

PPP means a 'commercial transaction between an institution and a private party'? Another question to be answered is: what sort of 'institution' is it and what is its function in society? The same TR 16 provides the answer by saying 'institution' means 'a department, a constitutional institution, a public entity...'. This may lead to a lengthy discussion. However, 'institution' means, inter alia, a department, a constitutional institution, a public entity listed, a provincial legislature, any controlling and supervisory function of the National Treasury and a provincial treasury in terms of that provision is undertaken by the speaker of the provincial legislature.[76] And the public institution is there to serve its public, which is the common good of the society as a political entity.

In so doing, the South African state, through its administration (government), enters into contracts subject to both private and public law in various ways, i.e. some aspects of the contract will only be governed by private law, others only by administrative law and some by both. In Mozambique, however, there is a tendency to make a conceptual distinction between a private and a public contract. Thus, the GoM will enter into both private and administrative contracts. However, what characterises the latter is its submission to the objectives of the administrative activity.[77] The state, in both jurisdictions, in pursuance of its objectives, acts by utilising certain juridical forms (such as regulations, administrative acts and contracts) and other means (for example public servants, goods and services, money) to ensure regular provision of such collective needs of the security, economic and social wellbeing of the members of a society. [78]

From the above formulation, it becomes evident that

> L'administration n'utilise pas seulement le procédé spécifique et classique de la décision unilatérale. Il lui arrive, très souvent, d'utiliser le procédé du contrat administratif pour donner à ses interventions le caractère d'un accord de volontés.[79]

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[76] South Africa Public Finance Management Act 1 of 1999 s3 *Government Gazette* 40637 dated 24 February 2027.

[77]Gilles Cistac 'O direito administrativo em Moçambique': Tema de Apresentação no *Workshop on Administrative Law,* Hotel Cardoso, Maputo (NP) 1−4 April' (2009) at 21.

[78] Marcelo Caetano *Manual de Direito Administrativo Vol II (*1999) at 1065.

[79] 'The Administration does not only use the specific and conventional method of unilateral decision-making. It often uses the process of the administrative contract to give its interventions the character of an agreement of wills.' — C Leclerc, J-P Lukaszewicz & A Chaminade *Travaux dirigés de Droit administratif* (1996) at 229 (this author's own translation).

The resort to contracting private sector collaboration has been the means most often utilised since ancient times.The following explanation clarifies:

> Depuis la Seconde Guerre Mondiale, une nouvelle variété de contacts de l'administration est apparue et a pris une importance grandissante. Il s'agit des accords relatifs a l'interventionnisme économique, par lesquels l'administration obtient de partenaires privés (entreprises), moyennant des avantages qu'elle leur octroie (notamment financiers)…en effet le droit administratif connaissait l'existence de contrats ayant pour objet de confier l'exécution du service au cocontractant de l'administration.[80]

The Romans registered the process of the collection of public revenues by private individuals and the accomplishment of public functions, thus freeing the public administration from the burden of costly organisation. At the same time, it enabled itself to anticipate the amount of public revenues it would receive. At the end of the nineteenth century and the beginning of the twentieth the public authorities were caught between the need for public infrastructures and services, and the scarcity of public funds to implement them on their own. Further, the predominance of the *laissez-faire* ideas discouraging state intervention in economic activity has paved the way for the development of concessions, with construction and the operation of public infrastructures and works being transferred to private actors. [81]

As demonstrated in the above brief history, it is possible to conclude that the phenomenon of concession, one of the current modalities of the PPP contract, [82] is not, in the provision of public services, new in the world of law. As mentioned above, public services are those services which fall under the legal responsibility of the state or other public entities (ie municipal bodies) to ensure their delivery to the users. These are the services for which the state has taken legal responsibility to provide to the political collectivity. This provision is done within specific and historical circumstances hence it varies from state to state, depending on the nature and level of development of each state.

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[80] 'A new variety of administrative contracts has emerged since the Second World War and has become increasingly important. These contracts are agreements on economic interventions, through which the administration obtains from the private partners (companies) benefits (in particular financial ones). In fact, the administrative law recognised the existence of such contracts, the purpose of which was to entrust the Administration's co-contracted private party, the performance of public service.' — Ade Laubadère, J-C Venezia, Y Gaudemet, *Traité de Droit administratif* (1996) vol I73 at 1 (this author's own translation).

[81] Amaral *op cit* note 75 at 544.

[82] PPP Law art 21(1)(a).

It needs to be noted, however, that when a state or municipal authority gives a service for concession to a private operator, such private counterpart is guaranteed the necessary public powers for the provision of such service. The private contractor acts on behalf of the state or public authority, including in the use of the specific public powers (given by the state or public administration through the concession contract) for the running of the service. In this sense, although the profit motive drives private sector involvement in any PPP project, and this cannot be underestimated, however, to argue that the PPP is a private contract becomes, *de facto*, problematic. More appropriate is the hybrid character that takes into account the fact that PPP falls between traditional public sector provision and full privatisation.

2.6 The public sector comparator and value for money for PPP projects

With an increased emphasis on the need to cut costs within government agencies, it is increasingly important for the public sector to find new and more cost effective ways to provide public services. Frequently, when governments calculate the costs of a given project they tend to omit several important costs, such as the cost of capital, employee benefits, utilities, and administrative costs. As a result, when comparing public sector versus private sector provision, the public sector may look cheaper than the private sector which can be due to an incomplete calculation of the total costs.[83]

Thus, prior to undertaking a PPP project, the government should be sure that, compared to traditional procurement, a PPP will deliver better VfM. This requires an *ex ante* comparison of the VfM of both the PPP and traditional procurement in every case where the government contemplates using a PPP. The public sector comparator (PSC) is a benchmark instrument that governments can use to conduct such an *ex ante* comparison.[84] This section provides a brief overview of the role of the PSC in the *ex-ante* assessment of the viability of PPP projects and the contribution of the VfM test in such assessment.

[83] C Goldbach, V Goldman, R Phillips et al *Public Cost Comparator for Public Private Partnerships* (2013) at 1.
[84] Organisation for Economic Cooperation and Development (OECD) *Public Private Partnerships in Pursuit of Risk Sharing and Value for Money* (2008) at 69.

2.6.1 *The PSC*

PPP is essentially a procurement model for which there is always one alternative — the traditional procurement. Because decision makers have different models to ensure the provision of infrastructures and/or services, it is necessary to compare those different models and select the best one. This comparison can be done using qualitative or quantitative methodologies. To avoid the subjectivity of qualitative assessment, practitioners have developed a quantitative tool for their projects: the PSC.[85]

PSC is a technical tool, created to aid public managers when considering to contract a PPP or engage in a traditional procurement. The PSC models financial estimates of what the costs envisioned in a proposed PPP would be if the project were fully funded and operated by the public sector instead of being a PPP. Simply put, the PSC calculates the in-house implementation costs and this calculation is used as a benchmark to compare alternative policy options. The PSC calculates the net present value (NPV) of procurement, taking into account defined output specifications as well as associated risks.

The baseline cost of the PSC is usually based on historical costs for a service that have traditionally been offered by the public sector. The cost is also based on the most recent year's operation and is adjusted on the basis of projected future particularities such as future demand, growth, demographical changes and political considerations.[86] It is a theoretical and forecast valuation of the life-cycle costs of the project but also accounts for risks[87] and is based on assumptions of the most efficient form of government delivery, adjusted for the life-cycle risks of the project. It is a model of the costs (in some cases, revenues) associated with a proposal under government delivery.[88]

The possibility of achieving extra benefits by implementing a PPP can be estimated with a twofold analysis conducted prior to the implementation of the PPP. It comprises, first, the calculation of the benchmark costs of providing the specified service under traditional procurement and, second, a comparison of this benchmark cost with the cost of

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[85] Cruz, Carlos Oliveira & Rui Cunha Marques *Infrastructure Public Private Partnerships: Decision, Management & Development* (2013) at 21.
[86] OECD *op cit* note 84 at 72.
[87] Cruz & Marques *op cit* note 85 at 27.
[88] Australian Government Department of Regional Development and Infrastructure *National Public Private Partnership Guidelines Volume 4: Public Sector Comparator Guidance* (2016) at 7.

providing the specified service under a PPP scheme. As was referred to above,[89] this benchmark is known as the PSC.[90]

The main objective of the PSC is to demonstrate VfM, by allowing an economically rational choice between PPP schemes and traditional procurement. While doing that PSC calculation allows the project promoter to focus on the output specification and also on the risk allocation for the project. The calculation of the PSC allows for simulating different risk allocations and selecting the one with the higher VfM.[91]

In assessing the costs of private provision against a PSC, it is important to ensure that only genuine cost savings arising from differences in productivity and efficiency are taken into account. Sources of cost difference that should be disregarded include: exemptions of state instrumentalities from taxes, the ability of private enterprises to avoid or minimise taxes, and differences in wages and other conditions.[92]

An important argument for undertaking a PPP is that it allows for substantial risk transfer from the public to private sector. The central principle of risk management strategy in PPP projects is that risks must be explicitly identified and then allocated to the party best able to manage them. In the evaluation of risks for the PSC, it is appropriate to value all risks transferred (or to be transferred) as costs of the public sector. Evaluation processes in PPP programmes have generally used the cost of risk to the private sector which is substantially greater. This nullifies the general rule that risk should be allocated to the party best able to bear it. To understand this point, it is necessary to consider the relationship between risk and cost of capital in more detail. If all risks have been identified and taken into account, the appropriate procedure for the evaluation of costs and benefits is to compute the present value using a riskless discount rate such as the rate of interest on government bonds which is generally lower.[93]

Furthermore, the principle of optimal risk allocation requires the availability of a range of contracting arrangements. The single-contractor model that characterises PPP programmes may be appropriate for only few cases.[94] Some are of the opinion that

[89] See section 2.6 last para.
[90] Cruz & Marques *op cit* note 85 at 23.
[91] Ibid at 21.
[92] John Quiggin, *Risk, Public Private Partnerships and the Public Comparator* (2004) at 18.
[93] Ibid.
[94] Ibid at 25.

> [W]hen using a PSC, a government should not just mechanically compare the PSC and the PPP. But should take note of the dangers of putting disproportionate emphasis on a single figure comparison.[95]

In essence, the PSC is used to generate a NPV of what traditional procurement would cost. This NPV must then be compared to the NPV of either a reference PPP or the actual PPP bids (or both).[96]

Because both a PPP and a PSC involve assumptions about the future and projections that include risk assessments, one danger of using a PSC is that of spurious precision. In such a case, NPV calculations in the PSC and the PPP proposal might be very close. A slight change in assumptions or in the assessment of risk may change the NPV calculation and cause preference for a PPP to shift in its favour or against it. It is necessary to ensure transparency and fairness that PSC analysis should clearly delineate assumptions and disclose information sources.[97]

Affordability and the impact of budgetary limits may affect the credibility of a PSC. A PSC may not be a realistically viable financial benchmark for deciding on a PPP when the asset or service under consideration would not have been possible except through the participation of the private sector and the availability of private funding mechanisms. A good number of PPPs are conceived due to the lack of public financial resources, in which case benchmarking efficiency against an infeasible policy option becomes problematic.[98]

Some other limitations or even problems with PSC calculation that were identified include:[99]

First, PSC narrows the decision-making process to the comparison between two numbers — of the PSC and the PPP. The PSC is a theoretical calculation including long-term forecasts and is therefore highly vulnerable to errors.

Secondly, PSC lacks transparency. PSC is criticised as it is often a 'black box' without any scrutiny. The opacity which involves the PSC process raises suspicion, particularly considering that it will support the decision-making process of projects worth multi-millions of ZARs or USDs.

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[95] OECD *op cit* note 84 at 75.
[96] Ibid.
[97] Ibid at 75.
[98] Ibid at 77.
[99] Cruz & Marques *op cit* note 85 at 25.

Thirdly, PSC lacks robustness. Even disinterested policy analysts operating with different assumptive worlds about public versus private sector provision are likely to generate different numerical responses. The lack of robustness might jeopardise the final decision. Just to give an example: it is not rare for a 1 per cent change in the discount rate to influence the final PSC by 7 to 10 per cent. Therefore, the PSC numbers are often estimated using little credible data.

Fourth, there might well be a lack of data. PSC calculation is strongly based on the use of historical data to estimate future costs. This raises a number of problems: (i) if the project is entirely new, then there is no historical data; (ii) the data may not be appropriate. Projects may not be comparable for several reasons — the legal and fiscal frameworks may have changed significantly with strong impact on the final cost accounting; (iii) historical data may also be a result of a lack of rigour because the teams working on the calculations may not know how those values were generated; (iv) there are no accounting standards to ensure data consistency; and, (v) the pattern of quality of service changes considerably over time and it is difficult to measure.

Fifth, there is the difficulty in estimating efficiency gains. The calculation of the PSC should account for future efficiency gains. For instance, in 20 or 30 years, it is reasonable to expect an improvement of the public sector managers' capacity. The scenario of efficiency gains over time is very difficult to determine. This difficulty arises at two different levels. One is related to the identification of the efficiency gains in the present, based on the current levels of the efficiency of the benchmarking sample. Naturally, this requires comparability between samples (avoid comparing 'apples' with 'oranges') which is not always possible. The other is related to the forecast of future efficiency or productive gains, and here, the complexity is much higher. The situation is even more serious when the market structure is not well developed and when reforms are expected to take place in that period or in a near future.[100]

To sum up, PSC is a hypothetical benchmark that stands for the whole-life cost and risk adjusted of public sector provision. The key elements of PSC include the following aspects: hypothetical and a forecast; NPV number based on lifecycle costing, risk adjusted and possibility that the public sector is one to deliver the service. The purpose of PSC is to

[100] Cruz & Marques *op cit* note 85 at 25.

assist public managers in their decision-making by testing whether a private investment proposal offers better VfM in comparison with the most efficient form of public procurement.[101] However, as demonstrated from the discussion above, PSC is not an easy management tool to calculate and use. Another management instrument that has often been attributed great relevance for PPP projects against the traditional procurement process is VfM. This is the focus of the next subsection.

2.6.2 *The VfM*

The gist term of VfM is wide-ranging and captures the issue of whole life cost, benefit, risk and quality to achieve the desired results in accordance with clients' requirements. In a generic sense, VfM will be determined through a comparative analysis of PPP proposals by private sectors against a public sector alternative by means of PSC.[102]

The concept of VfM includes both qualitative and quantitative aspects. In addition, it typically involves an element of judgement on the part of government. As such, a precise indicator to measure VfM does not exist. VfM can broadly be defined as what a government judges to be an optimal combination of quality, quantity, features and price (cost) expected (sometimes, but not always, calculated) over the whole of the project's lifetime.[103]

While the PSC is a hypothetical and forecast instrument, VfM is directly related to the actual efficiency and effectiveness of projects. This is clearly a technical instrument developed within public accounting and auditing, though it is not far from the political arena and decision theory.[104]

In PPP projects, VfM refers to the best available outcome through a comparative analysis of all benefits, costs and risks over the whole life of the project.[105] The typical definition for VfM found in the literature is in terms of three elements (the 3Es): economy, efficiency and effectiveness. Economy in VfM assessment is obtainable through the

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[101] Kharizam Ismail, Roshana Takim & Abdul Hadi Nawawi 'A public sector comparator (PSC) for value for money (VfM) assessment tools' (2012) 8(7) *Asian Social Science* at 192, available at <*https://www.researchgate.net/publication/274631939_A_Public_Sector_Comparator_PSC_for_Value_for_Money_VFM_Assessment_Tool*>, accessed on 31 August, 2020.

[102] Ibid.

[103] Philippe Burger & Ian Hawkesworth 'How to attain value for money: Comparing PPP and traditional infrastructure public procurement' *OECD Journal on Budgeting* (2011) at 51.

[104] Cruz & Marques *op cit* note 85 at 26.

[105] K Ismail, R Takim, AH Nawawi et al, *Public Sector Comparator (PSC): A Value for Money (VfM) Assessment Instrument for Public Private Partnership(PPP*) (n.d) at 173, available at *https://www.irbnet.de/daten/iconda/CIB_DC24084.pdf*, accessed on 31 August, 2020.

minimisation of the costs of inputs, while efficiency is the minimisation of inputs for a given set of outputs, or the maximisation of outputs for a given set of inputs. Efficiency entails both technical and economic efficiency. And effectiveness refers to the impact of the policy, for example whether or not the outputs reached deliver the desired outcome measured by indicators such as throughput rates.[106]

Even when the delivery of a service is technically and economically efficient, the service itself may technically fall short of addressing the needs it was designed to address. It is then said to be technically ineffective. Economic ineffectiveness exists when the overall effectiveness of public resources can be improved by reallocating resources. The above discussion can be summarised as: economy in the use of resources is attained by maximising inputs per ZAR, MZN, USD and other currencies; while efficiency is obtained by maximising outputs per input unit; and effectiveness is generated from the maximisation of outcomes per output.[107]

However, a report from the 2013 World Bank Global Round Table on *Value-for-Money Analysis — Practices and Challenges* indicated that 'a major risk of quantitative VfM analysis is that the results are seen as overly-scientific' and 'too much emphasis has been given to the quantitative analysis — as if it provided mathematical proof of VfM'.[108] This is to mean that above the numerical measurement it is the whole-of-life service quality that a project provides to the end-users, to whom it must account.

Broadly speaking, a PPP may provide VfM compared to traditional procurement models if the advantages of risk transfer combined with private sector incentives, experience and innovation— in improved service delivery or efficiencies over the project life-time — outweigh the increased costs of contracting and financing. This raises challenges for policy-makers: how to assess the VfM of different procurement and delivery options — that is, carry out VfM analysis — and how to use the results of this analysis in PPP decision making.[109]

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[106] Burger & Hawkesworth *op cit* note 103.
[107] Ibid.
[108] World Bank Institute (WBI) and Public-Private Infrastructure Advisory Facility (PPIAF) *Value-for-money Analysis: Practices and Challenges: How Governments Choose When to Use PPP to Deliver Public Infrastructure and Services* (2013) at 20.
[109] Ibid at 10.

The VfM is about measuring the utility of the expenditure, or searching for the public procurement solution with the highest efficiency. VfM as a way of obtaining the maximum benefit with the resources available, it is particularly relevant because public resources come from the taxpayers' money and are therefore subject to public scrutiny.[110] A critic of the VfM test argues that the concepts of efficiency and effectiveness both provide the same government decided outputs. Thus, whether developed under public management or through a PPP arrangement, the project will deliver the same pre-determined outputs. These outputs are defined a priori by the government and incorporate not only the service characteristics (provided in an efficient way) but also the quality standards that should be met.[111]

Another critic is of the opinion that although some countries test PPP project candidates against the alternative of a public sector option, many still do not have clear criteria to identify how projects get to be either PPP or traditional procurement candidates. The reality is that the decision, in some cases, is left to the discretion of line departments and so-called project champions to identify PPP candidates. [112] For countries with a high-level propensity for rent-seeking the discretion vested (or being vested) in the line departments or in so-called project champions risks fuelling opportunistic behaviour for corrupt activities.

To conclude, for the VfM test to become a relevant tool in PPP projects some points are suggested:

First, early in the procurement process a project should be subjected to an *ex ante* procurement test. This test is meant to guide the government in selecting which mode of procurement is likely to deliver the most VfM.

Secondly, with data recorded and reported on whole-of-life of projects, the government should develop an *ex post* assessment of both PPPs and traditionally procured projects. This should be done not only to establish and compare performance in terms of design and construction costs and time delays but also in terms of outputs (and outcomes) and operating and maintenance costs. Furthermore, to deal with optimism bias and to

[110] Cruz & Marques *op cit* note 85 at 26.
[111] Ibid.
[112] Burger & Hawkesworth *op cit* note 103 at 49.

ensure robust comparison between procurement options, both traditionally procured and PPP projects should *ex ante* include an adjustment for possible cost and time overruns and revenue shortfalls. The inclusion of such adjustments will render *ex post* VfM assessments more reliable for example, if a PPP outperforms a traditionally implemented project, it would be clear that this is not due to an optimism bias but to the actual improvements in VfM and efficiency.

Thirdly, governments should shift the VfM assessment to earlier in the procurement process and place it prior to the procurement option test. The objective with this is to ensure that the public sector option demonstrates that it represents VfM, no matter which procurement method is selected, and the public sector option should (within the TCT perspective) form part of a broader cost-benefit analysis.[113] VfM assessment in PPP projects should start at level of strategy formulation phase and be generated throughout the project life-cycle. VfM in this sense is the broad scope. Thus it is crucial to ensure that rigorous financial and non-financial elements are integrated in the VfM assessment process.[114]

Fourthly, there is a belief that VfM is not assessed based on cost saving but comprises the enhancement and benefit to the environment, innovativeness of the project, appropriate risk allocation, end-user satisfaction, resources and asset utilisation and flexibility of operation. This conclusion is in line with the definition of the VfM that has been presented by many researchers and practitioners. Therefore, governments should give more exposure to the stakeholders regarding the need to utilise PSC and to view VfM from all financial and non-financial perspectives. In conclusion, the development of a framework for VfM assessment comprising both financial and non-financial aspects would facilitate a comprehensive dimension of VfM evaluation for PPP projects.[115]

Concluding remarks

The concept, genesis, and arguments behind the growth of PPPs have been introduced in this chapter. Further, the legal definition of the PPP in both the countries that constitute

[113] Ibid at 50.
[114] Ismail, Takim, Nawawi et al *op cit* note 105 at 173.
[115] Ibid.

the subject of the study has been reviewed and compared. It has been acknowledged that PPPs are not new phenomena; they have been around since ancient times in the form of concessions. PPPs involve public sector institutions and private sector actors working together to achieve specific purposes or towards the attainment of mutual objectives.[116] Nowadays, PPPs are said to offer benefits and can also be mechanisms for financing public infrastructure and/or services development that help to achieve efficiency and effectiveness and generating value for money by transferring risks and costs to the private sector.[117]

The discussion on the juridical nature of the PPP contract was not conclusive. Although the PPP contract is a 'commercial transaction' it has become difficult to establish a definitive position to consider PPP as a private contract. Perhaps this is caused by its hybrid nature that involves both public institutions and private actors. The matter is further developed in the chapters 3 and 4 dealing with the formation, enforcement, implementation, termination, and conflict composition of PPP contracts in both jurisdictions under the study.

[116] Weiwu Zou, Mohan Kumaraswamy, Jacky Chung et al 'Identifying the critical factors for management in PPP projects' (2014) 32 (2) *International Journal of Project Management*.
[117] HK Yong (ed) *Public Private Partnerships Policy and Practice: A Reference Guide* (2010) at 6.

CHAPTER 3: THE REGIME OF THE PPP CONTRACT IN MOZAMBIQUE

Introduction

In this chapter the legal regime of the PPP contract in Mozambique and the risk management strategies for the successful and sustainable implementation of PPP projects are examined. A contract is generally defined as an agreement entered into by two or more persons with the intention of creating legal obligations. It is the agreement that the law recognises as binding on the parties.[1] This means that it must be an agreement that is enforceable by the courts in the case of non-compliance or breach of the parties objectively agreed obligations.[2] Contracting a PPP in Mozambique is part of public procurement that is specially governed by Law 15/2011 of 10 August 2011 (the PPP Law) and the decrees 16/2012 of 4 June 2012 and 69/2013 of 20 December 2013 (which covers the PPP regulations for LSP and SSP respectively), supplementary by Decree 5/2016 of 8 March 2016 (which regulates public procurement) and by specific sectoral and investment legislation as well as by international conventions or treaties signed and ratified under the terms of the Law by the Republic of Mozambique.[3] The Law defines the PPP contract as the juristic instrument by means of which the contracting (state or municipal institution) and contracted (private) parties formalise the partial or total assignment of the rights of conception, design, construction, rehabilitation, development, use, operation, management, and maintenance — on a commercial basis — of infrastructure, property or asset belonging to the state or municipal agency to the private entity.[4] The study concentrates on the key elements of the contract lifecycle, including the formation (3.1), implementation (3.2), enforcement (3.3) and discharge (3.4) of PPP. Also highlighted are the mechanisms for the resolution of disputes/conflicts arising from a PPP contract (3.5), the risk management strategy pursued by Mozambique according to the PPP Law (3.6) and the Mozambican-

[1] Dale Hutchison, Chris-James Pretorius & E J du Plessis *The Law of Contract in South Africa*(2012) at 6.
[2] Richard Taylor & Damian Taylor *Contract Law* 6th ed. (2017) at 51.
[3] Lei das Parcerias Público-Privadas, Projectos de Grande Dimensão e Concessões Empresariais) (Lei n.º 15/2011) art 22 (hereafter PPP Law) art 38; Decreto n.º16/2012, de 4 de Junho, Regulamento de Parcerias Público-Privadas, Projectos de Grande Dimensão e de Concessões Empresariais, BR 27, I (hereafter Decree 16/2012 of 4 June 2012); and Decreto 69/2013 de 20 de Dezembro, aplicável a projectos de PPPs e CEs de pequena dimensão, art 1, BR 102, I Série.
[4] PPP Law 'Glossary'.

specific context factors susceptibly able to affect the success and sustainability of PPPs (3.7).

3.1 The formation of the PPP contract

As a general rule, no formal process is required for the formation of a valid contract provided all the requirements for validity are met. Within the boundaries of the law the parties are free [5] and thus may express their intentions in whatever form they wish.[6] This is to say that the agreement of the parties need not be manifested in a particular outward form in order to constitute a contract. The law recognises both express, where the intention of the parties is articulated verbally whether orally or in writing, and tacit contracts, where the intention is inferred from the unarticulated conduct of the parties.[7]

In respect of certain contracts, however, the law may require that the parties express their intention in a prescribed, formal way [8] and failure to adhere to such prescribed formalities will render the contract void.[9] The justification for prescribing formalities can be to ensure reliable evidence of the terms of the contract and so cut out wasteful litigation caused by faulty memory or attempts to maintain fraudulent claims or defences.[10] This may be the case of the PPP contract in Mozambique, where the law prescribes that for a PPP contract to be regarded as a valid agreement it must be sanctioned by the Administrative Tribunal.[11]

The formation of the PPP contract in Mozambique starts with the definition provided by the government of pre-contractual elements (1), followed by the indication of the type and regime of PPP contract (2), and the process and formalities to be abided by (3).

3.1.1 *The pre-contractual elements*

'PPP is part of public procurement which is often governed and structured by specific and detailed rules, a distinct field of administrative law called public procurement

[5] Código Civil Moçambicano (hereafter the Civil Code) arts 219,221 & 405(1).
[6] Ibid.
[7] Ibid art 217.
[8] Ibid arts 219 & 222.
[9] Ibid art 220.
[10] Mota Pinto, Carlos Alberto *Teoria Geral do Direito Civil* **3** *ed* (1996) at 431; R H.Ritchie & G Bradfield *Christie's Law of Contract in South Africa* (2016) at 129.
[11] PPP Law art 31.

law or public procurement regulation, the focus of which is on the rules governing the process that leads up to the conclusion of the contract and, in particular, the process through which a supplier is identified and a government contract awarded to that supplier'.[12]

The pre-contractual elements involve the structuring of the principles and procedures to be followed before launching public tender. This is the moment in which the state administration (the government) takes unilateral acts, including identifying and deciding over the project to be developed via a PPP contract; clarifying the expected benefits from a PPP project; assessing potential risks with the PPP option and strategies for their management; securing public expenditure authorisation; deciding over key provisions to be incorporated into the contract; [13] the processes to be followed and the procedural behaviour expected from the participants; the definition of the conditions for admission, exclusion and ordering of bidders; the criteria for choosing the winning bidder and the award of contract; the establishment of complaining mechanisms; and the process of deciding over such complaints.

All aforementioned elements are part of the pre-contractual stage that, in the case of public procurement, is the subject of a detailed discipline of the administrative law, the violation of which can imply the suspension or cancellation of the process of analysis, assessment or negotiation of the project or contract proposals[14] – or even a source of the invalidation of the preceding and subsequent contractual acts. For instance, the Law 15/2011 of 10 August 2011 considers the following as irregularities [15] in the pre-contractual period: the failure to indicate — explicitly — the expected financial and socioeconomic benefits from the undertaking, and the lack of presentation of provisions for risks prevention and mitigation.[16] At this stage, the irregularities that cannot be resolved by the tender board and/or contracting entity are subject of administrative treatment under the government's prerogative right to regulate, including the suspension or cancellation of the course of analysis and assessment or negotiation of the proposed PPP project or contract.[17]

[12] Geo Quinot & Sue Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) at 1.
[13] Decreto n.º16/2012, de 4 de Junho, Regulamento de Rarcerias Público-Privadas, Projectos de Grande Dimensão e de Concessões Empresariais, BR 27, I (hereafter the Decree 16/2012 of 4 June 2012) art 37.
[14] PPP Law art 36.
[15] PPP Law art 35(a).
[16] PPP Law arts 33 and 34.
[17] PPP Law art 36(a).

3.1.2 *Modalities and regime of PPP contracts*

PPPs can be classified by the legal nature of private-sector involvement in the public facility using different expressions and variants all reflecting the point at which legal ownership of the facility is transferred from the project company to the public authority, or, if the project company is never the legal owner of the facility, the nature of its legal interest, such as a property lease or merely a right to operate.[18] However, such distinctions are legal technicalities and do not affect the commercial and financial reality that PPP facilities are public-sector assets which cannot normally be sold off to the private sector.[19]

In Mozambique, the award of a PPP contract can take one of the following modalities: concession contract, assignment for operation contract, and management contract.[20] The concession contract in which nowadays the main characteristics of PPP can be found, can take one of the following variants: Build, Operate and Transfer (BOT), Design, Build, Operate and Transfer (DBOT), Build, Own, Operate and Transfer (BOOT), Design, Build, Own, Operate and Transfer (DBOT), Rehabilitate, Operate, and Transfer (ROT) and Rehabilitate, Own, Operate and Transfer (ROOT).[21]

In any case, the Law [22] indicates that

> The general legal regime for contracting PPP is the public tender, and other rules governing the public procurement (specially, the regulatory framework governing public procurement under the Decree 5/2016 of 8 March 2016) shall apply on a subsidiary basis.[23]

The same Law, however, admits two exceptions as follows: considering public interest, contracting a PPP may take the modality of a tender with prior qualification or a two stage tender', [24] and 'in weighty situations and once duly justified and, as a measure of last resort, subject to prior approval by the Government, contracting a PPP may exceptionally take the form of direct negotiation for contract award',[25] hence, with no call for public tender.

There is no doubt from the above reading that the general regime for contracting PPP in Mozambique is through public tender, with the selection of the winner being

[18] E R Yescombe *Public Private Partnerships: Principles of Policy and Finance* (2007) at 13.
[19] Ibid.
[20] PPP Law art 21(1).
[21]PPP Law art 21 2).
[22] PPP Law art 13.
[23] PPP Law art 13 (1).
[24] PPP Law art 13(2).
[25] PPP Law art 13(3).

expected to come from a competitive and transparent bidding process. While the Law only allows direct negotiation for contract award in weighty circumstances, hence with no call for public bidding, in practice, however, most, if not all, PPP contracts awarded to date were all under this provision of 'weighty circumstances', at a non-competitive basis. The wider public has been caught by surprise by reading in the *Official Gazette* an announcement about the conclusion of such PPP contracts. The rule the Parliament passed to be used only in exceptional circumstances has, effectively, become the general rule.[26] This provision works against transparency in the selection of contract winning candidates, undermines the possibility of choosing the best qualified candidate in terms of technical, operational and financial capabilities, and compromises the attainment of best value/VfM which could be harnessed from an open and competitive bidding process.

To substantiate the above statement, the Government of Mozambique (GoM) has since the enactment of the PPP Law resorted to the 'public interest' principle, requiring to be served with great urgency and, through Resolutions 44/2012 of 28 December and 53/2011, 54/2011, 55/2011 and 56/2011 of 4 November, authorised direct negotiation and direct award of PPP contracts. Just two examples of these are the PPP contracts between CFM (a railway state enterprise), Salamanga Investimentos SA, and SPI Gestão e Investimentos, for the concession of the rail network of Tchobanine (South of Maputo); and between CFM, Salamanga Investimentos SA, and SPI Gestão e Investimentos, for the concession of the carbon port terminal of Tchobanine.

These contracts, having been awarded from November 2011, require further and independent investigation to evaluate their current level of performance. As an aside, it is worth noting that SPI Gestao e Investimentos is a commercial holding company owned by the governing Frelimo Party, and the fact that these contracts were awarded on a non-competitive basis raises the questions over transparency and conflicts of interest enacted in the Law 16/2012 of Public Probity (Lei n.º 16/2012 de Probidade Publica). Issues of transparency and conflicts of interest in Mozambique are further discussed in section 3.7.

[26] PPP Law art 22(1)(4).

3.1.3 *The process and formalities of the contract*

The process of undertaking a PPP encompasses the legal steps to be followed. These include: the identification and conception of the project; the conducting of a feasibility study; and the presentation of detailed plans for the development, procuring, implementation, monitoring, evaluation, and performance measurement of the PPP project.[27] As referred to in subsection 3.1.1, above, it is the prerogative of the government to define the phases of the PPP process as well as the administrative acts and elements of each phase.[28] All these follow detailed procedures established in the Law [29] and its Regulation.[30]

It is worth noting, too, that because the PPP contract in Mozambique is regarded largely as a public contract, it is subject to administrative rules and, thus, a key role is played by the Tribunal Administrativo (Administrative Tribunal).[31] It is within this context that the Law stipulates that 'without disregard to the protection of the confidentiality of the undertaking's strategic commercial and competitive information, the concluded PPP contract is subject to prior administrative tribunal ruling, called *Visto*,[32] by the Administrative Tribunal.[33] It is further required that the main clauses of the contract as well as of the accounting and balance sheet and reports related to the project activities be published in the *Official Gazette* and on the government website.[34] A failure to secure the *Visto* renders the PPP contract void (invalid) for all legal effects.

The examination of the process leading to the formation of the PPP contract is now concluded and in the next section the process of implementation is discussed.

3.2 The enforcement of the PPP procurement rules

The enforcement of public procurement laws and regulations governing the PPPs is an important ingredient for the success of PPP projects. The section first (and briefly) reviews

[27] PPP Law art 8(1).
[28] PPP Law art 8(2).
[29] PPP Law arts 8 and 9.
[30] Decree 16/2012 arts 9–28.
[31] The Administrative Tribunal is also charged with the function of overseeing public expenditure.
[32] Clearance/authorisation.
[33] The Administrative Tribunal is constitutionally responsible for the prior review of public projects involving state money and, thus, is legally competent to declare whether a public expenditure project does or does not conform to the Public Financial Management Law and its Regulations.
[34] PPP Law art 23.

the raison d'être for enforcement of law (1), secondly, presents the regime of remedies available to bidders for the enforcement of the regulatory framework governing the contracting of public works and services in Mozambique (2); and finally, examines the remedies for enforcement of the specific rules governing the procurement of PPP projects (3).

3.2.1 *The relevance of enforcement of law*

The enforcement of law is vital in all modern societies, and without some type of law enforcement a society would eventually cease to exist.[35] Generally speaking, the function called law enforcement is a society's formal attempt to obtain compliance with the established rules, regulations, and laws of that society. Without law enforcement, society as we know it would probably succumb to social disorder and chaos.[36] Thus, law enforcement is one means of formally supervising human behaviour to ensure that the laws and regulations of society are followed and that there is a certain amount of security and stability in society. The enforcement of law in all of its forms (statutes, regulations, administrative codes, ordinances, and suchlike) is legally authorised by the concept of police power.[37]

Legal enforcement is also understood as the activity by which a legally constituted power is applied to make the law's dictate actual.[38] This definition is adopted in this research because it captures the essence of the enforcement of public procurement laws and regulations as it involves initiation of a review action (activity) by an aggrieved bidder or affected/ disappointed party in pursuance of the right vested on it by law or regulation (legally constituted power) to challenge and redress non-compliance with procurement laws or regulations (applied to make the law's dictate actual).[39] The definition of a contract as a legally enforceable agreement assumes that mechanisms exist for the enforcement of those contracts that are identified by law as creating legally enforceable performance obligations.[40]

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[35] Jones & Bartlett Learning, LLC *The Field of Law Enforcemen*t (n.d.) at 1.
[36] Ibid.
[37] Ibid, at 2.
[38] Udeh, Kingsley Tochukwu *A Comparative Study of the Effectiveness of Bidder Remedies in South Africa and Nigeria* (unpublished DLL dissertation in Law, Stellenbosch University, 2018) at 13.
[39] Ibid.
[40] Jill Poole *Contract Law* (2016) at 331.

Included in this perspective are the public procurement rules and the PPP contracts, the theme of this work. The system for enforcement of public procurement rules entails a procuring entity receiving and considering complaints and grievances against its procurement actions or decisions with a view to correcting identified breaches as required by law.[41] It involves the availability of bidder remedies for the redress of his/her grievances.

The concept of bidder remedies refer to the right provided for by law or regulatory instrument by which a person that is interested in being awarded a government contract may challenge and seek redress against a decision, action or inaction of a public procuring entity, perceived to be in breach of applicable procurement rules.[42] A bidder remedy may involve merely an opportunity for a dissatisfied bidder to apply to the procuring entity to reconsider or reassess its decision or action, and reply to the aggrieved bidder. It may also be in the form of instituting a legal proceeding before an external and independent administrative entity or a court/tribunal which has the power to grant corrective or even punitive remedies against the alleged breach of procurement rules.[43] In Mozambique, public procurement bidder remedies may be obtained through administrative and judicial reviews. The administrative review takes the form of internal and external reviews while the judicial review is provided for by a court, the Administrative Tribunal. Remedies in the procurement of PPPs may mainly be found in the Decree 5/2016 of 8 March 2016, governing public procurement in general, and in the PPP Law (Law 15/2011 of 10 August, 2011) both of which constitute a special piece of legislation governing the procurement of PPPs.

3.2.2 *Public procurement bidder remedies provided for by the Decree 5/2016*

Five years after the enactment of the PPP Law in 2011 through the Decree 5/2016 of 8 March 2016 the Council of Ministers (the Cabinet) approved a general regulatory framework for contracting public works and supply of goods and services to the State. Article 1(1) of the aforementioned decree provides that 'the present regulation establishes the juridical regime applicable to the contracting of public works and services, including

[41] Udeh *op cit* note 38 at 123.
[42] Ibid.
[43] Ibid at 25.

consultancy and *concessions'*. Whereas art 21(1) of the PPP Law provides that '[the award of the PPP enterprise takes one of the following contractual modalities: (a) *Concession* contract. Thus, from the above reading, it can be concluded that the Decree 5/2016 of 8 March 2016 is applicable on a subsidiary basis to the PPP procurement process. Bidder remedies regime can be found in chapter V of the aforementioned Decree under the title 'Complaints and appeals'. For what can be considered as internal administrative review system, the art 275 of the Decree presents the conditions for the 'admission of appeals' (internal appeal), providing that

> (1) It may be object of appeal to the contracting entity, the acts of qualification, disqualification, and award (of contract);
> (2) The appeal must be presented in writing within 5 days from the date of notification of the act object of appeal;
> (3) During the course of appeal, the bidders have the right to consult the administrative procedure of the tender;
> (4) It is responsibility of the jury (the tender board) to send such complaint including the tender board's own opinion, within 5 days of receiving the complaint, to the contracting entity;
> (5) The contracting entity has 10 days to decide on the appeal; and
> (6) The pending of appeal suspends the march of the tender process.

Article 276 of the Decree under examination caters for external administrative review by stating that

> (1) The acts of the contracting entity may be challenged to upper ladder authority, among others, sectoral minister, provincial governor, and district administrator, respectively for central, provincial, and district levels of public procurement processes;
>
> (2)The appeal must be founded on:
>
> (a) The violation of the rules of this Decree;
>
> (b) The breach of the rules containing in the tender documents; and
>
> (c) The breach of the formalities, including the failure to provide reasons of *de facto* and/or *de jure* of the administrative act.
>
> (3)The appeal for review must be lodged within 3 days from the notification of the payment of a guarantee of 0,25 per cent of the value of the contract;
>
> (4) The appealed entity decides over the recourse within 30 days from its receipt; and
>
> (5) The appeal for review suspends the process of contracting.

Finally, art 278(1) of the Decree in analysis provides for judicial review by indicating that 'The decision of the administrative entity may be challenged via judicial appeal.' The judicial appeal will be lodged to Administrative Tribunal under the articles 32 and 34(d) of Law 7/2014 of 28 February 2014, the law governing the process of administrative litigation. Having reviewed public procurement bidder remedies available under the Decree 5/2016 of 8 March 2016, the study now moves on to examine the remedies available under the PPP Law.

3.2.3 *The PPP procurement bidder remedies under the PPP Law*

Article 13(6) of the PPP Law provides that '[I]n any of the modalities of contracting a PPP, the principles of legality, finality, reasonableness, proportionality, pursuit of public interest, transparency, publicity, equality, competitiveness, impartiality, good faith, integrity... must be observed.' Thus, the non-observance of one of the above principles can make a case for impugnation of a PPP process and contract, by any disappointed bidder. The PPP Law and its regulation provide for some forms of enforcing the rules governing the procurement of PPPs.

> On the one hand, art 20 *in fine* of the PPP Regulation,[44] provides that
> Dissatisfied bidders have 30 days after the communication of the adjudication of a contract to lodge eventual complaint over the evaluation/assessment of the proposals and decision.

The PPP regulation does not, however, indicate to whom the complaint/appeal must be presented. It can only be inferred that the complaint procedure will follow the process prescribed in the Decree 5/2016 above. Or, the complaint will successively be presented to the tender board, contracting entity, independent administrative entity, and, finally, to a court for judicial review.

On the other, art 35 of the PPP Law considers as irregularities the following: (a) the failure to indicate the main terms of the contract, and the lack of clauses for prevention and mitigation of risks; (b) non-compliance with the provisions of the PPP Law; and (c) an act or omission negatively impacting on the PPP undertaking.

As remedies available to dissatisfied bidders, art 36 (1) of the PPP Law provides that

> (a) In the pre-contractual stage, the suspension or cancellation of the course of analysis, assessment or negotiation of the terms of the PPP contract;

[44] Decree 16/2012 of 4 July, 2012.

(b) After the conclusion of the contract, reference is to be made to the dispute resolution clause; and
(c) In the post-contractual period, the indemnification or compensation by the party that committed the breach to the injured party.

Furthermore, art 36(2) provides that

[T]he administrative remedies provided for above do not release the breaching party from civil or criminal liability due to the costs incurred and losses caused to the other party or to third parties.[45]

Reference is, however, made to the fact that the determination of civil and or criminal responsibility is the domain of a court of justice. The discussion of this matter is developed further below.

The Mozambican PPP procurement regulatory framework also provides for judicial review. Judicial remedies entail seeking court intervention in grievances arising from public procurement proceedings or review.[46] Different from other jurisdictions such as South Africa, where common courts are legally competent to receive and decide over public procurement matters, in Mozambique, the Administrative Tribunal is the jurisdiction endowed with the powers to receive an application and decide over matters involving public procurement processes and contracts,[47] including the PPP contracts. While the Administrative Tribunal is the competent jurisdiction to receive an application and decide over the matters of civil responsibility under public procurement processes and to certain degree public contracts,[48] the criminal responsibility can only be sought and decided by the criminal court.

To conclude, the enforcement of PPP procurement rules in Mozambique deals mainly with administrative and judicial remedies. The administrative remedies include internal and external reviews. The internal review is exercised before the tender board and/or the contracting entity, the external review is provided for by an upper ladder independent administrative entity not directly involved in the tender process, such as the sectoral minister, provincial governor, or district administrator. This external administrative review constitutes a challenge to the internal review and is lodged before an

[45] PPP Law art 36(2).
[46] Udeh *op cit* note 38 at 172.
[47] Law 24/2013 of 1 November 2013 arts 4 &11; Law 7/2014, of 28 February 2014 arts 3,115, 116,119 & 120.
[48] Law 7/2014 arts 119,120,121&122.

administrative authority that is external to and independent of the procuring entity whose decision is being challenged.[49]

A public procurement judicial review may be granted by the Administrative Tribunal under the Laws 7/2014 of 28 February 2014 and 14/2013 of 1 November 2013. The appeal for a judicial review for a breach of public procurement rules which consubstantiates a criminal offence is, however, dealt with by the special criminal bench of the common court. It needs to be emphasised, however that an appeal for judicial intervention at post-contract award stage is regulated by private law, under the general principles of the law of contract. This includes matters relating to the resolution of disputes arising from, for example, the implementation of the concluded contract. This mix of public (administrative) law and private law (law of contract) reinforces the idea advanced in the last para of subsection 2.5.3 of this thesis according to which PPP is a hybrid institution.

The discussion about the enforcement of the PPP procurement rules is now concluded. The performance or implementation of the PPP contract will be the focus of the next section.

3.3 The performance of the PPP contract

The general rule is that the performance obligation is strict, so the contractual obligation must be completely and precisely performed.[50]According to the *pacta sunt servanda* doctrine, the parties to a contract are bound to honour the contract they entered into, respecting their agreement and performing (implementing) all the obligations that it imposes upon them.[51] This follows the doctrine of sanctity of contracts which entails that once parties enter into a contract they must honour their obligations under that contract.[52] Obligations freely entered into a contract must be honoured and, where necessary, enforced by the court of justice.[53] It is submitted that, since the doctrine of *pacta sunt servanda* is concerned with the accomplishment and stability of a contract, it shares a normative relationship with stabilisation clauses especially the doctrine of maintenance of economic

[49] Udeh *op cit* note 38 at 149.
[50] Poole *op cit* note 40 at 289.
[51] Hutchison, Pretorius & Du Plessis *op cit* note 1 at 278.
[52] Augustine E Arimoro *Public Private Partnerships in Emerging Economies* (2020) at 219.
[53]Augustine E Arimoro *The Role of Law in the Successful Completion of Public-Private Partnership Projects in Nigeria: Lessons from South Africa* at 44 (unpublished PhD (Law), University of Cape Town, 2018).

equilibrium found in international investment agreements (IIAs). This issue is further discussed in ss 5.11.5 and 5.11.6 which is devoted to a review of the international law perspective.

In line with the above construct, once a PPP contract has been concluded in Mozambique and cleared by the Administrative Tribunal, it must be implemented. At this stage, the state-administration hands over the properties, assets, and rights to the implementing agency (1). At the same time, however, it retains the right to oversee the implementation of the contract by the private or contracted party. To do this, the administration will use its monitoring and oversight public powers and, if it detects deficient implementation, whether total or partial, it (the state administration) may apply sanctions by, for instance, unilaterally modifying the contract or even terminating it (2).

3.3.1 *Assets handover to the implementing agency*

The implementation of the PPP contract starts with the handover to the implementing contracted party of the properties, assets and rights regarding the object of the contract. This party will manage, explore, maintain, and ensure project performance for the accomplishment of contracted objectives and, at its termination, guarantee the return of the properties, assets and rights to the owner (state or municipal institution).[54]

It is the handover or assignment of the undertaking that is the act at which the contracting public entity hands to the contracted private party or to the implementing agency the assets, land, rights and obligations necessary for the implementation of the PPP project.[55] This is, however, possible only after the Administrative Tribunal clearance and the publication in the *Official Gazette* of the main terms and contents of the contract. The implementation of the project includes the taking of all necessary diligences and actions for the realisation of investments, the construction or rehabilitation of infrastructures, and the assemblage of the technology or materials necessary for the materialisation, management, and exploration of the project in accordance with its terms, modalities [56] and conditions.[57]

[54] Decree 16/2012 art 9 (k–n).
[55] Decree 16/2012 art 24.
[56] PPP Law art 21.
[57] Decree 16/2012 25.

Monitoring and control by the contracting parties are crucial to ensure a successful implementation of the PPP project. These include the evaluation, measuring of economic, financial, and operational performances in accordance with the agreed upon indicators. In any case, the Law establishes that it is the responsibility of the Regulatory Agency to produce project performance reports to be submitted half-yearly to sectoral and finance ministerial authorities.[58]

3.3.2 *Public authority's power to monitor and apply sanctions*

During the process of monitoring the implementation of the PPP project the contracting entity may be confronted with poor performance — or even non-performance — of the contract; a serious breach of the contract which affects the objectives of the undertaking; the abandonment of the execution of the contract; the unauthorised contract transfer to a third party; the lack of payment of the agreed fees; and the breach of the provision of public goods or services, all of which may lead to the termination of the contract. Succinctly, the following can constitute causes for termination of a PPP contract: (i) a serious breach of contract which affects the objective and purposes of the undertaking; (ii) the abandonment of implementation of the contract or of its object or undue suspension thereof; (iii) the transfer to a third party by the contracted party of its contractual position, or the conclusion of another contract or operation of another business arrangement with the similar objectives as those of the contract in force, whether temporarily or definitely, without written approval or consent of the contracting party and of the state entities responsible for sectoral and financial oversight; (iv) the lack of payment of the agreed fees or other considerations; and (v) a breach in the provision of the public goods or services agreed under the terms of the contract.[59]

When it is detected or verified that one of the facts constituting a cause for contract termination is attributed to the contracted party, that party will be notified and warned in writing to comply with its obligations within 120 days.[60] If such compliance does not occur the contracting public party may terminate the contract by simply communicating its

[58] Decree 16/2012 art 27.
[59] PPP Law art 26(2).
[60] Decree 16/2012 art 44(1).

decision in writing.[61] In this case, the guarantee offered by the private party to ensure performance will be forfeited by the government, without disregard to the compensation to be paid by the contracted (private) party to the contracting (public) party for the losses and damages resulting from forced early termination of the contract.[62] A comment to be made, at this stage, is that this legal provision seems to embody a one-sided perspective, since it considers the contracted (private) party as one who will mostly fail to comply with its contractual obligations which, in practice, may not necessarily be the case.

3.4 The discharge of the PPP contract

The discharge of a contract implies the termination of the obligation. Only full and proper performance of a contract, as agreed by the parties, will naturally extinguish the obligation under the contract. Also, there can be other circumstances or reasons that may determine the discharge of a contract.

The following are some examples of such circumstance: a) a contract may fix a specific period for its duration, terminating automatically at the end of such period (other contracts may also specifically provide for termination by notice);[63] b) incidental circumstances may dictate termination (for instance, a contract may be terminated due to a breach or the effects of *force majeure* events, while a breach of contract that is serious allows for its cancellation by the aggrieved party [64]; c) by agreement in the form of release and waiver that the debtor is freed from an obligation; [65] d) by novation, which allows for the extinguishment of an obligation or and replacement of one or more existing obligations with a new obligation,; e) by compromise, in terms of which the parties settle a dispute or some uncertainty between themselves[66] (the purpose of compromise is to secure a settlement of a dispute or uncertainty [67]);f) by a supervening impossibility of performance, as when a performance is objectively impossible after the conclusion of contract;[68] and g) on grounds of insolvency, when the person's liabilities exceed his or her assets.[69] The

[61] Decree 16/2012 art 44(2).
[62] Decree 16/2012 art 44(3).
[63] Ibid.
[64] Civil Code arts 437, 790, 798 & 801.
[65] Ibid art 406.
[66] Ibid arts 857 & 436.
[67] Ibid art 432.
[68] Ibid art 801.
[69] Ibid art 429.

UNCITRAL *Guide* indicates that domestic laws often deal with the grounds for termination of the PPP contract before the expiry of its term and the consequences of such termination. The law may authorise the parties to terminate the PPP contract following the occurrence of certain types of events. In practice, however, termination is a frequent cause of dispute and litigation, and recurring arguments for international investment claims.[70]

Given the serious consequences of termination as the provision of the service may be interrupted or even discontinued and the costs of the ensuing litigation can be high, under most circumstances termination should be regarded as a measure of last resort. Thus, the conditions for the exercise of this right by either party should be carefully considered.[71] The Mozambican PPP Law provides for the circumstances which can determine the termination of the PPP contract. These include: end of its term or upon accomplishment of its goals (1); breach by either party of the agreed obligations (2); the consequences of *force majeure* events (3); and on the grounds of 'public interest' (4).

3.4.1 *End of the term of the contract*

As said above, a contract may fix a specific period for its duration and it terminates automatically at the end of such period.[72] Also, the PPP Law provides that the PPP contract comes to its natural end at its agreed term (30 years for greenfield (being developed by the first time) and 10 years for brownfield (existent/mature) projects); upon the attainment of its goals, or according to its economic and financial attractiveness.[73] In any case, the contracting parties are, in the contract, urged to stipulate the causes for contract termination and the respective mechanisms of compensation, if applicable.[74]

3.4.2 *Cancellation due to breach of contractual obligations*

A breach of contract constitutes an unlawful infringement of the other party's rights that arise from a contract.[75] According to the *pacta sunt servanda* doctrine, the parties to a contract are bound to respect their agreement and to perform all the obligations that it imposes upon them. If either party, by an act or omission and without lawful excuse, fails

[70] UNCITRAL *Legislative Guide on Public Private Partnerships* (2020) at 199.
[71] Ibid.
[72] Hutchison, Pretorius & Du Plessis *op cit* note 1 at 379.
[73] PPP Law art 22(1).
[74] PPP Law art 26(1).
[75] Hutchison, Pretorius & Du Plessis *op cit* note 1 at 314.

in any way to honour his or her contractual obligations, he or she commits a breach of contract.[76] For that the law provides the injured/aggrieved party with remedies.

Remedies for breach of contract include specific performance, interdict, declaration of rights, cancellation and damages. The first three may be regarded as methods of enforcement and the last two as recompense for non-performance. The choice among these remedies rests primarily with the injured party, the plaintiff, who may choose more than one of them, either in alternative or together.[77]

The ordinary remedies for breach of contract are specific performance, cancellation and damages. Specific performance is, on the one hand, the primary remedy for breach of a contract and is, in principle, available to the wronged contracting party. However, specific performance is not based on the breach as such but on the contract itself.[78] Cancellation of contract on the ground of breach of contract, on the other hand, is contrary to the purpose of the contract and is therefore a remedy which is available only in exceptional circumstances. A contracting party who is entitled to cancel the contract must choose between enforcing and cancelling the contract.[79] The remedy of damages for loss suffered as a result of breach of contract is available irrespective of whether the contract is upheld or cancelled.[80] Thus, early discharge of the PPP contract may occur when contractual obligations are not being met by one or both parties, due to breach of the contract.[81]

However, because of the disruptive effects of termination and in the interest of preserving the continuity of the service, it is not advisable to regard termination as a sanction for every instance of unsatisfactory performance by the private party. On the contrary, it is generally advisable to resort to such an extreme remedy only in instances of 'particularly serious' or 'repeated' failures to perform, especially in cases where it can no longer be reasonably expected that the private party will be able or willing to perform under the PPP contract.[82]

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[76] Ibid at 278.
[77] Christie & Bradfield *op cit* note 10 at 616.
[78] L F Van Huyssteen, G F Lubbe & M F B Reinecke *Contract: General Principles* (2016) at 366.
[79] Ibid.
[80] Ibid.
[81] World Bank *Report on Procuring Infrastructure Public Private Partnerships: Assessing Government Capability to Prepare, Procure, and Manage PPPs* (2018) at 60.
[82] UNCITRAL *op cit* note 70 at 201.

3.4.3 *Discharge due to the effects of force majeure events*

Also, a contract may early be discharged in circumstances where neither party is at fault, [83] such as effects from *force majeure* events. A distinction has to be made between *force majeure* events which can cause a temporary interruption in the provision of service under the PPP contract, which are dealt with as relief events, and those which destroy the project and so make it impossible to continue without major new investment. The latter should generally be covered by insurance, so if the facility is not rebuilt such cases can simply be regarded as defaults by the project company, and treated accordingly. Obviously the project company will receive little, if anything, as a termination sum but will receive the insurance proceeds.[84]

Grounds for termination in instances where unilateral and premature termination occurs, as well as their consequences, should be specifically defined and set out in the contract. Ideally, early termination should be the last resort because it is costly.[85] Once a contract has been terminated, either on schedule or prematurely, many consequences emerge, such as the requirement to provide monetary compensation and, as well as, project site handover. The identification of such consequences in the contract ensures, among other things, that the private partner is not put in a disproportionately disadvantaged situation should the public partner decide to end the contract,[86] for instance, in the circumstances of public interest as contemplated by the Mozambican Law. [87]

3.4.4 *The governments' public interest argument*

Contracting practices in some countries, public authorities procuring construction works traditionally retain the right to terminate the contract for reasons of public policy/public interest, that is, without having to provide any justification other than that the termination is in the government's interest.[88] Several legal systems belonging to the civil law tradition (as is the case of Mozambique) recognise the power of public authorities to terminate contracts for reasons of public interest or general interest and, in some cases, such a right

[83] World Bank *op cit* note 81 at 60.
[84] E R Yescombe *Public-Private Partnerships: Principles of Policy and Finance* (2007) at 287.
[85] World Bank *op cit* note 81 at 60.
[86] Ibid at 61.
[87] PPP Law art 25(1).
[88] UNCITRAL *Legislative Guide on Privately Financed Infrastructure Projects* (2001) at 158.

may be implied in the government's contracting power, even in the absence of an explicit statutory or contractual provision to that effect. In those legal systems that recognise it, the government's right to terminate a PPP contract for reasons of public interest is regarded as essential in order to preserve its unfettered ability to exercise its functions affecting the public good.[89]

However, the conditions for the exercise of this right and the consequences of doing so, must be carefully considered. The determination of what constitutes public interest may lie within the government's discretionary power so that the contracting authority's decision to terminate the agreement can be challenged, but only under specific circumstances.[90]

A general and unqualified right of the government to terminate the PPP contract for reasons of public interest may represent an imponderable risk that neither the private party nor the money lenders may be ready to accept without sufficient guarantees that they will receive prompt compensation for the loss to be sustained. The possibility of termination for reasons of public interest, where contemplated, must therefore be made known to prospective investors on the earliest possible occasion and must be expressly mentioned in the draft PPP contract circulated with the request for proposal (RFP) documentation.[91]

This is the case of Mozambique where the law provides for the contracting authority to have the right to terminate the PPP contract on the grounds of 'dully justified public interest under the terms of the PPP Law and of the contractually agreed provisions on the matter'.[92] Nevertheless, the Law also indicates that

> the termination of contract for the reasons of public interest (ie public health, public order and security), the reasons of which are not attributable to the private partner or the contracted party, entitles such party the right to compensation calculated by taking into account the remaining time for the recovery of the investment carried out, and the project's profitability level, if no other criteria for the calculation thereof were contractually agreed upon.[93]

As is further developed in section 3.6.3, a PPP contract may also come to its end due to the occurrence of a *force majeure* event, the effects of which will objectively make the performance or continuation of the contract impossible. In this circumstance, neither

[89] Ibid.
[90] Ibid.
[91] UNCITRAL *op cit* note 70 at 205.
[92] PPP Law art 25(1).
[93] PPP Law art 25(2).

party can be held responsible.[94] In the next section conflict/dispute resolution mechanisms suitable to PPP contracts will be discussed.

3.5 Conflicts resolution methods suitable to PPPs

The terms 'conflict' and 'dispute' will, in the course of this thesis, be used interchangeably. A conflict is more than just a disagreement. It is a situation in which one or both parties perceive a threat — whether or not the threat is real.[95] Conflicts trigger strong emotions, so that if one is not comfortable with its emotions or able to manage them in times of stress, they will not be able to resolve them successfully. Conversely, conflict may be an opportunity for growth — the resolution of conflict in a relationship builds trust by creating a sense of security and an understanding that the relationship can survive challenges and disagreements.[96]

A major area of concern at the stage of contract management when it comes to commercial activity is the setting up of an efficient and credible conflict-resolution mechanism which can ensure the settlement of disputes in a time-bound manner.[97] Nevertheless, the possibility of a dispute arising, for example, at the stage of procurement at which the award of contract may be challenged on the grounds of arbitrariness and illegality cannot be ruled out.[98] This is what attracts administrative review, as discussed in section 3.2.

The provision discussing dispute resolution mechanisms is intended to prevent the need for constant renegotiation by allowing changes to be made and problems to be resolved within the framework provided by the contract.[99] There are legal systems where the settlement of disputes arising out of the contracts related to the provision of public services is a matter for the exclusive competence of the domestic judiciary or the administrative courts, and the contracting authority or other governmental agencies

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[94] PPP Law art 18.
[95] Ben E Odigbo, Raphael Valentine Okonkwo & Joy Eleje 'Conflicts management for public private partnership and economic development in Nigeria through social marketing tools' (2014) (11) *International Journal of Economics, Commerce and Management* at 4.
[96] Ibid.
[97] K S Harisankar & G Sreeparvathy 'Rethinking dispute resolution in public private partnerships for infrastructure development in India' (2013) 5 (1) *Journal of Infrastructure Development* at 21.
[98] Ibid at 26
[99] World Bank *Benchmarking Public Private Partnerships Procurement: Assessing Government Capability to Prepare, Procure and Manage PPPs* (2017) at 48.

involved in a dispute may prefer local courts because of a familiarity with the courts' procedures and the language of the proceedings.[100] However, such a view by the contracting authority may not be shared by prospective investors, financiers and other private parties.[101]

Given that the stakes are high in PPP projects, investors, contractors, and money lenders will be more encouraged to participate in projects in economies where they have confidence that any dispute arising out of PPP contractual obligations will be resolved fairly and efficiently.[102] Thus, alternative dispute resolution (ADR) methods — out of the litigating courts — will be more preferable for them. This is to say that, apart from litigation, several ADR modes exist including amicable settlement, mediation, arbitration, and expert adjudication.[103]ADR are frameworks of voluntary and amicable procedures for resolving corporate governance disputes more quickly and at less cost than by using traditional court litigation. It may take several years for complaints to be resolved through litigation, and courts may lack expertise in corporate governance or be overwhelmed by their caseloads, all of which can be highly damaging to company's performance, reputation and market value.[104]

ADR has proven to be a valuable pillar in enhancing access to justice, bringing rapid and less costly consent-based dispute resolution to businesses in many emerging economies.[105] The role of a third-party independent, or a neutral, party offers a useful classification for the three primary types of ADR methods.[106] The most frequently used ADR models are mediation, a facilitation-based process; and arbitration, an adjudication-based process.[107] The adjudication-based process, such as arbitration and expert evaluation, requires enabling legislation to allow for an alternative judiciary forum (other than the courts) to give effect to the decisions, such as arbitral awards.[108] A dispute can undermine a PPP relationship, or be used to strengthen it — and that is why resorting to an appropriate

[100] UNCITRAL *op cit* note 70 at 186.
[101] Ibid.
[102] World Bank *op cit* note 99 at 48.
[103] Ibid at 21.
[104]International Finance Corporation (IFC) *Boardrooms Disputes: How To Manage the Good, Weather the Bad , and Prevent the Ugly* (2014) at 30.
[105] World Bank *Alternative Dispute Resolution Guidelines* (2011) at 1.
[106] Ibid at 8.
[107] Ibid.
[108] Ibid.

conflict resolution mechanism is important for PPPs.[109] Further, the characteristics of PPP arrangements make them prone to conflicts, some of which can be acute and jeopardise the success of projects.[110]

In Mozambique, the Law establishes that

> In order to enable speedy resolution of disputes in view to preserve economic and business dynamism to meet collective needs, the PPP contracting parties must prioritise the resolution of their potential disputes via mediation and arbitration, under the terms of the law.[111]

Clearly, the Mozambican authorities do not consider litigation as the appropriate method for the resolution of disputes arising out of the PPP contracts. Nevertheless, although there are other ADR methods used internationally in the composition of conflicts arising from PPPs, the Mozambican law offers only two methods: mediation and arbitration.[112]

3.5.1 *Mediation*

Mediation is a flexible process of helping to resolve disputes, conducted in confidentiality, in which a neutral person actively assists parties in working forward to a negotiated settlement of a dispute or difference.[113] Mediation relies primarily on the willingness of the parties to engage in negotiation and may be appropriate when a matter is complex or likely to be lengthy while the parties want to keep the dispute confidential.[114] The role of the mediator is to facilitate the parties to overcome their differences, guide them in identifying issues, engage them in joint problem-solving and explore creative settlement alternatives.[115] The mediation process goes further by allowing the mediator to suggest terms for the resolution of the dispute at hand.[116]

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[109] Ibid.
[110] Rui Cunha Marques 'Is arbitration the right way to settle conflicts in PPP arrangements?' (2018)` 34 (1) *Journal of Management in Engineering* at 1.
[111] PPP Law art 39(2).
[112] PPP Law art 39.
[113] World Bank *op cit* note 81 at 12.
[114] Ibid.
[115] Ibid.
[116] UNCITRAL *op cit* note 70 at 178.

In Mozambique, the mediation process can be used in the settlement of disputes arising out of PPPs under the terms of the PPP Law, [117] and the provisions regulated by the Law of Arbitration, Conciliation and Mediation, Law 11/99 of 8 July 1999.[118]

3.5.2 *Arbitration*

Arbitration is typically used for both the settlement of disputes that arise during implementation or operation of infrastructure facility and the settlement of disputes related to the expiry or termination of project agreement.[119] Arbitration plays a large role in the resolution of disputes between investors and the government. Such resolution can be based on a bilateral investment treaty (BIT), a contract between a foreign investor and a host government. Furthermore, in international arbitration processes involving governments, institutions such as the International Centre for the Settlement of Investment Disputes (ICSID) play a key role in handling investor-government disputes.[120] Mozambique has also signed BITs with many countries, including with South Africa, with the objective of protecting investments from both countries.[121] Thus, in the case of disputes arising out of PPP projects involving South African investors in Mozambique, this BIT would certainly provide guidance in facilitating the settlement of those disputes. However, for the benefit of investors, it is worth noting that the Mozambique-South Africa BIT has never entered into force, and recently, South Africa has ended its BITs.

Arbitration is preferred — and in many cases required — by private investors and money lenders, since arbitral proceedings are better suited to the needs of the parties and to the specific features of the disputes likely to arise under the project agreement. Furthermore, the parties can choose as arbitrators, persons who have expert knowledge of a particular type of project, and arbitral proceedings may be less disruptive of business relations between the parties than judicial proceedings.[122] Most of the concession agreements (such as PPP contracts) do provide for arbitration due to its relative advantages

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[117] PPP Law 39(2).
[118] Lei nº 11/99 de 8 de Julho, Lei sobre Arbitragem, Conciliação e Mediação (hereafter the Law of Arbitration, Conciliation and Mediation), arts 60, 61, 63, 64, 65 and 66.
[119] UNCITRAL *op cit* note 70 at 183.
[120] World Bank *op cit* note 81at 11.
[121] Bilateral Investment Treaty between the Mozambican and South Africa Governments signed in 1997, available at *http://investmentpolicyhub.unctad.org/Download/TreatyFile/5192,* accessed on 10 Oct 2017
[122] World Bank *op cit* note 99 at 11.

in terms of speedy conflict resolution thanks, in part, to the technical know-how of the adjudicators.[123]

Arbitration in Mozambique is governed by the Law of Arbitration, Conciliation and Mediation (Law 11/1999). It provides the framework for legally binding arbitration awards with limited grounds for challenge in a time-bound manner.[124] As regards PPP contracts, the Law[125] provides that '[t]he resolution of disputes arising in any phase of the PPP is processed under the terms contractually agreed between the contracting parties, complying with the applicable legislation in force on the matter'.[126] The composition of conflicts arising from any phase of the PPP project will follow the terms contractually defined and agreed to between the contracting parties.[127] Additionally, the PPP regulatory framework under art 37 of the Decree 16/2012 stresses that the contracting parties must agree on a conflict resolution clause which will govern the composition of conflicts once they arise. This means that the contracting parties can agree to submit the disputes arising from the PPP contract to an arbitral decision,[128] including resorting to arbitral bodies created under international conventions, such as the ICSID.[129]

The key elements of the legal regime of the PPP contract in Mozambique have been reviewed above, as has, among others, the formation, implementation, and discharge of the contract. Furthermore, the methods for the resolution of potential conflicts arising out of PPPs have been discussed. In the section which follows risk management strategies advanced in the PPP Law, and other factors able to affect the development and success of PPPs are analysed.

3.6 Risk management strategies in the Mozambican PPPs

As articulated above, PPPs are not a panacea for all the ills facing a variety of economic and social sectors. Instead, they are simply a tool to be used to unlock critical bottlenecks that causes a chronic deficit in the provision of public services.[130] This was articulated in

[123] Harisankar & Sreeparvathy *op cit* note 97 at 28.
[124] The Law of Arbitration, Conciliation and Mediation arts 12, 44 and 45.
[125] PPP Law.
[126] PPP Law art 39(1).
[127] Ibid.
[128] Law of Arbitration, Conciliation and Mediation art 10(1).
[129] Law of Arbitration, Conciliation and Mediation arts 52 and 54.
[130] Arslan Aziz, Deepa Karthykeyan, Anket Kumar Chatri et al *Public Private Partnerships in India: Lessons from Experiences'* (2012) at 44, available at

chapter 2. Attached to PPPs are risks sometimes not adequately evaluated, either because some do not come to the fore during the negotiation of the contracts, or because they are not seen as such and are, therefore, overlooked or swept under the carpet in order to get the deal done ('don't worry, the implementation team will figure this out').[131]

Risk can be defined as the measurable probability that the actual outcome of a project will deviate from the one expected because of the occurrence of objectively or subjectively ascribed factors or events.[132] It is the likelihood of unforeseen factors occurring which would adversely affect the successful completion of a project in terms of cost, time and quality;[133] or it refers to those events which, in the assessment of the parties, may have a negative effect on the benefit they expect to achieve with a project. While there may well be events that would represent a serious risk for all the parties (for example, in the case of the physical destruction of a building by a natural disaster), each party's risk exposure will vary according to its role in a project.[134]

Risk management in PPPs can be a complex task, and a systematic approach is required where risk is conceptualised, assessed, reviewed and communicated through the project life cycle. Some important factors that management must pay attention to with regard to risk management in PPPs include sufficient planning, clear decision-making structures and ownership outlines, performance management of projects and communication of risk.[135]

Under the theoretical assumption that contracts are always incomplete, as with the passage of time they need further renegotiation and investments are subject to holdups, it is suggested that ownership should reside with the party that cares most about a project in the provision of the public goods, as this will provide the basis for thinking systematically

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<*https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/186989/Report-PPPLessonsFromExperiences270812*>, accessed on 10 March 2016.

[131] World Bank PPPIRC *Public Private Partnership in Infrastructure Resource Centre* available at *https://ppp.worldbank.org/public-private-partnership/about-pppirc*, accessed on 4 May 2018.

[132]OECD,*Public-Private Partnerships: In Pursuit of Risk Sharing and Value for Money* (2008) at 48.

[133] George Anachebe Nwangwu *A Risk-based Approach to Enhancing Public Private Partnership Projects in Nigeria'* (unpublished PhD thesis, University of Hull, 2013) at 88.

[134]UNCITRAL *op cit* note 70 at 38.

[135] Danielle Nel *International Best Practice in Public Private Partnership and Risk* Management (2013) 24, available at <*https://www.researchgate.net/publication/277774154_International_Best_Practice_in_Public_Private_Partnerships_and_Risk_Management*>, accessed on 26 November 2019.

about the involvement of the private sector.[136] Thus, when it comes to risk management in PPPs, the procedure is to allocate risks to those best able to manage them in the public or private sectors, thereby providing incentives for sustained and effective performance over time.[137] However, the conundrum for the public authority is what to do about risks over which neither party can exert control, [138] for example, the effects of *force majeure* events.

The literature indicates that, in managing risk, the first step is to identify and determine all risks relevant to a PPP, possibly breaking down risks associated with the various phases of the project.[139] It is suggested that a 'risk register' be used to record all risks and serve as a checklist throughout the lifecycle of the project.[140] Furthermore, when it comes to risk allocation, the basic principle is of risk sharing between the public and private parties, and each party should bear the risk it can manage best. Risk allocation between the public and the private party is one of the key elements of a PPP contract.[141,142.]

It must be underlined that the main objective of a PPP risk management strategy cannot be the transfer of all risks to the private party, but rather, as referred to earlier, to allocate risks to the party best positioned to manage them. [143] In this context, 'best' means the party that can manage or prevent the risk at least cost.[144] However, there is no unlimited risk bearing, for private firms and their money lenders will always be cautious about accepting major risks beyond their control, such as exchange rate risks, or the risk of existing assets. If they bear these risks then their prices for the good or service will reflect this.[145]

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[136] Tahir M Nisar 'Risk management in Public Private Partnership contracts' (2007) 7 *Public Organization Rev* at 1–19.
[137] Ibid at 5.
[138] Ibid.
[139] World Bank *Attracting Investors to African Public-private Partnerships: A Project Preparation Guide* (2009) at 24.
[140] Ibid.
[141] Ibid at 25.
[142] Bernardin Akitoby, Richard Hemming & Gerd Schwartz *Public Investment and Public-Private Partnerships* (2007) at 11.
[143] Kosie Jacobus Haarhoff *Public Private Partnerships As An Alternative Service Delivery Option: A Multiple Case Study of the Healthcare Sector in South Africa* (unpublished MPA thesis, University of Stellenbosch, 2009) at 128.
[144] Philippe Burger & Ian Hawkesworth 'How to attain value for money: Comparing PPP and traditional infrastructure procurement' (2011) 1 *OECD Journal on Budgeting* at 4.
[145] World Bank available at <*https:ppp.worldbank.org/public-private-partnership/overview/ppp-objectives*>, accessed on 5 July 2017.

Once the risks and their potential impacts are identified and allocated, the parties must work to counter those risks that they are able to manage. According to the OECD, there exist five major types of responses to risk. [146] These are, first, risk avoidance, whereby the source of risk is eliminated or bypassed by avoiding project exposure to it; secondly, risk prevention, working to reduce the probability of risk materialisation; thirdly, risk insurance, such as buying an insurance plan; fourthly, risk transfer, by relocating risk, as was said, to parties who can best manage it; and, finally, risk retention, when risk is internalised because the cost of its management cannot be avoided and cannot be transferred to one single party.[147]

The risk management strategy advanced by the Mozambican PPP Law calls for the need for the contracting parties to abide by the general principles of risk prevention and mitigation.[148] It is within these parameters that the Law provides that the prevention and mitigation of risks by the contracting parties must constitute their permanent obligation in the entire PPP lifecycle. The following principles need, however, to be observed:[149] (i) risks arising from professional, technological, commercial or management capacity, whose occurrence produce a negative impact on the performance of the project, are of the responsibility of the private or contracted parties to ensure their prevention and mitigation;[150] and (ii) while risks from political and legislative decisions, conflict of interest from public institutions, land concession, and public planning, are of the responsibility of the state for their prevention and mitigation.

3.6.1 *Risks falling under the responsibility of the government*

The GoM or any state contracting party is responsible to ensure the prevention and mitigation of: [151] (i) political and legislative risks arising from unilateral adoption, by the GoM or state institution, of measures or practices which can cause adverse effects on the normal implementation, operation and management of the PPP project or its competitiveness and economic or financial performance; (ii) any conflict of interests of an

[146] OECD *op cit* note 132 at 55.
[147] Ibid.
[148] PPP Law art 15.
[149] PPP Law art 15(1).
[150] PPP Law art 15(1)(a).
[151] PPP Law art 16.

institutional nature arising from full or partial concentrating power, in the same state entity, of regulatory functions and licensing authority; and (iii) any conflict of interest relating to the functions of the land-use rights grantor and of those of public planning.[152]

3.6.2 *Risks to be managed by the private party*

The PPP Law lists the risks to be managed by the private and contracted party, such as:[153] (i) risks of conflicts of interests arising from the fact that one of them or both private partner and contracted party are, or have been, responsible in the occurrence of conflict of interest of business and political nature; (ii) conflicts of interests from the undertaking's interests and the private partner or contracted party's interests or involvement with those vested with public authority, political or governmental functions or other functions of public authority; (iii) financial and exchange rate risks, fiduciary risks arising from the improper use of financial resources made available for the undertaking, risks of unsustainable undertaking's debt, tax risks arising from tax evasion or from undue enjoyment of a tax rights regime not applicable to the project; (iv) risks of defective conception, design, engineering, and construction of the undertaking; (v) commercial, operational, management, and performance risks of the undertaking; (vi) risks of decrease in market demand or supply, excluding agreed exceptional situations; (vii) risks of squandering residual value of the undertaking assets, and (viii) environmental impact risks arising from facts subsequent to the taking over of the project.[154]

3.6.3 *Management of effects of* force majeure *events*

Finally, the PPP Law sets out the framework for the mitigation of effects resulting from *force majeure* events in which no one party is capable to exert control.[155] In this, the PPP Law establishes that the effects arising from *force majeure* events must be the object of mitigation under fair terms for both parties, the contracting party and the contracted party, as well as for affected third parties, in accordance with the liability, obligations, and rights contractually undertaken and applicable to each party.[156] At this stage, a question may arise

[152] PPP Law art 16.
[153] PPP Law art 17(1).
[154] PPP Law art 17.
[155] PPP Law art 18.
[156] PPP Law art 18.

out of what legally are — or will be — objectively considered as fair terms for both parties. Clearly, one can be left to think that this will depend on practical considerations and the moods of the parties or actors involved.

The review of the risks enshrined in the PPP Law has now been concluded so the discussion moves on to examine risks that are considered in this study to be the result of 'other factors' capable of negatively impacting on the success and sustainability of PPP projects in Mozambique. These are context-specific risks which will probably be overlooked at the negotiation table, or somehow left to the implementation team when raised.

3.7 Analysis of context-specific factors capable of affecting PPPs

As mentioned in section 3.6, the legislative branch of the government has in the PPP Law identified and enacted risks that contracting parties must consider when developing their PPP initiatives. However, the PPP Law does not (and even could not) present all legal, political, socio-economical, and institutional risks susceptible of jeopardising the success of PPPs in the country. These are context-specific risks that in the short or long run can constitute serious threats to a successful implementation of PPP projects.

While Mozambique elicited much optimism for its impressive growth in the post-civil war period until about 2014, its subsequent performance has disappointed many.[157] The escalation of public debt, lack of transparency, poor accountability system, and pervasive corruption, coupled with non-streamlined regulatory frameworks, and institutional weakness, are all factors that can adversely impact on PPPs. For this reason, the investigation has understood the relevance of providing some discussion of these factors in the hope of contributing to a better understanding of the context in which prospective PPP investors will operate, enabling them to take appropriate and informed decisions in any stage of the PPP project lifecycle. This is to say that both public and private parties must be aware of the real challenges these factors pose to the development of PPPs. The following are just some examples of such factors (their order of presentation does not indicate their special importance). In fact, all of them constitute serious threats with potential negative impacts on the performance of PPP projects.

[157] Aslak Jangård Orre & Helge Rønning *Mozambique: A Political Economy Analysis* (2017) at *x*.

3.7.1 *Uncertainty and non-streamlined regulatory framework*

Given the long-term nature of the PPPs as well as the complexity associated with them,[158] such as the complexity of the composition of the actors — i.e. the fact that many actors are involved — makes PPPs difficult and complex and increases the risks of the decision-making process and poses a difficult managerial challenge for the actors; the institutional fragmentation and complexity of decision-making in PPPs, such as institutional rules, roles, and cultural habits based on a public-private division, and the strategic choices and objectives of both public and private actors.[159] It is difficult to identify all possible contingencies during project inception as events and issues may arise that were not anticipated by the parties during the negotiation. It is thus more likely than not that the parties will need to renegotiate the contract to accommodate these contingencies.[160] Different events, including a change in government policy over time, a decline in demand for the infrastructure service, macroeconomic risks, and changes in the political environment, can all impact on a PPP project negatively.[161]

Furthermore, as far as the Law and its regulatory framework are concerned, private firms want to know, in the first place, what the rules of the game are and whether they are to be respected by the government.[162] In this respect, some argue that public authority should be granted some discretionary powers to decide upon PPP projects — for which *ex-ante* design is hard to complete and *ex-post* adaptations are expected — when negotiating directly with potential suppliers and thus they recommend that the public authorities should be left with the open possibility of directly negotiating to a certain extent, especially for PPPs that are complex and may not rely automatically on weighted criteria to define an offer.[163] Others with practical experience observe that Mozambique's PPP Law suffers from what appears to be excessive discretion on the part of the government in directly

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[158] K S Jomo, A Chowdbury, K Sharma et al *Public Private Partnerships and the 2030 Agenda for Sustainable Development: Fit for Purpose*? (2016) at 13, available at <*www.un.org/esa/desa/papers/2016/wp148_2016*>, accessed on 7 July 2017.

[159] Erik-Hans Klijn & Gerrit R Teisman 'Institutional and strategic barriers to Public Private Partnership: An analysis of Dutch cases' (2003) 23 (3) *Public Money & Management* at 137–146.

[160] World Bank *op cit* note 81 at 99.

[161] H K Yong (ed) *Public Private Partnerships Policy and Practice: A Reference Guide* (2010) at 15

[162] World Bank *op cit* note 81 at 96.

[163] Antonio Estache & Stephanie Saussier *Public Private Partnerships and Efficiency: A Short Assessment* (2014) at 10.

negotiating with private investors.[164] Flexibility in deciding on the scoring according too many objectives of the government is also a risky attribute that can lead to corruption in the bidding system.[165] For instance, phrases such as 'in the public interest' alongside 'justified ponderous situations' enable the GoM to authorise direct negotiations as well as the award of contracts[166] whenever it suits the GoM, with no publicly convincing explanation as to the arguments behind its decision.

The GoM's decision to cancel the water supply services management contract between the Water Investment Fund (FIPAG) and Aguas de Portugal was based (it was alleged) on the grounds of 'public interest'. Similarly, the cancellation in 2011 of the concession contract that was awarded in 2002 for a period of 25 years to the RITES & Ircom, an Indian consortium, did not send a positive signal to prospective investors, at the same time it cost taxpayers money as the Indians launched international arbitration proceedings against the GoM, demanding a compensation of around US$ 80 million. This cancellation was on the grounds of alleged delays in the completion of the rehabilitation of the Beira rail network, under the Companhia dos Caminhos de Ferro da Beira (CCFB).The conclusion is that the legal provision awarding the GoM the right to invoke/refer to the 'public interest' raises the problem of ambiguity as to what will constitute a 'public interest' will depend on who has the legal prerogative to define it and, yes, it may lead to an arbitrary definition as to what, over time, will be the 'public interest' to be served with greater urgency just to circumvent or bend the general procurement rule (of public and competitive bidding), or just to cater for vested interests, including corrupt acts.

Another daunting issue for potential PPP investors, particularly the ones coming from jurisdictions different from the civil law family, pertains to the juridical nature of the PPP contract, as some have analysed PPPs as a hybrid governance arrangement for the provision of collective goods.[167] As a contract, with all its legal implications, this hybrid character of the PPP institution raises questions as to whether it is a public or private

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[164] PPP Law art 13(2)(3).

[165]Ronald Fischer & Vasco Nhabinde *Assessment of Public-Private Partnerships in Mozambique* (2012) at 6, available at *<http://www.theigc.org/wp-content/uploads/2014/09/Fischer-Nhabinde-2012-Working-Paper1.pdf>*, accessed on 20 March 2016.

[166] PPP Law art 13(1)(3).

[167] Philipp Plattberg, Frank Biermann, Sander Chan et al 'Introduction topartnerships for sustainable development' in Philipp H. Pattberg, Frank Biermann, Sander Chan et al (eds) *Public Private Partnerships for Sustainable Development: Emergence, Influence and Legitimacy* (2012) at 3. .

contract and, consequently, which jurisdiction shall be competent for the resolution of disputes once they arise. Any response will have implications for the perception, behaviour and positioning of potential investors, especially the international ones. In the Mozambican civil law system, the PPP is regarded as a public contract where the state have more supremacy than the private operator having on its side the strong hand of public law, especially of administrative law.

Finally, the regime of PPP Mozambique is anchored on three instruments. These include the PPP Law 15/2011 of 10 August, the Decree 16/2012 of 4 July, and the Decree 69/2013 of 20 December. In addition, according to art 38 of the PPP Law, investors in PPPs are required to comply with: a) specific legislation of the sector in which the PPP is implemented; b) applicable investment legislation; c) further legislation applicable in Mozambique; and d) international conventions or treaties signed and ratified under the terms of the law by the Republic of Mozambique. The fact that there are three legal instruments regulating the PPPs (the Law 15/2011, and the Decrees 16/2012 and 69/2013) raises the question over the reasonableness of their existence.

The difference between the two Decrees (16/2012 and 69/2013) to be highlighted is that the first regulates an LSP while the second is devoted to SSP. According to art 2 (2)(b) of the PPP Law, an LSP means an undertaking of an investment project which exceeds, with reference to 1 January 2009, a threshold value of 12.5 billion meticais (the Mozambican currency), while the Decree 69/2013 is a simplified PPP regulation for SSPs for an investment project whose value is not superior to 5 million meticais (see art 1(2) of the Decree 69/2013). Another difference is related to the duration of the PPP contract. For instance, for LSPs the period of duration is 10 to 40 years while for SSPs it is 6 to 15 years.

Even with these minor differences, it is hard to find substantive ones between the three instruments (Law 15/2011, Decree 16/2012 and Decree 69/2013) that might have justified the enactment, by the GoM, of the two Decrees on top of the PPP Law. Perhaps, one can speculate, it is due to the fact that the Decree 69/2013 applies to SSPs governed and protected only under the domestic law, while the Decree 16/2012 regulates LSPs that may also be covered by international law under the IIAs.

In practice, the Mozambican PPP regime reveals a double (triple) regulation, since the subject regulated in the three instruments is the same and, further the fact is that the

articulation between the different legal instruments is not clear. The existence of the three legal instruments regulating the same subject may create confusion and difficulties in understanding the PPP system, at the part of prospective investors, especially the international ones, who may consider the Mozambican regime fragmented and cumbersome and, consequently, it may prevent them from materialising their investments in the country.

To mitigate the challenge the double regulation poses to PPPs, the GoM should consider streamlining the PPP regime by, for instance, consolidating the three instruments, and bringing them into a single PPP regulatory framework.

3.7.2 *Weak capacity of state institutions*

Many developing countries lack the critical mass of effective capacity to formulate and implement macroeconomic and strategic policies.[168] The creation of capable states is a challenge confronting several countries around the world and, although many have adopted significant political and economic reforms from the 1990s onward, most continue to suffer from a lag in the capacity of the state bureaucracy to carry out functions that are required by market economies and political democracies.[169] In most developing countries weak administrative capacity sets an important constraint to public sector efficiency and effectiveness.[170] Central capacity is weak, stretched thinly among a handful of senior officials who must attend to numerous tasks. These strains are compounded by problems in the bureaucracy: low pay at senior levels, rampant political patronage, and an absence of meritocratic recruitment and promotion.[171]

In Mozambique, too, institutional capacity building in public administration in economic analysis and policy formulation, implementation, and monitoring remain a challenge,[172] as the scarcity of skilled workers is an acute problem.[173] Sector-wide strategies in, for example, roads, health, and public financial management, have paid more

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[168] World Bank *The State in a Changing World* (1997) at 83.
[169] Merilee S Grindle *Getting Good Government: Capacity Building in the Public Sector of Developing Countries* (1997) at 26.
[170] S Schiavo-Campo *Building Country Capacity for Monitoring and Evaluation in Public Sector: Selected Lessons of International Experience* (2005) at 2.
[171] World Bank *op cit* note 168 at 83.
[172] D C Ross *Mozambique Rising: Building a New Tomorrow* (2014) at 22.
[173] World Bank *Capacity Building in Africa: An OED Evaluation of World Bank Support* (2005) at 26.

attention to capacity constrains in the implementation of Mozambique's public sector reform programme.[174] The World Bank has tried to help Mozambique in addressing this problem, primarily by financing training of civil servants. Nevertheless, training is only part of the human capacity building solutions, because low salaries, poor working conditions, and alternative employment options undermine the retention of trained staff.[175]

It is important that the public sector is able to correctly identify and select projects for which PPPs would be viable; to structure contracts to ensure an appropriate pricing and transfer of risks to the private partner; establish a comprehensive and transparent fiscal accounting and reporting standards and systems for PPPs; and establish regulatory and monitoring frameworks that ensure appropriately pricing and quality of service.[176] This is necessary if PPPs are to become effective instruments for the improvement of service delivery, efficiency, and development impact over and above those services that are attainable through traditional public procurement. In other words, the development of projects under PPPs demands the existence of appropriate competence and expertise in project viability assessment, the capacity to compare options at hand, and expertise in contract drafting, negotiation, implementation and monitoring.

PPPs involve a complexity of procedures, a multitude of multiple actors, big sums of money, and a long-term horizon of a minimum of 10 and a maximum of 30 years.[177] The management of all these factors is necessary to ensure success in PPPs and poses serious challenges for the local administration's capacity and expertise. As mentioned above, however, such capacity and expertise are not present in Mozambique's public sector and will be unable to match those of multinational corporations, who will be the most likely private counterparts in PPP projects. Because of the weak capacity of the state/public sector, PPP projects are likely to be doomed to fail if such challenges are not adequately addressed.

[174] Ibid at 22.
[175] Ibid at 26.
[176] Jomo, Chowdhury, Sharma et al *op cit* note 158 at 16.
[177] PPP Law art 22.

3.7.3 *Lack of transparency*

Transparency is one of key principles required for good governance, for corruption flourishes where both transparency and scrutiny are lacking. Transparency in public procurement can be understood as consisting of the publicity for contract opportunity and for the rules governing the processes and procedures. It is a principle of rule-based decision making that limits the discretion of procuring entities, and makes it possible to establish whether the rules have been followed – and to ensure their enforcement where they have not.[178]

Transparency also suggests that the procurement procedure is conducted in an open and impartial manner and that the parties to the process are aware of information on specific procurements. In addition, participants to the procurement process are subject to the rules applicable to the process.[179] Transparency and disclosure in all processes are essential to ensure that PPPs provide high-quality infrastructure services efficiently.[180] Conversely, the lack of transparency and a failure to use competitive procedures, as have been the case in most PPP contracts so far awarded in Mozambique, carry the risk of feeding corruption and inevitably result in the development of projects that are unsuitable, of a low quality and provide little VfM.[181]

VfM, one of the goals of transparency in public procurement, does not simply mean acquiring the goods at the lowest price. The quality of goods and the terms upon which the goods or services are procured are also important considerations in achieving VfM. One of the objectives of VfM can also be seen in ensuring that goods, works or services acquired are suitable — in the sense that they meet the requirements for the task in question, and that they are not over-specified (gold-plated), concluding an agreement that secures what is needed on the best possible terms (which does not necessarily mean the lowest price) and ensuring that the contracted partner is able to provide the goods, works or services on the agreed terms.[182]

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[178] Quinot & Arrowsmith *op cit* note 12 at 17.
[179] Sope Williams-Elegbe. 'A perspective on corruption and public procurement in Africa'in Geo Quinot & Sue Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) at 353.
[180]Akitoby, Hemming & Schwart l *op cit* note 142 at 10.
[181] World Bank *op cit* note 81 at 66.
[182] Quinot & Arrowsmith *op cit* note 12 at 9.

A lack of transparency is, however, embedded in Mozambique's culture of secrecy that was entrenched in its past one-party-state Marxist regime (1975–1990). This culture still dominates the government's bureaucracy, contradicting all officially pronounced commitments for the building of a sound public procurement system. The recent debt scandal of over USD2.5 billion of Mozambican illegal loans secretly taken by the preceding government, apparently to avoid public, media, and donor scrutiny and reactions, [183] is clear evidence of how a lack of transparency in the management of public affairs, is a serious problem in the country. In this case the government violated the national laws as it did not submit the request for the loan to the Assembly of the Republic for assessment, approval and monitoring, as required by the Constitution of the Republic of Mozambique (CRM),[184] as the loans exceeded the top limit of USD515 million placed on government borrowing in the relevant annual budget appropriation bill.[185]

It is within the aforementioned context that most PPP contracts were awarded through direct negotiation, with no publicly open and competitive tender. This stemmed, in part, from the fact that the PPP Law allows for excessive and non-regulated discretion on the part of the government in deciding which modality to use in each case at hand, whether to go to the public and competitive route or direct negotiation for contract award. The excessive government's discretion in deciding on PPP processes can make corruption endemic.

The above having been said, it is justifiable to ask what it is that can be done to further strengthen the transparency of the PPP process. Some may be tempted to suggest the production of more laws and regulatory frameworks as a remedy. Others will express scepticism, however, as to the potential for such measures to be effective in the current Mozambican context. This is particularly so when, as noted, no law or regulation could have prevented such a blatant misuse of power and influence to override constitutional and legal requirements as displayed in the recent illegal loans case.[186] Yes, those who decided to take illegal loans knew what they were doing, including that they were violating the

[183] David Aled Williams & Jen Isaksen *Corruption and State-backed Debts in Mozambique: What Can External Actors Do*'(2016) at 11.
[184] Article 178(2)(p) of the Constitution of the Republic of Mozambique, as reviewed by Law n°.1/2018
[185] Williams & Isaksen *op cit* note 183 at 11.
[186] Ibid at 12.

Constitution and other laws in place in the Republic of Mozambique. For this reason, they preferred to hide them from public, media, civil society, Parliament, international financial institutions (IFIs), and the donor community at large. A lack of transparency can affect the success of PPP projects and, hence, prospective investors must seek to understand, in the first place, the underlying political economy behind this reality.[187]

3.7.4 *Pervasive corruption*

The issues around transparency or the lack of it have been discussed in the above subsection. What follows now is a discussion of one of the most egregious of developmental problem: corruption. Corruption can be defined as a behaviour which deviates from the formal duties of a public role because of private (personal, close family, private clique) pecuniary or status gains.[188] Corruption in the public bureaucracy includes bribery, kickbacks, 'gifts' and illicit payments to government officials in their capacity as public servants, in order for the giving party to achieve a stated purpose.[189]

Public procurement is one of the areas of government activity in which bureaucratic corruption manifests, for there are several reasons why public procurement is susceptible to corruption: the large sums of money involved, the nature of the relationship between the decision-maker and the public body, the measures of unsupervised discretion, bureaucratic rules, budgets that may not be tied to specified goals as well as non-performance-related pay and low pay.[190] All these open the opportunity for corrupt behaviour. Many of these behaviours involve various forms of collusion between government officials and bidders, including the awarding of contracts on the basis of bribes; awarding contracts to firms in which one has personal interest; awarding contracts to firms in which one's friends, family or business acquaintances have an interest; and awarding contracts to political supporters or to firms that have provided financial support to political parties, or to regions which have voted for a party in government.[191] Such corruption can occur in the execution as well as award of contracts - for example, public officials can collude with the private contracted

[187] Orre & Rønning *op cit* note 157 at 28.
[188] Williams-Elegbe *op cit* note 179 at 338.
[189] Ibid at 337.
[190] Williams-Elegbe *op cit* note 179 at 345.
[191] Quinot & Arrowsmith *op cit* note 12 at 12.

parties or bidders to allow them to claim extra payments for non-performed or non-existent work.[192]

The web of complicities and corruption is a negative factor in the development of PPPs. The issue of the permeability of the protagonists in the complex process leading to the approval and implementation of a PPP contract represents a serious risk to the development of PPP projects. For instance, the political decision-maker of today may be the private partner of tomorrow and/or simply be in a functional and/or economic dependency of the project he/she approved yesterday. Thus, the dismantling of all networks of complicity has been a matter of concern in various international jurisdictions.[193]

Mozambique is a country where corruption has reached very worrying levels.[194] Corruption at all levels of government (grand and petty) remains a defining characteristic of Mozambique's political economy, leading to annual losses of hundreds of millions, possibly billions, of US dollars, and one of the consequences is the very low quality of most public services.[195] It is thus not surprising that over two years the country has dropped six places in the Global Corruption Perception Index. This acute drop by Mozambique cannot also be unconnected to the illegal debts that were incurred under the stewardship of the Guebuza presidency.[196]

The learning point is that the iterative processes of corruption risk assessment are required, focusing not only on fiduciary risks to investments, but on risks that arise from political economy dynamics.[197] Although the Mozambican government has passed anti-corruption legislation, the implementation thereof has, however, been very poor and it is often thought that the existence of the legislation is a measure of window-dressing, while the lack of implementation indicates the absence of a genuine effort on the part of the GoM to eliminate political corruption.[198] Corruption and the entanglement of the political elite in business dealings and government tenders remain a persistent problem in

[192] Ibid.
[193] J M Lopes *O Espectro da Corrupção* (2011) at 106–108.
[194] Centro de Integridade Publica 'Mozambique registers a further decline in the Global Corruption Perception Index for 2018' (2018) *Corruption Index Transparency International* at 5.
[195] Orre & Rønning *op cit* note 156 *at x*.
[196] Centro de Integridade Publica *op cit* note 194 at 148.
[197] Williams & Isaksen *op cit* note 183 at 12.
[198] Cayley Green & Lisa Otto *Resource Abundance in Mozambique: Avoiding Conflict, Ensuring Prosperity* (2014) at 19.

Mozambique.[199] Thus, prospective investors in PPPs should have this in mind when considering to work in Mozambique.

3.7.5 *The involvement of public officials in commercial activities*

In 2012 a public integrity law was enacted by Mozambique's Parliament,[200] with the hope of preventing conflict of interests, controlling high public officials appetites and involvement in commercial businesses (even in sectors they were entrusted with). The reality is, however, that nothing has changed. There is widespread evidence of high-profile members of government and of the ruling political elite being private partners in projects that involve, in the main, international capital.[201] The Frelimo Party controls the presidency and the parliamentary majority and dominates the Executive as well as the appointment of all staff to both the central and local state apparatus and most institutions, rewarding party-loyalists with jobs and other privileges.[202] Frelimo is the main hub for negotiating access to the principal sources of enrichment in the country, ie state resources and privileges, making it the principal arena for rent seeking. No independent entrepreneurial capitalist or business class exists outside of the Frelimo Party.[203] This means that prospective investors in PPP projects, national or international, will have to take this reality into account, including offering for free a percentage of shares in the capital of businesses to be established or otherwise paying a lump sum to their Frelimo negotiating 'partners'.

Since independence state/public sector officials were at the same time Frelimo Party leaders under the Marxist-Leninist regime established in 1976. After the 1992 Roma Peace Agreement, however, the statist model became embedded off and things started to worsen when power was transferred from the reformist, technocratic and state-centred President Chissano, who had considerably rolled back the Frelimo Party from the state, to the party-centred leadership of President Guebuza. The latter revitalised the party machinery, increased the salaries of Frelimo Party personnel, and brought back the subservience of the state to the Frelimo Party by entrenching the Party in the state and

[199] Ibid at 19.
[200] Law 16/2012 of 14 August, Law of 14 August 2012 (hereafter Law 16/2012)
[201] Edson Roberto de Oliviera Cortês *Old Friends, New Adversaries: The Disputes, Alliances and Business Reconfigurations in the Mozambican Political Elite* (2018).
[202] Orre & Rønning *op cit* note 157 at x.
[203] Ibid at x–xi.

putting it in the driving seat. [204] The 2010 African Peer Review Mechanism reported that there was a wide spread of Frelimo Party cells or units in all public institutions in which they operated with official sanction, while Frelimo members in the public administration were permitted to absent themselves from work in order to attend Party meetings when these were scheduled for during working hours. In this context the Peer Review Mechanism came up with a recommendation that called for an effective separation between political party activities and state institutions. [205]

Two years after the aforementioned recommendation the amendment of art 76 of the Frelimo Party constitution, as approved at its Tenth Congress under the Guebuza presidency, paved the way for the consolidation of a pre-state,[206] and have consequently represented a serious setback to the construction of a modern state based on the rule of law.[207] One of the dominant characteristics of the Mozambican state is the use of political influence for the protection of private businesses. Many of the members of the current governing political elite are involved in private businesses in all sectors of the economy.[208] These are the businesses which can only be sustainable while the political influence continues to last. Such businesses will not otherwise be viable and consequently there is a great need for those political elites to cling to their power in order to protect them.[209]

Substantial evidence from the Centre for Public Integrity of Mozambique demonstrates that there is a tendency among the local governing elite – due to their access to privileged information – to establish their own companies in a hurry in order to extract rents from public contracts or partner with prospective international investors coming in the country, especially in the extractive industries. The case of Nacala Corridor (CDN) is paradigmatic: one of the early international investors was the American Railroad. The presence of a private shareholding company owned by high-profile government and the ruling Frelimo Party officials did not enhance the development of the CDN or, even worse,

[204] Cortês *op cit* note 201 at 26.
[205] African Peer Review Mechanism *Report on the Republic of Mozambique* (2010) at 497.
[206] A neo-patrimonial state where the state is used to serve as an instrument of those in power, including the political party and its leadership.
[207] Gilles Cistac 'The three branches of the government' in Adriano Nuvunga & Marc De Tollenaere (eds) *Governance and Integrity in Mozambique: Practical Problems and Real Challenges* (2013) at 19.
[208] Cortês *op cit* note 201 at 234.
[209] Cistac *op cit* note 207 at 19.

stop the infrastructure degradation and the financial losses.[210] Strangely enough, sometimes, the participation of the Frelimo Party's political elite is unaccompanied by financial capital or expertise, an issue that discourages professional investors from putting their money into the country.

3.7.6 *Poor accountability systems*

Accountability and public accountability, in particular, is the hallmark of modern democratic governance. Democracy remains a paper procedure if those in power cannot be held accountable for their acts and omissions for their decisions, their policies, and their expenditures. Public accountability, as an institution, therefore, is the complement of public management. As a concept, however, "public accountability" is rather elusive. It is one of those evocative political words that can be used to patch up a rambling argument, to evoke an image of trustworthiness, fidelity, and justice, or to hold critics at bay. Historically, the concept of accountability is closely related to accounting. In fact, it literally comes from bookkeeping. Nowadays, accountability has moved far beyond its bookkeeping origins and has become a symbol for good governance, both in the public and in the private sector.[211]

PPPs change the dynamics of public accountability by involving private partners in government decision making and programme delivery. The terms and conditions of this involvement deserve careful scrutiny and understanding by public officials before a PPP contract is entered into, as private partners involve themselves in these arrangements for reasons different from those of the governments. While governments work to serve the public in capital investment projects, private partners are understandably focused on recouping their investment and on generating a profit. Thus, accountability in PPPs requires the creation of proper safeguards to ensure that public services are not compromised for the sake of private profits.[212]

Vertical hierarchy has long been the principal method of controlling the acts of those within organisations, a scenario that is much different from the horizontal

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[210] Borges Nhamire & Jorge Matine *Public Private Partnerships: A Necessary but Problematic Investment in Mozambique: The Case of Mozambique's Nacala Port and Northern Line Concession* (2015).

[211]Mark Bovens, *Public Acountability*, available at <*https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199226443.001.0001/oxfordhb-9780199226443-e-9*>, accessed on 1 July 2020.

[212] John Forrer, James E Kee, Kathryn E Newcomer et al 'Public-private partnerships & the public accountability question' (2010) 70 (3) *Public Administration Review* at 477.

relationships of PPPs. When PPPs are created, each partner enters into the agreement with its own objectives and resources, and exercising accountability in PPPs ultimately depends on clarifying responsibilities in the relationships.[213] PPPs for the most part, however, need to be stewarded by the government in order to ensure that public interests are met throughout the arrangement. The public partner should seek a leadership role that defines the tenor of the partnership. Thus, while both partners develop interdependence in the partnership, ensuring public accountability requires government to play an upper-hand role.[214] This means that governments need, in the first instance, to develop the capabilities to assess their comparative strengths and weaknesses in a prospective PPP arrangement.[215]

The broader welfare benefits of PPP projects should always be taken into account, including social externalities and the implications for sustainable development. In the case of infrastructures which are natural monopolies, independent and professional regulatory authorities are needed to oversee and monitor the functioning of PPPs.[216] Overall, by providing for a transparent and wider stakeholders' consultation, participation and engagement, especially with the local communities, and by safeguarding the public interest and reinforcing democratic accountability, popular acceptance and legitimacy of PPPs constitute the bedrock for successful projects.[217] Thus, strong accountability systems, together with transparency, are the necessary conditions for the success of PPPs, while weak accountability systems can have the opposite effect.

It is well-known that in Mozambique agencies entrusted with enforcing laws suffer from a great deal of political interference to such an extent that they are unable to enforce the stipulated standards of integrity and accountability.[218] Because PPP contracts are long-term agreements, some of them lasting 30 years or more, the need for enforcing accountability is in response to the concerns around the world of governments as well as

[213] Ibid at 478.
[214] Ibid at 479.
[215] Ibid at 478.
[216] Jomo, Chowdhury, Sharma et al *op cit* note 158 at 18.
[217] Ibid at 19.
[217] Ibid at 478.
[217] Ibid at 479.
[217] Ibid at 478.
[217] Jomo, Chowdhury, Sharma et al *op cit* note 158 at 18.
[218]José Jaime Macuane, Lázaro Mabunda & Anastácio Bibiane *Business Integrity Country Agenda: Assessment Report Mozambique* (2016).

many civil society organisations and public sector unions in respect of the public sector costs and risks associated with PPPs.[219] Where accountability systems remain weak, as they are in Mozambique, PPP project proponents will need to take supplementary measures by, for example, devising and agreeing to additional provisions to ensure that accountability is effectively reinforced. This may include developing and sustaining open channels of communication and involvement with diverse stakeholders, specially workers' representatives, media, local communities, and parliamentarians in the monitoring process, pushing for holding accountable both the government and the PPP project implementing agency.

3.7.7 *The escalation of public debt*

Effective debt management remains an intrinsic part of sound public financial management and overall good economic governance. Even though progress has been made in recent years in strengthening countries' capacity to manage public debt, debt management remains a challenge for many developing countries.[220] As regards Mozambique, some commentators ask: 'How can one explain that after having its foreign debt cancelled under the HIPC debt relief initiative in 2004, in 2016 Mozambique's foreign debt was bigger than its GDP, therefore practically unsustainable?'[221] A consequence of international donors' suspension of the budget support programme due to the USD2.5 billion of the government's illegal and secret debts, is that the authorities are currently resorting to local banks to finance their public expenditure. Analysts, including from the IMF, have come out and publicly expressed concerns over the unsustainability of Mozambique's internal public debt that is wiping out local business financing opportunities and driving up the cost (interest rate) of borrowing money.

Apart from the above situation, it must be mentioned that while PPPs can ease fiscal constraints on infrastructure investment they can also be used to bypass spending controls, moving public investment off budget and debt off the government balance sheet. Where this happens, government can be left bearing the risk involved in PPPs and facing

[219] Jomo, Chowdhury, Sharma et al *op cit* note 158 at 1.
[220] United Nations *Improving Public Debt Management*, available at <*https://developmentfinance.un.org/improving-public-debt-management*>, accessed on 4 June 2018.
[221] Orre & Rønning *op cit* note 157 at 2.

potentially large fiscal costs over the medium-to-long term.[222] Also, the contracting private partner might well fail to perform satisfactorily, or even abandon the contract because it is not profitable enough, or go bankrupt. At the end of the day, governments are ultimately responsible for managing the service and, sometimes, repaying bankers or what or who ever happens to be the private partner.[223]

For instance, in the case of the collapsed port and rail infrastructures of the Nacala CDN and the accumulated USD25 million in losses from non-paid concession fees and taxes to the state, in order to salvage the CDN the GoM took the responsibility for the reconstruction and development of the infrastructures. In a fresh start, the GoM requested, additionally, a USD350 million credit loan from the Japan International Cooperation Agency (JICA).[224] The lesson here is that the GoM should have taken responsibility for the reconstruction and development of the CDN in the first place, instead of embarking on the PPP (concession) contract that has proved to be disastrous for the Mozambican economy.

PPPs, as in the cases aforementioned, may entail fiscal risks for the government that will contribute to and exacerbate the already deteriorating public debt.[225] The escalation of public debt means that there will be less money available for businesses and families to spend on goods and services to be offered by PPP undertakings and, thus, investing in future PPP initiatives may not be attractive to private capital.

3.7.8 *Risk of local communities opposition and unrest*

PPP project initiatives have, in some places, triggered community opposition and unrest with mass demonstrations in some cases demanding an open and transparent process of public consultation and inclusion.[226] In cases involving the extraction, at first hand, of unexploited natural resources in areas of residence, it means that a displacement and resettlement programme will have to be conducted. Natural resources extraction is notoriously detrimental to the environment, and the pollution and environmental degradation that the extraction can cause are often highly damaging to the livelihoods of

[222] Akitoby, Hemming & Schwartz *op cit* 142 at 9.
[223] David Hall *'Why Public-Private Partnerships Don't Work: The Many Advantages of the Public Alternative* (2015) at 45.
[224] Nhamire & Matine *op cit* 210 at 8.
[225] Philippe Burger, Justin Tyson, Izabela Karpowicz et al *'The Effects of the Financial Crisis on Public-Private Partnerships*' (2009) at 3.
[226] Jomo, Chowdhury, Sharma et al *op cit* note 158 at 19.

the local population. This can cause severe grievances to arise in local communities, not only when the impact of extraction affects their livelihoods but also when sufficient measures are not taken by the government to curb or rectify such negative effects.[227]

International experience indicates that the extractive industry is associated with decisions that have enormous social and environmental consequences. Further, in mining-induced displacement and resettlement there is primarily an economic issue associated with loss or significant reduction of access to basic resources on which communities depend. Physical abandonment of the existing residence areas are, therefore, secondary to the loss of access to material resources such as land, pastures, forests and clean water as well as intangible resources such as socio-economic ties.[228]

In Mozambique, although it was expected that extractive projects in the country would have a positive spill-over effect through training and on-the-job knowledge transfers, creating job opportunities for locals[229] and contributing to the country's economic transformation, in fact, their real impact has so far been mixed. For example, the fiscal contribution of megaprojects — such as the Mozal aluminium smelter, the Temane gas project in Inhambane province and the Moma titanium ore and heavy sands project in Nampula province — has also been limited.[230]

In fact, Mozambique is already experiencing the negative effects of the extraction of its natural resources. In Moatize in the northern-west Tete province the displacement and resettlement of local communities due to coal operations by Vale and Rio Tinto is extremely controversial.[231] These operations caused significant and sustained disruptions in accessing food, water, and work. An estimated 500 residents from the Vale resettlement village in Cateme protested from 10 to 12 January 2012 and blocked the Sena railway and the flows of coal exports for three days. These protests were met with harsh and violent police repression. The protestors highlighted the disturbance of their everyday activities

[227] Green & Otto *op cit* note 198 at 20.
[228] Bogumil Terminski *Mining-induced Displacement and Resettlement: Social Problem and Human Rights Issue'*(2012) at 9.
[229] Ross *op cit* note 172 at 32.
[230] Neil Balchin & Peter Coughlin *Megaprojects and Economic Transformation in Mozambique (*2018) at 2.
[231]Joshua Kirshner & Marcus Power 'Mining and extractive urbanism: Post development in a Mozambican boomtown' (2015) (61) *Geoforum* at 61,available at <*http://dro.dur.ac.uk/15121/1/15121.pdf*>, accessed on7 June 2018.

and livelihoods by the coal megaprojects.[232] Mozambican civil society organisations (CSOs) have also expressed concerns about the displacement of local communities; the ecological implications of opencast mining; the limited job creation for local youth; the lack of transparency around the licence agreements between the mining companies and the state (which many regard as too advantageous to foreign companies and investors); the incentives and tax breaks used to lure foreign capital; and the state failure to locally redistribute the wealth generated by hydrocarbon revenues. [233]

In Cabo Delgado province's northern-east Palma district, where the exploration of gas projects are under way, the protests against the failure of both authorities and concessionaries to adequately resettle those displaced from their lands, unfortunately, follow the Tete experience. Thus, at this stage it is not pretentious to say that if future investors in PPPs initiatives are to develop their projects successfully and sustainably, consideration must also be given to the respect and protection of human rights, including the respect for local communities' rights to basic livelihoods, socio-economic and ecological rights as well as the provision of training to and employment of local youth. All of these must be part of the design and development of the PPP projects, especially those taking place in such natural resource-rich — but socio-economically poor — regions.

To conclude, it is conceded that the examination above in section 3.7 is somewhat simplified. Nevertheless, it serves for illustrative purposes to demonstrate the extent of potential context-specific factors which are not brought to the negotiating table. The discussion did not cover all factors or emerging challenges that can affect a successful and sustainable implementation of PPP projects in Mozambique. For this reason more research is needed, and will continue to be so over time.

Concluding remarks

This chapter has reviewed and discussed the legal regime of the PPP contract and the risk management strategies advanced by the Mozambican PPP Law. It has also analysed other context-specific factors capable of affecting PPPs in Mozambique. It was concluded that adequate risk transfer from the government to the private sector is a key requirement if

[232] Ibid at 27.
[233] Ibid at 28.

PPPs are to deliver high-quality and cost-effective services to the consumer and the government.[234] Risk transfer has a significant influence on whether a PPP is a more efficient and cost-effective alternative to public investment and government provision of services.[235] It must be noted, however, that assessing risk transfer is difficult, given the multitude of risks to which PPPs are exposed and the complexity of PPP contracts.[236]

Nevertheless, the point of departure in the first place for good risk management should always be the identification of the potential risks and the determination of the overall economic advantages for the PPP —this being the fundamental factor justifying a PPP option instead of alternative public procurement mechanisms. There must be an assessment as to whether the PPP agreement will result in a net benefit to the (public) institution, defined in terms of cost, quality, quantity, risk transfer, or a combination thereof. There is a need for convincing arguments for PPP, the rationale determining the choice of a PPP option. At this point, it is worth reviewing the jurisprudence of the Tribunal de Contas de Portugal, the Portuguese National Auditor Office (NAO), which plainly instructs that

> the launching of public tender for PPP and the signing of PPP contract must configure a sort of partnership that represent, for the public partner, value for money, in relation to other alternative forms of arriving at the same ends. [237]

This means that, in the first place and through a due diligence, the expected benefits must clearly be identified, demonstrated, assessed and weighed against other forms of procurement of the same activity or service. For example, the use of the traditional concession model leaves the public administration (the state) with more latitude for exercising its public authority, both regulatory and oversight, unlike the case when the state or public entity is a party to a PPP contract. The Mozambican regulatory framework is not clear on what should be the key determinants for deciding on a PPP contract, in opposition to traditional or conventional public procurement in the supply of public goods or services. For instance, although article 4 of the PPP Law states the guiding principles to be observed

[234]International Monetary Fund, The World Bank & Inter-American Development Bank *'Public-Private Partnerships*, (2004) at 3, available at *<https://www.imf.org/external/np/fad/2004/pifp/eng/031204.pdf>*, accessed on 16 March 2020.
[235] Ibid at 18.
[236] Ibid at 3.
[237] Tribunal de Contas de Portugal Acordao n° 161/2009 de 2 de Novembro 1ª Secçao available at *http://www.tcontas.pt*, accessed on 8 March 2016.

to undertake a PPP project, it was noted that in practice these principles are not respected. To substantiate the above statement (see p.60), the GoM has since the enactment of the PPP Law resorted to the 'public interest' requiring to be served with great urgency, disregarding such guiding principles and, through Resolutions 44/2012 of 28 December and 53/2011, 54/2011, 55/2011 and 56/2011 of 4 November, authorised direct negotiation and direct award of PPP contracts.

Also discussed in this study have been some points needing further reforms in order to develop a sound regulatory framework and a conducive environment for investment in PPPs. A key pre-requisite for attracting private capital has been identified as laying down transparent policy — legal and regulatory frameworks — that can level the playing field and assure investors of a fair return for their investments. These regulatory frameworks can also protect the interests of the public services users, especially the poor, and assure superior service quality at a reasonable cost.[238] The GoM has striven to introduce some reforms in the recent 10 years or so, by establishing the PPP Law and Regulation.[239] The approval of laws and regulatory frameworks has, however, proved not to be enough. Transparent implementation of such legal instruments, the establishment of a functioning institutional, political, and good economic environment, and controlling of corruption, all remain challenging factors and fundamental ingredients for the creation of an investor-friendly environment for attracting more investment into the country.

[238] Harisankar & Sreeparvathy *op cit* note 97 at 22.
[239] Law 15/2011 of 10 August, Decree16/2012 of 4 July and Decree 69/2013 of 20 December

CHAPTER 4: THE REGIME OF THE PPP CONTRACT IN SOUTH AFRICA

Introduction

The legal regime of PPP contract in South Africa and other factors capable of affecting the development of PPPs in the country will be examined in this chapter. A similar presentation to that used in chapter 3 in which PPP in Mozambique was studied will be employed with view to facilitating the comparative discussion that follows in chapter 5. South Africa, a sub-Saharan country contiguous with Mozambique, is a constitutional democracy with a three-tier system of government: national, provincial and local, and a legal system based mainly on Roman-Dutch law and English common law.[1] South Africa's experience with PPP dates back to 1996 when the government of the country signed with its Mozambican counterpart a 30-year concession contract for the consortium TransAfrica Concessions on a BOT basis for the construction of the N4 toll road linking Witbank, South Africa to Maputo, Mozambique.[2] Since then, various pieces of legislation were enacted to govern PPPs at different levels of the government. These include the Public Finance Management Act (PFMA) 1 of 1999 (for national and provincial levels of government), and the Municipal Systems Act 32 of 2000 (for the municipal level of government). In addition, the Municipal Finance Management Act 56 of 2003, and reg 309 as per *Government Gazette* no. 8200 of 1 April 2005 were enacted and promulgated to assist in clarifying the Municipal Finance Management Act of 2003, for municipal entities. Subsequently, the Treasury Regulation 16 was specifically developed under the PFMA to become the main legal instrument providing for precise and detailed instructions for the development of PPPs.[3] Thus, the study of the legal regime of PPP in South Africa will include the formation of (4.1), enforcement of (4.2), implementation of (4.3), discharge of (4.4), mechanisms for disputes resolution (4.5), risk management strategies (4.6), and the discussion of context-specific factors susceptible to affect the success of PPPs in South Africa (4.7).

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[1] Phoebe Bolton 'The regulatory framework for public procurement in South Africa' in Geo Quinot & Sue Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) at 178.
[2] Peter Farlam *Working Together: Assessing Public-Private Partnerships in Africa* (2005) at 9.
[3] David Johannes Fourie 'Good governance in Public-Private Partnerships approaches and applications: A South African perspective' (2015) 8 (1) *African Journal of Public Affairs* at 113.

4.1 The formation of the PPP contract in South Africa

As was referred to in the preceding chapter (section 3.1), no formal process is required for the formation of a valid contract. Provided all the requirements for validity are met, the parties may express their intentions in whatever form they wish.[4] The law recognises both of these expressions, namely, verbal contracts in which the intention of the parties is articulated either orally or in writing, and tacit contracts, where the intention is inferred from the unarticulated conduct of the parties.[5] It was in line with the above that the Supreme Court of Appeal in the *Novartis* case upheld the judgement of the Gauteng Local Division according to which because the representatives of the litigating parties met and orally agreed [6] that there was an enforceable contract between the parties which had been repudiated by Novartis. Thus, Novartis was ordered to pay damages plus interest, and the costs of the suit.[7]

In respect of some specific contracts, however, the law may prescribe certain steps to be followed and, most importantly, may require that the parties express their intention in a formal way: [8] a failure to adhere to such prescribed formalities will render the contract void.[9] This is the case of a PPP agreement which is subject to certain formal processes and procedures. For instance, TR 16 provides that a PPP agreement means a written contract recording the terms of a PPP concluded between an institution and a private party.[10]

Two implications can be derived from this definition. First, that the PPP agreement must be a written contract, not an oral or implied one. Secondly, the definition clearly excludes other types of partnerships — such as those involving only public institutions (public partnerships) or between private sector and not-for-profit organisations (CSOs, NGOs or philanthropies).

[4] Dale Hutchison, Chris-James Pretorius & E J du Plessis *The Law of Contract in South Africa* (2012) at 159.
[5] G F Lubbe, L F van Huyssteen, & M F B Reinecke *Contract: General Principles* (2016) at 146.
[6] *Novartis v Maphil* (20229/2014) [2015] ZASCA 111at [59].
[7] Supra at [61].
[8] Hutchison al *op cit* note 4 at 159.
[9] Ibid at 161.
[10] National Treasury Regulation 16.1 in GN R225 GG 27388 of 15 March 2005 (hereafter National Treasury Regulation).

In South Africa, the PPP is defined as a commercial transaction between an institution [11] and a private party in terms of which the private party performs an institutional function on behalf of the institution, or acquires the use of state property for its own commercial purposes.[12] TR 16 caters for a wide variety of PPP types, allowing such projects to be developed in South Africa with a range of different characteristics combining private and public resources in various ways for designing, financing, building infrastructures and services, and for owing and transferring assets, reflecting the international experience.[13]

PPPs can be classified by the legal nature of private-sector involvement in the public facility using different expressions and variants all reflecting the point at which legal ownership of the facility is transferred from the project company to the public authority, or, if the project company is never the legal owner of the facility, the nature of its legal interest, such as a property lease or merely the right to operate.[14] Such distinctions, however, are simply legal technicalities and do not affect the commercial and financial reality that PPP facilities are public-sector assets which cannot normally be sold off to the private sector.[15]

The South African legislation distinguishes two types of PPPs. One which involves the performance by a private party of an 'institutional function' and the other involving some form of 'use of state property' by a private party for its own commercial purposes. The concept of 'institutional function' is defined as a service, task, assignment, or other function that an institution is entitled or obliged to perform in the public interest, or on behalf of the public service generally, or any part or component of any service, task, assignment or other function performed or to be performed in support of such a service, task, assignment or other function.[16]

A PPP involving the 'use of state property' for the private party's own commercial purposes in which the private party will not be performing a function of a public institution

[11] National Treasury Regulation 16.1.defines 'institution' as meaning a department, a constitutional institution, a public entity listed or required to be listed in schs 3A, 3B, 3C and 3D to the Public Finance Management Act, or any subsidiary of any public entity.
[12] National Treasury Regulation 16.1(a) and (b).
[13] National Treasury PPP Practice Note nr.02 (2004) 5 Module 1.
[14] ER Yescombe *Public-Private Partnerships: Principles of Policy and Finance* (2007) at 13.
[15] Ibid.
[16] National Treasury Regulation 16(1)(a)(b).

and may include a variety of use forms recognised in South African law, including the use of movable and immovable property belonging to the state. However, while the definition of PPP in the TR does not exclude or limit the types of use of state property, certain types of use are not regulated by TR 16 but rather by other provisions of the PFMA 1 of 1999 and the Treasury Regulations (TRs) 13.2 and 32.2.[17] The formation of the PPP contract in South Africa starts with a project inception (1), followed by the conduct of a feasibility study (2); the process of procurement (3); and the award of the contract (4).

4.1.1 *The PPP project inception*

According to TR 16.3, as soon as an institution [18] identifies a project that may be concluded as a PPP, the accounting officer or accounting authority of that institution must in writing: a) register the PPP project with the relevant treasury,[19] b) inform the relevant treasury of the expertise within that institution to proceed with the PPP, c) appoint a project officer from within or outside the institution, and d) appoint a transaction advisor if the relevant treasury so requests. Only after the above, the feasibility investigation will follow.

4.1.2 *The feasibility study*

Following the project inception phase, a feasibility study must be conducted in order to determine whether the proposed PPP idea is in the best interest of an institution. The feasibility study is the exercise by which the accounting officer or the accounting authority provides the three key tests of affordability, VfM, and risk transfer, by ascertaining and explaining the strategic and operational benefits of the proposed PPP for the institution in terms of its strategic objectives and government policy. In the case of a PPP involving the performance of an institutional function, 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. Further, all aspects must be clarified in the case of a PPP involving the use of state property, namely, the description of the state property concerned,

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[17] National Treasury *PPP Manual and Standardised Provisions* (2004), available from *http://www.ppp.gov.za/Legal20Manual/Module2001,* accessed on 18 August 2015 (hereafter National Treasury Standardised PPP Provisions) at 11.

[18] An institution is defined as a department, a constitutional institution, a public entity, or a subsidiary of any such public entity — in terms of the National Treasury Regulation 16, March 2005.

[19] 'Relevant treasury', according to Treasury Regulation 16(1), means the National Treasury unless delegated in terms of s 10(1)(b) of the PFMA Act.

and the uses, if any, to which such state property has been subject prior to the registration of the PPP.[20]

In relation to a PPP pursuant to which an institution will incur any financial commitments, the accounting officer or the accounting authority must demonstrate the affordability of the PPP for the institution; set out the proposed allocation of financial, technical and operational risks between the institution and the private party; demonstrate the anticipated VfM to be achieved by the PPP; and explain the capacity of the institution to procure, implement, manage, enforce, monitor and report on the PPP.[21] It will only be after the satisfaction of the provisions of the feasibility study that an institution may receive a written approval (Treasury Approval: I) of the relevant treasury to proceed with the procurement phase.[22]

However, if at any time after Treasury Approval: I has been granted in respect of the feasibility study of a PPP — but before the grant of Treasury Approval: III in respect of the PPP agreement recording that PPP — any assumptions in such feasibility study are materially revised, these assumptions that concern affordability, VfM and substantial technical, operational, and financial risk transfer, then, in these instances the accounting officer or accounting authority of the institution must immediately: (a) provide the relevant treasury with details of the intended revision, including a statement regarding the purpose and impact of the intended revision on the affordability, VfM and risk transfer evaluation contained in the feasibility study; and (b) ensure that the relevant treasury is provided with a revised feasibility study after which the relevant treasury may grant a revised Treasury Approval: I.[23]

4.1.3 *The process of procurement*

The law that applies to the process of public procurement in South Africa is, in principle, the private law of contract. This is modified, however, in its application to the state as it incorporates public law rules in order to take account of distinct needs and responsibilities of the organs of state. This means that principles of both the law of contract (private law)

[20] National Treasury Regulation 16(4)(1)(a)(b).
[21] National Treasury Regulation 16(4)(1)(c-f).
[22] National Treasury Regulation 16(4)(2).
[23] National Treasury Regulation 16(4)(4).

and administrative law (public law) influence public procurement in South Africa.[24] As a general rule, administrative law governs the pre-contract award period of the procurement process, while the private law of contract and the private law of delict/tort govern the post-award period. The courts have held that the conduct of the public procurement process, the evaluation of the tenders, and the award of a contract to a successful bidder all attract administrative law rules. Thus, when an organ of the state calls for tenders, evaluates tenders, and awards a contract to a winning bidder, it is bound by s33 of the South African Constitution and the legislation enacted thereunder, like the Promotion of Administrative Justice Act 3 of 2000.[25]

In special circumstances administrative law may find application in the post-contract award period, for instance where an organ of state wants to cancel a contract on the grounds of 'public interest', because it fetters the future exercise of its discretionary power. However, remedies to this will come with the application of private law. Contractual damages may be claimed by either party for general breach of contract. Delictual damages may, however, be claimed by an unsuccessful bidder if it can be proved that fraud resulted in the non-award of the contract to him/her.[26] To sum up, it can be said that the South Africa's public procurement system is governed by public law or administrative law rules as well as private law rules.[27]

Section 217 (1) of the Constitution of South Africa provides the legal foundation by stipulating that organs of state must contract for goods or services in accordance with a system which is fair, equitable, transparent, competitive and cost effective. The implications of this constitutional provision is that public procurement must provide VfM, integrity in public spending practices, accountability to the public, and efficiency in the procurement practice.[28]

Bolton asserts that a

> A PPP is part of public procurement which is often governed and structured by specific and detailed rules, a distinct field of administrative law called public procurement law or public procurement regulation, the focus of which is on the rules governing the process that leads up to the conclusion of the contract and, in

[24] Bolton *op cit* note 1 at 183.
[25] Ibid.
[26] Ibid at 184.
[27] Ibid at 178
[28] Ibid at 179.

particular, the process through which a supplier is identified and a contract awarded to that supplier.[29]

The law, TR16.5 provides that prior to the issuing of any procurement documentation for a PPP project to prospective bidders, the institution must obtain approval from the relevant treasury for the procurement documentation, including the draft of the PPP agreement,[30] and that the procurement procedure must be in accordance with a system that is fair, equitable, transparent, competitive, and cost-effective; and must include a preference for the protection or advancement of persons, or categories of persons disadvantaged by unfair discrimination in compliance with relevant legislation.[31]

Having launched the bidding process and received and evaluated the proposals after the evaluation of the bids – but prior to the appointment of the preferred bidder – the institution must submit the evaluation report for approval by the relevant treasury and indicate how the criteria of affordability, VfM and substantial technical, operational and financial risk transfer were applied in the evaluation of the bids. Further, is must be demonstrated as to how these criteria were satisfied in the preferred bid and must include any additional information being required by the relevant treasury.[32]

4.1.4 *Concluding the PPP agreement*

The process of contracting a PPP agreement in South Africa encompasses the fulfilment of the legal steps starting with the inception project phase, followed successively by the conduct and approval of the feasibility study and the bidding process, in order to secure the Treasury Approval: III which provides clearance for the contract to be awarded to the winning bidder. After the bidding procedure has been concluded, but before the accounting officer or accounting authority of the institution concludes the PPP agreement, that accounting officer or accounting authority must obtain the necessary approval from the relevant treasury, indicating that the proposed PPP agreement meets the requirements of affordability, VfM, and substantial technical, operational and financial risk transfer as demonstrated in the feasibility study. He/she must also obtain the approval for the management plan that explains the capacity of the institution and its proposed mechanisms

[29] Geo Quinot & Sue Arrowsmith (eds) *'Public Procurement Regulation in Africa'*(2013) at 1.
[30] National Treasury Regulation 16(5)(1).
[31] National Treasury Regulation 16(5)(3)(a)(b).
[32] National Treasury Regulation 16(5)(4).

and procedures to effectively implement, manage, enforce, monitor and report on the PPP project; and that a satisfactory due diligence including a legal due diligence, has been completed. Further, matters relative to the competence and legal capacity of the proposed private party to enter into the PPP contract need to be clarified.[33] It will only be after the observance of all the above steps that the proposed PPP agreement will be cleared and authorised, by the National Treasury, for its conclusion.

4.2 The enforcement of the PPP procurement rules

Before a discussion of the mechanisms for the enforcement of PPP procurement rules in South Africa is commenced, a brief reflection of the importance of enforcement of law is given, (1), after which administrative (2) and judicial (3) remedies are examined.

4.2.1 *The relevance of the enforcement of law*

The enforcement of the law is vital in all modern societies, and without law enforcement a society would eventually cease to exist.[34] Generally speaking, the function called law enforcement is a society's formal attempt to obtain compliance with the established rules, regulations and laws of that society. Without law enforcement, society as it is known would probably succumb to social disorder and chaos.[35] Thus, law enforcement is one means of formally supervising human behaviour to ensure that the laws and regulations of society are followed and that there is a certain amount of security and stability in society. The enforcement of law in all of its forms (statutes, regulations, administrative codes, ordinances, and suchlike.) is legally authorised by the concept of police power[36]and is derived from the doctrine of the rule of law which is the hallmark of the modern democratic state.

Law enforcement can be defined as the activity by which a legally constituted power is applied to make the law's dictate actual.[37] This definition captures the essence of the enforcement of public procurement laws and regulations as it involves the initiation of a review action (activity) by an aggrieved bidder or affected/disappointed party in

[33] National Treasury Regulation 16(6)(1)(a)(b)(c).
[34] Jones & Bartlett Learning LLC *The Field of Law Enforcement* (n.d) at 1.
[35] Ibid.
[36] Ibid at 2.
[37] Udeh, Kingsley Tochukwu *A Comparative Study of the Effectiveness of Bidder Remedies in South Africa and Nigeria* (unpublished LLD dissertation, Stellenbosch University, 2018) at 13.

pursuance of the right vested in it by law or regulation (a legally constituted power) to challenge and redress non-compliance with procurement laws or regulations.[38] The definition of a contract as a legally enforceable agreement assumes that mechanisms exist for the enforcement of those contracts that are identified by law as creating legally enforceable obligations.[39] All this was referred to in the preceding chapter.

Public procurement processes in South Africa are regarded as administrative processes.[40] Public procurement including the PPPs is a field where the principles of both public and private law are relevant, including in the post-contract award. Public and private law remedies may be available to aggrieved parties, depending on the stage in the procurement process and the status of the party. Should a public tender be set aside on review, after it has been awarded and a resultant contract has been entered into between the parties, the contract so concluded between the public entity and successful bidder is void. This entails that no contractual remedies are available to the initially successful bidder.[41] In this case, remedies available to the bidder may include the right to administrative action and the right to be given written reason, under s33 of the Constitution. In addition, the aggrieved party may judicially seek bidder remedies which are discussed in 4.2.3.

PPP contracting is part of public procurement that in South Africa is governed by an extensive set of legal rules and regulations mostly developed under s 217(1) of the Constitution of the Republic of South Africa which provides that

> When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

These constitutional principles provide the legal foundations for the development of a system of public procurement regulation in the country. While progress has been made

[38] Udeh o*p cit* note 37 at 13.
[39] Jill Poole *Contract Law* (2016) at 331.
[40]Rolien Roos & Stephen de la Harpe *Good Governance in Public Procurement: A South African Case Study* (2008) at 126.
[41] Ibid.

in recent years towards the implementation of such a system through a number of key pieces of legislation, the regulatory regime referred to remains fragmented.[42]

With regard to the enforcement of public procurement law in South Africa, apart from the applicable common law rules of contract and delict, procurement decisions are also subject to the principles of administrative law.[43] Section 33 of the Constitution provides that

> (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

The above constitutional provisions place the contracting authorities under legal obligation to act in a lawful, reasonable, and procedurally fair manner, [44] when taking public procurement decisions, and provide reasons (explanation) to those affected by their decisions.[45]

In attempting to understand the enforcement of the rules governing the process of contracting PPP in South Africa, a first distinction in bidder remedies is between the administrative enforcement and judicial enforcement.[46] Bidder remedies refer to the right provided or recognised by law by which a person (an aggrieved bidder) that is interested in being awarded a government contract may challenge and seek redress against a decision, action or inaction of a public procuring entity, which are perceived to be in breach of applicable public procurement law or regulation.[47]

At this stage, a line is drawn in the sense that the intention in this research is not to bring to the fore the exhaustion all administrative and judicial remedies providing for the enforcement of public procurement in South Africa but, as this study has a comparative perspective, to demonstrate how, in each jurisdiction under examination, the enforcement of a public procurement is approached.

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[42] Geo Quinot *Enforcement of Procurement Law from a South African Perspective* at 2, available at <*http://www.sun.ac.za/procurementlaw*>, accessed on 10 May 2020.
[43] Ibid at 3.
[44] Constitution of the Republic of South Africa s 33(1).
[45] Quinot *op cit* note 42 at 3.
[46] Ibid.
[47] Udeh *op cit* note 37 at 23.

4.2.2 *Administrative enforcement of the procurement of PPPs*

Public procurement rules in South Africa are largely enforced via ordinary, general remedies. These are, however, not always well suited to particular procurement contexts. Therefore, there is, accordingly, a need to develop remedies towards a procurement-specific regime.[48] Nevertheless, until then the enforcement of the PPP procurement rules will be but provided by such ordinary, general remedies.

Since public procurement decisions are regarded as administrative actions and thus, subject to administrative regulation there is a strict rule that internal remedies must be exhausted before a court is approached for relief. In terms of this rule, a court's review jurisdiction is deferred until all internal remedies have been exhausted, unless exceptional circumstances justify a review application while internal remedies are still available.[49]

Courts are debarred from entertaining reviews if internal remedies have not been exhausted.[50] In practice, administrative enforcement of a procurement process in South Africa includes internal and external reviews, and entails a procuring entity or, additionally, a statutory authority receiving and considering complaints against procurement decisions, action or inactions with a view to correcting identified breaches as required by law. This practice derives from several legal instruments discussed next.

Internal administrative review

Examples of internal administrative review provided for by the Local Government Municipal Systems Act (s 62), and Municipal Supply Chain Management Regulations (s 49) are presented below:

Section 62(1) provides that

> A person whose rights are affected by a decision taken by a political structure, political office bearer, councilor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councilor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.

[48] Quinot *op cit* note 42 at 13.
[49] Udeh *op cit* note 37 at 23.
[50] Quinot *op cit* note 42 at 11.

Section 49 provides that

> The supply chain management policy of a municipality or municipal entity must allow persons aggrieved by decisions or actions taken by the municipality or municipal entity in the implementation of its supply chain management system, to lodge within 14 days of the decision or action a written objection or complaint to the municipality or municipal entity against the decision or action.

External administrative review

The external administrative review may be exercised in accordance with s50 of the Municipal Supply Chain Management Regulations, and Regulation 16A9.3 issued in terms of the PFMA 1, 1999 [51] applicable to departments, constitutional institutions, and public entities listed in Schedules 3A and 3C to the Act.

Section 50(5) states that

> A dispute, objection, complaint or query may be referred to the relevant provincial treasury if -
> (a) the dispute, objection, complaint or query is not resolved within 60 days; or
> (b) if no response is received from the municipality or municipal entity within 60 days.

And s 50(6) provides that

> If the provincial treasury does not or cannot resolve the matter, the dispute, objection, complaint or query may be referred to the National Treasury for resolution.

The National Treasury is the Minister of Finance.[52] Regulation 16A9.3 in its turn provides that

> The National Treasury and each provincial treasury must establish a mechanism:
>
> (a) to receive and consider complaints regarding alleged non-compliance with the prescribed minimum norms and standards; and
>
> (b) to make recommendations for remedial actions to be taken if non-compliance of any norms and standards is established, including recommendations of criminal steps to be taken in the case of corruption, fraud or other criminal offences.

[51] National Treasury Regulation 16.
[52] Public Finance Management Act 1 of 1999 as updated in *Government Gazette* 40637 24 February 2017 s 5(a).

An examination of the judicial enforcement of procurement rules follows the above discussion of the mechanisms for administrative review available for the enforcement of public procurement rules.

4.2.3 *The judicial enforcement of PPP procurement rules*

Public procurement disputes in South Africa are dealt with in ordinary courts, mostly in the High Court and on appeal to the Supreme Court of Appeal.[53] Sometimes such disputes can end up in the Constitutional Court,[54] as was the cases of *Steenkamp* [55] and *Trencon*. In this latter case and with regard to public procurement, the Constitutional Court emphasised the policy argument for the courts' role in the following terms:

> In our society, tendering plays a vital role in the delivery of goods and services. Large sums of public money are poured into the process and the government wields massive public power when choosing to award a tender. It is for this reason that the Constitution obliges organs of state to ensure that a procurement process is fair, equitable, transparent, competitive and cost-effective. Where the procurement process is shown not to be so, courts have the power to intervene.[56]

There is no special court or tribunal tasked with the enforcement of public procurement rules in South Africa. Suppliers have relied on general remedies in contract and administrative law in procurement disputes and the ordinary courts have used general civil remedies to grant relief. Recourse to courts in public procurement disputes can be categorised into three areas: interim relief, judicial review and damages claims.[57]

First, the interim relief remedy is sought as soon as the award decision has been communicated pending further legal action and is taken as an order precluding the contracting authority and the successful bidder from concluding the contract or proceeding with execution under the contract until the application for review is heard. The interim remedy serves to avoid irreparable loss or losses that cannot adequately be redressed in later proceeding.[58] However, it is only the interests served by the set aside remedy under

[53] Quinot *op cit* note 42 at 6.
[54] Ibid.
[55] *Jurgens Johannes Steenkamp N.O v the Provincial Tender Board of the Eastern Cape*, CCT71/05.
[56] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC22 at [1].
[57] Quinot *op cit* note 42 at 6.
[58] Ibid at 6.

judicial review that can be protected which determines whether interim relief is justifiable. What is of relevance is whether the set aside remedy is viable.[59]

Secondly, the judicial review remedies in public procurement starts with an analysis of the application of administrative rules and it involves the consideration of the merits of the matter in some way or another. While the review of decisions in the award stage of public procurement is common in South Africa, the judicial scrutiny of other stages is less clear.[60] For instance, Q Civils submitted to the High Court of South Africa, Free State Division, allegations according to which the decision of the first respondent, Mangaung Metropolitan Municipality, to award the bid to FMP should be set aside on the grounds that it was vitiated by an error of the fact that the applicant's bid did not exceed 15 per cent threshold; that it was also procedurally unfair as the applicant was not afforded an opportunity to explain its price tendered before a decision was taken; and that, in its conclusion, the decision was not only arbitrary and irrational but also unlawful.

The Court had no difficulty in arriving at its verdict. It held that it was satisfied[51] that a 15 per cent deviation from either the engineer's estimate, or the average bid price (the benchmark) was an objective factor and that it qualified as an objective criterion for the purposes of s 2(1)(f) of Preferential Procurement Policy Framework Act 5 of 2000 (the PPPFA).[61] It continued:

> [H]ere, all the bidders knew from the outset that a too low or too high bid, or put otherwise, a bid substantially below or higher than that of other bidders, will be disqualified. In order to set an objective yardstick or criterion, a deviation figure of 15 per cent was accepted'. Thus, 'there was no unfairness in the process and the decision reached was not arbitrary, irrational or unlawful.

In conclusion the Court found that no irregularity has been committed.[62]

The above case illustrates the right dissatisfied bidders have to judicially challenge a procurement decision, including the award of government contract.

In the post-award stage courts have oscillated between applying general rules of contract law and administrative law. Judicial review has thus not consistently functioned as an enforcement mechanism in public procurement processes. Decisions such as

[59] Ibid at 7.
[60] Ibid at 9.
[61] 'Acceptable tender' is defined in s 1 of the PPPFA as 'any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document.'
[62] *Q Civils (Pty) Ltd v Manguang Metropolitan Municipality & another* A48/2016 at [8, 51, 52, 53].

termination of the contract have been inconsistently subjected to judicial scrutiny.[63] This may be because the termination of contract attracts the application of the principles of the law of contracts. When it comes to the procurement context, the application for the judicial review, the court may grant an order that is just and equitable, including orders setting the award decisions aside and declaring concluded contracts void.[64]

The courts' 'oscillation' between applying general rules of contract law and administrative law was recognised by the Constitutional Court in the *Steenkamp case*, in the following terms

> This case raises the complex debate on the proper interface between private law and public law remedies in our constitutional dispensation. The narrow issue is whether financial loss caused by improper performance of a statutory or administrative function should attract liability for damages in delict. On the facts, the issue may be rendered as whether a successful tenderer whose award is later set aside by a court on review may claim delictual damages from the tender board for out-of-pocket expenses incurred subsequent to and in reliance on the award [65] which is later nullified being one of the reasons the fact that at the time of bidding the tenderer had no legal existence. 'The finding merely restates the self-evident rule that a valid contract comes into being only if a contracting party has the requisite capacity to act.[66]

Finally, a claim for damages and compensation under the public procurement rules is only possible when an aggrieved bidder demonstrates that there was fraud, dishonesty or corrupt practice in procurement process. In cases involving fraud the courts have been prepared to award delictual damages for loss of profits. However, in South Africa out-of-pocket expenses incurred in preparing the bid are not recoverable.[67] Despite the various mechanisms available to bidders to claim damages or compensation in the procurement disputes, such orders are not favourably viewed as appropriate for the enforcement of public procurement rules.[68]

The above discussion of bidder remedies for the enforcement of PPP procurement rules is followed by an examination of the implementation of the PPP contract.

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[63] Quinot *op cit* note 42 at 9.
[64] Ibid at 11.
[65] *Steenkamp N.O v The Provincial Tender Board, Eastern Cape*, 2006, CCT 71/05 at [1].
[66] Supra at [17].
[67] Quinot *op cit* note 42 at 12.
[68] Ibid at 13.

4.3 The implementation of the PPP contract

According to the *pacta sunt servanda* [69] doctrine, once a contract has been concluded, it must be implemented. The parties to a contract are bound to honour the contract they entered into, performing all the obligations that it imposes upon them.[70] This follows the doctrine of the sanctity of contracts which entails that obligations freely entered into a contract must be honoured and, where necessary, enforced by a court of justice.[71]

With regard to PPP contract, the accounting officer or accounting authority of the institution that is party to a PPP agreement is responsible for ensuring that the PPP agreement is properly implemented, managed, enforced, monitored and reported on and must maintain such mechanisms and procedures as approved in Treasury Approval: III. At the contract implementation/management stage, (1) the accounting officer or accounting authority of the institution that is party to the PPP agreement is charged with the responsibility for monitoring the implementation of the PPP agreement. However, (2) for whatever reason, during the implementation of the contract the parties may decide to materially change the content of the PPP agreement, which will lead to the need for amendment.

4.3.1 *Monitoring the implementation of the contract*

The South African law does clarify that the fact that an institution (public/state) enters into a PPP agreement with a private party that institution is not abdicating its responsibility for the provision of the public goods or services. For this reason, the regulation provides that a PPP agreement involving the performance of an institutional function does not divest the accounting officer or accounting authority of the institution concerned of the responsibility for ensuring that such institutional function is effectively and efficiently performed in the public interest or on behalf of the public service.[72] Equally, the PPP agreement involving the use of state property by a private party does not divest the accounting officer or accounting authority of that institution of the responsibility for ensuring that such state property is appropriately protected against forfeiture, theft, loss, wastage and misuse.[73]

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[69] The Latin legal principle according to which a concluded agreement must be honored and implemented.
[70] Hutchison, Pretorius & Du Plessis *op cit* note 4 at 278.
[71] See chapter 3 section 3.2.
[72] National Treasury Regulation 16(7)(2).
[73] National Treasury Regulation 16(7)(3).

The accounting officer or the accounting authority of the institution that is party to a PPP contract is held responsible for ensuring that the contract is properly implemented, managed, enforced, and reported on.[74] This will only be achieved if adequate contract implementation monitoring procedures are in place. To this point, he/she will be expected to maintain the mechanisms and procedures established for the Treasury Approval: III (the terms contracted in the PPP agreement), measuring the outputs of the PPP agreement, liaising with the private party, resolving disputes and differences with the private party, and generally overseeing the day-to-day management of the PPP contract.[75]

However, there is some doubt as to the real effectiveness of the monitoring of a PPP contract by the public institution officials. These arise, first, because public institutions lack capacity and specialised expertise. Secondly, and no less important, is that the accounting officer or accounting authority who is charged with the monitoring function does not have much authority over the private party because the private party does not form part of the government's democratic chain of command. Also, there is no express provision for a monitoring and evaluation framework.[76] Finally, the complexity of PPP projects means that there are many key performance areas, thus making monitoring difficult to sustain. Further, most governments are not yet prepared to manage performance systematically and comprehensively over the life cycle of these projects, but rather tend to rely on one-off reports or enquiries — usually when aspects of a PPP go wrong.[77] All and above, public institutions' capacity constraints are seen as being the serious challenge for monitoring contract implementation effectively.

The PPP agreement must clearly set out the level of performance entailed by the required output specification; the means by which the institution is able to monitor the private party's performance against such required level; and the consequences of the private party of a failure to meet the required level. In order to encourage innovation and optimise risk transfer, the PPP agreement must specify the required performance level through output specifications and not required inputs (for example, the manner of the

[74] National Treasury Regulation 16(7)(1).
[75] National Treasury Regulation 16(7)(1)(a)(d)(f).
[76] Madeleine C Fombad 'Accountability challenges in Public Private Partnerships from a South African perspective' (2013) 7 (1) *African Journal of Business Ethics* at 18.
[77]Ibid.

service delivery). Suitable performance levels will need to be worked out carefully by the institution and the bidders during the competitive stages of the procurement. The negotiated performance levels will form a key element of the risk transfer mechanism.[78]

To ensure monitoring, the parties can agree to contract an 'independent certifier', an expert who will be responsible for certifying that in its professional opinion, the works have been satisfactorily completed in terms of the PPP agreement, by issuing the 'completion certificate'. Once the completion certificate has been issued the private party may immediately thereafter issue the 'availability certificate' signalling service commencement.

The PPP agreement must however, clearly stipulate any necessary liaison procedures between the institution and the private party in order to ensure that the institution is aware of the imminent service commencement and is in a position to accept service commencement on service commencement date.[79] The primary function of the independent certifier is to inspect and monitor the works, attend any performance testing during commissioning, advise the private party of any items that in the independent certifier's opinion require rectification and, finally, when satisfied, to issue the completion certificate.[80] In performing its functions, the independent certifier does not in any way acquire any risk in relation to design, construction, fitting, installation or commissioning of the works.[81]The private party must be under the obligation to implement a quality assessment and management system which meets the requirements of good industry practice (GIP) and any other applicable standards. This will depend on the nature of the project. But the (public) institution should be entitled to review the private party's quality assessment and management system and, when necessary, establish adequate and accurate systems.

The PPP agreement must provide for this and also for the private party to provide, and to cause the subcontractors to provide, all reasonable assistance to the institution in relation to that review and to respond to and implement results arising from such review.[82]

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[78] National Treasury Standardised PPP Provisions (2004) *op cit* note 17 at 124.
[79] Ibid at 99.
[80] Ibid.
[81] Ibid at 100.
[82] Ibid at 112.

No other rights or remedies, such as the right to terminate, should arise from any such review, as deficiencies in the quality assessment and management system will probably be manifested through poor performance in the delivery of the service for which the payment mechanism should provide appropriate penalty deductions.[83] The private party's failure to fully perform its maintenance obligations will ultimately be reflected in reduced compensation on termination.[84] For an effective and consistent monitoring there must be an agreed methodology that enables monitoring of the private party's performance against the required output specifications in the PPP agreement, so that the performance measurement system can operate effectively. The monitoring requirements must be set out in the Request for Proposal (RFP) and a full methodology must be included in the bid. The methodology will normally include a substantial element of self-monitoring by the private party, subject to periodic institution review. Additional institution monitoring may take place, depending on the nature of the project.[85] The periodic reports to be provided by the private party will be key to the management of the PPP agreement and to the payment mechanisms, and must be specifically tailored to meet these monitoring requirements. A distinction must, however, be made between the monitoring mechanism undertaken by the institution as and when it is deemed necessary in accordance with the PPP agreement. The private party must have the primary responsibility for the former and the PPP agreement must clearly provide how it will conduct this self-monitoring which will constitute the basis for the calculation of penalty deductions.[86]Monitoring is ultimately the responsibility of the private party and will usually be dealt with as part of the quality management system run by the private party. Failure by the private party to adequately self-monitor must in itself result in penalty deductions. The obligation of the private party to self-monitor its performance of the service should not be confused with the institution's obligation to monitor in terms of its statutory obligations. Pursuant to TR 16, an institution is required to demonstrate in its application for Treasury Approval: I that it has the capacity to monitor the implementation and performance monitoring of a PPP agreement. Mechanisms and procedures of such performance monitoring must be established by the accounting officer

[83] Ibid at 113.
[84] Ibid at 121.
[85] Ibid at 125.
[86] Ibid at 126.

or the accounting authority of an institution even before the PPP agreement has been executed in order to ensure that the PPP agreement is properly enforced.[87]To sum up, the PPP agreement will need to specify the way in which information regarding performance is reported, and must set out clearly the consequences of any failure by the private party to perform to the minimum standards of the required output specifications. One approach is for the private party to incur a specified number of penalty deductions for each failure, with the level of deductions incurred varying according to the seriousness of the failure. The value of the penalty deductions must be set, based on commercial considerations as opposed to the cost of providing the service.[88]

4.3.2 *The amendment of the PPP contract*

After the signing, before or during the implementation of the PPP agreement, and due to a variation of the conditions, the parties may need to amend the contract. For any amendment, they will have to get prior and written approval of the relevant treasury, including material variations to the outputs therein, or any waivers contemplated or provided for in the PPP agreement.[89] The relevant treasury will approve a material amendment only if it is satisfied that the PPP agreement, if amended, will continue to provide the three tests of affordability, VfM, and substantial technical, operational and financial risk transfer to the private party.[90] Thus, for the amendment of the PPP agreement to be approved the responsible accounting officer or accounting authority must follow the procedures prescribed by Regulations 16.4 (in the feasibility study) and 16.6 (the conditions for contracting PPP agreements).[91]

One aspect to consider when negotiating and concluding a PPP agreement is the question of output specifications. These must take into account the institution's current as well as its future requirements. Variations to the output specification may, however, be necessary to cater for changes in the institution's needs which could not be anticipated or quantified at signature date or changes imposed by external factors for which the institution has retained responsibility (for example, of policy issues). The relevant Treasury must be

[87] Ibid at 129.
[88] Ibid at 133.
[89] National Treasury Regulation 16(8)(1).
[90] National Treasury Regulation 16(8)(2)(a-c).
[91] National Treasury Regulation 16(8)(3).

notified of all variations prior to their implementation, as variations which impact on affordability and/or result in an increase in unitary payment will require a new Treasury Approval: I.[92] In essence, variation may dictate the need for contract renegotiation and amendment to accommodate institution' needs.

However, the institution should recognise that the private party's funders, in particular, are unlikely to allow the private party to agree to any variation that would increase the cost of the project or financing risk and, as such, the sponsors are unlikely to allow the private party to agree to any variation that would reduce the ROR of their investment. The private party should, therefore, have a right to veto a variation that would adversely affect its risk profile.[93] At the end, one should not be surprised if a disagreement over variation culminates with termination of the PPP contract.

4.4 The discharge of the PPP contract

Discharge of a contract relates to the process of bringing the contract to an end. It is a process of terminating of a contract. Thus, the contract may be discharged/terminated by performance, agreement between the parties, breach of the contract, operation of law, and a frustrating event.[94] Termination of a contract implies the termination of the obligation therein. Only full and proper performance, as agreed, will naturally extinguish the obligation under the contract.

Obligations can also be terminated either by agreement in the form of release and waiver that the debtor is freed from an obligation, [95] and by novation in which an agreement is in place to extinguish and replace with a new one, one or more existing contracts, by compromise in terms of which parties settle a dispute or an uncertainty between themselves.[96] The purpose of compromise is to secure a settlement of a dispute or uncertainty.[97] The contract may also fix a specific period for its duration, terminating automatically at the end of such period. Other contracts may also specifically provide for termination by notice.[98]

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[92] National Treasury Standardised PPP Provisions *op cit* note 17 at 210.
[93] Ibid at 213.
[94] Geoff Monaham, *Essential Contract Law* 2ed (2001) at137.
[95] Hutchison, Pretorius & Du Plessis *op cit* note 4 at 378.
[96] Ibid at 379.
[97] Ibid.
[98] Ibid.

In South Africa the termination of contract may also come about by set-off, when two parties have claims against each other and the requirements for set-off are met; merger, when one person becomes both creditor and debtor in respect of a certain debt; supervening impossibility of performance, when a performance is objectively impossible after the conclusion of the contract;[99] extinctive prescription, which entails the extinction of obligations by lapse of time; insolvency, when the person's liabilities exceed his or her assets; and, finally, the death of the debtor, though the general rule is that the contractual rights and duties of that party are transmitted to his or her estate upon his or her death.[100] A contract may also be terminated by a unilateral act of the state under the doctrine of public policy/public interest or by an aggrieved party in the case of a breach of contract that is serious enough to allow cancellation by the aggrieved party.[101] All these were referred to in the preceding chapter.

From a reading of TR16 one cannot capture the circumstances in which a PPP contract can be terminated or made extinct. The National Treasury only does indicate that PPP agreement must specify its duration. And in doing so, a distinction may need to be made between the period (if any) from the signature date to the commencement of the service, and the service period itself. It may also be appropriate to specify a long-stop date for the commencement of the service, non-fulfilment of which may amount to a breach of the PPP agreement entitling the institution to terminate the agreement.[102]

However, the National Treasury Standardised PPP Provisions issued by the South African National Treasury in March 2004 indicate that prior to the expiry date (1), a project may be terminated for reasons of institution or private party default (2), *force majeure* (3), and corrupt acts (4). These are the only reasons for the termination of the PPP contract and the institution, in principle, cannot terminate the agreement for its own convenience even if it is of the view that it is better positioned to render the service itself,[103] save the 'public interest' argument which will, however, attract contractual damages.

[99] Ibid at 383.
[100] Ibid at 390.
[101] Ibid at 375.
[102] National Treasury Standardised PPP Provisions *op cit* note 17 at 95.
[103] Ibid at 248.

4.4.1 *Termination of the contract on the expiry date*

In South Africa, one of the reasons for the termination of the PPP agreement is when it comes to its natural end, depending on the agreed terms (for instance on the completion of the assignment) or on the expiry date. In this regard, as noted above, there is no a clear indication from the TR 16 which means that this will vary from contract to contract as the law does not establish the minimum term period for the duration of PPP contract.[104]

However, the Standardised PPP Provisions instruct that the PPP agreement must specify its duration, while taking into account the requirements of the institution in relation to the services, the possibility of alternative uses of the project assets, the affordability of the services for the institution in the light of its anticipated future budgetary allocations and the expected useful economic life of the project assets, the need of any major refurbishment or replacement programmes in respect of the project assets and the term of the debt (a longer debt service period could allow for a longer duration).[105] The conclusion is that the period of duration of a PPP agreement will be determined on a case-by-case basis, depending on what the parties have agreed upon. For example, of the 33 PPPs reported in the 2018 South African Budget Review, their terms vary from 3 to 30 years involving 25 DFBOT, 4 DFO projects, 1 equity partnership, and 1 facility management project.[106]

As the expiry date approaches, the institution's interest in the maintenance of any project asset will become most acute where such project asset is to be transferred to the institution on expiry. At signature date, the parties must agree on the requirements relating to handover of such project assets at the expiry date.[107] In a situation in which the institution will take over the assets at the end of the project term, the performance by the private party of its maintenance obligations as stipulated in the PPP agreement will need to be monitored throughout the project term and thus a mechanism needs to be agreed to in which this can be done in as non-intrusive a manner as possible. The private party's failure to fully perform its maintenance obligations will ultimately be reflected in reduced compensation on termination.[108]

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[104] The PPP practice indicates minimum term:3 years and maximum: 30 years(see next para.)
[105] National Treasury Standardised PPP Provisions op cit note 17 at 95.
[106] National Treasury *Budget Review 2018* Annexure *E* (2018) at 154.
[107] National Treasury Standardised PPP Provisions *op cit* 17 at 120.
[108] Ibid at 121.

4.4.2 *Termination for reasons of either party breach*

A breach of contract constitutes an unlawful infringement of the other party's rights that arise from a contract.[109] According to the *pacta sunt servanda* doctrine, and as was articulated above, the parties to a contract are bound to respect their agreement and to perform all the obligations that it imposes upon them. If either party, by an act or omission and without lawful excuse, fails in any way to honour his or her contractual obligations, he or she commits a breach of contract.[110] Some forms of breach of contract include: *mora debtoris*, *mora creditoris*, positive malperformance, repudiation, and prevention of performance. *Mora* debtoris consists of an omission, a failure to perform on time a positive obligation, an *obligatio faciendi,* or a failure to uphold a negative obligation, *obligatio non faciendi*.[111] Some requirements must be met before a debtor can be said to be in *mora*, such as the debt must be due and enforceable, the time for performance must have been fixed, and such failure to perform on time must be without legal justification.[112]

To deal with different forms of breach of contracts, different types of remedies can be found. It is noted that the remedies for enforcement and the remedies for termination of contracts are mutually exclusive. That is, the innocent party is only entitled to rely on one or the other remedy.[113] The point in South African law is that parties are free to enter into an agreement and for this reason they must honour it, in observance of the doctrine of *pacta sunt servanda or* sanctity of contracts.

For different motives, however, a breach of contract can occur and remedies exist for such an eventuality.[114] There are five remedies available to an innocent party for a breach or, in some cases, a threatened breach of contract, namely, specific performance, interdict, declaration of rights, cancellation, and damages. The first three may be regarded as methods of enforcement and the last two as recompense for non-performance.[115] Which of these remedies is chosen rests primarily with the injured party, who may choose more

[109]Hutchison, Pretorius & Du Plessis *op cit* note 4 at 314.
[110] Ibid at 278.
[111] Ibid at 280.
[112] Ibid at 281.
[113] Ibid at 312.
[114] Ibid.
[115]RH Christie & Bradfield *Christie's Law of Contract in South Africa* (2016) at 616.

than one of them, either in the alternative or together, subject to the overriding principles that the plaintiff must not claim inconsistent remedies and must not be overcompensated.[116]

There are, nevertheless, three remedies most frequently used for breach of contract. First, there are the remedies aimed at keeping the contract alive and these include: (i) *exceptio non adimpleti contractus*, the innocent party is entitled simply to refuse to perform until such time as the other party has performed in full; (ii) specific performance, in terms of which the innocent party asks for a court order to force the breaching party to render his or her performance; and(iii) an interdict, in terms of which the innocent party asks the court for an order to prevent a breach of contract that has not yet happened but which is threatened or imminent. Secondly, there are remedies aimed at cancelling the contract. In certain circumstances, the innocent party is entitled to the remedy of cancellation, in terms of which the contract is summarily terminated. Thirdly, there are remedies aimed at compensating the innocent party for loss or harm caused by the breach. These remedies can be claimed in addition to any of the remedies mentioned above and include a claim for contractual damages or for delictual damages. In certain circumstances the breaching party's action can constitute both breach of contract and a delict. Delictual damages are not awarded for a breach of contract as such, but only if there was a delict (for instance, a bidder who lost the tender due to a corrupt act may claim delictual damages); and a claim for interest on amounts owing although *mora* in interest for late payment is a species of damages.[117]

The termination of the PPP agreement can also occur when contractual obligations are not being met by one party or both parties, in the circumstances of the default of one party or both parties. Grounds for termination in instances in which unilateral and premature termination occurs, as well as their consequences, should be specifically defined and set out in the contract. Ideally, early termination should be the last resort because it is costly. [118] Many consequences emerge once a contract has been terminated prematurely, such as the requirement to provide monetary compensation or project site handover. The identification of such consequences in the contract ensures, among other things, that the

[116] Ibid.
[117] Hutchison, Pretorius & Du Plessis *op cit* note 4 at 312.
[118] World Bank *Report on Procuring Infrastructure Public Private Partnerships: Assessing Government Capability to Prepare, Procure, and Manage PPP*s (2018) at 60.

private partner is not put in a disproportionately disadvantaged situation should the public partner decide to end the contract.[119]

Thus, the Standardised PPP Provisions establish that the PPP agreement must clearly stipulate the events that can constitute an institution default which will entitle the private party the right to early terminate the PPP agreement with compensation.[120] For instance, it can constitute a compensation event any breach by the institution of any of its obligation under the PPP agreement to the extent in each case that the breach is not caused or contributed to by the private party or any subcontractor.[121]

The PPP agreement must, further, deal comprehensively with the possibility of early termination owing to private party default. However, a fair balance must be achieved between the institution's desire to be able to terminate the agreement on the grounds of, for instance, inadequate services provision (a right which the institutions have in conventional service contracts) and the private party and its funders' interests in restricting termination to the severest of defaults when all other reasonable alternative options have been exhausted, including rectification opportunities. It should be the institution's last resort to exercise its right of termination.[122]

The PPP agreement must specify the events of private party default that may lead to termination and, as far as is practicable, these must be objective, clear and provide for reasonable tolerances, bearing in mind the undesirable consequences of a termination.[123] Therefore, the PPP agreement must provide a mechanism which allows the private party to remedy breaches that are capable of being remedied in order to avoid termination. However, not all breaches may be remediable or give rise to remedy opportunities, for instance, a failure to complete the works by a long stop date or insolvency.[124]

[119] Ibid at 61.
[120] National Treasury Standardised PPP Provisions *op cit* note 17 at 248.
[121] Ibid at 192.
[122] Ibid at 251.
[123] Ibid.
[124] Ibid at 353.

4.4.3 *Termination due to the effects of force majeure events*

Force majeure should be defined in the agreement to include those very limited events [125] that will clearly be out of the control of both contracting parties and which, if they continue for more than six months (for instance) can result in the termination of the PPP contract. *Force majeure* should only include those events that are likely to have material adverse consequences on either party's ability to fulfil its obligations under the PPP contract and which are uninsurable.[126]

A PPP contract can be terminated due to the consequence of the occurrence of a *force majeure* event which will objectively make the performance or continuation of the contract impossible. The party claiming relief shall be relieved of any liability under the PPP agreement — to the extent that by reason of the *force majeure* event it is not able to perform all or a material part of its obligations under the PPP contract.[127] In these circumstances, normally, neither party can be held responsible.

4.4.4 *Termination of the contract due to corrupt acts*

A PPP agreement in South Africa may be terminated as a consequence of corrupt acts. The Corrupt Act (the Prevention and Combating of Corrupt Activities Act) provisions are aimed at all types of bribery, corruption and fraud perpetrated against the institution in connection with the procurement and the ongoing performance of the PPP agreement.[128] These include: (i) offering, giving or agreeing to give to the institution or any other organ of state or any person employed by or on behalf of the institution of any other organ of state, any gift or consideration of any kind as an inducement or reward for doing or not doing any act in relation to the obtaining or performance of a PPP agreement, or for showing or not showing favour or a disfavour to any person in relation to the PPP agreement; (ii) entering into a PPP contract with which a commission has been paid or has been agreed to be paid by the private party or on its behalf, or knowledge, unless the terms

[125] The events listed in the National Treasury's Standardised PPP Provisions (2004) *op cit* note 17 at 203, include: war, civil war, armed conflicts or terrorism, nuclear contamination (unless one party is the source of the contamination), chemical or biological contamination of the works and /or the facilities and/or project site, which directly causes either party to be unable to comply with all or a material part of its obligations under the contract.

[126] National Treasury Standardised PPP Provisions *op cit* note 17 at 201.

[127] Ibid at 203.

[128] National Treasury Standardised PPP Provisions *op cit* note 17 at 257.

and conditions of any such contract for the payment of such a commission have been disclosed in writing to the institution; and/or (iii) committing any offence under any law dealing with bribery, corruption or extortion, creating offences in respect of fraudulent acts, or defrauding or attempting to defraud or conspiring to defraud the institution or any other public body.[129] Corruption, as a development malaise affecting PPP projects, is further discussed in section 4.7.6. To prevent corrupt behaviour in PPP projects, the National Treasury developed standard clauses to assist the parties when writing PPP contracts. The following are some examples of such clauses:

Termination for corrupt acts

> (a) The private party warrants that in entering into this PPP agreement it has not committed any corrupt act.
>
> (b) If the private party, any shareholder, any subcontractor or any affiliate of any of them (or anyone employed by or acting on behalf of any of them) commits or is reasonably suspected by the institution of having committed any corrupt act, the institution shall be entitled to act in accordance with clauses (b)(i) to (iii) below:
>
> (i) if the corrupt act is committed by the private party, any shareholder, any director of the private party, any director of any shareholder, or any employee of the private party or of any shareholder acting under the authority of or with the knowledge of the private party or such shareholder, as the case may be, then, in any such case, the institution may terminate this PPP agreement with immediate effect by giving written notice to the private party;
>
> (ii) if the corrupt act is committed by an employee of the private party or of any shareholder acting on his or her own accord, then in any such case, the institution may give written notice to the private party of termination, and this PPP agreement will terminate unless within [x] Business Days of the private party' receipt of such notice that employee's involvement in the project is terminated and (if necessary) the performance of any part of the project deliverables previously performed by him or her is performed by another person;
>
> (iii) if the corrupt act is committed by a subcontractor, director of a subcontractor or an employee of a subcontractor acting under the authority or with the knowledge of a director of that subcontractor, then in any such case, the institution may give written notice to the private party of termination and this PPP agreement will terminate, unless within [x] Business Days of its receipt of such notice the private party terminates the relevant subcontract and procures the performance of the relevant part of the project deliverables by another person, where relevant, in accordance with clause [*x*].[130]

[129] National Treasury Standardised PPP Provisions *op cit* note 17 at 259 and 260.
[130] National Treasury Standardised PPP Provisions *op cit* note 17 at 260.

The circumstances in which a PPP contract may be discharged has been discussed above. The focus in what follows is on the mechanisms available to the parties for the resolution of disputes when they arise.

4.5 Dispute resolution mechanisms in PPP contracts

The terms 'dispute' and 'conflict' are used interchangeably throughout this chapter. When it comes to commercial activity, a major area of concern at the stage of contract management is the setting up of efficient and credible conflict-resolution mechanisms which can ensure the settlement of disputes in a time-bound manner.[131] Nevertheless, the possibility of a dispute arising, for example, at the stage of bidding where the award of a contract may be challenged on the grounds of arbitrariness and illegality cannot be ruled out.[132] This was dealt with in section 4.2 which discussed bidder remedies for the enforcement of the PPP procurement rules. The discussion in this section, however, revolves around the post-contract award, specifically at implementation stage at which the principles and rules of the law of contract take prominence over the administrative rules.

Due to the long-term nature of the PPP contract, the provisions discussing dispute resolution mechanisms are intended to prevent the need for constant renegotiation of the terms of the agreement by allowing changes to be made and problems to be resolved within the framework provided by the contract.[133] There are legal systems where the settlement of disputes arising out of the contracts related to the provision of public services is a matter for the exclusive competence of the domestic judiciary or the administrative courts, and the contracting authority or other governmental agencies involved in a dispute may have preference in local courts because of a familiarity with the courts' procedures and the language of the proceedings.[134]

Given that the stakes in PPP projects are high, private investors, contractors, and money lenders will be more encouraged to participate in projects in economies where they have the confidence that any dispute arising out of PPP contractual obligations will be

[131] KS Harisankar &G Sreeparvathy 'Rethinking dispute resolution in public private partnerships for infrastructure development in India' (2013) at 5 (1) *Journal of Infrastructure Development* at 21.
[132] Ibid at 26.
[133]World Bank *Benchmarking Public Private Partnerships Procurement: Assessing Government Capability to Prepare, Procure and Manage PPPs* (2017) at 48.
[134] UNCITRAL *Legislative Guide on Privately Financed Infrastructure Projects* (2001) at 186.

resolved fairly and efficiently.[135] Thus, ADR mechanisms — away from the traditional litigating courts — will be more preferable to them. This is to say that, apart from litigation, several ADR mechanisms exist including amicable settlement, conciliation, arbitration, and expert adjudication.[136]ADRs are frameworks of voluntary and amicable procedures for resolving commercial disputes more quickly and at less cost than by using court litigation processes. It may take several years for complaints to be resolved in litigation. Further, courts may lack business expertise or be overwhelmed by their caseloads, all of which can be highly damaging to a company's performance, reputation and market value.[137]

ADR has proven to be a valuable pillar in enhancing access to justice by bringing rapid and less costly consent-based dispute resolution to businesses in many economies.[138] The role of an independent third-party, or a neutral party, offers a useful classification for the three main types of ADR processes.[139] The most frequently used ADR models are conciliation/mediation, a facilitation-based process, and arbitration, an adjudication-based process.[140] The adjudication-based process, such as arbitration and expert evaluation, requires enabling legislation to allow for an alternative judiciary forum (other than the courts) and to give effect to the decisions, such as arbitral awards.[141] A dispute can undermine a PPP relationship or be used to strengthen it. Resorting to an appropriate and speedy dispute resolution method is important for PPPs.[142] Further, the complexities and characteristics of PPP arrangements make them prone to disputes, some of which can be acute and jeopardise the success of the PPP projects.[143] All the above was elaborated in the preceding chapter.

The main legal instrument guiding the procurement, contracting, and management of the PPPs contract in South Africa, TR 16, does not expressly provide for any dispute resolution medium to be utilised for the settlement of disputes once they arise. It only

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[135] World Bank *op cit* note 133 at 48.
[136] Ibid at 21.
[137]International Finance Corporation (IFC) *Boardrooms Disputes: How to Manage the Good, Weather the Bad, and Prevent the Ugly* (2014) at 30.
[138] World Bank *Alternative Dispute Resolution Guidelines* (2011) at 1.
[139] Ibid at 8.
[140] Ibid.
[141] Ibid.
[142] Ibid.
[143] Rui Cunha Marques 'Is arbitration the right way to settle conflicts in PPP arrangements?'(2018) 34 (1) *Journal of Management in Engineering*.

indicates that the accounting officer or accounting authority is responsible for resolving disputes and differences with the private party.[144]

However, the Standardised PPP Provisions instruct that the PPP agreement must specify a procedure for handling disputes under its terms. For instance, the parties to a PPP must agree on the governing law and jurisdiction clause by, for instance, expressively indicating that the PPP agreement shall be governed by and construed in accordance with the laws of the Republic of South Africa and that each party agrees that the High Court of South Africa shall have exclusive jurisdiction to hear and decide any application, action, suit, proceeding or dispute in connection with the PPP contract, and irrevocably submits to the jurisdiction of the High Court of South Africa.[145] This may be easily acceptable for the local/national investors.

In any case, subject to an agreement in force between the Republic of South Africa and any state of investor origin, [146] in some cases in South African PPP projects a greater role will be played by foreign investors. The recent enactment of the International Arbitration Act 15 of 2017 which provides for the incorporation of the Model Law on International Commercial Arbitration, as adopted by the United Nations Commission on International Trade Law into the South African law,[147] thus sends a positive signal to those foreign investors who view the arbitration (specially the international one) as the preferred mechanism for settling commercial disputes.

The International Arbitration Act applies to international commercial arbitration, subject to any agreement in force between the Republic of South Africa and any other state or states. Further, the parties must have expressed and agreed in writing that the subject matter of the arbitration agreement relates to more than one country.[148] Therefore, although there are other ADR methods used internationally in the composition of conflicts arising from PPPs, with the recent enactment of International Arbitration Act 15 of 2017 in South Africa, two important mechanisms for international commercial disputes settlements will clearly be preferred and used in resolving conflicts: conciliation and arbitration. These

[144] National Treasury Regulation 16.7.1(d).
[145] National Treasury Standardised PPP Provisions *op cit* note 17 at 375.
[146] Act 15 of 2017 art 1(1).
[147] Act 15 of 2017 'Preamble' *Government Gazette* no. 41347 20 December 2017
[148] International Arbitration Act 15 of 2017 art 1.

mechanisms are based on the UNCITRAL Model Law of International Commercial Arbitration and the UNCITRAL Conciliation Rules, both of which are enshrined in the South African International Arbitration Act 15 of 2017.

4.5.1 *The conciliation and mediation*

Conciliation and mediation [149] are ADR mechanisms endeavouring to resolve conflicts amicably, by agreement between the affected parties, rather than by imposition of external decision. The prescribed alternative of dispute resolution involves informal conciliation through internal referral up a ladder of increasingly moving up to senior levels of the management of the business.[150] Fast-track dispute resolution may not be ruled out when the parties wish to have certain disputes determined by independent experts, for instance, for calculation of any refinancing gains, or the application of any inflation-indexation mechanism, or the application of an economic test to determine whether the proceeds of the material damage insurance should be applied to reinstate the project service be resolved on a fast-track basis by an independent financial expert.[151]

The mediation is a flexible process of helping to resolve disputes, conducted in confidentiality, and in which a neutral person actively assists parties in working forward a negotiated settlement of a dispute or difference.[152] Both the conciliation and mediation rely particularly on the willingness of the parties to engage in negotiation, and may be appropriate when a matter is complex or likely to be lengthy while the parties want to keep the dispute confidential.[153] The role of the conciliator as well as of the mediator is to facilitate the parties to overcome their differences, guide them in identifying issues, engage in joint problem-solving and explore creative settlement alternatives.[154] However, the mediation process goes further by allowing the mediator to suggest terms for the resolution of the dispute at hand.[155]

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[149] International Arbitration Act 15 of 2017 art 1Chap 1 *General Provisions, Definitions*.
[150] National Treasury Standardised PPP Provisions *op cit* note 17 at 368.
[151] Ibid at 371.
[152] World Bank *op cit* note 138 at 12.
[153] Ibid.
[154] Ibid.
[155] UNCITRAL *op cit* note 134 at 178.

4.5.2 *The arbitration*

Arbitration is preferred — and in many cases required — by private investors and money lenders, since arbitral proceedings are better suited to the needs of the parties and to the specific features of the disputes likely to arise under the project agreement. Furthermore, the parties can choose as arbitrators persons who have expert knowledge of a particular type of project, and arbitral proceedings may be less disruptive of business relations between the parties than judicial proceedings.[156] Most of the concession agreements (such as PPP contracts) do provide for arbitration due to its relative advantages in terms of speedy conflict resolution thanks, in part, to the technical know-how of the adjudicators.[157]

An arbitration agreement is defined in the South African law as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.[158]Arbitration is used typically for both the settlement of disputes that arise during implementation or operation of infrastructure facility and the settlement of disputes related to the expiry or termination of a project agreement.[159] The resolution can also be based on a bilateral investment treaty (BIT), a contract between a foreign investor and a host government. Furthermore, in international arbitration processes involving governments, institutions such as the ICSID play a key role in handling investor-government disputes.[160] As previously was mentioned in section 3.5.2, South Africa had signed a BIT with Mozambique, with the objective of protecting investments from both countries.[161] Thus, the objective was that in the case of disputes arising out of PPP projects involving investors from both countries, this BIT would certainly provide guidance in facilitating the settlement of those disputes. However, not only has the Mozambique-South Africa BIT never entered into force but – and also – South Africa has decided to end its BITs.

In any case, the composition of conflicts arising from any phase of the PPP project will follow the terms contractually defined and agreed to between the contracting parties.[162]

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[156] World Bank *op cit* note 138 at 11.
[157] Harisankar & Sreeparvathy *op cit* note 131 at 28.
[158] International Arbitration Act 15 of 2017 art 7.
[159] UNCITRAL *op cit* note 134 at 183.
[160] World Bank *op cit* note 133 at 11.
[161] Bilateral Investment Treaty between South Africa and Mozambique governments signed in 1997.
[162] Act 15 of 2017 art 6.

This means that the contracting parties can agree to submit the conflicts arising from the PPP contract to arbitral decision,[163] including using the legal framework established by Act 15 of 2017, or resorting to arbitral bodies created under international conventions, such as the ICSID. The arbitration contract is a written agreement providing for referral to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein.[164] Unless the agreement otherwise provides, an arbitration agreement shall not be capable of being terminated except by consent of all the parties thereto.[165] This is what was reasserted in *National African Federation for the Building Industry & another*. There the High Court of South Africa, Kwazulu-Natal Local Division, when making the case for the points raised in limine by the respondent who contended that the applicants failed to refer the dispute between the parties to arbitration in terms of a Discretionary Grant Agreement (DGA) concluded between the parties, held that

> If the applicants wished the court to prefer litigation above the express choice of having their disputes resolved by way of arbitration, they would be required in terms of s 3(2) of the Arbitration Act 42 of 1965 to show good cause for the court to exercise its discretion in not recognising the agreement. The applicants herein have not come close to making out a case for this court to exercise its discretion in their favour to disregard the preference expressed by the contracting parties to have the dispute resolved by arbitration.[166]Accordingly, this point taken by the respondent that the parties are bound to have their dispute referred to arbitration is sound in law, and must be upheld.[167] The court forewarned the applicants not to proceed further with the matter in light of this court not having jurisdiction to entertain the matter.[168]

Clearly, with the recent enactment of the International Arbitration Act, South Africa, it is hoped, will become a preferred venue, hosting the resolution of commercial disputes, both for the region and the world.

The formation, implementation, and extinction of the PPP agreement, and the mechanisms for disputes resolution arising out of PPPs have been discussed. The section which follows studies risk management strategies in South African PPPs.

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[163] Act 15 of 2017 art 20.
[164] Arbitration Act 42 of 1965 art 1(i).
[165] Arbitration Act 42 of 1965 art (3)(i).
[166] *National African Federation for the Building Industry & another v Safety and Security Sector Education and Training Authority*, 2017, 7094/2016 at [21].
[167] Supra at [22].
[168] Supra at [24].

4.6 Risks and their management in the South African PPP regime

As has been mentioned earlier, PPPs arrangements are not a panacea, because they involve risks sometimes not thought of, or not adequately evaluated by the parties concerned. Risk can be defined as the measurable probability that the actual outcome of a project will deviate from the one expected, or will not at all realise, due to the occurrence of objectively or subjectively ascribed factors or events.[169] It is the likelihood of unforeseen factors occurring which would adversely affect the successful completion of a project in terms of cost, time and quality;[170] or those events which, in the assessment of the parties, may have a negative effect on the benefit they expect to achieve with a project. While there may be events that would represent a serious risk for all the parties, each party's risk exposure will vary according to its role in a project.[171]

When it comes to risk management in PPPs, the strategic procedure is to allocate risks to those best able to manage them in both the public and private sectors. Further, to allocate risks to whichever party that can best control and manage drives the real possible benefits for the PPP contract because it gives the party in question an incentive to minimise its costs.[172] However, the dilemma, for the public authority is what to do about risks over which neither party can exert control, [173] for example, effects from *force majeure* events.

The literature indicates that in attempting to manage risks, the first step is to identify and determine all risks relevant to a PPP, possibly breaking down risks associated with the various phases of the project.[174] It is suggested that a 'risk register' be used to record all risks and serve as a checklist throughout the lifecycle of the project.[175] The main objective of a PPP risk management strategy cannot be the transfer of all risks to the private party but, as referred to earlier in chapter 3, to allocate risks to the party best positioned to

[169]OECD *Public-Private Partnerships: In Pursuit of Risk Sharing and Value for Money'*(2008) at 48.
[170] George Anachebe Nwangwu *A Risk Based Approach to Enhancing Public Private Partnership Projects in Nigeria* (unpublished PhD thesis, University of Hull, 2013) at 88.
[171]UNCITRAL *op cit* note 134 at 38.
[172] Tahir M Nisar 'Risk management in Public Private Partnership contracts' (2007) 7 *Public Organization Rev* at 1–19.
[173] Ibid.
[174] World Bank *Attracting Investors to African Public-Private Partnerships: A Project Preparation Guide* (2009) at 24.
[175] Ibid.

manage them. [176] In this context, 'best' means the party that can manage or prevent the risk at least cost.[177] However, there is no unlimited risk bearing, for private firms and their lenders will always be cautious about accepting major risks beyond their control, such as exchange rate risks, or risk of existing assets. If they bear these risks, then their price for the service will reflect this.[178]

In the real world, PPPs risk management is a complex task. However, a number of mechanisms have been developed to address risks to make PPP projects bankable and to benefit the different project parties by managing risks more efficiently.[179] The OECD's five major strategy responses to risk[180] are listed here. These include risk avoidance (the source of risk is eliminated or bypassed by avoiding project exposure to it); risk prevention (working to reduce the probability of risk materialisation); risk insurance (such as buying an insurance plan); risk transfer (by relocating risk to parties who can best manage it); and, risk retention (when risk is internalised because the cost of its management cannot be avoided and cannot be transferred to one single party).[181]

The South African Treasury Regulation 16 provides that the relevant treasury official competent to enter into a PPP agreement may give such approval only if she/he is satisfied that the proposed PPP agreement will substantially transfer technical, operational and financial risks to the private party.[182] This is what is enacted in the law. However, it does not provide for more details, for example, the percentage of the cost of the risks to be appropriated by the private party, neither does it for risks to be managed by the institution which is the public party. Notwithstanding, as argued in chapter 3, for a good PPP risk management strategy the point of departure should always be the examination and determination, in the first place, of the economic rationality for opting for a PPP instead of

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[176] Kosie Jacobus Haarhoff *Public Private Partnerships As An Alternative Service Delivery Option: A Multiple Case Study of the Healthcare Sector in South A*frica (unpublished MPA thesis, University of Stellenbosch, 2009) at 128.

[177] Philippe Burger & Ian Hawkesworth 'How to attain value for money: Comparing PPP and traditional infrastructure procurement' (2011) 1 *OECD Journal on Budgeting* at 4.

[178] World Bank, available at <*https:ppp.worldbank.org/public-private-partnership/pverview/ppp-objectives*>, accessed on 5 July 2017.

[179] Jeffrey Delmon *Public Private Partnership Projects in Infrastructure: An Essential Guide for Policy Makers* (2011) at 114.

[180] OECD *op cit* note 169 at 55.

[181] Ibid.

[182] National Treasury Regulation 16(3)(2)(c).

embracing other alternative public procurement mechanisms. The South African regulation indicates that there should be an assessment as to whether the agreement will result in a net benefit to the institution, defined in terms of cost, quality, quantity, or risk transfer, or a combination thereof. [183]

The law provides that for a PPP project to get the Treasury Approval: I, the accounting officer or the accounting authority of the concerned institution must set out the proposed allocation of financial, technical, and operational risks between the institution and the private party.[184] To get the subsequent Treasury Approval: IIB, he/she must demonstrate how, among other things, the criteria of substantial technical, operational, and financial risk transfer was applied in the evaluation of the bids;[185] and, finally, to get Treasury Approval: III, he/she must satisfy the relevant Treasury that the PPP agreement meets the requirements of, among other things, substantial technical, operational and financial risk transfer as provided in terms of regulation 16(4)(2) or as revised in terms of TR 16(4)(4),[186] to the private party.[187]

However, the regulation does not specify the nature and the degree of such risks to be transferred to the private party.[188] But concentrating too much power, for example, of 'demonstrating the affordability, and substantial technical, operational, and financial risk transfer to the private party' in the hands of one individual (the accounting officer or accounting authority of an institution) seems to be a recipe for corrupt behaviour.

Although TR 16 does not clearly provide for the specific risks to be managed by either party, from the Standardised PPP Provisions it is possible to capture risks that will particularly be borne by the institution (1) and by the private party (2).

4.6.1 *Risks to be borne by the institution*

The public party in a PPP contract will be expected to be responsible for the management of, for example, the feasibility study risks (ie the failure to identify key downsides with

[183] Ibid.
[184] National Treasury Regulation 16(4)(1)(d).
[185] National Treasury Regulation 15(5)(4).
[186] National Treasury Regulation 16(6)(1)(a).
[187] National Treasury Regulation 16(4)(1)(d).
[188] Madeleine C Fombad 'Enhancing accountability in public-private partnerships in South Africa' (2014) 18 (3) *Southern African Business Review* at 68.

the indented project),[189] risks involving the availability of land free of onus and public planning; [190] political and legislative risks arising from unilateral adoption, by the state, of measures or practices which can cause adverse effects on the normal implementation, operation and management of the PPP or its competitiveness and economic or financial performance; acquiring approval (unusual delays, or permission may be denied for ill-defined schemes), licensing authority, and all risks arising from the exercise of public authority, in principle, are to be managed by the public party.

4.6.2 *Risks to be managed by the private party*

Similarly, in a conventional PPP the private party is expected to bear most of the financial, foreign exchange, operational, management, and demand risks. In South Africa too, the private party will be responsible for the mitigation of climatic, hydrological, hydro-geological, ecological, geotechnical, paleontological and archaeological risks to the site of the project;[191]environmental risks associated with performance or non-performance of project deliverables, environmental damage to the project site or third party property risks;[192]design, construction fitting, installation or commissioning works risks,[193] including latent defects in existing building and /or infrastructure;[194] utility supply risks such as water, electricity or gas that will be required for any part of the project, except where the supply of any of such utilities falls within the functional competence of the institution.[195]

4.6.3 *Management of effects of force majeure events*

Finally, the Standardised PPP Provisions set out the framework for the mitigation of effects resulting from *force majeure* events in which no one party is capable to exert control. To the extent that an event of *force majeure* has occurred and the parties have been unable to agree upon a mutually acceptable solution for dealing with the consequences of the event, either party must be entitled to terminate the PPP agreement.[196] The private party may have

[189] D V G Devan *Public Private Partnerships: Risk Management in Engineering Infrastructure Projects* (unpublished MPhil thesis, University of Johannesburg, 2005) at 26.
[190] National Treasury Standardised PPP Provisions *op cit* note 17 at 65.
[191] Ibid at 76.
[192] Ibid at 85.
[193] National Treasury. Standardised PPP Provisions *op cit* note 17 at 100.
[194] Ibid at 78.
[195] Ibid at 92.
[196] Ibid at 256.

the right to compensation on termination for *force majeure*. However, as *force majeure* events are events that occur through no fault of either party, the compensation payable to the private party on termination of the PPP contract must reflect the 'no-fault' principle with the consequences of a *force majeure* event being shared by the parties.[197]

At this stage, and before the discussion of the South African PPPs risk management strategies is over, some concerns on the matter merit review. The concerns are that in managing risks, in practice, there are no proactive steps to ensure that PPPs meet such criteria of 'substantial technical, operational and financial risk transfer', and that although the PSC is used to determine VfM, it is a hypothetical scheme, and there is no provisions for full publication of the details used for the calculations.[198]

Additionally, given the multitude of risks and the complexity of the PPP contract, risk transfer at the contract preparation and discussion stages tends to be subjective and exaggerated, resulting in poor risk allocation and cost overruns. This assertion is substantiated with two examples: for instance, it was estimated that the construction of the Kimberley prison facility would cost R300 million but it ended up costing R 1.5 billion over a 15-year period. Also, the initial cost estimate of the Gautrain Rapid Rail Link of R3.5 in 2000 escalated to R30.462 billion in 2011.[199]

Yet, in relation to the Gautrain the budget of the Gauteng Department of Roads and Transport for 2011/2012 was said to have included an estimated R259 million guarantee costs for Gautrain Rapid Link concessionaries if the train did not attract enough passengers for the subsequent nine months that it was due to be fully operational, and that guarantee was expected to raise over R360 million in the subsequent year.[200] This meant that the demand risk was to be managed at the cost of the public institution, contrary to what is normally expected in a conventional PPP, where this sort of risk falls under the responsibility of the private party.

Paying this money out every year will squeeze out other public transport projects as it will consume about a third of the Gauteng roads and transport budget.[201] In this case,

[197] Ibid at 300.
[198] Fombad *op cit* note 188 at 71.
[199] Ibid.
[200] Fombad *op cit* note 76 at 19.
[201] Ibid.

given that the government is actually bearing the demand risk which in a conventional PPP would be expected to fall under the responsibility of the private partner, in South Africa the question that arises is whether there is actually risk transfer to the private sector, or whether the private sector does effectively bear significant penalties when things go wrong.[202] Similarly, in the light of the growing incidence of public bailouts in PPPs, a question arises whether the projects become more public than private ones, given the nature of public intervention.[203]

Therefore, contrary to the implicit assumption that substantial risk is transferred to the private party as by the TR 16, in reality, this does not necessarily prove to be the case in South Africa.[204] Crucial factors in enhancing risk transfer are providing a clear specification of the requirements of proper allocation of responsibilities between the public and private partners and a better understanding of the risk and equitable risk allocation between the partners, a risk allocation strategy which can no longer depend upon an optimisation model of risk allocation but rather on the efforts of the partners to negotiate and effectively transfer or diffuse risks elsewhere.[205]

The review of risks and their management strategies in the South African PPPs has now been concluded. What follows is an examination of some 'context-specific factors' capable of negatively impacting on PPP projects in the country.

4.7 Analysis of context-specific factors capable of affecting PPPs

Notwithstanding that in South Africa there are many pieces of legislation, instruction notes, and circulars issued by the National Treasury under which PPP agreements must be construed and managed, these regulatory instruments do not capture all political, socio-economical, and institutional challenges able to affect the success of PPPs in the country. While South Africa is recognised as the economic powerhouse in the SADC region and, hence, with more sound institutions than those of its neighbouring countries such as Mozambique when it comes to the procurement and management of PPP agreements, some challenges exist that still need to be recognised and addressed. Some of these challenges

[202] Ibid.
[203] Ibid.
[204] Ibid.
[205] Fombad *op cit* note 188 at 83.

include complexity in and uncertainty of the PPP environment, non-streamlined regulatory frameworks, weak capacity of the public institutions, lack of transparency, corruption, poor engagement with diverse stakeholders, and poor accountability systems, among others.

In fact, while preparing the literature review dealing with the South African PPP practice,[206] some context-specific concerns surfaced that merit discussion with the hope that some insights will be drawn to a better understanding of the South African milieu in which prospective PPP investors will operate, enabling them to take informed choices. The following are just some examples of such context-specific factors and their order of presentation do note award any special weight.

4.7.1 *Complexity and uncertainty in PPP projects*

PPPs are long-term complex arrangements,[207] composed of many actors, sometimes with different and even conflicting interests. The fact that many actors are involved make the management of PPPs even more difficult and complex and also increases the risks of the decision-making process and poses a difficult managerial challenge for those involved; for institutional fragmentation and a complexity of decision making in PPPs — ie institutional rules, roles, cultural habits based on a public-private division; and for the strategic choices and objectives of both public and private actors.[208]

Also, from a project inception to the conclusion of the PPP agreement, it is difficult to identify all possible contingencies as events and issues may arise that were not anticipated by the parties during the negotiation of the contract. It is thus more likely than not that the parties will need to renegotiate the contract to accommodate these contingencies.[209] Different events, including a change in government policy over time, a

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[206] Fombad *op cit* note 76; Fombad *op cit* note 188; M Maseko *'Analysis of Critical Success Factors for Public-Private Partnerships in Infrastructure Development in South Africa'* (2014), available at *<https://www.platinum.org.za/Pt2014/Papers/129-Maseko.pdf>*, accessed on 24 Oct 2018; Dominic Mitchell *Capacity Development for Partnerships in South Africa: Increasing Service Delivery through Partnerships between Private and Public Sector: Report on Findings of Needs Assessment* (2007); Afeez Olalekan Sanni & Maizon Hasim 'Building infrastructure through Public Private Partnerships in sub-Saharan Africa: Lessons from South Africa' (2014) *Procedia Social and Behavioral Sciences* 133–138.

[207] K S Jomo A Chowdbury, K Sharma et al *Public Private Partnerships and the 2030 Agenda for Sustainable Development: Fit for Purpose*? (2016) at 13, available at *www.un.org/esa/desa/papers/2016/ wp148_2016*, accessed on 7 July 2017.

[208] Erik-Hans Klijn & Gerrit R Teisman 'Institutional and strategic barriers to Public Private Partnership: An analysis of Dutch cases' (2003) 23(3) *Public Money & Management* at 137–146.

[209] World Bank, available *at <https://ppp.worldbank.org/public-private-partnership/overview/ppp.objectives>,* accessed on 5 July 2017.

decline in demand for the infrastructure service, macroeconomic risks, and changes in the political environment, can all impact negatively on a PPP project.[210]

For instance, in 1999, the Borough of Dolphin Coast in the KwaZulu-Natal province signed a 30-year concession contract for water provision with Siza Water Company, a consortium of the French multinational SAUR and three Black Economic Empowerment (BEE) partners. In 2005, the concession entered its sixth year and a study by the Palmer Development Group, cited by Farlam,[211] reported that communities expressed frustration at receiving a lower level of water services than they expected. It also emerged that some of SAUR's initial investment of R7 million was used to pay for the BEE partners which meant the concession needed additional money in the form of a loan from the Development Bank of South Africa (DBSA).[212] Thus, although a dedicated investigation is required to further determine whether the BEE participation was partly the cause of the poor performance of the concession, a quick conclusion that can be drawn from this experience is that the participation of the BEE partners did not add value to the project, or even avoid the failure of the service delivery, including for their own community that they are expected to better serve.

Adding to the above is the possibility of the materialisation of the so-called 'unforeseeable government conduct'. The private party under the PPP agreement is obliged to comply with all applicable law and regulations, and a failure to comply with could give rise to termination. Private parties normally submit bids on the basis that they will not be materially and adversely affected by potential 'unforeseeable conduct' on the part of a government, whether as a result of a change in law or any act or omission by any responsible authority.[213]'Unforeseeable conduct' refers to those changes in law including statutes, regulations and by-laws as well as any act or omission by any responsible authority and the institution to the extent that such act or omission is not covered by the terms of the PPP agreement.[214] Unforeseeable conduct occurs if, after the signature date, the institution or any responsible authority takes an action (including the introduction, application, or

[210] HK Yong (ed) *Public Private Partnerships Policy and Practice: A Reference Guide* (2010) at 15.
[211] Farlam *op cit* note 2 at 22.
[212] Ibid at 24.
[213] National Treasury Standardised PPP Provisions *op cit* note 17 at 205.
[214] Ibid at 205.

change of any law, regulation, by-law or order having the force of law) or fails to carry out its obligations as prescribed by law; and the principal effect of which is directly borne by the project, the private party, or parties undertaking PPP in respect of which the private party is not entitled to any other relief pursuant to any provisions of the PPP agreement which was not foreseen by the private party on or before the signature date and which could not reasonably have been foreseen by any person in the position of the private party on or before the signature date.[215]To deal with the matters concerning government's unforeseeable conduct, the National Treasury Standardised PPP Provisions recommend the inclusion in the PPP agreement of specific clauses, such as

> Should any unforeseeable conduct occur which materially and adversely affects the general economic position of the private party, the private party shall be entitled to such compensation and/or relief from the institution as shall place the private party in the same overall economic position as the private party would have been in but for such unforeseeable conduct.[216]

Though the private party may be entitled to compensation and/or relief arising from such an unforeseeable government conduct, the question that one can raise is whether the 'unforeseeable government conduct' will substantially not result in changing the 'rules of the game' and hence affect investor confidence in the PPP business environment. It should be noted that the materialisation of any 'unforeseeable government conduct' would work against some of the principles of the rule of law (ie predictability and certainty).

Rule of law is described as 'the supreme authority of the law over governmental action and individual behaviour'.[217] It corresponds to a situation where both government and individuals are bound by the law and comply with it. It is the antithesis of tyrannical or arbitrary rule. [218] Predictability, stability/constancy (relatively stable and not changed too often), and certainty are some of the principles of the rule of law that unforeseeable government conduct will work against, with negative impact on the investors' confidence.[219]

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[215] Ibid at 208.
[216] Ibid at 209.
[217] Antony Valcke*The Rule of Law: Its Origin and Meaning* (2012) at 3.
[218] Ibid.
[219] Susan Segal *Rule of Law, Economic Growth and Prosperity* (2007) at 68.

Therefore, establishing and observing the principles and values of the rule of law is essential for consolidating an accessible and fairer market economy that can spearhead economic growth and prosperity. Among other things, the role of the rule of law and that of all its forms is crucial for, among others, ensuring predictability; imparting stability and providing legal certainty.[220] Establishing a credible regulatory framework with effective enforcement mechanisms has the potential to attract more capital in to the economy. To achieve a sound regulatory framework for business and investment requires a basic framework of clarity and consistency in the process behind the regulations; clear, streamlined regulations concerning the incorporation and operation of businesses; predictability in the agencies enforcing the regulations; and fairness in the application of regulations according to the law across cases and subject matters.[221]

Investment decisions are based on both real and perceived factors. Naturally, investors, both domestic and foreign, gravitate to countries and sectors that offer a low risk with a high possible ROR of investments. With countless investment destinations, capital will naturally flow to countries where there is security under the law.[222] A stable environment is one that encourages the formation of new enterprises and the growth of existing ones and hinges on the expectation that agreements/contracts will be respected.[223]

Every individual needs to be certain that the law from its drafting to its enforcement is part of a legal system that is open, prospective, general and equal. The people that make up a country's economy, from aspiring entrepreneurs to business owners and consumers, must have confidence in the rule of law to maximise their potential economic contributions. An environment conducive to entrepreneurship is tied hand-in-hand to one where all individuals and institutions are equal beneficiaries of a sound legal framework.[224]Thus, any uncertainty will always work against the development of PPP projects.

[220] Ibid at 8.
[221] Ibid
[222] Ibid at 68.
[223] Ibid at 73.
[224] Ibid at 113.

4.7.2 *Non-streamlined regulatory framework*

Private investors always want to know, beforehand, what are the rules of the game and be sure whether they are also to be respected by the government.[225] In South Africa, the PPP legislation is perceived as too complex and this has contributed to the slow pace at which PPPs have been implemented.[226] A major concern is that the PPP legislation is cumbersome, resulting in a culture of rule bending and the tendency to use corrupt practices to avoid these rules.[227] For example, the Municipal Finance Management Act (MFMA) and the Municipal Systems Act (MSA) require feasibility studies to be undertaken before a municipality promotes a PPP and the period for the feasibility studies in s 78 of the MSA is approximately two years, and in the MFMA it takes an average of six months. A municipality faced with the challenges of having to satisfy the requirements of both Acts might rather defer or even forgo a PPP project.[228] Because of this, some PPPs were reported to having been established outside the structures of the PPP legislation and policies.[229]

Clearly, at the municipal level the challenges are even greater due to complex and interlinked legislation involving inherent confusion and duplication, by having to satisfy the requirements of both MFMA and MSA, which is often perceived to be a difficult task.[230] An analysis of the PPP laws and regulatory frameworks, in terms of clarifying the conflicting signals these laws and regulations send to the PPP market, can be the first step towards the streamlining the PPP regulatory framework in the country. Legislation – and its application– is also currently a serious impediment to PPPs becoming a long-term tool for the development of South Africa's infrastructure.[231] There is, therefore, an urgent need for the simplification of the legislation and processes around PPPs.[232] If reforms of the PPP

[225] World Bank *op cit* note 118 at 96.
[226] Nathaniel Bruchez *Public Private Partnerships (PPPs) in South Africa: To What Extent Are PPPs Suitable for Long-term Development of Infrastructure in South Afric*a? (unpublished Master's thesis, University of Bern, 2014) at 48.

[227] Fombad *op cit* note 188 at 69.
[228] Ibid at 70.
[229]Ibid at 69.
[230] Axis Consulting *PPP Country Paper South Africa* (2013) at 18.
[231] Bruchez *op cit* note 226 at 48.
[232] Ibid at 51.

legislation are not made, PPPs risk remaining a good but marginal and insignificant tool for South Africa's infrastructure development.[233]

4.7.3 *Public institutions capacity constraints*

Even though South Africa is, compared to other African countries, sometimes regarded and referred to as a developed nation, it remains in many respects a developing country.[234] Many developing countries lack the critical expertise and effective capacity to formulate and implement policies.[235] The creation of capable states is a challenge confronting several countries around the world and, although many have adopted significant political and economic reforms from the 1990s onward, most continue to suffer from a lag in the capacity of the state administrations to carry out functions that are required by market economies.[236]

It is important that the public sector is able to correctly identify and select projects where PPPs would be viable; structure contracts to ensure an appropriate pricing and transfer of risks to the private partner; establish a comprehensive and transparent fiscal accounting and reporting standards and systems for PPPs; and establish regulatory and monitoring frameworks that ensure appropriately pricing and quality of service.[237]

An investigation conducted in 2007 into the South African PPPs found that they were regarded as viable mechanisms for the delivery of public infrastructures. However, one of the biggest challenges that undermined their effective implementation lay in the lack of institutional capacity to manage and maximise the potential of the partnership arrangements.[238] Ten years later, in 2014, another analysis came to the conclusion once more that one of the major challenges in the South African PPP environment is the lack of capacity in terms of quality or skilled personnel with the ability to identify, develop and manage PPP projects.[239] It is recognised that there is a lack of capacity among the public officers to initiate, develop and implement PPP projects, and that the resources in the PPP

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[233] Ibid at 48.
[234] Bolton *op cit* note 1 at 178.
[235] World Bank '*The State in a Changing World'* (1997) at 83.
[236] Merilee S Grindle *Getting Good Government: Capacity Building in the Public Sector of Developing Countries* (1997) at 26.
[237] Jomo, Chowdhury, Sharma et al *op cit* note 207 at 16.
[238] Mitchell, *op cit* note 206 at 14.
[239] Maseko *op cit* note 206 at 137.

Unit are not capable of promoting PPPs and helping to support the implementing agencies in developing and using them to effectively and efficiently deliver public works and services in South Africa.[240] Thus, it is suggested, the PPP Unit needs to live up to its expectations as a knowledge management centre and centre of expertise by improving capacity development in project evaluation, financial analysis, business development, information technology, and performance monitoring and evaluation.[241]

4.7.4 *Transparency concerns*

Transparency in public procurement can be understood to consist of the publicity for contract opportunity and for the rules governing the procedures. It is a principle of rule-based decision-making that limits discretion of procuring entities, and makes it possible to establish whether the rules have been followed — and to ensure their enforcement where they have not.[242] Transparency also suggests that the procurement procedure is conducted in an open and impartial manner and that the parties to the process are aware of information on specific procurements, and, in addition, the participants to the procurement process are subject to the rules applicable to the process.[243] Transparency and disclosure in all processes are essential to ensure that PPPs provide high-quality infrastructure services efficiently, at best value.[244]

Conversely, because this may result in the possibility of exempting PPP initiatives from complying with any or all of the provisions of the TR 16,[245] the lack of transparency and a failure to use competitive procedures carry the inevitable risk of facilitating corrupt practices, in the development of projects that are not suitable, of low quality, providing little VfM, or even at high cost for the taxpayers.[246] VfM is one of the goals of transparency in public procurement, even though it does not necessarily mean acquiring the goods or services at the lowest price. However, the quality of goods and the terms upon which the goods or services are procured are also important considerations. Furthermore, one of the

[240] Sanni, & Hasim *op cit* note 206 at 136.
[241] Fombad *op cit* note 188 at 84.
[242] Quinot & Arrowsmith *op cit* note 29 at 17.
[243] Sope Williams-Elegbe 'A perspective on corruption and public procurement in Africa' in Geo Quinot & Sue Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) at 353.
[244] Bernardin Akitoby, Richard Hemming & Gerd Schwartz *Public Investment and Public-Private Partnerships* (2007) at 10.
[245] Treasury Regulation 16.10.1.
[246] World Bank *op cit* note 118 at 66.

objectives of VfM can also be seen in ensuring that goods, works or services acquired are suitable – in the sense that they meet the requirements for the task in question, and that they are not over-specified (gold-plated). What is desired is the conclusion of an agreement that secures what is needed on the best possible terms and ensures that the contracted partner is able to provide the goods, works or services on the agreed terms.[247]

South Africa's requirements of transparency in procurement are enshrined in s 217(1) of the Constitution[248] and in TR 16.6.3,[249] that stipulate an open and transparent procurement process. Transparency and disclosure in all processes are essential to ensure that PPPs provide high-quality infrastructure services efficiently.[250] Non-disclosure of PPPs between the public and private partners on the grounds of 'commercial confidentiality', protection of 'property rights', or on grounds of 'data protection', raises issues of transparency. In this respect, the leader of the South Africa's opposition party, the Democratic Alliance, was cited as having called for the Gautrain Rapid Rail Link contract to be made public, lamenting that much has been done and kept in secret.[251] Indeed, a lack of transparency, including procurement irregularities and non-disclosure, has highlighted a number of financial and operational problems that resulted in the suspension, by the Minister of Correctional Services, of four new prisons projects in order to undertake another review of the PPP model.[252]

The fact that the main South African National Treasury Regulation (Regulation 16) that deals with PPPs provides that 'the relevant treasury may, subject to any terms and conditions that it considers appropriate and upon written application from an institution, exempt that institution from complying with any or all of the provisions of the National Treasury' Regulation',[253] articulates such concerns over the issue of transparency in PPPs and further indicates that this provision can be perceived as legally opening an opportunity for non-transparent, and subsequent corrupt practices.

[247] Quinot & Arrowsmith *op cit* note 29 at 9.
[248]Constitution of the Republic of South Africa 1996.
[249]National Treasury Regulation 16 in GN R225 *GG* 27388 of 15 March 2005.
[250]Akitoby, Hemming & Schwartz *op cit* note 244 at 10.
[251] Fombad *op cit* note 188 at 71.
[252] Ibid.
[253] National Treasury Regulation 16(10)(1).

4.7.5 *Poor accountability systems*

Accountability, in particular public accountability, is the hallmark of modern democratic governance. Democracy remains a paper procedure if those in power cannot be held accountable in public for their acts and omissions, for their decisions, their policies, and their expenditures. Public accountability, as an institution, therefore, is the complement to public management. As a concept, however, 'public accountability' is rather elusive. It is one of those evocative political words that can be used to patch up a rambling argument, to evoke an image of trustworthiness, fidelity, and justice, or to hold critics at bay. Historically, the concept of accountability is closely related to accounting. In fact, the word comes from bookkeeping. Nowadays, accountability has moved far beyond its bookkeeping origins and has become a symbol for good governance, both in the public and in the private sector.[254] All of the above were referred to in the preceding chapter and it serves to highlight the particular importance that accountability plays in the governance of PPPs.

PPPs change the dynamics of public accountability by involving private partners in government decision-making and service delivery. For this reason, the terms and conditions of this involvement deserve careful scrutiny and understanding by the public officials before a PPP agreement is entered into, as private partners enter into these arrangements for reasons different from those of governments. While governments work to serve the public, private partners are understandably focused on recouping their investment and on generating profits. Thus, accountability in PPPs requires the creation of proper safeguards to ensure that public goods and services are not compromised for the sake of private profits.[255]

Vertical hierarchy has long been the principal method of controlling the acts of those within organisations, a scenario that is very different from the horizontal relationships of PPPs. When PPPs are created each partner enters into the agreement with its own objectives and resources, and exercising accountability in PPPs ultimately depends on

[254] Mark Bovens *Public Acountability*, available at <*https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199226443.001.0001/oxfordhb-9780199226443-e-9*>, accessed on 1 July 2020.
[255] Jame Forrer, James Edwin Kee, Kathryn E Newcomer et al 'Public-private partnerships & the public accountability question' (2010) 4 (May/June) *Public Administration Review* at 477.

clarifying responsibilities in the relationships.[256] PPPs, however, need to be stewarded by the government in order to ensure that public interests are met throughout the arrangement. While both partners develop interdependence in the partnership, ensuring effective public accountability, however, requires the government to have the upper hand.[257] This means that governments need, in the first place, to develop the capabilities to assess their comparative strengths and weaknesses in a prospective PPP arrangement.[258]

Hierarchical accountability is relevant within the context of PPPs because they are public investments that affect the rights and interests of the public, and it stands to reason that government officials are obliged to explain to the public, how they provide public goods and services and fulfil the substantive values of democratic governance.[259] However, hierarchical accountability is not very effective in PPP projects because of the multiple actors and the complex and conflicting undertakings of stakeholders involved, which result in a blurring of public and private sector responsibilities.[260]

Preoccupations over accountability emerge in PPPs in South Africa.[261] A political mistrust of PPPs is quite dominant amongst some sectors of the South African local government and communities which perceives PPPs as a way of privatising state-owned assets.[262] Because PPP contracts are long-term agreements, the need for enforcing accountability is in response to the concerns around the world of governments as well as many civil society organisations and public sector unions in respect of the public sector costs and risks associated with PPPs.[263]

Where accountability systems remain weak, as is also the case with South African PPPs, [264] project participants need to take supplementary measures by, for instance, agreeing on additional provisions to ensure that accountability is effectively reinforced. This may include developing and sustaining open channels of communication and an involvement with diverse stakeholders, especially workers' representatives, media, local

[256] Ibid at 478.
[257] Ibid at 479.
[258] Ibid at 478.
[259] Fombad *op cit* note 188 at 74.
[260]Ibid.
[261] Axis Consulting *op cit* note 230 at 19.
[262] Fombad *op cit* note 188 at 69.
[263] Jomo, Chowdhury, Sharma et al *op cit* note 207 at 1.
[264] Fombad *op cit* note 76 at 15–18.

communities, and parliamentarians from project inception phase to the implementation process, pushing for holding accountable those daily involved in the management of the PPP — the institution and private party agents.

4.7.6 *Corruption concerns*

Corruption can be defined as a behaviour which deviates from the formal duties of a public role because of private (personal, close family, private clique) pecuniary or status gains.[265] Corruption in the public bureaucracy includes bribery, kickbacks, 'gifts' and illicit payments to government officials in their capacity as public servants, in order for the giving party to achieve a stated purpose.[266]

Public procurement is one of the areas of government activity in which bureaucratic corruption manifests, for there are several reasons why public procurement is susceptible to corruption: the large sums of money involved, the nature of the relationship between the decision-maker and the public body, unsupervised discretion, bureaucratic rules, budgets that may not be tied to specified goals as well as non-performance-related pay, and low pay.[267] All these open the opportunity for corrupt behaviour. Many of these behaviours involve various forms of collusion between government officials and bidders, including awarding contracts on the basis of bribes; awarding contracts to firms in which one has personal interest; awarding contracts to firms in which one's friends, family or business acquaintances have an interest; and awarding contracts to political supporters or to firms that have provided financial support, or to regions which have voted for a party in government.[268]

For example, a former South African Minister of Transport was reported as having resigned as a director of First Rand Bank in 2003 after, it was alleged, he accepted gifts and payments of more than R500 000 from a former African National Congress fundraiser whose company was part of the winning N3 toll road consortium.[269] Another challenge that can fuel corrupt practices is that TR 16.5.3 provides that active measures must be taken to promote BEE at all stages of PPPs by including a preference for the protection or

[265] Williams-Elegbe *op cit* note 243 at 338.
[266] Ibid at 337.
[267] Ibid at 345.
[268] Quinot & Arrowsmith *op cit* note 29 at 12.
[269] Fombad *op cit* note 76 at 16.

advancement of persons disadvantaged by the unfair discrimination of the past.[270] However, there are reports indicating that BEE deals have been affected by 'fronting' in which companies appoint nominal black directors or shareholders to win PPP contracts that are, in fact, managed or owned by whites.[271]

4.7.7 *Off-balance financing and the risk of public debt escalation*

Most governments have moved away from the cash-based accounting method in which investment in government infrastructure has a massive impact on the government balance sheet to accrual accounting in which upfront capital and operating costs are paid throughout the life of an agreement.[272] The argument — that appears sound — is that the government can build infrastructure without incurring new debt, because off-balance-financing provides it with a means of escaping tight constraints imposed by fiscal targets and public and parliamentary scrutiny.[273]

Indeed, while PPPs can ease fiscal constraints on infrastructure investment they can also be used to bypass budget and spending controls, moving public investment off-budget and debt off the government balance sheet. When this happens, government can be left to bear the risk involved in PPPs and to face potentially large fiscal costs over the medium-to-long term.[274] Also, the contracting private partner might well fail to perform satisfactorily, or even abandon the contract because it is not profitable enough, or go bankrupt. At the end of the day, governments are ultimately responsible for managing the public service and, sometimes, repaying bankers for whatever happens to the private partner.[275]

Also, it may be possible for the government to underestimate the cost of a project and the revenue to be earned from it, and this may be a recipe for disaster, resulting in an unnecessary cost to government and future generations of taxpayers. For example, the Gautrain project increased the burden on the public debt, as the expenses incurred for Gautrain have increased from the initial cost estimate of R3.5 billion in 2000 to R30.462

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[270] Ibid at 72.
[271] Ibid.
[272] Ibid at 16.
[273] Ibid at 17.
[274] Akitoby, Hemming & Schwartz *op cit* note 244 at 9.
[275] David Hall *Why Public-Private Partnerships Don't Work: The Many Advantages of the Public Alternative* (2015) at 45.

billion in June 2011.[276] PPPs, as in the cases aforementioned, may entail fiscal risks for the government that will contribute to the deterioration of public debt.[277] The escalation of public debt means, in turn, that there will be less money available for businesses and families to spend on goods and services to be offered by PPP undertakings, and thus, investing in future PPPs may not be attractive for the private capital. The choice of the application of PPPs should always make economic sense, promote efficiency, effectiveness, and VfM, and should not be considered an option because the government wants to avoid on-budget spending, because off-budgeting has proven not to be a panacea for all ills.[278] So, sometimes it is better for the government to increase its debt levels and fund the projects itself rather than to sign PPP agreements because of the long-term cost burden that the government may incur.[279]

4.7.8 *Poor engagement with all PPPs stakeholders*

In some places PPP projects have triggered community opposition and unrest with mass demonstrations in some cases demanding an open and transparent process of public consultation and inclusion.[280] The broader welfare benefits of PPP projects should always be taken into account, including social externalities and the implications for the communities and for sustainable development. In the case of infrastructures which are natural monopolies, independent and professional regulatory authorities are needed to oversee and monitor the functioning of PPPs.[281] Overall, by providing for a transparent and wider stakeholders' consultation, participation and engagement, especially with the local communities, and by safeguarding the public interest and reinforcing democratic accountability, popular acceptance and legitimacy of PPPs would constitute the bedrock for successful projects.[282]

An important critical success factor in South Africa can also be the maintenance of good communication and engagement with all relevant stakeholders. The Gautrain project

[276] Fombad *op cit* note 76 at 17.
[277] Philippe Burger, Justin Tyson, Izabela Karpowicz et al *The Effects of the Financial Crisis on Public-Private Partnerships* (2009) at 3.
[278] Fombad *op cit* note 76 at 17.
[279] Ibid.
[280] Jomo, Chowdhury, Sharma et al *op cit* note 207 at 19.
[281] Ibid at 18.
[282] Ibid at 19.

seems to have proven that if communication is open and active from the early stages of a project even a very complex and large-scale PPP implemented in densely populated areas can be successful. In doing so, potential resistance from the trade unions and the general population can be reduced.[283]

To conclude, it is to be conceded that the discussion above (in s 4.7) is simplistic. Nevertheless, it serves to illustrate the extent of potential context-specific factors which are sometimes not necessarily brought to the negotiating table. The discussion did not cover all potential factors/ challenges that can affect successful and sustainable implementation of PPP projects in South Africa. For this reason, more research is, and will continue to be, needed over time.

Concluding remarks

This chapter has examined and discussed the regime of the South African PPP contract. Many of the author observations for South Africa are similar to those in respect to Mozambique. The study of the PPP South Africa concluded that if a PPP were to make sense an effective risk transfer from the government institution to the private sector must occur and must ensure the delivery of high-quality and cost-effective services to the public and the government.[284] It was concluded that risk transfer has a significant influence on whether a PPP is a more efficient and cost-effective alternative to public investment and government provision of services.[285] It was, however, recognised that assessing risk transfer is difficult, given the multitude of risks to which PPPs are exposed and the complexity and the incompleteness of the PPP contracts.[286]

Nevertheless, for good risk strategy management, the point of departure should, in the first place, always be the identification of the potential risks and the determination of the overall economic advantages for the PPP — this being the fundamental factor justifying a PPP option instead of alternative public procurement. There must be an assessment as to whether the PPP agreement will result in a net benefit to the (public) institution, defined in

[283] Bruchez *op cit* note 226 at 47.
[284] International Monetary Fund, World Bank & Inter-American Development Bank *Public-Private Partnerships* (2004) at 3, available at *<https://www.imf.org/external/np/fad/2004/pifp/eng/031204.pdf>,* accessed on 16 March 2020.
[285] Ibid at 18.
[286] Ibid at 3.

terms of cost, quality, quantity, risk transfer, or a combination of them. These benefits must clearly be identified, demonstrated, assessed and weighed against other forms of procuring the same activity or service.

However, in South Africa, there are two serious challenges to the monitoring of PPPs. One is that the accounting officer or authority who is legally charged with the responsibility of monitoring the implementation of the PPP agreement may be among those public officials who suffer from a lack of technical capacity and expertise to systematically monitor the performance of these projects. Further, there is also a political issue related to the fact that the accounting officer or the accounting authority does not necessarily have much authority over the private party because the private party does not form part of the government's democratic chain of command. In other words, the private party does not have obligations to report with regularity to the public party, for example, to the Parliament.

A key pre-requisite for attracting private capital has been identified as laying down transparent policy — regulatory frameworks — and thus streamlining and levelling the playing field to assure private investors a fair return for their investments. This is with a view to protect the interests of the public services users, especially the poor, and to assure quality at a reasonable cost.[287] As the national PPP legislation is regarded as too complicated and, in some cases, repetitious, the discussion's conclusion was that the regulatory framework needs further reforms, including the consolidation of the legislation, in order to create a predictable and conducive environment for investment in PPPs.

The provision of a transparent implementation of the PPP legislation by establishing an institutional and socio-political environment, and restriction on corruption remain challenges to be tackled for the creation of an investor-friendly environment for attracting more investment (including for PPP projects) into the country. It must be highlighted, in conclusion, that the present research has indicated that a government's choice to opt for a PPP will only make economic sense if public goods or services are delivered with efficiency, effectiveness and VfM to the society.

[287] Harisankar & Sreeparvathy *op cit* note 131 at 22.

CHAPTER 5: THE COMPARATIVE ANALYSIS OF PPP CONTRACT REGIMES: MOZAMBIQUE AND SOUTH AFRICA

Introduction

In this chapter the comparative analysis of Mozambique and South Africa's PPP regimes is presented. The chapter distils the main similarities and/or differences of the key rules and institutions governing PPPs, as well as identifies and discusses risks/challenges confronting PPPs and the strategies for their mitigation. The chapter first discusses the legal definition of the PPP contract (1); second deals with the formalities for the conclusion of a valid PPP agreement (2); third analyses mechanisms for the enforcement of the PPP process (3); fourth reviews the circumstances for early termination of the PPP agreement (4); fifth compares the methods for the resolution of disputes arising in PPPs (5); sixth reviews risks and their mitigation under the Mozambique and South Africa PPP regulatory frameworks (6); seventh identifies political risks in context and their mitigation (7); eighth deals with fiscal risks (8); and ninth analyses governance challenges (9). Before presenting the concluding remarks on the comparative analyses of the PPP contract regimes, the SADC perspective is offered, as is an analysis of risks confronting PPPs in the region, and an assessment of the value of the Mozambican and South African PPP frameworks and experience for the SADC (10). Finally, the International Law angle is called in with the aim of bringing an understanding of how PPPs fit in the domain of international law (11).

5.1 The definition of the PPP contract

A brief comparative discussion on the legal definitions of the PPP contract in Mozambique and South Africa undertaken in chapter 2 concluded that the PPP is a modern form of concession contract of public works that have, traditionally, fallen under the full responsibility of the state. [1] In the light of this, the question raised is what sort of contract the PPP is and whether it is a public/administrative or private contract? In answering this question, the study has identified the similarities and differences. The existing similarities is that public 'institutions' are in both jurisdictions the ones legally charged with the

[1] See chap 2 at 2.5.3.

responsibility of driving the PPP processes, and both countries consider PPP to be the involvement, on the one hand, of a public (state/municipal) institution, and on the other, of a private actor, working together to achieve agreed goals.

The differences are that while South Africa defines it as a 'commercial transaction'[2], the Mozambican legislation does not provide any indication on this matter. This then prompted a lengthy discussion as to what a Mozambican PPP is with some sources considering it an administrative contract and, hence, a public contract. A question posed was whether it would be appropriate to conclude that the South African PPP is a private contract due to the fact that the TR 16 indicates that a PPP means a 'commercial transaction between an institution and a private party'. Another question asked was what sort of 'institution' is it and what is its function in society? The response to this is provided by the same TR 16 in which 'institution' means 'a department, a constitutional institution, a public entity listed, a provincial legislatures, any controlling and supervisory function of the National Treasury and a provincial treasury in terms of that provision is performed'.[3]

It is further explained that the public institution (namely, the state) is there to serve the public which is, in the case of the state, the common good of the society as a political entity. In so doing, the state through its administration (government) enters into private contracts governed by private law, as well as into administrative contracts governed by administrative (public) law. In pursuing its objectives, the state, especially through its administration, acts by utilising certain juridical forms (such as regulations, administrative acts, and contracts) and other means (namely, civil servants, goods/services, money) to ensure the regular provision of the collective needs of security, economic, and social wellbeing of the members of the society. [4]

It is also mentioned that the phenomenon of concession, one of the current modalities of the PPP contract is not, in respect of the provision of public services, new in the world of law.[5] It is noted that when a state or municipal authority gives a service for concession to a private operator such private party is guaranteed the necessary public

[2] See South Africa Treasury Regulation 16(1):
[3] South Africa Public Finance Management Act 1 of 1999 s 3 as updated in the *Government Gazette* 40637 dated 24 February, 2017.
[4] Marcelo Caetano *Manual de Direito Administrativo Vol II* (1999) at 1065.
[5] See chap 2.1 for a brief discussion of the historical background of the PPP.

powers for the provision of such service. He/she acts on behalf of the state or public authority, including in the use of the specific public powers (given by the state or public administration through the concession contract) for the running of the service. The concluding remark from the above discussion is that, although the profit motive drives the private sector involvement in PPP projects, to argue that the PPP is a private contract is, *de facto*, problematic.[6] In conclusion, the author thinks it more appropriate to consider it a hybrid institution, taking into account the fact that the PPP falls between traditional public sector provision and full privatisation.[7]

The comparative discussion on the definition of the PPP in Mozambique and South Africa is now concluded. Next, the study moves to review the mechanisms for the conclusion of a legally valid PPP contract.

5.2 The conclusion of a valid PPP agreement

From the review of the requirements for the conclusion of a valid PPP contract in both systems under study (sections 3.1 and 4.1), it was seen that there are similarities in regard to the steps to be followed in contracting PPPs that include project inception, feasibility study, procurement, contract award, and management.[8] The legal frameworks in both systems provide for detailed procedures to be observed at each stage of the PPP process. Failing to comply with such procedures may trigger the suspension by the administration of the phase in question or even the cancellation of the entire PPP procurement process.

There is, however, a fundamental institutional difference in the two countries for the effective conclusion of a valid and, consequently, a binding PPP contract. In Mozambique there is a mandatory subjection to a prior jurisdictional review and the clearance of the draft of the PPP agreement to be entered into by the Administrative Court.[9] In the South African system, however, the relevant administrative arm of the state — in this case the National Treasury or other delegated body — is legally the competent

[6] See sections 2.5.3 & 5.1 for a brief comparative discussion on the legal definition of the PPP contract.
[7] Ibid.
[8] See sections 3.1 & 4.1 for the discussion on the conclusion of PPP contracts in Mozambique and South Africa respectively. In addition, see the Mozambican and South African legal frameworks for concluding PPP contracts: Law 14/2014 of 14 August arts 58 and 60 (Mozambique), and Treasury Regulation 16(6) (South Africa).
[9] See also the important role the Administrative Tribunal plays in the conclusion of PPP contract in Mozambique (last para of section 3.1.3).

authority for the approval of a draft of the PPP agreement to be concluded between the accounting officer or accounting authority of an institution and the private partner.[10]

At this stage one could speculate that the Administrative Court's involvement for the conclusion of a valid PPP agreement in Mozambique is due, partly, to the fact that in that country the PPP contract is regarded as an administrative contract with most of PPPs taking the form of a concession contract, [11] treated in the Romano-German civil law system as a public contract, with the government vested with substantial powers, including that of terminating the contract at any time on the grounds of public interest.[12]

The above assertion, however, is worthy of discussion for, although the TR 16 defines it as a 'commercial transaction' in South Africa as well, the PPP is also considered a mechanism that state/public institutions utilise to procure public goods or services. It can thus be seen that the PPP is defined as a commercial transaction between an institution and a private party in terms of which the private party performs an institutional function on behalf (as a delegation/concession) of the institution. [13]

Actually, the private party by acting 'on behalf of an institution' does exactly what concessionaires do in typical concession agreements. Furthermore, in exceptional circumstances, an organ of state can cancel the contract in the public interest because it fetters the future exercise of its discretion.[14] In this instance the government does exercise its *ius imperium* emanating from public law. For this reason, a question remains to be answered — and further research is needed — so as to determine why in Mozambique the conclusion of a valid PPP agreement requires the authorisation by a court (the Administrative Court) while in the South African system the administration itself (the minister responsible for the Treasury, for example), is considered sufficiently competent to approve the conclusion of the PPP agreement.

[10] Note that in South Africa the role of clearing/non-objection of a draft of PPP contract is played by the Minister in charge of the Treasury.
[11] Lei n.º 24/2013, de 1 de Novembro Controlo da Legalidade dos Actos Administrativos e Fiscalização de Receitas e Despesas Públicas, BR 79, I Série, de 6 Outubro de 2015 (republicaçãao) (hereafter Law 24/2013).
[12] PPP Law art 25(1).
[13] Treasury Regulation 16.1.
[14] Phoebe Bolton 'The regulatory framework for public procurement in South Africa' in Geo Quinot & Sue Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) at 184.

5.3 The PPP enforcement mechanisms

The review of both PPP regimes, of Mozambique and South Africa enforcement mechanisms has resulted in the presentation of more similarities than differences.[15] At the pre-contractual stage the PPP process is, in both systems under study, mainly enforced by the institutions of public administration whose public powers derive from public law (administrative law). Dissatisfied stakeholders can put their cases before the administrative institutions such as tender boards, contracting entities, sectoral ministries/departments, the Ministry of Finance, or regulatory agencies). Subsequently, and in the case of Mozambique, there is also a role for the Administrative Court if an aggrieved party decides to judicially challenge an administrative decision.[16] The Administrative Tribunal in Mozambique is a special jurisdiction responsible for judging the legal conformity of government procurement and public contracts.

In the South African system, aggrieved bidders can also enforce public procurement rules in the ordinary courts. [17] In addition, if an aggrieved bidder is not satisfied with a court decision, he/she may lodge an appeal to the Supreme Court of Appeal and, in some cases, the matter may even end up in the Constitutional Court. Thus, remedies are, in the South African system, available in both public and private law, and in review proceedings include an interdict to prevent the conclusion of an agreement, the setting aside of an award decision or, in exceptional cases, an award of compensation, damages in delict/tort, and/or contractual damages.[18] To sum up, it can be said that apart from administrative remedies available to bidders in both jurisdictions studied, aggrieved bidders may judicially challenge an administrative decision by approaching an administrative tribunal (in Mozambique) and an ordinary court (in South Africa).

5.4 The early termination of a PPP contract

There are similarities and differences that can be found in the early termination of a PPP agreement when comparing both the Mozambican[19] and the South African[20] systems. The

[15] See sections 3.2 & 4.2 for the discussion on PPP enforcement mechanisms in Mozambique and South Africa.
[16] See sections 3.3 & 4.3 for the performance of the PPP contract in both countries.
[17] Bolton *op cit* note 14 at 198.
[18] Ibid.
[19] See section 3.4 for the discussion on the termination of a PPP agreement in Mozambique.
[20] See section 4.4 for the discussion on the termination of a PPP agreement in South Africa.

similarities include default by either party to comply with its contractual obligations and effects of *force majeure* events, if these cannot be sustainably mitigated. The differences comprise the right of the Mozambican authorities to use their public power to terminate a PPP contract, at any time, on the grounds of the public interest/public policy (something which is unusual in the South African PPP system).

One of the reasons for the early termination of the PPP agreement in both jurisdictions would be the cancellation of the contract — mostly on the part of government— which could be subject to stabilisation clauses if a foreign investor were involved. Stabilisation clauses, under international law consider freezing the applicable law of the host state in order to protect investor interests. Among other stabilisation clauses (other than freezing), an economic equilibrium clause makes a business sense as it provides an investor with the right to claim damages and *lucrum cessans* in the case of the early termination of the PPP contract due to its cancellation.

The cancellation of an internationalised PPP contract may, however, be in response to dramatic changes in circumstances which were taken for granted by the contracting parties at the conclusion of the contract. In this case and under art 62 of the Vienna Convention on the Law of Treaties (VCLT),[21] the *rebus sic stantibus* doctrine could be invoked in case of change of circumstances which constituted the essential basis of the agreed contract. It shall be noted that the effect of such changes must be to transform radically the scope of the obligations remaining to be performed.[22] Unlike the foreign corporations whose motive is profit, the state has to be conscious of its economic and development goals. Thus, the view that *rebus sic stantibus* should be used to early terminate agreement which a state feels is detrimental to economic development would accord with the community objective of development.[23]

A PPP agreement in South Africa can also be terminated as a consequence of a corrupt act perpetrated by an institution's official or its representative for private gain. It is necessary, however, to point out that although corruption is also regarded as a criminal

[21] '[A] change of circumstances will not normally negate the principle of of pacta sunt servanda unless there has been fundamental change of circumstances which has occurred and which was not foreseen by the parties at the time of concluding their agreement.'
[22] Abul Maniruzzaman 'State contracts with aliens: The question of unilateral change by the state in contemporary international law' *Journal of International Arbitration* (1992) .9 (4) 141–172.
[23] Ibid.

offence in terms of the Mozambican general legislation,[24] the only circumstance in which it is mentioned in the PPP Law is the requirement for the contracting parties to include an 'anti-corruption clause' in their PPP agreement.[25] Nevertheless, no indication is given of the consequences of the perpetration of corrupt activity in the process of contracting or execution of a PPP contract. The absence of a clear and specific provision in the Mozambican procurement system determining corruption as a circumstance for termination of PPP process or contract is surprising for, at least, two reasons.

First, the country's corruption performance has worsened lately, compounded by the discovery of the country's hidden debts revealed in the spring of 2016 which prompted donors and international development partners to suspend their direct support of the government budget. Secondly, corruption has become a common feature in political rhetoric, with speeches and official statements frequently acknowledging the gravity of the issue. Further, the Mozambican authorities have affirmed zero tolerance against this economic and social malady.[26] It seems surprising that there is no enactment allowing for any proven corrupt activity to be a trigger for the termination of a PPP process or contract. This is surely something that Mozambique's legislative body should consider remedying.

5.5 The dispute resolution mechanisms

In reviewing dispute resolution mechanisms at the disposal to the parties wishing to or implementing PPP projects in both Mozambique and South Africa, two important similarities were revealed.

One is the fact that, in both systems, the parties are urged to agree in writing and in advance to the terms for the resolution of disputes arising in PPP projects.[27] Another is that in both systems under review the parties have the possibility to use both litigation and alternative processes for the settlement of their disputes. A clear difference, however, is that in the Mozambican system the PPP agreement is regarded as a public contract and thus the jurisdictional composition of disputes will be of the responsibility of administrative

[24] Penal Code arts 501, 502 and 503.
[25] Decree 16/2012 of 4 June art 37(1)(z).
[26] Ariane Wolf & Elisa Klein *Mozambique: Overview of Corruption and Anti-corruption* (2020) at 3, available at *https://www.u4.no/publications/mozambique-overview-of-corruption-and-anti- corruption-2020*), accessed on 16 August 2022.
[27] See section 3.5 & 4.5

courts, [28] unless the contracting parties have agreed to, in advance, submit their conflicts to a different fora. Conversely, in the South African system the use of common courts of justice is a possibility available to the contracting parties.[29]

Apart from litigation, ADR mechanisms preferred in both systems include mediation and arbitration. PPP contracting parties can agree to choose national or international arbitration for the settlement of potential conflicts arising in the implementation of PPP projects. Additionally, the recourse to international arbitration for the resolution of disputes involving the government of South Africa is subject to the exhaustion of national arbitration [30] in accordance with the exhaustion of local remedies (ELR) rule. In international arbitration, however, an opposing party may invoke the *res judicata* doctrine to safeguard the decision of the tribunal *a quo* as final and binding.

The ELR is a rule applicable in international arbitration proceedings which requires that a foreign national allegedly harmed by a host state must first seek redress for the alleged harm before the administrative and/or judicial system of that state until a final decision has been rendered, before its international responsibility can be called into question. [31] The Mozambican regime does not provide any conditionality based on the ELR rule. Nevertheless, it is submitted that because of the fact that the ELR rule emanates from international law, it also applies to Mozambique since this country is a full member of the international community and, as such, is governed by international law.

The ELR's main purpose is to protect the sovereignty of the state by requiring foreign investors to seek redress, first, for any harm allegedly caused by a host state in its domestic legal system. The ELR is one of the conditions for international protection. The investor need to exhaust all available local remedies in a host state's legal system in order for the state of its nationality to espouse the claim and bring it to the international level. However, most of the investors are sceptical about legal systems of developing countries, and direct access to international remedies is the most favourable option for them.[32] To

[28] Law 7/2014 of 28 February art 115. This provision indicates that if a choice of arbitration were not made by the contracting parties, the administrative tribunal enjoys full jurisdiction over the composition of disputes arising in PPP contracts.
[29] See section 4.2.3 on the judicial enforcement of PPP procurement rules.
[30] Protection of Investment Act 22 of 2015 art (13)(5).
[31] Martin Dietrich Brauch, *Exhaustion of Local Remedies in International Investment Law* (2017) at 1.
[32] Dalibor Ribicic, *Is Exhaustion of Local Remedies Procedural or Substantive Requirement in Investment Treaty Arbitration?* (unpublished Master's thesis, University of Uppsala, 2020) available at

this, developing countries such as Mozambique and South Africa will have to see how they can strike the balance between the national and international remedies.

Another rule relevant to the arbitral settlement of investment disputes involving a state and a foreign national is fork-in-the-road (FITR) clause. FITR provides that once an investor opts for a particular dispute settlement mechanism available, he/she is considered to have taken the FITR with — in principle — no possibility of subsequently choosing a different path. The provision prohibits an investor from submitting an investment dispute to a particular court/tribunal if he/she has previously seized another court/tribunal of the same dispute.[33]

The purpose of the FITR provision is to ensure that the same dispute is not litigated before a different fora, thus avoiding 'parallel proceedings'. Parallel proceedings can be regarded as covering two types of situations: those in which proceedings in the same matter are pending before a different court/tribunal and those in which this court/tribunal has already decided the dispute.

The problems of parallel proceedings include, on the one hand, (i) an unfair advantage conferred upon claimants in such proceedings as the claimant is given not one, but two or more opportunities to prevail in one and the same lawsuit. And the respondent, on the other hand, will have to prevail in both (or more) proceedings in order to escape liability; (ii) create the risk of overcompensation of the claimant; (iii) undermine the efficient resolution of investment disputes; and (iv) may lead to conflicting decisions, for instance, different decisions on identical legal issues. Such lack of decisional harmony can threaten an orderly resolution of disputes and may be a source of complications in the context of the enforcement of the decisions rendered.[34]

An important landmark for the international arbitration settlement of investment disputes in the SADC region was achieved in 2017. Furthermore, in respect of international arbitration, with the enactment in South Africa of the International Arbitration Act 15 of 2017, incorporating the Model Law on International Commercial Arbitration as adopted

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https://www.diva-portal.org/smash/get/diva2:1435936/FULLTEXT01.pdf at 40, accessed on 10 February 2022.

[33] Markus A Petsche, *The Fork in the Road Revisited: An Attempt to Overcome the Clash between Formalistic and Pragmatic Approaches* (2019) at 395, available at, *https://openscholarship.wustl.edu/law_globalstudies/vol18/iss2/*7, accessed on 10 December 2021.

[34] Ibid at 424.

by UNCITRAL, the United Nation Commission on International Trade Law. Investments involving both countries were protected and governed under the 1997 BIT. However, in the light of the passage of the Act 22 of 2015, the BIT came to its end in South Africa. Now foreign investors and their investments cannot be treated less favourably than South African investors in like circumstances.[35] Perhaps Mozambique should follow this example and enact a law that does not treat South African investors less favourably than its nationals.

The comparative analysis on the dispute resolution mechanisms is now concluded. What follow is a review of the risks/challenges confronting PPPs in both countries under study.

5.6 Risks and their management according to the PPP laws

> Risk management is defined as a formal process of coordinated activities to direct and control an organisation with regard to risk. There are three main stages of risk management: identification of relevant and potential risks, risk analysis and evaluation of the potential impact, and risk response in order to formulate suitable risk treatment strategies or mitigation measures.[36]

It should, however, be recognised that 'although a vast body of literature is already available, to date there exists no overarching overview that synthesizes risk factors that are relevant to all PPPs regardless of the project or sector'.[37]

It is recalled that the investigation has, in sections 3.6 and 4.6, revealed that both Mozambican and South African governments have anticipated, in their respective PPP legislations, what they consider as risks and provided the procedures to be observed once they materialise. These are the risks the contracting parties will have no choice but abide by the law, once they occur.

In reviewing the PPP regimes of both countries the study has identified the risks which are relevant for the development of PPPs and concluded that there are more similarities than differences between both jurisdictions with regard to risks falling under the government's responsibility and to those to be managed by the private party.

For instance, it falls under the responsibility of the government/public institution to manage failure of the feasibility study to identify key downsides with the intended project.

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[35] Protection of Investment Act 22 of 2015 art (7)(1).
[36] Robert Rybnicek, Julia Plaklolm & Lisa Baumgartner *Risks in Public-Private Partnerships: A Systematic Literature Review of Risk Factors, Their Impact and Risk Mitigation Strategies* (2020) at 1177.
[37] Ibid at 1200.

These include, unusual delays of acquiring approval or permission of the project; the government's change of law; the unilateral adoption of laws, rules or practices which can cause adverse effects on the implementation, operation and management of the PPP project; conflict of interests of an institutional nature arising from full or partial concentrating public power in the same state entity, for example, of regulatory functions and licensing authority; the risk of land unavailability or land-use acquisition rights; and the risks from public planning.

The legislation assigns to the private party the responsibility to manage financial and exchange rate risks; fiduciary risks arising from the improper use of financial resources made available for the PPP project; risks of an unsustainable project's debt; tax risks arising from tax evasion or from undue enjoyment of a tax rights regime not applicable to the project; risks of defective conception, design, engineering, construction, and maintenance of the project; risks emerging from poor commercial, operational, management, and poor performance of the PPP project; risks of a decrease in demand or supply of goods and/or services, excluding agreed exceptions; risks of squandering the residual value of the project's assets; and environmental degradation risks and its impact arising from facts subsequent to the taking over or establishment of the project.

However, since the responsibility to mitigate certain risks is typically associated with a bundle of others, an effective mitigation strategy should include translating risk allocation into detailed contract structure. PPP practitioners in Mozambique and South Africa will need to go through an intermediate step in which they define other elements of the contract structure such as: who will do what and how will the payments flow? For instance, the private party may be responsible for revenue collection — which carries the risk that some customers will not pay. Or the private party may be responsible for construction — which entails a series of risks. Labour costs, the timing of equipment and other supplies delivery, and the cost and time to obtain the needed licences can also affect total costs and construction times, positively or negatively.[38]

Overall, until regulatory reforms aiming at streamlining the PPP regimes take place, PPP practitioners will be expected to comply with the legal provisions including the risks allocations defined in both countries' regulatory instruments. The prevention and/or

[38] World Bank *Public-Private Partnerships Reference Guide Version 2.0* (2020) at 152.

mitigation of these risks will be key for successful and sustainable implementation of the PPPs. Thus, once the parties have agreed upon and signed the PPP contract, all effort should be made to prevent risk from occurring, at the same time that proactively design mitigation measures to be implemented once the risks materialise, minimising their impact.

The review of what the governments of both countries consider as potential risks and their management approach is now concluded. The discussion moves on to examine the risks/challenges resulting from the PPPs' experience in context. These are those risks which are probably overlooked at the negotiation table or somehow left to the implementation team when they materialise.[39] The study has grouped them into three categories: political, fiscal, and governance risks/challenges.

5.7 The political risks and their management

Before delving into an analysis of risks and the strategies for their mitigation, it needs to be explained that the author does not intend to cover all sort of political risks that may be relevant to PPPs in their different variants, but to discuss the political risks in context, those risks that emerged during the investigation in the two jurisdictions under study.

Political risks are sensitive and nuanced and small differences may have important negative implications for the PPPs.[40] Given the public service nature of the PPPs, it is inevitable that they are subject to heavy political debate and unless there is a strong political will on the side of the government and the ability to communicate the case for pursuing PPPs clearly and fairly, political winds can easily blow the programme off and PPPs will struggle to succeed.[41] Political opposition to PPPs is often quite misconceived. For instance, PPPs may be regarded as a form of privatisation of a public asset which gives rise to various reasons for political opposition, including claims that PPPs give private investors the opportunity to make enormous profit at the public's expense by providing services which could be provided by the public sector more effectively. It may also be claimed that a PPP erodes the working conditions of the public sector workers in cases where the work

[39] Sections 3.7 & 4.7.
[40] Kim, M Julie *Understanding and Mitigating Political Risks of Public-Private Partnerships in U.S. Infrastructure* (2014) at 57.
[41] Yescombe, *Public Private Partnerships: Principles of Policy and Finance* (2007) at 27.

is taken over as part of the PPP. Or it may be argued that a facility managed by a private operator under the PPP contract will sacrifice safety for profit.[42]

When investigating risks susceptible to affect the success of PPPs in both Mozambique and South Africa, it was found that there are more similar political risks than differences confronting PPPs in both countries. The similarities include: uncertainty and risk of changes in law (1); non-streamlined regulatory frameworks (2); weak capacity of state/public institutions (3); lack of public confidence and the risk of political opposition (4); and poor engagement with key stakeholders (5). The difference is that what is categorised as political violence that includes the acts of war and terror plaguing Mozambique (6). The discussion of these risks and the suggested mitigation strategies now follows.

5.7.1 *The uncertainty and the risk of changes in law*

Investors need — and seek — to operate in a legally predictable and stable environment. However, this may not always be the case including in Mozambique, with the government enjoying excessive discretion,[43]and in South Africa, where an unforeseeable government conduct is a possibility, the law may be changed overnight to serve 'public interest'. The risk of change in laws and regulatory frameworks is one of the sources of uncertainty, in the one hand, and the complexity of the PPP structure involving high transaction costs, long-term contracts (ie 10 to 40 years), blurred ownership and accountability, complex financing structure, risk sharing, and contracting incompleteness, are also sources of uncertainty, on the other.

The provisions granting the government the right to engage in direct negotiation with a private investor and subsequently award a contract with no public tendering,[44] or to cancel or modify a PPP contract, with view to, allegedly, catering for the public interest in Mozambique [45] and/or the possibility of 'unforeseeable government conduct' materialising in South Africa, [46] present serious risks for PPP investments as they do not induce

[42] Ibid.
[43] See section 3.7.1 for a discussion on this.
[44] Article 13(3) of the PPP Law.
[45] See section 3.7.2.
[46] See section 4.7.1.

investors' confidence. Predictability, stability and certainty are some of the principles of the rule of law that 'unforeseeable government conduct' will work against, with a negative impact on PPPs. Thus, if investors face uncertainty in the PPP market and an unstable PPP regime, they will not invest.

Thus, although the PPP regulatory regimes of both countries provide that should any of the cases (early termination of PPP contract, changes in law with adverse impact on investor and its investment, and/or expropriation) materialise the private party shall be entitled to fair compensation, these provisions do not contribute to the boosting of investors' enthusiasm and confidence, especially the international ones. For instance, the cancellation by the GoM of the contracts with Aguas de Portugal in FIPAG, and with RITES & Ircom in CCFB was argued as operating under the 'public interest' provision. However, the GoM's decision did not send a positive signal to the PPP market and also not for prospective investors.

To mitigate the risks posed by uncertainty and changes in law (adoption, promulgation, change, repeal or modification of the rules after the signing of a contract), it is suggested that both the Mozambican and South African governments should streamline their regulatory regimes. Until then, parties in PPPs should agree to and write into their contracts some sort of stabilisation clauses.

Stabilisation clauses are contractual clauses in private contracts between investors and host states that aim to shelter investors from government adverse action and address the issue of changes in law/rules in the host state during the life of a project.[47] The objective of the stabilisation clauses is to exempt an investment from the application of new laws, freezing the laws of the host state either in their entirety or limited to certain regulatory issues; and/or securing an economic equilibrium in which the aggrieved party can claim high compensation to cover the financial loss it may have suffered. However, it is advised that the stabilisation clauses should be designed in such a manner as to avoid preventing the host state from complying with its international law obligations, particularly the

[47] Katja Gehne & Romulo Brillo *Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment* (2014) at 3, available at *https://www.wti.org/media/filer_public/c7/83/c783ecf8-11cf-4e3c88c46214f8f7b51e/stab_clauses_final_final.pdf*, accessed on 16 August 2022.

obligation to uphold and enforce the laws protecting human rights and environmental protection in its territory.[48]

The protection against arbitrary changes in law and applicable rules is important for investment promotion and may facilitate investments that contribute to sustainable development. However, governments should avoid signing up excessively broad stabilisation commitments that may, in the future, constrain governments from implementing social, environmental and economic programmes. An investor seeking a stabilisation commitment from the Mozambican and South African governments should also demonstrate its need and to negotiate for it in a transparent manner.[49] This will be the circumstance in which the investors should be reminded that international law treaties and international conventions (ie on human rights) cannot be overruled by contracts and that, therefore, exceptions to the scope of stabilisation commitments allow for changes to applicable rules and standards in line with evolving international law exist — even if they are not explicitly mentioned in the PPP contract.[50]

5.7.2 *The non-streamlined regulatory frameworks*

All investors , whether in PPPs or not, want to know, in the first place, what the laws are, and which rules are applicable for the development of their projects and, also, whether they are to be respected by the governments and other society' members. Investors want predictable, secure, fewer, stable, simpler, better rules and commercially-oriented regulatory instruments, so that PPPs can flourish.[51]

The study of the Mozambican PPP regime reveals double regulation,[52] while that of South Africa is viewed as being fragmented and cumbersome, resulting in a culture of rule bending and a tendency to use corrupt practices in order to speed up the materialisation of PPP projects.[53] The scenario described above does certainly not provide any inducement

[48] Andrea Shemberg *Stabilisation Clauses and Human Rights* (2009) at 7.
[49] Lorenzo Cotula *Investment Contracts and Sustainable Development: How to Make Contracts for Fairer and More Sustainable Natural Resource Investments* (2010) at 71.
[50] Ibid at 72.
[51]UNECE *Guiding Principles on People-first PPPs for the United Nations Sustainable Development Goals (UN SDGs)* (2018) at 29.
[52] See section 3.7.1.
[53] See section 4.7.2.

for prospective investors who will be rather confused as to which laws/regulatory frameworks to use for the implementation of their projects.

Double regulation in Mozambique, and a fragmented and cumbersome regulatory system in South Africa, present a challenge for PPP investors since these may make it difficult for them to understand easily which law to apply in each case at hand. In the end, prospective investors may simply abandon the idea of developing a PPP project in the country (whether in Mozambique or South Africa).

To mitigate the challenges of double regulation of PPPs in Mozambique and of the fragmented and cumbersome regulatory system in South Africa, there is an overarching need for both countries to streamline their PPP regimes by, for instance, consolidating all the PPP-related legislation into a single legal instrument. This suggestion goes in line with the regional agenda aiming at a harmonisation of the PPP regulatory framework at regional level as set out in the SADC strategic indicative plan.[54]

5.7.3 *The weak capacity of public institutions*

PPPs are complex transactions that require special technical, legal and financial expertise.[55] The weak capacity of state/public institutions means that PPP projects will be unlikely to deliver on expected gains. To address the capacity constrains governments worldwide have been building PPP units. A successful PPP unit requires the presence of expertise including with specialised sector-specific technical skills and expertise in economics, finance, and law of contracts, regulation, procurement, and communication. To attract and retain these skills, including from the private sector, PPP dedicated units have to offer attractive packages to both permanent staff and short-term consultants.[56]

Thus, while South Africa (relative to Mozambique) is technically and financially well sourced, however, both countries faces the challenge that capacity constraint pose for the implementation of PPPs. Mozambique does not possess a pool of PPP expertise and a PPP unit is practically non-existent. And one of the reasons behind this is, partially due to

[54] Regional Indicative Strategic Development Plan (RISDP) 2005–2020 at 79–80.
[55] Kim *op cit* note 40 at 64.
[56] OECD *Public-Private Partnerships in the Middle East and North Africa: A Handbook for Policy Makers (*2014) at 31, available at <*https://www.oecd.org/mena/competitiveness/PPP%20Handbook_EN_with_covers.pdf*>, accessed on 7 August 2021.

the fact that there is no incentive to develop such competencies and capacity as there is no market competition for PPP contracts. This is because when there is a need to develop a project with recourse to PPP modality, the contract is directly awarded on a non-competitive basis.

To mitigate these challenges two approaches may be required. One is that in Mozambique the PPP provision [57] allowing the GoM to engage in direct negotiation and direct contract award (with no public tender) supposedly to cater for urgent 'public interest' needs to be reviewed. Further, all PPP procurement processes, should, perhaps, be subjected to open and transparent public competition. It is this lack of open and public bidding for the award of a PPP contract which makes the development of PPP expertise superfluous. Another approach, that also includes South Africa, involves skills development through well-tailored educational and training programmes and the building of effective and efficient PPP units that can house the best PPP expertise.[58] The key is to develop and retain PPP expertise. Taking into account that the PPPs are long-term contractual arrangements, the key role of any PPP units should also be to help and intelligently support the management of PPP projects with their preparation and development.[59]

5.7.4 *The lack of public confidence and risk of political opposition*

PPPs involves big projects with huge sums of money involved and sometimes the expropriation of lands and subsequent resettlement of displaced poor people. In some places PPP project initiatives have triggered community opposition with mass demonstration[60]. In Mozambique, ordinary citizens' perception of PPPs is that they are the vehicle the political elites utilise for their own private enrichment. The involvement of public officials in PPP projects by, sometimes, taking for free percentages of stocks in SPV, the businesses created under a PPP arrangement, or by receiving a lump sum for facilitating the implementation of a PPP project, are the reasons behind the popular suspicion and mistrust.[61] In South Africa, political mistrust of PPPs is quite dominant amongst some

[57] Article 13(3) of PPP Law.
[58] Kim *op cit* note 40 at 64.
[59] UNECE *op cit* note 51 at 24.
[60] See sections 3.7.8 & 4.7.8
[61] See section 3.7.5.

sectors of the society which perceive PPPs as a way of privatising public assets.[62] Political mistrust may augment popular discontentment and opposition against PPPs.

One way in which to mitigate the risks of suspicion towards and political opposition against PPPs in both jurisdictions, is by involving the public, local communities, businesses, and public employees early on the PPP planning process. This exercise may also help to gain some insight into the political feasibility of PPP projects well before costly consultants are brought in to assess the legal and financial feasibilities of a project.[63] Another is that governments should consider providing investment guarantees and political risk insurance designed to meet the needs of international investors.[64] Mozambique's integrity system needs to be improved to win its citizens' trust. Transparency and accountability in PPPs need to be clarified and reinforced, including drawing a clear line between conflict of interest and pure acts of corruption resulting from the abuse of public office at the part of government officials.[65] In Mozambique things have become increasingly serious and complicated, to the extent that an effective mitigation strategy cannot be suggested, since the lack of transparency is an embedded culture in the management of public affairs that works directly with corrupt behaviours for the private enrichment of those in public offices.

The case of USD 2.5 billion of hidden public debt, taken in a non-transparent manner by the government during the Guebuza presidency, substantiates what is said here. What is needed in Mozambique, and with greater urgency, is the presence of a political will from the governing party leadership to change the current state of affairs and move the country forward, implementing a governance agenda for sustainable development. While in South Africa, the mitigation of the risk of political mistrust may be addressed by improving transparency and accountability systems in place, by developing and sustaining open communication channels and involvement with diverse stakeholders, especially

[62] See section 4.7.5.
[63] Kim *op cit* note 40 at 65
[64] Kathryn Gordon *Investment Guarantees and Political Risks Insurance: Institutions, Incentives and Development* (2008) at 92.
[65] Penal Code arts 426, 431& 436.

workers' representatives, media, local communities and parliamentarians, from project inception, implementation and, at the end of the project, the asset hand-back.

5.7.5 *The poor engagement with key stakeholders*

The investigation revealed that in both jurisdictions most PPP projects may involve, for instance, workers retrenchment, in the case of brownfield projects, or displacement of populations from their lands, in the cases of greenfield projects. In some places, it was referred to in s 5.7.4, PPP projects have triggered communities' opposition and unrest.[66] If the affected communities perceive that they will lose their jobs or lands and corresponding livelihoods with the implementation of a PPP project or with one that is being developed, opposition against such a PPP project will grow and, then, the prospect of the PPP project achieving sustainable success is unlikely.

To mitigate the risks associated with poor involvement, participation and engagement with key stakeholders, both the Mozambican and South African governments and their PPP partners need to bring in the communities and other political stakeholders on board, taking them to buy in the PPP projects. Both governments should create or reinforce the implementation of a stakeholder's framework, making provision for transparency, openness, communication, popular consultation, participation and engagement with all relevant stakeholders and, by making popular consultation and participation mandatory throughout the entire PPP process.

The discussion of the similarities regarding political risks in both countries is now concluded. Next, the study reviews their differences.

5.7.6 *The political violence and acts of war and terror*

Peace and political stability are fundamental ingredients for the development of the nations. Without them the economic activity cannot flourish. There can't be successful and sustainable development of PPPs without peace and stability. Therefore, both Mozambique and South Africa need to be stable and in peace.

The above said, the difference between Mozambique and South Africa to be highlighted in terms of political risks is that the former is cyclically (since 1994) experiencing, after every general election, political unrest due to the opposition's refusal

[66] See sections 3.7.8 & 4.7.8.

to accept electoral results allegedly due to vote rigging. On top of that are the acts of war in the centre of the country which have as the main protagonist the residual forces of ex-rebel movement, RENAMO, and the acts of terror in some districts of the northern and northwest provinces of Cabo Delgado, Nampula, and Niassa waged since 2017 by Islamic insurgence. The escalation of acts of war and terror present serious risks not only for the development of the economic activity, including the PPPs, but also for the safety and lives of the investors in particular, and also for the population, in general.

For instance, as a consequence of the escalation of acts of terrorism in Palma in the Cabo Delgado province, the French company, TOTAL, has recently suspended its operation in a gas project. As the TOTAL case spells out, political risks, particularly political unrest and acts of war and terror, have the potential significance to chase away investors, diverting them from materialising (in the country) their investment decisions and in the end the affected country loses out, with negative economic and humanitarian consequences.

While for the mitigation of the political risks discussed in sections 5.7.1 to 5.7.6 does necessitate the presence of a political will from the governments to conduct policy reforms and, hence, their resolution depends on the will of the both governments, the same cannot be said in relation to the management of risks arising from acts of war and terror. Some have argued that the risks associated with political violence, war, or civil disturbance can be mitigated by a government by protection guarantees.[67] However, for the specific case of Mozambique, the author is of the opinion that the GoM should work harder and try to rout out the underlying political and socio-economic causes of the acts of war and terror in the country, apart from the military approach that involves the presence of regional and international defence forces. Meantime, investors should, from time to time, be alert and monitor the developments on the ground, including by taking note of and acting upon intelligence reports.

[67] Jason Zhengrong Lu, Jenny Jing Chao, & James Robert Sheppard *Government Guarantees for Mobilising Private Investment in Infrastructure* (2019) at 19, available at <*https://ppiaf.org/documents/5798/download*>, accessed on 13 of February 2022

The discussion of political risks challenging the development of PPPs in both countries is now concluded. Next, the research moves on to examine the fiscal risks and the suggested mitigation strategies.

5.8 The fiscal risks and their mitigation

PPPs may not always be more efficient than the traditional public procurement mechanism. Therefore, the issue is not whether the private sector is better than government provision. What matters is whether the government benefits by writing a PPP contract with a private agent that is responsible for managing investment and operations over the entire lifecycle of the PPP project.[68] The point is that PPPs may be used to bypass budgetary constraints (off-balance financing) and governments may be tempted to use PPPs because they can undertake investments apparently without initially having to report any new spending or debt.[69] Of course, traditional public procurement also creates fiscal risks. However, cost overruns in traditional procurement may quickly become budget overruns and lower than forecast, and publicly financed project may lead to shortfall in government revenue, not losses for a concessionaire.[70]

Although there are various economic risks that may confront PPPs, it is the fiscal risk that is more salient in the investigation and thus worth discussing in both countries. Experience tells that PPPs can exacerbate the already deteriorated public debt. For instance, in Mozambique, in order to save the CDN project from bankruptcy, the GoM had to take back the responsibility of USD25 million unpaid workers' salaries and concession fees. Likewise, to return the CDN to its operational level, the GoM took an additional USD350 million loan from JICA, the Japanese cooperation and development agency. In South Africa, an important hard lesson learned has come from the Gautrain project. The budget for the Gautrain was initially estimated at R3.5 billion in the year 2000, but the cost went up to R30.462 billion in June 2011 all supported by the public purse. The two cases (CDN in Mozambique and Gautrain in South Africa) are clear evidence of how a PPP may entail fiscal risk ultimately increasing the public debt to be borne by the government. The

[68] Tim Irwin, Samah Mazraani & Sandeep Saxena *How to Control the Fiscal costs of Public-Private Partnerships* (2018) at 2.
[69] Ibid.
[70] Ibid at 3.

implications of the escalation of public debt caused by a failure of a PPP project are at least threefold. First, is that it may increase political controversies (public opposition and scepticism) against PPPs. Second, is that the government will have to deviate money which would be devoted to fund other public services in need in order to rescue a failing PPP project. And third, is that there will be less money available in the pockets of consumers to be spent on goods and services to be offered by PPP projects, and thus future PPP investments may not be feasible.[71] To mitigate the fiscal risks arising from the PPPs both governments should, *ab initio*, conduct a comprehensive due diligence that examines, on case by case basis, whether a PPP project proposal has the potential to meet the envisaged VfM. Thereafter, the implementation, monitoring, control, and reporting should be part of the entire project lifecycle. Also, both governments should consider adopting and/or rigorously implementing the IMFs' Fiscal Transparency Code that includes an indicator to assess the transparency and disclosure of fiscal risks related to PPPs. The code requires that obligations under PPPs are regularly disclosed and actively managed. Governments are expected, at a minimum, to publish annually their total rights, obligations and other exposures under PPP contracts.[72] Otherwise, if a PPP is not a feasible option, it should make sense for the government to build the service internally, through traditional forms of public procurement, including taking loan directly from multilateral development banks (MDBs) or from other IFIs.

The discussion of fiscal risks terminates here. The analysis now moves to discuss governance challenges confronting the growth of PPPs in the both jurisdictions.

5.9 The governance challenges confronting PPPs

Governance and, above all, good governance matters if governments are to fully benefit from the PPPs. The process requires putting in place enabling institutions and processes surrounding PPPs. Good governance is open to much interpretation but, overall, six core principles have become widely accepted. These include: participation, transparency, accountability, efficiency, fairness, and decency.[73] The study of the PPPs experience in Mozambique and South Africa has revealed that both countries are confronted with similar

[71] See sections 3.7.7 & 4.7.7 for a review of the discussion.
[72] Irwin, Mazraani & Saxena *op cit* note 68 at 7.
[73] United Nations *Guidebook on Promoting Good Governance in Public-Private Partnerships* (2008) at 13.

governance challenges, particularly the lack of transparency and weak accountability (1) and corruption (2).If the governance systems are poor, PPP projects will unlikely be able to deliver on the expected gains and thus, will not make a business case for continuing to invest in PPPs.

5.9.1. *The transparency/accountability concerns*

Transparency (the degree of clarity and openness with which decisions are made), participation (the involvement of all stakeholders), and accountability (the extent to which political actors are responsible to society for what they say and do), are well-recognised governance principles as well as human rights principles. Members of the public have the right to appropriate information about PPPs, including public access to PPP contracts, or at least the key terms of those contracts, as well as the right to participate in consultation meetings to voice their views.[74] Lack of transparency and disclosure is a risk confronting sustainable development of PPPs, since PPP contracts are awarded on non-competitive basis and, hence, the envisaged VfM may unlikely be achieved.

In Mozambique, the lack of transparency has resulted in most (if not all) PPP contracts being directly awarded at a non-transparent and non-competitive basis.[75] And, apparently, so far, no one had complained, until the year 2021, in the *SICPA v. Ministry of Mineral Resources and Energy* case, when the aggrieved party in the concession contract for the provision of quality assurance services for the petrol sold to the public, the Maputo administrative tribunal cancelled the contract and ordered the repetition of the tender. The lack of transparency of the tender process was the argument for the tribunal's decision.

In South Africa too, transparency and accountability in PPPs have also been regarded as a matter of concern. For instance, the leader of the South African Democratic Alliance was cited as having called for the Gautrain contract to be made public, lamenting that much has been done in secret. The lack of transparency and financial and operational problems has also resulted in the suspension, by the Minister of Correctional Services, of

[74] Brooke Guven, & Motoko Aizawa *Updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects* (2018) at 11, available at *https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/155/,* accessed on, 31 January. 2022.
[75] See section 3.7.3.

four new prisons projects in order to take another review of the PPP model.[76] The point here is that with lack of transparency and weak accountability system it means that PPP contracts will be awarded on non-competitive basis and with it forgoing a possible best offer and with the risk of fuelling acts of corruption, as well as, no one being held to account when things go wrong, including, for instance, any deviation from the implementation or failure of the PPP project.

To mitigate transparency and accountability challenges, both countries should make transparency in each phase of the PPP cycle a key to ensuring an open and competitive process that can win the trust of local and international investors. Information about the processes, projects, and their characteristics published on different platforms should be accessible that ensures integrity.[77] Enhancing transparency in PPPs can be done in various ways. One is to provide public access to PPP projects information, by involving the public, local businesses, and public employees early on the PPP planning process, it is possible to gain insight into the political feasibility of PPP projects well before costly consultants are brought in to assess legal and financial feasibilities on the project. [78]

Also, such transparency should include offering the public access to relevant information, and where possible through an easily accessible website and among the relevant information it should include financial and budget disclosure.[79] In improving transparency in the PPP process both countries should consider enacting and/or enforcing the provisions making transparency and disclosure, openness and communication with the public, mandatory in all PPP contracts, subjecting them to comprehensive transparency clauses. In this regard, transparency should be the first step towards accountability by each stakeholder to the external parties (the private sector and the citizens) and internally to the public sector institutions.[80]

When enforcing accountability both governments should enact provisions ensuring that when things go wrong those responsible in the public office are held to account, and as well as, consider taking appropriate steps to ensure, through judicial, administrative,

[76] See section 4.7.5
[77] Joan Prats *The Governance of Public Private Partnerships* (2019) at 26.
[78] Kim *op cit* note 40 at 65.
[79] Ibid at 10.
[80] Prats *op cit* note 77 at 26.

legislative or other measures that when negative impacts occur, those affected have access to effective remedy. The establishment of or the recourse to a public ombudsman and other grievance mechanisms in relation to PPPs should be available to aggrieved parties.[81]

5.9.2 *The corruption*

Corruption has been defined as a behaviour which deviates from the formal duties of a public role because of private (including personal, close family or private clique) pecuniary or status gains. Corruption in both countries has become a developmental malaise. In Mozambique, although the GoM has passed anticorruption legislation the implementation thereof has, however, been very poor. Corruption and the entanglement of the political elite in business dealings and government tenders remain a persistent problem in Mozambique.[82] The phenomenon is exacerbated by the involvement of public officials and high profile governing party officials in commercial dealings involving international capitalists.[83] The USD2.5 billion of hidden loans which prompted the suspension of direct budget support by the international development partners is a clear manifestation of how corruption has become a serious challenge in Mozambique.

A former minister of transport in South Africa was reported to have resigned as a director of the First Rand Bank in 2003 after it was alleged he accepted gifts and payments of more than R500 000 from a former African National Congress fundraiser whose company was one, among others, that won the N3 toll road contract. Another risk capable of fuelling corruption is the measures aiming at promoting BEE in PPPs, as there are reports indicating that BEE deals have been affected by 'fronting' in which companies appoint black directors or shareholders to win PPP contracts that are, in fact, managed or owned by whites.[84]

To mitigate the risks of corruption in PPPs (acknowledging that both countries have their anticorruption legislations in place and that most PPP contracts have/will have anticorruption clauses written in it), the suggestion the author makes is that both governments should courageously enforce their anticorruption laws. Another strategy for

[81] Guven & Aizawa *op cit* note 74 at 11.
[82] See section 3.7.4.
[83] See section 3.7.5.
[84] See section 4.7.6 for a review of the detailed discussion.

the mitigation of corruption in PPPs is by improving or enforcing transparency and disclosure in all PPP processes, since it seems that there is a close relationship between improved transparency and the reduction in corruption. The more transparent, predictable and objective the PPP process is, the less likely is the PPP process to be captured by vested interests.[85]

Concluding remarks

With the regard to the risks here discussed, the important point to be highlighted is that if the PPP regulatory regimes of both countries remain as described in this study (double regulation in Mozambique and fragmented and cumbersome in South Africa); if there is no popular acceptance of PPP as a credible development mechanism; if PPPs' debt grows uncontrollably thus augmenting governments' fiscal risk; if transparency remains lacking at the same time as accountability is poor and corruption is rampant; and if acts of war and terror (in Mozambique) continue plaguing the country, the existing PPPs will not deliver on expected gains. Furthermore, at the same time prospective new entrants in PPP projects will not be encouraged to enter into the market as they will find no favourable conditions to invest their resources and, hence, their investment decisions will be deferred or definitely forgone in favour of other jurisdictions. Consequently, both countries will lose out, as jobs for the youth will not be created; public revenues from taxation will not be realised; and the governments will have fewer financial resources to fund public services. Therefore, both governments need to engage in a reform program in order to address these issues. As solutions to these problems, the author, in the recommendations (s 6.6.2), presents some suggestions.

The comparative analysis on risks and risk management strategies in PPP contracts in Mozambique and South Africa is now concluded. Taking into account the fact that both countries are members of the SADC region which is aiming at economic integration, the study now briefly investigates risks confronting PPPs in the region, and how the SADC legal frameworks are used to mitigate them.

[85] UNECE *op cit* note 51 at 39.

5.10 The SADC perspective

Mozambique and South Africa are members of the SADC. The study in the SADC perspective investigates risks/challenges confronting PPPs in the region and advances how the SADC frameworks are used to mitigate them and, as well as, assesses the value (if any) of the Mozambican and South African PPP frameworks and experience for the SADC.

The point of departure is the SADC's Regional Indicative Strategic Development Plan which provides that

> PPPs are effective financing mechanisms for both national and regional development activities, especially in infrastructure projects. In order to maximise these mechanisms, member states need to develop and implement policies and strategies on PPPs and market them to key stakeholders including potential investors.[86]

It is within this policy perspective that art 4 of the Protocol on Finance and Investment (PFI) provides that State parties shall co-operate on policies and other related issues that will encourage and facilitate the use of PPPs to ensure development in the region.

Although some PPPs undertaken in the region are showcased as success (ie N4 toll road linking Maputo and Witbank,) there are, however, considerable challenges hampering the uptake of PPPs in the SADC countries that need to be addressed.

5.10.1 The challenges confronting PPPs in the SADC region

To start with, it shall be noted, there is no yet a harmonised and unified SADC PPP regulatory body. In fact, each SADC member state enacts/has its own PPP legislation. And an examination of SADC countries snapshot led to identify risks/challenges facing PPPs.

For instance, in Angola, corruption is reported as a major challenge for PPP development; in Madagascar, political uncertainty triggered by the 2009–2010 coup d'état has negatively impacted PPP development; in Botswana, the PPP unit is not staffed, and government has hesitated in pushing forward with PPPs; in Comoros, the country has faced resistance from government to undertake PPPs and until 2019 had not enacted a PPP law or policy; in Lesotho, PPPs have been regarded as not successful, particularly due to the

[86] RISDP *op cit* note 54 at 79.

controversial outcome involving a collaboration between the Queen Mamohato Memorial Hospital and a South African private healthcare organisation as the hospital cost USD67 million per year to run; Malawi, Mauritius, and Tanzania have not reported serious challenges; while Zambia faces capacity constraints and lack of adherence to the PPP legislative framework;[87] and in Zimbabwe, the political situation has proven challenging for attracting private investment.[88] Mozambique and South Africa are not mentioned here because as the two countries were examined extensively in chapters 3 and 4.

The challenges confronting the PPPs in the SADC region are not new. In 2015, a work by Mfunwa, Taylor and Kreiter had reported that

> There are some critical issues to attend to, if the full potential of PPPs in the SADC is to be realised. These range from putting in place sound legal and regulatory frameworks for PPPs; improving countries' institutional quality, with special emphasis on developing skilled human capital needed for conducting good feasibility studies, negotiating and monitoring the implementation of PPP contracts; ensuring good governance in PPPs by improving transparency, accountability, provisioning for reporting, accounting and information disclosure; rooting out corruption in PPP processes; and, reinforcing public participation to reduce political risks and ensuring sustainability in PPPs.[89]

In addition, in 2012 a set of case studies examining private sector experiences with PPPs developed by SADC with support from GIZ, the German development agency, had also reported a number of constraints to effective implementation of PPPs. Such constraints included a lack of clear PPP policy in the SADC countries, bureaucratic procedures, fragmented decision-making, weak capacity, lack of institutions responsible for driving PPPs, suspicion of private sector motives, and corruption.

For their part, Ngobeni and Fagbayibo, have also pointed out that major risks facing PPPs in the SADC region is the lack of political will (on the part of member states) to bring about effective articulation and implementation of harmonisation of standards and rules.[90]

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[87] Nthatisi Khatleli, Palesa Shipalana, Chelsea Markowitz et al *Best Practices on PPP Infrastructure Development in SADC Countries* (2019) at 7– 8.

[88] Ibid.

[89] Mzwanele Mfunwa, Anthony Taylor & Zebulun Kreiter *Public Private Partnerships for Social and Economic Transformation in Southern Africa: Progress and Emerging Issues* (2015) at 29, available at <*https://www.tralac.org/images/docs/7815/mfunwa-ppps-for-social-and-economic-transformation-in-southern-africa-july-2015.pdf*>, accessed on 10 June 2019.

[90] Lawrence Ngobeni & Babatunde Fagbayibo 'The investor-state dispute resolution forum under the SADC Protocal on Finance and Investment: Challenges and opportunities for effective harmonisation' (2015) 19 *Law, Democracy and Development* at 186.

And last and but not least, Nthatisi, Shipalana, Markowitz et al. have referred to weak capacity for project conceptualisation, analysis, development and implementation monitoring; poor policy frameworks; and diverging laws and regulatory regimes, as the major challenges the PPPs face in the SADC region.[91]

In the light of the above scenario, a question that can be posed is what strategies can be put in place in order to mitigate the reported challenges/risks in order to create a conducive environment for the development of PPPs in the region.

5.10.2 The management of the challenges facing PPPs in the region

The challenges reported above have the potential to negatively impact on the successful and sustainable implementation of PPPs in the SADC region as they hinder the activities of the existing PPP projects in one hand, and discourage the prospective investors from coming in the region's PPP market, on the other.

Most of the challenges seem, however, to be the consequence of a bigger one: the lack of political will. This is the conclusion one can arrive at after examining the nature of the risks involved and the wording of the provisions of the SADC frameworks. If there were an effective political will at the part of SADC member states, most of the challenges which include political risks would not exist as such, as it is demonstrated in the following:

5.10.2.1 *The mitigation of political risks/challenges*

The risks deriving from cumbersome bureaucratic procedures, fragmented decision-making, lack of institutions responsible for driving PPPs, could/can be addressed by enforcing the content of art 2(2) of the PFI that provides that

> The host state shall facilitate and create favourable conditions to attract investments in its territory through suitable administrative measures and in particular in the matter of expeditious clearance of authorisation in accordance with its laws and regulations.

And for the specific case of PPPs, art 4 of the PFI provides that

> State parties shall co-operate on policies and other related issues that will encourage and facilitate the use of PPPs to ensure development in the region.

[91] Nthatisi, Shipalana, Markowitz et al *op cit* note 87 at 6.

In the same vein, the challenges posed for having to deal with divergent PPP regimes in the region, the SADC organs established under art.9 of the SADC Treaty (ie The Summit, The Council of Ministers, and the Secretariat) should be more effective in promoting the necessary reforms aiming at to harmonise the laws and regulations as is referred to in art.19 of the PEI which provides that

> State parties shall pursue harmonisation with the objective of developing the region into a SADC investment zone, which among others, include the harmonisation of investment regimes including policies, laws and practices in accordance with the best practices within the overall strategy towards regional integration.

The SADC's RISDP asserts that harmonisation of regulatory frameworks, policies and strategies at the regional level will create a larger PPP market space and attract PPP oriented investments.[92] It is reiterated in it that harmonisation of policies and regulatory frameworks is key for the success of the regional integration agenda.

Therefore, in a situation whereby each SADC member state enacts and promulgates its own PPP legislation instead of their acting in concert towards a single PPP regulatory instrument, for instance, enacting a 'Protocol of Law on PPPs', the question one can raise is whether *de facto* the region is truly committed to moving towards the harmonisation of laws and full integration. It becomes difficult to understand that SADC member states which strive for regional integration which encompasses the harmonisation of laws and regulatory frameworks in the region continue acting on individual basis on matters of such magnitude as the promotion of investments for the development of regional infrastructure projects.

Adding to the above, is the risks that emerge from the host sates' right to regulate in the context of the states' sovereign power. Under art14 of the PFI, SADC member states enjoy the right to regulate in their territories, as expressed in the following:

> Nothing in this Annex (1) shall be construed as preventing a state party from exercising its right to regulate in the public interest and to adopt, maintain or enforce measures that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns.

The definition of what can, over time, be considered a public interest to be served is a subjective exercise as it depends on who has the legal prerogative to do so. Therefore,

[92] RISDP *op cit* note 54 at 79.

for investors and especially the international venture capitalists, the provision which entitles a state party the right to regulate may create a sentiment of uncertainty, discouraging investors from investing in the region. The state party's right to regulate, including changing laws and rules or even cancelling contracts in the name of public interest is, understandably, a legitimate exercise of the sovereign power of any state that, however, may raise concerns at the part of investors.

To mitigate the risks arising from the host states' right to regulate and win investors' confidence, both SADC member states and investors should consider working together and coming up with a balanced compromise which satisfies both parties. For instance, SADC member states may grant stabilisation clauses to accommodate investors' interests and to attract future investments by offering a high level of warranty. [93] If such warranties are not offered by the state party and without compromising the host state's obligation to regulate on the fundamental rights protected under the international law frameworks,[94] investors should be encouraged to negotiate and write into their contracts a stabilisation clause, especially the economic equilibrium clause, defining in advance the conditions of economic restoration, once the host state takes unilateral measures with adverse impact on investors and their investments.

To mitigate the risks of expropriation and/or nationalisation of investor's property, it is suggested, SADC member states should avoid the materialisation of this sort of risks, due to the harsh reputational image the region would portray and suffer before world investors, with long term negative impact. However, once the risk of expropriation or nationalisation materialises, the aggrieved party will at least expect to be awarded adequate compensation under the provisions of art 5 of the PFI that states

> Investments shall not be nationalised or expropriated in the territory of any state party except for public purpose, under due process of law, on a non-discriminatory basis and subject to the payment of prompt, adequate and effective compensation.

With no surprise some member states' actions may trigger disputes involving investors and host state. When this is the case the disputing parties are advised to seek remedies for

[93] Gehne & Romulo *op cit* note 47 at 5.
[94] For instance, on human rights.

the settlement of their disputes through peaceful means (ie amicably) under the terms of art 4 (e) of the SADC Treaty which provides that

> Member states shall act in accordance with the principle of peaceful settlement of disputes.

The above provision is in line with art 33 (1) of the United Nations Charter that advocates, first of all, for peaceful means for the settlement of disputes. In PPP investments, too, if a dispute is not settled by amicable means, the case shall be referred to the Tribunal under the art 32 (1) of the SADC Treaty. However, the SADC Tribunal is, at the moment, not operational due to the political interference it suffered from its suspension in 2012 to practically its extinction in 2014. Nevertheless, access to justice for the settlement of disputes arising from PPPs is granted by the provisions of arts 27 and 28 of the PFI. These provisions overcome the lacuna of not having the SADC Tribunal active. For instance, art 27 of the PFI provides for access to courts by stating that

> State parties shall ensure that investors have the right to access to the courts, judicial and administrative tribunals and other authorities competent under the laws of the host state for redress of their grievances in relation to any matter concerning any investment including judicial review of measures relating to expropriation or nationalisation and/or determination of compensation in the event of expropriation or nationalisation.

The above provision offers access to tribunal and it does not necessarily mean the SADC Tribunal (now extinct). It means any tribunal legally established and empowered to receive, hear and decide over a case it may be submitted to. However, international investors may not be sympathetic with host states tribunals. To resolve this concern and assure more independent access to justice, SADC legal frameworks allow for international settlement of investment disputes. Art 28 of the PFI provides that

> 1. Disputes between an investor and a state party concerning an obligation of the latter in relation to an admitted investment of the former, which have not been amicably settled, and after exhausting local remedies shall, after a period of six (6) months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes.
>
> 2. Where the dispute is referred to international arbitration, the investor and the state party concerned in the dispute may agree to refer the dispute either to: a) The SADC

> Tribunal; b) The ICSID and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings; or c) An international arbitrator or *ad hoc* arbitral tribunal to be appointed by a special agreement or established under the Arbitration Rules of the UNCITRAL.

The discussion of the strategies for the mitigation of political risks is now concluded. Next, the mitigation of the governance challenges follows.

5.10.2.2 *The management of governance challenges*

The most reported governance challenges confronting the development of PPPs in the SADC region are the lack of transparency, weak accountability systems, and corruption. For their mitigation, the author is of the opinion that the SADC needs to live up its promises by implementing the policy proposition contained in art 8 of the PFI which provides that

> State parties shall promote and establish predictability, confidence, trust and integrity by adhering to and enforcing open and transparent policies, practices, regulations and procedures as they relate to investment.

As can be noted from the above provision, if the state parties had effectively promoted and enforced the construct contained in art 8 of the PFI, transparency in PPPs would not be a concern and corruption would have been controlled, since a lack of transparency tends to fuel corruption. To mitigate the risk of such a lack of transparency, state parties should make the PPP process open and public, on the one hand, and potential investors in PPPs and their state counterparts should write into their contracts transparency and anticorruption clauses, on the other. These clauses not only need to be written into the PPP contracts but, above all, need to be enforced over the entire PPP cycle.

5.10.2.3 *The mitigation of capacity constraints*

The mitigation of the constraints posed by weak capacity of public institutions, lack of skilled human resources to staff PPP units can be approached by meeting the RISDP targets according to which by 2005 all member states should have PPP units created and capacity building developed thereof.[95] However, to date, such 2005/2007 SADC targets remain to

[95] RISDP *op cit* note 54 at 80.

be met. Again the competent authorities (the SADC organs) should work for the implementation of the provision of art 4 of the PFI that states

> State parties shall co-operate on policies and other related issues that will encourage and facilitate the use of PPPs to ensure development in the region.

The 'other related issues that will encourage and facilitate the use of PPPs' referred to in art 4 of the PFI above shall include building the necessary capacity and developing the needed skills for effective and efficient implementation of PPPs in the region. Thus, if capacity is lacking and skilled human resources are non-existent, the prospect of the SADC region achieving successful and sustainable implementation of PPPs is unlikely.

Therefore, it is important that the targets the SADC have set for itself in the RISDP, including that all member states shall have their PPP policies, strategies and guidelines developed, and the harmonisation of PPP regulatory framework at the regional level should be achieved as soon as possible as by the date set out in the RISDP (2007) they were not met. This is because the investigation carried out under this study has revealed that not only were the targets not met but, and also, some targets set in the RISDP seem to contradict each other. For instance, on the one hand, each member state should have its PPP policy, strategy and guidelines in place and, on the other, the SADC should have the PPP regulatory framework at the regional level harmonised by 2007.[96] The reality is that up to the present, not only have all member states not met these targets but, also, there is not in the SADC any harmonised PPP regime, for instance, a sort of 'SADC PPP Model Law' in place.

Concluding remarks

The discussion over the risks facing PPPs in the SADC region is now concluded. At this stage what can be said is that the risks identified and here discussed involving the PPP experience in the SADC region is that most of the risks should be mitigated by application and enforcement of the provisions of the SADC frameworks. And for that to happen there is a fundamental need for a political will and commitment from the member states and, especially, from the leadership of the region.

[96] Ibid.

In regard to the value the Mozambican and South African PPP study can offer to the SADC region, the author thinks that it is not necessarily of a normative character since both jurisdictions also have their PPP regimes in place the one different from another. Perhaps the important lesson captured and to be highlighted here may be that of political character: the demonstration of how political will and appropriate leadership and commitment matter. For instance, the projects that are showcased involve the financing, construction and operation of the N4 toll road linking Maputo (Mozambique) to Witbank (South Africa) and the development of the Maputo Port Development Company (MPDC)t, were started well before the enactment of the Mozambican PPP Law, under the leaderships of Presidents Joaquim Chissano and Nelson Mandela, regardless of the PPP regimes, and the projects were jointly developed with financial guarantees offered by both governments.

With respect to the harmonisation of laws in the region, evidence gleaned from the research presented a contradictory view. The SADC region itself proposed to harmonise the PPP regulatory regime. The reality is that the region is not moving forward and even if it is, it is not moving fast enough towards the harmonisation of the PPP legislation. However, it must be said that the harmonisation of laws and regulatory frameworks is key for an effective regional integration and thus it is a fundamental course of action to be pursued with no delay. And for the specific case of the PPP regime, the author is of the opinion that ideally in mirroring the UNCITRAL *Legislative Guide on Public Private Partnerships*, the SADC should consider and engage its legal experts to produce a draft proposal, a sort of 'SADC Protocol on PPPs', to be put before the competent SADC body for consideration.

As Ngobeni and Fagbyibo rightly put it,

> Until such time that SADC states adjust their investment laws, policies and practices to be in accordance with the PFI or other SADC instruments or policies, different and varying regimes for the resolution of investment disputes will remain. The first will be regulated by the member states' investment codes. The second will be regulated by BITs entered into by the states. The third will be in terms of investor-state agreements. The fourth will be regulated by the PFI at SADC level. However, all these array of options available to an investor do not bode well for harmonisation, because they defeat the objectives of having a single, SADC wide investment regime.[97]

[97] Ngobeni, & Fagbayibo *op cit* note 90 at 192.

Ngobeni and Fagbyibo's conclusion on the analysis of the mechanisms for the settlement of disputes in the SADC also applies to other areas of the PPP process. As final remarks, it is reiterated that political will is key not only for the management of the risks confronting the PPPs in the region but — and also — for the materialisation of all regional propositions including the harmonisation of laws in general, and of the PPP regime in particular.

The analysis of the SADC perspective is now concluded. Next, the study moves on to review the international law angle.

5.11 The international law angle

The comparative analysis on the juridical nature of the PPP in both Mozambique and South Africa concluded that the PPP is a hybrid institution [98] governments utilise to overcome financial and operational constraints they face in the provision of public infrastructures and/or services. PPPs are sometimes seen as occupying the middle ground between full public provision, where the asset is built through public procurement and managed by the public sector agent, and full private provision.[99] PPPs are contracts entered between a state, or a public entity created by a state, and a private party. The private party may be a foreign investor covered by an International Investment Agreement (IIA) who enters into the contract motivated for profit expectation. It is this contractual relationship involving a host state and a foreign investor/investment which internationalises the PPP contract that is relevant for discussion here. The study of the international law angle briefly reviews the issues of state contract (1), state immunity (2), definition of investment (3), role of national law and international law in arbitration proceedings (4), stabilisation clauses in PPPs involving international investment (5), and *pacta sunt servanda norm*/the *rebus sic stantibus* rule (6).

5.11.1 The state contract

There is still a serious debate among jurists as to the legal nature of state contracts, and whether state contracts are public or private law contracts can be determined objectively

[98] See section 2.5.3.
[99] Sonia Araujo & Douglas Sutherland *Public-private Partnerships and Investment in Infrastructure* (2010) at 6, available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1685344*, accessed on 16 August 2022.

rather than in the abstract. The two branches of law (public and private) differ in that the former governs the relations between the state and the private persons coming into contracts with it, and the latter governs the relations between private persons.[100] A state enters into contract on behalf of its citizens, representing their collective interests, whereas the private party in such a contract is interested in his/her own profit-oriented goals.[101]

In the IIA perspective, the PPP contract is a state contract signed between a state — or an entity of the state — and a foreign private person to which international law is applicable.[102] It should be recalled that the discussion as to the juridical nature of the PPP contract concluded that it is a hybrid institution governed by both public and private law that falls in between traditional public provision and full privatisation.[103]

There are not many instances of direct reference to state contracts in IIAs.[104] However, the process of negotiation, conclusion, operation, or termination of a state contract including the PPP is of relevance to IIAs as it often forms the legal basis of the investment relationship between a foreign investor and a host country.[105] Normally, states provide the legal and institutional conditions for the operation of contracts not only for domestic but also for international operators including those exploring PPP projects. The extent to which PPP is covered under IIAs depends, first of all, on the scope of the definition of investment provided for in an agreement. And, as latter is discussed, the concept of investment is not static but it can evolve to meet new interests and expectations.[106]

State contracts can thus cover a wide range of issues, including loan agreements, purchase contracts for supplies or services, contracts for financing, construction and operation of large infrastructures projects such as the construction of highways, ports and dams. One of the oldest forms of state contract in the exploitation of natural resources is referred to as a 'concession agreement' [107] which, nowadays, takes the form of the PPP

[100] Maniruzzaman *op cit* note 22 at 142.
[101] Ibid at 143.
[102] Arnaud de Nanteuil,'The emergence of international investment law: from state contracts to Bilateral Investment Treaties' (2020) at 19.
[103] See section 2.5.3.
[104] UNCTAD *State Contracts* (2004) at 15.
[105] Ibid at 9.
[106] Ibid at 15.
[107] Ibid at 3.

contract. And one of the strategies governments utilise to attract foreign investment into a country is by bringing in foreign investors through FDI mechanism and making with them a state contract. For the materialisation of the FDI, both the host state and foreign investor may agree to establish a special purpose vehicle (SPV). The SPV will be the enterprise entrusted with the responsibility of the implementation of the PPP agreement. For the present purpose, a state contract shall be understood to be the agreement between a host state and a foreign person (natural or juridical) aiming at implementing an international investment in the host state, including the PPPs involving foreign/ international investment.[108]

However, the issue of state contracts as they relate to IIAs, for instance, in the exploitation of natural resources, has also exposed concerns about a number of matters. For this reason the management of such concerns should especially count with the following: First, the extension of investment agreements' protection to state contracts depends on the scope of the definition of investment, the exclusion of certain state contracts from their coverage, and how far dispute settlement provisions of the agreements apply to state contracts. Thus, the PPP contract shall provide for some clauses on it. Second, the preservation of host state discretion in the negotiation, conclusion, and regulation of state contracts can be based on inscribing the principle of good faith, providing for a PPP periodic review to address emerging issues in the political and social environment. Third, the duties towards private investors to state contracts to compensate for more favourable position of the state by allowing for stabilisation of the governing rules, choice of law, arbitration, and the breach of contract on the part of the host state are all important considerations for the mitigation of risks of uncertainty and changes in law. Fourth and finally, the development of substantive regimes of state contracts in IIAs can be perceived as related to the international commitment on the side of the host government.[109]

From the above review three policy options are posed to states. One is that states that want to maintain freedom of action in relation to state contracts and avoid as far as possible international investment protection standards should exclude state contracts from

[108] Ibid.
[109] UNCTAD *International Investment Agreements: Key Issues* (2004) at 1.

IIAs. However, this option might signal caution to potential foreign investors, particularly in cases when the host country's legal system does not protect foreign investors' rights.

Another option is that governments wishing to extend protection to foreign investment and, at the same time, maintain regulatory discretion, should opt strategically for a limited protection of state contracts under IIAs by means of positive or negative list of assets, restrictions on the definition of contractual breaches and dispute settlement clauses, the exclusion of certain protection standards as well as the inclusion of public policy exception clauses.

Last, not least, is to the possibility of a consideration of full protection for investors entering into state contracts under international investment treaties that can be achieved through an unlimited definition of investment, unconditional dispute settlement and stabilisation commitments.[110] However, as will be seen later in the course of the study of the definition of investment, this option may be problematic for a host state.

The brief review of the issues regarding the state contract is now concluded. The study moves on to discuss state immunity under a state's international obligations which may arise in the course of implementation of internationalised PPP contract involving foreign investor.

5.11.2 State immunity under international law

Traditionally, as a risk management strategy, the government of one sovereign country, together with its agents and properties, enjoyed absolute sovereign immunity from suits in the courts of another sovereign state. However, as the role of the state changed after World War II countries shifted to a new restrictive doctrine of sovereign immunity which carved out exceptions to such claims of immunity from suit in foreign courts. [111]

Nowadays, there is a distinction between absolute sovereign immunity and restrictive sovereign immunity. Most jurisdictions adopt either an absolute or a restrictive approach to state immunity. Under the absolute approach a foreign state enjoys total immunity from being sued or having its assets seized by a foreign court, even in

[110] Ibid.

[111] Yilin Ding 'Absolute, restrictive, or something more: did Beijing choose the right type of sovereign immunity for Hong Kong?'((2012) 26(2) *Emory International Law Review* at 998, available at *hhttps://scolarlycommons.law.emory.eedu/eilr/vol26/2/15*, accessed on 10 December 2021.

commercial matters.[112] Under the restrictive approach, a foreign state is only immune in relation to activities involving the exercise of its sovereign power. The state may therefore be sued and have its assets seized in foreign court in commercial or private matters. Thus, important distinctions must be drawn between sovereign activities and assets (sovereign test) and the state's commercial activity (commercial test). [113]

At this stage, a question that needs to be answered is what relevance the state immunity has for the analysis of risks in PPPs. One possible answer to this is that some PPPs may be contracts involving state or a public institution created by the state and a foreign national covered by IIA.

State immunity is an important consideration for commercial parties dealing with foreign states or state owned entities.[114] Issues of sovereign immunity are not only complex but they differ from jurisdiction to jurisdiction. For instance, failure to adequately address questions of sovereign immunity could have serious implications, including losing the ability to enforce contractual rights, recover damages or enforce judgments or awards. Thus, parties contracting PPPs with foreign sovereigns or sovereign-owned entities must ensure that they have comprehensive advice covering all relevant jurisdictions, for instance, where proceedings might be brought as well as those where enforcement against state assets might be sought. For that, contractual terms must be carefully worded if parties are to benefit from the best possible protection.[115]

The mechanism of state immunity provides foreign states with protection against legal proceeding brought before the courts of other jurisdictions.[116] In the context of PPPs a state may claim a sovereign test to be applied in circumstances when, for instance, a government decides to develop a certain infrastructure project through a PPP mechanism or through a traditional form of public procurement. Until the state launches a public tender it may claim absolute immunity since this exercise falls under its *ius imperi* that can hardly be challenged and which will not be the case after the conclusion of the PPP contract

[112] Azim Hussain, Matthew Kirtland, Alfred Wu et al 'State immunity and international arbitration: A comparative analysis of key common law jurisdictions' (2017) 8 *Norton Rose Fulbright International Arbitration Report* at 43.
[113] Ibid.
[114] Ibid.
[115] Ibid at 46.
[116] Ibid at 43.

involving a foreign investor covered by international investment law (ie a BIT), where a commercial test will be applied and consequently the state may be held responsible for the breach of contract or treaty (if there is a BIT in force) in terms of arts 4 and 5 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts.

Thus, in writing a PPP contract involving a foreign investor covered by a BIT or other international investment protection instrument, both Mozambican and South African governments should examine the content and terms of the BIT or of such investment protection instrument in order to avoid the state being held responsible for breach of its obligations under international law, and the implication of such eventuality in the international plane which may include the state having its assets seized in foreign courts.

The review of the theory and practice of state immunity is now concluded. Next, the study examines the definition of investment under the IIA.

5.11.3 The definition of investment under IIAs

The concept of an investment is not clearly established. It may involve the use of capital, technical and managerial skills, patents and other forms of intellectual property as well as a variety of other assets.[117] In fact, the definition of investment has always been a controversial issue and countries have debated whether the definition should be broad or narrow. For instance, one of the contentious issues is whether the definition of investment should be limited to FDI or should be extended to include other types of investments such as the portfolio investment as well. The distinction is that FDI involves significant long-term investment with managerial control, whereas portfolio investments may include long-term or short-term investments with hardly any management control. The inclusion of different forms of investment in the definition of investment as provided by IIAs will have different developmental implications.[118]

Arguments in favour of the broad definition of investment in BIT are that it may not be possible for countries to draft a precise definition of investment taking into account all the assets. And a BIT may have a broad definition in order to take into account new forms of investment that may emerge in the future without needing to renegotiate it.

[117] Christoph Schreuer *Investments, International Protection* (2011) at 7.
[118] Prabhash Ranjan 'Definition of investment in Bilateral Investment Treaties of South Asian Countries and regulatory discretion' (2009) 26(2) *Journal of International Arbitration* at 217.

However, in the light of ICSID jurisprudence, assuming ICSID has jurisdiction over a dispute which may arise, any asset construed as an investment will still have to fulfil the characteristics of investment under art 25(1) of the ICSID Convention.[119]

Thus, investment is a broad term meaning different things in everyday economic and legal usage.[120] Legally, the definition of investment is key to the scope of application of rights and obligations arising from investment agreements and to the establishment of the jurisdiction of investments.[121] The term investment may take a broad-based and/or an asset-based definition that is provided in BITs, including those entered by Mozambique and South Africa covering state contracts, including PPPs. Since a BIT is an agreement involving at least two jurisdictions, it is regarded as an international agreement and, by this way, any commercial contract entered between a state party and a national or a juridical person of another state party signatory of such BIT is automatically internationalised, being governed by international law.[122] The implication is that any term captured in the BIT, including in PPP contract involving a covered foreign investment, will also be regulated by international law.[123] There is no a single definition of what constitutes an investment. Most BITs define investment in very broad terms. They refer to 'every kind of asset', followed by an illustrative but non-exhaustive list of assets, recognising that investment forms are constantly evolving. The ICSID Convention does not define the term 'investment'. It is, however, possible to identify certain typical characteristics of investment under the ICSID perspective which have been increasingly used by arbitral tribunals, such as: duration of the project; regularity of profit/ return; risk for both contracting parties; substantial commitment; and the significance for the host state's development.[124]

With the passage of Act 22 of 2015, South Africa has opted to terminate its BITs, while Mozambique, to date, maintains 18(eighteen) BITs in force of which, for illustrative

[119] Ibid at 226.
[120] Mahnaz Malik, *Definition of Investment in International Investment Agreements* (2009) at 1.
[121] Yannaca-Small, Catherine 'Definition of investor and investment in international agreements' in OECD (ed) *International Investment Law: Understanding Concepts and Tracking Innovations* (2008) at 7.
[122] Vienna Convention on the Law of Treaties (1969), art 2 (1)(a).
[123] Yannaca-Small, *op cit* note 121 at 7.
[124] Ibid at 9.

purposes, the author will choose to review the one signed with Japan. Article 1(a) of Mozambique-Japan BIT in force since 29 August 2014 provides that

> For the purposes of this Agreement, the term "investment" means every kind of asset owned or controlled, directly or indirectly, by an investor, including: (i) an enterprise and a branch of an enterprise; (ii) shares, stocks or other forms of equity participation in an enterprise, including rights derived therefrom; (iii) bonds, debentures, loans and other forms of debt, including rights derived therefrom; (iv) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts; (v) claims to money and to any performance under contract having a financial value; (vi) intellectual property rights, including copyrights and related rights, patent rights and rights relating to utility models, trademarks, industrial designs, layout designs of integrated circuits, new varieties of plants, trade names, indications of source or geographical indications and undisclosed information; (vii) rights conferred pursuant to laws and regulations or contracts such as concessions, licenses, authorizations and permits, including those for the exploration, prospect, exploitation and extraction of natural resources; and (viii) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges. Investments include the amounts yielded by investments, in particular, profit, interest, capital gains, dividends, royalties and fees. A change in the form in which assets are invested does not affect their character as an investment.

The expression 'every kind of asset'[125] followed by an endless list of assets offers the idea of an open broad-based definition of what constitutes as an investment to be protected under the Mozambique-Japan BIT. This approach is in line with recent developments in bilateral model treaties, such as the SADC Model BIT. However, in art 2 of the SADC Model BIT and for the definition of investment, three proposals are put forward to the SADC member states they can choose from: the enterprise-based definition (1), the asset-based closed-list exhaustive test (2), and the asset-based non-exhaustive asset-based test (3).

The first option, the enterprise-based approach, requires the establishment or acquisition of an enterprise, normally associated with FDI. The list that follows is not the test of an investment but illustrates the types of assets an investment covered under the treaty may own or possess. For instance, the SPV construed/ to be construed under a PPP contract may well fit in this option (enterprise-based definition of investment).

The second option, the asset-based closed-list (exhaustive test) definition of investment starts from an enterprise approach but this expands to include such assets as intellectual property rights, whether or not they are associated with an existing enterprise

[125] Mozambique-Japan BIT art 1(a).

in the host state. Many of the listed items contained in this approach can be interpreted in a very expansive manner by tribunals.

The third option is the most expansive approach, an open-ended asset-based test that allows most assets to be claimed as covered investments. This is the definition most favourable to investors, however the least predictable for host states.[126]This is the approach in most existing SADC BITs and the opinion is that this should be rejected in all future treaties in favour of option one, the enterprise-based approach.[127]

It is advised that the choice of defining an asset as an investment for the purpose of IIA needs to be in line with the policy objectives of developing countries, including Mozambique and South Africa, aiming at promoting investment that is supportive of sustainable development, meaning businesses that bring economic and social wellbeing of the local citizens and to the society as a whole. It is submitted, however, that a failure to include a broader definition of investment does necessarily not mean that other assets cannot be owned by foreign investors or foreign citizens. Rather, it simply means that they will be protected through domestic law processes and not through international treaties. Where a broad asset-based test is applied such as it is presented in options two and three of the SADC Model BIT, it is strongly recommended that the test of the relationship of the investment to the host economy be added. The test arises from past arbitration practices that have looked at what qualifies as an investment under the ICSID Convention. That the asset must have the characteristic of an investment, such as (substantial) commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and a significance for the host state's development. [128]

The definition of investment in a treaty should be in conformity with a host state's own understanding of the term and its long-term economic development objectives. Thus, if a state does not define investment with greater detail and clarity of what constitutes an investment to be covered under international law, it may run the risk of being 'surprised' by arbitral tribunals over the range of assets that are protected under the international law, even though this may not be the case under that state's domestic law.[129]

[126] Commentary on art 2 of SADC Model BIT at 12.
[127] Ibid.
[128] Ibid.
[129] Malik *op cit* note 120 at 18.

In the light of the above, recently, states have defined investments with greater detail, not as 'every kind of asset', albeit to different degrees to suit their specific objectives. Some recent IIAs have rejected the typical formulation of including 'every kind of asset'. The problem with the typical formulation is obvious: it does not bring in the common understanding of investment such as expectation of profit, risk, and duration. The impact of the general and broad formulation for defining investment can lead to a wide scope of application of the IIA and the failure to properly address the issue can have serious consequences, including losing the ability to enforce contractual rights, recover damages or enforce judgements or awards.[130]

As a final note, it is suggested that when contracting PPPs with foreign investors both Mozambican and South African governments should ensure that they have a comprehensive advice covering all relevant jurisdiction, including jurisdictions where legal proceeding might be brought as well as those where enforcement against state assets might be sought. Therefore, the provisions/terms of PPP contracts entered or to be entered between the state/state owned entity involving foreign investors/investments need to be carefully drafted, if the parties are to benefit from the best possible protection.[131]

The definition of investment under the IIAs is now concluded. The examination of the role of both national and international law follows.

5.11.4 The role of national law and international law

The analysis of the role of national law and international law can be developed in the context of international investment arbitration that is designed to replace two different forms of dispute settlement: diplomatic protection and litigation in domestic courts. The use of a diplomatic approach as a mechanism in seeking a remedy for investment disputes would mean that the investor's home state would espouse its national's claim and pursue it against the host state on the international plane, while litigation in domestic courts is the traditional way of settling disputes between private persons.[132] Both types of remedies were, at a certain point, considered unsatisfactory for the settlement of investment disputes,

[130] Ibid at 11.
[131] Hussain, *op cit* note 112 at 46.
[132] Christoph Schreuer *The Relevance of Public International Law in International Commercial Arbitration: Investment Disputes* (2013) at 1.

since diplomatic protection is discretionary and, therefore, it does not offer assurance of an effective outcome to the investor. In addition, diplomatic protection is liable to lead to frictions in the relations between the two state parties. While litigation in the host state's domestic courts is often seen as lacking the objectivity that the investor desires, and domestic courts are bound to apply domestic law, even if that law falls short of the standards provided by international law. Therefore, international arbitration has thus, been sought as the most rational way to overcome the gap between the traditional international remedy of diplomatic protection and proceedings in domestic courts.[133]

Thus, in examining the role of national law and international law in IIA processes, including internationalised state contracts such as the PPPs participated by covered foreign investors, the study first reviews the primary applicability of the national law and, in this case, the role the international law plays and then, vis-à-vis, the role of the national law when international law is of primary application in international arbitration proceedings.

5.11.4.1*The primary applicability of the national law*

As a matter of substantive principle, when parties enter into a contract they normally choose the law which will govern their contractual relationship. For a state contract, such as the PPP, it is presumed that it would be better regulated by national law. In favour of the application of national law is an agreement by the parties to that effect. The choice of the national law, among other reasons, may also be due to the national nature of the claim at hand. The application of the national law on the basis of choice-of-law agreement is also in conformity with the doctrine of party autonomy, which for territorialised tribunals is respected by the national arbitration law of the tribunal's juridical seat, as well as the arbitration rules to which the parties may refer to internationalised tribunals, in conformity with art 42(1), first sentence, of the ICSID Convention.[134] This provides that

> The tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the tribunal shall apply the law of the contracting state party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

[133] Ibid at 2.
[134] Hege Elisabeth Kjos *Applicable Law in Investor-state Arbitration: The Interplay between National and international Law* (2012) at 158.

The application of national law by virtue of party agreement will also arise where the arbitration tribunal is constituted pursuant to an investment contract. In addition, reflecting host state's desire to have the investment relationship governed by its own national law, a choice for the application of national law is seen as having the advantage of predictability for both parties. A national system of law is an interconnecting, interdependent collection of laws, regulations and ordinances, enacted by or on behalf of the state and interpreted by the courts. It is a complete legal system designed to provide an answer to any legal question that might arise. Furthermore, a national system of law will in principle be a known existing system, capable of reasonably providing an accurate interpretation by experienced practitioners.[135]

While foreign investors often agree to subject their investments to the application of national law of the host state, nevertheless, they would rather prefer to have their cases arbitrated by the application of international law, either alone or in combination with host state's national law.[136] When the parties agree on the application of both national and international law, the argument in favour of the application of national law may also relate to the principle of state sovereignty and specially the right of the host state to regulate activities, including those of foreign investors, on its territory.[137]

It is submitted that the decision to apply national law to the merits ought to depend more on the national nature of the claim at hand than any automatic sequential primacy of the national law. On the basis of such a 'case-of-action' analysis, contractual claims are generally to be governed by national law.[138] Thus, when the national law is of primary applicability, international law may also apply in a complementary or supervening manner. This is because several states consider international law as part and parcel of their law. Consequently, their national courts may directly apply international norms that are considered as self-executing or have direct effect. For instance, in investment arbitration, investors should have the same opportunity to make use of international norms as a function of the applicable national law if it so provides.[139]

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[135] Ibid at 158.
[136] Ibid at 214.
[137] Ibid at 163.
[138] Ibid at 180.
[139] Ibid at 181.

Another aspect is that several states will not apply international norms in case of a conflict of norms. In this respect, as established in *Ioan Micula v Romania,* 'in the case of conflict between host state law and international law, international law shall take precedence.[140]

The practice of territorialised tribunals supports the idea and application of international law on the basis that it constitutes 'part and parcel' of applicable national law.[141] International law can also be a source of interpretation in a way in which national courts give effect to international law in the national legal order through the application of the principle of consistent interpretation, whereby a rule of national law is construed in light of international law. Therefore, courts will always attempt first to reconcile a conflict between international and national law through the principle of consistent interpretation, such as the international-law-friendly interpretation required by the South African Constitution[142]

Further, when national law is primarily elected to govern a dispute arising from the implementation of internationalised PPP contract, international law can apply in a corrective fashion either because the national law contains a lacunae or due to a conflict between a particular national norm and an international norm. The international law would thus play a function as a 'gap-filler', a 'complement' and thereby a 'corrective' of the national law.[143] It was asserted in *Klover v. Republic of Cameron* that ' [t]he role of international law can also be both corrective and supplemental, providing a filler where there is a lacuna'.[144]

5.11.4.2 *The primary applicability of the international law*

When the international law is of primary applicability, arbitral tribunals may require the application of the national law in order to determine the parties' rights and obligations pursuant to that national law.[145] The national law can also play a corrective role vis-à-vis international law, as international law may not provide answers to specific issues presented

[140] *Ioan Micula Ors v. Romania,* ICSID Case No.ARB/05/20, 2013, para.287.
[141] Kjos, *op cit* note 134 at 184.
[142] Constitution of the Republic of South Africa Chap 14, s 233.
[143] Kjos, *op cit* note 134 at 189.
[144] *Klockner v. Republic of Cameroon,* ICSID Case No. ARB/81/2, 1985, para.69.
[145] Kjos,*op cit* note 134 at 241.

to the tribunal. In such situations in which international law primarily governs a dispute, for instance in internationalised PPP contracts, tribunals may have recourse to the law of the host state in a complementary, or gap-filling fashion. And by using national law to complement international law, the incomplete nature of the international legal order is also thereby 'corrected'. However, where the parties have agreed to the sole application of international law, a tribunal would not be authorised to create new causes of action from national law. The appropriate course to pursue would be for the tribunal to seek to distil a general principle of law, since a different conclusion would be contrary to the principle of party autonomy.[146]

Also, the national law could fulfil a complementary role with respect to ancillary questions of law, [147] or play a supervening role. In view of the power of national courts to annul or refuse recognition and enforcement of awards, territorialised tribunals are advised to consider the international public policy of various states. This international public policy is, in fact, domestic public policy applied to foreign arbitral awards and its content and application remains subjective to each state.[148]

Without prejudice to a further role of international law, a possible argument whether international law is referred to (in a Treaty or Convention) as a corrective to the national law, or as a filler of lacuna in the law, the tribunal shall refer to the finding of the Annulment Committee in *Wena Hotels v. Arab Republic of Egypt* that reported in the following terms

> The law of the host state can be applied in conjunction with international law if this is justified.[149]

However, where there is a conflict between the national law and international law the latter will prevail. This was reasserted in *Ioam Micula & Ors.v Romania*

> in the case of conflict between host state law and international law, international law takes precedence.[150]

The conclusion that can be made over the role of national law and international law in international arbitration proceedings is that both national law and international law have a

[146] Ibid at 259
[147] Ibid.
[148] Ibid at 260.
[149] *Siemens v. Argentina*, ICSID Case No. ARB/02/8, 2007 para.77.
[150] *Ioan Micula & Ors.v. Romania* para.287.

role to play in state contracts such as PPPs. This is because of either the national nature of the claim or its international nature. Thus, the argument pertaining to the superior nature of international law vis-à-vis national law should not be important in ascertaining the primarily applicable law. Such relevance has a bearing on the choice-of-law methodology, once the tribunal has decided to apply international law to the merits of a case.[151]

In conclusion, it should be submitted that the direct application of international law does not necessarily exclude the role for national law, as it may apply indirectly in the determination on the merits of the international claims. In these cases the role played by the national law is more than of facts. Arbitral tribunals may have recourse to national law in gap-filling for ancillary questions of law, while they shall consider, and if necessary apply, national public policy and mandatory rules.[152]

The discussion over the role of national law and international law in investor-state arbitration is now concluded. The next section discusses stabilisation clauses in international investments.

5.11.5 The stabilisation clauses in PPPs under IIAs

One of the challenges facing international investors in host states is the risk of changes in applicable laws and regulations after the conclusion or during the implementation of a contract. Therefore, the desire to attract foreign investment, including that for the development of PPP projects, has led governments, especially those of developing countries, to adopt policies that are designed to create a favourable and attractive investment climate.

An important part of these policies are legal safeguards that include the stability of the legal conditions under which an investor can operate, the transparency of the regulatory system and an effective system of dispute settlement. In addition to the guarantees that may be contained in domestic law, host states may also give legal guarantees to foreign investors in PPPs through additional instruments such as stabilisation clauses.[153] These clauses are a variant of a choice-of-law clause and provides that a chosen law, typically of the host state, will apply as in force at a particular date. Alternatively, it may provide that

[151] Kjos *op cit* note 134 at 269.
[152] Ibid at 270.
[153] Schreuer *op cit* note 117 at 2.

future changes in the host state's law that work to the investor's disadvantage will not be applied to it.[154] These clauses are known as stabilisation clauses and aim to provide a sort of shelter in the protection of investment.

Stabilisation clauses are mostly included in contractual clauses and, generally, relate to private contracts between investors (especially the foreign ones) and host states. The clauses intend to address the risk of potential changes in law and rules governing the investment in the host state during the life of, for instance, a PPP project.[155] These clauses may also be designed to insulate private investments from new environmental and social legislation. [156] The rationale of stabilisation clauses is risk management more for LSPs involving foreign investment with longer periods to recover the costs and generate profits, such as infrastructure projects.

As it is required in the context of IIAs, the doctrine of the sanctity of contracts from which the *pacta sunt servanda* norm derives has renewed attention there towards the so-called 'umbrella clauses' and, together with the stabilisation clauses. The expectation is that once the parties conclude their agreement they will honour it *in toto*, including maintaining the conditions existing at the time of the signing of the contract. With the stabilisation clauses, investors seek guarantees that changing investment conditions do not harm the economic equilibrium of their investments and, thus, host states will grant stabilisation clauses to accommodate investors' interests and attract future investments by offering a high level of warranty. [157]

Umbrella clauses are provisions in an investment protection agreement (treaty) that guarantee the observance of obligations assumed by the host state with respect to international private investments. Contracts and other obligations are put under the treaty's protective umbrella. Many BITs will contain clauses of this kind: 'Each contracting party shall observe any obligation it has entered into with an investor or an investment of an investor of any other contracting party'.[158]

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[154] Ibid at 5.
[155] Gehne, & Brillo *op cit* note 47 at 3.
[156] International Finance Corporation (IFC) *Stabilization Clauses and Human Rights: A Research Project Conducted for IFC and UN Special Representative of the Secretary-General on Business and Human Rights* 2009) at vii.
[157] Ibid at 5.
[158] Schreuer *op cit* note 117 at 14.

However, human rights advocates have expressed concerns that the current method of protecting investors' rights in contracts and IIAs are not consistent with the state duty to adequately regulate, and the investors' responsibility to respect, human rights. These concerns were also echoed by the Office of the High Commissioner for Human Rights on balancing investors' rights with obligations to meet wider goals such as those calling for sustainable human development.[159]

It should also be mentioned that some stabilisation clauses such as freezing clauses are likely to be unlawful and, hence, unenforceable in many jurisdictions since they may conflict with constitutional norms on the separation of powers, therefore meaning that the administration/government cannot enter into contractual commitments that will undermine current or future legislation adopted by Parliament. Freezing clauses are also quite inflexible as, faced with a breach, the investor can either put up with it or go to arbitration, thereby risking to undermine the entire PPP project. Given the greater flexibility of the economic equilibrium clauses, choosing economic equilibrium over freezing clauses may make good business sense from the PPP investors' perspective.[160]

The government commitment regarding stabilisation clauses can be possible legally for a state only if such commitment is made in the international legal plane, for instance, if it is subject to international law. Thus, it is true that on their own, the Mozambican and South African governments can make such stabilisation commitments not to modify their laws in order to attract and accommodate investors. They will, anyway, always be able to take them away since an administrative act may replace another, a bill may modify legislative provisions, and a constitution of the country may be revised. However, a commitment made in the international legal order will necessarily entail liability when it is violated. That is why a commitment made by a state not to modify its law would be meaningless in domestic law and can only have a real effect in international law. Therefore, any contract including a stabilisation clause should be considered as inherently rooted in international law and, hence, any dispute arising from a violation of a stabilisation clause

[159] Ibid at11.
[160] Cotula *op cit* note 49 at 72.

will be settled with recourse to international arbitration mechanisms, otherwise it would not produce its full effect.[161]

5.11.6 The pacta sunt servanda norm and the rebus sic stantibus rule

The *pacta sunt servanda* norm derives from the doctrine of the sanctity of contracts, according to which once the parties have reached an agreement they must honour it,[162] and failure to do so may constitute a breach of contract and the aggrieved party shall be entitled to just/adequate compensation.[163] In BITs perspective, this means that the warrantees offered to the investors must be upheld. The application of the principle of *pacta sunt servanda* can also be found suitable to the contractual relationship between two equal partners, such as the Republic of Mozambique and the Republic of South Africa, two equal sovereigns. [164]

The controversy arises as to whether it applies to the contractual relationship between unequal partners, ie, between state as a party, on the one hand, and a foreign private party, on the other. By way of deduction from international law or the general principles of law, it has been strongly maintained that the principle of *pacta sunt servanda* also applies to contracts between a state and a foreign private party, including those who are party in PPP projects.[165]

It is submitted that the GoM's right to terminate a PPP contract on the ground of public interest[166] and the possibility of materialisation of 'unforeseeable government conduct' which may include changes in law (ie statutes, regulation and by-laws) as well as any act or omission by any responsible authority or institution, in South Africa, that may lead to material breach and termination of the PPP agreement is a manifestation of one fact: that the norm of *pacta sunt servanda* is not absolute because in the case of treaty relations the *pactum* is limited by *rebus sic stantibus* which constitutes an important exception to it.[167]

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[161] De Nanteuil *op cit* note 102 at 26.
[162] Civil Code art 406.
[163] Ibid art 562.
[164] Manruzzaman *op cit* note 22 at 2.
[165] Ibid.
[166] PPP Law, art .25 (1) & 26(1). In addition see section 3.4.4.
[167] Maniruzzaman *op cit* note 22 at 10.

Under the art 62 of the 1969 of the VCLT, a PPP contracting party covered by a BIT or any international instrument may invoke a fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of the treaty/contract, which was not foreseen by the parties, if the existence of those circumstances constituted an essential basis of contracting, or, if the effect of the change is radically to transform the existent obligations still to be performed under the treaty/contract.[168]Thus, under the *rebus sic stantibus* the aggrieved party may seek remedies invoking fundamental change of circumstances.

The analysis over the *pacta sunt servanda* and *rebus sic stantibus* is now concluded. With the conclusion of the analysis of the *pacta sunt servanda* and *rebus sic stantibus* the discussion of the international law angle terminates here. Although more could be said over the international law, the study cannot, however, go further to cover every issue of international law that may directly or indirectly govern PPP projects. It is recalled that the theme of this thesis is the analysis of the regimes of the PPP contract in Mozambique and South Africa. The international law perspective was brought into the study with the view to reflect, briefly, on some international norms that may govern internationalised PPP contracts.

With the above in mind, the concluding remarks of the comparative analysis on PPP contracts in Mozambique and South Africa now follow.

Concluding remarks on the comparative analysis

Some conclusions can be drawn from the comparative study on the regimes of PPP contracts in Mozambique and South Africa.

First, the discussion over the legal definition of the PPP contract concluded that the PPP is a modern form of concession contract of public works that have, traditionally, fallen under the responsibility of the state/public institutions. In the light of this, the question that was raised is what sort of contract the PPP is and whether it is a public/administrative or private contract? In answering this question the study identified the similarities and differences. The existing similarities is that public 'institutions' are in both jurisdictions the ones legally charged with the responsibility of driving the PPP processes, and both

[168] VCLT *op cit* note 122 art 62(1)(a)(b).

countries consider PPP to be the involvement, on the one hand, of a public (state/municipal) institution and, on the other, of a private actor, working together to achieve agreed goals. The differences are that while South Africa defines it as a 'commercial transaction', the Mozambican legislation does not provide any indication on the matter. The fundamental conclusion the analysis arrived at is that PPP is a hybrid institution that falls in between a traditional public provision and full privatisation of the infrastructure or service.

Second, there are similarities in regard to the administrative processes and procedures to be followed for the conclusion of a valid PPP agreement. These include project inception, feasibility study, procurement, contract award and management. However, a fundamental institutional difference does exist for the approval of the draft of the PPP contract to be concluded. The PPP contract in Mozambique, must be approved by the Administrative Court while in the South African system the government through the National Treasury or other delegated body is legally competent to issue the non-objection to the PPP draft agreement to be entered into.[169]

Third, in both systems, dissatisfied parties can administratively challenge procurement decisions with government bodies, such as sectoral ministries/departments, ministry of finance, or sectoral regulatory agencies. If still not satisfied with the government decision, the aggrieved party can jurisdictionally challenge it before the Administrative Court (in Mozambique) and ordinary courts (in South Africa). After the conclusion of the contract and also at the post-contractual period, remedies can be sought by enforcing the terms of the contract with the application of the private law of contract and the law of delict, including the seeking of civil or criminal damages under the civil or criminal courts of justice. In South Africa — but less so in the Mozambican system — remedies available in review proceedings include an interdict to prevent the conclusion of an agreement, the setting aside of an award decision or, in exceptional cases, an award of compensation, damages in delict and/or contractual damages.[170]

Fourth, circumstances that can, in both systems under study, dictate an early termination of a PPP agreement include breach of contract/default by either party to comply with its contractual obligations and the effects of *force majeure* events that cannot be

[169] See section 5.2 for the discussion on the conclusion of PPP contracts in both countries.
[170] See section 5.3 for discussion on the enforcement mechanisms for PPP in both jurisdictions.

sustainably mitigated. There are, however, also two differences. First, the Mozambican law provides that the government can use its *ius imperium* to redeem, at any time, a PPP contract on the grounds, for instance, of public interest/public policy, something which is not much present in the South African system. Secondly, an act of corruption can be invoked and, if proven, constitute a reason for termination of a PPP agreement in South Africa, something which is not specifically present in the Mozambican legal system.[171]

Fifth, in both the Mozambican and the South African regimes, the contracting parties are urged to agree, in writing, to the methods for resolution of their potential disputes arising in PPP projects. Another similarity derived from both systems is that litigation can be a method of conflict resolution, with the Mozambican system having the Administrative Tribunal endowed with the legal powers to judge conflicts arising in PPPs,[172] while in the South African system the use of the common courts of justice is a possibility available to the contracting parties. In both the systems under study, however, ADR mechanisms are preferred, namely, mediation and arbitration. For both systems, contracting parties can agree to the submission of a contested issue to national or international mediation and/or arbitration for the settlement of potential disputes arising in the implementation of PPP projects. However, in the case of South Africa, the applicability of *res-judicata* with recourse to international arbitration for the resolution of disputes involving the government and private agent, is admitted only after the exhaustion of national arbitration processes.[173]

Sixth, with regard to risks and risk management strategies the investigation led to the conclusion that both countries experience similar risks/challenges. These include: uncertainty, changes in law, double regulation, fragmented and cumbersome PPP regulatory systems, state/public institutions capacity constraints, political mistrust, poor engagement with key stakeholders, fiscal risks, lack of transparency, weak accountability system, and corruption. The only difference (at the time of writing this thesis) is the existence, in Mozambique, of acts of war and terrorism, something which was not reported

[171] See section 5.4 for discussion on the early termination of the PPP contracts.
[172] This is because in Mozambique, unlike in South Africa, there is a tendency to co-exist with two types of contract: the private and the public (administrative); and PPP Mozambique is mostly governed by the administrative law.
[173] See section 5.5 for discussion on dispute resolution mechanisms in PPP contracts.

in South Africa. To resolve these risks/challenges, the author has suggested in the recommendations a host of policy reforms and mitigating strategies to be implemented in both jurisdictions.[174]

Seventh, as both Mozambique and South Africa are founding members of the SADC, a region that endeavours for economic integration, the investigation included a review of the SADC perspective and concluded that PPPs in the SADC are also confronted with similar challenges faced by the Mozambican and South African PPPs. The most critical challenging factor confronting PPPs in the SADC is the lack of political will to execute the necessary reforms leading to the harmonisation of PPP laws and regulatory frameworks. Other challenging factors including public institutions capacity constraints, fragmented and cumbersome bureaucratic procedures, lack of transparency, weak accountability systems, and corruption, were also encountered during the investigation. To overcome these hurdles, it is suggested that SADC leadership and all member states need to be at forefront and lead the reform process starting from the harmonisation of the PPP regime in the region, by, for instance, enacting a SADC Protocol on PPP Law and Regulatory Model.

Eighth, also, recognising that most PPP projects in both Mozambique and South Africa count with foreign investors covered by international instruments, the analysis under the international law angle concluded that both Mozambican and South African governments need to recognise the importance of understanding and adequately managing the concepts (and their implications) of state contract, state immunity, the definition of investment, the role of national law and international law in the international arbitration proceedings, stabilisation clauses, the doctrine of the maintenance of economic equilibrium, and *pacta sunt servanda* versus the *rebus sic stantibus* rule.

The conclusion that can be drawn from this comparative analysis is that there are, actually, more similarities than differences between the Mozambican and South African PPP contracting regimes. The existing differences are, in practice, apparently not of sufficient substance to deter any investor from either legal system from operating in either country. This is somewhat surprising, considering that one country belongs to the civil law family and the other to a hybrid system. While one can speculate, as was seen in chapter 2

[174] See sections 5.7, 5.8 & 5.9 for further discussion.

of this thesis, that multilateral and bilateral donors have exerted significant influence on Mozambique's public sector reforms [175] since the second half of the 1980s and that this influence has certainly shaped the regime of the PPP Law, the same cannot, however, be said in relation to the South African system where the public procurement regulation is fully 'home-grown', with very little external influence on the development of the law.[176] For this reason, it is appropriate to envisage that further research is needed in order to determine the *raison d'être* of such similarities and differences.

[175] Annamaria La Chimia 'Donors influence on developing countries' procurement systems, rules and markets: a critical analysis' in Geo Quinot & Sue Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) at 219.
[176] Bolton *op cit* note 14 at 186.

CHAPTER 6: CONCLUSION

Introduction

This concluding chapter presents the summary of the findings from the research question – 'How can risks be managed in Public Private Partnerships (PPPs) contracts in Mozambique and South Africa to ensure the sustainability of PPPs?'– addressed by the responses to the subsidiary questions. The presentation of the summaries of the chapters aims to offer an easy fast-track reading of the key findings of the investigation as developed over the course of the preceding chapters of this thesis. After presenting the summaries of the findings from the previous chapters, some concluding remarks are made followed by a reflection and recommendations.

6.1 Summary of findings from chapter 1

The first chapter introduced the background, research problem, context and approach of the investigation. It also conceptualised the PPP as a generic term used to describe a myriad of structures that facilitate the participation of the private sector in the provision of public infrastructures and services that operate on a continuum between full privatisation and traditional government direct provision.[1] A PPP is seen as a vehicle of crowding in investment and expertise from the private sector for the delivery of public works and services.[2] It is internationally emulated, arguably, for providing an important platform enabling governments to ease budgetary constraints and bridge the demand-supply gap of public infrastructure.[3] It is recognised, however, that PPPs are not a panacea. They involve costs and risks, some of them anticipated in legislation and others not, as is demonstrated in chapters 3 and 4. The TCT framework, an analytical tool that emerged from the

[1] See section 1.2 for the discussion on the conceptualisation of Public Private Partnership (PPP).

[2] Samuel Colverson & Oshani Perera 'Sustainable development: Is there a role for Public-Private Partnerships?' (2011) *Policy Brief October 2011,* available at <*http://www.iisd.org/pdf/2011/sust_markets_PB_PPP.pdf*>, accessed on 18 March 2016.

[3] Nilesh A Patil, Dolla Tharun & Boeing Laishram 'Infrastructure development through PPPs in India: Criteria for sustainability assessment' (2016) 59 (4*Journal of Environmental Planning and Management*, available at <*http://dx.doi.org/10.1080/09640568.2015.1038337*>, accessed on 10 March 2016.

economics of contracting,[4] was, therefore, called in to aid the research. Due to its crosscutting nature that stretches all over the chapters of the thesis and its valuable contribution to the final considerations, the discussion of the TCT is resumed here.

The findings of the 'economics of contracting' research from which TCT is derived have also been regarded as very relevant to an understanding of the strengths and weaknesses of any PPP deal and, above all, to the analysis of transaction costs and the critical reflection on whether PPPs are the better alternatives to the traditional method of public provision.[5] Transaction costs arise from the costs of seeking out buyers and sellers and arranging policing and enforcing agreements in a world of imperfect information or under conditions of imperfect and asymmetrically distributed information.[6] As risks in PPP contracts are examined in this research, TCT was found to be the most appropriate conceptual framework for evaluating PPP projects, including the investigation of what happens in the processes of formation, management, performance measurement, and monitoring of such long-term and complex contracts.

According to the TCT, transaction costs emerge because there are limits to human cognition. The limited capacity of individuals to plan for the future — given the complexity and pace of change in the environment and the lack of knowledge — is a source of uncertainty and can result in incomplete contracts. Consideration needs to be given to the difficulties arising from the enforcement of contracts because the parties to a transaction are exposed to opportunistic behaviour. To protect or prevent those behaviours, individuals seek the best institutional arrangements to minimise the costs involved in a transaction by, in some instances, carrying out the transactions internally and, in others, by relying on the markets.[7] TCT has often been applied to a study of the boundaries of a firm and the rationale for deciding on such an essential matter as to make or to buy.[8] Thus, with some adaptation, the TCT framework can also be used in deciding whether or not to enter into a

[4] David Parker & Keith Hartley 'Transaction costs, relational contracting and public private partnerships: A case study of UK defence' (2003) 9 (3) *Journal of Purchasing and Supply Management* at 99.
[5] See section 1.6 for the discussion on the theoretical framework.
[6] Parker & Hartley *op cit* note 4 at 99.
[7] Rodrigo Martins, Fernando Ribeiro Serra, André Luis da Silva Leite et al *Transaction Cost Theory Influence in Strategy Research: A Review through a Bibliometric Study in Leading Journals* (2010), available at *<http://globadvantage.ipleiria.pt/files/2010/03/working_paper-61_globadvantage.pdf>*, accessed on 29 June 2017.

[8] Ibid at 14.

PPP contract or, otherwise, have recourse to an alternative solution, for example, internal state/public production or even full private sector development.

The above discussion is at the heart of this thesis: the construction of arguments to be put forward to decision-makers as to whether to engage in a PPP initiative or to resort to conventional/traditional forms of public provision. In fact, the choice between PPPs and conventional provision turns on whether it is easier to write, manage, and monitor contracts on service provision than on internally building that service provision. In practice, the discussion shifts the attention from what seems to have been secondary to financing issues to what seems to be the central issue: the costs of contracting.[9]

Because of the special characteristics of the PPP contract, many transactions occur during its life cycle, thereby resulting in an increase in the project's 'transaction costs'. These are costs associated with, for instance, executing projects such as searching, negotiating, contracting, managing, performance monitoring, and enforcing contracts.[10] Further, there are several reasons why transaction costs in PPPs will be high, especially compared to traditional public service provision.

The main sources of higher transaction costs in PPPs are their long-term character, ownership, financing structures, and risk-sharing features. Due to these reasons, the degree of contractual incompleteness is high in PPPs, and attempts to reduce this give rise to correspondingly high transaction costs. Negotiating a contract is especially costly, not least due to the high cost of advisory services. Such costs are not limited to the pre-delivery phase, as renegotiations are almost inevitable in contracts that stretch over decades.[11]

Apart from the direct costs related to searching, tendering, contract drafting, negotiation, and performance monitoring, the long contract period also indirectly gives rise to economic costs. The enforcement of a long-term contract can be difficult because of the threat of contract termination that can be used only if the public agency is committed to

[9] Oliver Hart 'Incomplete contracts and public ownership: remarks, and an application to Public Private Partnerships' (2003) 113 (486) *The Economic Journal*, 113 (486) at 75.
[10] Morteza Farajian & Qingbin Cui *Transaction Cost in Public-Private* Partnerships (n.d.), available at <*http://www.si.umd.edu/Publication/14.%20TRANSACTION%20COST%20IN%20PUBLIC-PRIVATE-PARTNERSHIPS.pdf*>, accessed on 29 June 2017.
[11]Dudkin Gerti & Valila Timo 'Transaction costs in Public-Private Partnerships: A first look at the evidence' (2006) 4 1(2) *Competition and Regulation in Network Industries*, available at <*https://journals.sagepub.com/doi/abs/10.1177/178359170600100209*?>, accessed on 29 June 2017.

buying out the asset at a fair value in case of termination. Otherwise, an expropriation risk (for instance, on the grounds of public interest) would need to be factored into project costs. Also, a PPP established for service provision using privately owned assets and management might entail higher monitoring costs than an in-house public provision of the same service.

The provision of most services is relatively difficult to measure and monitor, especially in terms of quality. While in-house provision, too, necessitates monitoring and quality control, it can be argued that private asset ownership implies higher monitoring costs for the public sector. After all, if the asset were in public ownership, the public sector could always ensure the desired service quality. It is more costly, therefore, to maintain the desired service quality under private asset ownership and/or management.[12]

This implies that the transaction costs can have the potential to erode the cost savings achieved — or thought to be achieved — through a PPP structure. Apart from their direct negative impact on the financial and economic viability of the project, the high costs of bidding constitute an obvious hurdle for potential bidders to enter the bidding process. This, in turn, undermines the power of *ex ante* competition which is in many public sector infrastructures and services the only form of competition that can exist. The inability to harness the power of *ex ante* competition to support the quest for productive efficiency will, in turn, deter the achievement of VfM through a PPP. Besides, the design of the bidding process, aimed at avoiding inefficiencies due to collusion or opportunistic or corrupt behaviour, is difficult generally during the course of the implementation of PPP, and particularly in the case of long-term contracts.[13]

Due to the higher transaction costs in PPPs, the degree of contractual complexity is high and any attempts to reach agreements increase the costs associated with a PPP transaction. Consequently, the search (tendering and bidding), contracting, and monitoring processes become more resource consuming — both in terms of budget and time — than in traditional methods of procuring public projects. This also creates many challenges regarding the definition of a cost-breakdown structure for transaction costs to consider from the perspective of accounting.[14] Also, there can be other costs deriving from political,

[12]Ibid at 5.
[13]Ibid.
[14] Farajian & Cui *op cit* note 10 at 678.

social and institutional environments that are difficult to attribute a monetarist metric too, but that can constitute serious risks capable of affecting the overall cost structure and performance of a PPP project.

It is appropriate to explain briefly the relationship between risk and cost before the summarisation of the chapter 1 is concluded. While the risk is a foreseeable or unforeseeable event whose occurrence is capable of endangering or jeopardising the course of an activity or the attainment of a defined objective, the materialisation of such risk can translate into additional financial or non-monetary costs. This explains why the TCT framework was chosen as an aid in evaluating risk management for the sustainability of PPP contracts in both jurisdictions under study.

6.2 Summary of findings from chapter 2

The second chapter offered the legal definition of the PPP, the brief historical context from which the PPP emerged and the arguments for its global prominence. The PPP is defined in Mozambique as an undertaking in an area of public domain [15] under a contract and with full or partial financing of the private partner that undertakes to accomplish the necessary investment and to operate the respective activity for the provision of services or goods, the availability of which to users is the responsibility of the state to guarantee.[16] It is defined, in South Africa, as a commercial transaction between an institution and a private party in terms of which the private party performs an institutional function on behalf of the institution; and/or acquires the use of state property for its own commercial purposes; and assumes substantial financial, technical, and operational risks in connection with the performance of the institutional function and/or use of state property; and receives a benefit for performing the institutional function or from utilising the state property.[17]

It is explained that PPPs are not a novel phenomenon in deploying public policy objectives, especially in areas ranging from infrastructure development and urban

[15] The Constitution of the Republic of Mozambique in art 98 (2) defines as areas of public domain those under the control of the state and include: Mozambique's exclusive maritime zone and air space, archaeology assets, natural protected zones, hydraulic and energetic potential, roads and railways, and natural mineral deposits.
[16] The Law 15/2011 of 10 August (the PPP Law) art 2(2)(a).
[17] South Africa Treasury Regulation 16 (1).

services.[18] The concessions, the current most common form of PPPs, date back thousands of years. They served as the legal instruments for the construction of roads and the operation of public baths and markets during the time of the Roman Empire.[19] Nowadays, and via PPPs, governments turn to private actors to mobilise private financing, design, build, and operate infrastructure facilities hitherto provided by the public sector.

In chapter 2 it is explained that the emergence of the PPP phenomenon occurred within international circumstances and contexts that resulted in public sector reforms.[20] On the one hand, there was the fiscal crisis in the north and the need to respond to citizens' dissatisfaction with the worsening quality of public services. On the other, in the south the 1982 Mexican default symbolised that the crisis of the state should be tackled globally to avoid its spread, since developing countries were experiencing similar problems of unsustainable public debt and poor economic performance. Subsequently, the world (from north to south), started to hear new jargons in public management thinking and practice such as 'Next Step', 'Executive Agencies', and 'Project Finance Initiative' in the United Kingdom, 'Reinventing Government' in the United States of America, 'Public Choice Theory' in parts of Western Europe, 'Structural Adjustment' in developing countries, [21] privatisation, and NPM. All these represented new ideological perspectives entrenched in neoliberal ideas for reforming the state (rolling back the state), the public administration in particular.

The NPM was then re-created as the NPG, with the expectation that it would help to assert more transparency and accountability in public processes and thus contribute to the sustainable implementation of public policies. However, because the state's financial constraints and the public debt crisis were the overarching issues that hindered economic and social infrastructure development, they exerted more pressure on the state and were the driving factors for seeking private sector involvement by joining the resources and

[18] Philipp H Pattberg, Frank Biermann, Sander Chan et al 'Introduction to partnerships for sustainable development' in Philipp H. Pattberg, Frank Biermann, Sander Chan et al (eds) *Public Private Partnerships for Sustainable Development: Emergence, Influence and Legitimacy* (2012) at 2.

[19] KS Jomo, Anis Chowdhury, Krishnan Sharma et al *Public-Private Partnerships and the 2030 Agenda for Sustainable Development: Fit for Purpose*? (2016) at 2,,available at *www.un.org/esa/desa/papers/2016/ wp148_2016,* accessed on 7 July 2017.

[20] See section 2.3 for the discussion on the context to the upsurge of the PPP in development.

[21] Jan-Erik Lane *New Public Management* (2000) at 224.

capabilities of both public and private sectors, thereby forming a partnership. Partnership — or PPP —became the new dominant rhetoric of public sector reforms towards good governance.

Good governance is a form of governance that embodies ideal characteristics such as accountability, consensus orientation, effectiveness and efficiency, equity and inclusiveness, participation, responsiveness, rule of law and transparency. In applying these characteristics to PPPs, one would expect a fair and transparent selection of projects and private actors, an assurance of VfM and the improvement of public services, especially for the socially disadvantaged members of society.[22] Thereafter, nations worldwide started to introduce further reforms, including streamlining their regulatory frameworks or enacting new legislations envisaging the creation of a conducive environment for the implementation of PPP initiatives.

Public policy practitioners developed two management instruments to be utilised by public managers to test and maximise *ex ante* the potential of PPP projects: the PSC and the VfM assessment tool. The PSC is a hypothetical forecast, a benchmark that stands for the whole-life cost and risk adjusted if the project were to be developed by the public sector. It serves to assist public managers in decision making, by testing whether a private investment proposal through a PPP mechanism offers better VfM in comparison with the most efficient form of public procurement.[23] The VfM is determined through a comparative analysis of the PPP proposal against its public sector alternative generated by the PSC analysis. It takes into account both quantitative and qualitative aspects and refers to the best available outcome measured in terms of 3Es of economy, efficiency and effectiveness in the production and delivery of a public service. However, the calculation of both instruments is not an easy task.[24]

The summary of chapter 2 is now concluded. Next the summary of chapter 3 is presented.

[22] David Johannes Fourie 'Good governance in Public-Private Partnerships: Approaches and applications: A South African perspective' (2015) 8 (1) *African Journal of Public Affairs* at 111.
[23] See chapter 2 sections 2.6.1& 2.6.2.
[24] Ibid.

6.3 Summary of findings from chapter 3

The third chapter examined the regime of PPP from the point of view of the Mozambican legislation and regulation. The study started by reviewing the legal process for the formation, enforcement of PPP procurement rules, implementation, termination, and the mechanisms for the resolution of disputes arising from the PPP contracts.[25] Thereafter the risks confronting, or susceptible to confront, PPPs and their management strategies were discussed. In analysing risks and in devising risk management strategies, the study confirmed what was articulated in chapter 1, namely, that PPPs are not a panacea for all the ills facing a variety of economic and social sectors. Instead, they are simply a tool to be used to unlock critical bottlenecks that cause a chronic deficit in the provision of public goods or services. In the course of the investigation it was acknowledged that attached to PPPs are risks which are not sometimes foreseen, either because some do not come to the fore during the contract negotiation table, or because they are not seen as such and are overlooked or swept under the carpet in order to get the deal done.[26]

Basing on the PPP Law and the regulatory frameworks of the country, risks falling under the government management responsibility, others to be managed by the private party, and those to be mitigated by and with the intervention of both public and private parties (ie the case of effects from *force majeure* events) were reviewed and discussed. Concomitantly, the investigation went further to capture and discuss some challenges that can turn into risks for PPP projects. That is why here they are also treated as risks. These are challenges/risks that are not brought forward by the PPP legislation and regulaation. Under the title 'Analysis of context-specific factors capable to affecting PPPs', the study analysed context-specific factors that in the short or long run can constitute serious threats capable to jeopardise successful and sustainable implementation of the PPP projects. These include, inter alia, uncertainty and non-streamlined regulatory frameworks (double regulation), the weak capacity of state institutions, weak integrity systems (including a lack of transparency and poor accountability systems), corruption, the pervasive involvement

[25] See sections 3.1, 3.2, 3.3 and 3.4 for the discussion on the formation, implementation, termination of PPP contract, and conflict resolution methods.

[26] World Bank PPPIRC PublicPrivate Partnership in Infrastructure Resource Centre, available at <*https://ppp.worldbank.org/public-private-partnership/about-pppirc*>, accessed on 4 May 2018.

of the governing party officials and/or holders of public office in commercial activities, the escalation of public debt, local communities opposition against PPP projects, especially megaprojects, and acts of war and terror in the north of the country. All represent serious risks/challenging factors for successful and sustainable implementation of PPPs. The United Nations 2030 Agenda for Sustainable Development which focuses on the needs of the poorest and most vulnerable with the participation of all countries, all stakeholders and all people [27] calls, inter alia, for a substantial reduction of corruption and bribery in all their forms;[28] the development of effective, accountable and transparent institutions at all levels;[29] and responsive, inclusive, participatory and representative decision-making at all levels.[30] In answering the question posed by Jomo, Chowdhury, Sharma et al, namely, 'whether PPPs and the 2030 Agenda for Sustainable Development are fit for purpose'[31], when taking note of the risks and challenges referred to above, it is difficult to foresee the chances of the PPPs in Mozambique contributing positively to the realisation of this global agenda.

This discussion is followed by the summation of chapter 4.

6.4 Summary of findings from chapter 4

The fourth chapter studied the regime of PPP in South Africa. The study started by reviewing the legal process for the formation, enforcement of procurement rules, implementation, termination, and the mechanisms for the resolution of disputes arising from the PPPs.[32] Thereafter the risks and their management strategies were discussed. In analysing risks and in devising their management strategies, the study confirmed what was articulated in chapter 1, that PPPs are not a panacea for all the ills facing a variety of economic and social sectors. In the course of the investigation it was acknowledged that attached to PPPs are risks which are not sometimes foreseen, either because some do not

[27] 'Preamble' in United Nations General Assembly *Transforming Our World: The 2030 Agenda for Sustainable Development* (2015).
[28] Ibid goal 16.5.
[29] Ibid goal 16.6,
[30] Ibid goal 16.7
[31] Jomo, Chowdhury, Sharma et al op cit note 19 at 1.
[32] See sections 4.1, 4.2, 4.3 & 4.4 for the discussion on the formation, implementation, termination of PPP contract, and conflict resolution mechanisms available in South Africa.

come to the fore during the contract negotiation, or because they are not seen as such, are overlooked or swept under the carpet in order to get the contract concluded.[33]

Based on the regulatory framework in force in South Africa, risks falling under the government management responsibility, others to be managed by the private party, and those to be mitigated by and with the intervention of both public and private parties were reviewed. The investigation went further to discuss some challenges that can turn into risks for PPP projects. These are challenges/risks that in the short or long run can constitute serious threats capable to jeopardise successful and sustainable implementation of the PPP projects.

In South Africa, factors capable of compromising the success of PPP projects discussed in this study include complexity, fragmented and non-streamlined PPP regulatory framework, public institutions' capacity constraints, transparency concerns, poor accountability system, corruption, off-balance financing and the risk of public debt escalation, and poor engagement with the wider PPP spectrum of stakeholders.[34] All these represent serious challenging factors for successful and sustainable implementation of PPPs in the country. Thus, the study of the PPP South Africa could not answer positively the question posed by Jomo, Chowdhury, Sharma et al, namely, whether 'PPPs and the 2030 Agenda for Sustainable Development are fit for purpose'[35] in South Africa, taking note of the risks and challenges referred to above.

The presentation of the summary of findings from chapter 4 is now concluded. Next the summation from chapter 5 follows.

6.5 Summary of findings from chapter 5

A comparative analysis of the regimes of the PPP contract in Mozambique and South Africa reported in the fifth chapter has distilled the main similarities and differences of the key juridical processes and institutions. The conclusion of the comparison is that there are actually more similarities than differences found in the Mozambican and South African

[33] World Bank PPPIRC PublicPrivate Partnership in Infrastructure Resource Centre, available at <*https://ppp.worldbank.org/public-private-partnership/about-pppirc*>, accessed on 4 May 2018.
[34] See sections 4.7 for the discussion on the analysis of context-specific factors capable to affect PPPs in South Africa.
[35] Jomo, Chowdhury, Sharma et al *op cit* note 19 at 1.

PPP contracting regimes.[36] The existing (minor) differences are, in practice, seemingly not enough of a substantive nature to pose a serious impediment to prevent investors from either legal system – South Africa to Mozambique and/or from Mozambique to South Africa – from conducting their businesses. What this conclusion has revealed has, however, been surprising, particularly when there is cognisance of the fact that Mozambique belongs to the civil law family, while South Africa is regarded as belonging to hybrid system. Obviously, one can speculate, as has been the case in chapter 2 of this thesis, that multilateral and bilateral donors who have exerted significant influence [37]on Mozambique's public sector reforms since the second half of the 1980s, have shaped the recent legal reforms, including in the enactment of the regime of the PPPs. However, the same cannot be said in relation to South Africa, where public procurement regulation is fully 'home-grown' with very little external influence on the development of the law.[38]

6.6 Summary of findings from the SADC perspective

Section 5.10 analysed the SADC perspective by reviewing the PPP experience in the region. The study noted that most of the PPPs in the SADC countries are confronted by the similar risks and that these should be mitigated by application and enforcement of the provisions of the SADC frameworks. With respect to the harmonisation of laws in the region, evidence gleaned from the research presented a contradictory view. The SADC region itself proposed to harmonise the PPP regulatory framework. However, the reality is that the region is not moving forward and even if it is, it is not moving fast enough towards the harmonisation of the PPP legislation. Each member state is enacting its own PPP legislation, against the regional harmonisation agenda. For the case of the PPP regime, the author is of the opinion that ideally, mirroring the UNCITRAL *Legislative Guide on Public Private Partnerships*, the SADC should consider and engage its legal team of jurists to produce a draft proposal, a sort of 'SADC Protocol on PPPs', to be put before the competent SADC body for consideration. And for that to happen there is a fundamental need for a

[36] See the concluding remarks on the comparative analysis

[37] Annamaria La Chimia 'Donors influence on developing countries' procurement systems, rules and markets: a critical analysis' in Geo Quinot & Sue Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) at 219.

[38] Phoebe Bolton 'The regulatory framework for public procurement in South Africa' in Geo Quinot & Sue Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) at 186.

political will and commitment from the member states to harmonise the regulatory framework in the region.

In regard to the value the Mozambican and South African PPP experience could offer to the SADC region, the author thinks that it is not necessarily of a normative character since both jurisdictions have their PPP regimes in place the one different from another. Perhaps, the important lesson from the Mozambican and South African experience to be highlighted may be that of political character: the demonstration of how a political will and appropriate leadership and commitment matter. For instance, the projects that are showcased involving the financing, construction and operation of the N4 toll road linking Maputo (Mozambique) to Witbank (South Africa) and the development of the Maputo Port Development Company (MPDC), were started and developed well before the enactment of the Mozambican PPP Law.

The summary findings from the SADC perspective is now concluded. Next, the summary of the international law angle is presented.

6.7 Summary of findings from the international law study

Section 50.11 reviewed the international angle of the PPP contract. Although the theme of this thesis is the comparative analysis of the regimes of the PPP contracts in Mozambique and South Africa, the international law angle was brought into the study with the view to reflect, briefly, on some international norms that may govern internationalised PPP contracts. At this stage it is recalled that PPPs are contracts entered between a state, or a public entity created by a state, and a private party. The private party may be a foreign investor covered by an IIA who enters into the contract motivated for profit expectation. It is this contractual relationship involving a host state and a foreign investor/investment which internationalises the PPP contract that is relevant for discussion here, since it exposes the host state to the international law.

The study of the international law briefly reviewed the notions of: 1) state contract, one of which is the 'concession contract' nowadays the PPP contract; 2) state immunity, particularly 'absolute and restrictive immunity'; 3) the definition of investment and the implications of 'every kind of asset', 'enterprise-based definition', 'asset-based closed-list exhaustive test', 'asset-based non-exhaustive'; 4) the analysis of the role of national law and international law in international arbitration proceedings; 5) the stabilisation clauses

and their implication on the separation of powers within the State, and on the international responsibility of the State, particularly on human rights development; and 6) the *pacta sunt servanda norm*/the *rebus sic stantibus* rule in international contracts.

The summary of findings from the international law angle terminates here. Next the concluding remarks now follow.

6.8 Concluding remarks

This research departed from the premise that governments resort to PPPs because they are financially constrained, are in great need of economic public infrastructures, and see partnerships with the private sector as a window capable of helping them to attain their goals.[39] However, as was advanced in the introductory chapter and corroborated by the results of the investigation thereto developed in the subsequent chapters, the PPPs are not a remedy for all economic and social ills confronting societies. While PPPs may well provide much-needed infrastructure to meet the needs of end-users, this often comes at considerable cost. Thus, the PPPs' wider fiscal impact, as illustrated by the case of a hospital PPP in Lesotho which consume more than half of the country's national health budget, need to be taken in consideration. The fiscal cost and distributional implications of PPPs are accentuated when compared with state borrowing.[40] Additionally, when comes to the risk management, all those risks that are supposedly transferred to a private operator are never truly transferred and, in the end, the government is always the residual risk holder should the PPP consortium fail.[41] Far from freeing resources to be invested in other poverty reduction programmes, PPPs can absorb funds that could have been devoted directly to infrastructure investment. And rather than compensating for weak state capacity they place significant extra demand on it.[42]

These contradictions call into question the merits of promoting PPPs to overcome developing countries' public service financing gap,[43] as the evidence clearly suggests that PPPs often have tended to be more expensive than their public procurement alternative,

[39] See chap 1 at 1.5 Delimitation of the research.
[40] Kate Bayliss & Elisa van Waeyenberge, 'Unpacking the Public Private Partnership revival' (2017) (2017) *The Journal of Development Studies* at 16., available at: *http://dx.doi.org/10.1080/00220388.2017.1303671*.
[41] Ibid at 11.
[42] Ibid at 17.
[43] Ibid.

while in a number of instances they have failed to deliver the envisaged gains in quality of service provision, including its efficiency, coverage and development impact. [44] In other words, PPPs have failed to yield VfM in its broadest sense, taking into account not just the financial costs and efficiency gains deriving from a project but also their longer-term fiscal implications, including the risks of any contingency liabilities and the broader welfare benefits for society such as the impact on poverty and sustainable development.[45]

To sum up, with the risks and challenges identified in the course of this thesis [46] the author is of the opinion that, contrary to the recommendations proposed by IFIs, the AfDB and the SADC,[47] PPPs are not the ideal vehicle for any southern African country's sustainable economic development. Thus, the governments of Mozambique and South Africa should, on the one hand, carefully and diligently evaluate beforehand whether they are prepared to engage in PPPs or opt outright for the traditional procurement methods. For instance, the traditional concession agreement to operate a public service has the advantage of leaving the hands of government free to exercise its *ius imperium* over time, something which can pragmatically be compromised when the government is involved in a project as a partner of a private agency. This view may be challenged, however, and thus further research is needed to gather more — and substantive — evidence. On the other, with the view to ensuring that future PPPs harness their full potential, a host of institutional and regulatory reforms should be considered and carried out in the both jurisdictions.

6.9 Reflections and recommendations

This s presents the author's reflections (1) and recommendations (2) as follow.

6.9.1 *Some reflections*

The author proposed to discuss PPP contracts in Mozambique and South Africa, with the special focus on managing risks and ensuring sustainability. Different authors have offered different definitions of what a PPP is.[48] However, the conceptual idea adopted by the author for the present research is that established early at the introductory chapter indicating that

[44] Jomo, Chowdhury, Sharma et al *op cit* note 19 at 22.
[45] Ibid.
[46] See chap 3 at 3.5, 3.6; chap 4 at 4.5, 4.6; & chap 5 at 5.5-5.9.
[47] See chap 1 at 1.2 last para.
[48] See section 2.5.

governments resort to PPPs because they are financially constrained, are in great need of economic and social public infrastructures, and see partnerships with the private sector actors as a window to help them to attain their goals. Thus contracting a PPP is not justifiable in a situation in which these three dimensions are not present, and thus, should not be discussed here.[49]

The main argument of this thesis at the point of departure of the research was that PPPs are not a panacea for all the ills faced in the economic and social sectors in the both countries under discussion but are, instead, a tool to be used to unlock critical bottlenecks that cause chronic deficits in the provision of public goods and/or services.[50] The course of the subsequent investigation has proved that PPPs involve complex structures, incomplete contracting which is a source of high transaction costs, risks in context specific to the milieu — some anticipated and thus susceptible for discussion and agreement during contract negotiation and others not.[51]

Some researchers have affirmed that it is too early to take a definitive stand either for or against PPPs in southern Africa.[52] The difficulty in taking such a definitive position stems from the fact that there have been reports of successes in some areas (such as the N4 Toll Road linking Witbank, South Africa to Maputo, Mozambique), while others have been plagued by controversies and questionable outcomes (ie in the case of South Africa's concessions to build and operate prisons in Bloemfontein and Louis Trichardt, the cost to government turned out to be more than had been planned for). [53] The failures of the Beira Railway System (in the centre) and of the CDN (in the north), are also the most paradigmatic examples of unsuccessful PPPs in Mozambique.

While it may be appropriate to conduct a thorough investigation to determine what contributed to success in one case and failure in other, given the overall lessons learned from the research in the course of this thesis, the conclusion that can be drawn is that PPPs are definitely not a cure-all. A critical challenge that undermines the effective

[49] See section 1.5.
[50] See section 1.1 for the discussion of the background to PPPs.
[51] See sections 3.5, 3.6, 4.5 & 4.6 for the discussion of risks and context-specific factors in PPPs.
[52] Mzwanele Mfunwa, Anthony Taylor & Zebulun Kreiter *Public Private Partnerships for Social and Economic Transformation in Southern Africa: Progress and Emerging Issues* (2015) at 29, available at <*https://www.tralac.org/images/docs/7815/mfunwa-ppps-for-social-and-economic-transformation-in-southern-africa-july-2015.pdf*>, accessed on 10 June 2019.
[53] Ibid at 29 and 49.

implementation of PPPs is the lack of an institutional capacity to manage and maximise the potential of partnership arrangements.[54] PPPs are complex instruments that require the presence of a number of capacities in government, including developing a credible PSC mechanism, TCT analysis, and the setting up a robust system to assess VfM and financial performance management; the use of prudent public sector mechanisms; and transparent and consistent guidelines regarding non-quantifiable elements in the VfM judgment.[55]

PPPs are not suited to countries with weak institutional capacity, weak integrity systems (including a lack of transparency and poor accountability), pervasive rent seeking and high records of corruption (as the case of Mozambique's USD2.5 billion hidden debts spells out[56]). All the above are challenging factors that can undermine the success and compromise the sustainability of PPP projects in the countries under study. Long-term contracts are involved (some stretch over 30 to 40 years) and the risks of losing control of their original proposition, the costs of re-negotiating the PPP contracts due to their incompleteness character or of ending the contractual relationship on the grounds of public policy interests, can be costly and unsustainable for the public purse and for socio-economic welfare.

To sum up, in order for the PPPs to be able to harness their full potential and deliver on the economic and social development expectations sustainably there is a fundamental need for effective and comprehensive institutional reforms, including setting up and operationalising PPP units and streamlining the PPP regulatory regimes in both jurisdictions under study. While the research has also reviewed the risks recognised by both governments under their PPP legislation and advanced their mitigating strategies, in addition, the investigation went further by identifying and discussing context-specific risks/challenges capable of seriously jeopardising the success of PPP projects in both jurisdictions.[57] These include: uncertainty and risk of changes in law, non-streamlined regulatory frameworks, weak capacity of public institutions, lack of transparency and poor

[54] Fourie *op cit* note 22 at 116.
[55] Ibid.
[56] Aled Williams & Jan Isaksen *Corruption and State-backed Debts in Mozambique: What Can External Actors Do* (2016) at 5, available at *<https://www.cmi.no/publications/6024-corruption-and-state-backed-debts-in-mozambique>*, accessed on 10 June 2019.
[57] See sections 5.5, 5.6, 5.7& 5.8.

accountability, poor engagement with key stakeholders, mistrust and misconception, corruption, fiscal risks and, in Mozambique, the acts of war and terror.

The presentation of reflections on different issues encountered in the course of the research is now concluded. Next, the recommendations follow.

6.9.2 *Recommendations*

To deal with the context-specific risks/challenges confronting the development of PPPs in both Mozambique and South Africa, and also in the SADC region, there is an overarching need for the risks/challenges identified and discussed in the course of this thesis[58] to be addressed by, inter alia:

i) Building simpler, lean, predictable, secure, and stable PPP regimes; offering investment guarantees including economic equilibrium clauses; and providing for fair compensation to foreign investors that satisfy international standards; — to mitigate the risks stemming from uncertainty and changes in law in both jurisdictions;

ii) Streamlining both countries' PPP regimes by, for instance, consolidating all PPP related legislation into a single legal instrument; — to address the challenges posed by double regulation in Mozambique, and complex, fragmented, and cumbersome regulatory system in South Africa;

iii) Being, both Mozambique and South Africa governments, on the driving seat pushing the SADC region towards the harmonisation of laws, particularly the harmonisation of the SADC PPP regime;

iv) Strengthening the capacity of state/public entities to track and enforce the breach of PPP laws and regulations, through tailored educational and training programmes, and building effective and efficient PPP units that can house the best PPP expertise; — to resolve the challenges posed by weak capacity of public institutions.

v) Subjecting all PPP projects to an *ex ante* due diligence, VfM evaluation, and PSC examination, to ascertain whether, in each case, a PPP project being proposed has the potential for success; — in view to reduce fiscal risk exposure

[58] See sections 3.6, 4.6, 5.5, 5.6, 5.7 & 5.8.

and escalation of public debt the PPPs pose. In addition, both governments should be adopting and/or implementing the IMFs' Fiscal Transparency Code that include an indicator of assessing transparency and disclosure of fiscal risks related to PPPs.

vi) Discarding non-feasible PPP project proposals and, alternatively, consider building the public infrastructures/services in question internally through traditional form of public procurement including, sometimes, taking loan from multilateral development banks and, when necessary, outsourcing some activities;

vii) Improving the integrity systems, including open, transparent and accountable PPP procurement processes; — in order to mitigate the transparency and accountability concerns and to address public mistrust and misconception surrounding PPPs in both jurisdictions.

viii) Strengthening public participation in PPP processes including the participation of CSOs. This can be done in various ways. One is by providing public access to PPP projects information and by involving local businesses, and public employees early on the PPP planning process. Another is through the implementation of stakeholder's framework provisioning for popular consultation, participation and engagement with all relevant stakeholders, and making popular participation mandatory in the entire PPP process;

ix) Enforcing accountability systems in PPPs through judicial, administrative, legislative measures, and by affording to aggrieved parties transparent processes to obtain redress and prompt remedies for violation of their rights. The establishment of or the recourse to public ombudsman and other grievance mechanisms in relation to PPPs should also be available to aggrieved parties;

x) Curbing/controlling corruption in the PPP processes. Taking into account that both countries have their anticorruption legislations in place and that most PPP contracts have/will have anticorruption clauses written into the agreements, both governments should effectively enforce their anticorruption laws and frameworks. And since there seems a correlation exist between enhanced transparency and reduction of corruption, the mitigation of corruption in PPPs

can also be done by improving or enforcing transparency and disclosure in all PPP processes. The more transparent, predictable and objective the PPP process is, the less likely a PPP project will be captured by vested interests — this as an approach used/ to be used in the combat against corruption.

xi) The GoM working to root out the underlying causes of war and terror affecting the north of Mozambique, apart from trying to settle the conflict militarily. Though it may be at high cost premium, the GoM should also consider offering PPP investors insurance guarantees to cover political violence and terrorism risk; — in mitigating the acts of war and terror plaguing Mozambique.