PPP Best Practices Roundtable

Technical workshop around PPP Law and Policy Implementation issues

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PPP Law & Implementation: Best Practices

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PPP Law & Implementation: Best Practices

Introduction

The Ministry of Finance in collaboration with the EC Delegation would like to welcome you for this informal roundtable led and facilitated by an independent PPP expert, Yves Speeckaert.

The Ministry of Finance (MoF) has released the draft Law on PPPs and Megaprojects for review by Donors, other ministries and representatives from the Private Sector. The Law is still under review and this roundtable hope to make a constructive contribution to its revision process.

The underlying purpose of the PPP Law is to provide a clear regulatory framework and incentives for the Private Sector to get involved in the rebuilding of basic infrastructure in Mozambique (whilst preserving quality of service, the state interest and user's rights).

This technical roundtable's main objective is to provide an opportunity for the Sector ministries and Private Sector representatives to discuss best practices and principles in PPPs as an input for possible options to be considered in regulating PPPs and concessions in Mozambique.

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Definitions (1): PPP as Project Finance

Public Private Partnership:

« Public private partnerships (PPP) refer to contractual or equity agreements formed between a public agency and private sector entity in which the latter substitutes the former in the provision of public goods and services over a specific and/ or indefinite period, for mutual benefits and better efficiency ».

Ownership structure of PPPs can vary from 100% public, to majority stake of Private partner (especially in Equity PPPs or where the Private partner finance the whole project and assume most of the risks) .

Infrastructure PPPs are ***Project Finance type structures***:

« The financing of long term infrastructure, industrial projects and public services based upon a non-recourse or limited-recourse (to the sponsor balance sheet or assets) financial structure where project debt and equity used to fund the project are paid back by the cash flow generated by the project. The assets of the project are being used as security for the repayment of the loans. »

(*) in the section forward Public sector is referred as PUB and Private sector partner as PRIP

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Definitions (2): PPP vs Corporate funded Megaprojects

Corporate Megaprojects

« Corporate Megaproject are also funded by a mix of equity and debt, but under very different « security package ». The major difference from PPP is that large corporation have already a proven trackrecord in planning, building and operating similar projects (sector specific usually (oil, mining, telecoms…)).

For Megaprojects, a) the operating and commercial risk of the project tend to be lower as corporation only invest after extended feasibility studies and with proven technologies; b) the lenders would consider the balance sheet and assets of the sponsor as recourse and to establish whether or not additional borrowing is appropriate. Megaprojects are sponsor-led projects, not public service led project. Hence their logic is very different from PPP…

Ownership structure of Megaproject is usually 100% Private:

Return to the state and to the local community is in the form of Taxes, employment and skill transfer, investment in basic infrastructure and contribution to exports (and balance of payment of the country). Linkage and sub-contracting to local SMEs is also another windfall.

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Purpose of PPP structure and private sector led financing

The ultimate goal of PPPs is to deliver more « Value for Money » than traditional public procurement options would deliver. In the case of Mozambique PPP can be an alternative and necessary source of funding (from Private sector) where tight government budget often are not sufficient for rebuilding basic infrastructure.

In general PPP can be said to generate value improvements when it achieves the following advantages (based on EU best practices):

- ***Reduced life-cycle costs***
- ***More efficient allocation of risk;***
- ***Faster implementation;***
- ***Improved service quality and standards***
- ***Additional revenue (for the operator and the state)***

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Sharing of risks between the public and private sector is central to PPPs (1)

Risk category	Definition	Risk allocation
❑ Statutory / planning risk	• Land acquisition & compensation risk (and political dimension of project (project acceptance, etc.))	• Public
❑ Design & construction	• Risk of poor project definition, costs overrun, late delivery of the assets	• Private
❑ Financial risk	• Exposure to interest and exchange rate fluctuations (Ex: hard currency debt vs local currency income)	• Private
❑ Demand risk	• Risk that overall demand for service be lower that initially forecast (Ex Hungarian Motorway)	• Private/ Public
❑ Performance risk (assets)	• Delivery risk: failure to meet quality standards of continuity of service provision	• Private

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Sharing of risks between the public and private sector is central to PPPs (2)

Risk category	Definition	Risk allocation
❑ Legislative/ regulatory	• Risk of changes of Laws and contract re-negotiation	• Public/ Private
❑ Fiscal and budgetary risk	• Risk of accumulating liabilities (overrun subsidies) which affect integrity of government budget	• Public
❑ Residual value risk	• Related to the future market value of the asset; relevant in BOT when asset is transferred back (*) • Incentives to the PRIP to look after the facility during contract: give a final compensation conditional on the good state of facility.	• Public/ Private
❑ Political risk	• Unforeseen event/ conduct by a government adversely affecting ROI, debt service and costs.	• Private

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Substantial project risk (financial, technical, operational) is transferred to PRIP. However the Public partner is also essential….

Case study N. 1: YD 2nd tunnel in Shanghai (China) – Statutory risk

In the PPP for the construction of the tunnel, *<u>the local authorities assumed the responsibility for land acquisition and compensation risk</u>* involved in the project (Statutory risk). The PRIP party would have faced great uncertainty if it had had to take care of these steps, coping with the political consequences typical of these operations.

This is particularly relevant when the *<u>site risk has already been indentified by the PUB</u>* (Ex: in Victorian State of Australia) (i) when the existing site owned by the public had environmental liabilities; (ii) when the land asset is subject to ownership claims by indigeneous people.

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Substantial project risk (financial, technical, operational) is transferred to PRIP. However the Public partner is also essential….

Case study N. 2 (Demand risk going wrong): Wijkertunnel Randstad, the Netherlands

The chosen contract agreement is a 30 year BOT Concession between the National Transport Dept and the IBG Bank. During the tender procedure, the latter was the only bidder…which raised concerns already.

***In this PPP, the PRIP bears design and construction risks*. A shadow toll system sets the minimum revenue on a financial/ traffic demand base, while the maximum revenue is not capped but related directly to actual usage. *As the demand risk remained with the public party, costs to the State rose dramatically*, (Maximum revenue was not capped). In the end the PPP turned out to be more expensive than the public sector alternative….Fault in the initial design of the project and allocation of risks….**

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Types of Risks of PPP: Comparison between Draft Law and mainstream PPP risks

Draft PPP Law Moz (Cap. V)	World Bank (Contract design)
"Corruption Prevention (31-33)" • Conflict of interest (political) • Conflict of Interest shareholder • Concentration of power	**Statutory and planning risk** **Design and construction**
Financial risk (from the State Point of view (commitment & Limits on Guarantees)	**Financial risk (interest, currency)**
Budgetary and fiscal risk (35-38) • Fiscal risk • Unsustainability of Debt • Fiduciary risk • Parafiscal risks (liabilities)	**Demand risk** **Performance and management** **Legislative and regulatory** **Fiscal and budgetary risk**
Environmental risk (new) **Management risk (deleted?)**	**Residual value risk**
Extraordinary risks (Art 41) • Force Majeure • Political risk (indemnization)	**Extraordinary risks (Art 41)** • Force Majeure • Political risk (indemnization)

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Modalities of PPP: from lesser to more transfer of risk and responsibility to PRIP

PPP Schemes	PPP Modalities
Service contracts	***The private party procures, operates and maintains an asset for a short period of time. The public sector bears financial and management risks***
Operation and management contracts	***The private sector operates and manages a public owned asset. Revenues for the private party are linked to performance targets. The public sector bears financial and investment risks***
Leasing-type contracts o *Buy-build-operate (BBO)* o *Lease-develop-operate (LDO)* o *Wrap-around addition (WAA)*	***The private sector buys or leases an existing asset from the government, renovates, modernizes, and/or expands it, and then operates the asset, again with no obligation to transfer ownership back to the government***
Build-operate-transfer (BOT) o *Build-own-operate-transfer (BOOT)* o *Build-rent-own-transfer (BROT)* o *Build-lease-operate-transfer (BLOT)* o *Build-transfer-operate (BTO)*	***The private sector designs and builds an asset, operates it, and then transfers it to the government when the operating contract ends, or at some other pre-specified time. The private partner may subsequently rent or lease the asset from the government.***
Design-Build-Finance-Operate (DBFO) o *Build-own-operate (BOO)* o *Build-develop-operate (BDO)* o *Design-construct-manage-finance (DCMF)*	***The private sector designs, builds, owns, develops, operates and manages an asset with no obligation to transfer ownership to the government. These are variants of design-build-financeoperate (DBFO) schemes.***

Source: Elaboration on IMF (2004) and European Commission (2003)

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Modalities of PPP: notice that when the Private sector bears the entire cost and funding responsability of the PPP, concessions, BOT or BOO have longer duration (25-30 years)

Table 2: Responsibilities for the private and public sectors under forms of private sector participation

*Option**	*Asset ownership*	*Operations & maintenance*	*Capital ivestment*	*Commercial risk*	*Typical duration*
Service contract	Public	Public and private	Public	Public	1-2 years
Management contract	Public	Private	Public	Public	3-5 years
Lease	Public	Private	Public	Shared	8-15 years
Concession	Public	Private	Private	Private	25-30 years
Build Operate Transfer	Public and private	Private	Private	Private	20-30 years
Divestiture	Private or Public and private	Private	Private	Private	Indefinite (may be limited by licence)

Source: World Bank and Nepad, 1997

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It is very important to distinguish between « Contractual » (short term) and « Institutional (Equity) » (long term) categories of PPPs,

Whilst it is true that in most cases the Ownership of the assets remain with the public sector (at end of period, against compensation), the GOM may take into consideration other options of both level of management transfer and ownership:

- Build Operate and transfer (BOT), where the asset is transferred back to the government;

- Build, Operate and Own (BOO), where the private sector designs, build owns, develop, and operate an asset with no obligation to transfer ownership back to government. (Private divestiture, where the government keeps a regulatory role)

Public Sector Led

- WATER TREATMENT (UTILITIES)
- HEALTHCARE
- CRIMINAL JUSTICE
- EDUCATION FACILITIES
- ENERGY (better managed by Private sector if Energy sector is fully liberalised and undundled (Generation and Transmission)
- TRANSPORTATION (RAIL, METRO, ROADS)

Private Sector Led

- TELECOMMUNICATIONS
- ECO TOURISM
- WASTE MANAGEMENT
- ENVIRONMENTAL MANAGEMENT
- LEISURE FACILITIES

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The Partnership that have been the most successful in Africa (based on a best practice studies accross 8 African countries) were characterized by

- **Thorough planning and feasibility studies**
- **Multiyear budget framework to assess the affordability of projects for specific Government institutions**
- **Good communications (between PUB and PRIP) and strong commitment from both parties**
- **Effective regulation (transparent, credible and effective regulatory agencies, adapted to the specific need of the country; Competition should be encouraged in all sectors, including Public service monopolies.**
- **Effective monitoring and enforcement of contract (PPP Unit) – Performance, pricing and service indicators should be build in the contract**

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Why set up a PPP Agency?

The Public Private Infrastructure Advisory Facility (PPIAF) has conducted a survey of the creation of PPP Agencies in 8 developing countries. Results are shared in the following pages.

- Appreciation of the role of PPPs in achieving government's objectives:
- A) PPP as way to attract finance and overcome fiscal constraints vs b) value for money & optimal risk transfer to private partners (rather than maximum risk transfer…)
- Good regulation requires painstaking institutional design and a clear understanding of the country needs, capacity , culture and administrative traditions (No size fits all approach in designing or using PPP Units)
- Creating a PPP program and unit requires a range of specialized functions (financial analysis, project evaluation, industry specific skills, negotiation..) which are at times absent from government current staff
- Hence creating a PPP Unit help in correcting Government shortcomings and lack of specific Project finance competences as well as tendering for PPP (See the following diagram)
- PPP Units have both Technical (Project review and selection) and regulatory roles (tendering , execution and monitoring of PPP contracts)

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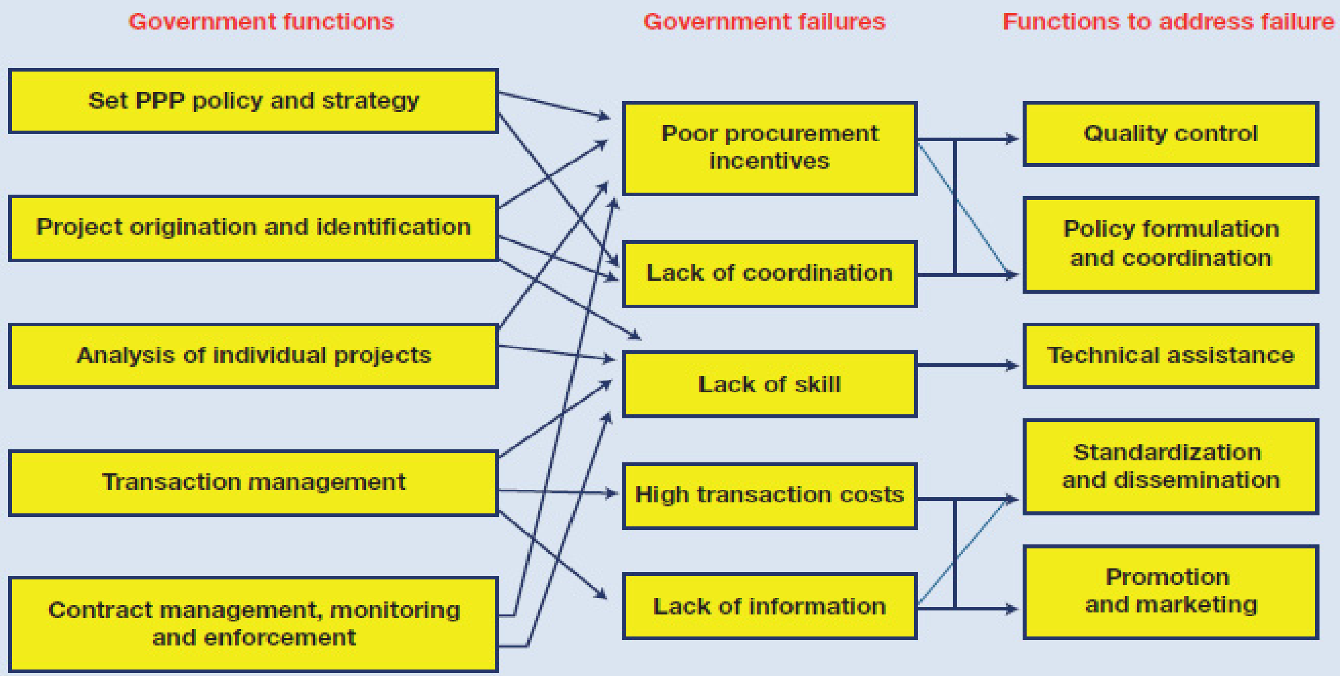
The advantage of having a PPP Unit is that it is a dedicated administration equipped (ideally) with both the technical, transaction and regulatory skills

FIGURE 1

Functions PPP units can provide to address government failures in PPP programs



Source: PPIAF and World Bank forthcoming.

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Options (*) for regulating PPP: from Line Ministries to a dedicated PPP Unit/ Council…

Risk of lack of coordination ← **PPP Regulation (*)** → *More consistency*

Line Ministries (Internal project Devt Teams)	Coordinating Agency (a cabinet w. Min Finance or bank)	PPP Task Force + Technical Assistance Unit	PPP Unit (line agency)
Philippine Sector Ministry & BOT Admin (led to Failed PPP in Energy)	Jamaica National Investment Bank (reporting to Cabinet)	Australia United Kingdom: • PPP Task force • Partnership UK	South Africa Canada (Canadian Council for PPP) Slovenia

(*) C Analysis Y. Speeckaert, 2010, based on comparative PPP Law frameworks and PPFIAF sources

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Research shows that there is a high correlation between successfull PPP Programs and the use of PPP Agencies (PPFIAF)…..Here are the key lessons.

- *Lack of political commitment to advancing a PPP program, or lack of transparency and coordination within government agencies*, will reduce the chances of success for a PPP unit.
- Even with a good design, a PPP unit is unlikely to be effective in such an environment. The least effective PPP units are in countries where decision making is fragmented and uncommitted
- Without high-level political support for the PPP program, a PPP unit will most likely fail.
- *Relatively successful PPP units directly target specific government shortcomings*. A clear focus on responding to particular government shortcomings is essential in ensuring the success of the institutional solution selected.
- The authority of a PPP unit must match what it is expected to achieve.
- *If a PPP unit is expected to provide quality control or assurance, it needs the authority to stop or alter a PPP that it perceives to be poorly designed*. But this executive power must be coupled with a mandate to promote good PPPs—or the unit may simply wield a veto without adding value.

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PPP Unit benchmarking: where to locate the PPP Unit?

A PPP unit's location in the government is among the most important design features, because of the importance of interagency coordination and political support for a PPP unit's objectives. *In a parliamentary system of government a PPP unit is most likely to be effective if located in a strong ministry of finance or treasury (which is a transversal ministry.*

In a country with a strong planning or *policy coordination agency (or Ministry of Planning),* that agency might make a natural home for a PPP unit.

Case study / PPP Unit in South Africa:

In South Africa, PPP Unit is a division of the Budget Office Directorate in National Treasury. It reports through the Budget Office of the Director General and the Minister of Finance. The Head of the PPP Unit is a Chief Director.

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Analysis of Best and Worst PPP Unit cases. Fragmented or no real regulatory power by the PPP Unit was behind some of the failure cases

Summary of success or failure of PPP units

Jurisdiction and unit[a]	How much success did PPP program achieve?	What were PPP unit's objectives?	Did PPP unit meet its objectives?	How many functions necessary for solving government failure? Did PPP unit perform effectively?
Bangladesh IIFC (1999)	Little success	• Advise line ministries and government agencies in identifying, evaluating, awarding, negotiating, and implementing projects • Promote private participation in infrastructure and serve as clearinghouse of expertise on PPPs	No apparent effect on private participation in infrastructure	None to few • Technical assistance • Policy formulation, but no implementation authority
Jamaica NIBJ (1988)	Little success	• Secure greater efficiency • Reduce fiscal drain • Optimize government's management resources • Secure enhanced access to foreign markets, technology, and capital • Broaden ownership	No, especially not the reduction in fiscal drain	None to few Managed some transactions, but real power never effectively delegated
Portugal Parpública (mid-1990s)	Much success	• Help structure higher-quality PPPs	Yes	Some • Policy formulation • Technical assistance • Quality control
South Africa Treasury PPP unit (2000)	Much success, despite low deal flow	• Filter out fiscally irresponsible PPPs while creating a structure for PPPs that would reassure private investors despite its being a fine filter	Yes, but scant impact on infrastructure deals	Some • Technical assistance • Quality control • Policy formulation

Source: World Bank and PPPIAF, 2007

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PPP Unit in South Africa (Benchmark): there are six desk in the Unit, performing two roles: Technical and Regulatory

Technical Assistance role

- Procuring transaction advisors
- Procuring Project Officers
- Approving feasibility studies (to permit procurement as a PPP)

Regulatory role

- Development and issuance of tender documents
- Selection of preferred bidder
- Approving the execution of the negotiated PPP Agreement
- Approving material variations to executed PPP agreements (Performance monitoring and evaluation)

Project Evaluation

Financial analysis

Business devt

Municipal desk

IT

Performance Monitoring & Evaluation

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The PPP Unit (South Africa) has developed Guidance documents that empower the PPP Unit to provide the technical and regulatory advice required for successful PPPs

These documents have legal significance for guiding local, provincial and national PPPs, including

- ***The Public Private Partnership Manual, applicable to provincial and national PPPs***
- ***Standardized Public Private Partnership provisions – Standard PPP agreement provisions applicable to all PPPs***
- ***Public Private Partnership Toolkit for Tourism PPP***
- ***Municipal Service Delivery and PPP Guidelines for municipal PPPs.***

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A. PPP Best Practices: key principles

B. PPP Agency: Organisational options

C. *Mozambican Draft PPP Law: Benchmarking*

D. PPP and Megaproject: Priorities for Mozambique

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Mozambique Draft PPP Law: how does it compare?

In the following tables we have summarized the most relevant sections of the PPP Law (focusing on the PPP and Concession content of the Law, excluding the Megaproject which is a different class of Project Finance). [May 20th version of the draft Law]

For each of the section, we summarized the Government proposed provision and to the right we provided alternative provision and positions from well established PPP Legislation

This analysis is not meant, in any way, to substitute rigorous legal analysis and review of the PPP Draft Law (which we believe is needed). It is just meant as a platform of discussion around key principles and possible alternatives shown by and through "other" practices.

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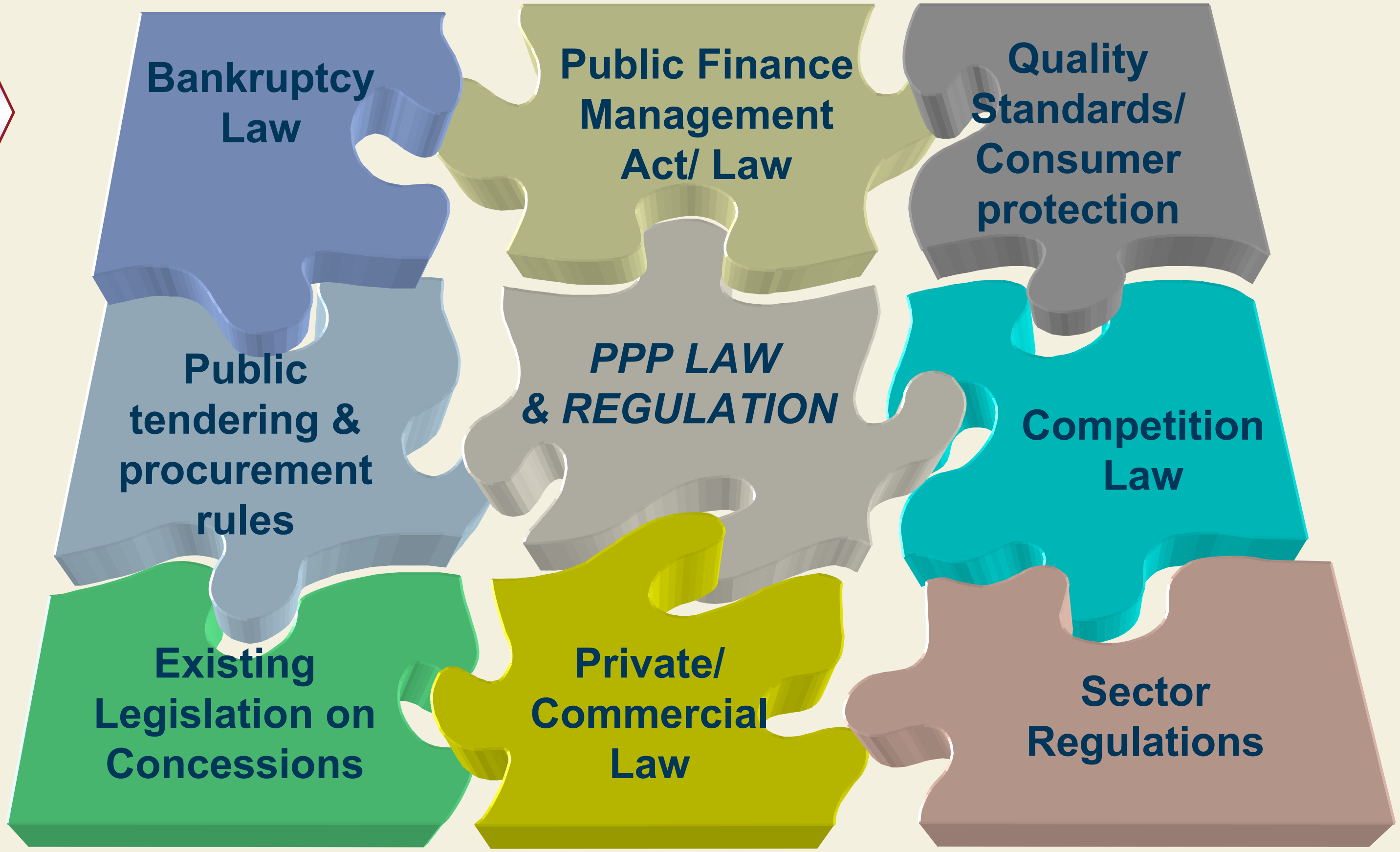
Mozambique Draft PPP Law: how does it compare?

Benchmark PPP legislation used to perform this “high level” comparison are:

- Brazil: Lei N. 11.079 of Dec 2004 of PPP (no âmbito da administração publica)
- South Africa: Public Finance Management Act; PPP Manual, Municipal Finance Management Act and PPP toolkit for Tourism
- United Kingdom: Private Finance Initiative (PFI) legislation and HM Treasury paper “Public Private Partnerships, the Government Approach” (2000)
- Slovenia Public Private Partnership Act (ZJZP)
- European Union’s “Green Paper on public private partnerships” (2004)

PPP Law & Implementation: Best Practices

One general comment on the Draft Law: we failed to see the links (*) and references being made to the other pieces of legislations, relevant to Public procurement, public finance and/ or private and commercial law…



(*) C. Puzzle regulatory linkage model, Y. Speeckaert/ KPMG, 1998

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Mozambique Draft PPP Law: how does it compare?

Sections of the Law	Art	PPP Draft Law proposal & provision (Mozambique)	Best practice/ alternative proposal (private sector)
General disposition (I)			
Main purpose of the PPP		Balanced sharing of benefits & prevention of risks in projects + acceleration of economic growth and poverty reduction	EU: Value for Money. Using private operators when it is more efficient and cost effective to use a private operator vs a Public one. Purpose of PPP Act (Slovenia Law)
Duration of PPP contracts/ concession	**Art 9.1**	▪ 25 years for concessions ▪ 20y max for Leasing of operations and revenue flows ▪ 15 Maximum period for Management contract	Usually not defined so precisely: *Ex (Brazil):* " O prazo de vigência do contrato, compatível com a amortização dos investimentos realizados, não inferior a 5, nem superior a 35 anos, incluído eventual prorrogação." Cap II, 5
Renewal clauses	**9.4**	Maximum duration of 25 years for initial concession. Renewal not superior of 50% of concession period (12.5 years) Renewal are conditioned on authorized added investment Prices and tariffs fixed by Govt.	Concession can be renewed for the same period (20 or 25 years) if performance is deemed satisfactory (UK) *Ex Brazil: "In some cases the Public Partner authorizes the transfer of the control of the PPP company (SPV) to the private investors,* in order to ensure the continuity in the delivery of services and/ or financial restructuring" Cap II, 2

PPP Law & Implementation: Institutional dispositions

		Institutional Dispositions (II)	
Supervision & regulation	**Art 11-16**	Double regulation by both • *Sector Tutelage supervise all matter related to the development* of the project, feasibility and implementation • *Financial tutelage focuses on impact of project on public finances*, Moz society, and fit with overall development plans of the state. • *Creation of a PPP Unit* (within the Finance Ministry) for tendering and monitoring of PPP projects	High PPP usage countries have a *dedicated PPP Unit (both technical administration and PPP regulator).* *Ex: Slovenia: creation of the PPP Council:* *"The PPP Council shall be headed by the Minister competent for Finance" […] "The PPP Council shall study key policy issues of conducting PPP projects and problems and deficiencies of the system in this area…it shall draw up a strategy for operating PPP and shall formulate proposals and initiatives to the Ministry…" Art 21.*
	15	Creation of a New commercial company with mixed capital (public and private) who will be the operator of the concession	*Ex: Brazil (on Special Purpose Companies):* ➢An SPV should be created for managing the partnership ➢That follows Good governance and accounting standards ➢ The Public administration is prohibited to be the owner of the majority of the Capital of these companies. Creation of SPV (Brazil) (Click here for the Law)

PPP Law: phases and contractual dispositions

		Phases and contractual dispositions (III)	
Phases of the Process	**17**	Phases of the PPP tender process ▪Identification and conception ▪Establish basic principles ▪Elaborate economic, social, technical and environmental feasibility studies ▪Planning of investments ▪Promotion of the project and launch of public tender ▪Assessment of proposals ▪Analysis and negotiation of contract (of concession) ▪Approval process ▪Concession contract ▪Implementation ▪Management and monitoring	*Standard process for selection and management. There are some variations on the sequencing of the Tendering and contract…* *Ex South Africa – Concession Award Process:* ▪Definition of tender objectives ▪Level playing field/ fairness ▪Expression of Interest/ request for proposals and tender ▪Tender preparation ▪Tendering ▪Tender Opening/ compliance ▪Evaluation ▪Award ▪Negotiations ▪Concession/ implementation / Agreement signing ▪Concession Agreement monitoring

PPP Law: Contractual dispositions

		Phases and contractual dispositions (III)	
Concession and contractual modalities	**18**	Three concession modalities (PPP) 1. Concession contract (BOT) 2. Leasing of the operations and revenues (contrato de cessão de exploração) 3. Management contract (contrato de gestão) (Interestingly the Build Operate and Own option is not considered in the draft law)	PPP around the world have found many expressions and variants/ mostly into two categories (EU): *Ex: EU Green Paper:* ▪ *Institutional PPP (Equity)* are characterized by the creation of the institutional entity jointly held by the public and private operators ▪ *Contractual PPPs*, instead are based on an agreement between the public sector and private partner to provide a service in exchange for some form of compensation from final users/ or through regular payment by the PUBLIC authority. In countries that have adopted a Market orientation, ownership and operations of large, complex utilities and infrastructure tend to be trusted on Private hands. Overall trackrecord of Private operators is better than management by public sector (but this does not apply to core public services (such as postal, water management that are usually subsidized).

		Classes of Benefits for the State (direct and indirects) IV	
Share of benefits between parties	**19**	Benefits of the concession should be evenly shared between the Private and the public parties, depending on: ▪Levels of resources and cost of opportunity ▪Levels of responsibility ▪Level of risk of the project	Standard practice - OK
Benefits sought by the Public sector and the government	**19 .2**	Direct benefits sought: ▪ Level of participation of national companies (in %) ▪ Concession award fee ▪ Fee for Concession or leasing ▪ Commission for management (on return of the project) ▪ Impact on balance of payment ▪ Impact on tax receipts and contribution to state budget ▪ Sharing of extraordinary profit	*Are these realistic?* Based on other PPP legislations and PPP practices, the fact of imposing initial Award fees, heavy concession fees may be a deterrent for Private Sector players. It is important to remember that a large infrastructure Project Finance does NOT generate any free cash flow before 4 or 5 years *Best way for the state to ensure a fair share and return on PPPs is through fair and appropriate taxation.*
		Indirect benefits sought: Benefits for national economy , employment, training, SMEs and industry linkage….	Very important and key to PPP project in developing countries: social, infrastructure investment and environmental improvement should be integrated to any Public or private undertaking

PPP Law: Benefits for the State (IV)

		Classes of Benefits for the State (direct and indirects) IV	
Level of local participation to Equity	**20**	Mozambican participation in Shareholder capital of not less than 10 to 20% of total capital Ensure participation by Mozambican private companies, subject to capacity to follow capital increase	Need to differentiate between Megaprojects and PPP (very different capital structure).. On Megaprojects, local participation to shareholder capital may be made difficult by the significant initial outlays and capital increase…
Concession award fee	**21**	Payment of an Award Fee. The level of which depends on the economic attractiveness of the concession type; Between 2% and 5% of the valuation of assets and exploration rights ceded by public party (based on the economic model of BP)	Not seen in best practice countries. Usually the "Signing bonus" applies to large "natural resources" projects such as mining, petroleum, etc. *In PPPs , this is not usual practice and may deter participation from international operators* to tenders or investing in Mozambique.

PPP Law : Benefits (continued)

Remuneration on the concession or leasing	**22**	In the case that the concession is economically profitable and sound, Concession fee will include a fixed and variable fee: ▪ Fixed fee = 5-10% of value of assets ceded by the state ▪ Variable fee = 5-10% of the gross revenue of the company, net of taxes.	5-10% of the Gross revenue of the company…may have a permanent adverse impact on willing investors…please review In the case of leasing of public assets, the private leasor does pay a fee – In the case of an institutional (SPV) PPP where the private sector assume most of the funding, it is the reverse: *Ex: Brazil (Cap II "Dos Contratos")* O Contrato poderá prever o pagamento ao parceiro privado de remuneração variável vinculada ao seu desempenho, conforme metas e padrões de qualidade e disponibilidade definidos no contratos (performance bonus for the PRIP)" Cap II, Art 6
Management fee (commission de gestao)	**23**	5-10% of the gross revenue, net of taxes.	Usually it is the reverse, the state pays the Management contractor for managing the public assets 10% of gross revenue…?

PPP Law & Implementation: Benefits (continued)

Tax revenue	**25**	Application of the Fiscal legislation Fiscal and customs incentives and "isenções" could be considered	Shouldn't corporate taxation be the main way the State gets a budgetary return on project? *Research (World Bank) shows that large fiscal incentives and tax brakes does not have long term positive return.* Most corporation accept a fair level of corporate taxation (there is competition at regional (SADC) level). Some tax incentives over initial 5 years does help.
Profits and dividends to be distributed	**26**	Profits and dividends to be redistributed – apparently no retained earnings allowed.	Again dividends is a sharing of profit once a concern is profitable and generate Free cash flow + has assumed its responsibilities vis a vis lenders Would not recommend to include a clause on dividend distribution in general PPP Law.

PPP Law & Implementation: risk management

		Risk management - Capitulo V	
Tipos de Riscos: Categories of risks	30	The following categories of risks are to be included in concession assessment / contracts: ▪Conflict of Interests ▪Conflict of interest of private sector interest (companies) ▪Concentration of Powers ▪Financial risks ▪Fiduciary risks ▪Debt management risks ▪Fiscal risk ▪Parafiscal risk ▪Environmental risk ▪Technical and management risk ▪Other risks ▪Extraordinary/ Force majeure risks	Analysis of Risk categories and class can be found in main body of the presentation (earlier sections)
Extraordinary risks and Force majeure	41	Force majeure risk, including caused by action by the state or political situation…. Indemnization…	What insurance for political risks are in build in Project Finance and PPP? What Indemnity? Existing international mechanism and mediation exist at COMESA and SADC regional levels.

PPP Law & Implementation: Infractions, final dispositions

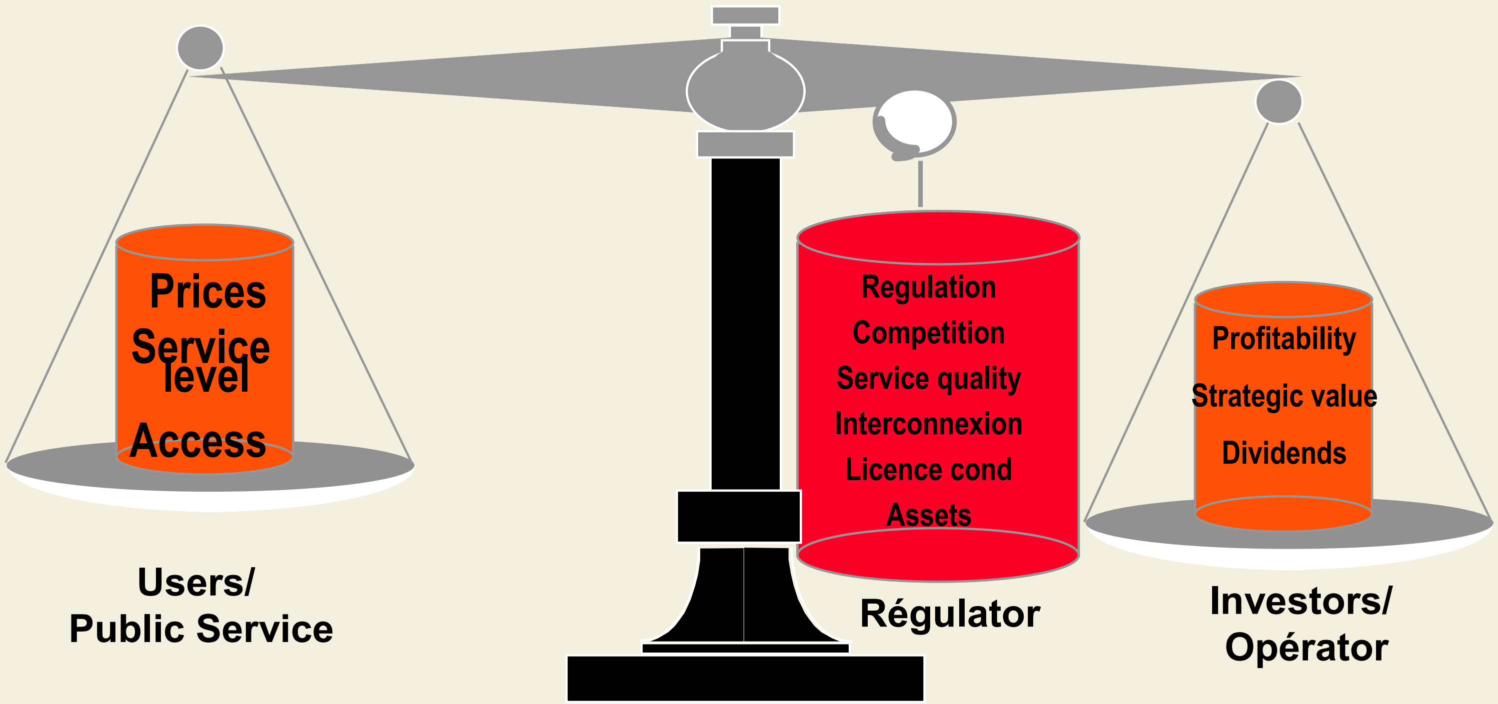
		Infractions and sanctions (VIII)	
Of Infractions	**51**	Are considered infractions: -Lack of definition, in explicit form, of the benefits (to the state, to the people) of this Law -Inclusion in the contract of clauses which implies any form of risk normally mitigated by this Law	Not included in the "infraction" a provision for the main class of "default" that is performance default or large deviation from performance indicators – planned in the Concession contract Keep definition of infraction and level of sanction at general (and flexible level): *Ex Brazil: Cap II dos Contratos:* *"As penalidades aplicáveis a Administração Publica e ao parceiro privado em caso de inadimplemento contratual, fixadas sempre de forma proporcional a gravidade da falta cometida, e as obrigações assumidas" Art 5-II*
Sanctions & renegotiation and rescind of contracts	**52**	The infractions above could result in the following sanctions: - Suspension of the feasibility study or negotiation of contract - Suspension or canceling of the contract - Rescission of the contract - Indemnization of the parties affected by the infraction (post contractual)	Strong terms and does not include a mediation process This opens the way to arbitrarily rescind or suspension of concession rights (deterrent to investment)…

PPP Law & Implementation: Infractions, final dispositions

		Transitory dispositions (IX)	
Adjustment and renegotiation of current concessions and going concern	5 4	…..For Project already awarded and going concerns, and through a mutual agreement, there can be a renegotiation or adjustment of certain clauses of the contract…..	Renegotiation of existing and signed contract is permitted under this law…Impact? If renegotiation is made by consensus and given changes in market or external conditions - OK
Final Dispositions (X)		Are revoked and obsolete all the previous dispositions on concessions , and regulations which differ from this present Law	Legal impact of obsolescence of previous relevant pieces of legislation? This raises also the issue of the linkage of this PPP Law with other Legal framework (investment Law, Public procurement law, etc)

Regulation: the guarantor of balanced interests

The role of effective regulation is to preserve the interest and benefits of the various stakeholders in a PPP or any undertaking in regulated sectors: the balance between public and state interest (sectorial policy and taxes), investors interest and most importantly users and consumers interests.



Source, KPMG, Telecom & Media practice, 1998

PPP Law benchmarks: on creating an SPV (Brazil)

"Antes da celebração do contrato, devera ser constituída sociedade de propósito especifico (SPV), incumbida de implantar e gerir o objecto da parceria."

…"a sociedade de propósito especifico poderá assumir a forma de companhia aberta, com valores mobiliários admitidos a negociação do Mercado"

A sociedade SP devera obedecer a padrões de Governança corporativa e adoptar demonstrações financeiras padronizadas…

Fica vedado a Administração publica ser titular da maioria do capital votante das sociedades de que se trata

Lei dos PPPs ..."Cap. IV, Art 9

PPP Law benchmarks: purpose of the PPP Law

Ex (Slovenia):

"The Purpose of this Act is to enable and promote private investment in the construction, maintenance and/ or operation of structures and facilities of PPP and other projects that are in the public interest"

(Art 6, PPP Act)