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# Public-Private Partnership: An Investment Tool to Rebuild Syria

Par Janabelle Abd El Aziz

Thèse de doctorat de Sciences juridiques - droit privé

Dirigée par le Professeur Olivera Boskovic

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## **Abstract**

The Syrian conflict has become one of the worst disasters of modern times. Therefore, the rebuilding process requires huge investments in the infrastructure and public services. The Syrian economy has witnessed structural and significant changes since 1946. Gradually, the State pursued a progressive policy of economic reform and liberalization to give wider space for the private sector to contribute in the economy. In that context, the promulgation of the investment law No. 10 of 1991 has been seen as the cornerstone legislation for the private investment and economic growth. The second step in this regard was the issuance of Decree No. 8 of 2007 on the promotion of investments in the country. Therefore, the concept of partnership with the private sector has been progressively accepted by the public sector. Hence, the promulgation of the public-Private Partnership (PPP) law No.5 of 2016. The specificity of the PPP law lies in its legal nature, as it could be placed at the crossroads of the public and the private law classifications. In this case, the country needs a legal framework for protection of local and foreign investors. Therefore, the PPP law constitutes, among others, a legal driver to rebuild Syria.

The research offers an explanatory presentation of the issuance of the PPP Law and its implementation process in a country emerging from a conflict. Therefore, the research question relies on asking how, and to what degree can the public-private partnership law plays a crucial role and be one of the leading investment tools in the rebuilding process? Furthermore, what are the most suitable contractual and dispute resolution methods utilized for such objective?

The research announced the introduction for PPP through defining each terms of the public sector, private sector, and public services. Then, the PPP concept is addressed by distinguishing its several definitions through civil law and common law systems. This was a comprehensive entry for studying and analyzing the Syrian PPP law provisions and its legal, economic, and social circumstances. This would help the research to identify the potential legal gaps in the different phases of a PPP process. In that context, a chapter is dedicated to compare several PPP laws and experiences, although the PPP text law of different countries, including Syria, is quite similar in the format and shape of provisions. However, the main disparities are in the legal framework preparing the PPP's issuance and in the implementation understanding of PPP projects. The selected countries are France, the United Kingdom, China, and the United Arab Emirates. Thereby, the research analyses two European countries and two Asian countries to have a comprehensive view of the main different legal systems in the world.

The research studied the implementation processes of PPP. This implementation framework contains examining the technical, contractual, and settlement of disputes mechanisms of PPP per the PPP law. The outcome of this thesis indicated that Syria has an opposite two folded sides. On the one hand, the country stills have gaps in implementing the partnership. There is inaccessibility of adequate skills and expertise in managing partnership contracts and transactions, and the absence of readiness of the cultural and public environment for such an undertaking. However, on the other hand, we cannot neglect the several

successful projects that were established under BOT premises in Syria and the flexibility provided in the text of PPP law.

**Key words:** Partnership, Public and Private sectors, Syrian PPP law, Project Company, PPP contracts, companies law, private law, administrative law, investment tool, bidding procedure, post conflict rebuilding, dispute resolutions mechanisms, international arbitration, international administrative law.

## Résumé

Au cours des dix dernières années, le conflit syrien est devenu l'un des pires catastrophes des temps modernes. Par conséquent, la phase de reconstruction nécessitera d'énormes investissements dans les infrastructures et les services publics. L'économie syrienne, dominée par le secteur public, a connu des changements structurels et importants depuis 1946. Progressivement, à partir des années 80, l'État a poursuivi une politique progressive de réforme économique et de libéralisation des échanges afin de donner un champ d'action plus large au secteur privé pour contribuer au développement de l'économie. Dans ce contexte, la promulgation de la loi n° 10 de 1991 sur l'investissement a été considérée comme le pionnier des législations qui ont eu une influence sur l'investissement privé et la croissance économique. La deuxième étape à cet égard a été le décret n° 8 de 2007 sur la promotion des investissements dans le pays. Par conséquent, le concept de partenariat avec le secteur privé a été progressivement accepté par le secteur public. La dernière étape est la promulgation de la loi PPP n° 5/2016 qui fait l'objet de cette thèse.

La spécificité de la loi PPP réside dans sa nature juridique. Cette loi peut se situer à la charnière des classifications de droit public et privé. Dans ce cas-là, le pays a besoin d'un cadre juridique qui protège les investisseurs locaux et étrangers. Ainsi, la loi syrienne sur les PPP a été promulguée à cette fin et constitue – entre autres – un véhicule juridique pour la reconstruction de la Syrie. Cette étude offre une présentation explicative de ce qui constitue un partenariat public-privé et de son processus de mise en œuvre, dans un pays sortant d'un conflit. Par conséquent, la problématique de la thèse est de savoir comment et dans quelle mesure la loi sur les partenariats public-privé peut jouer un rôle crucial et être l'un des principaux outils d'investissement dans le processus de reconstruction? En outre, quels sont les méthodes contractuelles et le règlement des différends les plus appropriées utilisées pour un tel objectif?

L'étude a introduit le PPP en définissant chacun des termes du secteur public, du secteur privé et des services publics. Ensuite, le concept de PPP est abordé en distinguant ses différentes définitions à travers les systèmes de droit civil et de droit anglo-saxon. La loi Syrienne de Partenariat s'inspire d'autres expériences internationales de PPP. À cette fin, un chapitre est consacré pour comparer les différentes expériences de Partenariats, à savoir, la France, le Royaume-Uni, les Émirats arabes unis (EAU) et la Chine. Ainsi, la recherche analyse deux lois européennes et deux autres asiatiques pour avoir une vue d'ensemble des principaux systèmes juridiques différents dans le monde. À cet égard, les principales différenciations résident dans le cadre juridique préparant la mise en œuvre des projets de Partenariats. Ce cadre de mise en œuvre contient l'examen des mécanismes techniques, contractuels et de règlement des différends des PPP.

Le résultat de cette thèse indique que la Syrie a deux côtés opposés. D'une part, le pays a encore des lacunes dans la mise en œuvre du PPP. La compétence et l'expertise adéquates dans la gestion des contrats et des transactions de partenariat sont inaccessibles et le milieu culturel et public n'est pas prêt pour une telle entreprise. Cependant, d'un autre côté, nous ne pouvons pas négliger les nombreux projets réussis qui ont été mis en place sous forme de BOT et la flexibilité prévue dans le texte de la loi de Partenariat.

**Mots clés:** Partenariat Public-Privé- Secteurs public et privé, Droit Syrien de PPP, Société de projet, Contrats de PPP, Droit des sociétés, Droit privé, Droit administratif, Outil d'investissement, Procédure d'appel d'offres, Reconstruction, Mécanismes de résolution des litiges, Arbitrage international, Contrat administratif international.

## Résumé substantiel

Un partenariat est généralement caractérisé comme une sorte de coopération entre les secteurs public et privé en établissant des relations contractuelles dans lesquelles le partenaire privé est autorisé à fournir des biens et des services, autrefois produits par le secteur public. Il s'agit d'une relation contractuelle pour un certain délai fixé par une entité publique et un partenaire du secteur privé, dans laquelle, ce dernier investit des ressources dans au moins l'un des travaux suivants: construction, la mise en œuvre, l'entretien, la réhabilitation, le développement, la gestion ou l'exploitation d'une installation publique ou de projets appartenant à une entité publique. Cette relation-là est basée sur le partage des risques entre les parties contractantes.

Pour l'état actuel de la Syrie, le partenariat peut apparaître comme une solution idéale pour garantir la participation du secteur privé dans le développement économique et assurer des services aux ressortissants. Pourtant, la question du partenariat est très compliquée, notamment en ce qui concerne le financement, l'ingénierie du projet, les garanties et le soutien gouvernemental, le partage des risques, le type du contrat et la durée. En conséquence, le partenariat doit être établi avec beaucoup de soin avant que le gouvernement ne choisisse d'exécuter un projet de PPP. À cette fin, la loi du partenariat est l'un des principaux outils d'investissement qui peut jouer un rôle crucial dans la reconstruction de la Syrie.

La recherche implique l'étude et l'analyse de la loi syrienne des PPP avec ses répercussions. L'adoption d'une telle loi par le parlement était conforme à d'autres lois concernant les différents ministères syriens, dans le but de mettre fin au monopole du secteur public sur des projets importants, notamment l'électricité et les transports. L'objectif de la dite loi est de tenter d'améliorer les dispositions législatives pour attirer des investisseurs étrangers et assurer leur protection. L'étude vise également à identifier les domaines de partenariats en déterminant les secteurs spécifiques qu'il est recommandé au secteur privé d'y participer. De plus, elle montre les étapes conduisant à la réalisation d'un projet sur un terrain de partenariat à travers un contrat de société de projet.

Lors de l'étude du PPP, la question évidente qui peut se poser est de s'interroger sur la nature de ce type de contrat ou d'arrangements et dans quelle catégorie les PPP sont classés. Ainsi, la nature juridique des contrats PPP est discutable. En effet, le secteur public est une partie essentielle de ce contrat ou de cet arrangement, ce qui signifie qu'il inclut des questions de droit administratif. D'un autre côté, nous avons une société de projet qui est soumise au droit des sociétés, ajoutant que l'autre partie du contrat est du secteur privé. C'est pourquoi la nature des contrats de PPP pourrait être classée sous une loi neutre et spécifique entre droit public et droit privé.

Même si le concept de PPP a été fortement contesté il y a plus de 25 ans, il est désormais presque omniprésent dans le domaine public de nombreux pays.

Cependant, il est important d'appliquer les principes de bonne gouvernance et de s'assurer que ces principes sont compatibles avec le contexte dans lequel les PPP fonctionnent. Il était également important d'étudier les types et la structure des PPP. En effet, dans le cadre du PPP, il existe plusieurs types, tels que les contrats de location, les contrats de gestion, BOT, BOO et autres. Chacun de ces types a été étudié séparément pour avoir une approche globale de chaque type. En fait, l'établissement d'une telle loi était nécessaire pour renforcer le système juridique du PPP en Syrie. Cette nouvelle loi aborde des questions clés, telles que la méthode d'appel d'offres, la structure institutionnelle, les procédures de règlement des différends (y compris l'arbitrage international) et la possibilité du soutien de l'État.

L'origine de l'idée de Partenariat revient au 2009. En effet, pour soutenir et encourager le gouvernement syrien à promulguer une loi sur le Partenariat, la « British-Syrian Association » a conclu une conférence importante sur les PPP à Damas à la fin de 2009. À la fin de 2010, le premier projet de loi sur les PPP en Syrie a été préparé après deux ans de travail entrepris par des avocats syriens et français. Aucun retard de promulgation n'était prévu; cependant, le conflit dans le pays a commencé en 2011. En effet, cette conférence, qui a été précédée par le projet «Adra Extension» mis en œuvre avec le principe du partenariat, constitue la première étape vers la promulgation de la loi de partenariat public-privé (en force) en 2016 en vue de la reconstruction et de la réhabilitation des infrastructures en coopération avec le secteur privé. Le moment délicat de la promulgation de la loi est perceptible, car le conflit en Syrie était toujours en cours. Cela a été très discutable et a suscité beaucoup de critiques et de questions controversées.

La loi syrienne sur les PPP s'inspire d'autres expériences et lois mondiales sur les PPP. Par conséquent, une comparaison analytique est effectuée pour présenter ces expériences et enrichir la recherche. Il est important de comparer différents systèmes juridiques car les terminologies et les textes législatifs des PPP peuvent différer d'un pays à l'autre. Cependant, nous voyons dans le chapitre de comparaison entre des systèmes juridiques sélectionnés de PPP, qu'ils sont tous dans le même cercle. Ils ne vont pas au-delà de la participation du secteur privé avec le secteur public au financement, à la construction et au développement de projets d'infrastructure en utilisant les capacités humaines, financières, managériales, administratives et organisationnelles dans la prestation de services publics.

Une approche comparative a amélioré les connaissances sur la loi PPP. Cela a permis de voir et de comprendre les lacunes et les avantages de la loi syrienne en la matière. Par ailleurs, une telle approche nous a permis de clarifier certains aspects nouveaux ou peu connus ainsi que des tendances générales, qui ne seraient pas visibles d'un point de vue national. Ajoutez à cela l'avantage de faire bénéficier le législateur syrien des lois d'autres pays et d'entreprendre des réformes spécifiques pour s'adapter aux nouveaux modèles de gestion des investissements.



Quatre expériences ont été étudiées ; à savoir, celle de la France, celle du Royaume-Uni, celle des Émirats Arabes Unis et celle de la Chine. La France est un facteur de comparaison important parce qu'elle fait partie de l'Union européenne et est un pionnier du système juridique civil. Ce sont deux critères importants pour enrichir l'étude au regard de sa position et de son expérience avec les PPP. De plus, le système de droit civil français est considéré comme la base de référence de la législation syrienne. Dans la même atmosphère européenne, il est important de voir le Royaume-Uni comme une référence dans le système anglo-saxon et il a une longue et riche histoire en PPP. En revanche, il est essentiel d'envisager d'autres modèles comparatifs de systèmes juridiques spéciaux comme la Chine et les Emirats Arabes Unis.

La deuxième partie de cette thèse aborde et explore les perspectives de mise en œuvre des projets PPP. Par conséquent, pour garantir une mise en œuvre efficace du projet PPP, chaque idée doit être clairement exprimée et stipulée lors de la préparation du contrat ainsi que de leurs mécanismes de résolution des litiges. En effet, il y a plusieurs étapes pour aboutir à la conclusion du contrat PPP, puis à la mise en œuvre du projet. Ces étapes sont des procédures de planification, d'identification des candidats du projet à la gestion du contrat PPP. Il convient de noter que chaque étape est vérifiée pour s'assurer qu'elle continue de répondre aux critères requis pour un PPP efficace. À cet égard, il est important de noter qu'il n'existe pas d'accord universel sur ce qui doit être inclus dans chaque phase ou sur le moment où une phase doit commencer ou se terminer. La loi syrienne sur les PPP a une autre nomenclature concernant les étapes de développement et les procédures de mise en œuvre des PPP.

Les étapes de mise en œuvre du projet selon l'approche de partenariat commencent par l'identification des projets PPP, puis la sélection de ces projets comme projets éventuels de PPP, et se terminant par le choix d'un partenaire privé et la mise en place d'un projet d'entreprise. La sélection du partenaire privé et la création de Société du Projet se font à travers une invitation aux soumissionnaires qualifiés, qui ont été choisis dans le cadre des procédures de pré-qualification. Trois étapes de la mise en œuvre d'un projet sont expressément énoncés dans la loi PPP n ° 5/2016, à savoir, l'appel d'offres, les procédures non concurrentielles et les offres non sollicitées. Par conséquent, on pourrait dire que le projet de partenariat diffère des autres projets car l'appel d'offres n'est pas autorisé pour tout le monde. En conséquence, la partie publique qui souhaite passer un contrat est censée annoncer ce qu'on appelle la «qualification initiale» pour la procédure d'appel d'offres. Par la suite, la procédure d'appel d'offres se poursuit pour sélectionner l'offre gagnante en fonction de deux critères principaux: le rapport qualité-prix et le partage des risques. À cet égard, il convient de noter que la loi syrienne sur les PPP est différente des autres lois des différents pays en ce qui concerne les propositions non sollicitées.

Encourager les investisseurs, les prêteurs et les entrepreneurs à participer à des projets PPP exigerait une grande confiance dans le système de règlement des différends. En

d'autres termes, ils doivent être convaincus que tout différend pouvant découler du contrat sera résolu de manière équitable et efficace. À cet égard, le cadre juridique du pays d'accueil de l'investissement devrait permettre certains principes de base, tels que la garantie des mêmes conditions pour les entreprises locales et internationales, le droit de choisir la loi applicable par les parties devrait être abordable, la force exécutoire des jugements étrangers et les sentences arbitrales, et l'autonomie des parties dans le choix du mécanisme de règlement des différends approprié. Par conséquent, les méthodes d'arbitrage sont les plus utilisées pour le règlement des différends découlant des PPP. Les parties au PPP recourent généralement à l'arbitrage pour régler le différend qui surgit pendant la phase de construction du projet et également des différends découlant de l'expiration ou de la résiliation du contrat PPP. Par conséquent, l'arbitrage est généralement l'option privilégiée par les parties privées compte tenu de ses nombreux avantages, tels que son adéquation aux besoins des parties, moins formelle que le système judiciaire. Cependant, le caractère exécutoire de la sentence arbitrale est une considération cruciale qui doit être prise en compte lors de la rédaction de la clause compromissoire.

Il est important de rappeler le rôle que les traités internationaux d'investissement et de protection des investisseurs puisse jouer pour rassurer les entrepreneurs, les prêteurs et les investisseurs. En effet, les traités bilatéraux internationaux et les traités multilatéraux internationaux pour la protection des investissements fournissent des dispositions de protection de base que l'investisseur devrait en jouir, en particulier pour les investisseurs étrangers. Dans ce contexte, la Syrie est membre signataire de plusieurs traités internationaux bilatéraux et multilatéraux, ce qui montre que la Syrie s'est engagée à mettre en œuvre la norme internationale en matière de protection des investissements.

Enfin, il est tout à fait important de suggérer qu'il est nécessaire de créer un Ministère de la coopération internationale et de la reconstruction, en plus de créer des unités de partenariat dans chaque ministère. Ces unités pourraient être liées à l'unité principale établie dans le ministère proposé. Chaque unité devrait être composée d'experts juridiques, économiques, financiers, administratifs et techniques. Sa tâche serait de proposer des projets et de fournir des études de faisabilité pour chaque projet. En conséquence, toutes sortes d'investissements et de projets de PPP doivent être placés sous l'autorité du ministère susmentionné. Un seul ministère de tutelle devrait couvrir exclusivement les différents projets d'investissement, soit réalisés en vertu de la loi PPP, soit en vertu d'autres lois d'investissement. En outre, parmi les nombreuses tâches du dit Ministère, il y a un grand besoin de formation pour qualifier les Ressources Humaines dans le secteur public et pour contrôler les contrats de partenariat, comme garantir la formulation des contrats, la bonne mise en œuvre, la qualité du service et de contrôle pour assurer la réalisation des objectifs visés.

Finalement, comme le sujet de cette recherche est «PPP: un outil d'investissement pour reconstruire la Syrie», on a voulu se concentrer sur cet outil et prouver qu'il

serait un outil d'investissement efficace et important pour reconstruire la Syrie. En fait, étant donné le coût énorme de la reconstruction, nous pourrions suggérer qu'il faudrait une intervention internationale dans la reconstruction, en parallèle avec la loi sur les PPP. Dans ce contexte, la loi des PPP n'est, peut-être, pas le seul recours et l'outil suffisant de reconstruction. À cette fin, et compte tenu de ce qui a été suggéré ci-dessus, un «plan» international éventuel pour la reconstruction de la Syrie pourrait être une idéale solution, comme déjà le «plan Marshall» pour la reconstruction de l'Europe en 1945. L'idée d'un plan de reconstruction internationale a déjà été élaboré par la création du Fonds fiduciaire pour le rétablissement de la Syrie (SRTF). On pourrait également inviter les Fonds souverains comme étant les principales institutions de financement de ce Fonds d'affectation spéciale, tels que le Fonds koweïtien pour le développement économique arabe (KFFAED), le Fonds d'Abou Dhabi pour le développement (ADFD), le Fonds saoudien pour le développement (FSD) et le Fonds de l'OPEP pour Développement international (OFID), les Fonds européens et autres. Ainsi, nous pensons que ce Fonds (SRTF) provisoire pourrait être transformé, grâce à une intervention internationale, a un plan de relance de la Syrie. Cela pourrait être la meilleure solution pour la reconstruction de la Syrie. Par conséquent, l'équation suggérée est comme suivant: Volonté internationale + plan de relance (SRTF) + donateurs (Fonds) / Banque mondiale = Reconstruction de la Syrie.

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## Main abbreviations

1. ADR	Alternative Dispute Resolution
2. AOT	L'Autorisation D'occupation Temporaire
3. AJDA	<i>Actualité juridique de droit administratif</i>
4. APP	Alianza Publico Privada
5. ASB	Adjusted Shadow Bid
6. BEH	Bail Emphytéotique Hospitalier
7. BEA	Bail Emphytéotique Administratif
8. BBO	Buy-Build-Operate
9. BDO	Build- Develop- Operate
10. BIT	Bilateral Investment Treaties
11. BLOT	Build-Lease-Operate-Transfer
12. BOT	Build-Operate-Transfer
13. BOOT	Build-Own-Operate-Transfer
14. BOO	Build-Own-Operate
15. BTO	Build-Transfer- Operate
16. CA	Cour d'appel
17. Cass.	Cour de cassation
18. CE	Communautés Européennes
19. CEDA	Council for Economic and Developmental Affairs
20. CEO	Chief Executive officer
21. CJCE	Cour de justice des Communautés européennes
22. CPP	Collaboration Private-Public
23. CPE	Contrat de Partenariat et les Contrats Equivalents
24. CP	Contrat de Parternariat
25. CSRC	China Securities Regulatory Commission
26. DBFOM	Design, Construct, Finance, Operation, and Maintenance
27. DBFO	Design-Build-Finance-Operate
28. DBFM	Design-Build-Finance and Maintain
29. DCMF	Design-Construct- Manage- Finance
30. DGITM	Direction générale des infrastructures, des transports et de la mer

31. DIAC	Dubai International Arbitration Center
32. DoF	Department of Finance
33. DSP	Délégation de Service Public
34. EIB	European Investment Bank
35. EMP	Environmental Management Plan
36. ESCWA	Economic and Social Commission for West Asia
37. EU	European Union
38. EC	European Community
39. FBC	Final Business Case
40. FET	Fair and Equitable Treatment
41. FDI	Foreign Direct Investments
42. GCC	Gulf Cooperation Council
43. GDP	Gross Domestic Product
44. Ibid.	<i>idem</i>
45. ICC	International Chamber of Commerce
46. ICSID	International Convention on the Settlement of Investment Disputes
47. ICA	International Commercial Arbitration
48. IFIs	International Financial Institutions
49. IFC	International Financial Corporation
50. IMF	International Monetary Fund
51. Infra.	<i>Below</i>
52. IPA	Infrastructure and Projects Authority
53. ISDS	Investor-State Dispute Resolution
54. ITT	Invitation to Tender
55. JCP	Semaine juridique
56. LCIA	London Court of International Arbitration
57. LDO	Lease-Develop-Operate
58. LOA	Location avec Option d'Achat
59. LPVR	Least Present Value of Revenue
60. MAPPP	Mission d'Appui aux Partenariats Public-Privé
61. MFN	Most Favoured Nation
62. MIGA	Multilateral Investment Guarantee Agency
63. MIT	Multilateral Investment Treaties

64. NAFTA	North American Free Trade Agreement
65. NCP	National Center for Privatization
66. NDRC	National Development and Reform Commission
67. NGOs	Non-governmental organizations
68. NPM	New Public Management
69. NPD	Non-Profit Distributing
70. O&M	Operations and Maintenance
71. OBC	Outline Business Case
72. OECD	Organization for Economic Co-Operation and Development
73. OSS	One-Stop-Shop
74. PFI	Private Finance Initiative
75. PIU	Project Implementation Unit
76. PPP	Public Private Partnership.
77. PSC	Public Sector Comparator
78. Req.	Arrêt de la chamber des requêtes de la Cour de cassation
79. RFP	Request for Proposal
80. RFQ	Request for Qualifications
81. ROT	Rehabilitate- Operate Transfer
82. SASAC	State-Owned Assets Supervision and Administration Commission
83. SID	Settlement of Investment Disputes
84. SoPC	Standardized of PF2 Contracts
85. SOC	Strategic Outline Case
86. Soc.	Arrêt de la chamber sociale de la Cour de cassation
87. SPV	Special Purpose Vehicle
88. Supra	<i>above</i>
89. TOT	Transfer-Operate-Transfer
90. ToR	Term of reference
91. UAE	United Arab of Emirates
92. UN	United Nations
93. UNCITRAL	United Nations Commission on International Trade Law
94. UK:	United Kingdom
95. UP	Unsolicited Proposal
96. USA	United Sates of America.
97. VGF	Viability Gap Fund

98. VFM	Value for Money
100. WB	World Bank
101. WTO	World Trade Organization



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## General Introduction

1. Over the past decade, the conflict in Syria has become one of the worst humanitarian and economic disasters of modern times. Over a million victims, around five millions refugees abroad and six millions people were internally displaced; the numbers only capture a part of Syria's tragedy<sup>1</sup>. Other aspects of this tragedy include extensive damage to infrastructure, public utilities, residential sector, medical clinics, schools, streets, bridges and dams. Since the reconstruction phase requires enormous investments in infrastructure and public services, it could be crucial to use all sectors and civil society associations to improve the economic and social situation and the living conditions of citizens<sup>2</sup>. This conflict caused a sharp reduction in the rates of financial development after a significant evolution in the years preceding the conflict (2000-2010). As a result, Syria found itself in serious difficulties to propel the basic standard of the national economy, such as declining public and private incomes, the flow of funds abroad (legally or illegally), loss of capacity in specialized and professional human resources and the lack of attracting local and foreign investments

2. The conflict's present situation has our overall concentration toward reconstruction, regardless of the absence of an official peace process. Some researchers have qualified what is rising in Syria as an "authoritarian peace"<sup>3</sup> in which perpetual violence and types of social and economic deletion, reinforce the post-war order. It is through this revealing structure and its emergence on the ground that we need to reconsider Syria's present and future legal structure<sup>4</sup>. Thus, recognizing the damages caused by this conflict raises an important question: what does "reconstruction" mean in the Syrian context? The primary sense for reconstruction makes us think about a process that aims to bring a situation back to a previous state. Most reconstruction costs estimated by international organizations like the World

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<sup>1</sup> E. Dacrema, V. Talbot and P. Magri, "Rebuilding Syria, the middle East's next power game", ISPI,

<sup>2</sup> Bassam Haddad, "Business Networks in Syria: The Political Economy of Authoritarian Resilience book", 1<sup>st</sup> edition, 2012.

<sup>3</sup> Ishiyama J., Conway R. and Haggans K., "Is there a monadic authoritarian peace: Authoritarian regimes, democratic transition types and the first use of violent force", African Journal of Political Science and International Relations Vol.2 (3), 2008.

<sup>4</sup> Turkmani R., Theros M. and Hadaya S. "Political Economy and Governance in Syria", Conflict Research Programme at The London School of Economics and Political Science, March 2019.

Bank and the UN revolved around the following question: How much will it cost to bring Syria as it was in 2010? However, such a question could be misleading, particularly because Syria has experienced brutal years of war with intense consequences on society. In that context, significant transformations have and would profoundly affect the post-war situation<sup>5</sup>.

## **I. Public sector's evolution towards PPP**

3. The Syrian economy has witnessed structural and several important changes since its independence in 1946. Thereafter, several laws were enacted that resulted in gradual socialization of the economy, particularly between 1958 and 1965. Progressively, the State acquired control of the development of natural resources, and reform measures were introduced, although not effectively implemented. In 1963 commercial banks and insurance were wholly nationalized. In the following year, most large businesses were nationalized wholly or partially. By 1966 the public sector included: development of natural resources, electric power, water; the bulk of industrial plants, banking, and insurance; part of transportation; and most international commerce and domestic retail trade.

4. By the end of that decade, Syria faced an economic transformation, from traditional economy concentrated on agriculture to an economy dominated by services, and industrial, and commercial sectors. The situation remained quasi unchanged until 1986. As a consequence of these previous measures, the government controlled the economy and exercised significant influence over the private sector. However, the government thereafter liberalized the structure to encourage more private sector investment. For example, the government relaxed exchange controls and allowed private traders to import more goods. The period from 1989 to 1996 was characterized by the issuance of new laws and regulations.

What was noticeable in this period was to allow a wider scope of the private sector where it can have a greater contribution and role to the economic activity. This stage

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<sup>5</sup> Although the political structure of the Syrian State has not changed, everything else has. See: Khouri, R.G. "The implications of the Syrian War for the New Regional Orders in the Middle East", MENARA Working papers, Sep. 2018.

also faced an adaptation of a gradual policy of economic reform and trade liberalization. This openness towards the private sector started in 1991, where the private sector, for the first time, has the ability to do its business independently.

5. Thereafter, the issuance of investment law No. 10 of 1991 played a key role in the investment domain, where thousands of investment projects have been created under its umbrella. The two major encouraging outcomes were, on the one hand, the growth of investment projects that have strongly participated in the transfer of technology; and on the other hand, the acquisition of the foreign currency, which is an important factor in strengthening the national economy. Subsequently, Syria has experienced a considerable growth in the economic activity thanks to the mentioned law. Moreover, this law offers privileges, such as exemption from fees and taxes. During this period, many new industries, which did not exist before in Syria, appeared such as sugar production and refining, carpets, and electric motors. Between 2000 and 2010, the government sought further liberalization and economic reforms where new legislation allowed the establishment of private banks in 2004.

6. The new investment climate urged the government to legislate new laws to promote investment in Syria. To this end, Decree No. 8/2007 for promotion of local and international investments replaced Law No. 10. At the same time, the Decree No. 9/2007 was enacted to create, for the first time, a specialized investment agency “the Syrian Investment Agency (SIA)”. The essential characteristic of this Agency is the creation of a single window that has representatives of all government entities concerned with investments.

7. Disregarding the outbreak of the conflict in 2011, it was noticeable that the private sector was progressively emerging to be one of the important contributors in the Syrian economy. Given that the above mentioned Decree No. 8 is to promote investments of small and medium enterprises; and that it is therefore no longer sufficient to meet the massive needs of huge projects, there was an urgent need to enact a new law that can encompass those big projects. Hence, the apogee of the evolution from public towards the private sector is the promulgation of the PPP law No. 5 of 2016. Thus, the trajectory mentioned above is an inevitable step to promulgate this law, which is the subject of this research thesis.

## II. Significance of the Research

8. After a prolonged war in Syria, the partnership arguments have become more important than before since the war has devastated a huge part of the public and private resources and assets. The significance of the topic of this research originates first in its timing. The latter is worthy to comment, as the idea of drafting a PPP law had existed since 2009-2010. However, the official enactment came out in 2016. Such a law is considered novel in the country's legal history. Meanwhile, we should note the outbreak of the conflict in 2011, where such a law at that time, was unfeasible or incapable of being implemented and accepted among the population and the local and foreign investors<sup>6</sup>. However, this law could be considered as the starting point in the rebuilding process since the time of this process is almost there, hence, the importance of treating this topic now. Moreover, it should be noted that there is very little academic literature on this topic, which makes this academic work an important reference.

9. This research topic also has a noticeable specificity, which lies in its legal nature. This specificity is shown in the different links that has PPP with public, private and international administrative laws. PPP law would be placed at the hinge of public and private law classifications. Hence, we chose this research topic despite its complex nature; we cannot definitely classify the topic neither under the public law nor the private law<sup>7</sup>. It should be noted that public-private partnerships tend more towards a special categorization and could be considered a mixture of public and private law. In that context, the notion of the international administrative contracts could be at stake. In other words, if the private partner is a foreigner investor who would invest in Syria with a partner of the public sector, the contract could not be, in this case, mere administrative as it has an international element. The private partner would not usually accept to be bound with public law rules, as it would guarantee its protection from a partner that is stronger than him.

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<sup>6</sup> See, *infra* chapter I-title II-Part I at 129.

<sup>7</sup> See in details, *infra* chapter II-title I-Part I at 74.

### III. Research Problematic

10. Given the importance of this topic for Syria, especially since the conflict is almost ended, several questions should be raised. Who will bear the burden of the country's reconstruction? Given the huge destruction in the country's almost all economic and social infrastructure, there will be a need for a huge amount of capital and investments. The World Bank evaluates the damage at \$200bn<sup>8</sup>. At the same time, the UN Economic and Social Commission for West Asia (ESCWA) estimates that the total cost of recovery of the country to its 2010 condition will be nearly \$400bn. It should be noted that the most recent damage estimation by the Syrian Center for Policy Research is \$530bn, 40% of the infrastructure is destroyed<sup>9</sup>. These are enormous figures, and it is difficult to envision such resources easily. However, developments on the ground are already bringing up urgent questions about how Syria is to be rebuilt and who will participate in financing this operation. In this context and circumstances, the country needs a legal framework that protects national and international investors. Thus, the Syrian PPP law was issued for that purpose and constituted- along with other legislations- a legal vehicle in Syria's reconstruction.

11. Furthermore, studying the PPP law and its importance in the rebuilding process lead us to study its implementation process<sup>10</sup> (detecting PPP projects, appraising and structuring PPP...), as well as its practical application towards the private sector. In that context, managing a PPP transaction is complex and essential as, in the transaction phase, the government selects the private winner party that will execute the PPP<sup>11</sup>. It concludes when the PPP reaches the financial close; that is, the point at which the government has awarded and signed a contract with a private party.

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<sup>8</sup>World Bank Group, "The Toll of War: The Economic and Social Consequences of the Conflict in Syria", 10 July 2017; Also see: World Bank, "Syria's Economic Outlook-Spring 2016", 2016; CEIC Data, "Syria Real GDP Growth", 2019.

<sup>9</sup> ESCWA and University of St. Andrews, UNRWA, "Syria at War, Five years On", 2016; See also recent report: Syrian center for Policy Research, "Syria, Justice to transcend Conflict, Impact of Syrian Conflict Report 2016-2019", 20 Mai 2020.

<sup>10</sup> See *infra* Chapter I- Title I- part II at 251.

<sup>11</sup> See *infra* chapter II – Title I- part II at 295.



**12.** The issuance of Syrian PPP law and its executive instructions led to the necessity to shed light on the scope and successful conditions of the PPP contract<sup>12</sup>. After detecting the PPP project's best option, the PPP contract is the focal point of the partnership. The contract defines the connection and relation between the parties, their particular rights and obligations, assigning risks, and providing components for managing change. As a rule, partnership contracts are classified into some main groups arranged according to the responsibility, the duty of the private sector, and the risk it bears. The most satisfactory characterizations by numerous researchers fall into the management contracts, lease contracts, concession contracts, and private ownership of assets (private sector financing)<sup>13</sup>. It is worth noting that one project can be implemented based on one type of agreement, such as management contract. Likewise, it can be implemented by merging two or more agreements (contracts of leasing existing assets, with the creation, operation and transfer of new assets).

Each of the above models has its pros and cons. Additionally, the uniqueness of certain sectors, and the degree of technological improvement, regulations, laws concerns toward services have a role in deciding the appropriateness of the type of partnership<sup>14</sup>.

**13.** Since the Syrian partnership law does not determine the duration of the PPP agreement and permits the private sector to access to all government-owned projects<sup>15</sup>, models of partnership agreements can range from basic contractual arrangements to provide a particular service<sup>16</sup>, to complex arrangements for the structure, building, operating, maintenance, and infrastructure fund of services<sup>17</sup>. The

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<sup>12</sup> See *infra* chapter I – Title II -part II at 333.

<sup>13</sup> Transport and Tourism Division, “Public-Private Partnership in Infrastructure Development- An Introduction to issues from a different perspective”, *UNESCAP* Version 1, Thailand, September, p.16, 2007

<sup>14</sup> For example in Syria, the most utilized type of contract in huge infrastructure projects is the BOT.

<sup>15</sup> In contrast to a traditional public contract, it is the contractor who has the obligation to provide service and operation. The PPP contract must run for a period equal to the time it takes for the private party to regain the investment. This is the main reason in general for the long duration of PPP projects.

<sup>16</sup> e.g. trash collection.

<sup>17</sup> e.g. air terminals.

law will permit the partnership council to set up different models of the partnership agreements and issue guidelines for each agreement.<sup>18</sup>

**14.** A partnership is commonly characterized as a kind of cooperation between the public and private sectors by building up contractual relationships whereby the private sector is permitted to provide goods and services, used to be produced by the public sector. It is noticeable that the essence of partnership is risk sharing between the parties. In Syria, the partnership is characterized as per the PPP law<sup>19</sup> as a contractual relationship for a certain timeframe settled upon by a public entity and private sector partner, whereby the private partner invests resources into at least, one of the following works: design, construction, implementation, maintenance, rehabilitation, development, management or operation of one public facility or projects owned by a public entity<sup>20</sup>.

**15.** It should also be noted that the PPP law in Syria does not expressly refer to funding as one of the activities that should be embraced by the private partner. However, financing is one of the most significant purposes behind Syria's resort to the partnership. Besides, the law extends the private sector's field to enter not only to public infrastructure and utilities but also to public-owned enterprises<sup>21</sup>. Accordingly, it could be said that the law of partnership in Syria opened the entryway broadly for the private sector to enter all public sector domains, furthermore, to let them take an interest in all projects possessed by the government.

**16.** One of the private partner's concerns is seeking protection by the law during the life of a PPP project. It is essential to understand what arrangements of legal remedy will be obtainable to the several parties involved in that project. Foreign investors will be normally worried about relying on a local legal system that they do not understand or know. There is an almost permanent possibility of disputes under PPP contracts. Therefore, dispute resolution mechanisms could be incorporated in the PPP contract. Other jurisdictions define dispute resolution mechanisms in

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<sup>18</sup> Law No. 5 of 2016 Public-Private Partnership Law adopted on 10/01/ 2016. Amended by Law No. 21 of 2017 Law on 16/05/2017

<sup>19</sup> *ibid.*

<sup>20</sup> *ibid.*, article 1.

<sup>21</sup> *Ibid.*, articles 8-9.

international tools such as bilateral investment treaties or multilateral agreements. Therefore, when drafting the contract or reviewing it, it is important to read the dispute resolution clause carefully<sup>22</sup>.

**17.** On the other hand, the private partner usually prefers to resort to Alternative Dispute Resolution (ADR), such as conciliation, mediation, arbitration<sup>23</sup>, and, more preferably, to international arbitration<sup>24</sup>. ADR can be defined as a set of techniques for resolving disputes without litigation<sup>25</sup>. Arbitration usually provides the last chance to resolve the issue in question. In this context, does the Syrian PPP legislator provide the possibility for the parties to resort to arbitration? What about international arbitration?

**18.** From the start, the partnership might appear the delight solution for Syria to guarantee the accessibility and security of services to its citizens. However, the issue of partnership is more perplexing than that, particularly regarding funding formats, financial engineering of the project, guarantees and government support, risk sharing, and sort of agreement and duration. Accordingly, the partnership should be established with much care before the government chooses to execute any project. To this end, the assumption that partnership law between the private and public sectors is one of the main investment tools that will play a crucial role in rebuilding Syria, is theoretically, very strong and appealing.

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<sup>22</sup> To this end, see *infra* chapter II- Title II-Part II aiming to identify the PPP dispute resolutions and the investment protection treaties.

<sup>23</sup> For example in France, the “Conseil d’Etat” considers, however, that the prohibition on providing for recourse to arbitration derives from “general principles of public law” (EC, opinion, 6 March 1986). There is however a certain number of exceptions to this principle listed, in particular in article L. 311-6 of the code of administrative justice. In addition, a decree of January 8, 2002 (n ° 2002-56) authorizes certain public establishments to make compromises. In a general way, the order “ordonnance” of June 17, 2004 (n ° 2004-559) of June 17, 2004 relating to partnership contracts provides that recourse to arbitration to resolve disputes relating to the execution of the partnership contract is possible, provided when it is provided for in the clauses of the contract. For partnership contracts signed on or after April 1, 2016, arbitration is only one option. For the State, recourse to arbitration is authorized by decree taken on the report of the competent minister and the minister in charge of the economy.

<sup>24</sup> For more information see also articles (in French): M. Laazouzi, “L’arbitrage international des marchés de partenariat soumis au régime du code de procédure civile, AJDA 2016. 1163 and G. Teboul, “Arbitrage international et personnes morales de droit public”, AJDA 1997. 25

<sup>25</sup> Treacy, T. (1995). “Use of alternative dispute resolution in the construction industry.” J. Manage. Eng., 10.1061/(ASCE)0742-597X(1995)11: 1(58), 58–63.

19. Therefore, based on the complexities and versatile aspects presented above, this research attempts to clarify and guide the legal process of PPP by answering the following questions: **How and to what degree can the public-private partnership law take a crucial part, and be one of the main investment tools in the rebuilding process?** Furthermore, what are the most suitable contractual and dispute resolution mechanisms utilized for such purpose?

#### IV. Objective and scope of the research

20. The scope of the research can be seemed controversial and wide, as the topic of PPP is indeed versatile and has multi-purposes. To this end, it is difficult to detach the economic, social, financial side from its legal side and vice versa. However, the research's scope is to focus on the fact that the legal framework of PPP is the umbrella that embraces the other sides of the subject. Hence, the subject will be studied comprehensively on a legal basis. Therefore, the legal framework of PPP is inevitable to coordinate with the other sides of the subject.

21. The research has several objectives. The topic implies studying and analyzing Syrian PPP law with its repercussions. The passing of such law, by the parliament, was in line with other laws concerning the various Syrian ministries, with the aim of stopping the public sector's monopoly on important projects, including electricity and transportation. The latter's objective is an attempt to improve law provisions to attract foreign investors and to ensure their protection.

22. In the same direction, the research also has an objective of showing to the parties of the partnership, especially the private party, the main contract provisions that should exist in the agreement to ensure protection and best practices for the implementation and application processes. Thus, this study aims to identify the partnership domain of applications and implementation, and distinguish the specific sectors that are recommended to the private sector to participate. Furthermore, the study shows the stages prompting the realization of a project on a partnership premise through a project company contract. Moreover, this research also has an objective to present the dispute resolution mechanisms to provide a suitable course of action for the private sector party in case of a dispute. Finally, this research study will offer a

guidance work and an explanatory presentation of what constitutes a public-private partnership law in a country just going out from a conflict.

## V. Methodology

23. The Syrian PPP law is inspired from other worldwide PPP experiences and laws. Therefore, an analytic comparison is done to present these experiences and to enrich the research. It is important to compare different legal systems as PPP terminologies and text laws could differ from country to another. However, we will see further in the thesis<sup>26</sup> a comparative study among the selected PPP legal systems, which all are in one circle. They do not go beyond the participation of private sector with the public sector in financing, building, and developing infrastructure projects by utilizing human, financial, managerial, administrative, and organizational abilities in the delivery of public services<sup>27</sup>.

### 1. The interest of the comparative chapter in the research

24. In law, as a cognitive activity, comparative methods are of fundamental use. Indeed, they allow the right to communicate with other scientific fields to avoid radicalization of positions<sup>28</sup>. Thus, the utilitarian purpose of comparative research has been widely accepted by legal doctrines<sup>29</sup>. Comparison increases knowledge, both on its legislative framework and foreign ones. Moreover, comparative research is seen as a tentative to unifying laws<sup>30</sup>. This study is part of this perspective. This is why we have the ambition to explore several foreign legal systems to find the best PPP model

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<sup>26</sup> See *infra* chapter II of title II-Part I p. 176.

<sup>27</sup> C. Tvarno, H. Andersen, F. Cao and P. Wang, “Guidelines for Successful Public- Private Partnerships- an International Analysis from a Legal and Economic Perspective”, European Union, 2010. Tvarno et al. characterized partnership as a long-term contractual agreement between the government authority and the private part (Consortium) plans to make a mechanism for the stipulation of public services utilizing the private area experience over long period of time. This necessitates the private party to fund part or the entirety of the project.

<sup>28</sup> Remus Titiriga, “La comparaison comme method interpretative en Droit International Privé: le juge européen et la convention de Bruxelles”, R. Review of European Law, no 2012.

<sup>29</sup> A. M. Badrawi, “Les principes de droit civil compare”, Edition 2, library Syed Abdulah Wahba, p.158, 1970.

<sup>30</sup> Remus Titiriga, *supra* note 28

and better understand the structure of the Syrian PPP law. In this process, a study of the specific characteristics of each foreign law is therefore essential.

25. A comparative approach seems appropriate for several reasons. As stated above, this comparative approach will enhance our knowledge about the PPP law. It will enable us to see and understand the gaps and advantages of the Syrian PPP law. Besides, such a comparative approach could allow us to bring to light certain new or little known aspects as well as general trends, which would not be visible from a national perspective. The other interest of this comparative chapter is to make Syrian legislators more aware of the laws in other countries and make certain reforms to adapt to new ways of investment dealing.

## **2. Selecting countries for comparison**

26. We will study the PPP experiences and law in four countries: France, United Kingdom, United Arab Emirates, and China. For the sake of having PPP experiences and laws from civil and common law systems, we selected France and the United Kingdom. France is an important element of comparison as it has three main criteria appropriate for the research. Indeed, being a part of the European Union and a pioneer of the civil legal system are two important criteria to enrich the study with regard to its position and experience with PPP. Moreover, France's civil law system is considered as the referential basis for the Syrian legislation. In the same European atmosphere, it is important to consider the United Kingdom as a comparative model for its pioneering status in the common law system and a long, rich history in PPPs. Therefore, by studying France and the United Kingdom's two PPP laws and experiences, a comprehensive view from civil and common-law systems is formed.

27. On the other hand, it is essential to consider other comparative models of special legal systems. Therefore, China is a good example of studying and investigating as one of the world's super economic powers, which is keen on PPP projects. On the other hand, the United Arab Emirates is also an important element of comparison for being a successful Arab country in PPP projects. Giving the idea that the main focus is the Syrian PPP law, taking an example of an Arab country is needed for a holistic comparative view.

## **VI. Research Plan**

**28.** To answer and clarify all concerns and questions, we present the nature and the legal framework of the public-private partnership in Part I. Therefore, it is first necessary to deepen the understanding of the private and public sectors and then determine PPP's definition before studying the Syrian PPP law and compare it with other PPP legal systems, such as France. This part is studied among four chapters and divided into two titles:

### **Part I: Nature and Legal Framework of PPP**

#### **Title I: Concepts and Motives of PPP**

#### **Title II: Legal Framework and Comparative Contexts of PPP**

**29.** On the other hand, Part II will allow us to explore the implementation process of PPP law by presenting several case studies. We also study the contractual process and termination before studying the dispute resolution mechanisms in a PPP. These research ideas will be studied through four chapters divided into two titles:

### **Part II: Procedures of PPP Implementation and Dispute Resolution**

#### **Title I: Regulatory structure of PPP functioning**

#### **Title II: PPP Contractual requirements and dispute resolution mechanisms**

## **Part I: Nature and Legal Framework of PPP**

**30.** The first part of this thesis is dedicated to study several aspects of public-private partnerships, such as its nature and legal framework. The first title of this part encompasses the concept, motives, nature, and definition of PPP. Therefore, the terms of “public sector” and “private sector” are studied and defined apart. This distinction allows us to deeply understand the combination of these two sectors under what is called a “partnership.”

In contrast, the second title of this part addresses the specific legal framework of PPP in Syria. It also presents a comparative study among particular countries that experienced PPP law and implementation. The purpose of this title is to show the differences and similarities among several legal systems. Consequently, this shows up the gaps existing in the Syrian law and its implementation context.



## **Title I: Concepts and Motives of PPP**

**31.** The matter of public-private partnership has increasingly received considerable attention from several entities, such as governments, communities, and research institutions. It was notable that the economic and social developments are based on collecting all capabilities of the society from the public and private sectors. Therefore, both developed and developing countries seek to establish organizations, and legislation to adopt partnerships that almost sectors of the society could contribute<sup>31</sup>.

**32.** The public-private partnership has several definitions depending on the various legal systems in each country, which will be studied as well as the different theories and principles of this concept. On the other hand, it is interesting to analyze the motives and reasons to resort to partnerships, and tackle the various forms and kinds that are under PPP.

Therefore, chapter I-under this title- identifies the concept and role of public and private sectors, and their legal structural framework. On the other hand, the concept of PPP is presented in chapter II after a detailed comprehension of what constitutes the public and the private sectors, especially in Syria.

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<sup>31</sup> UNECE, “Promoting People first PPP for the UN SDGs”, 2016.

The emergence of “People first PPP”, developed under the aegis of the UN and the Sustainable Development Goals, aims to put public-private partnerships (PPP) at the service of the interests of citizens before all other parties stakeholders

## **Chapter I: Understanding Public and Private Sectors**

**33.** The chapter I addresses the notion of the public sector in section I. In contrast, the concept and different meanings of the private sector is the subject of section II. It should be noted that both sections would be focusing of the Syrian economic case.

### **Section I: Concept and Evolution of the Public Sector**

**34.** The emergence of the public sector was linked with the emergence of the State<sup>32</sup>. The term “public sector” signals economic activities based on government ownership of capital and products. Theoretically, the concept of public sector is linked to service provision for citizens and how this service responds to the citizens’ needs and expectations.

**35.** From the material scope perspective, as the public sector is the property of the State, it contains public business from companies and profit economic organizations. Public sector comprises the natural wealth of the country, such as oil, minerals, forests, and water. Also, it includes public utilities such as productive infrastructure (e.g., roads, ports, and airports) or social infrastructures (e.g., schools, universities and hospitals). Therefore, the public sector is a major development nexus to accelerate economic development, diversify the national income sources, changing the pattern of income through social services, and other forms of public expenditure<sup>33</sup>. The administration of the public sector is represented in general regulations, policies, and laws under governmental supervision and guidance that are exercised on the companies and institutions of the public sector<sup>34</sup>.

**36.** The §(1) of this chapter will address the concept of the public sector, which is also called the State sector. Besides, the concept of public service will be identified,

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<sup>32</sup> AlNafii F., “Concept and emergence of Public sector”, Arabic forum for Human resources, 2010.

<sup>33</sup> In that sense: Cass. Soc., 18 Dec. 2013, n° 13-15.471, CCASS: 2013:SO02222

<sup>34</sup> The government administration in this context means the implementation of the general policy of the state and bringing it into reality, and thus represents the total activity and government work in the purpose of the performance of public services, government production and law enforcement.

as it is closely linked to PPP. On the other hand, the history of the public sector in Syria is the subject of §(2).

### **Paragraph 1: Concepts of the public sector and public services**

**37.** The public sector is composed of both public services and public enterprises. The expression “public sector” alludes to all government organizations and includes public goods and governmental services, such as the military, law enforcement, and public education. The public service is an activity of general interest assumed by a public entity, and governed partially or totally by the rules of public law<sup>35</sup>. Thus, there is no public service unless the activity represents a general interest and is organically linked to a public person<sup>36</sup>. However, the question on identification of the public service could arise when the activity is delegated by the public entity to the private entity according to a contract. In this case, the French case law has stated three cumulative criteria to facilitate the identification of a public service: the criterion of general interest, prerogatives of public power, and the control of the organism by the public authorities<sup>37</sup>.

#### **A- Definition, role, and purpose**

**38.** There are several definitions for the public sector because each country has its definition depending on how much the public sector interferes in the economy<sup>38</sup>. In general terms, the public sector is a term used to indicate governments and publically owned or funded entities, enterprises and other agencies that provide essential services for citizens<sup>39</sup>. Generally, the kinds of services classified under the public sector differ from country to another. Education is a typical example of a service

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<sup>35</sup> Durand G., “service publics locaux: autres sociétés locales”, Encyclopédie des collectivités locales, 2017.

<sup>36</sup> See, CE, sect., 28 juin 1963, Nancy, req. n° 4383; CE, sect., 6 avr. 2007, Cne d'Aix-en-Provence, req. n° 284736

<sup>37</sup> *ibid.*

<sup>38</sup> Pathirane L., and Blades D., “Defining and Measuring the Public Sector: Some International Comparisons”, OECD, Paris, 1982.

<sup>39</sup> The institute of Internal Auditors, “Supplemental Guidance- Public sector definition”, December 2011.

provided by the public sector. Countries that support the public school system, like in Syria, usually do so without taking tuition fees from students to take advantage of existing learning opportunities at the primary education level. Funding public sector is usually collected through different manners such as taxes, fees. It should be noted that each country could put its system and methods of funding for public services<sup>40</sup>.

**39.** It should be noted that it is not always clear whether any particular organization has to be incorporated under the umbrella of the public sector. Hence, the concept of public sector could be considered very broad and may have intersection with the not-for-profit or private sectors. In that regard, the public sector could consist of the core government at the center followed by an expanded sphere of agencies and public enterprises<sup>41</sup>.

After presenting the public sector's general definition, we present its role and evolution in the following points.

### **1- Role of the public sector**

**40.** The role of the public sector differs from society to another. This differentiation is made based on the political and social doctrine of the country. For instance, in a socialist society, the role of the public sector may be larger than the role of the private sector, while in a capitalist society; roles may be equal or even more expansive for the private sector. According to economist Richard Musgrave<sup>42</sup>, the role of the public sector is shown under the following points<sup>43</sup>:

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<sup>40</sup> The public sector is the domain that includes departments, government institutions, and all companies controlled and owned by government agencies and the private sector has no relationship in its management. It could be also defined as a part of economic sections that is concerned with the implementation of government agreements and engagements. This sector depends on the financing and material resources generated from taxes imposed on goods in addition to revenues collected from various economic activities. Moreover, the public sector has an influence on different fields of economy through issuing and controlling investment decisions (through fiscal and taxes policies).

<sup>41</sup> For more information of the definition and criteria of public enterprises see: Dreyfus J.D., "Public sector enterprises- Legal forms of public sector enterprises", Directory of companies, Dalloz, 2009.

<sup>42</sup> Jean-Marc DANIEL-Richard Musgrave is an American professor in economy.

<sup>43</sup> Daniel J.M., Musgrave R., "les fonctions économiques de l'Etat", le revue de trésor, No 1, 2008, p. 61.

The first one is the optimal allocation of available resources. The question here is, what is the method of dividing the available economic resources between the public and private sectors? This issue differs from a country to another because it depends on the economic and political views of each state. It is noted the importance of guiding the resources towards best usages through eliminating the factors that negatively affect the market, such as monopolies.

The second one is the redistribution of income, which means introducing modifications to the primary distribution of income and wealth, in the aim to decrease the gaps in society. To this end, every fiscal policy adopted by the government should be aiming to decrease gaps.

The last one is rebalancing the economic situation of the market in case of market disruption. This rebalancing is to guarantee an exit strategy from the changes of the capitalist system through depending on the direct interference of the government in the economic system without causing inflation or deficiency. Furthermore, to guarantee the economic balance, the government can adopt several ranges of policies such as fiscal and monetary policies.

## **2- Evolution of the public sector**

**41.** The process of improvement of the public sector goes through the following main nexus<sup>44</sup>:

The first one is the restructuring of the governmental framework. It is one of the primary nexus for the development of the public sector. It includes the governmental departments, ministries, and institutions. Thus, restructuring these components has the objective of improving the public sector to prevent duplication of functions. Besides, it aims to create legislative frameworks that allow the restructuring of administrative

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<sup>44</sup> Curristine T., Lonti Z., and Joumard I., "Improving Public Sector Efficiency: Challenges and Opportunities", OECD Journal on Budgeting Volume 7- No.1, 2007.

components and building new structures for several governmental institutions to improve its effectiveness in using all available resources<sup>45</sup>.

The second nexus is about the development of services and the simplification of procedures. This nexus is concerned with raising the efficiency of the government system to achieve a higher level of service, whether it is for the citizen, government, or private sector. This is realized through sustainable improvement of governmental service level, enabling governmental institutions and departments in laying procedures to improve services, besides, to simplify and restructure governmental service procedures to become more transparent, effective, and capable of achieving all national objectives.

Also, we have the nexus of human management that is concerned with a human component. The nexus is considered a base to implement development programs in various economic, social, and political fields. The absence of skilled human resources affects the government's ability to carry out its tasks. It aims to create and find skilled and talented human resources in the public sector that are compatible with performing tasks and functions. This will reflect positively on the public sector's performance in achieving its strategic objectives<sup>46</sup>.

Communication is also an important nexus to the development of the public sector since it aims to increase awareness, and educative public programs, emphasizing its understanding for both employees and the public sector. These are to reach a professional and sustainable relationship<sup>47</sup>.

**42.** It is essential to study and analyze the impact of public involvement in the economy. Therefore, the next point addresses the interference of the public sector in the economy.

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<sup>45</sup> For example in France, the law of February 11, 1982 created the High Council of the public sector (art. 53) charged with monitoring the evolution of the public sector. Its purpose is to ensure compliance with the operating rules of public enterprises and constitutes a forum for reflection on their future. See also: Decree no. 2008-1029 of 9 Oct 2008, OJ 10 Oct.

<sup>46</sup> Popa L., "Public Sector-Conceptual Elements, Implications in Economic and Social life", Institute of National Economy, Romanian Academy, 2017.

<sup>47</sup> Brown T., "The evolution of public sector strategy", Public administration review, 2010.

## **B- Interference of public sector in the economy**

43. Public involvement reports age-old anxieties between bureaucracy and democracy and the suitable settings and policies of engaging citizens through administrative corps of government. The awaiting role and purpose of the public involvement can range from a one-way form of sharing information, such as marketing advertisement to mutual channels of communication, which is not merely informative but participatory because it reflects citizens' views into administrative decisions<sup>48</sup>. The public sector involvement might be referred to direct involvement or indirect involvement. The latter indicates a set of activities that require citizen contribution and effort on decision-making among leaders. In contrast, direct involvement can involve various in-person events (panels, public meetings, conferences, etc.), noting that it could include virtual meetings, such as web-based platforms. Another critical point is the possible effect of public involvement to advance the efficiency of the project in hand through supporting a political process in performing PPP. Several studies and literature found PPP as an accelerator element for project delivery for infrastructure projects<sup>49</sup>.

44. Other perspectives of views see that public involvement may constrain the project delivery process by promoting rather than calming public resistance. It is worth to analyze the beneficial link between public involvement and the information. Since the information is essential for any collaboration or partnership between governmental and non-governmental organizations, there is a possibility for the citizens generating information to reach public sector negotiations with their private partners. This is important particularly in partnerships between the public and private organizations to determine and solve problems together, such as information imbalance intrinsic to any project; tendency from private partner to bring unequalled expertise to the technical or financial aspect of the PPP. Knowing that in some cases, the private sector may use information advantages to deal with public sector purposes since, according to some scholars, private motivations usually disagree with the

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<sup>48</sup> Sherry A., "A Ladder of Citizen Participation," *Journal of the American Institute of Planners*, Vol. 35, No. 4, July 1969, pp. 216-224.

<sup>49</sup> Pongsiri N., "Regulation and public private partnership", *International Journal of Public Sector Management*, 2002.

public's interest<sup>50</sup>. We can say that there is a strong indication that public involvement has the prospective to influence a variety of terms and conditions to the design and operation of PPP<sup>51</sup>.

**45.** The government tends to be responsible to handle all businesses in societies directly or indirectly. Besides, it is responsible for providing the requested environment to guarantee the economic situation and the essential conditions to achieve this goal. Further, government intervention in economic activities and affairs can be defined as governmental interference that affects the free professions of the market forces in a way or another. That is for achieving a specific economic goal. These interferences have three different forms, which are the following: Unorganized intervention, organized intervention, and intervention in line with an economic policy.

**46.** The unorganized intervention of the government is when it works on setting special modifications and changes on the working regime. This intervention aims to exploit and distribute the available resources in society among different fields, for instance, the government interference for the protection of startups projects. In contrast, the organized intervention is represented in directing private projects to achieve the intended governmental goals. Furthermore, it provides facilities and privileges for the investment project that it desires to establish. Its role stops at this level; namely, the private sector is responsible for determining its position to these facilities<sup>52</sup>. Lastly, the government intervention should be along with an economic policy that depends on the principle of transparency. This policy allows the private sector to do more deals and contracts with them to achieve both government and private sector goals. This image should be coupled with the path of the market

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<sup>50</sup> Hodge G., and Coghill K., "Accountability in the Privatized State", Wiley-blackwell, 2007.

<sup>51</sup> Boyer E., David M., Slyke V., and Rogers J., "An Empirical Examination of Public Involvement in Public Private Partnerships: qualifying the benefits of public Involvement in PPPs", Journal of Public Administration Research and Theory, 2016.

<sup>52</sup> The government role here is developing planned programs aimed to create changes to the national economic structure in a specific time. Thus, the government is playing the role of distributor of economic resources to all available fields along with its planned programs and not according to the market mechanism. Often, the unorganized interference or so-called indirect planning is related to the capital regime while, the planned interference is related to the socialist regime. Noting that, the private sector management is more effective in resources management in comparing with the public one but will not be effective in exploiting these resources because the government has full vision according to resources and requirements that enable it to plan on how these resources can be exploited without waste of energy and repetition, namely in an effective manner.



mechanism in economics, enabling this mechanism to protect the economic track and be based on full competition.

47. The government intervention in the economic track must aim at removing the market mechanisms' faults and defects. Therefore, a competitive environment is necessary to keep the concept of economic freedom appropriate to the new international economic system requirements. This vision is an inclusive vision aimed to consolidate the theoretical concept for the government intervention issue in the economic track and the limits of this intervention. It should be noted that it will differ between states and, from time to time, it is related to each economic specialization.

### **1- Government functions and its economic activities**

48. Many studies and references were prepared concerning the government intervention in the economic track<sup>53</sup>. These studies found that there is a justification for government intervention in the economy. These interventions are revealed through four functions, which are: the specialization function, the distribution function, the legislative and regulatory function, and the function of achieving macroeconomic stability.

49. The first function is concerned with resolving the failure of market mechanisms or the faults in market performance, resulting from the utilization of monopoly power from some organizations and other forms of failures. The second one is the distribution function. The government should aim to affect the distribution of goods and service, the benefits of growth among individuals, and the distribution of incomes, to prevent the concept of income inequality among the groups<sup>54</sup>.

The third is the legislative and regulatory function; many perspectives reported this function as an essential role to the government. Even those who did not recognize that the government has an economic role, they request to provide and protect the

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<sup>53</sup> European Center for Not-for-Profit Law, "Legal Regulation of Economic Activities of Civil Society Organizations", Policy paper, Hungary, 2015.

<sup>54</sup> Dupuis J.P., Laliberté L., and Sutcliffe P., "Task Force on Harmonization of Public Sector Accounting", fifth meeting of the Task force on Harmonization Public sector accounting, 2006.

legislative environment and the suitable instructions for the economic and investment track. These laws are responsible for building the market economy, including property, contract, organizations, consumer protection, fighting monopoly, and bankruptcy regulation law.

Then, the function of achieving macroeconomic stability; this function includes all the instructions and policies that guarantee price stability, full employment, and growth. However, this function encompasses the role of planning several economic policies at the microeconomic level in order to fight all the challenges, such as unemployment, and inflation.

**50.** It is notable that the government could justify its intervention in the economic track of a country through different functions as mentioned *supra*. On the other hand, it is necessary to present the different mechanisms of the public institutions to provide a suitable financial climate.

## **2- Governmental mechanisms to improve financial climate**

**51.** The government can intervene to motivate the financial market track. It provides some legal and technical facilities on the private financial motilities related to the local financial market. The private sector, as considered the leading partner in partnership contracts, can get the needed fund from the financial market; this approach can be used to prefer the local dealers to the private one<sup>55</sup>. Indeed, the public institutions could afford several mechanisms and fiscal assistance to activate and incentivize the partnership contracts between the public and private sectors in the field of public services. However, it is rare to find successful and sustainable partnership contracts without direct financial assistance from public institutions. Thus, a sufficient fund for partnership contracts could be related to governmental fiscal incentives<sup>56</sup>.

**52.** Thereby, the government could burden the fiscal transactions, while the private sector's role is to coordinate and organize according to their precedent knowledge in the market. For instance, the infrastructure projects have positive

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<sup>55</sup> Banque asiatique de développement, "Public-Private Partnership (PPP) Handbook", Manille, 2008.

<sup>56</sup> Delmon J., "Partenariats public-privé dans le secteur des infrastructures", practical guide for public decision makers, The World Bank and Public Private Infrastructure Advisory Facility (PPIAF), 2010, p.55.

external effects on public sector, which explains the government's direct fiscal intervention. This mechanism is applied through a direct expenditure from a prepared budget supported by the public institutions to take over the financing task. This action is, in contrast, to the local fiscal markets that hesitate in funding to keep far and safe from the high risks.

**53.** Among the most critical mechanisms in fiscal assistance, there are the following<sup>57</sup>: In the event of direct financing mechanisms, public institutions are entitled to adopt direct financing policy of projects, which occurs through loans and grants. The government depends on these policies when the intended project has inadequate incomes or has a high risk. Accordingly, the project will receive high converted amounts from the private financing side. However, the government could fund the partnership contracts in case the private partner is in shortage or deficiency. This process is mostly used in developing countries. Often, public assistance emerged in the government public budget<sup>58</sup>, while the expenses will be covered by the project and for the sake of government, such as taxes<sup>59</sup>.

### **3- Mechanisms of conditional financial support**

**54.** The public authorities have conditional financial support right. In this case, the government does not provide real funding. However, the government is committed to resolving some issues. For example, when the government is the public partner in insuring bank loans that are related to the targeted project. Therefore, it should guaranty the level of demand on the public services, or the remuneration in case of shortage or decrease in profits or the expenditures were higher than expected for the primary stage, or insure the services that are related to the project and provided from the public authorities, such as transport service, water wasting, and sources of energy.

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<sup>57</sup> Musgrave R., "Public finance", The New Palgrave Dictionary of Economics, Second Edition, USA, 2008.

<sup>58</sup> So that, many researchers reported it as one of the budget assistance mechanisms and it can be under several forms such as afford direct support through direct cash assistance such as expenditure reimbursement of building infrastructure and financial compensation when seizing real estate; through total or partial exemption of financial commitments.

<sup>59</sup> The partnership project operator will benefits from the tax exemptions or reductions; or the government could credit the partnership project in case of financial temporary shortage, further it has the right to engage in direct support for the social capital of the project; and the government could play the role of motivator for the final and secondary project outputs and that through exempt the consumers from paying taxes on VAT (value added tax) or through supporting price policy. The government has the right, due to its great financial flexibility, to resort either to one of the aforementioned options or to all of them at once if needed.

These loans are conditional. The government usually forbids the debtors from taking any loan in the future or from financial institutions.

**55.** Conditional and direct financial support methods have several cons. The government is a social partner for the private sector in the partnership contract through a legal and commercial contract; therefore, these contracts should be clear and straightforward. Moreover, the government might give financial support to the project that might cause several problems. One of these problems could be the appearance of wrong actions from the public sector due to the pressure done on the private sector to guide the project.

After reviewing the concept and the financial implications of the public sector interference in the country's economy, the notion of public services is presented.

### **C- The concept of Public Services**

**56.** Public services and the means of its improvements are the main concerns of all countries<sup>60</sup>. This subject raised many controversies, especially in the eighties. The tendency of attenuating the responsibility of the state was adopted by many countries and highlighted by the United Kingdom (UK) and the United States of America (USA). However, the social pressure that followed the movement of privatization led the mentioned countries above, to think about other mechanisms that ensure successful management in public institutions and effective financial management when provided public services. Amongst the innovative mechanisms, the public-private partnership had been developed and very used.

#### **1-The Legal definition of public services**

**57.** The public service has evolved with the development of the concept of the state. The term “ public service” has always been associated with the legal aspect, especially in the French administrative law, due to several circumstances, most notably the French revolution that is the turning point in the concept of the

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<sup>60</sup> See on the notion of public services in France and the delegation of public services: Tribunal de l'union Europeenne, 6eme Chambre, arrêt du 30 avril 2019, chambre de commerce et d'industrie metropolitaine Bretagne- Ouest port de Brest c/European commission, n° T-754/17;.

characteristics and features of public services<sup>61</sup>. However, the public service as a group of functions related to public life is not the result of the moment. However, it dates back to the pre-French revolution. The public service could be provided by a legal or natural person belonging or independent of the political apparatus that governs the region, and it could be for free or against something<sup>62</sup>.

**58.** The public service is considered as the cornerstone of the administrative law. In other terms, the public service is the first activity of the administration. This activity is carried out under a public body control to achieve the general interest<sup>63</sup>. Before 1920, the French public law had considered the following formula: Public service = public law= public person. This had restricted the meaning and concept of the public service due to its relation to administrative work only. Several legal theorists attempted to define this notion. The French jurist and scholar of public law Léon Duguit<sup>64</sup> stated that the public service covers the realization of any activity that must be ensured, regulated by the governors as performing these activities is a necessity for social development<sup>65</sup>. This cannot be done without government interference. However, the legal concept of public services had witnessed a transformation after 1920. This was after the emergence of industrial and commercial public services with the ability to resort to the private sector to manage the public service<sup>66</sup>.

**59.** The field of intervention of the public service is considerably large. Traditionally, there is a distinction between the administrative public service and the

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<sup>61</sup> Cour de justice des Communautés européennes, 24 juillet 2003, N° C-280/00

<sup>62</sup> Lévêque R., "Concepts économiques et conceptions juridiques de la notion de service public", CNRS Editions, 2000, p.11.

<sup>63</sup> Lemardeley G., "La notion de "service public", Centre national de la fonction publique territoriale, 17 Dec. 2018.

<sup>64</sup> Leon Duguit, French jurist, one of the main legal thinkers of his generation. He elaborated an influential natural law philosophy. He was professor at Bordeaux University in France and had a great influence on French public law.

<sup>65</sup> The exact terms of Léon Duguit, the public service covers « toute activité dont l'accomplissement doit être assuré, réglé et contrôlé par les gouvernants parce que l'accomplissement de cette activité est indispensable à la réalisation et au développement de l'interdépendance sociale, et qu'elle est de telle nature qu'elle ne peut être réalisée complètement que par l'intervention de la force gouvernante » Pilszer J., "La notion de service public", Caisse nationale d'allocations familiales, 2010/2.

<sup>66</sup> See Peyrical J., "De nouvelles voies pour la gestion des services publics locaux. Services d'intérêt économique général, partenariats public privé institutionnalisés et sociétés publiques locales", L'Actualité juridique. Droit administrative (AJDA), Dalloz, 2011.

industrial and commercial public service within the activities of the administration. However, under the influence of the community law “droit communautaire”, another distinction has emerged, which is between the market services (that operate in the economic sector) and non-market services (that are non-commercial, such as national defense)<sup>67</sup>.

**60.** In the case of direct management of a public service, the public authority decides to manage it itself. The management of the public service is totally placed under the control of the organizer authority. However, in the case of indirect management of the public service, the public entity chooses to entrust the management to a third party. The latter should autonomously ensure the continuous operation of the public service, either within a unilateral authorization “habilitation unilatérale” for a public entity or for a private entity.

**61.** Addressing the general principles of public services led us to differentiate between the classical principles, which have legal perspectives, and the modern principles that are linked to the requirements and needs of the public within the governance framework of these services.

**a) Classic principles of public services**<sup>68</sup>

**62.** The classic principles of public services are a set of rules mainly related to the French administrative law and can be summarized as follows:

**- Principle of continuity**

The principle of continuity is always the first principle of public services because of its importance. The first goal of service is its continuity, which is linked to the continuity of the state itself. In case of disability of the service, it will be a sign of government failure<sup>69</sup>.

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<sup>67</sup> Karpenschif M., “Vers une définition communautaire du service public?”, Revue française de droit administrative, Dalloz, 2008.

<sup>68</sup> Gilles J., “Introduction au droit des services publics”, Paris, L.G.D.J, Nov. 1994, p.14.

<sup>69</sup> It should be noted that the principle of continuity has some exceptions such as the establishment of a public service could be done in light of exceptional circumstances such as natural disaster and war, so it is normal to the service to disappear when the exceptional situation ends.

- **Principle of equality before public services**

Equality has two dimensions; the first is employment in the domain of public services on the basis of competency and proficiency. The second one is the equality in the right of usage of public services. As well as the principle of continuity, the principle of equality has exceptions too; such as exceptions in pricing<sup>70</sup>.

- **Principle of neutrality**

The principle of neutrality is considered as a complement to the principle of equality and is often associated with it. However, this principle is independent of the conditions that should be met in the service provider and the service demander. The first condition is the respect of the institution's objective without religious, political, sectarian considerations for service demander. In the same context, the beneficiary of the service should not review his religious tendencies or political ideas when applying for them.

- **Principle of mutability**

One of the underlying conditions for the continuity of the public service is the ability to adapt and change when social, environmental, or political conditions occur or there is a desire to improve it<sup>71</sup>.

**b) Modern principles for public services**

**63.** It is noticeable that modern principles do not conflict with the classical principles of public services. Modern principles were introduced to fill gaps in the old principles as kind of modernization in response to modern social requirements.

- **Principle of transparency**

Transparency is the principle of creating an environment in which information about current available work, decisions, and business is identified. The methodology of

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<sup>70</sup> For example, a different price can be placed on the same public service, so that the material capacity of the service applicant is taken into account.

<sup>71</sup> For example, in the event of an unexpected stream in oil, airlines are forced to cancel low-cost lines to reduce costs. However, the impact is negative on the service recipient.

providing data and making-decisions is related to a social policy known through timely publication and openness to all involved parties.

- **Principle of participation**

The principle of participation in the organization of the society is defined as voluntary work and effort that the individual chooses to perform a particular work. This work should benefit other people, whether this effort is a donation of money, time, or effort with a sense of social responsibility and solidarity with its society.

## **2- The economic definition of the public service**

64. It would be wise to present the economic definition of public services. Economists' interest in public services has increased; this was clear from the range of economical reports that are complementary to the legal concept. For instance, amongst the reports related to public services, the report of Martinand- Lorenzi in 1995<sup>72</sup> and Cohen-Henry in 1997<sup>73</sup>, where they developed the economic concept of the public service. According to the Lorenzi report, the term "public service" is linked to the concept of natural monopoly and public goods. Both cases are related to an economic theory of market disorder where the market lacks full competition, which will negatively affect the social welfare.

According to Cohen and Henry, public service could be divided into three categories<sup>74</sup>. The first category is services that are financially affordable to individuals that suffer from a severe financial deficit; in this case, the services are considered as basic and essential services. The second category is services beyond the concept of fighting exclusion, which symbolizes social cohesion and belonging to the national community and lastly the category of services aimed at optimal and efficient use of resources.

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<sup>72</sup> Martinaud C., Lorenzi J., and Jacobzone S., "La Régulation des services publics: concilier équité et efficacité", Commissariat général du plan, Official reports, Paris, 1995.

<sup>73</sup> Cohen E., and Henry C., "Service public, secteur public", rapport au Conseil d'analyse économique, Paris, La Documentation française, CAE, n° 3, Dec. 1997.

<sup>74</sup> Cohen-Henry 1998 has introduced the double composition of efficiency and equity to characterize the activities and missions of the public service.



**Paragraph 2: Historical background of the public sector in Syria**

65. The Syrian economy has witnessed structural and several significant changes since its independence in 1946. Despite the encouragement of commerce from the Allied forces during World War II through offering new markets dedicated for agriculture, textiles, and other products, Syria had a shortage in developing infrastructure and resources to stimulate economic wealth. Syria's economy relied primarily on agriculture and industrial sectors. In that regard, focusing on agro-industrial made numerous farmers' wealth. The main Syria's rural population who were working on possessing lands and agricultural arrangements did not make significant economic growth in the 1950s. However, the union of Syria with Egypt (1958-61) and the creation of the Baath Party as the significant political power in the country in the 1960s changed Syria's economic approach and development strategy<sup>75</sup>.

66. Thereafter, between 1958 and 1965, several laws were passed that led to gradual socialization of the economy. Progressively, the government had gained control over natural resources and announced land reform measures, however they were not effectively employed. In 1963 agricultural reform stripped several landowners of their properties and their political power. In the same year, commercial banks and insurance were completely nationalized, and in the following year, a large number of organizations and institutions were fully or partially nationalized. From 1966 the public sector embraced the natural resources, electricity, and water; the majority of industrial plants, banking, and insurance; part of transportation; and majority of international and national trade. Also, the government was taking responsibility for the majority of investments, and controlling the price of several commodities and services involving a significant part of salaries<sup>76</sup>.

We cannot ignore the effects of the socialist measures of the 60s on Syria's economy. There was a considerable departure of private professional human and capital resources, and this migration sustained to the 1970s.

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<sup>75</sup> Omar D., and Yasser M., "Revolts in Syria: Tracking the Convergence Between Authoritarianism and Neoliberalism", *Journal of Asian and African Studies*, 2012; Abboud S., "Syria's War Economy," *Carnegie Middle East Center*, 2014.

<sup>76</sup> Ibid.

67. It can be said that during the 1970s, Syria reported high economic growth rates. The considerable increase in world oil prices that occurred from 1973 to 1974 led to more production from national oil refineries<sup>77</sup>. Moreover, there was an increase in money transferred from Syrians working abroad; especially in oil-rich Arab countries and high level of Arab and foreign aid, had marked the country's economic boom. By the end of the decade, Syria has faced an economic transformation, from the traditional economy concentrated on agriculture to an industrial, commercial, and service economy.

68. The situation stayed quasi unchanged until 1986. As a consequence of these previous measures, the government controlled the economy and exercised significant influence over the private sector<sup>78</sup>. However, the government<sup>79</sup>, after that, had liberalized the structure to attract more the investment of the private sector. For instance, the government was flexible on exchange controls through allowing private traders to import more merchandise. Further, the government founded six free trade zones where local investors and traders could freely import, process, and re-export merchandise.

Moreover, local and foreign private investment was promoted by adopting policies, such as tax exemptions and cheap credit. This opening towards the private sector led to more rationalization of the economy (post-1970) to encourage more significant private sector and development<sup>80</sup>. As an outcome of these measures, the private sector took quasi-control of the agriculture and wholesale trade. Moreover, the private sector

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<sup>77</sup> The elevated prices for agriculture and oil exports and the limited economic liberalization policy played a role in economic growth.

<sup>78</sup> We have an extreme example of the influence and involvement of the government in the economy in that time. The Cotton was one of the most important exports in the country before 1974. Indeed, the government through licensing individual farmers controlled cotton cultivation areas. A governmental bank supplied the credits, majority of the credit were in kind, such as purchasing, storing, and distributing the approved seeds, fertilizers, and other items. After that, government organizations were responsible to purchase and advertised the cotton internally and externally. The government fixed the price for cotton and subsidized prices for such inputs as credits, seeds, fertilizers, and fuel to run the irrigation pumps.

<sup>79</sup> Former Syrian President Hafiz al Assad.

<sup>80</sup> Daher J., "The political economic context of Syria's reconstruction: a prospective in light of a legacy of unequal development", Research project report, European University Institute, 2018.

was influential in the light industry (fabric and clothing), construction, transportation, and tourist facilities.

**69.** An unfavorable change has occurred at the mid-end 1980s. The economic climate had changed from prosperity to austerity due to the rapid chute of world oil markets, lower export revenues, shortage affecting agricultural production, and decreasing worker money transfers<sup>81</sup>. Therefore, the government made several actions in order to attempt economic recovery, such as decreasing spending, reducing imports, promoting more foreign investment and private sector, and propelling an anti-corruption movement against black-market moneychangers<sup>82</sup>. At the end of the 1980s, lack of primary products happened often, and industry functioned below the requested capacity due to the unchanging situation. In addition to that, foreign exchange reserves dropped, the commerce deficit increased, then, the real Gross Domestic Product (GDP) growth declined. The government's restricted reforms measures to respond to the growing crisis that required a radical restructured economic policy.

**70.** The phase from 1989 to 1996 is characterized by the issuance of new laws and regulations to resolve the problems that arose in the 1980's. An expansion in the exploration and investment of oil through service contracts concluded with foreign companies. This increased the production from approximately 194 thousand barrels per day in 1986 to about 600 thousand barrels in 1995, In addition to the discovery of large quantities of gas<sup>83</sup>. In this phase, what was important to note is allowing a broader scope for the private sector to have more contribution and role to the economic activity. This phase has also faced an adaptation of a progressive policy of economic reform and trade liberalization. Thereafter, the issuance of the law No. 10 of 1991 to encourage investment and allow a space for the private and foreign capital and grant them privileges and exemptions that did not exist before.

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<sup>81</sup> Other political and geopolitical reasons such as the decreased Arab aid levels due to the rapid chute of world oil markets.

<sup>82</sup> Abboud S., "Locating the "Social" in the Social Market Economy," Syracuse University Press, 2015.

<sup>83</sup> Library of Congress-Federal Research Division, "Country Profile: Syria", 2005.

71. The phase from 1996 to 2000 had known a considerable growth of the private sector in the economic activity thanks to law no. 10 of 1991. This law is considered one of the most important legislations that had a practical impact on economic growth due to the privileges it offers (exemption from fees and taxes, etc.). In this period, many new industries, which did not exist, before in Syria, have emerged such as, sugar production and refining, carpets, electric motors.

72. Lastly, during the phase from 2000 to 2010, the government sought greater liberalization and economic reforms. The most notable reform was new legislation allowing the establishment of private banks in 2004. Also, the government has taken several measures linked to the acquisition of foreign exchange, tax, and banking reform.

73. In 2011, Syria entered into a conflict that has affected and changed the social and economic face of Syria<sup>84</sup>. Although Syria is not the cradle of democracy, more than 500 civil associations and members were active from the beginning of the conflict, and were based in Damascus. In the run-up to March 2011, the reports found that the Gross Domestic Product had grown fast. The vision was based on dialoguing, measuring, and fighting poverty phenomenon, especially in the rural areas<sup>85</sup>. Consequently, hundreds of millions of dollars were dispensed through an official or semi-official way, as a source for generating income<sup>86</sup>. From the economic view, there is a significant decline and losses between 2011 till now, in which the GDP was declined at approximately \$259.6 billion<sup>87</sup>.

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<sup>84</sup> Mouhoud M., "Économie politique des révolutions arabes: analyse et perspectives," Maghreb - Machrek, No.210, 2011.

<sup>85</sup> Raymond H., "Syria: From authoritarian upgrading to revolution," International Affairs, Volume 88, Issue 1, 2012.

<sup>86</sup> World Bank Group, "The toll of War the Economic and social consequences of the conflict in Syria", 2017.

<sup>87</sup> The United Nations for Economic and Social Commission for Western Asia (ESCWA), "Syria at war- five years on", 2016. These losses can be divided into two groups, where the first one is the GDP that is declined by \$169.7 billion and \$89.9 billion according to the capital stock and that because between 2012 and 2013 the fighting had been widespread over all Syria. This had definitely affected the economy on all levels and sectors in which all productions, that had depended on primary raw materials, foods and fuel were affected significantly. Furthermore, the oil and gas collapse was very huge in which the production of oil had declined from 386000 to 28000 barrels a day while the gas from 8.9 billion cubic meters to 5.9 billion cubic meters between 2010 and 2013.

On the other side, international donor and organizations have paid attention regarding the role of the private sector as a motor for financial development and poverty decrease in developing and transition economies<sup>88</sup> (see *infra*).

## **Section II: Conceptual Framework of the Private Sector**

74. The rapid improvement and development in the global economic environment do no longer allow the absolute domination of the public sector on economic and social fields. Therefore, most of the countries have introduced some reforms in their economic structures by applying privatization. Thus, the general feature of a developed country's economy is increasing the private sector's role in economic activity.

75. It was notable how it is important to identify the contractor parties of the partnership between the public and the private sectors. Therefore, after presenting the conceptual framework of the public sector, it is the turn of the private sector. For more clarifications about the concept and the scope of the private sector in the study, we will first see the delimitation of the private sector scope through presenting its definition, role, and history (§1). We will then present the regulatory framework relevant to the private sector by shedding light on Syria's situation (§2).

### **Paragraph 1: Delimitation of the private sector scope**

76. In general terms, the private sector is a part of economy that is related and controlled by individuals and companies for profit. Therefore, these businesses are not connected to the government or any of its institutions and bodies<sup>89</sup>. Other definitions of the private sector are that it constitutes a collection of professions, the work of individuals, or a group of individuals. It is linked to the skills and expertise acquired through professional training or academic education. The private sector

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<sup>88</sup> For examples of donor private sector development strategies, see AusAID (2000), ADB (2000), Cida (2003), DFID (2004), OECD (1995, 2004), Sida (2001), UNDP (Commission on the Private Sector and Development 2004) and World Bank (2002b).

<sup>89</sup> Syrian Economic Forum, "Syrian private sector- strategic role", 2017.

assists in assuring the income for individuals through providing several job opportunities within private establishments<sup>90</sup>.

### **A- Definition, role and history**

77. Like the public sector, the private sector also has many definitions. The private sector is the part of economy managed by individuals, business units, and companies for profit that are not under the control of the State, such as sole proprietors (designers, plumbers...), small and medium-sized businesses (retail, food...), and individual entrepreneurs. Another definition also stated that the private sector is an essential factor in economic activity; its work depends on the market and competition. Its activity is characterized by private initiative and bears the risks, decisions, and activities taken<sup>91</sup>. Indeed, the private sector includes private individuals, groups of individuals, and all categories that accept risk tolerance. This is through the exercise of an activity to achieve profits and returns in the framework of maximizing private interest<sup>92</sup>.

#### **1- Role of the private sector in economic and social development**

78. The private sector has a fundamental role to play in wealth creation, in other words, the private sector could be considered as the engine of growth in a country. It should be noted that in developing countries, the private sector generates 90 per cent of jobs, funds 60 per cent of all investments and provides more than 80 per cent of government revenues<sup>93</sup>. The development process cannot be done without an active private sector because of its human resources, material capabilities, and effective

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<sup>90</sup> White S., "A conceptual Framework to Guide Research on Private Sector Development in Developing Countries", Canada's International Development Research Centre (IDRC). 2008.

<sup>91</sup> Bou dakh dakh K., Bou dakh dakh M., "The vision of strategic development of the private sector in the economic activity", 2011.

<sup>92</sup> The Organization for Economic Co-operation and Development (OECD) has defined the private sector, in 2013, that is an essential factor and regulator for the economic activity under private ownership, in which the process of production is based on the market system and competition where the private initiative and bearing of risks are identified.

<sup>93</sup> Department of foreign affairs and Trade, "the role of the private sector in supporting economic growth and reducing poverty in the indo-pacific region", Australian Government, 2014.

control of modern technology. In this context, it is essential to provide a safe investment environment to guarantee its sustainability.

**79.** The private sector is considered as a cornerstone for the development of any country's economic activity. Despite the existing controversies regarding the dimensions of the private sector's activity in the presence of the public sector, there is no denial of the importance of its role in establishing a dynamic economic activity in light of a range of conditions, such as reasonable costs, and competitive climate appropriate to the market<sup>94</sup>.

## **2- Difference and relationship between public and private sector**

**80.** In a simple way, the public sector could be perceived as the private sector's largest single customer, and the private sector could be seen as the public sector's only benefactor. In principle, the contract between these two sectors contains the two parties taking into account the critical differences between government finance and the private one. It is essential to see the similarities and differences of their financial sides in case of partnership contract.

**81.** The public finance of the state is linked with economist theories for several periods. For example, the modern economic theory seeks to distinguish between the nature of the public activity and its counterpart the private activity<sup>95</sup>. The purpose of public finance is different from those of private finance in several points. The most important one is from the financial management perspective. For the public sector, the goal behind expenditure or collecting money is for the public interest, while regarding the private sector; it is for each individual interest and benefit. Nevertheless, the purpose of expense criteria to establish public projects remains limited in light of nowadays circumstances since public and private sectors' objectives might overlap. The government can establish some projects for profit without considering the social capabilities and the limited purchasing power for some.

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<sup>94</sup> OECD, "Promoting Pro-Poor Growth: Policy Guidance for donors, Part II: Private sector development", OECD 2007.

<sup>95</sup> Engel E., Fischer R., and Galetovic A., "The basic Public Finance of Public Private Partnerships", Journal of the European Economic Association, 2013.

Also, on the other side, under what is called “social responsibility for institutions”, private establishment is committed doing expenses on some activities without direct profit<sup>96</sup>.

**82.** In addition to the differentiation factor of the purpose of public finance, there is another essential factor that distinguishes between the public and private sectors, which is the organizational factor. This difference is because the government has excellent privileges to increase its revenues, whether they are taxes and fees revenue or public internal or external loan revenues. Concerning the methods, the government or the public sector has substantial authority and privileges in management that do not exist in the hand of individuals or private institutions. The most important power that has the government on its land and citizens is the right to deduct taxes.

**83.** From an ownership perspective, public projects, the ownership is not for a particular individual or a group of individuals, it is the ownership of the State. In contrast, the private ownership projects are for a particular individual or a group of individuals, this is why the purpose and goals of the economic activity are different between the public and private sector<sup>97</sup>.

### **3- Historical background of the private sector in Syria**

**84.** In 1963, the Syrian economy was saliently oriented towards the socialist economy. However, at the beginning of the 70s (see *supra* §(1) from section I), several trials were done by the government to pave the way for the private sector. This was the direction until the adoption of the concept of the social market economy in 2005. The social economy means opening the way to the private investment and alter the economy from central planning focus to a market economy. This economy was based on economic liberalization and on activating the private sector’s role in the country<sup>98</sup>.

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<sup>96</sup> See also Orsoni G., “Ressources locales: Finances departementales”, Encyclopedia of local communities, Dalloz, May 2014.

<sup>97</sup> “The basic Public Finance of Public Private Partnerships”, *supra* note 95.

<sup>98</sup> Mohsein A., “development phases of the private sector in Syria”, 2014.



**85.** However, the tendency of the government toward the market economy was not clear and exposed until 2005. After that, the market economy concept was adopted in the tenth five-year plan (2006-2010). It was noticed that in parallel with the new approach adopted by the government, an attractive investment environment has been formed. To this end, the infrastructure has been expanded and improved. As result, four industrial cities had been established, which have had a role in boosting the private sector to implement big industrial projects.

This period was marked by the liberalization and less interference of the government in international trade. Furthermore, the government decreased its monopoly on the import of several goods and services for the sake of the private sector. Besides, the insurance sector was opened to the private sector, and it was permitted to establish private banks, service companies, and social finance institutions for small funds. The private sector was also permitted to invest in the educational sector (private universities) and private newspapers and magazines were published<sup>99</sup>. Furthermore, a Syrian Investment Agency and the Damascus Securities Exchange were established in 2009.

**86.** At the start of the second decade of the twenty-first century, the country got into a terrible conflict that exposed the Syrian economy to huge losses and had a deep effect on the country's social and humanitarian situation. There was significant damage to infrastructure projects, factories, markets, buildings, and facilities. This situation has affected the sustainability of the private sector in the country.

### **B- Factors affecting the Private sector**

**87.** According to experts in the field of private sector<sup>100</sup>, many important factors seem to affect the private sector and its decision<sup>101</sup>. As a result, the conflict

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<sup>99</sup> The World Bank in cooperation with the National Team, Syria "Reform Options for Syria: A Growth Diagnostics Report", 2011.

<sup>100</sup> Syrian Economic Forum (SEF), "Syrian private sector- strategic role", Think Tank, 2017

<sup>101</sup> Such as the existence of democratic institution; Security stability; Knowledge network, which means the relationship and links among investors, businessmen and industrialists. The stronger is the relationship, the greater is the integration of the private sector at the macro level. Laws and legislations: their existence must be clear and applied effectively in order to the private sector to play its full role in

circumstances led to the destruction of the infrastructure, as well as to the absence of a clear political solution and the interference of many foreign parties to the Syrian dialogue table. The potential factors that might influence the private sector are the presence of democratic institutions and their ability to exercise their full and free role. It should be noted that the definitions of “democratic institution” differ among scholars, but many agree that freedom of expression, rule of law, human rights, an independent judiciary and effective legislature are deemed belonging to the category of democratic institutions<sup>102</sup>.

**88.** The other factor is security and stability, which is the most critical factor that affects investment and investors. That is why, in the absence of security and stability, the capital flows out of the country, and the trade movement decreases<sup>103</sup>. After crossing these two factors with each other, we will have as an outcome four potential scenarios regarding the future environment of the private sector in Syria. Thus, the following four scenarios:

### **1- Security and stability with a democratic institution**

**89.** Security and stability with a democratic institution is an ideal scenario and may be unrealistic for the time being. In this case, we will witness the return of Syrian businessmen and investors to contribute to the Syrian economy recovery and make a direct investment that will improve the living situation and the economic development.

This investment could be made through continuous communication with local councils, municipalities, and governorates within Syria. These communications

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the process of economic development; Opening of international markets and facilitating import and export procedures; The level of government protection of private sector products against foreign imported products: the higher is the government protection, the higher is the activity of local private sector, noting that the level of protection should be limited; Availability of human resources is an important factor to attract investment in Syria, in addition to skilled labor, which is an element of sustainability and expansion of investments; Level of education; Infrastructure and availability of energy supplies; Availability of working capital.

<sup>102</sup> Norris P., “Makinf Democratic Governance Work: How regimes shape prosperity, welfare and peace”, Cambridge University Press, New York, 2012.

<sup>103</sup> Pomerantz P., “The Sage Handbook of Governance”, Development theory, Sage Publications, Ltd., London, 2011.

could lead to repair the operational gaps in each region, and support the service institutions inside Syria, such as schools and universities<sup>104</sup>.

## **2- Absence of security and stability with the existence of democratic institutions**

**90.** The absence of security and stability leads to a reduction in private sector investment. Also, it leads to the flight of domestic capital abroad in addition to a decrease in foreign direct investment. These are due to the difficult communication among cities inside the country, and the absence of job opportunities, are the result of this absence. With this scenario, the private sector should work with the official security institutions to improve the security situation. This is considered as the more significant challenge at this stage<sup>105</sup>.

## **3- Security and stability with the absence of democratic institutions**

**91.** In this view, there are security and stability to do private investment projects, but for a part of them, not all. There is a lack of fair distribution of investment opportunities due to corruption and favoritism, which lead to difficulties in obtaining project licenses and approvals. Also, citizens in this scenario are likely to suffer from poverty, unemployment, ignorance, and high rates of social corruption. These factors will lead to country's brain drain and flight of capital.

The private sector's role here is to increase the networking between them and create a robust economic bloc to face corruption. They should not be dragged behind the ambitions of some politicians, as the benefit is in the hand of the investor at last, not in a politician's hand.

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<sup>104</sup> When there is a safe investment climate and a clear regulatory environment, the national private sector must develop itself, restructure its institutions, train its employees, pay its taxes, look for export markets, and invest through an efficient financial market, i.e., encouraging joint stock companies rather than individual or corporate institutions.

<sup>105</sup> "Syrian private sector- strategic role", *supra* note 100

#### **4- Absence of security and stability with the absence of democratic institutions.**

**92.** This scenario means excluding the private sector from participating in setting social and economic policies. The emergence of the parasitic economy and absence of a sustainable, active economy led to informal economy's expansion and the emergence of a war economy which means the absence of foreign direct investment. Hence, deficiency in business diversity due to limited resources and nonexistence of the foreign exchange market. These elements lead to exclude the role of the private sector and to flee out the capital and skilled labor of the country.

In this case, the private sector should support small and micro enterprises as well as communicate with local administrations and with active civil society councils in Syria. Therefore, the private sector could establish projects that have awareness and educational activities and goals, and thus investing in human resources in line with the business need<sup>106</sup>.

#### **Paragraph 2: Regulatory Framework relevant to the private sector**

**93.** It is worth noting that Syria was not rich in legislation concerning the promotion of national and foreign investment before the issuance of the law of investment No. 10/1991. At that time, the country was considered as economically isolated and had several restrictions in domains of investments. Therefore, the first legislative stone in that context was the issuance of Law No. 10 of 1991<sup>107</sup>. Decree

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<sup>106</sup> See also: Amin U., Rafiq M., Gabriel K., and Gabriel H., "Factors affecting Private Sector Participation in BOT construction projects", Third International Conference on Construction in Developing Countries (ICCIDC-III), Thailand, July 2012.

<sup>107</sup> In addition to the investment law No. 10, the main investment laws in Syria are:

1. Decree number 8 in force encouraging investment in Syria
2. Decree 10 of 1986 (the common agricultural sector companies)
3. Resolution No. 186 of 1985 to encourage investment in the tourism sector
4. Law No. 348 of 1969 to encourage expatriate capital and Arabs capital
5. Decree No. 103 of 1952 to encourage investment in the industrial sector
6. Legislative Decree No. 58 of 1970, which included the exemption of deposits of postage fee for all operations and savings deposits at banks and savings funds, as well as income tax to raise capital in circulation and all the benefits of savings deposits, and also includes that the deposits guaranteed and protected by the state.
7. Law No. 36 of 1972, which provides an exemption for the international class hotels (first-degree and excellent degree) invested within hotels from all taxes and customs duties and others.

No. 7 of 2000, amended that law, was the peak of empowering the investment environment in Syria as it has provided many incentives to investors.

### **A- Syrian Investment Law**

**94.** This law is perceived as the first significant indicator of the economic transformation from a closed to a liberal system. It is worth to note that the law treated both the national and foreign investors equally. It is also considered as the leading tool for the Syrian government to let the private sector participate in the economic growth<sup>108</sup>.

**95.** The Supreme Council has the highest authority for investment affairs due to its power in issuing decisions and authorizing any project that is considered useful for the national economy. In that sense, it can provide some privileges for specific projects, although this case is not expressly stated in the investment law<sup>109</sup>. The Syrian legislator provided an exceptional legislative competence to this Council, in case it is necessary for achieving governmental objectives. Furthermore, once the investment law was issued, foreign investors became able to own a whole project encompassing the land where the project will be built. Moreover, these projects could be simplified by the exemption for seven years from real estate and income taxes for joint ventures companies and five years for the other types of companies<sup>110</sup>.

However, the application of this law has proven inefficient nine years later. Therefore, there was a necessity to issue a new law amending the law No. 10 to attenuate the

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<sup>108</sup> The goals of that law were expressly announced in its preamble as a reasons of its issuance: “Out of the desire to transfer the surplus of funds for the sake of development and production, in addition to completely exploit all the available capacities of the private and joint sectors. Moreover, encouraging these two sectors in order to participate in building and developing the economy of country. Therefore, inline with all experienced practices by many countries to create a suitable environment for investment, which in its turn will help to attract both local and international investors. In consequence, use these new capitals in production lines, where this might add a kind of prosperity to the country. Based on all the above the unified law of investment was issued. To this end, this law aims to encourage both residents and expatriate to invest their capitals in development projects within their country of origin. Therefore, they will participate in improving the economical development track in the country.

<sup>109</sup> This law was replaced by Decree No. 8/2007. But the importance of Law No.10 remains, as it is the first phase of investment in Syria.

<sup>110</sup> All the project machines, equipment, tracks that intended to use only in the project will be exempted from the whole taxes including the municipal and custom taxes. Noting that, all these machines cannot be relinquished except by the approval of council, and taxes and fees levied on them at current state are paid.

impediments raised before and to provide more privileges. This amendment happened through the legislative Decree No.7 of 2000<sup>111</sup>.

96. It is worth noting that there was a general impression of the improvement of the economy and business. Several attempts were taken after the issuance of the investment law and its amendments to encourage and improve the investment climate<sup>112</sup>. Until 2007 Syria was more committed to liberalizing the economy. It encouraged the private sector to have a role in the sustainable development of the country. Therefore, to convince the investors, the Syrian government had to enact several laws essential to enable an appropriate investment atmosphere. In that context, a set of laws, decrees, and norms were issued. The main ones were the decree No. 8/2007<sup>113</sup> and decree No. 9. The latter has established a specialized agency called the Syrian Investment Agency SIA, which is dedicated to investment issues linked directly to the prime minister. Those legislative decrees are complementary to each other and correlated. In other words, the SIA has to apply the provisions of decree No.8. On another note, SIA could be perceived as the principal gate for national and foreign investors in Syria.

### **B- Legislative Degree for investment promotion**

97. It is generally known that a post-war period implication is two-fold. From one side, it is challenging to attract and ensure protection for investors. From the other side, a destructed area is a beneficial investment for investors. In that sense, investment requires a reliable decision-making system and unambiguous norms and laws for the sake of investors. It is true that the law No. 10 has enlightened the way from 1991 to 2007 to establish a new transitional phase of investment. However, it

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<sup>111</sup> The Decree No. 7/2000 offered an additional guarantees and promotions such as the following: the foreign investors have the right to acquire lands and real estates to implement or develop their future projects. Furthermore, providing an exemption for paying taxes in addition to several privileges for the joint projects licensed based on the law.10. Noting that, the licensed projects under the law No.10 have the right to open a bank account by a foreign currency outside Syria.

<sup>112</sup> Among these steps, which were taken in response to, the requirements of the world of economy, were: developing the investment law; banking secrecy and the law of funds and laws in addition to the application to join the international trade organization. Several efforts were taken in order to implement the One Stop Shop to incubate the licensing process in behalf of the investor. These practices should facilitate the licensing process by removing the routines of bureaucratic administration before the foreign investors came.

<sup>113</sup> This decree replaced the encouragement investment law No. 10/1991.

could not comprehend significant developments in the field of the liberation of the economy and the rapid evolution of the private sector's role. Therefore, the developments on the grounds had required the promulgation of another law to understand the evolution of the economy in the country. To this end, Decree No. 8/2007 was issued to answer all investment requirements and investors' concerns.

98. First of all, Decree no. 8 has treated local and foreign investors equally in several aspects such as the right of land ownership, property, and all fixed assets<sup>114</sup>. Also, several projects might benefit from this decree, such as projects related to agriculture, land reclamation, transportation, and environment. However, some projects are not covered, such as tourism and real estate projects. This law aimed to present the Syrian market as a probable premise for national and foreign investors. Then, Decree no.8 was followed by decree No. 9/2007, which has set up the SIA.

### **1- Creation of the Syrian investment agency**

99. The SIA was created for combining all the investment policies, and for developing both the investment climate and the system that manage the investment in Syria. This agency is financially and administratively independent and has a legal personality, and it is located in Damascus. The SIA's principal purposes are to shorten and ease the investment procedures, preparing the investment map, considering the

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<sup>114</sup> For the aim of providing a summarized view of the incentives that the legislative decree No. 8 had provided in 2007, we list the following: investors have the right to import the requested machines and equipment for their projects and any thing that perceived essential to proceed further with their development projects. Furthermore, all these imports are exempted from the custom taxes; the decree No 51/2006 which highlighted the matter of dynamic deduction exemption insisted that during all the project foundation period, these exemptions are applied. Another incentive is represented by the ability for the Arab and international investors and technicians to transfer 50% of their wages to the foreign currency, further 100% of their service indemnities. In addition to that, the licensed projects under the investment law are benefitted from the provisions against expropriation or decrease alienation of their investments and revenues. However, these provisions might executed only if it fulfill a public benefit, noting that this case should be done by a judicial judgment and the investor directly will receive fair and direct return payment equal to project value before the expropriation. It is worth mentioning that all investors are permitted to make an annual transfer of the revenues and interests outside. To this end, the Board of Directors of the Syrian investment Agency is responsible to prepare and solve the potential obstacles that might imbed the project implementation, especially the transfer of foreign capitol aboard.

internal and international importance of the projects, and participating in the agreement drafting and protocol with other Arabic and foreign investment agencies<sup>115</sup>.

**100.** SIA has several competencies, such as hire national or foreign experts for a determined period and for setting up specific tasks. Indeed, the strategic vision of this agency is to provide a suitable environment for investment that, in its turn, will help to achieve the sustainable development, encouraging the investment inflows, and emphasize their role in the socio-economic development and executing the national investment policies. The agency regularly updates the Syrian investment map and promotes it locally and internationally to be a center to provide data and advice for investors.

**101.** There is a high chance that the project gets an investment license; however, nearly 40 % of licensed projects are only implemented on the ground. The main reason for this is that many projects might face obstacles sine the projects are versatile and linked to several entities. To this end, the agency has to supervise the implementation process of the project in order to attenuate the several potential difficulties that may appear. It is worth mentioning that the agency has contributed in designing and drafting investment-related agreements and protocols. In that context, SIA signed several Investment Cooperation Agreements with other agencies of several countries<sup>116</sup>. Another amendment in Decree no. 9 reformed the Supreme Council for investment and the management of the agency. The main achievement of this Decree was represented by the establishment of the One-Stop-Shop (OSS) in Damascus, to provide all needed services, data, and information for the investors in a single window. The latter will simplify the road for the investor, as the investor will not need to go to several ministries and public institutions to get a file or information, these are available in the OSS at the agency.

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<sup>115</sup> For more information, only by a presidential decree or prime minister decision, the General Director of the agency is nominated, which shall daily manage the Agency. Also, the Agency has a Board composed from 3 others directors from the Agency, and representatives of private entities from the Chambers of industry, agriculture and commerce.

<sup>116</sup> With: Jordon: Jordon Investment Board, Kuwait: Kuwait Investment Authority, Kuwait: Inter Arab Investment Guarantee Corporation, Saudi Arabia: Islamic Organization for Investment Insurance and Exports Credit, Cyprus: Cyprus Investment Promotion Agency



## **2- Other investment- related institutions**

**102.** Besides the agency SIA, numerous public entities are related to attract investors and encourage private investment in Syria. The research takes as an example two central bodies: the industrial cities and the Free Zones.

### **a) Industrial Cities**

**103.** The industrial sector in Syria is characterized by a lengthy historical background that dates back to 1973. It should be noted that this sector has witnessed an increasing evolution from that date, as the State was a strong supporter, especially in establishing industrial zones in several places in the country. This implies that there is one special location in the city dedicated for industrial activities and licensing procedures<sup>117</sup>, which makes the procedures more accessible.

**104.** At that time, the government focused its efforts on developing these zones and granted incentives to encourage industrials. Since twenty years ago, this sector witnessed a noticeable evolution, which led the government make crucial decisions, such as decision No. 326/1996. The industrial zones did not cover all the industrial projects according to the increasing number of industries. Given the numerous application requests of industrial projects, the industrial zones could not receive big industrial projects, such as power plants and chemical. In 2004, in addition to the existing industrial zones, the law No.57 was promulgated to create and organize three additional industrial cities. This law aimed to aggregate all industrial projects, especially the huge ones in specific areas. In other words, it also aimed to perceive such cities as attraction centers for investment via Foreign Direct Investments (FDI).

Accordingly, the permitted projects to be implemented in the critical industrial cities will benefit from the privileges and guarantees dependent on the investment laws. The system of One-Stop-Shop exists in every industrial city. Moreover, the lands in the

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<sup>117</sup> Barakat S., "Industrial sites in Syria", *Journal of Economics Cooperation Among Islamic Countries* 20, 1999.

industrial zones were sold at thoughtful prices by premiums to investors. Therefore, the State has actively extended and boosted investment in industrial cities<sup>118</sup>.

### **b) The Free Zones**

**105.** After presenting the industrial cities, the Free Zones also had an important role as an institutional body related to Syria's investment. The Free Zones were established by Decree No. 18/1971<sup>119</sup>. It should be noted that the decree No. 84/1972 amended by Decree No. 40/2003 was guiding the investment system in those free zones. The Free Zones is defined as an enclosed zone wherein the investors freely practice their commercial activities and trade without passing by customs duties<sup>120</sup>.

**106.** Syrian free zones are perceived as an integral part of the national economy due to the exportation of products abroad, the ability to bring foreign currency to the State, and the opportunity to adopt a new technology from foreign countries. There are many privileges to invest in the Free Zones, mainly an exemption from taxes and duties of the inward and outward products and custom duties on exportation to local markets. It is worth mentioning that the OSS in the SIA encompasses the Free Zones Sector, namely providing the requested data and receiving the applications for those who want to invest within Free Zones<sup>121</sup>.

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<sup>118</sup> The areas selected to form industrial cities were the largest towns in Syria; namely, Damascus, Aleppo and Homs because these areas have the bulk of industries. It should be noted that the quarter of industrial cities was established in the southeast of the country "Der El Zor". In that regard, since Damascus is the capital of the country, it is considered the first vast industrial city, as it comprises almost half of the industrial activities. Aleppo is the second large industrial city as it is considered the economic capital the country. Homs is the third industrial city, it was designed to be the Hub of industrial projects and the node cross road in the country because of its strategic position. The fourth industrial city is in Deir Ezzor. The establishment of this industrial city has a significant effect due to its shortage in industry and economy. Also, this city has faced a lot of destruction and changes due to the conflict, which impacted its economic and social development.

<sup>119</sup> Free zones in Syria:

1. Adra Free Zone (close to Damascus). 2. Damascus International Airport Free Zone. 3. Aleppo Free Zone. 4. Tartous Free Zone. 5. Latakia Free Zone (2 free zones). 6. The Syrian-Jordanian Free Zone (on the Syrian-Jordanian borders close to Daraa.) 7. Alya'roubiah Free Zone on Syrian Iraki borders extreme north east of Syria and the last one is in Hessia- homs next to the industrial city.

<sup>120</sup> The investor can, for example, construct a factory inside the free zone and have products and export them all over the world as well as commercial and trade activities. It is considered that it's built outside the territory of Syria.

<sup>121</sup> Yagci F., "Improving Export incentives and the Free Zone System in Syria", World Bank Group, June 2010.

**107.** The concept of FDI is briefly evoked in the next point. Usually the reconstruction operation that concerns all levels of sectors needs considerable amount of national and foreign capital. Therefore, this issue will request foreign investors with their capital to come to Syria. So, the FDI could be a suitable option for investors for business.

### **C- The option of Foreign direct investment**

**108.** FDI means a cross border investment made by a resident in one country in a company in another country. It means also the ability to transfer tangible or intangible assets between two countries with the objective to generate wealth in the host-country. On the other hand, an important link between FDI and globalization could be made as it encourages “the transfer of technology and know-how between economies<sup>122</sup>. Usually, the entities concerned with FDI have a significant influence over the target company<sup>123</sup>. The International Monetary Fund (IMF)<sup>124</sup> defines FDI as a “cross-border investment”. This means that an investor who is resident in a country has considerable control or influence over an enterprise that is resident in another country. Also, IMF refers FDI to an “investment made to acquire long-term interest in enterprises operating outside of the economy of the investor”<sup>125</sup>. This means that it could be a foreign person, company, or group of entities seeking to control, manage,

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<sup>122</sup>The Secretary-General of the Organization for Economic Co-operation and Development (“OECD”), Benchmark Definition of Foreign Direct Investment, 2008.

<sup>123</sup> The Organization of economic cooperation and development (OECD) defines control as owing 10% or more of the business. Businesses that mean foreign direct investments are often called multinational corporations (MNCs) or multinational enterprises (MNEs). A MNE may make a direct investment by creating a new foreign enterprise, which is called a Greenfield investment, or by the acquisition of a foreign firm, either called an acquisition or brownfield investment, see [www.oecd.org](http://www.oecd.org).

<sup>124</sup> The IMF (international monetary fund) is an organization of 189 member countries. It stabilizes the global economy in three ways. First, it monitors global conditions and identifies risks. Second, it advises its members on how improve their economies. Third, provides technical assistance and short-term loans to prevent financial crises. The IMF’s goal is to prevent the disaster by guiding its members. IMF, “How the IMF promotes financial stability”, March 10, 2016.

<sup>125</sup> As per the directory of preparing statistics payment balance issued by the IMF in 1993: the FDI is defined as: The international investment which reflected the obtaining of a permanent interest by a resident entity (company, institution or a bank). It is referred to the resident entity as the “direct investor“ and the institution is the establishment of direct investment. The permanent interest implies upon a long-term relationship between the investor and the establishment. In addition to that the investor enjoys great authority in the administration. The relationship includes all dealings between them and between establishments whether shareholding or not. This definition complies to that of the UNCTAD and of the OECD. IMF, “directory of preparing statistics payment balance”, 1993.

or have control over the foreign enterprise<sup>126</sup>.

**109.** Based on the significant role of FDI in financing the projects and in transferring the technology, offering new job opportunities, in other words supporting both traffic export and import, it is crucial to gain insights about the different models of FDI. These models are projects that are entirely owned by foreign investors in the hosting country, joint investments, and multinational companies. The foreign investor can be represented by different entities, such as individual or a private or public establishment shareholding or non - shareholding or group of individuals, or institutions that own a part of the direct investment establishments in a state other than that where the investor lives. Indeed, FDI offers several privileges for the sake of foreign investors. For instance, FDI supports startups by bringing an external source of capital to support them.

**110.** However, it is beneficial to enlighten some negative aspects of resorting to FDI. As FDI focuses its resources elsewhere other than the investor's home country, the foreign direct investment can sometimes hinder domestic investment<sup>127</sup>. Furthermore, there is the risk of political change that frequently may lead to a change in the system of laws and rules. This could lead to expropriation where the government will have control over the investor's property and assets. Thus FDI could be very risky.

#### **D- Upcoming Syrian investment law**

**111.** Before the year 2019, there has been a discussion of issuing a new investment law to improve and update the old one with the changes occurred after the conflict. The outcome of these discussions was a draft law of investment. This draft law has

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<sup>126</sup> Another significant definition is in Graham E., and Krugman P., "Foreign direct investment in the United States", *International Review for Social Sciences*, 1991, p.7. " Foreign direct investment is formally defined as ownership of assets by foreign residents for purposes of controlling the use of those assets".

<sup>127</sup> Investment in your own country rather than abroad, moreover, the gross private domestic investment is the measure of physical investment used in computing GDP in the measurement of nations' economic activity. This is an important component of GDP because it provides an indicator of the future productive capacity of the economy.

been presented in a participatory platform to allow relevant expert to provide their opinions and views before the law issuance. Indeed, the draft law provides the investor with targeted and studied incentives, advantages, and benefits of exemptions and incentives that provide added value to the national economy. The aim is to direct investments towards development priorities and to implement government plans.

**112.** This law would breakdown the standard benefits template applicable for all investments, and the Supreme Investment Council has been given flexibility in identifying incentives according to the interim development requirements. Tax incentives are granted only to priority sectors and for development projects that are more in line with economic, social, and other development tracks. Therefore, the new draft law is linked to the priorities of development and its tracks. Its goal is to accelerate the economic recovery by directing private investment towards those priorities. The law provides more guarantees for the investment project to ensure its implementation and continuity. The most important guarantees are the creation of dispute resolution tools and the provision of a sophisticated business environment. These guarantees will motivate investors to establish more joint-stock companies because of its important role in allocating economic resources and promoting investment<sup>128</sup>.

### **1- Guarantees and incentives provided by the law**

**113.** The draft of the given investment law included guarantees to the investors provided by the State, such as equal opportunity and fair treatment among all investors. In addition, there is the concept of non-discrimination in terms of rights, duties, benefits and incentives. The draft law stated that the ownership of the project would not be taken unless for public benefit and by a decree. The action of taking the ownership of the project or the asset by the State would be done by an exchange of compensation equivalent to the real value of the asset.

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<sup>128</sup> Al Watan, "New investment law will change the investment map in Syria", The Syrian Observer, Aug. 2019.

**114.** From the guarantees also, there is the freedom of investment and prevention of monopoly in various economic activities and productive sectors and services available per the provisions of the laws in force. It was assuring that no seizure of project's assets shall be carried out except by a judicial decision unless cases where the provisions of the law on the collection of public funds apply. There is no cancellation of investment license or withdrawal of licenses and approvals of the project or stopping the allocation of real estate except in case of violation and after notifying the investor and giving him sixty days to remove the reasons of violation<sup>129</sup>.

**115.** There are several incentives for investment granted by the draft law, such as obtaining an investment license for a project that benefits from a reduction in income tax on net profit by 25 percent for three years. Regarding the existing investment projects that do not have an investment license within one year from the date of entry into force of this law will benefit from a 50 % reduction on income tax on net profits for three years<sup>130</sup>. In addition to that, there is a reduction of 2% on the exemption percent from the net profit income taxes for every project working under this provision<sup>131</sup>.

## **2- Investor's rights and duties**

**116.** The investor is entitled within the draft law to own and lease lands and the requested real estate or expanding it. Furthermore, the investor can create bank accounts in Syrian pound and foreign currencies from the banks that are licensed and have been working in Syria. Also, the investor is allowed to borrow for the sake of the

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<sup>129</sup> *ibid.*

<sup>130</sup> Moreover, the income tax on the net profits for seven years is exempted from each of the projects included in the investment map and located in the development areas, in addition to the projects of the priority sectors. Then, the investment map, the priority sectors and the development zones are decided by a decision from the council. In return, it will benefit from a 75 percent reduction on income tax on net profits for seven years for each processing and operating the exports where the percentage of the local component in its inputs or requirements of its production shall not be less than 65 percent and the added value shall not be less than 40 percent.

<sup>131</sup> The investment projects that acquired investment license or damaged projects covered by laws encouraging investment, as well as the projects which are encompassed into these regulations and both are entitled to import all their needs such as machines, equipment, all the production requirements, and the non touristic transport without complying with the provisions of stopping, preventing and restricting imports and direct imports from the original country. These prevention regulations must be modernized and not refurbished and should be used only for the project requirements. Noting that the project items imported are exempted from customs and financial fees with the condition that it must be used only for the purposes of the project.

project in the Syrian pounds and foreign pounds from the local banks. After the completion of all their (investors) financial commitments and final budget auditing according to the regulations and restrictions of the central bank of Syria and monetary and credit council, they can transfer their profits to other countries.

**117.** According to the regulations, after notifying the commission, the investors are entitled to acquire a work license and residency for them and their families throughout establishing and operating the projects. Also, this is applicable for workers, experts, and foreign technicians per the enforced regulations. Additionally, the investor is permitted to re-export all equipment, machines, or any assets that were imported and re-transfer the foreign capital that was aiming to fund the project in case of disability to continue and complete the project establishment<sup>132</sup>. However, the workers, experts, and non-Syrian technicians are permitted to transfer 50% of their monthly compensations and salaries. Further, they can transfer 100% of their end of service indemnity to the outside through any bank<sup>133</sup>. Alongside the several advantages provided by this draft law to the investors, it also encompasses what the investors should do, such as project economic feasibility. It should be noted that the investor has the right to revoke the project with its benefits from the facilities and privileges that are acquired as per the investment license, after ten years from the actual starting day.

### **3- Settlement of the investment disputes**

**118.** All the investment disputes, except taxation issues, which are established between the investors and one of the public institutions, are resolved through amicable ways. If the amicable way did not lead to a solution throughout three months from the date of presenting a written notice from one of the parties, any of the parties could resort to internal commercial arbitration or the international center for settlement of investment disputes or the committee for the settlement of investment disputes in the agency. In addition to that, the draft law suggests to establish a committee based on a judicial structure where its headquarter is in the Syrian

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<sup>132</sup> The Syria report, economic News, Data and Analysis, 2019.

<sup>133</sup> Ibid.

investment agency. This committee will be specialized in settlement of the investment disputes that may emerge between the investor and the public partner<sup>134</sup>.

**119.** The law stressed the importance of the project establishment determination period, which is developed according to nature, type, and economic feasibility study of the project by the agency in which the period doesn't exceed three years from acquiring the investment license. Regarding to the abolition or liquidation of the project, the investors are responsible for abandon their exceeded property, according to the government's determined property, for national Syrians. In addition to that, the non-Syrian investors are accountable for abandoning the exceeding real estate properties related to the project<sup>135</sup>.

#### **4- Concerns and repercussion of the law**

**120.** The idea of presenting the draft of the new investment law on the official website to receive comments from relevant experts was a good step. However, when reading the provisions carefully, economic researchers might notice some concerns and questions regarding the Syrian investment agency, the incentives given for investors, targeted investors, and other issues. In case the law is issued, it will be the third law for investment after law No.10 of 1991 and the legislative decree No.8 of 2007. The text law includes provisions that may somehow attract investors by granting them exceptional exemptions, but this will be at the burden of treasury revenues. At the same time, investment in Syria is supposed to be an essential supporter of the local economy and not a burden on it.

**121.** An example from the criticisms that were addressed to this law is in chapter three entitled "Investment guarantees". The argued § 6 of the article 4 states, " The state shall guarantee to investors not to enforce any decision, circular or

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<sup>134</sup> This commission will be composed from a commercial judge that is appointed by the minister of justice, and a person on behalf of the committee that is selected by the director of the agency in addition to that, a representative of the trade, industry, and agriculture or tourism chamber in accordance to the field.

<sup>135</sup> In the case of abandonment by a Syrian investor or a foreign investor to a non Syrian person for the establishment of an investment project, the project must be approved in advanced from the board of directors and fix a maximum of two years period for the implementation of abandonment that is compatible with the laws in force. Furthermore, the investors should pay all the financial obligations incurred in the cancellation and liquidation.



communication issued by public entities that might hinder the implementation of the project or its continuation throughout its lifetime.” The argued question was: how does a law in Syria explicitly guarantee the non-implementation of decisions, circulars, and communications? In other words, how does the state guarantee in its sovereign sense, the non-enforcement of a governmental decision? Many considered it a real violation of State sovereignty in front of the private capital. Thus, who will determine and has the competence to say whether such decisions, circulars or communications are impeding the project’s work and continuity?

## **Conclusion of chapter I**

**122.** After studying the conceptual framework of each of the public sector and the private sector, we can deduce a potential compliance of these two sectors within the skeleton of a partnership. In fact, we noticed how an appropriate public system is essential for a country’s economic growth and prosperity. The existence of the public sector is a fundamental component for a PPP as it is the party that decides on the regulatory framework of such partnerships. It is noticeable how government interference in the economy should be studied and planned carefully because the market might need some detailed extent of the government intervention. At the same time, a slightly more intervention may negatively affect the market and the private sector. Syria has a long experience with the total domination of the public sector on almost sectors of the country. It took time to admit the crucial role that the private sector can afford in contributing to the economy and growth. However, this situation has changed with years to be more open to private sector investments.

**123.** There are different ways and methods to improve and strengthen the private sector to a certain extent in order to preserve a reasonable equilibrium in the economy. We also highlighted the historical background of the private sector in Syria to remember chronological events regarding the evolution of the private sector in the country. Moreover, it was important to shed light on the sequential order of the several laws and decrees regarding the investment, especially that there is a new draft investment law that might enter in force soon, the specificity of the potential

upcoming law remains in its timing as it will be the first investment law after the conflict.

**124.** It can be deduced that the partnership between the public sector and the private sector seeks to expand the horizons of economic activity through cooperation and coordination between the two sectors to find suitable solutions to the problem of inadequate provision of services. It also allows the public sector to benefit from the technical and cognitive methods and the modern management methods that characterize the private sector away from the routine procedures prevailing in the public sector and government companies. Therefore, the public-private partnership law is considered a useful and complementary legal tool to any economic development and recovery. The concept of PPP will be vigilantly studied and identified in the next chapter of this study.

## **Chapter II: Introduction to Public-Private Partnership**

**125.** In this chapter, we will enter the world of a partnership between the public and private sectors. To this end, we will explore various meanings, concepts, and kinds of contracts related to PPP from different approaches in section I. Moreover, we will identify the features of PPP and the motives for engaging into it in section II.

### **Section I: PPP terminology and Contracts types**

**126.** It is essential to display the academic definitions of PPP and then analyze practitioners' definitions and points of view regarding the concept of PPP<sup>136</sup>. Effectively, the main question is to know the circumstances under which the State and the private enterprise would cooperate and how both of them would cooperate despite of difference in their objectives<sup>137</sup>.

Therefore, the §(1) of this section will be focusing on understanding the conceptual framework of the PPP term. Indeed, there are numerous definitions of PPP; however, we will not be able to gather all of them in our study, as the main point is to select the main definitions through different legal systems, especially through civil and common law legal systems and analyze them. Then, we will see the different types of PPP contract. In the §(2) of this section, we will present the economic and legal theories regarding PPP. In this sense, the legal adaptation of the PPP law is addressed whether it is related to the private or public law.

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<sup>136</sup> Raman K., "What is a Public Private Partnership? A definition that addresses the needs of the practitioner and the concerns of the scholar", student Public Policy and Management, Management development Institute Guragaon, 2014.

<sup>137</sup> Noting that the goal of the private company is to increase shareholder wealth, whereas the goal of the public entity is to increase citizens' wealth.

**Paragraph 1: Conceptual framework of PPP term**

**127.** PPP has witnessed great attention and popularity in public sector management. According to Osborne<sup>138</sup>, establishing PPP as an instrument of public policy across the world in the 1990s has been considered as result of a New Public Management (NPM). NPM generally concentrates on management from a public service perspective. However, it has shifted the focus to service delivery perspective. This has diminished the public sector expenditure and has raised a delegation of responsibilities to the private sector. Moreover, it has boosted a voluntary engagement of the private sector, which was noticed in the aim of providing public goods<sup>139</sup>. Hence, we can say that the principles of NPM have promoted the formation of Public-Private Partnerships as a new management tool.

**128.** Currently, we might consider the Public-Private Partnership as a suitable and useful tool for delivering public services in both developed and developing countries. There is no universally accepted definition of PPP, and its concept is still contested. The term “PPP” might refer to any form of relationship or collaboration between the public and private sectors to achieve the same purpose. Furthermore, in specific fields such as procurement and delivery of public infrastructure and services, there are also several visions and definitions<sup>140</sup>.

The following subparagraph (A) addresses the several definitions of PPP across different systems and approaches. On the other hand, the different types and qualifications of PPP contracts are presented in the subparagraph (B).

**A- Definitions through different legal systems**

**129.** The states that have addressed public-private partnership contracts have ensured that the legislation on this type of contract includes a specific definition. In Egypt, for example, the legislator defined the PPP contract as: “A contract concluded

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<sup>138</sup> Stephen P. Osborne, a professor of International Public Management at school of Management and Economics, Edinburgh University. Osborne, S.P., “Public–Private Partnerships: Theory and Practice in International Perspective”, Routledge, London, 2000.

<sup>139</sup> Weaver M., and Manning B., “Public-private partnerships in third world development: A conceptual overview”, Studies in comparative international development, University of reading, 1991.

<sup>140</sup> *ibid.*

by the administrative authority with the project company, under which it undertakes to carry out all or part of the work provided for in article (2) of this law, namely, to finance, establish and process infrastructure projects and public utilities and to make available or finance and develop such facilities, with the obligation to maintain of what is created or developed, and the provision of services and facilities necessary to it to become a suitable project for use in production or service delivery regularly and steadily throughout the contract period”<sup>141</sup>. Whereas, in France, the law defined the Public-Private Partnership contract as<sup>142</sup>: “An administrative contract whereby a person of public law assigns to a private law person a holistic task relating to the financing, management, exploitation, and maintenance of an investment relating to the works and equipment necessary for the public facility, for the duration of the specified contract, depending on the nature of the investment or the methods of financing, in exchange for sums financial obligation of the contracting authority to pay it to the project company in a fragmented manner throughout the contractual period”<sup>143</sup>.

**130.** On the other hand, there have been many jurisprudential definitions that have been made in relation to public-private partnership contracts. Some of the case law has defined public-private partnership contracts as: "The will of the public sector (represented in the government) and the private sector (private investment institutions) to cooperate and interact to employ their human, financial, administrative, technological, and knowledge capabilities based on partnership, commitment to goals, freedom of choice, shared responsibility and accountability for achieving economic and social goals”<sup>144</sup>. Another aspect of the jurisprudence case law is that public-private partnership contracts are: “Formal cooperation between public and private sector entities, where one or more government agencies form a non-hierarchical partnership or a joint venture with one or more private entities, to

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<sup>141</sup> Articles (1) and (2) of the Law No. 67/2010 on the regulation of private sector participation in infrastructure projects, services and public utilities, published in the Official Gazette No. 19, Bis (a), issued on 18 May 2010, Fifty-third year, Egypt.

<sup>142</sup> See Didriche O., “Marché Public: choix de la procédure”- Chapitre 2 (folio no. 3014), Encyclopedia of local communities, Dalloz, Feb. 2020.

<sup>143</sup> Article 1 of Decree No. 2004/559, dated 17 June 2004, amended by the Act of 28 July 2008 and Act No. 2009/179 of 17 February 2009. See also case: Cour administrative d'appel de Paris, 3 avril 2014, n° 13PA02766, 13PA02769, 13PA02770

<sup>144</sup> Fawaeer S., “ Partnerships contracts between the public and private sectors: its concept and legal nature, comparative study” (in Arabic), Research article at International Review of law, Qscience, 2017.

implement a specific action plan, which is usually formed to provide services or implement activities considered by the public as government services and activities”<sup>145</sup>. By assessing the above definitions, which are practically all of them in the same circle (give the same meaning), the partnership contracts are a two-tiered agreement, called the "project agreement", which combines two categories of contractors: public persons, private persons, or so-called "project company"<sup>146</sup>.

**131.** The scope of these contracts is determined by the agreement establishing the obligation, which generally includes investment in one of the areas of infrastructure or public utilities that provide services to the general public, directly or indirectly, for a specified period and a specific financial allowance. The main objective of these contracts is to combine the needs of the public with the private sector’s technical and material resources to provide the best opportunities and sharing of risks that may arise on the implementation of these large projects.

**132.** The PPP approach could be illustrated in the table below<sup>147</sup>.

<b>PPP Approach</b>	
<b>Goal</b>	Incentivize private investors to achieve infrastructure efficiency.
<b>Need</b>	<ul style="list-style-type: none"> <li>• Fiscal Shortages</li> <li>• Lack of efficacy in service delivery</li> </ul>
<b>Criteria</b>	<p>What can the private sector provide:</p> <ul style="list-style-type: none"> <li>• Capital investment</li> <li>• New management tools</li> <li>• Better service delivery</li> </ul> <p>Whereas, Public sector has a limitation in:</p> <ul style="list-style-type: none"> <li>• Funding resources</li> <li>• Undertaking institutional commitment to a project.</li> </ul>
<b>Advantages</b>	<ul style="list-style-type: none"> <li>• Optimize service delivery.</li> <li>• Decrease financial charges to the public sector.</li> <li>• Encourage new investment.</li> </ul>

<sup>145</sup> Ibid.

<sup>146</sup> For more information see: Cour de justice des Communautés européennes, 15-10-2009, n° C-196/08

<sup>147</sup> Khanom N., “Conceptual Issues in Defining Public Private Partnerships”, International review of Business Research, July 2010.

	<ul style="list-style-type: none"> <li>• Complement private capital with public funds.</li> <li>• Improve and implement projects on a long-term basis.</li> </ul>
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Table 1:PPP approach.

**133.** Besides, there are other different approaches about the concept of PPP<sup>148</sup> such as *Hodge and Greve*<sup>149</sup> who think that PPP should be redefined “there is a necessity to re-investigate in the several meanings and definition of PPP in order to know whether the concept is worth keeping and using for empirical studies”. However, for other authors<sup>150</sup>, PPP is cooperation between public and private sectors with a strong character, risk, and benefits. On the other hand, some could argue that PPP does not need a specific definition because it is assumed that the concept is clear. There are many opinions that could be sometimes in contrast with each other due to the numerous definitions. Therefore, we could say that PPP has a compromise on general characteristics of its definition, which are that PPP is a long-term contractual relationship between a public sector and a private sector for a determined timeframe and for achieving a project necessary for public service<sup>151</sup>.

### **1- Practitioners definition of PPP**

**134.** The point that PPP does not have a single definition permits us to go deeper among numerous definitions to refine a definition that meets our views on PPP in this study. Below are four randomly picked definitions: government of India, the World Bank (WB), the International Monetary Fund (IMF), and the European Union (EU).

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<sup>148</sup> *ibid* at 150-163

<sup>149</sup> Hodge G.A. and Greve C., “Public Private Partnership: An International Performance Review”, *Public Administration Review*, 2007, pp. 545-558.

<sup>150</sup> Klijn E., and Teisman G., “Public Private Partnership as the Management of Co-product: Strategic and institutional Obstacles in a difficult marriage in the challenge of Public Private Partnerships, Edward Elgar Publishing, 2005.

<sup>151</sup> Williams A., “Regional Governance: Contemporary Public Private Partnerships in the South”, PhD thesis, Virginia University of Commonwealth, 1997, P. 41.

**135.** The government of India<sup>152</sup> has defined PPP as an agreement between a government, statutory entity, or government-owned entity and a private sector entity, to provide public assets. Besides, the private sector entity assumes the management of the public assets for a determined duration. It should be noted that the allocation of risks is well determined between the two entities. The private entity receives its payment (performance linked payments) according to a benchmark performance that can be measured by the public entity<sup>153</sup>.

**136.** The World Bank has adopted a broad definition of PPP by referring the latter from medium to long-term arrangements made between a government entity and a private party with a clear agreement for delivering a public service and/or infrastructure, where the private party bears major risk and responsibility, and the remuneration is related to performance<sup>154</sup>.

**137.** IMF refers to PPP to agreements where the private sector undertakes to supply services and assets that the government used to provide, such as infrastructure assets.<sup>155</sup> PPP has more characteristics than private implementation and financing of public investment, which are: improve service provision and investment by the private sector. In this way, the government transfers the risk to the private sector. In that regard, PPP is concerned with numerous social and economic infrastructure projects, such as build and operate hospitals, airports, roads, bridges and others.

**138.** The vast majority of the national procurement enactment in the EU member States is inspired from EU law, from both the European Community (EC) Treaty and the procurement directives. The EC procurement law depends on the common market and the removal of borders to exchange merchandise and development in business,

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<sup>152</sup> The example of India was taken as their PPPs definition could be considered one from the comprehensive definitions among others.

<sup>153</sup> Ministry of Finance, government of India, defining PPP, 2010-11. While the reserve Bank of India defines PPP as adopted by the Planning Commission as follows: PPP is a mode of implementing government plan or scheme in partnership with private sector.

Lakshmanan L., “ Public-Private Partnership in Indian Infrastructure Development: Issues and Options”, Reserve Bank of India, 2008.

<sup>154</sup> The World Bank Group, Public-private-partnership legal resource center, “Public-Private Partnerships Reference Guide- Version 2.0”, Jan. 2014.

<sup>155</sup> OECD, “Public-Private Partnerships: In Pursuit of Risk Sharing and Value for Money”, 2008.



work, and capital between the member States<sup>156</sup>. EU describes PPP as a kind of collaboration between the public authorities and economic operators. The principal objective of this collaboration is funding, constructing, renovating, or operating infrastructure or the providing public service<sup>157</sup>.

**139.** From the four definitions above, we can highlight the main points in the below comparative table:

<b>Factor</b>	<b>Finance Ministry of India</b>	<b>World Bank</b>	<b>IMF</b>	<b>EU</b>
<b>Parties</b>	Government/ statutory entity/ government-owned entity on one side and a private sector entity	Government entity and a private party	Private sector and Government	Public authorities and economic operators
<b>Purpose</b>	Provision of public assets/ public services	Services that fall under the responsibilities of the public sector	Infrastructure and assets that have been provided by Government	Fund, construct, renovate or operate infrastructure or provision of a service
<b>Mode of financing</b>	Investments/ private sector entity			Private sector
<b>Duration</b>	Specific period	Medium to long term		
<b>Risk Sharing</b>	Clear defined allocation of risk	Big risk, management and responsibilities borne by		

<sup>156</sup> Krugman P., and Obstfeld M., “International Economics, Theory and Policy”, part I, 6th ed., Boston: Addison Wesley, 2003.

<sup>157</sup> Arrowsmith S., “The Law of Public and Utilities Procurement”, 2nd ed., London: Sweet & Maxwell, 2005, p. 121. See also Arrowsmith S., “Public Private Partnerships and the European Procurement Rules: EU Policies in Conflict?”, 37 Common Market Law Review 709-737, 2000, p. 709. ; Arrowsmith S., “The Law of Public and Utilities Procurement”, 2nd ed., London: Sweet & Maxwell, 2005; Burnett M., “Public-Private-Partnerships (PPP) – A Decision Maker’s Guide”, Maastricht: Institut Européen d’Administration Publique, 2008. ; Hjelmberg S., Jakobsen., P and Poulsen., S “Public procurement law – the EU Directive on public contracts”, Copenhagen: Djøf, 2006.

		private party		
<b>Conditions for payment</b>	Performance linked payments	Remuneration is linked to performance		
<b>Performance standards</b>	Pre-determined performance standards			
<b>Nature of contract</b>		Shared objectives for delivery		

Table 2: Comparable table of PPP definitions.

**140.** It can be noticed that the definition given by the Finance ministry is the most comprehensive one. It includes all factors in the definition. The only factor that is not mentioned in the definition is the nature of the contract. It seems that this aspect is an important one that should be considered in the definition of PPP. The project has to provide an appropriate incentive to attract the private sector; otherwise, the project will be a failure. Hence, the importance of “ shared objectives for delivery”; it is the design of the PPP that ensures that the two objectives of both parties (public and private) are met at the same time<sup>158</sup>.

## 2- Common and Civil law approaches towards PPP

**141.** In general, PPP laws may set, guiding principles for a PPP programme and policies such as Public financial management rules that govern PPP. Indeed, countries differ largely in the way they document and give force to PPP frameworks. We will begin with Common law legal systems<sup>159</sup> that are known to rely on policy documents and administrative management tools. Countries with “civil law” legal systems<sup>160</sup> are

<sup>158</sup> Other organizations and legal systems have their own definitions: According to the Organization for Economic Co-operation and Development (OECD), PPP is an arrangement between the government and private entities comprising the operators and the funders. For the European Investment Bank, PPP is a tool to provide resources and expertise to the provision of public services. This tool is formed from a relationship between private sector and public entities. OECD, *supra* note 156.

<sup>159</sup> In general Common law is un-codified; namely, there is no comprehensive set of legal rules and statutes. The common law relies on legislative decisions that are to a large extent based on precedent. This means the judicial decisions already made in similar cases.

<sup>160</sup> Civil code or civil law is codified. Such codes differentiate between several classifications of law: substantive law determines the actions that are subject to criminal or civil prosecution. substantive law establishes which acts are subject to criminal or civil prosecution, procedural law establishes how to

more expected to endorse the PPP framework in statute law, through detailed rules and regulations with legal force. It should be noted that each different kind of PPP relates to a different legal tradition.

**142.** In the past, civil law countries used to conclude concessions contracts and similar contracts for the private delivery of public services. The difference in the case of common law countries is that they do not have a tradition of concession contracts, where they are used to provide infrastructure services under government regulation through fully private companies<sup>161</sup>.

#### **a) PPP in Common law systems**

**143.** In modern economies and countries, the use of PPP in long-term infrastructure contracts increases. Here are some examples in a few countries: in the UK and Australia, PPP is no longer new. They are even considered in the policy toolbox that the government can use. In the United States, the administration planned to spend billions on infrastructure projects with a significant part-funded by the private sector. In Turkey, for instance, PPP is an essential factor in upgrading in the health sector. Much research and knowledge have been conducted about PPP.

**144.** The initiative of the World Bank that launched their PPP Knowledge Lab in 2015, in collaboration with several organizations, such as OECD, European Investment Bank, International American Bank, is the most well known one. The purpose of this initiative is to provide practical knowledge about the implementation of PPP<sup>162</sup>. The PPP description evolved to be recognized as a legitimate part of the

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determine whether a particular action constitutes a criminal act, and penal law establishes the appropriate penalty. In a civil law system, the judge's role is to establish the facts of the case and to apply the provisions of the applicable code. Much civil law originates from "Code Napoleon".

<sup>161</sup> If we look at the numerous definitions and meanings of Public private partnerships through different contexts and legal systems, there are two mains noticeable components in the composition of PPP definition: the provision of public service (that includes infrastructure) and the transfer of risks between the partners.

<sup>162</sup> Another similar initiative "the G20 Global Infrastructure Hub" resulting from the Australian summit of the G20 countries.

conversation on infrastructure governance. There is an important coupling between the focus on infrastructure and economic growth<sup>163</sup>.

**145.** In the United Kingdom, the early 1990s, the conservative government looked for private finance to bring it to the publically funded services, such as health, education, social housing. This is due to the wave of infrastructure privatization that occurred at that time. Thus, the fact that private companies construct and maintain the capital-intensive facilities such as school and hospital buildings is called “Private Finance Initiative” (PFI). The Private finance initiative launched in the UK was a turning point that marked PPP history aiming to attract private finance to build public infrastructure<sup>164</sup>. The UK PFI prolonged its influence on other countries, first in Canada and Europe and then the rest of the world.

**146.** Indeed, the PPP experience in Canada has shown that the PPP project can be procured professionally and proved successful results in delivering new infrastructure<sup>165</sup>. With time, PPP began to spread around the world to many Asian, African, Middle- East, Indian, and Latin American economies to become global. The rise of PPP is generally linked to government’s intention to make the bond between new infrastructure and growth.

### **b) PPP in Civil law systems**

**147.** After the UK and other Commonwealth<sup>166</sup> countries’ experiences, several civil law countries have initiated legal frameworks to permit and monitor the use of PPP.

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<sup>163</sup> The APMG public-private partnerships certification program, “establishing a PPP framework, 1.5.2 legal and administrative approaches to establishing PPP frameworks”.

<sup>164</sup> The UK experience in PPP and especially in the Private Finance initiative will be developed and presented in details further in this thesis. See *infra* Chapter II of title II of Part I at 176.

<sup>165</sup> Hence, the Canadian Council for Public Private Partnerships (CCPPP) defines PPP as follow: “ A cooperative venture between the Public and Private sectors, built on the expertise of each partner, that best meets clearly defined public needs through the appropriate allocation of resources, risks and rewards.” It can be deduced that PPP, by offering several models, is progressively engaging the savoir-faire and the capital of the private sector. Therefore, PPP is another way to contracting out, other than the traditional way, to deliver a public service and is presenting arrangements that are administratively governed by the Public sector but in the same time allow for private finance, design, operation, building and temporary ownership of asset.

<sup>166</sup> The Commonwealth is a voluntary association of 53 independent and equal sovereign states. Its origins go back to the British Empire when some countries were ruled directly or indirectly by Britain. Membership today is based on free and equal voluntary co-operation; no historical ties to the British Empire are required.

This was done by adopting different approaches: creating specific laws for government-pays<sup>167</sup> PPP, while keeping the existing laws and the traditional form of concession for user-pays PPP; creating a new law that governs any type of PPP (user-pays, government-pays, and hybrids), and expanding or modifying the application of the existing procurement law.

**148.** In 2004, France introduced the “Contrat de partenariat” (partnership contract). It established the basis for a central PPP unit called “Mission d’appui aux partenariats public-privé” (MAPPP)<sup>168</sup>. The PPP law was intended to fill the gap between using traditional works contracts (marchés publics) and “user-pay” concession arrangements (délégations de service public)<sup>169</sup>. In Spain, for example, a framework for “government-pays” PPP was established. However, this was not done through a stand-alone law like in France. In the 2000s, concession provisions in the government procurement law were used for government-pays PPP till 2011, where the government procurement law was prolonged to allow a new type of contract aimed for PFI-type projects. These contracts are called ‘CPP’ (Collaboration Private-Public). The CPP is mostly used for projects that are known technically complex, given its flexibility in risk allocation. Most government-pays PPP is accomplished under the provisions in the procurement law dealing with concession contracts<sup>170</sup>.

**149.** In Latin America, Chile also extended its Concession Law to include government-pays PPP. On the other side, other Latin American countries such as Colombia, Mexico, and Peru<sup>171</sup>, had established specific laws for PPP generally referred to as “Alianza Publico Privada” (APP), when they started to use government-pays PPP structures. Poland also approved a specific law to govern PPP. It narrowly defines PPP, so it involves only projects where there are government payments. In

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<sup>167</sup> In a PPP context, it refers to the source of money over the long-term to pay the PPP private partner for the investments, operating costs, and maintenance costs of the project. Funding is typically sourced from taxes (in government-pays PPPs) or from user charges (in user-pays PPPs).

<sup>168</sup> Mission d’appui aux partenariats public-privé (MAPPP), “Typologies des PPP: Comparaison juridique et terminologique des PPP dans les conceptions Française et anglo-saxonne” (Comparison of French and International Concepts of PPPs), May, 2013.

<sup>169</sup> European PPP Expertise Centre France: PPP Units and Related Institutional Framework, 2012.

<sup>170</sup> *ibid.*

<sup>171</sup> The first government-pays PPPs in Mexico were called ‘proyectos de prestación de servicios’ or service provision projects (PPS) and had to rely on two regulations: the concession regulations to grant the title to operate economically the asset, and the leasing law (Arrendamientos), as the concession contract as established did not contemplate the service payments as a revenue or compensation form to the private partner. APP legislation (both at Federal government and state level) has solved this issue.

Brazil, the PPP concept was introduced “Parceiras Publico Privadas” under a specific law to refer to government-pays PPP, including any PPP with public payments. That is why there is a need to define and determine which kind of PPP to apply due to the legal requirements that differ between government-pays PPP and user-pays PPP. From a practical perspective, it is not easy since many user-pays PPP have some level of government payment. For example, the government may contribute to the capital costs, or pay a subsidy to keep charges to certain groups below cost. The typical approach is to define a PPP as government-pays if more than half the funding comes from the government.

**150.** The World Bank pointed out a very important aspect in some jurisdictions, and in particular civil law countries that follow the Code of Napoleon’s tradition, a differentiation is made between public contracts and PPP. In the concession contract the private party provides a service directly to the public and takes the end-user risk. Whereas in the PPP contract, the private party is delivering a service to a public party in the form of bulk supply, such as a Built-Operate-Transfer (BOT) project for a water treatment plant, or the management of existing facilities (e.g., hospital facilities) against a remuneration<sup>172</sup>. In other countries, particular sectors are excluded from the definition, particularly those subject to efficient regulation or extensive private sector initiative. In some countries, arrangements involving more limited risk transfer, such as management contracts, are excluded from the definition for institutional reasons, as the authorities prefer that they fall under traditional procurement procedures for goods and services<sup>173</sup>.

## **B- PPP Contracts forms**

**151.** The experts of the World Bank have rather a tendency to consider PPP contracts as the variants of concession. Moreover, the experts and specialists of the FMI see that in the concession, there is a form of PPP. However, these terminologies and vocabulary problems do not have great importance, since it might be possible to

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<sup>172</sup> See: CJCE, 15-10-2009, n° C-196/08; Cour administrative d'appel de Nantes - 4ème chambre, 30 mars 2020, n° 18NT02671

<sup>173</sup> World Bank Group, “Approaches to Private Participation in Water Services: A Toolkit”, 2006. ; Nouel G., “Some Differences between Civil Law and Common Law in a "nutshell", IFC, 2007.

identify a sufficiently characterized economic form. Reference to the preparatory document of the World Bank,<sup>174</sup> concessions in the broad sense are used here in different guises, as well as pure concessions (concessions stricto sensu), there are arrangements called franchise, operating concessions, management contracts, leases, affermage, BOTs, and so on. The names are not always applied consistently, nor are they always helpful. What matters are the incentives and opportunities created by the contracts. The crucial distinction among the types of concessions (“among various concession arrangements”) is the risk transfer<sup>175</sup>.

**152.** There are also two important types of categorization of PPP, which are the purely contractual PPP and institutional PPP. This categorization is usually used by the European Union and several other countries. It should be noted that both arrangements have the same concept of delegating the management of a traditional public sector activity to the private sector. However, the partnership in a purely contractual arrangement is only based on contractual links where rights and duties are specified according to administrative contracts and other contracts. Usually, the private partner assumes all the responsibilities, such as operating, constructing, maintaining the service. In contrast, in a partnership of an institutional arrangement, the both sectors are collaborating within a distinct entity held jointly by them where they are guaranteed in accordance to the company’s law and by the shareholder agreement. Therefore, both arrangements contain contractual regulation<sup>176</sup>. The institutional PPP arrangement could be done through two options. The first option is by establishing an entity managed by both sectors, while the second option occurs when the private sector buys or owns shares in an existing public entity<sup>177</sup>.

**153.** Partnership contracts are classified as contractual partnerships for supply or to provide public services. The state retains control of the work and tasks of the private partner, noting that it can terminate the contract of partnership or replace it. Contractual partnerships take many forms, such as leasing, management, service, total

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<sup>174</sup> *ibid* at 16-17

<sup>175</sup> Sedjari A., “Partenariat public-privé et gouvernance future”, 2005, p. 62.

<sup>176</sup> Marques R., “What are the different types of PPP arrangements?” , Body of Knowledge on infrastructure regulation, 2010. <http://regulationbodyofknowledge.org/faq/private-public-partnerships-contracts-and-risks/what-are-the-different-types-of-ppp-arrangements/>

<sup>177</sup> *ibid*.

or partial sale, strategic partner, and concessions. The latter encompasses many forms, such as Build- Operate- Transfer ‘BOT’, which has several branches like Build-Own-Operate- Transfer ‘BOOT’, Rules of Origin ‘ROO’, Build-Own-Operate ‘BOO’, Build-Own-Lease-Transfer ‘BOLT’ and others<sup>178</sup>.

As stated, *supra* contractual partnerships take several forms; these forms could be gathered as follows:

### **1- Service contracts**

**154.** Service contracts are the most common forms of partnership contracts. It is an administrative contract binding to the public and private parties to the contract. Therefore, the first party is committed to providing the required service according to the provisions agreed on in the contract. In contrast, the state represented by its government or its institutions commits to remunerate the private sector. Service contracts are considered short-term contracts (from 6 months to two years) while its scope is worldwide and used in all sectors as it is characterized by flexibility. From the definition above, some advantages can be deduced that can also exist in administrative contracts. As mentioned, the service contract is a short-term contract. It lets the government use these contracts in many sectors, especially those that are important for citizens<sup>179</sup>. The competition factor resulted from the short-term contract grants the government the ability to lay down its conditions on private companies. However, whilst the private sector is taking care of the service, the costs of operating, investing, developing, and maintenance are borne by the government in addition to bearing all commercial risks.

### **2- Management contracts**

**155.** Besides of service contract, the management contract is the 2nd level in terms of private sector interference. The contract is awarded to the private sector for the free

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<sup>178</sup> Projaes Training and development, “public-private partnerships (PPP) contracts”, Paris- France, 9-13 Sep. 2019.

<sup>179</sup> See cour de justice de l'Union européenne, 2e chamber, 1 mars 2012, n° C-393/10.



management of the establishment for a certain period of time (medium-term). The establishment is usually strategic and very important to the government that lacks effective and competent employees. This is contrary to the private sector, where the latter develop competitiveness among employees and improve their capabilities through training. The private sector receives in return remuneration for a specific period of its supervision on the given establishment.

**156.** What distinguish this procedure of contract are the government's capabilities to employ the private sector expertise and benefit from their qualification. This will enhance productivity and increase the returns of public establishments or institutions. In addition to that, the government does not give up its property by waiving it to the private sector since the management contract allows it to keep all the assets and liabilities of the property or the company in question.

**157.** These contracts had known to be successful in several developed and developing countries. For instance, in Ghana<sup>180</sup>, this method was used in the problem of electricity in 1986. They asked for technical assistance from France to improve the electricity sector. A contract was concluded with a French electrical institution to manage the sector in Ghana, and the contract was renewed in 1991. The result was an increase in electrical power and improvement in financial performance and quality. However, the duplication management is considered a disadvantage in administrative/management contracts; on one hand, when the private sector is applying its strategy to improve competence and profit for the company it will face a high pressure from the former management that applies bureaucratic practices. However, on the other hand, in case the private sector fails to find appropriate solutions, it does not bear the risks resulting from its decisions, so in both cases, success or failure, the private sector will receive its remuneration as agreed in the contract<sup>181</sup>.

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<sup>180</sup> Krori M., "Study on Public private partnership, case study Egypt", Egypt fiscal ministry, 2009, p.10.

<sup>181</sup> *ibid.*

### **3- Lease contracts**

**158.** The lease contracts concluded between the government and private partners do not differ from the lease contract concluded between individuals. At the end, the government rents a public facility or an establishment to the private sector for a specific and definite period (medium to long term). The government remains the owner of the asset in return for an agreed fee. Lease contracts differ from the management contract in that the first case, the government does not bear risks when operating and exploiting the public facility<sup>182</sup>. This form of contract was used in several countries, especially those suffering from inadequate funding for public utilities, such as water, electricity, land transportation, and mines<sup>183</sup>.

**159.** The main features of this contract are their capabilities to provide public expenditure that is spent on operating and recovering the disabled public facilities, which became the responsibility of the private partner. Moreover, the lease fee will be a stable funding resource for the government. However, with this form of contract, the private sector is limited, he cannot expand in its investment except within the limits of what allows to maximize the profit since the asset and ownership of the public utility is at the end to the government<sup>184</sup>.

### **4- Concession and franchise contracts**

**160.** These forms of contracts are the most used in all countries and the more used than other forms of contracts in Public-Private Partnerships. The two parties of the contract are legally independent during the partnership between the public and private sectors. The government grants the franchise to the private partner with the agreement of a range of conditions, the most important one is giving up the public facility to the private partner who will manage the facility for a certain period that goes between 30

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<sup>182</sup> The World Bank Group, “Leases and Affermage Contracts”, Public-Private Partnership Legal Resources Center, 2016.

<sup>183</sup> For example, in Thailand, lease contracts were concluded in railway sector in 1985, and in 1990 this was a successful experience since transportation lines attracted a big number of passengers and turned great profits.

<sup>184</sup> See: Conseil constitutionnel, 24-07-2008, N° 2008-567-DC; Conseil d'État - 7 and 2 sous-sections reunites, 29 Oct. 2004 / n° 269814, n° 271119, n° 271357 and others.

and 40 years on the virtual project age. In return, project revenues cover investment expenses and profits<sup>185</sup>.

**161.** An independent institution is established to monitor the implementation of the provisions of concession contracts, in addition, to offer concession licenses through supervising future concession operations to guarantee competitiveness and transparency between companies offers willing to get concession rights. This institution will also organize and monitor investment procedures, quality, and cost<sup>186</sup>.

**162.** The main idea behind the concession contract is to create a private company that works on the fund, build, and operate a new service project for a certain period. This project is responsible for capital and investment expenditure that will attenuate the financial burden of the State. It should be noted that at the end of the agreement, the asset of the project would return to the State. Many countries seek to adopt this kind of contract when it comes to big projects that required colossal investment expenditure in comparison with the modest capabilities of the public sector, especially when the funding resources are limited and there is a poor banking system of several countries. This might make the government unable to choose the appropriate private partner to grant him the franchise to supervise those projects<sup>187</sup>.

#### **a) Build- Operate- Transfer (BOT)**

**163.** The BOT form of project financing is the more used and known form in public-private partnerships. The origins of BOT are the concession contracts that were spread in the late 19th century and early 20th century in France and other countries. France had used these contracts to implement the railways, power stations, and water supply. In the mid of 80s, the BOT system was applied through signing the Channel

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<sup>185</sup> Cesar A., and Pereira G., “Public-Private Partnerships (PPPs) and Concessions of Public Services in Brazil”, Justen, Pereira, Oliveira & Talamini Law Firm, Brics law journal, Volume I, Issue 1, 2014.

<sup>186</sup> Concessions are defined in the public sector procurement Directive 2004/17/EC (“the Directive”) as contracts where the consideration for the works or services to be carried out consists either solely in the right to exploit the work or service, or in this right to exploit together with payment.

<sup>187</sup> SIGMA, “Concessions and PPPs”, Brief 18- Public procurement, Aug. 2011.

tunnel (that links France and England) agreement between French and British governments and the Eurotunnel company on the other part<sup>188</sup>.

**164.** The general concept of the BOT system is when the government seeks to control its expenditure. It works on waiving some of the tasks to the private sector with the several tasks that it has. It should be noted that the government does not establish the project but let the private sector build, use, and exploit for the time agreed on in the contract, in addition, to bear all the expenses, costs, and risks resulting from operating and developing the project. Moreover, the private partners work to collect revenue for which he has a surplus, which guarantees his profits already agreed on in the contract. The private investment has the right of exploitation of the project throughout the contract. At the end of the contract, the project's assets and ownership will be transferred to the public sector (the government) that will continue the work or let it to the private partner through management contracts in order to preserve effectiveness and competence in operating<sup>189</sup>. In BOT projects, the government does not bear the expenses of establishing and operating the project, which is considered as an essential feature of BOT. Moreover, the government is not obliged to bear the commercial risks. Also, the public sector benefits from the efficiency and innovation of the private sector in management and modern technologies. On the other hand, BOT can have higher transaction costs where there is sometimes instability in the country's political and economic situation<sup>190</sup>.

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<sup>188</sup> In France, with its long tradition of infrastructure venture, the project of Channel tunnel had far reaching endorsement. The French National Assembly approved it unanimously in April 1987, and after a public request, the Senate affirmed it unanimously in June. In Britain, select committees inspected the proposition. In February 1987, the third reading of the Channel Tunnel Bill occurred in the House of Commons, and passed by 94 votes to 22. The Channel Tunnel Act gained Royal consent and went into law in July. Parliamentary support for the venture came incompletely from provincial individuals from Parliament based on guarantees of regional Eurostar through train services that never emerged; the guarantees were repeated in 1996 when the agreement for construction of the Channel Tunnel Rail Link was awarded. (Louise Butcher, *Railways: Channel Tunnel Rail Link Act 1996, SN/BT/70*, updated on 17 March 2010) The tunnel is a build-own-operate-transfer (BOOT) project with a concession.

<sup>189</sup> Also see: Delmon V., "Project Finance, BOT Projects and Risk", 2005.

<sup>190</sup> The World Bank, "Concessions, Build-Operate-Transfer (BOT) and Design-Build-Operate (DBO) Projects", Public Private Partnership Legal Resource Center (PPPLRC), 2018.

### **b) Build- Own-Operate- Transfer (BOOT)**

**165.** The government grants the private partner the right to construct a public service project with its commitment to ownership of the project with its operation. BOOT contract allows the investor's private partner to set a tariff on the services he provides to achieve an explicit agreed financial profit. However, with the expiry of a period (in general long-term), the assets of the project shall be transferred to the government or one of its authorized organs. The methods of BOOT and BOT are matching in all points except for the ownership of the assets at the time of exploitation, which is the right of the private partner contrary to the previous method. In other words, the major difference between BOT and BOOT is that BOT operator or the service provider does not own the facility or infrastructure during the operation period but it is entitled to manage it for a fee that covers the operation expenses. In contrast, BOOT operator will "own" and finance the facility or the infrastructure during the operation period, in addition to managing it for a fee. This method has a positive side with regards to the government since the latter does not bear the expenses of operating and building and is away from commercial risks that the private sector is responsible for. However, the project will not be under government supervision during the operation and maintenance period, which might lead to a deviation in its goal of providing a public service<sup>191</sup>.

### **c) Building, Ownership, and Operating (BOO)**

**166.** The BOO partnership strategy is viewed as non-explicit privatization. Once a private investor is granted a license to start its activity, the government should also let the rights of ownership and operating. Subsequently, the government has neither the right of recovery nor the right to intervene in due course, noting though that a permit could have a length up to 40 years period. This form of partnership is an attractive strategy for numerous investors as they might be keen to recover construction expenses in the long run (e.g., airport electricity generator stations and networks).

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<sup>191</sup> Akbiyikli R., and Eaton D., "A comparison of PFI, BOT, BOO, and BOOT procurement routes for infrastructure construction projects", Research Institute for Built and Human Environment, University of Salford, 2018.

**167.** The BOO form is characterized by its transferable risks (e.g., construction risks and management and operational risks) from the public sector to the private one. Also, this form allows the continuity of construction of supplied structures to the benefit of public services in the event of financial shortage at State level, since the government does not contribute financially where a BOO form is adopted in a PPP contract. However, the gradual attenuation of the State sovereignty over the public projects, whereby the private partner benefits from exclusive rights (e.g., establishment, utilization, and maintenance of projects) with the protection of the partner’s freedom in taking relevant decisions about its project, might transform certain public service goods such as water stations or education, to profit-based ventures. This will trigger conflicts and exclusions, as seen in many European countries<sup>192</sup>.

**168. PPP scheme modalities<sup>193</sup>:**

<p>Build –own-operate (BOO)</p> <p>Build- develop- operate (BDO)</p> <p>Design-construct- manage- finance (DCMF)</p>	<p>In those arrangements, considered variants of design-build-finance-operate DBFO, the private sector designs, operates and manages an asset with no commitment to transfer ownership to the government.</p>
<p>Buy-build-operate (BBO)</p> <p>Lease-develop-operate (LDO)</p> <p>Wrap-around addition (WAA)</p>	<p>Here 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 the ownership back to the government.</p>
<p>Build-operate-transfer (BOT)</p> <p>Build-own-operate-transfer (BOOT)</p> <p>Build-rent-own-transfer (BROT)</p>	<p>The private sector designs build and operate an asset and then transfer it to the government when the contracts terminate. The private partner may subsequently rent or lease the asset</p>

<sup>192</sup> Ibid.

<sup>193</sup> International Monetary Fund, “Public private partnerships”, Fiscal Affairs Department, March 12, 2004, pp.8-9.

Build-lease-operate-transfer (BLOT)	from the government.
Build-transfer- operate (BTO)	

Table 3: PPP scheme modalities.

This list does not relate to special contracts, as it is not about legal classification or types. However, We cannot deny or exclude the fact that in a particular or another legal system, there are one or more of these contracts mentioned in the table above, isolated, defined and regulated.

### C- The concept of Joint Sector in Syria

**169.** "Joint sector" is a partnership between the State administrative sector and the private sector in infrastructure and public utility projects. Because of the large volume of investment in these projects and the limited resources of the state and its unwillingness to resort to indebtedness to implement them, the State administrative sector in many countries in the last 30 years has begun to resort to the private sector to take full investment in these projects. This is done through the establishment of a private company operating exclusively for the implementation of the project, wholly owned by the investor or the investor group without the interference of the government administration into the ownership of the project. This company shall bear all the risks and financing of the project (itself or in cooperation with the banks)<sup>194</sup>.

**170.** For the "joint sector", it is usually a partnership investment between the public and private sectors in tourism, agricultural, industrial, or other projects to make a profit. In the Syrian case, the establishment of companies, activities, and salaries of workers in the public economic sector are subject to special laws. In contrast, the private sector projects are subject to other laws, such as the laws of commerce, companies, and labor; the Syrian legislator had previously issued special laws for the joint-profit sector, which combines the public and the private sector, some of which

<sup>194</sup> However, partnership is not privatization because infrastructure and public utilities projects combine a profit-oriented and public-interest team, which creates a conflict of interest, states usually issue a private law of partnership that gives incentives to the private sector to enter these high-risk projects and establishes control to preserve the interest in their implementation, management and pricing of their services.

are in agricultural activity and others in the tourism and other sectors. The provisions of those laws differed in the absence of a special law for the joint sector to be adopted in all sectors. Despite the motivation that preceded the PPP law, where the bet was excepted to make a difference in the investment and development processes, as it depends on the principle of borrowing from the future for the establishment of large and costly strategic projects, meaning that the government gets the projects and services provided without cost it, but paying for it over many years, not at once<sup>195</sup>.

### **1- Brief historical background of the joint sector in Syria**

**171.** The Syrian trade law<sup>196</sup> did not address the subject of joint sector companies, where the first joint company in Syria was “Lattakia port”. This port was established under the legislative decree No. 38 of 1950 where the articles 2 and 3 stated that a joint Syrian stock company should execute and invest the project, adding to that, the state will share 51 percent of the capital on a mandatory basis and should provide coverage of shares not subscribed. Moreover, law No.99 of 1960, in its Article 5 has authorized the establishment of companies that have economic development and participatory purposes.

**172.** Between the years of 1964 and 1967, several legislative decrees were issued in order to nationalize several companies and individual institutions by approximately 90%. The joint sector emerged as an economic sector within the framework of economic pluralism. Indeed the state has participated in several companies in the fields of tourism, agriculture, and transport services. Several joint companies were established in the fields of agricultural, food, and insurance production to this end. More and more joint companies have been established in telecom and the Internet, where a joint company is set up between the public sector and the private sector to invest the Internet and provide its services. However, the joint sector remained without a specific and agreed legal definition in the Syrian legislation. Therefore, the legal reference for these companies remains in its legislative provisions and laws of their (companies) creation.

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<sup>195</sup> Nabolssy H., Syrian Expert, “Partnership law: Unbalanced Marriage, [...]”, 03-01-2016 (in Arabic).<http://syrianexpert.net/?p=8223>.

<sup>196</sup> Law No. 141 of 1949.



## 2- The situation of the joint sector in Syria

173. The data related to the joint sector in the national accounts are not available, and they are very limited in case of availability. That is because these data are ranged either with the public sector accounts or the private sector ones. This is enough to show the limited participation and shape of the joint sector compared with the public sector, then with the private sector<sup>197</sup>. What is a little bit surprising is the absence of the joint sector in industrial and service fields especially after the issuance of decision No.35 of 1986. The latter allowed private sector companies to be active in fields such as food, textile, chemical, and engineering industries. This was in light of the trend of encouraging the national private sector and attracting Arabic economic activities to participate. However, this did not succeed as expected in encouraging the establishment of national joint companies. This sector remained as it is despite the development of public and private sectors following the issuance of the first law of investment<sup>198</sup>.

174. The emergence of the joint industrial sector in Syria was delayed compared with the joint sector in the field of transportation until the year 1965 (approximately fifteen years). The joint industrial sector has been established and expanded in several methods such as partial nationalization of several industrial establishments<sup>199</sup>, the bilateral governmental agreement between Syria and some foreign companies (Ex: Spanish and French companies), bilateral or multilateral governmental agreement for cooperation and investment in many areas including industrial zones and the law no.10/1991 for encouraging investment<sup>200</sup>.

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<sup>197</sup> Generally speaking, the joint companies in Syria, except those related to tourism sector, didn't have significant success. The companies working in the field of agriculture face obstacles and this is the reality that has been confirmed by several experiences from countries; while success in agriculture remained related to private individual activities. Noting that the practical experience has not been successful for public sector companies or for joint companies, this is due to the nature and conditions of agriculture production that differ from the nature and conditions of other economic activities.

<sup>198</sup> Law No.10 of 1991.

<sup>199</sup> According to the nationalization decree issued in 1966 which includes the nationalization of 75%-90% of industrial companies and institutions ownerships and keeping the rest of the percentage to the owners of those companies. However in 1970, the legislative decree No.38/1970, whereby the remaining shares were nationalized.

<sup>200</sup> The industrial joint sector has several features that don't easily exist in other sectors; they could be summarized as follows: Expanding the scope of ownership, in a case that it includes, in addition to the public sector and main investors of private sector, the small citizen contributors. As this will contribute to the mobilization of domestic savings and encourage small contributions; It reduces the pressure on the state budget, especially, its investment project through implementing important priority projects

**175.** The current industrial joint-sector in Syria includes 13 joint stock companies with limited liabilities and branches for joint companies in which Syria contributes with other Arab countries whose centers are located outside the country such as the Syrian-Jordanian company for the industry. These companies could be classified according to contributions into four main groups, such as joint companies between the public and national private sectors<sup>201</sup>, the joint companies between the public sector and one or more Arab governmental sector<sup>202</sup>, and joint companies between the public sector and the Arab or foreign private sector<sup>203</sup>.

**176.** After viewing the different definitions and terminologies of the PPP concept and the various PPP types of contracts and distinguishing several terms with PPP in §(1), we will see in §(2) the theoretical frameworks of PPP through addressing several economic and legal theories relevant to PPP. It should be noted that determining whether the nature of PPP contract is either administrative or civil, plays an important role in determining the applicable law and the competent court when a dispute arises from these contract.

## **Paragraph 2: Theoretical Frameworks of PPP**

**177.** After studying the definitions of PPP and the types of partnership contracts, §(2) presents the theoretical framework of PPP. In this study, it is necessary to study the economic and legal sides of PPP together as they are very linked. Therefore, this paragraph aims to present the relevant economic and legal theories of PPP. On the other hand, it gives a clearer image about the legal nature and adaptation of the PPP contracts.

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that are essential to the national economy with a few government investments covering part of the costs of these projects; It contributed to the integration of the private sector in the development process and activates its role and capabilities in a wider way and it is considered as an important entry point in achieving Arab coordination and integration.

<sup>201</sup> It includes three companies covering the biscuit and chocolate industry (Ghraoui), the preservation of vegetables and fruits (Gdaq) and the chemicals.

<sup>202</sup> It includes seven companies whose activities concerns the modern furniture and milk (Syrian Saudi Arabian), Milk and cheese (Syrian Libyan) and ceramics (the Arab Union for reinsurance) and the Syrian Iraqi company for the manufacture of switches and communications equipment.

<sup>203</sup> Includes four companies like tractor industries, telecommunication equipment and the manufacture and maintenance of electrical equipment.

## **A- Economic theories of PPP**

**178.** We will examine the leading scientific and economic theories that explain this concept of contracting, even in an indirect way. We will choose four main economic theories, which are the following: the theory of efficiency-X, the public choice theory, theory of agency, and theory of contestable markets.

**179.** Firstly, the theory of efficiency-X, this theory assumes that the problem of “X” restricts and limits the economic effectiveness and performance of the public sector and not the result of a misallocation of resources. In other words, the efficiency-X describes a company’s inability to get the maximum output for its inputs due to an absence of competitive pressure. According to the economist Harvey Leibenstein<sup>204</sup> in his analysis for American companies in 1966<sup>205</sup>, the economic aid is far from innovation and creativity when the work is repetitive and far from the risks of the market where the competition is the essential factor. The efficiency –X is the differentiation factor between the theoretical performance expected from the company and the effective performance affected by the individual’s behavior inside the company.

**180.** Usually, the efficiency –X factor is almost absent in companies and organizations owned by the government. In reference to a study by Leibenstein in 1977 on public institutions especially those on agriculture; he emphasized the importance and goal of these institutions in modern societies. The theory insists that it was possible to abandon the arbitrary governance from the central supervision and open a bigger space for the competent masters. The partnerships between the public and private sectors lead to abandoning the bureaucracy and the routine of life. Leibenstein's concept of x-efficiency disagrees with traditional neoclassical economics because it proposes that companies and people don't always maximize utility. Which means, they don't always make the most effective choices.

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<sup>204</sup> Harvey L., "Allocative Efficiency vs. X-Efficiency", *American Economic Review*, 1966.

<sup>205</sup> *Ibid.*, at 392-394.

**181.** The public choice theory is derived from the study of public expenditures and taxes. It is a branch of economic science branches. One of these theory architects was the economist James M. Buchanan<sup>206</sup> who had established a research center of public choice in George Mason University, which became one of the important research centers for the theory of public choices. This theory takes the same principles of economic science in analyzing people's wishes and will when they enter a market to purchase. The same analysis is applied to study people's will when taking a collective decision. Thus, the theory of public choice follows the same way when analyzing people's behavior in the public and political market. People, whether they are politicians or electors, pretend to work for others. However, in the end, their main ambition is to realize their wishes<sup>207</sup>.

**182.** The master of the theory of agency is the famous economist Adam Smith in his book "nations' wealth" in 1776, where he discussed the separation between the control and the ownership. The basis of the theory depends on the legal concept of contracting, which binds the parties of the contract, each according to its role, where the first commits to the agent. The second is committed to taking care of the interests of the principal. To this end, it can be considered that the company is a range of agency relationships like the relation from one part, between the administration and the employees and on the other part between it and the owners. The agency theory is based on several assumptions; we will display some of them: market efficiency and good conduct<sup>208</sup>, a difference of priorities for the contracting parties<sup>209</sup>, the difference in risk allocation<sup>210</sup>, and information asymmetry<sup>211</sup>.

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<sup>206</sup> James M. Buchanan is an American economist famous by his work on public choice theory for which he received the Nobel Memorial Prize in economic sciences in 1986.

<sup>207</sup> The theory uses principles of the microeconomics through studying individual's behavior in the public administration and life to understand the reason of financial deficiency in public organizations. This theory suggests returning to the theory of production and exchangeable goods and services on the level of microeconomics, which means the abandon of the government of managing its public utilities in favor of the private sector.

<sup>208</sup> To check the efficiency of the market, it should be confirmed the relationship between the market value of securities and the financial instruments. In addition to what extent the effect of this information is in the financial market in a complete and subjective way.

<sup>209</sup> The difference emerges in what the parties will get, as an outcome, as the principal seeks to maximize the profit and to get a great extent of work against a low wage. While the main goal of the agent is to earn the highest possible salary in addition to incentives, vacations and rewards with simple efforts.

<sup>210</sup> Both agent and client have different perspectives when the issue is related to the level of risk. Usually, the client is uncertain of the degree of risk while the agent seeks to avoid that risk. Thus, both have different expectations from each other.

In brief, the public-private partnership under an agency contract might be the right method to decrease costs and risk of information asymmetry because there is no contradiction between the private sector and the market, which is the contrary for the government.

**183.** The theory of contestable markets is built on the “threat” principle from the entrance of competitors or potential competitors to the market that is already monopolized by an organization or a cartel<sup>212</sup>. This theory first appeared in the United States<sup>213</sup> in the context of the suppression of the wealth-state privileges. The aforementioned theory relies on the following factors<sup>214</sup>: the freedom of companies’ entry into the relevant market without imposition or any kind of restrictions, plus the fair treatment alike local companies in respect of technologies and other privileges; The freedom of exit the relevant market with no legal obstacles and non-refundable expenses and the possibility for further companies to enter the relevant market<sup>215</sup>. The theory of contestable markets invites the government to let down some of its sectors that might be monopolized by the state. However, the latter event could not happen, as the contestable market’s mechanism alone is sufficient to guarantee an integral and comprehensive competition in the relevant sectors and markets, even though a single party monopolized the market. Consequently, expenses will remain at their lowest

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<sup>211</sup> Information asymmetry is the main critic that is pointed out to the agency theory. This is shown when the agent is willing to mislead the client in order to maximize its wages or to minimize the work stress and pressure. On the other hand, the client is unable to check the validity of the information provided because of his ignorance in the procedures or because of the differences in point of views, which facilitate the manipulation of the information.

<sup>212</sup> The theory of contestable market was laid down first by Baumol, Panzer and Willig in a book entitled “contestable markets’ and the theory of Industrial structure” published in 1986. Baumol W., Panzer J., and Willig R., “contestable markets’ and the theory of Industrial structure”, 1986.

<sup>213</sup> Bialès C., “marchés et règles”, conference held in the faculty of economics, law and management in Orléans, research center of economics, 1999, p.29.

<sup>214</sup> Baumol W., and Willig R., “Fixed Costs, Sunk Costs, Entry Barriers, and Sustainability of Monopoly”, *The Quarterly Journal of Economics*, Vol. 96, No.3, 1981.

<sup>215</sup> The availability of the above conditions incentivize companies to follow the known mechanism of ‘behavior Hit & Run’, through which companies willing to enter the relevant market and rapidly exit the latter, will do so without any minor losses, but in contrast, with a satisfying benefit.

rate along with the diversity of goods, items, services, and an increase in innovation<sup>216</sup>.

## **B- Legal adaptation and theories of PPP**

**184.** The doctrine was clearly divided in terms of determining the legal adaptation and nature of the public-private partnership law, and there was a multiplicity of doctrinal opinions in this regard. Some scholars tended to consider the partnership contracts between the public and private sectors as administrative contracts. In contrast, other academics have tended to consider this law as private law. A third doctrinal opinion took a middle position between the two directions. It has considered that these contracts are special, which we should look at separately.

**185.** We will do an analytical view, following the historical origins of public-private partnership contracts in countries with a dual judicial system, and their counterparts in the unified judicial system. We will highlight the importance of legal adaptation of these contracts under the various regulations. Then, we will review the existing case law on this topic.

**186.** In the face of the rigidity of the general theory of administrative contracts, and its inability to keep up-to-date with developments at the service level (public utilities, infrastructure), it was necessary to have a new contractual system to finance, implement and manage public utilities, which prompted the UK to adopt the Private Financial Initiative<sup>217</sup>. The idea of the private finance initiative was indirectly inspired by the French experience of Concession contracts of public utilities, where contracts concluded under the PFI system are almost identical to the concession contracts as long-term contracts for the management of a public facility against a specific financial allowance.

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<sup>216</sup> This theory pretends that the monopoly exercised by the public sector on some goods and services through some legislations and laws, is considered as a constraints to competition that had could be in the private sector. This confirms the idea of inefficacy of the government in producing some goods and services and that public private partnership contracts will increase the performance of the public sector.

<sup>217</sup> Cazalet B., “The Evolution of the Concession and Public Private Partnership Legal Concepts over the Last 20 Common Law Influence”, *International Business Law Journal*, 2014.

The only difference between these two types of contracts is that the remuneration of the contractor from the administration in the concession contracts should be directly caused by the contractor's exploitation of the facility subject to the concession. This is contrary to the financial allowance received by the contractor in the "PFI" contracts, where the latter is charged against the contract according to various methods determined by the administration<sup>218</sup>.

### **1- Public-private partnership contracts as administrative contracts?**

**187.** The administrative contract is defined as: “A contract in which one of the parties is the public administration which is represented by its moral persons or its administrative organs as an official public authority, and aims to conduct a public facility on a regular and sustained basis to achieve public interest, based on methods and means of public law where these procedures contain unfamiliar terms according to private law contracts<sup>219</sup>”. Accordingly, based on the above definition, the contract to be administrative, it must have these following pillars<sup>220</sup>:

**188.** The administration or a public law person is one of the parties to the contract. The administrative contract must have the administration, represented by its moral persons or public authority, a party to the contract. Then, the contract is related to a public facility. In order to be in front of an administrative contract, the latter must be related or subject to a general facility, where the purpose is to operate this facility regularly and steadily for the public interest.

**189.** Those two components mentioned above are not enough for a contract to be an administrative contract; it should use public law procedures and methods. One of the methods is the inclusion of exceptional and unusual clauses, unlike private law contracts. According to this point of view, all the pillars of the administrative contract are available in public-private partnership contracts. The first party in such contracts is the state or a public law person. The purpose of concluding such contracts is to use them as a means of development, management, and operation of a public facility. No

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<sup>218</sup> Abdulhadi B., “Administrative contract: Legal, administrative and literary aspects: analytical study and proposed solutions”, Dar al-Culture for publishing and distribution, Jordan, 2015, pp. 20-21.

<sup>219</sup> *ibid.*

<sup>220</sup> See Tribunal des conflits, 14 May 2018, n° 4119.

one denies the availability of these pillars in public-private partnership contracts, even the deniers of these contracts' administrative nature. The third pillar, which consists of the inclusion of exceptional clauses in these contracts, is also available. If we go deeper into this type of contract, we find that "the administration is authorized to intervene to modify some of its organizational aspects without the consent of the contractor, in respect of the public interest, while preserving the right of the contractor in compensation, if available"<sup>221</sup>.

**190.** Besides, the contractor's mere involvement in the establishment and operation of one of the facilities, providing public services to the public is an exceptional condition that confers the administrative nature to this type of contract. This has prompted the authors of this trend to say that PPP contracts have an administrative nature, based on the following two arguments:

Since the subject of public-private partnership contracts is the establishment, management, and exploitation of a public facility, it is not logic that this type of contract will be subject to private law. Moreover, these provisions establish a sort of equality between public and individual interests, which will reflect negatively on the functioning and regularity of the public utilities in providing the services<sup>222</sup>.

Secondly, the relative expansion of tasks given to the private partner in PPP contracts does not deny the essential role of the administration (public entity) in ensuring the sustainability of the public facility, and therefore, ensuring the continuity of the public service for the citizens. In that regard, the administration has the right to supervise and monitor the facility and the implementation of these contracts. Besides, It can interfere when it is necessary for amending provisions of the contract or even recovering the public facility before the end of the contract for the public interest<sup>223</sup>.

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<sup>221</sup> Al-Dhafiri, "Legal basis for BOT contracts under both Jordanian and Kuwaiti law (Comparative study)", University of Jordan, Jordan, 2007, p. 61.

<sup>222</sup> Hamoud W., "Construction, operation and transfer of ownership contracts (BOT): the rights and obligations of the contracting authority", Culture House for Publishing and distribution, Jordan, 2010, p. 55. ; Al-Habashi M., "Short in BOT Contracts", Legal Books House, Egypt, 2008, p.29. (Arabic).

<sup>223</sup> Hamoud W., *ibid* at 54.



## 2- Public-private partnership contracts as private law contracts?

**191.** Partnership contracts tend to be considered as private contracts that are subject to the principle of “*pacta sunt servanda*” and subject to the parties’ will and consent. Therefore, the provisions of private law are applied to PPP contracts and the competent jurisdiction is held by the ordinary judiciary instead of the administrative judiciary. This opinion was based on the fact that PPP contracts do not carry the distinctive qualities of administrative contracts; they do not accept, by their nature, to include exceptional conditions.

**192.** As mentioned *supra*, the administrative contract have to fulfill three basic pillars, which are: one of the parties should be the administration or one of the public law persons, the contract should be connected to a public facility and the contract should contain exceptional and unusual conditions. The supporters of the view that PPP is private contract believe that PPP contracts fall under the third pillar of the administrative contracts. Therefore, in such type of contracts, the administration (or the public entity) contracts with the private sector as if it is a normal individual. In other words, the administration ignores its sovereignty to be in an equal position with the private party. Although the public party includes in its (administrative) contracts unusual and exceptional conditions, it cannot implement those conditions on a foreign contractor. Thus, the public party authority is limited within the geographical scope of its State. Moreover, the international trade aspects request from the State to be on an equal footing with individuals in contracting and to be far away from public law to achieve its economic interest. Otherwise, if the State sticks to its contractual sovereignty and power, it will destroy the contractual relationship with the foreign contractor<sup>224</sup>.

**193.** The idea that the nature of PPP contracts is administrative can oppose the policy of attracting investment, as it could discourage investors to invest and put their money because they fear the legislative and judicial risks that they can face. Therefore, the State that wants to attract foreign investors should avoid the application

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<sup>224</sup> Mustafa Al Habashi, *supra* note 223; Elias N., “Series of comparative law reviews (6): BOT contracts”, Lebanon, 2006, p. 139.

of public law provisions and apply private law provisions. Hence, this will assist in increasing national and foreign investments<sup>225</sup>.

**194.** In some forms of PPP contracts, the state waives the ownership of the project to the investor, so that it can mortgage its assets and obtain funding, which is proof that the contract is not subject to the rules of public law that always assumes state ownership of the project, and might be a proof of its subordination to private law. In this case, saying that the nature of the PPP contract is administrative would contradict the ownership concept of the private sector.

**195.** The main argument is the existence of the principles mentioned *supra* “Pacta sunt servanda” and the principle of “will consent” or “party will autonomy” in PPP contracts. These principles have their origins in civil law, as the general principles in civil law are the legal basis for all private law branches<sup>226</sup>. This opinion was, in fact, the subject of criticism from the direction that consider PPP contract as administrative. Saying that the State cannot apply the exceptional conditions contained in the contract to foreign contractor is not an accurate statement, as all partnerships projects originate on the territory of the State and for the general interest of its citizens. Besides, containing exceptional conditions in the contract is not depriving the other contractor its contractual rights.

### **3- Public-private partnerships contracts as “specific” classification?**

**196.** A side of the jurisprudence case law tends to add a “special” nature to the contracts of PPP<sup>227</sup>. A trial from them to stand in between from the jurisprudence that considered those contracts administrative and those that considered the PPP contracts as private law contracts. The supporters of this point of view state that it is complicated to determine the legal nature of PPP contracts in advance, as each contract should be considered on a single basis to determine its nature. To this end, the PPP contracts might be included in the concepts of the administrative or civil

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<sup>225</sup> *ibid* at 32.

<sup>226</sup> Ramadan A., “the legal nature of BOT contracts”, Master thesis, University of the Middle East, Jordan, p. 23, 2011.

<sup>227</sup> Al-Abadi M., “The nature of the law governing the contract with the foreign investor”, Jordan in law, science and politics, 2013.

contracts depending on the terms and conditions of the contract. This trend was based on two main arguments:

**197.** The partnerships contracts are relatively modern contracts with a different large number of contractual elements, such as land ownership, that the project will be built on. In addition to the ownership handover means to the government at the end of the contract, to the charges that each contractual party will receive from the users as well as the extent to which the funds of the project may be seized and many other contractual elements that vary according to the contractual stages. Based on that, it is not possible to develop a general adaptation to all forms of these contracts, but instead creating a specific adaptation on each contract on a sole basis<sup>228</sup>.

**198.** Furthermore, PPP contracts have characteristics that distinguish them from other administrative contracts. As the PPP contracts, unlike the concession contracts of public utilities, are concluded after negotiation between the governmental side and the private partner. It should be noted that several traditional rules that the concession contracts of public utilities are based on have been updated into the partnership contracts. Therefore, establishing the project is financed by the private sector, and land ownership became the private partner, making it challenging to develop a specific and consistent adaptation of PPP contracts<sup>229</sup>.

Despite the division among jurists about the legal nature of partnership contracts, some tend to weigh the aspect of the administrative nature of public-private partnership contracts as one of the recent images of public utility contracts. Others tend to believe that PPP should be classified under a specific law that has some private and public aspects together.

### **C- The notion of international administrative law: BOT contracts**

**199.** Since the nineteenth century, the French jurisprudence of the Council of State proves the existence of agreements concluded by the administration and which are of international character. Agreements for the recruitment of officials of the administration posted abroad, public procurement of provisions or services abroad are

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<sup>228</sup> Sharaya A., "The legal nature of BOT contracts", Master thesis (unpublished), Middle East University, Jordan, 2011, p.23.

<sup>229</sup> See: Cass. 3<sup>e</sup> civ., 9 mars 2005, n. 03-19.385.

only a few outlines of a more significant arrangement of international administrative contracts. At the same time, to determine the applicable law, the assessment of the international competence and the impact of the foreign judgments concerning the agreements concluded by the French Administration and by foreign public persons, this sub paragraph tackles the difficulties raised by international administrative contracts<sup>230</sup>.

**200.** These challenges stem specifically from the decision made in 1999 by the Council of State to adjust their framework to a great extent with that of contracts governed by private law. Administrative contracts have been subject to the contention of law rules that have been developed to oversee private law contracts, specifically the Rome Convention of 1980 on the law applicable to contractual obligations. This subparagraph proposes an alternative way to deal with the regulation of international administrative contracts through a necessary examination of positive law directed by the necessities of administrative law and private international law<sup>231</sup>.

### **1- BOT contract classification trial within the existing categories**

**201.** The classification of PPP contract and its different kinds has carried out a part of the doctrine, supported by the case law, to give it the administrative qualification. Indeed, the identification of the administrative criteria in a PPP contract must be established before looking for which particular category of administrative contracts best corresponds to its characteristics. In order to clarify more this complex nature and to have a concrete example, let us take a specific type of PPP contract, such as BOT<sup>232</sup>.

**202.** The absence of legal qualification, in the Syrian and French law, of a growing contractual practice, the uncertainties of the doctrine and jurisprudence concerning the latter clearly show that the difficulty posed by the study of the nature of PPP contract is not simple. Generally, it is legitimate that the doctrine and the jurisprudence seek to

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<sup>230</sup> Waked R., “La notion de contrat administratif international à travers l’exemple du contrat BOT: Etude comparée” Doctoral thesis in private law, Paris 2, 2011.

<sup>231</sup> Laazouzi M., “Les contrats administratifs à caractère international”, *Economica, Recherches Juridiques*, 2008.

<sup>232</sup> Waked R., *supra* note 231.

introduce practical realities into preexisting categories. According to the World Bank, the BOT contracts are similar to the concession contracts<sup>233</sup>. However, this has not unified doctrinal opinions and jurisprudential solutions. Therefore, we will see the position of the jurisprudence then one of the doctrines regarding the subject of the legal nature of the BOT contract.

**203.** The analysis of the position made by the French positive law regarding the nature of the BOT contract requires attention towards the “Tunnel sous la Manche” affair. This affair is the most known as a megaproject related to the technics of BOT<sup>234</sup>. Therefore, It is essential to shed light on the contract relative to the “Tunnel” as this contract is obtained from the English qualification the BOT nature and the French qualification the concession nature. According to Mr. Goy, the BOT contract is a concession contract of public works<sup>235</sup>. For the author, the criteria of the mentioned contract are found in the contract of this project of “tunnel”, at the level of the contracting parties. The grantors are riparian States, which are France, and Great Britain represented by a governing body: the intergovernmental commission<sup>236</sup>. While regarding the concessionaires, they are “France Manche SA” and the “Channel Tunnel Group Ltd”, private persons that can concede their rights to other moral persons with the consent of the grantors.

The concession within the framework of the “Tunnel” project also operates responsibilities sharing: the financial responsibility behooves to private concessionaires charged of funding the entire project, without recourse to public authorities. Regarding the responsibility throughout the construction and development, it is shared between the two parties. According to Mr. Walker, for example<sup>237</sup>, the concession within the context of the “Tunnel” project is a concession

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<sup>233</sup> The World Bank, “BOT approach and its application in the developing countries”, report, August 1990, p.18.

<sup>234</sup> This project is called in English “Chunnel”, contraction of “Channel” and of “Tunnel”, like the “Canal du Suez”, Walker-Arnott E., “The Channel Tunnel Concession”, International Business Lawyer (IBL), 1996.

<sup>235</sup> Goy R., “Le Tunnel sous la Manche”, *Annuaire Français de Droit International (AFDI)*, 1986, p.741.

<sup>236</sup> Assisted by the security committee.

<sup>237</sup> Walker-Arnott E., *supra* note 235 at 12: “We are not so used to the idea of the Channel Tunnel Concession that it is easy to overlook that for a French lawyer the idea of a “public service concession”

of public works that have been transformed, after the completion of the works, to a concession of public services.

**204.** The majority of the doctrine assimilated the BOT contract to the concession contract of public service<sup>238</sup>. However, not excluding the fact that there are differences between those two contracts. Thus some authors have criticized this assimilation<sup>239</sup>.

On the other side, the BOT contract is an Anglo Saxon creation; therefore, the considerations of the Anglo Saxons legal principles applicable to contracts should be qualified. Thus, the Anglo-Saxon law, as opposed to the laws in the countries of the Romano-Germanic traditions that distinguish between civil contracts and administrative contracts, do not allocate any special legal regime to these latter<sup>240</sup>.

## **2- Application of international criteria for the BOT contract**

**205.** While analyzing these contracts, it is incontestable that they trigger the interest of international commerce. The object of the BOT contract consists of the development of an infrastructure or a public service where the recourse to foreign “know-how” and funds will do this. Therefore, the BOT contract involves a foreign concept, required equipment, and competent workers. To this end, the positive law refers to two international criteria: the first one is legally related to the external element of the contract, and the second is economically related to the goods and services movement of transfer across borders<sup>241</sup>.

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is a familiar term of art, while for the English lawyer the expression “concession” is almost unknown in ordinary practice”.

<sup>238</sup> Among the authors that are favorable to the qualification of BOT contract to concession; we could cite Mr. Bettinger where according to him the BOT contract is an English translation of the concession. Bettinger C., “La gestion déléguée des services publics dans le monde: concession ou BOT”, Berger-Levrault, 1997, p.7.

<sup>239</sup> Among the authors that were against the assimilation of the BOT contract to the concession contracts, Mme. Najjar, N. Najjar, p.821: “the worry of the jurisprudence is to avoid the qualification of the BOT contract but which would have made it possible to avoid all diversions to reach a qualification of the BOT contract from the international commerce contract, whereby the recourse to arbitration is allowed [...]”

<sup>240</sup> Khoury R., “les contrats BOT et les contrats de privatization en droit comparé”, Sader 2002, p. 38.

<sup>241</sup> Noting that neither the doctrine nor the jurisprudence was unified on the question of the BOT contract qualification related to its administrative and international characteristics at the same time.

**206.** Indeed, the qualification of the BOT contract calls to the definition of the relations between two different natures, considered previously as repulsive, where one is an intern and the other international. Its qualification also contributed to the renewal of the problems related to the boundaries between the public and private nature of the contract. The BOT contract calls in particular for an analysis of the relations between the administrative and international nature of the contract, which is situated at the core of the evolution of the notion of international administrative law<sup>242</sup>.

**207.** Moreover, we might note that the positive law faces a movement of internationalization of the public contract, primarily through the evolution of the application of conflictual methods inside this contract. There is also a phenomenon of “publicization” of the international law that is shown through the presence of the readjustment of benefits in the international contract clauses, which are, in fact, the consecration of the administrative theory of the unforeseen<sup>243</sup>. We can deduce that there is a fact of rapprochement between the private and the public contracts as the international contract in question within the context of the BOT contract is also a private contract. This question of the relation between the public and private law of contracts has monopolized and occupied the spirit of jurists and the doctrinal activity<sup>244</sup>.

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However, it is worth to note that the international nature was recognized in the exploitation contract concluded between the Tunnel Group Limited society and the France Manche SA with the SNCF and the British Rail by the arbitral award rendered on 30 October 1995. According to this award, the contract is an international private contract due the fact of its submission to a law chosen by the parties. As, according to the tribunal, such choice cannot be compiled with the nature of administrative law. Marcou G., “La sentence arbitrale relative à la convention d’utilisation du Tunnel sous la Manche par la SNCF et la British Rail”, *Annuaire Français de Droit International (AFDI)*, XLIII, 1997, p. 810.

<sup>242</sup> See: Ponthoreau M., “L’internationalisation du droit public”, *Introductive relation, REDP*, vol.18. n. 1, printemps 2006, p. 104.

<sup>243</sup> We can evoke two examples that illustrates that the positive law has devoted the notion of international administrative contract: in the Lebanese law, the court of Appeal of Beyrouth has rendered a case on 21 March 2001 and in the French law, the tribunal of conflicts has also rendered a case on 17 May 2010. These have introduced the notion of international administrative contract in positive law.

<sup>244</sup> Auby J., “Le rôle de la distinction du droit public et du droit privé dans le droit français”, in “la distinction du droit public et du droit privé: regards français et britanniques”, Paris, ed. Pantheon-Assas, 2004, p.19. See also Morellet J., “l’interpénétration du droit public et du droit privé, introduction à l’étude du droit compare”, *LGDJ* 1938, tome III, p. 140.: “also on the level of public international law

## **Section II: Reasons to Resort Towards PPP**

**208.** The goodwill of having better services in high quality and the need for additional financial resources; boost the government to do partnerships with the private sector to provide these services. The partnership between public and private sectors differs depending on the traditional methods of pressure policies on funding the public utilities. This method has shown its in compliance with the expectations, particularly on profit revenue level from services and equipment that did not meet the citizens' needs from a quality perspective.

**209.** To this end, section II of this chapter will be dedicated to displaying the different reasons and motives for engaging in PPP. §(1) of this section will explain these motives in addition to the success factors of PPP. In contrast, the §(2) will show the potential risks of PPP as well as the difference between PPP and privatization.

### **Paragraph 1: Motives and Success Factors of PPP**

**210.** Some evident and general reasons express how it is essential to partner with a private sector. Namely, the primary constraint to economic development is the deficiencies in infrastructure. The government will find itself incapable of funding required financial needs. In addition to that, the government also suffers from poor delivery and poor operational implementation in public management.

**211.** One of the primary responsibilities and obligations of each government is to keep pace with society's progress, namely, meet the expectation of its citizens. Therefore while the government is trying to provide certain public services, it is limited by the extent to which it can bring the money required, finding that the only way to hide this gap is by raising taxes. In this case, the government tends towards borrowing money, which might lead to fiscal deficit, and the latter can lead to the risk of default because of not repaying the loans. This could be very disturbing in case of significant amounts borrowed from external resources. In such cases, the investment

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and private international law, the public and the private law penetrate in each other so intimately, so it become difficult to distinguish them”.



might concentrate on the infrastructure because the latter is essential for economic growth. It is here where PPP come to the rescue<sup>245</sup>.

### **A- Motives for engaging in PPP**

**212.** Since 2008 onwards, the financial crises lead to highlight the importance of PPP in the developing and advanced countries. According to the financial limitations of public resources, governments tend to use private sectors to fill the gap. Indeed, the reasons to resort towards private sector are broadly the following<sup>246</sup>: Considering the PPP as an essential tool to improve the technology and innovation level in public services by achieving effective operations; encouraging the private sector to carry a project within a time limit and specific budget; imposing certainty in the cost on an infrastructure project in the present and the future; developing the capabilities and skills of the local private sector through large international companies; facilitating infrastructure, namely creating sustainability in the economy of the country in order to be more competitive; encouraging the growth of the public sector by supplementing the missed capabilities and risk sharing and risk transfer to the private sector.

#### **1- Allocating the resources between the public sector and private sector**

**213.** This matter of “inter-sector misallocation” is considered as an important issue in the economy because it is a determinant of the public management and the economic shape of the state. However, what is noticeable is that no society, whatever its political or economic views, allocates all its resources in one single economic sector and neglects the others. In contrast, the division between the public and the private sector differs, depending on the philosophical position of the state (socialist economy, capitalist economy). Therefore, to avoid this issue, it was thought in partnership between the public and private sectors to decrease the misallocation and provide public services and goods for individuals<sup>247</sup>.

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<sup>245</sup> PQA, “Partenariat public-privé: principes et méthodes”, documentary file, 2008, p.2.

<sup>246</sup> The World Bank, “Government Objectives: Benefits and Risks of PPPs”, Public private partnership legal Resource Center, 2016.

<sup>247</sup> See in that context: CA Nantes, 4<sup>ème</sup> chamber, 16 mars 2018, n. 16NT04075.

## **2- Emergence of economic theories that discourage government spending**

**214.** According to Neo-Classical<sup>248</sup> and Monetarists<sup>249</sup> theories, the main reason for the crisis is because of the massive interference of the government through its public spending since the income increases, and so do the rates of interest. Thus, the public sector will fight the private sector, which will lead to shake the economic stability and to market imbalance. The main focus points of these theories mentioned above are the optimization of behavior, limited government interference, and the effective prices and wages tend to be closer to their competitive counterparts in the long run.

**215.** Changes in public policies in a way that guarantees effective management of governmental bodies, such as administration, hospitals, and insurance companies. have led to new public management requirements. The speed of providing public goods or services led to a consideration of accountability principles, similar to those used in the private sector. Moreover, grant complete independence to the central banks according to the economic market concept; these are the NPM main principles<sup>250</sup>.

**216.** The political and economic prevailing variables, as by the 1980s, the global economy was characterized by various tensions and difficulties. On the one hand, the development process was subject to diverse deliberations, severe debts, decreasing in chief commodities prices e.g., hydrocarbons, commercial disputes, and support of exchange prices. On the other hand, other key factors were particularly the focus of the century, namely globalization<sup>251</sup>, privatization<sup>252</sup> and the technological revolution<sup>253</sup>.

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<sup>248</sup> This theory of economy is an approach focusing on the determination of goods, outputs and income distributions in market through supply and demand.

<sup>249</sup> This is an economic concept, which argues that changes in the money supply are the most important determinants of the rate of economic growth and the behavior of the business cycle.

<sup>250</sup> This latter has main some basics, which are the following: The relationship between the user and services should be built on the freedom of choice in a way that the service is not imposed during its implementation. The Centralization of governmental work in a way that the role of government is limited to identify the collective goals without its participation in the performance.

<sup>251</sup> Gamo P., "Globalization and Growth Prospects in Arab Countries", International Monetary Fund Working Paper No. 97/125, 1997. According to Alonso Gamo, the globalization is the added value on the international trade and financial relations. Plus, the author argues that the globalization was further intensified through the liberalization of economy and technological transition.

See also Salim M., "Globalization and public relations lectures", Cairo University, 2000. According to Ulrich Beck, the Globalization illustrates the collapse of the unity of the State and the solidarity and

### **3- Compliance of necessities of the general fiscal balance with the supply of public goods**

**217.** The effective use of public resources remains the main challenge of governments. It should be noted that several governments are far from this usage; the reason is the absence of the level of incentives that offer the governments to reach organization and effectiveness, by consequence, the governments tend to increase the public money to guarantee a sustainable work, but this method exhausts the processing budget. However, the private sector does fall in such a situation unless there are exception cases like external changes or blurred strategic vision. It is known that the goal of the private sector is to maximize profit<sup>254</sup>. Even the presence of a partnership does not eliminate this rule. Reducing cost and maximizing profits is the first rule in a successful investment. Here comes the role of the government that does not aim to restrict the private sector from realizing profits but rather to make the quantity and quality its essential goal by finding compliance between effectiveness in performance and reasonable costs in a way that fits both private sectors and consumers.

### **4- Impact of international financial institution**

**218.** There are extreme weaknesses in the basic infrastructure of some developing countries. According to the World Bank statistics done in 1994<sup>255</sup>, more than 1.2

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national community in establishing good relations, incentivizing competition and the interference between the State and its representational body, both internally and externally (e.g. international justice or relations).

<sup>252</sup> Originally initiated in the United Kingdom and the United States, the privatization had drastically decreased the direct intervention of the State in the economy and had privileged private sectors in terms of ownership and management of strategic sectors, including public-known sectors such as education and security. This trajectory had encountered a skeptical resistance of union associations and civil society organizations. Indeed, the United Kingdom had reviewed its mechanisms and advanced a less controversial mechanism: the public-private partnership.

<sup>253</sup> The technological renovation first appeared in the 1930s under the supervision of the economist Schumpeter (Joseph Schumpeter was an Austrian political economist- professor at Harvard University). Until the 1970s, this understanding stressed the importance of technology within the management of an organization in the context of economical crisis that largely hit industrial activities and the massive evolution in computer sciences, electronics, biotechnology and energy. The latter depletion led to the limitation of competition amongst organizations as well as a drop in production life-cycle for a couple of years and subsequently, the increase of intensive capital despite the work level and the produced efforts and expenses dedicated for research and innovation.

<sup>254</sup> Asian Development Bank, "Public-Private Partnership Handbook", Asian Development Bank, 2008, p.10.

<sup>255</sup> World Bank, World Development Report, 1994.

billion human beings are deprived of electricity and health care, and more than one billion deprived of drinkable water. According to international financial organizations, the reason for that is the lack of both public and private infrastructure investments. At the same time, on the other part, there is an increase in public utilities costs.

**219.** At the beginning of the 90s, according to the same organization mentioned above, the cost of managing the infrastructure for electricity and railways sectors were 55 billion dollars, so 1% of the gross domestic product of developing countries. This is taken into account in developing countries, in addition, to the apparent shortage in managing the infrastructure and poor quality of the service provided. However, these areas and countries are targeted by development goals. These countries became under the pressure of international financial organizations, such as the World Bank and the IMF to reform economic legislation and regulation for investment to open the way for a partnership between public and private sectors<sup>256</sup>.

## **B- Success criteria of PPP projects**

**220.** This section aims to present the success elements of PPP projects. The success criteria that will be presented below are formulated according to general standard of success criteria of PPP.

**221.** The success of PPP is built on good governance. It falls under the “good governance” standard several criteria, such as effective assessment for the delivery of services and goods, conformity with the management and regulatory framework, the appropriation of projects and relevance of data, and the collected information to make decisions in a way that faces uncertainty and risk. “Good governance” will be defined according to governance international scholars. The latter defines this concept as “the implementation by multiple stakeholders of quality of life improvements through agreed principles and processes of working together”<sup>257</sup>. This definition might have consequences on the role, performance, and objectives of PPP. According to that,

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<sup>256</sup> *ibid.*

<sup>257</sup> Bovaird T., “Public private partnerships: from contested concepts to prevalent practice”, *International review of administrative sciences*, 2004.

PPP's main criterion is not only the efficiency of the process where they produce the outcome but also the main criterion of success remains in the pre-phase of the preparation of taking responsibility for realizing the given outcome<sup>258</sup>.

**222.** There have to be some conditions to effective implementation of PPP in a way that it employs its human, financial, and organizational potential on a basic principle of good governance in partnership. The aim is to reach social and economic goals that are considered important for citizens. It is possible to summarize the conditions for a successful partnership by the existence of a shared and realistic community perception of partnership based on the strengths and weak points of the society and common awareness of the capabilities of the areas in question<sup>259</sup>.

After presenting the reasons behind engaging into PPP and the main criteria that PPP project needs to success in §(1), it is worth to present the potential risks and the concept of privatization in §(2).

## **Paragraph 2: Potential risks of PPP and Privatization**

**223.** Enlightening just the successful factors of PPP's might give an idea that the PPP operation is very simple. However, in practice, it is a huge, complicated operation. It could have challenges and risks through confronting a range of legal and economic variables. PPP and privatization are two buzz terms, which may lead to small rooms of interpretations. Based on that, distinguishing the content of these

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<sup>258</sup> Ibid.

<sup>259</sup> By providing an effective organization that enables the integration of individual concerns with the public interests of the society; by Providing a community based culture supportive for partnerships, which encourages leadership, engagement of citizens in partnership activities with long-term view; by the continuity of partnership policies in which they have the capacity to adapt to the changing circumstances to encourage people that take economic risks to do partnerships; Strong political support on national level with a realistic vision of partnership based on strengths and weakness points in the contracted parties; a detailed analysis of the benefits and feasibility of the project before the contract and after the contract through laying down a good framework for the project; a detailed analysis of technical and financial risks of the project from the two parties; by the existence of public sector willing to accept new innovative ideas and procedures related to the private sector; a detailed contract that includes flexibility to certain changes related to project needs throughout the lifetime of the contract; by an effective and professional monitoring system on the operator of the private sector from the client side; by an effective settings through a clear study of the work area with a clear description for outputs and by a transparent contractual procedures based on effective competition and structure. World Bank Institute, "Public-Private Partnerships- Reference Guide", Version 1.0, 2012, p.11.

terms is essential. Consequently, this paragraph will be divided into two sub-paragraphs. The first one will clarify the main risks that might face any PPP project. In contrast, the second one will illustrate the difference between the terms above. Therefore, at the end of this paragraph, we will try to prove that the PPP's operation has several facets that should be considered.

### **A- Challenges of PPP**

**224.** At the same time, there are some potential risks of PPP where PPP projects are likely to be more costly than the traditional procurement processes such as bidding, development and ongoing costs. Therefore, the government should analyze these costs to justify the high cost, while getting financing from the private sector is much easier. On the other hand, some projects are easier to finance than others, especially when they contain developed technology or when the responsibilities and risks are unambiguous. Other projects might produce local currencies or international currencies, which are considered as constraints<sup>260</sup>.

**225.** Moreover, some projects may face social and political challenges in terms of implementation and performance. That is because some of the public sectors may fear to transfer its workforce to the private sector. There is also a limitation in risk-sharing, noting that the private sector will be careful in taking risks beyond its control, as it will do what is paid and planned for not more than that. That is why the contract should include a specific description of tasks. In all terms, the government will be accountable and responsible before its citizens, of the quality and utility of the public service. Thus, the government should execute its obligations under the PPP agreements and control the private sector's performance<sup>261</sup>.

**226.** To reduce the potential imbalance that may occur from the divergences in the expertise between the public and private sectors. So it is basically to ensure the contract details are clear and simple. The regulatory and legal side is fundamental to

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<sup>260</sup> Bloomfield P., "The challenging Business of long- term Public-Private Partnerships: Reflection on local experience", Public Administration Review, 2006.

<sup>261</sup> Hodge G., and Greve C., "The Challenge of Public-Private Partnerships: Learning from international experience", Edward Elgar Publishing, 2005.

reach a sustainable solution. According to the nature of PPP projects, there is a complexity associated with all phases of implementation, which arise by the difficulty of identifying possible emergencies that may occur during the lifetime of the project, such as changes in government policy, failure by the private operator to implement their obligations, external circumstances, force majeure).

**227.** Therefore, the PPP has obvious advantages for everyone (provide funds and transfer public services to paid services.). However, this does not eliminate the existence of some risks and disadvantages related to partnerships. To understand the disadvantages, we should be aware of the fact that PPP is a new source from several funding sources. The following example will illustrate the above. If the government had to build a school for an amount of X million dollars, it could take the traditional routes of funding through a loan from the banks. In this case, the indebtedness will increase for X million dollars, as well as the current expenses. The other option for the government is to implement the project of the school through PPP. In this case, the government could give the private sector the task of establishing the school with agreed conditions and lease commitment. Here the government is trying to bypass the indebtedness as it builds the school without taking a loan under the assumption that it avoids the burden of borrowing. It should be noted that when looking deeper into this matter, it is found that the burden remains on the government because it is the burden of repayment and not of borrowing. Indeed the government will repay through paying the lease fees that cover the reconstruction expenses in addition to investment revenues requested by the private sector.

<p><b>Issues in selecting private participation</b></p>	<ul style="list-style-type: none"> <li>- Technological features of the sector;</li> <li>- Current status and circumstances of the sector;</li> <li>- Social goals;</li> <li>- Ownership assets with a strategic view;</li> <li>- Legal and managerial capabilities.</li> </ul>
<p><b>Role of the Private sector</b></p>	<ul style="list-style-type: none"> <li>- Familiarize with technology;</li> <li>- Resource mobilization;</li> <li>- Effective implementation;</li> <li>- Communication network</li> </ul>

<b>Role of the public sector</b>	<ul style="list-style-type: none"> <li>- Define PPP scope and limitation;</li> <li>- Controlling performance;</li> <li>- Coordination;</li> <li>- Considering the safeties of the environment;</li> <li>- Strategic planning;</li> <li>- Create a regulatory framework.</li> </ul>
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Table 4: Role of the private and public sector in PPP.

**228.** PPP is usually viewed as heterogeneous components. Indeed, different authors investigated further by highlighting the concerns of a partnership approach to public issues, which is devising the arrangement and mechanisms<sup>262</sup>. This leads to confusing the responsibilities and accountability in the partnership. Furthermore, due to the partnership, both parties might sacrifice some of their sovereignty. It can also be easier to blame the partnership (private sector) rather than the public sector<sup>263</sup>.

**229.** As the term privatization is frequently confused with PPP or is usually considered a consequence of PPP, some could go further and consider it the same as PPP. To this end, we will clarify the term privatization and PPP in the next point (B).

## **B- Privatization and PPP**

**230.** There are a variety of definitions describing and explaining privatization among different countries and legal systems<sup>264</sup>. Some of these definitions are explored. In State-owned enterprises, developing countries, post-socialist countries, and countries in Western Europe, the term privatization<sup>265</sup> refers to the whole or part

<sup>262</sup> See: König, K., and Löffler E., “Accountability Management in Intergovernmental Partnerships”, Paris: OECD, 1999; and Wettenhall R., “Public and Private in the New Public Management (NPM) State: Some Australian Reflections”, Public Administration and Policy, 2001.

<sup>263</sup> Other positions, where partnerships are seen as unwanted, can be identified when a partnership takes an end in it particular area of work; there is a fear from the workers of losing their jobs; politicians fear from loosing control over policy-making and management; service users and citizen fears from becoming a profit making calculus and voluntary organizations and NGOs are hesitant to become service providers because there is a risk that they will lose their independency.

<sup>264</sup> Starr P., “The Meaning of Privatization”, in Kamerman S., and Kahn J., eds., Privatization and the welfare State, Princeton, NJ: Princeton U. Press, 1989.

<sup>265</sup> Privatization is also called “denationalization” and “destatization”.



handover of the enterprise ownership from the government to the private party<sup>266</sup>. Despite the general agreement that privatization represents the sale of government enterprise to the private sector, there is less agreement about the definition of the sale of other government's assets (land, building, etc.)<sup>267</sup>. According to the United States, the term Privatization is known as contracting for public services. However, others disagree with the designation and call the practice outsourcing. The usual practice is found in the private sector as well. Some "competitive sourcing" or "managed competition" calls the competition between the public employees and the private contractor. If the private contractor wins, it is privatization, and some called it "contracting out". While if the public employee wins, it is not privatization, and sometimes it is called "contracting in".

**231.** Financially speaking, privatization indicates the transformation of a company from whose share is listed on the stock exchange to one who is no longer listed because a private actor has bought it. However, when the government is forced to sell its services and to operate in a market environment, it is rather a marketization than privatization.

**232.** Regarding the concept of public-private partnership, it is exceptionally compliant with privatization. In a very general way, this term is defined as arrangements between the government and a private entity to perform a public activity jointly. Despite its vagueness, PPP is a useful nomenclature to avoid the seditious effect of "privatization" on those opposed. From all the definitions above, there is a tendency to capture the essence of privatization definition, which clarifies that privatization is not merely a financial and managerial fact. It has a weight concerning the function and the relationships between private<sup>268</sup> and government institutions. Despite the ambiguity of the boundaries of the term "Private-public Partnership," it is common to refer to them as both public, and private sectors have an important role in privatization. The latter supporters do not reject the role and the

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<sup>266</sup> See: Cour de justice de l'Union européenne, 6 mai 2010, n° C-149/08.

<sup>267</sup> See, Draxler A., "International PPPs in education: New potential or privatizing public goods?", Edward Elgar, 2012, p.43.

<sup>268</sup> Private institutions such as market, voluntary non-profit associations of all kinds.

need of the government because government intervention in the society and economy is necessary<sup>269</sup>.

**233.** The following paragraphs present an analysis and description of how the change is made from relying quasi completely on the government to relying more on the private sector. A modest classification is composed of three methods resulting from privatizing government-run services and government-owned enterprises and assets<sup>270</sup>: delegation, divestment, and displacement.

### **1- The Delegation Method**

**234.** Delegation is a broad privatization strategy, and it is somehow a positive attitude by the government; it is also called “partial privatization”. Delegation is when the government remains responsible and has a sustainable and active role but delegate the production activity or the delivery of service to the private sector. The delegation can be done through contracts, public-private competition, public-private partnerships, franchises, subsidies (vouchers or grants) and mandates. Let us discuss each one of these tools.

**235.** Firstly, the delegation by contracts, as its name said, the government can privatize an activity by contracting with a private institution or organization (non-profit or profit) to achieve the work requested<sup>271</sup>. It is worthwhile to differentiate between the purchase of goods and the purchase of services. Governments buy all sorts of goods, for example, food for schools and hospitals, chairs, trees, etc. here, the purchasing is straightforward, but for other goods, it is more complicated such as computer networks. In contrast, the purchase of services is more complicated. It is used for direct services, such as solid waste collection, street cleaning, and tree

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<sup>269</sup> The typical reasons are to supply risk capital when there is a huge investment in unexplored area; to provide services considered necessary and to fund them if the market alone cannot respond to the society's need, etc.

<sup>270</sup> Savas E., “A Taxonomy of Privatization Strategies” Policy studies Journal, 1990.

<sup>271</sup> In the United States this is the most common way of privatization and most direct form of delegation. As contracting is remarkably complex it is important to consider the analysis of Williamson, an American economist and professor, in his article Markets and Hierarchies states that functions can be done externally through market or internally through vertical hierarchal organization, both acquire costs. Therefore, decision makers should measure the cost of each approach and decide whether to choose to use the market and external contracts or their own hierarchy internal contracts.

maintenance, support services (data processing, training, loan processing, mail services, transportation) and service delivered for third party clients (employment training, adoption programmes, family counseling programmes).

**236.** As the main goal of contracting is competition, “Managed competition” has proven efficiency in performance for public agencies through boosting their workers to compete for contracts with private contractors. However, the term “managed competition” seems to be insufficient, therefore, because all competitions have to be managed, the term “Public-private competition” is preferred.

**237.** A Franchise could be another face of privatization. That means when a government gives a private actor an exclusive right to sell a service to the public in return of a fee (from the private organization). There are two forms of the franchise: one called concession, which involve the usage of the public domain, such as air space, and streets to conduct a commercial activity, such as utilities, and airlines. However, a huge project in infrastructure like airports, bridges, highways are built through Public-Private Partnerships which they are still considered franchise in the form of concession<sup>272</sup>.

**238.** The other form is a lease, where a private lessee has the usage of a government tangible owned property, such as land, and building in order to reach a commercial activity. Lease and concession are lightly differentiated, but some suggest that the difference remains in the capital investment where under a lease they are made by the owner (the government) and under the concession they are made by the franchisee or concession holder.

**239.** More and more infrastructure projects are built under PPP. To this end, PPP refers to an agreement where the government expresses its need for intensive capital, long-life infrastructure. Then the needed activity is built through a complicated combination of government and private financing. A private party, under a long-term

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<sup>272</sup> Savas E., “Privatization and Public-Private Partnerships”, Chatham House publishers, 2000.

contract, franchise, or lease, operates this activity. The classical projects of PPP are bridges, roads, water systems, schools, municipal buildings<sup>273</sup>.

**240.** Regarding the delegation by grants, it is where a private entity carries an activity instead of the government, which provides the private party financial support. What distinguishes grants, from contracts is that there are general requirements, such as building houses, and conducting research. In contract, in a contract, there are specific details and provisions for a particular service. Delegation might also be done by issuing vouchers and by mandate. Indeed, issuing vouchers from the government is the eligible recipient (consumers) to benefit from services like food, education, job training, and health care.

**241.** The mandate is the final form of privatization by delegation, where the government commands requiring private agencies to provide a service at their expense. Finally, grants, mandates, vouchers, franchises, and contracts can be considered forms of privatization only when they offer a lesser, not more significant role to the government<sup>274</sup>.

## **2- The Divestment Method**

**242.** Divestment means abandoning an enterprise or asset. It is similar to the delegation in one aspect, which is the requirement of direct action from the government. However, it differs from delegation in that divestment is a one-time event. Divestment is done by three methods: by sale, by free transfer, and by liquidation<sup>275</sup>.

**243.** It is commonly known that state-owned organizations are being vended, thus, transmitted to the appropriate tender of the marketplace. There are four ways to

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<sup>273</sup> See, Dreyfus J.D., “Le partenariat Public-Privé et le financement de l’opération”, Revue de Droit Immobilier, Editions Dalloz, 2003.

<sup>274</sup> “Privatization and Public-Private Partnerships”, *supra* note 272.

<sup>275</sup> See: Cartier-Bresson A., “La réforme aéroportuaire”, RFDA, 2019, p.595. “[...] Paradoxalement, le gouvernement a préparé le terrain pour les privatizations avec l’affirmation en 2014 d’une « doctrine d’investissement de l’État actionnaire » qui n’est rien d’autre qu’une doctrine de désinvestissement visant à justifier que l’État actionnaire cède ses participations”.

practice the sale operation through selling organization or asset to one purchaser; through issuing and selling shares to the public; through transferring the ownership of the company to the manager or the employees and through transferring the ownership of enterprises to their consumes and clients. Therefore, the government is used to sell buildings, lands, equipment that is no longer needed and usable, and to prevent expansion.

Last but not least, divestment could happen by closing and liquidating a poorly performing government enterprise. Also, selling assets can occur when there is no buyer found. This can be considered as privatization because these assets will be recycled for future enterprises.

### **3- The Displacement Method**

**244.** Displacement is the third aspect of privatization besides divestment and delegation aspects. Unlike the two other privatization methods that require positive and direct action from the government, displacement is an indirect and inactive act that leads government to be displaced completely or gradually by the private sector.

Displacement often happens in four ways: by default, by withdrawal, by voluntary action, and by deregulation, which depends strongly on local proposals and entrepreneurship.

**245.** Displacement by default happened when the public is going toward the private sector, considering it as the appropriate and recognized sector while; the governmental one is not suitable. Also, this feeds in the definition of privatization since it relies more on the private sector and less on the state. From another point of view, wherever the neglected attitude of the public sector increases regarding supplies of goods and services, the larger is the role of the private sector<sup>276</sup>.

**246.** What distinguishes the Withdrawal way from the default method is that the latter is unintended. At the same time, the former is a deliberate withdrawal by restricting the size of a government agency. In contrast, the private sector is expanded in that field. It has another nomenclature, which is “privatization by extinction”.

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<sup>276</sup> For instance, the growth of private transportation and education; where people consider the governmental ones unsatisfactory.

Withdrawal usually goes in parallel with default. Other than that, withdrawal can happen by accommodation (Cooperation between public and private providers). Noting that government withdrawal is not an easy procedure. Then a new political consensus should be realized to fill the gap. However, such consensus may arise for specific services.

**247.** In specific cases, voluntary action may lead to cost displacement where the government encourages such action (programs to adopt, for example, parks for cleaning). This means making voluntary interventions to support those activities and institutions. Another kind of voluntary action is “a voluntary micro collective,” which means the creation of collective units through which there is an arrangement of collective goods between them (cleaning, maintaining streets and parks, street furniture). Such units are preferred in communities that have well-defined boundaries and are consistent in terms of income and culture/origin.

**248.** The main common feature of government and government-owned enterprises is their monopoly status and that the private sector is forbidden from competing. Displacement by deregulation facilitates privatization when it lets the private sector to challenge the monopoly of the government<sup>277</sup>. The outcome of deregulation should be the rise of demand-driven, market-based arrangements to satisfy unmet needs.

#### **4-Caveat about Privatization**

**249.** Critics towards privatization are both practical (pragmatic) and ideological (theoretical). There are practical concerns about all kinds of failure that can face the application of privatization, such as failure of the public officials to specify the dimensions of a service to be bought; underestimate an asset to be divested; fail to manage a competitive sale or procurement. It is important to note that conflict of interest in procurement is very risky for both parties and fails to monitor the provider’s performance, thus failing to penalize poor performance.

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<sup>277</sup> “Government is the biggest single reason for poverty in the third world, and less government is the most effective single remedy” a prominent journal summarizes the situation in developing countries.

From the point of view that goes with privatization, we can say that the latter and public-private partnerships are the reflection of the market principles and contribute together to the strategy of improving public management<sup>278</sup>.

## **Conclusion of chapter II**

**250.** Despite the numerous researches in defining the terminology and typology of PPP, there is no universal definition of this term. The definitions of PPP are conforming to many national and multilateral institutions. It takes into account the concerns of academics in the field of PPP. Even though the PPP concept was strongly contested over 25 years ago, it is now almost omnipresent in the public domain in many countries. However, the idea of knowing which kind of PPP is suitable for which tasks is important to grow public value. Hence, it is important to apply principles of good governance and ensure that these principles are compatible with the context where PPP is working. It was also important to shed light on the kinds, structure of PPP. Indeed, under the PPP, there are several kinds and types, such as lease contracts, management contracts, BOT, BOO and others. Each of these types was studied alone to have a comprehensive approach to each type.

**251.** When studying the PPP, the obvious question that may arise is to wonder about the nature of this kind of contract or arrangements and under what category PPP is classified. Thus, the legal nature of PPP contracts is debatable. This is because the public sector is an essential part of this contract or arrangement, which means it includes administrative law issues. On the other hand, we have a project company that is subject to private law as the other essential part of the contract is the private sector. This is why PPP's nature might be classified under a neutral and specific law between public and private law.

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<sup>278</sup> Savas E., "Privatization in the city: success, failures, lessons", CQ Press, Washington, 2005.

## **Conclusion of title I**

**252.** It was worth to note the emergence of a special notion concerning the classification of kinds of contracts, such as PPP, which are the international administrative contracts. The latter category is called a hybrid nature of this contract. We can say that this is an evolution with two tendencies; one towards the internationalization of public contracts and the other towards the publicization of the international contract. Moreover, the new role of the comparative law and the phenomenon of the rapprochement between the public and the private contracts are factors that had encouraged the positive law to admit the category of international administrative contracts.

**253.** It should be noted that the public-private partnership seeks to expand the horizons of economic activity through cooperation and coordination between them to find suitable solutions to fill the gap in providing services. To this end, there are several motives to enter into a partnership with each sector, knowing that there will be some advantages and disadvantages. After studying the private sector and the public sector as well as their combination, it seems that the concept of public-private partnership is a difficult coupling. However, in further chapters, we will see that this is not a rule; this coupling could be easy and successful.



## **Title II: Legal Framework and Comparative Contexts of PPP**

**254.** In every country, there is a necessity to have a legislative framework to enable establishing PPP. However, some legislative systems cannot support the concept of PPP, especially in terms of transfer of responsibility to the private sector to provide a public service. According to the World Bank<sup>279</sup>, the legislative framework encompasses two different kinds of law: The first one is the law that makes PPP possible. It might be called the enabling law or framework, such as concession laws or PPP law. The second kind encompasses laws that might affect PPP projects, which are many as PPP is large and complex. Examples of laws that might have a significant impact on PPP projects in infrastructure are property laws, environment law, tax law, company law, disputes resolution, and others.

**255.** Nonetheless, the certainty and clarity of a country's legal and regulatory framework are needed for the success of a PPP programme. The existence of a PPP law can help to attract investors through boosting and improving the legal framework applicable to PPP. To this end, it will prevent dependence on general laws, which might not be appropriate to PPP. As known, investors and lenders will pursue comfort that the applicable law to their contracts provides them suitable protection and that disputes can be solved objectively and proficiently.

**256.** In the second title of the first part of this thesis, we will study the legal structure of the public-private partnership and analyze it through focusing on the legal and structural framework of PPP in chapter I. In chapter II, we will focus on selected comparative PPP experiences.

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<sup>279</sup> The World Bank, "The Public Private Infrastructure Advisory Facility", Annual report, Public Private Infrastructure Advisory Facility (PPIAF), 2009.

## **Chapter I: Legal Structure of PPP**

**257.** Several legal aspects of PPP are examined in this chapter that should answer some legal questions, such as why should Syria lay down an attractive PPP legal framework? To this end, the Syrian PPP law enacted in 2016 is examined in detail, showing the main changes that occurred between the draft law dated in 2010 and the law in force in section (I). In section (II) of this chapter, the different fields of application and requirements of PPP in Syria are explained and described by illustrating them through some practical cases in the country.

### **Section I: Building a sound PPP law in Syria**

**258.** The existence of a specific law governing PPP could be a tool to overcome the challenges that may occur when several laws apply to PPP. For instance, there may be a mixture of sector-specific laws or the requirement for project specific laws. The fact that there are different systems for different types of PPP models is not essentially problematic<sup>280</sup>. It should be evident and clear which law will apply to which model with little room for interpretations. In general, a law that is fully dedicated to PPP has the advantage of not relying on the uncertain interpretation of laws regulating infrastructure procurement. Effectively, enacting specific PPP laws has different advantages, such as facilitating the development process in some countries<sup>281</sup>.

**259.** In civil law countries, written laws are the guarantee of certainty and have great importance. Thus, the existence of specific PPP law presents the required components of certainty to the legal framework of PPP<sup>282</sup>. By contrast, England, for example, does not have a specific PPP law. In common law jurisdictions, a clear intention of the contracting parties is generally realized by the presence of a

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<sup>280</sup> Described and explained in part I- title1- chapter1 of this thesis at 33.

<sup>281</sup> For instance, specific laws have been enacted in France (the 17 June 2004 ordinance), South Africa (treasury regulation 16), Poland (the PPP act), etc. on the other part, there are initiatives in some of Mediterranean countries such as Syria, Lebanon, Jordan, while others like Morocco, Tunisia, Algeria do not have PPP specific laws.

<sup>282</sup> Bourgeois F., and Lecerf M., “Quel cadre juridique pour le partenariat secteur public – secteur privé , Groupement d'intérêt public ou groupement d'intérêt économique ?”, JCP, éd. E, 1995.

comprehensive PPP contract written under a legal system, which is lenient and not prescriptive. Another benefit of enacting a specific PPP law is the proof of political will towards the promotion of PPP projects. Furthermore, those laws can advance the PPP project if its contracts contain precise and comprehensive provisions and provide main guidance issues. However, the influences of public authorities in the Mediterranean countries to procure projects are diverse, resulting in a complicated legal framework. In other countries, there is clear authority to procure PPP<sup>283</sup>.

**260.** Therefore, §(1) addresses the legal and regulatory framework of PPP in Syria. This will be done through presenting the historical pace of PPP and see if there was an appropriate milieu for PPP enactment in the country. Then, in §(2) we will focus on the PPP law in force and study its provisions through passing by the draft version of the law in 2010 to compare the provisions of the two versions.

**Paragraph 1:            Legal and regulatory framework**

**261.** Specific parts of the Syrian legal system would profit from focused changes and reforms to expand clearness and time effectiveness in legal procedures. Syria has basics in civil law tradition. It is true that written legislative text exists, but the law is generally untested. The court procedures generally tend to be long, and judges do not have concrete competence in PPP or complex procurement matters. As to dispute resolution mechanisms, as is normal in most PPP; international arbitration is probably a reasonable strategy for settling PPP disputes. In Syria, parties are allowed to refer an issue to international arbitration under their contractual arrangements, and this is probably going to be the situation at least in the medium term.

**262.** Building up the legal structure for PPP aims to upgrade chances of investment achievement. It should be noted that partnerships between the public and the private parties have required various exemptions and explicit endorsement forms that cannot shape the base for a wide and delayed program of infrastructure investment. In this way, impressive improvement in the legal system is required to give satisfactory relief

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<sup>283</sup> European Investment Bank, “Study on PPP legal& Financial Frameworks in the Mediterranean Partner Countries”, Volume 1, May 2011, <https://www.eib.org/attachments/med/ppp-study-volume-1.pdf>.

to private developers and lenders to support their activities.

**263.** The establishment of a new PPP law was required to fortify the PPP's legal system in Syria. This new law addressed key issues, such as tendering methodology, institutional structure, dispute resolution procedures (counting permitting international arbitration), and accessibility of state support. In any case, the correct balance should be struck in the last version of the law to give a level of adaptability and explaining the key perspective of the law to guarantee enforceability concerning the part of the judiciary. The Syrian PPP law will have more chances of achievement if it enables adequate adaptability to solve concrete issues relying on the project<sup>284</sup>.

**264.** It is important to step back in time to show the specific trajectory that led to partnerships between the public and the private sectors. Also, the strategies of the 2000s, that laid the foundation for a fragment of the reconstruction approach, which is shown in Syria today.

#### **A- Roots of PPP law in Syria**

**265.** The basic way to deal with reconstruction in Syria would not be reliable only on specific arrangements, or institutional development, but instead on a methodology that centralizes PPP as the core component through which attracting capital and accomplish reconstruction ends. The foundation for such a methodology was laid preceding the conflict.

**266.** We will briefly pass through two economic approaches: the Social Market Economy and the National Partnership. As explained in chapter I, the Social Market Economy was a technique declared in the Regional Conference in 2005. Social market economy is a name given to liberalizing measures that started before, in the 1986 and the 1990s, and were quickened in the mid-2000s<sup>285</sup>. However, the Syrian approach to deal with liberalization and privatization was not based on the transfer of

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<sup>284</sup> *ibid.*

<sup>285</sup> Abboud S., "From the Social Market Economy to the National Partnership: The conflict elite and public-private partnerships in a post-war Syria", The London School of Economics and Political Science (LSE), January 31<sup>st</sup>, 2019.

assets from the public to the private sector, but rather, through the expansion of markets to encourage the entry of private capital into the economy<sup>286</sup>. In principle, the public sector would keep on cooperate with an expanding private sector made up of the diaspora and national Syrians as well as regional private actors.

**267.** By the late 2000s, the Syrian government had, on a basic level, formally embraced the idea of PPP. The latter is expected to play a role in completing various planned infrastructure projects on a large scale and mitigates a significant part of the state's financial burden. Given Syria's socialist background, this policy was explained, attempting to convince different segments of society that there is no goal to pursue privatization. PPP is being promoted on the premise that the government would resort to the private sector to contribute both in fund and expertise to the delivery of public service using a partnership with the public sector and not through privatization. It is worth noting that the government believed that a legal framework to this effect would be welcomed since the present public procurement law does not give proper mechanisms to perform PPP projects.

**268.** Therefore, the strategies of the 2000s made new components inside the business class and gave new chances to the development and wealth accumulation of the networks<sup>287</sup>. The main ones are the improvements in the last part of the decade when two holding companies were created, “Cham and Souria”. Like the Chambers, they represented an institutionalization of a particular sort of business interest, assets, and power. Interestingly, when the holding companies were begun, they were limited in their exercises, however soon, before the outbreak of the conflict, they were swallowing up significant government contracts, including enormous infrastructure projects. This also prompted the formation of new public-private partnership law to encourage and legalize the procurement system and to benefit these new partnerships inside a developing economic system. Inside a couple of years, power plant ventures

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<sup>286</sup> Along these lines, for instance, banks were not sold off yet rules were loose with the goal that private banks could work in the country. The same could be said in many zones of the economy, from insurance to higher education, that were viably marketised as opposed to privatized.

<sup>287</sup> Haddad B., “Business Networks in Syria: The Political Economy of Authoritarian Resilience book”- 1<sup>st</sup> edition, 2012.

and significant national roadways covering the entirety of Syrian territory were projects that should have been realized through PPP<sup>288</sup>.

**269.** A scope of significant infrastructure projects in the pipeline was expected to be implemented as per PPP models. They included power plant projects, two planned highways running north to south and west to east Syria, the Damascus metro network, air terminals and much more. Indeed, special enactment was authorized to procure the power plant project in “Al-Nasserieh” north of Damascus on a PPP premise. In like manner, it endorses a more prominent role for the private sector in the financing and improving power-related infrastructure projects. Moreover, the government allowed the Ministry of Transport in the late spring of 2010 to enter contracts with the private part for the foundation and operation of new air terminals. It likewise gave its approval for private sector companies to develop and modernize existing air terminals in Syria. Earlier in 2005, a law was pushed through allowing the detachment of ownership and management of publicly owned commercial substances, which resulted in Syria's two principal ports at “Lattakia” and “Tartous” being operated by private international firms<sup>289</sup>.

**270.** The leading significant conference on PPP in Syria was held in late 2009 related to the British-Syrian Society. Its main commitment is to encourage relations at all levels between the United Kingdom and Syria. The conference united a large number of businessmen, investors, lawyers, bankers, consultants, and many more professionals from around the world. The importance of the event was not missed by anyone who attended. They were indeed witnessing what was expected to be a significant milestone in the Syrian economic policy. By late 2010, Syria’s first-ever comprehensive Draft PPP Law was prepared after two years of work undertaken by Syrian and French lawyers. No enactment delay was expected; however, the conflict in the country began in 2011.

**271.** The promulgation of PPP law in 2016 has terminated the social market economy phase. This law represents a way of dealing with reconstruction issue that expands on some principles laid down in the economic strategy before the conflict,

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<sup>288</sup> Ibid.

<sup>289</sup> Syrian Journal, “PPP: the law that never was?” 17 Dec. 2015.

such as privatization components. In that regard, PPP is considered as the center approach to deal with reconstruction. This is not just a result of the conspicuous government financial issues, however part of a pattern in Syria State formation since the 2000s to move and open up spaces for private capital.

## **B- The Syrian PPP law**

**272.** The PPP law has been enacted on 10 January 2016 to prepare the ground for reconstruction and the rehabilitation of infrastructure in coordination with the private sector. The delicate timing of the law issuance is noticeable, as the conflict in Syria was still ongoing. This was very debatable and has created a lot of criticisms and controversial issues. The said law indicated that its provisions applied to the public sector's partnership contracts that are concluded with the private sector for the creation, development, or expansion of a project related to the public interest. Also, it invests it from the private sector alone, or in partnership with another public or private entity through the project company, so that the proceeds of the private sector are essentially the project's proceeds resulting from the investment<sup>290</sup>.

**273.** This law is composed of eighty-three articles, which are divided into two sections. The first section is concerned with definitions of the terms and concepts contained in the purpose and objectives of the law. The second section is concerned with the regulatory and institutional framework for partnership contracts, through the creation of a higher partnership council to approve projects covered by the law<sup>291</sup>. In this context, the law assigned a special committee called the "Proposal Evaluation committee", which exercises its functions in such a way as to ensure a "fair" assessment of the private sector offer.

**274.** The expected output of the law was to provide the appropriate legislative environment that safeguards the wanted balance between the duties of the partners

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<sup>290</sup> The provisions of this law do not in return apply to:

- Contracts that are concluded by the public sector in accordance with the provisions of law No. 51 of 2004 and its amendments.

- The exploration and investment of natural resources like oil.

<sup>291</sup> Ratification, adoption and development of partnership policies and procedures, approval of support grants of any project, grant rights and privileges, supervise the implementation of projects [...]

who have joined their will to the goal of making their projects economically practical so that each partner bears the consequences. What was said about the features of the law is its reliance on traditional legal rules known in the administrative and commercial law, especially the provisions of the companies' law and contract law<sup>292</sup>. Therefore, the law was keen to regulate the partnership with the private sector in such a way that it ensures the partner's effective choice on transparency and competitiveness. Moreover, it identifies the scope of partnership projects and the guarantees of its success.

On the other hand, the legislator sets the institutional and regulatory frameworks for the partnership contracts by establishing a partnership council to approve projects covered by the law and to launching procedures and policies related to the partnership's improvement. Furthermore, it approves granting economic support to any project and granting the rights and privileges and to supervise project implementation that should be compliant with administrative and performance standards.

**275.** In this context, the law assigned a special committee called "appraisal committee", where it exercises its functions in such a way as to ensure a fair assessment of the offer from the private sector. The law permitted to this committee to be assisted by an external monitor in order to preserve independence and confidentiality. Thus, the legislator has determined the phases, procedures, assessment, and criteria of bidders selection followed in receiving offers. The law has also dedicated the third section of the given part to the non-competitive partnership contract conclusion. In contrast, in its next section, it addresses the automatic offers by the private sector without any demand or offer. The fifth section triggers the right to object on the appraisal committee decisions to ensure transparency,

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<sup>292</sup> Law No. 51 of 2004.



## 276. Examples of PPP laws in different countries<sup>293</sup>

Country	PPP specific laws and regulations
<b>Chile</b>	It is the law No. 20410, which is the current concession law; this had modified the original legal tool for PPP in Chile. The law specifies the institutional framework for PPP, tender rules, inspection and oversight requirements and procedures for resolving disputes.
<b>Brazil</b>	<p>In Brazil the legal framework for PPP is different from concessions.</p> <ul style="list-style-type: none"> <li>• The law No. 8987 is the federal Concession law by which it is determined which government body can grant concession. It lays down criteria for selecting bidders, the requested content for concession contract, etc.</li> <li>• The law No. 11079 is the Federal PPP law where PPP is defined according to the Brazilian context. It identifies the scope and the content of PPP contract and programme.</li> </ul>
<b>Colombia</b>	The law No.1508 is the National PPP law, which defined the scope and the principle of the PPP programme in the country in addition to the procedures and institutional framework for PPP. There are some other laws that contribute to the legal framework for PPP such as law No. 80 (norms and guides for government contracting).
<b>France</b>	It is the law No. 559 of 2004 on partnership contracts that sets out the legal and institutional frameworks for PPP in France. In addition, the law No. 735 of 2008 had introduced adjustments to the previous law as well as the codes for subnational governments, general tax, monetary policy and finance in order to optimize the PPP framework in France. Noting that France has also passed sector specific laws to enable PPP in the justice and the public hospital system.
<b>Mexico</b>	The PPP law in 2012 states the principles, scope, institutional and contracting mechanisms, approval procedures, PPP registry and others.
<b>Indonesia</b>	It is a presidential Regulation No.67 of 2005, which lays down the purpose, principles, fundamentals and framework for PPP performance in Indonesia.
<b>Peru</b>	The legislative Decree No.410 of 2015 determines the principles,

<sup>293</sup> The World Bank group- PPP knowledge Lab, PPP law, 2019 <https://pppknowledgelab.org/guide/sections/27-ppp-laws>

	processes, and role of public sector in the evaluation, application and operation of public infrastructure and public service involving private sector incorporation.
<b>Philippines</b>	In Philippines there is the BOT law that enables the use of PPP to improve infrastructure. It defines the rules concerning the bidding process, financing, and government support.
<b>Tanzania</b>	It is the PPP act of 2010 that sets out the responsibilities of the public and private sectors in addition to the functions and authorities of the PPP unit as well as the approval process for PPP.
<b>South Africa</b>	The Public Finance Management Act of 1999 is the enabling legislation for PPP. Accordingly; the National treasury has issued Treasury regulation 16 to the Act, which establishes the rules for the nation's PPP programme.

Table 5: PPP laws in different countries.

**277.** It is worth mentioning and analyzing the important and long preparation of this law by identifying the main points and objectives of the draft law of 2010. Especially that the context and framework of preparing the law of PPP in 2010 were completely different from the context of issuing the same law in 2016, where a hard conflict has occurred in between.

**Paragraph 2: Identification of the draft law and the law in force**

**278.** There is no perfect piece of legislation to be found in the world; nevertheless, the legislation is the primary key to the development of the PPP framework. The strategic step of the law is how it will be implemented and esteemed. However, to have an effective implementation of the legislation, it should be strongly based on transparency and clarity in how promulgates rules and procedures among stakeholders. It is important to have an idea about what provisions circulated in the coulisse of the Syrian PPP law in the period of its preparation and mention the significant improvements and work undertaken in the draft law to make it simple.

**279.** The draft PPP law has been studied and prepared in 2010 by a Syrian expert team in the objective of enabling the private sector to participate in constructing, rebuilding, maintaining, operating the infrastructure, and the essential public utility in order to provide public services. The scope and definition of the law have been

explained clearly so that all PPP engagements should be feasible under the law. However, the recommendation that was addressed to the draft law at that time was to add more clarifications regarding the concerns of investors to enhance certainty and predictability<sup>294</sup>.

#### **A- General reading of the draft law**

**280.** In reading the draft, it could be identified some institutional issues where there might be some lack of clarity regarding the process for pre-feasibility, feasibility, and approval of different PPP engagements, in addition to the link and function of the different committees, bureau, council, and line ministries which might lead investors as well as the government to uncertainty and ambiguity. It should be noted that there was a discussion about the intention to consider the bureau as a center of excellence and expertise, which it seems that in the draft, the role of the bureau is not clear and extended. This is because international best practices demonstrate the advantage of having a robust central PPP unit. The unit has the role of providing expertise and guidance, especially in the early stage of a PPP programme, before any steps from the ministers. Therefore, the bureau should be dedicated to an explicit provision stating an acknowledged expert who will be respected by the different stakeholders and especially by the government<sup>295</sup>.

**281.** To this end, there were some concerns in the draft law about the advisory board, where it stated that the latter would be established as a self-sovereign body, however duplicating the role of the bureau. Advisory boards are normally known to play a useful role, and it is more typical to have the council appoint a panel of experts to advise on an ad-hoc basis. Another point in the institutional issues is developing a nodal PPP unit in each ministry even though the PPP channel will principally be in a few ministries. Moreover, the limited capacity of the public sector is the main reason for establishing a central PPP unit as the center of excellence. It can provide support and lead to PPP programme development across the public sector in Syria.

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<sup>294</sup> Construction week, “Controversial Syrian PPP law imminent say experts”, 6 Mar 2011. <https://www.constructionweekonline.com/article-11270-controversial-syrian-ppp-law-imminent-say-experts>.

<sup>295</sup> Syrian draft of the Public-Private Partnership Law, 2010.

**282.** Regarding procurement issues, the draft law reserved all the range of possible procurement procedures, and “competitive dialogue” and “competitive negotiation” procedure, as well as “negotiated procedure” are still the options for procurement. Keeping limited options for procurement is important because if bidders are discouraged from bidding at the beginning due to transparency or fairness, the government will be affected as they may pay a higher cost for services. What is noticeable in this regard is that the draft law leaves the decision of the choice of the method of procurement to the line ministry, which may lead to inconsistency in the execution of the legislation. In contrast, the right solution might be to accord such decisions to the PPP council based on the recommendations of the project steering committee<sup>296</sup>.

**283.** Concerning fairness and value for money audits, it is important to have an audit once the project is accurately proceeding. However, in the draft law<sup>297</sup>, the fairness audit period is to be performed within 15 days of selecting of the selected bidder. Therefore, it would be more accurate to have a more appropriate period, particularly in projects that involve large construction. Thus, it was unclear what the intended consequences of this audit should be.

**284.** Generally, it could be noticed that the some of the above comments were taken into account in the version in force. However, several provisions in the draft law were deleted and replaced by other more detailed provisions (which will be detailed further in the next point). However, in a critical glimpse, we can see that the draft law that has been discussed and drafted in 2010 was more attractive to private investors and the private sector in general than the law in force now, which is a little bit surprising as, knowing the situation that the country has been through, one could have expected that the law would be more attractive to the private sector than before.

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<sup>296</sup> Ibid.

<sup>297</sup> Article 23 of the draft law.

## **B- Changes and Amendments**

**285.** The comparison between the draft version and the version in force helps to have an idea about the feedback process of the law. Therefore, the differences are divided in negative and positive changes in the PPP law. Before that, there is a general remark on the form of the provisions. The number of articles added in the law in force is remarkable from the first view of the two texts. The draft law contained 44 articles, while the version in force contains 83 articles. Theoretically, the increase in the number of provisions might be understood as clarification and adding more useful details in the law in force. However, practically and substantially, there are some changes that might be considered as increasing confusion in the law.

**286.** The first little change that could be noticed is the definition of PPP. Indeed, in the first article of the law there are new terminologies that were added and defined, such as the expression of “reference vision”. As it is remarkable that the article (presented in the draft version) that was supposed to give a precise definition of how the Syrian legislator had defined the term of PPP was removed and the legislator has instead kept the definition deductible and understood from the general terms of the provisions<sup>298</sup>. Moreover, we can notice that there is a strict condition for the private partner in his right to terminate the contract<sup>299</sup>. In the article that addresses the cases of termination of the contract for other reasons, it is important to shed light on this provision stating that the economic sanctions and other related issues are not considered as “force Majeur” circumstances to terminate the contract if they existed before the conclusion of the contract<sup>300</sup>.

**287.** It is also observed that the law has dedicated several provisions and details to the ownership of assets and the rights special to the project location<sup>301</sup>. We can detect that Article 57 addresses the concerns of risk allocation, giving the private sector the full responsibility to bear the financial burden, which could be a discouraging point for private investors. In general, we can deduce from reading the articles related to the

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<sup>298</sup> It could be considered that the PPP definition has been incorporated in the article 3 of the law, which is entitled the scope of the law.

<sup>299</sup> Article 50 from the law No. 5 of 2016.

<sup>300</sup> Article 51 from the law No. 5 of 2016.

<sup>301</sup> Article 53 to 56 in addition to the article 61 from the law No.5 of 2016.

rights and responsibilities of the private partner and of the procedure of terminating, amending, conceding the contract as well as the rights of acquisition, that the legislator had limited and restricted the attractive provisions for the private sector.

**288.** When talking about the private partner's warranties, we cannot avoid the most important provision for them, which is the dispute resolution. The latter has been changed from the draft law where it has given as the first choice to the parties the right to resort either to the national or international arbitration or to the national laws applicable to the contract. However, the law in force, in its article 78 concerning the dispute resolution, has clearly stated that the first choice is to settle the dispute amicably within 30 days after notification. In case the parties did not reach any settlement, the legislator gave three options: the Syrian administrative judiciary, the internal arbitration, and the external arbitration. Here we can question the wording of "external arbitration". Does it mean international arbitration<sup>302</sup>? The said article also determines that the contract should include one of the options mentioned above; in case it was absent, it would be possible to agree and add the arbitration clause later. In case the parties did not solve the arbitration option, the dispute might be referred to as the Syrian administrative judiciary.

**289.** The criticism was on the dispute resolution in the draft law is that the article only related to arbitration and does not refer to other forms of dispute resolution, such as mediation or an independent expert engineer. What is also not discussed is the enforcement of arbitration awards, which is still the case of the article in the law in force, and whether courts in enforcing them are required to recognize them, in particular foreign arbitral awards. Therefore, in order for this provision to give private investors comfort, the legislator will have to recognize foreign arbitral awards formally<sup>303</sup>.

**290.** It will also be significant to mention the changes or amendments, if available, regarding the PPP contract's contract. There were references to several clauses in the content of the partnership contract in the draft law that covers issues that were not

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<sup>302</sup> Article 78 entitled dispute resolution from the law No.5 of 2016.

<sup>303</sup> The dispute resolution issues and provisions will be explained and analyzed in details in the chapter II of part II-title II at 366.

clear and are permitted in law. That would also be the kind of issues that one could expect to see them covered in a PPP law, such as the right of the private sector to collect end-user fees on its account; rules that apply to employees, right of step-in by lenders and rules that apply to bid bonds.

**291.** On the other hand, the positive changes that were made are that the law in force distinguishes the role and function of PPP different bodies clearly, which was a bit confusing in the draft law. Indeed, it is observed that the partnership council has the most important role and say in PPP procedures and decision, as described in article 7. Noting that in the draft version, there was a lack of clarity, particularly in the division of responsibilities between the executive line ministries, the council, and the bureau, both during the development phase of the project and also in implementation. Thus, what can be deducted from the law that the partnership council has been given a wide range of responsibilities.

**292.** It is worth mentioning that the bureau's reference and establishment were changed from a bureau related to the council of ministers to a bureau related to the planning and international cooperation authority. In all cases, what is very important is to clarify and be able to distinguish the roles and functions of each body related to PPP. There is another slight change regarding the project committee, which is that in the draft law, it can be understood from the text that the committee should be established once there is consent to enlist the project on the partnership projects list. However, in the law in force, the establishment of the committee is not mandatory at all, and its establishment is created when needed.

Moreover, we can expressly observe the difference between the structure and division of the provisions and articles. In the enforced text, we can see that the procedures of contracting and work preparations and offer requests are more detailed and structured than the draft law, which could be counted as a positive point for the law.

## C- Challenges of the Syrian PPP law

**293.** After nearly seven years of debates between supporters and opponents of partnership, the PPP law was issued. In that context, the government had issued a resolution to form a special committee to prepare the legislative, regulatory, and institutional framework for partnerships in Syria. This has shown that the law prepared in cooperation with local and international experts with the support of some international bodies, will deal with the basic legal provisions for the successful implementation of partnerships. Days later, the government announced the partnership strategy for the first time at a public private-partnership conference<sup>304</sup>.

A key institutional challenge for Syria will be to make a well-structured framework of PPP work in practice, as it is untested. It is especially significant to secure and verify financing to empower the technical support and to increase ability inside the key institutions. Specifically, know-how should be improved over those organizations keen on seeking after PPP.

**294.** Experiences with different countries show that careful consideration should be given to project choice and plan. Before going to market, projects must be upheld by solid business cases and itemized documentation. Thus, a comprehensive project configuration will make the procurement procedure smoother and give more prominent clearness to bidders. Transaction guides and technical advisors selected by the procuring authority have a significant task to carry out, and advisers should work with their counsels from a beginning time in the project lifecycle. The current constrained accessibility of funding, of both equity and debt, must be considered in the arranging exercise as the size of each undertaking and the cumulated volumes can essentially expand the risk of not reaching financial close. Moreover, as sovereign credit backing to procuring public elements is probably going to be required, coordination at the focal level, with direct inclusion of the Ministry of Finance, is to be empowered<sup>305</sup>.

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<sup>304</sup> Held by the British-Syrian Association on 30 January 2009.

<sup>305</sup> European Investment Bank, *supra* note 284.



## **1- Controversial issues**

**295.** Partnership law No. 5/2016 was perceived as a new milestone in the level of transition to liberalism that the Syrian Economy is proceeding with. Therefore, many Syrian experts have considered this law as “an economy principle” rather than a mere law regulating the relationship between the public and private sectors. Therefore, a significant divergence in interpreting this law was noticed among Syrian experts. These divergences can be divided into two significant tendencies: the first tendency is that this law is not an option; it is necessary for the Syrian Economy, especially in this period. The second tendency is that this law is not a mere statute; it is a new “economic model” that will increase the gaps and deficiencies in the Syrian Economy.

**296.** The main arguments and justifications of the law remain: it will engage the private sector, and ensure technical and human resources necessary for the economic recovery in light of significant difficulties in securing local government resources, funds, financial loans and external partners. Moreover, the law addresses potential partners inside and abroad the country, especially financial and economic institutions, global companies and, of course, decision-making positions of the world’s political and economic institutions. These actors require that the private sector should be active in many sectors. In other words, reconstruction cannot take place without an international will.

**297.** On the other hand, empowering the private capital from the economic sphere will create a disparity in the distribution of material resources. That means a disparity in social resources, trends in public opinion, and political positioning. It should be noted that there is a legislative environment for the PPP law through the existence of investment laws, and the Syrian Investment agency, but the required development has not taken place.

**298.** Some significant criticisms of the law were addressed about some problematic articles, such as article 1. This article states that the private partner is “any legal person or coalition of local or foreign corporate persons being contracted” sovereign facilities will be open for foreign investment. This could be considered a breach of the essential standards of national sovereignty. Another criticism concerned the duration

of the project, which is open and left to the contractors' agreement<sup>306</sup>. At the same time, compared to other PPP law systems in different countries, there is usually a time limit indicated in the law for any project<sup>307</sup>. A further main criticism is a fear from privatization that the said law. According to some experts, this law opens the way to the privatization<sup>308</sup>.

**299.** On the opposite side, some experts said that partnership could not be considered as privatizing because the funds of the public sector in the projects will eventually return to the state by the end of the contract. Even if some projects could be privatized, they must be transparent manner, so they do not occupy a space in the state's budget. If we want to talk positively, the PPP law has positive points; for instance, the determination of the applicable law to such contracts and partnership projects, namely the Syrian law. The legislator sought to preserve the public sector and its employees when the project concerned a public sector project.

**300.** It is necessary to refer to what this law mentioned about changing economic, financial, and legislative conditions, also defined in the international administrative law jurisprudence as the "legislative and economic stability" of the contract. This is a matter that has long been a major issue for investors in international private contracts. Therefore, the Syrian legislator devoted a special text to address the issue of economic and financial equilibrium, changes in the project and prevent project interruption, delay, or failure in the quality of service provided to the citizen<sup>309</sup>.

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<sup>306</sup> Article 10 paragraph 16, even in article 47, there isn't any limits or time ceilings for these contracts.

<sup>307</sup> For instance, in Morocco which sets a maximum of 30 years for investment in such projects.

<sup>308</sup> The "privatization" is reflected in article 53, which relates to the procedures for transfer of ownership, namely, in its paragraph (a): "Transfer of ownership of the assets to the contracting authority at the end or termination of the contract or its dissolution, unless it prefers Keeping the project company or the private partner" what is risky in this article that the legislator left the possibility of ceding ownership of parts of the public sector' assets to the private sector, which means that the private sector may win ownership of these projects or parts of them at the end of the contract and not only benefit from investment.

<sup>309</sup> Article 75 from the law.

## 2- Constraints to attract investors

**301.** Before the beginning of the conflict in Syria and 2011, the rate of Syrian industries, in general<sup>310</sup>, has exceeded the size of industries in any Middle East countries. The country used to produce and export until the conflict began in March 2011. Consequently, many industries were dismantled, and important plants were withdrawn from Aleppo and Homs. Furthermore, significant facilities and institutions were damaged in the capital of Damascus, which also has played a role in decreasing the Syrian economy and caused colossal human suffering.

**302.** As known, the conflict and the insecurity situation themselves are the main constraints for investors. Moreover, the implication of the conflict and its outcome could be more dangerous and risky than anything else, especially from its economic perspective where war economy might be the case<sup>311</sup>. Indeed, amid of the conflict, different parallel economies have been reshaped even though the faces of corruption and nepotism didn't disappear. Mentioning that the investment in the Syrian market was complex and requested to work with a local partner<sup>312</sup>.

**303.** The war economy, which has been made upon the ruins of the pre-war economy, has somehow made the Syrian business elite more fraudulent than before, as the old structures have been destroyed. Hence, new economic structures had to be reproduced in compliance with the new level of illicit enrichment. Therefore, it is important to take into account that we are not facing a market based on supply and demand in a commercial environment; we might rather face a group of “warlords” who are characterized by dynamism, liquidity and planning to generate more profits<sup>313</sup>.

This is to say that the situation after the conflict will be susceptible and dangerous for investors, and the factors mentioned above are the main constraints for local and foreign investors. However, the government is tending to convince the world that the

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<sup>310</sup> Especially in Aleppo, Homs and Damascus.

<sup>311</sup> A war economy is the organization of a country's production capacity and distribution during a time of conflict.

<sup>312</sup> Shalash M., “Post war Syria's economy: to where?” (In Arabic), Al Jumhuriyah platform, 18 December 2018, <https://www.aljumhuriya.net/ar/content/أين-؟-إلى-الحرب-بعد-ما-سوريا-اقتصاد>.

<sup>313</sup> *ibid*.

time has come to rebuild Syria through an UN-led programme. Surprisingly, the foreign governments are very interested in being a part of the reconstruction process, which could be the most encouraging factor for international investors dedicated to huge investment, especially in infrastructure projects.

**304.** However, the different foreign and Arab participation in conferences on rebuilding Syria is not a sufficient guarantee or proof that there is a serious will to rebuild the country. Though several legislations were issued from 2012, for instance, in 2015, a legislative decree was issued that enables all ministries and institutions inside the country to establish private investment companies. Furthermore, there was the issuance of PPP law, which is the subject of our study. It could be considered that these kinds of legislation are part of the rebuilding strategy and a step towards reconstruction and economic recovery.

**305.** Based on the above, Syria may be on the margin of applying the policy of “accumulation by dispossession”<sup>314</sup>. This is a concept produced from a mixture of Marxism and geography, meant to say that the state as a representative of capitalism will create fictional capital and will make profit as if it created value through displacing “poor” people from their houses and lands under the pretext of development and reconstruction<sup>315</sup>. Therefore, in the fifth year of the conflict, the issuance of this law raised several questions, such as the availability of a stable economic environment that will help the implementation of this law, and that will encourage private partners to enter into effective partnerships with the government? Who are the expected partners in these circumstances? Isn't it a legitimate constraint for private investors and capital that this law might form a secure passage of money laundering of warlords? Moreover, there is a solid infrastructure capable of absorbing a law that is expected to correct the historical imbalance in the private sector's relationship with the state<sup>316</sup>.

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<sup>314</sup> Accumulation by dispossession is a concept presented by the Marxist geographer David Harvey where he defines the neoliberal capitalist policies in many western countries.

<sup>315</sup> According to an urban researcher, this process in the science of architecture is called “Urban class replacement”.

<sup>316</sup> Al Watan Journal, “ Partnership in wartime..”, (in Arabic), 30-01-2016 <http://alwatan.sy/archives/38906>.

**306.** Furthermore, several economic experts clarified that the PPP law was put forward before the conflict. However, after the conflict, it has a different view. Taking into account the existence of a part that has been, legitimately or illegally, enriched from the conflict and its circumstances, such as asset owners, foreign exchange hawkers, black market traders, etc. to this end, the partnership law might open the door for those and their illegitimate capital. For example, when they participate in a partnership project, it cannot be called direct money laundering as this latter is an illegal act; however, in the case of “conflict traders,” they will carry out legitimate activities but with extra profits as a result of exchange rate differences and conflict conditions<sup>317</sup>.

**307.** Concerning to the private sector’s need for economic stability, especially in terms of the exchange rate to enter into partnership projects with the public sector in conflict and post-conflict circumstances, the private sector might not need to have an immediate stability. If the private sector has links with the government and was present in the market during the conflict and worked with governmental and non-governmental bodies, the private sector would not embark on serious investments until they signaled that the conflict is over, especially in infrastructure projects.

**308.** However, there have been criticisms of this law as soon as it was issued, both organizationally and technically. The organizational side was discussed without being presented for public debate or the participation of universities, research centers, and local media in its content before it is transmitted to the people's Assembly (Parliament). From the technical side, it is related to the investment process; the criticisms are made here of the fear that this law will be a step towards privatization, despite the government's assurances that it does not include the transfer of ownership to the private sector because it is state-owned assets. Therefore, it aims to encourage private sector investment in new infrastructure projects<sup>318</sup>. Perhaps the current situation is the concern of this law, especially in stepping down the public sector from its service scene and giving way to his private counterpart. Indeed, in times of crisis,

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<sup>317</sup> “PPP: the law that never was?” *supra* note 290

<sup>318</sup> Especially in the light of the decline in the government's financial resources, the improvement of services to citizens, the use of private sector capabilities and flexibility in the areas of operation, maintenance, marketing, efficiency improvement, cost reduction and increased quick completion of projects, reduction of risks to the public sector and creation of new jobs.

all countries resort, whatever is their economic system (capitalist-socialist), to focus on the public sector and give greater impetus to it to remain the leader of the economy and own the initiative in this regard<sup>319</sup>.

**309.** One of the points of view is that this law is not a step towards privatization. However, it is described as an “unequal marriage” that will generate a “failed family”. Strategic sectors such as electricity, communications should remain in the public sector and do not enter into partnerships with the private sector. The suggestion is that the use of the private sector might be in some of the administrative joints of public sector companies and institutions, for example, a person with a high managerial and professional experience to run and manage some of the losing public companies and turn them into a winner, not to enter into partnership and quota with the private<sup>320</sup>.

**310.** At the end of this section, it can be concluded that there are provisions in the Syrian PPP law that need to be more accurate. One of these provisions is the one dedicated to the PPP fields of application. In section II, we will see how the Syrian legislator has dealt with specifying the fields and requirements of PPP.

## **Section II: Fields of Application and Requirements of PPP in Syria**

**311.** There are two main risks that may occur in the framework of PPP application. The first is the negligence of the public’s rights to the private, which means the attenuation of the value and the shares of the public sector asset when partnering with the private sector. Also, there are the facilities and flexibility in terms of the contract in favor of the private sector, either deliberate or unintentional indulgence, which will be harmful, as if a person offers a gift from people’s money to a private actor. The second case is the severity and exaggeration in setting the conditions for the favor of the public in order to evade responsibility. Those cases impede the completion and conclusion of the contract or conclude incomplete and unclear contracts that need

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<sup>319</sup> *ibid*

<sup>320</sup> Nabolssy H., Syrian Expert, “Partnership law: Unbalanced Marriage, [...]”, 03-01-2016 (in Arabic). <http://syrianexpert.net/?p=8223>.

justifications and interpretations to lead the two parties and the project in much confusion<sup>321</sup>.

**312.** In that context, there is a necessity to study the PPP domains of application stated by the PPP law in §(1), to avoid the risks that may occur in the application as mentioned *supra*. Then, we will see in §(2) the PPP success requirements in Syria.

### **Paragraph 1: PPP domains of application**

**313.** There is a need to reconsider the role and responsibilities of the State and how to manage the national economy. Whereby under the law of PPP and as a result of the economic and social situation that Syria has reached throughout the years of war, the private sector could be a partner in all sectors and projects. This could be done after laying down several criteria that are deduced from development, economic, and social needs and goals in Syria, to identify the project that could be implemented on a partnership basis. However, no single model has a once-contractual formula that could be used and copied on all sectors and projects. Therefore, there is a complex and different form of partnership. Especially before putting forward any project on a partnership basis, the decision of partnership should be clear. This could be achieved into two levels: the initial preparatory phase of the project and the project approval phase<sup>322</sup>.

### **A- Partnerships governance framework**

**314.** According to the different approaches of PPP, many matters arise. Consequently, several gaps have been specified from the management, governance, and policy view of PPP. Therefore, when discussing the scope and extent of application of the PPP concept in general, the debate is whether it is a management or governance tool or a development strategy or a language of the game.

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<sup>321</sup> “Partnership in wartime...” *supra* note 317

<sup>322</sup> In that context also see: Peyrical J., “Marché public: notion”, chapter 1 (folio n. 3005), Feb. 2017.

## **1- A tool of governance or management**

**315.** If PPP is considered as a governance and management tool, there is a need to define first the concept of governance and management. Governance consists of the method, process, and organizations through which people focus their interests and exercise their rights. In contrast, management is the combination of the achievement of results and responsibility and direction of the manager and the goal that should be cheap and efficient.

According to this approach, the tool of governance or management is the popular one defining PPP<sup>323</sup>. This point of view of PPP emphasizes the organizational aspect of the relationship. However, there are some common agreements in most PPP literature; three agreed aspects of organizational arrangements. First, PPP is cooperation between organizations. Second, it is the risk sharing, and third it is the result of the cooperation that could be new and better products and services. Related to the above, we can notice the definition given by the Dutch Public management scholars Van Ham and Koppenjan<sup>324</sup>: “ A cooperation of some sort of durability between the public and private actors in which they jointly develop products and services, and share risks, costs, and resources which are connected with these products”. This definition highlights that cooperation cannot only be short-term contracts and that risk sharing is an essential factor, and they jointly produce something.

## **2- A Tool of financial Arrangements**

**316.** There are some scholars and definitions that consider PPP as a financial tool and stress on the financial relationship of PPP<sup>325</sup>. This approach is reliant on the argument that PPP reduces on the government’s financial pressure concerning public infrastructure by using private finance. These mostly include BOT (Build Operate Transfer), BOO (Build Own Operate), but the most common is BOT. On the other

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<sup>323</sup> Hodge and Greve, 2005 *supra* note 261 at 3

<sup>324</sup> Van Ham H., and Koppenjan J., “Building Public Private Partnerships: Assessing and Managing Risks in Port Development”, *Public Management Review*, Vol. 4, 2001, P. 598.

<sup>325</sup> Campbell definition: “a PPP project generally involves the design, construction, financing and maintenance and in some cases operation of public infrastructure or a public facility by the private sector under a long term contract”, Campbell G., “ Public-Private Partnerships - A developing Market?”, Melbourne, Unpublished, 2001.



side, there are other modes of financial arrangements in PPP where both parties (public and private) are involved in financing<sup>326</sup>. According to the World Bank report, the PPP could be considered as a tool of development Process<sup>327</sup>. There is an emerging idea that PPP is optimizing the benefits of development through collaborations<sup>328</sup>.

### 3- A language of Game

**317.** Group of scholars stated that PPP is a language of game, namely, the game that designs other strategies and purposes. A common example of purpose is Privatization. According to Savas<sup>329</sup>, PPP enables the private organization to get a market share of a public service provision. Therefore, several scholars<sup>330</sup> stated that the term “Public-Private Partnership” is a pejorative term like the terms “contracting out “ and “ Privatization”. Thus the researcher should be careful when analyzing the term PPP.

According to the inter-organizational aspect of PPP, it clarifies the level of risk caused by sharing. In contrast, the development aspect of PPP highlighted resource sharing rather than risk-sharing, which includes sharing expertise, knowledge, finance, and technical support. Another aspect of PPP is the involvement of the private sector, where the latter varies in nature, such as business organizations, NGOs, development institutions, and even the national government.

**318.** However, the main distinctive feature that arises is the purpose. To clarify that, we have to identify the difference between the objective and the purpose of PPP. The objective of PPP is delivering services and producing goods, while its purpose is facilitating the access to these goods and services. From the governance perspective, management and policy design of PPP, gaps are identified in three areas. These area

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<sup>326</sup> Collin S.E., “In the Twilight Zone: A survey of Public Private partnerships in Sweden” Public Productivity & Management Review 1998, P.79, and Collin& Hanson, The propensity, “Persistence and Performance of Public Private Partnerships in Sweden”, Routledge, 2000.

<sup>327</sup> World Bank Group, “World Bank report 1999”, 2000.

<sup>328</sup> Ibid.

<sup>329</sup> “Privatization and Public Private Partnerships”, *supra* note 275.

<sup>330</sup> Ibid. , Such as Savas, Teisman and Klijn, Stern and Harding and Linder.

are the nature, the strength and the existence of inter organizational policy network. PPP is inter-organizational cooperation; thus, the inter-organizational network is essential for PPP. This leads us to several questions; such as what is the nature of inter organizational relationship? How secure is this relationship and whether there is any inter-organizational policy network between different organizations.

## **B- Partnerships operational framework**

**319.** The more complex and difficult part of the PPP concept is not its theoretical side, but it is its operational implementation. Regarding both theoretical and empirical research, there has been developed a three-stage framework to evaluate the PPP contracts<sup>331</sup>. The benefits of this three-stage framework are to discover and analyze the failures that occurred in PPP, and prevent future PPP mistakes. Therefore, before entering the first stage of negotiation, it is important to make a full assessment regarding the partners through adequate preparations, especially for the public partner.

**320.** The first stage is mainly about conducting a negotiation process between the public and private sectors. These negotiations are mainly about property rights on the resulted goods and assets from the partnership. Thus, when the rights are consigned, the partners can start the investment. In the second stage, the bargaining process is used to make the right decisions. This latter will lead either to an agreed cooperative solution or to a non-agreed solution. However, in the third stage, the partners respond by either contracting the partnership or restart the process and returning to the first stage by renegotiation the assignment of property and monitoring rights.

**321.** Therefore, it is important to state and explain the pre-contract stage. PPP is dependent on the commitments resulted from the contract that encompasses the majority of regulations related to the public sector and imposed on the private sector. The public sector should make self-assessment to determine their main objectives in looking for the strengths, and assets of a private partner. However, the incomplete

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<sup>331</sup> Queiroz C., and Martinez A., “The Routledge Companion to Public-Private Partnership”, Routledge, 2013.

theoretical literature led to making the self-assessment and the evaluation of potential partners essential by focusing on the partnership output and how much each partner will contribute their assets. The final objective is to choose the best potential partner that will maximize the PPP' outcomes. Each part of PPP should be studied to know the extent of its effect on a long-term basis. Private companies frequently seek government contracts and make restricted partnerships leaving the public institution passive role. The public institution could seek to find an appropriate partner to complement the public's strengths.

Moreover, the public sector could form a public consortium, through the evaluation process and approaching potential private partners, in which all potential partners are present. Though, the self-assessment process requests a high initial investment effort, the public sector is provided full control of selecting partners. It is important to shed light in more details on the following three stages:

### **1- Negotiating the contract**

**322.** Once the partner is selected, the public and private partners negotiate a contract that allocates shares for each partner by identifying the resources committed by both partners and defining the decision-making power over the investment or production process. Moreover, they will clarify the assignment of the partnership outputs and point out the distribution of these outputs. Consequently, risk allocation will be implicitly assigned<sup>332</sup>.

**323.** Due to the variety of partnership investments, it will be difficult for partners to balance their asset contributions<sup>333</sup>. There have to characterize the partner's assets and investment to capitalize on complementarities among the assets of the public and private partner. On another point, it is essential to specify a governance structure to have a proper evaluation process and to know under what conditions the scope might change. Therefore, the negotiation process involves a set of investments and contributions from each partner in addition to a set of expected outputs. Thus, the

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<sup>332</sup> These risks include: planning risk, design risk, construction and timing risk, operation risk, regulatory risk, financial risk and others.

<sup>333</sup> These assets could be tangible (equipment etc.) or intangible (knowledge asset).

practical assignment of rights in PPP contracts will be based on assessing the type of all partnership output.

## **2- Decision making through bargaining**

**324.** In this stage, the two parties are responsible for managing the partnership through two phases of bargaining. The first phase considers what the partners should decide in case of threats that might happen in case no agreement is reached. In the second phase, threat strategies will be chosen to maximize the partner's payoff while minimizing effort based on rights assignment in the first stage. Therefore, in this stage, the partners will attain a proficient outcome in which the partners will exercise their rights and share their benefits.

## **3- The partnership**

**325.** In this stage, the partners will respond to an unexpected surprise. What is meant by surprise is an event for which there is no explicit possibility that affects the partnership. In this case, the partners have two options to react: the first option is to conclude the partnership, and the second one is to renegotiate the rights designated in the first stage. However, if the partners choose to renegotiate, the balance of bargaining will be different from that of the initial negotiation. If the agreement has been reached, the partners will assess the outputs, and based on it; they will decide whether they will renew the agreement.

### **Paragraph 2: Conditions for successful PPP in Syria**

**326.** The partnership is a complex social issue that involves the economy with politics and law. Therefore, there are several factors of technological, social, demographical, and historical improvements that play an important role that could not be neglected. The partnership is not a mere goal in itself, but a way to realize the goals of the government in the national economic development. Therefore, it needs to have several conditions to be established and be successful in achieving the expected

goals and not be in contradiction with the public interest, such as improving the legal framework<sup>334</sup>.

#### **A- Improving legal framework**

**327.** The general challenge is that the legal procedures in many jurisdictions, including Syria, are insufficient, complicated, and fail to provide investors with sufficient security and incentives in PPP agreements. Investors in a PPP arrangement need predictability and security in legal frameworks, namely, fewer, simpler, and better rules<sup>335</sup>.

**328.** A reasonable system of law and guideline are indispensable for countries. They need a protected, predictable, steady, and commercially oriented system of law and guideline to promote PPP. Therefore; it must be founded on key standards and needs. These standards are protection of rights of investors to discard their property and resources; making enforcement more business sensitive; improving the adequacy of the judiciary in the enforcement of agreements; and developing the legal structure for PPP based on thorough consultation in those regions which most directly affect the beginning of the venture and its activity, including concession, tax, competition, procurement, and company laws.

**329.** PPP enactment should not be prescriptive, but permissive focusing on accomplishing results. At the same time, setting broad parameters in which partners can plan and implement ventures that they concur on. Dense legislation that tries to micromanage the PPP procedure might prevent forthcoming investors. The accentuation ought to be set on adaptability. It likewise implies the expulsion of burdensome legal constraints on investors utilizing public resources. The utilization of assets by private partners can be challenged by reference to provisions in the constitution.

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<sup>334</sup> Syroub R., "PPP scope of application in Syria", Damascus Center for research and studies, 2017.

<sup>335</sup> United Nations Economic Commission for Europe, "Guidebook on Promoting Good Governance in Public Private Partnerships", 2008, p.29.

## 1- Regulatory and legal environment

**330.** A fair political, legal, and administrative framework should be available and clear by which it manages the partnership projects and regulate the relationship. Besides, it ensures the importance of achieving the planned goals, which are to energize the economic cycle and attenuate the financial burden on the public budget. Furthermore, it contributes to the sustainable development process. In that sense, the regulator should clarify the dispute resolution basics that might happen between the partners in the partnership. To this end, coordination among several legislations and policies that are relevant to the partnership projects is indispensable. These policies and partnerships must be verified and committed to the socioeconomic government plan, and to be clarified for the lower levels in order to implement the requested instructions to avoid the partnership obstacles<sup>336</sup>.

**331.** The issuance of PPP law and its executive's instructions hasn't been accompanied by fiscal, banking and insurance laws, which might clarify, and provide financial, taxable, accounting solutions for partnerships projects. The regulatory formwork cannot be separate from the institutional framework; thereby, these regulations and laws are not enough; there have to be institutions able to carry up the burden resulting from the partnership projects. One of the most important steps regarding that is the existence of the special centralized management enriched with several legal, economic, fiscal, management, and technical experts. According to the law No.5 of PPP, the organizational and institutional framework consists on the following: partnership council, which is related to the council of ministry; partnership office, which is related to the body of international planning and cooperation; and establishing a committee related to every project<sup>337</sup>.

**332.** It is noticeable that the said law overlooked the role of the finance ministry, in the mechanism of partnership projects. The preparation of the reference vision of partnership contracts<sup>338</sup> is considered from the main provisions that are requested in

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<sup>336</sup> Daher J., "The paradox of Syria's reconstruction", Carnegie Middle East Center, Sep. 2019

<sup>337</sup> "PPP scope of application in Syria", *supra* note 335

<sup>338</sup> The reference vision, indicated and defined in article 1 of the law, means the basic features of the partnership project that include economic and social assumptions from which it was launched in the feasibility study phase and encompasses investment assessment and main fiscal indicators.

the contract to succeed. This task is assigned to the project consultant. Therefore, an establishment of a partnership unit should be added along with these institutions in each ministry administratively aligned to the minister and technically for the partnership centralized contains economic, financial, administrative and technical cadres to provide feasibility studies, preparation study between the public sector, and the reference vision for any project.

#### **a) Better and simpler laws**

**333.** Better and simpler laws enable investors to plan investment choices and to embrace longer-term perspectives when entering a market. This factor can attract a better quality of investment to PPP. In PPP, better predictable standards have likewise some other more specific preferences, in particular where the need to alleviate risk is such a focal component; consistency can enable lenders to better evaluate the risk. Lenders and investors will search for an anticipated and reliable system for PPP, such as on investment laws, tax, security, corporate law, and agreements, and dispute resolution law in the host country of the project. “Better” additionally implies better quality enactment that explains rights and commitments in PPP forms<sup>339</sup>.

**334.** Governments can standardize contracts to improve productivity in the legal procedures encompassing PPP. This methodology advances a typical comprehension of the main risks, permits consistency of approach and pricing over a range of comparable activities, and decreases the time and expenses of negotiations by empowering all parties concerned to concur a standard methodology without expanded negotiations<sup>340</sup>. Another practice is bundling ventures, that is contracting with only one partner to give a few little scale ventures and gradual partnerships, which enable a partnership to develop by stages rather than in one “big bang”. Every

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<sup>339</sup> The requirements and extent of any PPP law will also depend on the nature of the legal system. Under common law systems, the need for an extensive PPP law is often not nearly as great as in civil code systems. In the UK and Australia for example, PPPs have been successfully implemented with very little PPP law. In civil code systems this is less likely.

<sup>340</sup> In the UK, the Government decided to standardize PFI contracts: The Standardization of PFI Contracts was developed (Standardization of PFI Contracts Version 4 (SoPC4), UK Government, 2007). In the UK all PFI schemes must be SoPC4 compliant. To avoid uncontrolled sector-specific derogations from the model contract, at the time of writing all derogations from SoPC4 require specific prior approval from HM Treasury.

one of these practices uses economies of scale, lower costs to improve incentives for investors<sup>341</sup>.

**335.** Another practice that is turning out to be ordinary is “competitive dialogue”. In complex agreements where a contracting authority isn't objectively ready to characterize the technical methods fit for fulfilling its needs or goals or determine either the legal or financial make up of a project or both, a new form of plan – competitive dialogue – is frequently utilized by governments. It includes working with bidders to create technical and commercial arrangements. While this methodology leads to solutions that overcome the inherently complex nature of PPP, the contracting authority should still work to guarantee decency in the tendering strategies and keep away from discrimination.

#### **b) Developing legal processes**

**336.** Claims in PPP cases can be costly and burdensome. Governments can improve the system wherein commercial disputes are solved. Generally speaking, the investor needs to have certainty that the legal executive will enforce the laws and enforce contracts. Furthermore, the necessary administrative reports (e.g., authorizations and licenses) to implement the PPP venture must be possible. Legal enforcement is likewise a concern in arbitral decisions. Disagreements throughout a PPP contract are frequent. Arbitration ordinarily is performed based on an agreement before or after the dispute emerged. Most countries have a law on commercial arbitration, some of which depend on the UNCITRAL Model Law on International Commercial Arbitration. Regularly, arbitration happens with an institutional arbitration court.

**337.** The concern of the investor is that local courts tend usually to support the local public partner. This concerns firstly the obligation for arbitration to occur before local courts. If the judgment is held outside the country, there is frequently a further concern that the local judiciary will not enforce the decision. Arbitration should be broadly perceived and, for the most part, not obstructed. To improve countries'

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<sup>341</sup> In Australia, bundling sometimes takes the form of grouping hospital construction with ancillary structures and commercial activities, thereby creating enough revenue generation to balance against building and procurement costs.



dealings as to arbitration, governments may wish to familiarize their judiciary with the different international bodies managing international commercial arbitration, similar to the ICC. Moreover, governments should likewise consider, if not effectively done as such, the ratification of the New York Convention on the enforcement of arbitral awards<sup>342</sup>.

**338.** It is essential to train lawyers and judges, especially about lenders' rights, to “step in”. Particularly under concession contracts, lenders ask to be given “step in” rights. This enables the lender to assume control over the project, and if necessary, bring in a substitute concessionaire, to forestall a termination of the concession agreement following the concessionaire's default. The principle motivation behind “stepping in” is to maintain a strategic distance from a collapse of the understanding of the concessionaire and the premise by which the lender is reimbursed. Given this risk to its reimbursement, the lender will probably guarantee that it or a substitute project company selected by it has a chance to fix the default. This mainly permits the private element to halt the government practicing its right to end. In any case, this right can demonstrate controversial to government substances that have not experienced them previously and can lead to various awkward questions related to when the lender can step in, duration of the cure period and so on<sup>343</sup>.

**339.** Good governance additionally implies the act of extending the rule of law to groups who, for different reasons, do not have access to laws to ensure their rights. Legal empowerment explicitly alludes to the socially and economically disadvantaged who need to improve their access to fundamental services. In numerous societies, the impression of the legal and law-enforcement frameworks are not favorable among the economically underestimated communities. This has to be overcome if the benefits from PPP is to reach a broader constituency.

The strategy for legal empowerment is to better inform individuals regarding their privileges to access good services and to empower them to take an interest in decision making, ideally while the project is still in the planning stage. Governments ought to

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<sup>342</sup> Explained in more details in chapter II- title II- Part II at 366.

<sup>343</sup> See Law in Transition, Public-Private Partnership, 2007, p. 46-47.

make systems for early public interest and develop the constituencies who will utilize them. Otherwise, this will end up being a right that is not utilized or implemented<sup>344</sup>.

## **2- Transparency of the partnership projects organizational environment**

**340.** Practically, the existence of regulatory and legal frameworks and institutions might not guarantee the partnership's success. Therefore, transparency is a fundamental factor in achieving success in the partnership. For an effective partnership, there will be a need to expand the participation in the initial negotiations and discussions to the next phases until the parties are reached the phase of decision-making. Thus, there is a need to have a clear and transparent contract by which the duties and rights of the parties are determined<sup>345</sup>. Hence, the contract should include the minimum of provisions to ensure the good running of the project, in addition, to allocate the risks to both parties. Moreover, it has to provide an effective and clear methodology and approach to correct any mistakes and settle it to prevent its recurrence again.

### **a) Socio- economic environment**

**341.** A partnership is an agreement between several parties; it will be evident that each party will try to benefit from it. Indeed, the government tends to optimize its economic and social investment profits. In contrast, the private sector seeks to optimize its part of financial profits. In the meantime, the parties will agree on particular points to achieve the success of the project. On the other side, they will be negotiating other points such as profit sharing, risk allocation. Several of PPP's experiences have confirmed that the main reason for failure in partnerships is the

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<sup>344</sup> A good example of the legal empowerment of individuals that is applicable to PPPs is the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention). This Convention advances the standards of good governance and the standard of law by recognizing that better access to data and expanded public support improve the quality of decision making, while empowering public authorities to be progressively receptive to public requests and concerns. It additionally gives access to a survey system before a court of law or another autonomous and fair body built up by law to individuals from the public whose privileges of access to data and public cooperation have been impeded. The Convention is along these lines not just a environmental understanding, it is additionally a treaty about government responsibility, straightforwardness and responsiveness. The Convention's primary commitment in advancing good governance is in setting standards for government performance that are pertinent all through the UNECE region and beyond.

<sup>345</sup> The contract should be concrete on all the meanings of the provisions in order to avoid disagreements and misunderstanding during project implementation.

parties' conflict of interests in PPP contracts. In fact, a PPP contract is the main document, which characterizes the dimensions of the relevant project. Therefore, this kind of contracts should be different from other contracts due to its size and complex nature<sup>346</sup>.

#### **b) Cultural and public environment**

**342.** The cultural and public climate cannot be separated from the legal, economic, and social frameworks when discussing PPP. The PPP concept is still not well conceived and understood among people. It is still seen as one of the privatization faces. Therefore, it will be beneficial to disseminate the awareness of partnership in a subjective way and clarify its advantages and disadvantages and the reasons to resort to it.

#### **c) Human Resources**

**343.** All the mentioned above factors need to have competent and trained staff economists, which are motivated to innovate, to complete the success of the partnership. The expertise and competence in the government employees are considered an important condition for managing the partnership contracts well. There are four basics principles to achieve the desired goals of the partnership<sup>347</sup>:

Firstly, ensure that the requested services are compliant with the public need and it could be measured and identified, while the second principle is to ensure that the public sector has the sufficient expertise to assess and manage the risks. The third principle is to ensure that the partnership would be able to provide the services in high quality, and lastly ensure a clarity process regarding the accountability and responsibilities.

**344.** It is worth to mention that the corruption is considered as the main constraint that could impede the realization of the mentioned principles. In addition to that, corruption might increase contract expenses but limit transparency during contract conclusion. The corruption harms investments and the institutional grant and banks

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<sup>346</sup> See *infra* chapter II- title I-Part II for more details on PPP contract structure and management.

<sup>347</sup> Murphy T., "The case for Public-Private Partnerships in infrastructure", Canadian Public Administration, Volume 51, No.1, March 2008, P.120.

will doubt financing the projects. Consequently, they will lay down strict conditions to grant these countries due to political, and economical high expenditure<sup>348</sup>. Therefore, the equilibrium is clear: the lack of transparency and non-impartiality of jurisdictions lead to a shortage in institutional financing because of corruption<sup>349</sup>. However, in the contrary case, the transparency and impartiality will strongly attract funding from banks and financing institution.

**345.** In the upcoming sub-paragraph (B), we will display a practical and significant experience in the PPP domain in Syria. This experience was applied in one of the Syrian Free Zones branches called “Adra” region (25 km northwest of the capital Damascus). This is an example to prove the importance and the necessity of the PPP law.

#### **B- Free Zones “Adra Extension” case study**

**346.** “Adra extension” remains the first actual, but informal, practical experience in establishing the principle of partnership between the public and private sectors in Syria. This experience was launched by an individual initiative of the CEO of the General Establishment Free Zones in Syria<sup>350</sup>.

The “Adra” Free Zones is a branch of the eight General Organization of Free Zones in Syria and is located in the city of “Adra”<sup>351</sup>. Two-thirds of the Adra area has been nearly invested. However, the remaining third, with an area of 318 thousand square meters, has not been equipped with required infrastructure and services to invest in and employed by investors interested in investing in free zones.

**347.** According to the governmental method usually adopted in Syria, which require to put that region area into investment, it should have been included in the annual accreditation plan by the ministry of economy to which the Free Zones are administratively linked. Thus, the ministry of finance should secure the necessary

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<sup>348</sup> UNDP, “Anti-corruption movements to improve governance”, New York, USA, 1998, p.9.

<sup>349</sup> International transparency Organization, “Transparency International-Annual Report”, New York, 2010, p.80.

<sup>350</sup> Abdolaziz A., “Adra Extension”, Director of Free Zones, Syria from 2006 to 2008, 2018

<sup>351</sup> Located north - west of Damascus, at a distance of 25 km, and an area of one million square meters and was its creation by the Decree No. 18 of 1971, margin of the decree establishing free zones in Syria and the definition of the Free Zone

cash . It should be noted that it was not possible to implement the Extension and secure the necessary funds at one time, due to the form of the governmental policy investment: “step by step”. The estimated cost of implementing the infrastructure of that area exceeded 450 million Syrian pounds (Nearly US \$ 9 million)<sup>352</sup>. That is not a small figure for a developing country like Syria, especially that there are other branches of the General Organization for Free Zones that need funds for their development .

**348.** We can illustrate this idea by presenting how the government, especially the Adra branch, normally finances the Free zones. In fact, in 2005, it was allocated by the amount of 40 million Syrian pounds (800,000 \$) as a credit that needed to secure cash to be implemented. In other words, the value of the credit cannot be implemented unless it is possible to get funding from the Ministry of Finance. Hence, in 2006 the credit, for Adra branch was 70 million SYP (nearly 1.5 US dollars). Therefore, the average allocated amount per year for the implementation (Adra extension) is a million US dollars per year.

**349.** For the performance of a specific project and according to the approved liquidity required on the part of the Extension, there are some conditions and steps to be done, such as the announcement of tender prices, and the submission of investors of their bids within the conditions prescribed in the law. Each bid should be studied and then approved by the competent authorities. Other procedures take a long time, more than six months, and to a period of implementation that needs to be at least nine months. With a simple discretionary calculation, the project implementation of the extension could have taken between ten years at a minimum to fifteen years’ maximum.

**350.** At that time, the director of the Free Zones in Syria has managed to convince custodianship authorities of the State, ministry of economy and the prime minister, to implement the extension on the investors’ expense and based on the partnership principle between the establishment (public sector) and investors (private sector). So, the establishment provides the land while the investors provide the financing. The

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<sup>352</sup> According to figures published by the General Establishment for Free Zones Management, invest in Syria Free zones magazine No.4, 2007, p.21

project of the Extension could be implemented within one year and start the investment the year after the implementation. In contrast, if the Extension carried out by the traditional way under the normal legal procedures in the government, starting the investment would be after ten years at least . This means getting huge returns for the State, resulting from the lease fee period for partnership investment of approximately ten years at least.

**351.** The investors received considerable profits, as they soon recovered the money they have spent on the Extension and the profits they earned throughout the post-extension period for 15 years. Noting that they know this before through their investment work in the free zones . The investor knows where to invest his money, and the free zones are fertile ground for investors as they work in an “isolated islands”; outside the customs zones. Thus their adventure in financing the Extension was well counted.

**352.** However, due to the absence of a PPP law in Syria at that time, namely, there was a legal vacuum that regulates the partnership process. The first unofficial experience in Syria in the field of partnership took into account the factors that helped the success of the experiment. It generalized it if successful to other sectors and pressure towards the issuance of the law PPP. This experience has been considered a successful experience, from who innovate it. The most important of these criteria is to find the legal document to implement this idea, and then ensure absolute transparency during implementation.

### **1- The legal basis for the first unofficial PPP experience**

**353.** The verbal approvals obtained by the general Director from the Minister of Economy, the Deputy Prime Minister for Economic Affairs, and the Prime Minister at that time do not legally benefit in the event of a dispute or disagreement during the implementation. This is very likely to happen due to the novelty of the idea and the absence of a law regulating it. Therefore, it was necessary to search for a legal reference on which to implement the Extension project.

Therefore, back to laws and regulations concerning Free zones investment, we found some rules organizing this issue:

**354.** According to the Decree No. 40 of 2003 regulating investment in the free zones in Syria, Article 3 thereof, on the paragraph “10” states that: “Free Zones are specialized exclusively in investment, management and development of all branches, free markets, free and special free points, according to the following activities<sup>353</sup> : [...] Any other activity that contributes to the development of trade exchanges and serves the national economy per the Council's estimates . Upon the proposal of the Director, the council may entrust the investment of some of these activities to other parties within the conditions set by it for this purpose.”

Also, Article 4 of the said Decree states: “The Corporation shall have the right, following the necessities of its work, to finance projects for the creation of new free zones and markets and some investment projects in which it shall be established in any manner the Board deems appropriate, whether internal or external or joint financing.”

Thus, according to the articles cited above, the legal texts explicitly cover the PPP operation, as the public partner is the Free Zones, which offer the “land” and the private sector, are local and foreign investors that will finance the project. The legal vehicle by which the implementation of the project occurred is the Decree No.40 of 2003 regulating investments within the Syrian Free zones, especially articles three and four. Article 3 states that all kind of investment that contribute to the development of the national economy and based on the proposal of the director general is permitted. Moreover, article 4 of the same Decree expressly announce the possibility to create new branches of Free Zones financed from a private party or

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<sup>353</sup> “1- Commercial activity and free markets;

2- Industrial activity

3- Banking activity .

4- Hotel activity and restaurant;

5- Cities and media centers;

6- Electronic commerce and information;

7- Commercial and shipping offices;

8- Health activity [...];

9- Service activity in all its kinds;”

jointly with a public party depending on the board decision. This article could have been considered as an embryo of the PPP law.

## **2- Implementation Mechanisms of the “Extension”**

**355.** The following stage was to prepare the organizational plan and design of the project by the engineering department in the General Establishment for Free Zones to be implemented based on bids requested for public tender. According to the board director’s decision, the main condition of the tender was to implement the Extension on the investor 's funding depending on the partnership principle. This was based on the Economic Institutions Law No. 35 and the Decree regulating investment in the Free Zones No. 40-2003 . In deed the approval of the Board of Directors on the proposal was obtained and the ground fields<sup>354</sup> distribution procedures on the subscribers initiated. In addition, an implementation contract was organized between one of the investors in the Free Zones (hereinafter referred as Contractor) and the project subscribed investors on the Extension (hereinafter referred as Subscribers).

### **a) Distribution of fields to subscribers**

**356.** The first step in the implementation of the Extension was the distribution of fields to subscribers . After drawing the scheme of the divisions on the sketch, the ground field is a piece of Extension with an area of 1000 square meters. The general plan of expansion consists of 192 ground fields designed and organized in addition to the roads among them. All these ground pieces are equal, but there are better grounds fields than others, in terms of their location within the general Extension plan.

For example, the one located on a corner with two interfaces at a crossroads is better, in terms of commercial value than the one between two grounds fields with a single interface, and according to the proximity of the ground field to the service centers. In such a case, all subscribers want to have a privileged position; otherwise, they accuse the administration of bias or even to be in conspiracy with some of the investors. Therefore, the principle of absolute transparency in distribution must be achieved fairly to avoid any distortion in the distribution and to fill the gaps or accusations that could be made to the management .

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<sup>354</sup> The ground field is about a piece of expansion with an area of 1000 square meters.



**357.** The best way to achieve absolute transparency and justice in distribution was to resort to the distribution of grounds fields by lot and by the presence of media from journalists and official television filming the process of lots and distribution. Indeed, what happened is that the administration brought two envelopes with inside one of them the names of subscribers and the second one the numbers of ground fields. Then, a paper from the envelope of the subscribers' names was withdrawn and read to the open audience in the hall. Then the one selected of the subscribers did, at his turn, withdraw another paper from the other envelope that contains the numbers of the ground fields and announce in front of the attendance the number of his ground field. By doing that way, the competition between the Subscribers on the grounds fields with important locations was canceled and replaced with a fair distribution that included transparency in front of the media and did not leave any room for criticism.

**b) Selection of the contractor implementing the Extension project**

**358.** The contractor's choice is also very important because most subscribers are businessmen, so they find themselves competent to implement the Extension in terms of infrastructure, which does not require many technical works such as electro-mechanical. However, most of its work is paving roads, sewage networks and switching the soil of the ground field to the hardest soil, and so on.

**359.** Therefore, the process of selecting the contractor must also be in line and in agreement between subscribers. On the other hand, it must have a mechanism to monitor and follow up on the ground's field investors and management . The best option was the consultation and mutual consent between the administration and the investors. They agreed that one of the investors in the free zones was actually chosen to implement the Extension project .It was necessary to organize a contract between the parties and determine the mechanism for resolving disputes, in case it occurred and to the formation of a follow-up, committee to oversee the implementation of the Extension.

### c) Organization of the execution contract

**360.** The contract for the implementation of the Extension was arranged between the implementing investor (the contractor) and the duly subscribed investors . Given the ambiguity surrounding the nature of the contract whether it is an administrative contract or not, as it regulates a public facility under the supervision of the General Establishment for Free Zones, it might be subject to the internal administrative law, which is regulated in this area by the General Contracts Act. Therefore, subject to the resolution of disputes between the parties and subject to the manner prescribed by the decree No. 40 / 2003 in the above - mentioned Article 78 thereof:

“If a dispute arose between the establishment, on the one hand and the investors or depositors on the other hand, it can solve this conflict by one of the following methods:

- a- Settlement procedure approved by the Council .
- b- Arbitration .
- c- Recourse to the competent Syrian judiciary.”

**361.** In case the contract is considered as administrative, it will be subject to Law No. 51 of 2004 concerning the system of contracts for public bodies : Article no. 66-a stated “Administrative Judiciary in the Syrian Arab Republic is the competent reference to decide on any dispute arising from the contract.

b- It may be provided to resort to arbitration in the booklets of conditions for the contract in accordance with principles in place before the administrative judiciary, and constitute the arbitration jury headed by an adviser to the State Council designated by the President of the State Council and two members; one of them is chosen from one public entity, and the contractor chooses the other member.

c- It can be provided for, in external contracts, with the consent of the competent minister in particular on a special arbitration entity contrary to the provisions of paragraphs (a) and (b)<sup>355</sup>. In fact, the arbitration stated in this article constitutes a

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<sup>355</sup> Article 67 also from the same law, states that the Syrian Arab legislation is the only reference in all matters relating to the validity of the contract and the interpretation of its provisions and their application in every dispute arising as a result of its implementation .

minor step to accept the concept of internal arbitration. It is just a beginning in a legal milieu adopting the intern courts litigation; however, this beginning will open the door for external arbitration in PPP dispute resolution.

**362.** It might also be subject to the private law as it is considered a private-private contract and subject to the arbitration clause in the contract. The parties agreed to arbitrate one sole arbitrator. They agreed that the Director-General of the establishment at that time would represent him. Moreover, the qualification of the contract here between administrative and private law will result in different consequences resolving potential disputes and their implications.

**363.** The administration's point of view is that the contract is private and is subject to private law because it has not been subject to the administrative contract procedures stipulated in Law 51 of 2004 governing contracts of public bodies. It should be noted, again, that the implementation of the “Extension” project was funded by the investors and not at the expense of the State and the principle of partnership is not to submit to routine procedures but to the speed of implementation which requires exceeding and shortened those procedures as much as possible to gain time, which is the most important factor in success and profit calculation.

#### **d) Forming a committee to follow up the implementation**

**364.** As mentioned earlier, the most important element for partnership's success is transparency in the procedures' implementation to gain the trust of the investors (the private sector) in the management of the Establishment of the Free Zones (public sector) under the risk of failure that is not in the interest of anyone . Therefore, subscribed investors should have been involved in supervising the implementation and approving the implementation statements step by step. Thus they share with the management the implementation risks and bear the results together .It should be noted that the most important characteristic of partnership contracts is the sharing of risks between the public and private sectors.

**365.** Indeed, a supervision committee was formed and composed of five members, three experts of the private sector, including engineers and two engineers from the administration, one is Head of the Technical Directorate of the Establishment and Deputy Director General of the second engineer is the resident engineer of the Extension project. The implementation mechanism of the project was going as follows :The performing contractor will present the achieved work step by step to the Resident Engineer for approval. Then, the other three members of the Committee representing the subscribers will share it. After that, the work statement list shall be submitted to the Deputy Executive Director, the Head of the Technical Department, and a member of the said committee, for signature after being audited by the Financial Directorate. Over financial auditing for approval, signature, and directing the financial directorate of the exchange value of the disclosure and retention of %5 of its value until project is completed and handed over assets according to applicable laws and regulations.

### **3- Inauguration of the “Extension” project**

**366.** The usual routine and obstacles from several sides in several areas, namely, the fear from modernity and the unknown, made it difficult to convince others, and especially the public workers, the principle of partnership between the public and private sectors and how it can work outside the circle of governmental boundaries and restrictions. However, the Extension was achieved within a considerable timeframe of about ten months (what should have been done in at least ten years, was implemented in ten months).<sup>356</sup>

**367.** The “Extension” inauguration has started by displaying a documentary about the project in the context of the experience of the free zones in Syria. Besides, several speeches of those responsible for the implementation of the project :“... the free zones play an important role in the development of the national economy through its

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<sup>356</sup> In September 21, 2008 and sponsored by the President of the Syrian Republic the expansion project was launched, where the inauguration ceremony was attended by ministers of: financial and local administration, environment, economy, trade and the Secretary of the party branch in the province of Damascus ,the Governor of Damascus and the governor of Damascus province, and Director General Customs, and a crowd of investors and invitees. As it has also put the 190 ground fields serviced by infrastructure in the expansion into investment on 16 November 2008.

essential role in job creation and absorption of unemployment from the market, it also contributes to the return of expatriates to their country to contribute to the process of construction and development by providing them with distinctive services and create promising investment opportunities to set up their projects within the free zones instead of the country of expatriates and competitive advantages”<sup>357</sup>.

**368.** One of the investors who spoke on behalf of the other investors, Engineer Mustafa Al-Khatib praised the idea of partnership by saying : “... We offer this project to be a building block in the economy of this country. Through which we seek to providing a unique model in the production of a new investment reality that contributes to provide possible support for the national economy, the project was completed in record time with high technical specifications through a creative and innovative idea. We have established the principle of partnership between the public and private sectors”<sup>358</sup>.

**369.** The Director of the Free Zones pointed out that the participation of the private sector in the extension of Adra area<sup>359</sup> was in fact within the framework of speeding

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<sup>357</sup> AbdolAziz A., *supra* note 351

<sup>358</sup> The investor Mustafa Khatib added that “This project launch represents the first investment born of its kind in the Arab world in terms of the application of partnership principle between the public and private sectors, the project provides the homeland and the citizen 's interest through activation of the movement of capital from home and abroad, and create as much as possible job opportunities and it opens up broad prospects”. Moreover, an interview with Dr. AbdolAziz was made about the idea of the project where he says : “expansion " Adra " is a land that has been allocated from the state in favor of the free zone for several years, and after fencing it remained neglected and did not put in the investment, until public administration noticed that the ground fields waiver between investors costs large sums of up to ten million pounds per exchange, and based on commercial and economic feasibility, the management discussed the subject with investors and were agreed to complete the expansion so that the investor pay the amount of two million pounds for the service of the infrastructure of a single exchange for fifteen years”. And about the benefits offered by the new expansion and future projects of the organization, he added : “ It can be said that the project is the application of the principle of PPPs as a partnership formula , rather than the completion of the project within / 10 / years after we were able to provide material liquidity during the completion of the project within 10 months, in addition to saving about / 700 / million pounds, with an annual profit of up to three million dollars, and the investor can within one year recover what he paid”.

<sup>359</sup> The project in number:

- The area of the expansion project of the free zone is 18 hectares.
- The infrastructure of the project was implemented at the expense of 190 investors .
- The total cost is 350 million Syrian Pounds with a period of time not exceeding one year .
- The project comprises 190 divided area of each divided 1000 m<sup>3</sup>

up the implementation, as the public sector alone in this experiment would have been subject to long routine operations spanning several years such as allocating credit and securing necessary cash by the ministry of finance budget and tender announcement. He continues by describing the experience of cooperation between the public and private sectors that it has positively contributed to the implementation of the Extension during the ten months and with extreme precision and high coordination because the implementation was at once and not in stages. Therefore, the expected investment revenue for the expansion was \$ 3 million a year, which means the Establishment gained time 15 years in advance and earned \$ 45 million in addition to that, saving infrastructure costs. Thus, the first unique experience in cooperation between the public and private sectors has been successfully established<sup>360</sup>.

**370.** What we have presented above is an early experience of implementing the principle of public-private partnership in Syria. However, it remains the result of an individual private initiative of one of the executive directors. They believed that partnership is the wheel of development and the rapid economic development of the society. The experience has proved on the ground remarkable success. What is accomplished in years can be accomplished in months, thus doubling inputs and reducing the time that is the most important element of production. However, this requires that there is clarity in vision and accuracy in design and implementation with transparency and strong will.

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- The project includes 11 electrical conversion centers .
  - Road network with a width of 20 m and a length of more than 4 km .

<sup>360</sup> In a statement in the magazine “the revolution”, Dr. Amer Hosni Lutfi, Minister of Economy and Trade, said that “what we saw today in the expansion of Adra Free Zones is very important as it refers to several points. First, it turns out that there is a huge investment demand on the free zones, especially in “Adra” Free Zone, which necessitated the government to seriously consider the process of expansion and when the decision was taken to expand it turned out that this needs to allocate large allocations amounting to hundreds of millions and this needs several years to come to accomplish this [...]” He added: “From here , we can conclude that the partnership process’ is fruitful in cooperation between the public and private sectors” and noted Dr. Lutfi that he cannot hide the great admiration that this style has left in the government “[...] The government is considering it as a positive step and confirms that the pursuit of private interests, if honest, the results will be absolutely positive and it depends on the availability of an important element which is the presence of investment demand in this free zone[...]”.

There is no doubt that this experience has contributed to the spread of the partnership's culture among people, especially economic experts. This made a kind of informal lobbying pressure on the government to initiate to think about the legalization of the idea and activated it through legislation and regulations. However, it was not until 2016 that the Syrian PPP Law No. 5/2016 was issued.

## **Conclusion of chapter I**

**371.** The Syrian PPP law No.5 was issued in 2016 to correct the historical relationship with the private sector and enhance the investment environment in Syria, especially in the post-conflict reconstruction phase. It is worth mentioning that the PPP law could be considered as an achievement for the Syrian legislation due to its context and exceptional time. However, its application and implementation require minimum conditions of stability in a macroeconomic environment, such as fixing the exchange rate.

**372.** From a legal perspective, several points are important to mention concerning the PPP law No.5/2016. In that context, this chapter examined the provisions of the said law and compared it with its draft that was written six years before its issuance. Hence, the benefits and challenges of this law are noticed. Given the circumstances of the war, the issuance of the law in 2016 did not, in principle, generate motivation for investors to come to Syria for investing as happened in 2009 and 2010. Therefore, the implication of this law is crucial, as it should provide strong protection and incentives for the investors in the provisions of the law. The major aim of this law is to attract domestic and foreign investment to the country. At the same time, the major fear from this law in Syria was a misconception between PPP and privatization because the latter is a sensitive issue in a country that has based its economic policies on socialist principles for more than half a century.

## **Chapter II: PPP experiences in the international arena**

**373.** Public-private partnerships are contextual since they differ in scope, inclusion, aims, and structure. These elements rely upon several mechanisms, namely the private sector circumstances in one country, the level of a region's monetary improvement, social settings, the regulatory framework, and the effectiveness of governance. The variety of experiences with PPP over the world has produced strategy and policy issues about empowering conditions, legal settings, organizational and administrative structures, financing systems, scope and coverage of services<sup>361</sup>. Hence, presenting these issues may help Syria to benefit from these experiences to conduct effective PPP projects.

**374.** It is important to pass over several international relevant PPP experiences to have an overall comparison study showing the considerable divergences and similarities of PPP laws. This chapter will trigger the PPP experiences in the United Kingdom, France, China, and the United Arab Emirates, where the comparable findings of these experiences will be exposed in a comparable table with the PPP law and expertise in Syria. Therefore, section (I) addresses the comparative contexts of PPP in Europe, while section (II) presents the comparative contexts of PPP in Asia.

### **Section I: Comparative Contexts of PPP in Europe**

**375.** The complicated and heterogeneous embracing of PPP in European countries has prompted the improvement of an extensive number of variations of this legally binding arrangement. Therefore, a holistic scientific classification is, in this manner complex to figure it out. PPP is not expressly stated by European law but are grounded on general standard stated by EC Treaty, such as on optional enactment, namely secondary legislation. These general standards state that "all agreements whereby a public body grants a work including an economic activity to a third party, regardless of whether covered by optional enactment or not, are dependent upon the

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<sup>361</sup> Hammami M., and Ruhashyankiko J., and Yehoue E., "Determinants of Public Private partnerships in Infrastructure", IMF Working paper, April 2006.



general standards on the freedom of establishment and the freedom to supply services”<sup>362</sup>.

**376.** As an outcome, PPP agreements need to conform to the necessities of transparency, equivalent treatment, proportionality, and mutual recognition. These core values set an adaptable system for the advancement of public-private collaboration plans and various methods for control by the public party<sup>363</sup>. Therefore, PPP made for contracts that are qualified, as "public agreements" under the last Directives must consent to their provisions. Then again, "works concessions" are covered distinctly by a couple of provisions of secondary legislation, while "service concessions" are excluded by the "public agreements" Directives.<sup>364</sup> The Green Paper of 2004 on PPP<sup>365</sup> further explains the PPP implementation as indicated by EC optional law regarding public procurement and concessions. The latter sets up a first expansive grouping of existing agreements: institutional PPP and contractual PPP (explained in the section presenting the PPP types, chapter II of Part I).

**377.** Therefore, this section will display two important experiences in Europe. The §(1) studies the United Kingdom PPP’s approach, while the §(2) analyzes the PPP experience in France.

### **Paragraph 1: The United Kingdom’s PPP approach**

**378.** The UK has historically been the biggest market for PPP around the world. However, inside the UK, PPP has been utilized in different manners and at various degrees of intensity.

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<sup>362</sup> Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts; Commission interpretative communication on concessions under Community law, OJ C 121 , 29/04/2000 p. 2-13.

<sup>363</sup> DG Internal Policies of the Union- Directorate A- Economic and Scientific Policy, “Public-Private Partnerships models and Trends in the European Union”, 2006.

<sup>364</sup> For further details, European Commission, Directorate-General Regional Policy, Resource book on PPP case studies, June 2004, p.12.

<sup>365</sup> European Commission, Green Paper on public-private partnerships and Community law on public contracts and concessions, Brussels, 2004.

## **A- An overview of PPP in the UK**

**379.** PPP could be seen as infrastructure delivery models based on joint working and convened risk allocation between existing parties. In principle, these models operate on the long run, with the UK's Private Finance Initiative (PFI) structure regularly existing over a concession time of 25 to 30 years. There are numerous types of PPP, from private contracting as a component of a state business through concession-based PPP to regulated private sector entities. However, in 2018 the Chancellor of the Exchequer stated that PFI would never again be utilized to deliver infrastructure. This declaration did not influence existing projects procured under these models. In that context this paragraph focuses on the predominant PFI/PF2 models.

### **1- Background of PPP history**

**380.** The United Kingdom is considered one of the first countries to perform partnership contracts. Contrary to popular belief, the PPP policy in the UK is not considered as a tool to attenuate the role or authority of the government in the economy. It is considered as an alternative to the privatization event occurred previously. The government of John Major at that time was the first to officially introduce, in 1992, a partnership between the two sectors. The PFI (the term PPP was not used in the UK until late 1990s) was in force since the signature of the contract concerning the establishment of the Queen Elizabeth the second bridge in 1987, where it came within the reform context initiated by Margaret Thatcher to enhance the competition between both sectors in providing services and public utilities<sup>366</sup>.

In fact, the UK has a long history of providing public services through the private sector with various private arrangement models. The UK model has developed a complex parity of public and private delivery with public and private financing<sup>367</sup>.

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<sup>366</sup> Marty F., Voisin A., and Trosa S., “Les partenariats public-privé”, Éditions La Découverte, Paris, 2006, p.8.

<sup>367</sup> Sombra T., and Moreira T., “the public-private partnership law review”, fifth edition, 2019, p. 141.

**381.** Post the worldwide economic crisis by 2008; the value and number of PFI projects fell to their lowest levels in ten years. However, it followed a halfway bounce back in 2009 until a small value increment in the year of 2016. The utilization of PFI has likewise been intensely affected by changing political atmosphere. Moreover, a gradual policy spotlight has been a prerequisite for new investment in economic (rather than social) infrastructure – especially power generation, transport, and broadband – where the significant exercises are in many cases already in the private sector.

#### **a) PFI procedure and concept**

**382.** PFI was a method for transferring capitals from private sector into sectors that were not considered appropriate for privatization. PFI's unique motivation was that the latter operation would enable more capital interest amongst public services, and deal with a historic lack of capital investment<sup>368</sup>. The subsequent strategy would, in general, center on PFI creating preferable value for money over the public provision of infrastructure.

**383.** The PFI procedure is moderately simple. After getting authorization from the treasury, the local authority or public body issues a tender to the private part for the particular project. Risk evaluation is directed on each bid by utilizing a public sector comparator. This assessment prompts an agreement that frames a partnership where the private partner funds, constructs, and deals a facility, such as a school or emergency clinic, in return for a long term contract (25 years or more) whereby the government invests in paying a yearly charge during the life of the contract to use the facility.

**384.** The scope and size of PFI contracts vary considerably<sup>369</sup>, even though the labor party had been distrustful of PFI for some time. The party came to find value in this model since it hypothetically gave the likelihood of financing significant public sector projects without raising income tax or public borrowing. In that context, the HM Treasury has defined PFI projects as PPP in which the private sector would be in charge for constructing project's assets, such as building and increasing the needed

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<sup>368</sup> HM Treasury, 'PFI: Strengthening Long Term Partnerships', March 2006.

<sup>369</sup> From 100,000 pound to 4 pound billion such as the Channel Tunnel rail link.

funding, often on a project finance basis. As a result, the private sector has created extreme benefits without taking a risk, which has made the present government downsized. Also, the ultra-low government-borrowing rate, combined with decreased long-term bank debt accessibility, has expelled some portion of the legislature's business motivator to utilize PFI/PPP as a delivery model. These changes prompted reforms tending to some PFI/PPP criticisms, with government's more prominent accentuation on efficiency, transparency, and risk-sharing<sup>370</sup>.

**385.** Numerous companies taking part in UK PFI/PPP projects are signatories to the voluntary code of conduct<sup>371</sup> that applies to each PPP signatory party. It sets out responsibilities from both public and private sector parties in connection to their constructive commitment and adaptability and improves their projects' operational productivity. The Code of Conduct plans to reflect best practice and should be reviewed in detail by new bidders hoping to enter the sector.

#### **b) A new approach to PFI: PF2**

**386.** In 2012, the UK treasury issued the updated PFI model, called PF2<sup>372</sup>. Despite previous proposals from inside the government that the PFI model may be rejected, it was left broadly intact but with some significant changes. The PF2 model emphasized transparency, efficiency, and guarantee that projects provide value for money, and energized alternative sources of institutional capital<sup>373</sup>.

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<sup>370</sup> Simmons & Simmons LLP, "Public private partnerships in the United Kingdom", United Kingdom, 26 March 2019.

<sup>371</sup> The Code of Conduct for Operational PFI/PPP Contracts, 2013

<sup>372</sup> HM Treasury, "A new approach to public private partnerships", Dec. 2012.

<sup>373</sup> Crown Commercial Service, "Lean sourcing: guidance for public sector buyers", 29 June 2015. Examples of main changes: Private sector equity return data will be published. A "project approvals tracker" will be accessible on the government's site, demonstrating the status of each phase in the government endorsements process (counting pre-procurement). Divisions with a PF2 pipeline are urged to set up a focal procurement unit. "Soft" services, for example, cleaning and providing food will be expelled from PF2 to concentrate the contractor on provision of the asset and long-term maintenance. Underspend on foreseen life cycle expenses are to be shared similarly among public and private sectors. The distribution of certain unmanageable risks to the private sector, for example, unexpected changes in law and site contamination, will stop.

## **2- Regional variations**

**387.** The UK Parliament has delegated certain powers to the parliaments and assemblies of Scotland, Wales, and Northern Ireland. Also, the system of law applied in Scotland and somewhat in Northern Ireland is different from that in England and Wales. Therefore, there are varieties for PPP in those regions. For example, the Scottish government has adjusted the structure of Scottish PPP through replacing the UK PFI model by the Non-Profit Distributing (NPD) model<sup>374</sup>. Nonetheless, a new EU guidance<sup>375</sup> on the EU rules application<sup>376</sup> to the accounting treatment of PPP proposes that there is a need to adjust the NPD model if the project is permitted to remain out of the public sector net debt balance sheet<sup>377</sup>.

## **3- The UK's withdrawal from the EU: consequences for PFI**

**388.** The most significant event in the UK in 2016 was the referendum in favor for the UK leaving the EU, known as “Brexit”. In legal terms, this has no direct impact. The UK was required to give notice of its intention to leave the EU<sup>378</sup> before the end of March 2017. However, the UK remained a Member State of the EU with all its current rights and commitments during the notice time frame, which is set at two years, except if there is an agreement with every one of the 27 other Member States that its enrollment should cease sooner or proceed for more period. At the end of the notice period, the UK will naturally leave the EU, regardless of whether the leave terms have not been agreed. The UK government has declared a “Great Repeal Bill” table, which, despite its name, will serve as a transitional measure to save most EU law applicable in the UK as UK law after Brexit.

The date for the UK withdrawal was set on 29 March 2019 (the actual withdrawal took place on 31 January 2019- 1<sup>st</sup> February 2020). Negotiations have identified the

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<sup>374</sup> Scottish Futures Trust, “NPD Model Explanatory Note”, Dec. 2011.

<sup>375</sup> Eurostat, “A Guide to the Statistical Treatment of PPPs”, Sep. 2016.

<sup>376</sup> Council Regulation (EC) 549/13 of 21 May 2013 on the European system of national and regional accounts in the European Union (OJ L 174/1, 26.06.2013, p. 1).

<sup>377</sup> *ibid.*

<sup>378</sup> Article 50 of the Treaty on European Union.

probability of a transition period up to a maximum of two years during which the parties could agree on a bilateral deal, a post-Brexit trading model; however, the relationship between the EU and the UK is yet to be clear<sup>379</sup>.

**389.** The key issue is that numerous EU laws cannot be repealed and reintroduced to the UK as they are, as many sectors will not make sense without full EU membership. Most EU-derived laws must be amended in some way preceding incorporation again on March 2019<sup>380</sup>. Brexit has also one major effect on UK infrastructure due to the United Kingdom's withdrawal as a shareholder from the European Investment Bank (EIB) and what may be paid on leaving the EIB. Temporarily, the UK ventures have been warned<sup>381</sup> about the need to insure against the hazards of Brexit. In the long run, loaning from the EIB may diminish or completely, remove a significant source of financing. By 2017, a joint report on preliminary matters was issued expressing the UK's expectation that an association with the EIB can be maintained, stating: "The UK considers that there could be mutual benefit from a continuing arrangement between the UK and the EIB. The UK wishes to explore these potential arrangements in the second period of the negotiations."<sup>382</sup>

## **B- Contractual framework and types of PPP**

**390.** The predominant type of PPP in the UK has been the PFI (presently PF2) project, with almost 700 projects having accomplished financial close and still under

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<sup>379</sup> Sombra T., and Moreira T., *supra* note 368.

<sup>380</sup> It is the goal to hold all EU-derived procurement law in the United Kingdom right after Brexit. Procurement law which is compatible with European willingness to guarantee that cross-border exchange is supported, and the United Kingdom is as yet considered 'open for business', however likely to treat non-UK based organizations with respect to a level playing field. It is likewise to be a prerequisite of any future UK–EU economic deal.

<sup>381</sup> Financial Times, "EU infrastructure bank warns of Brexit hit to UK", 16 Oct. 2017, [www.ft.com/content/aaaaa9cc-b1b2-11e7-aa26-bb002965bce8](http://www.ft.com/content/aaaaa9cc-b1b2-11e7-aa26-bb002965bce8).

<sup>382</sup> "Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of the negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union", 8 December 2017, European Commission, [https://ec.europa.eu/commission/sites/beta-political/files/joint\\_report.pdf](https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf).

contract. Other less basic types of PPP utilized in the UK are additionally described below<sup>383</sup>.

**391.** Regarding concession contracts, firstly, a private entity is given an exclusive right to build, maintain, and operate-specific resources for determined period. These kinds of developments are financially independent. For the most part, the contractor is paid through user charges, availability expenses, or a mix of both to guarantee the operating model can empower both current capital use and service delivery innovation. This structure is regularly utilized for activities, for example, tolled streets, and river crossings<sup>384</sup>, but there are relatively rare.

**392.** Moreover, there is the public delivery partner or integrator where a contractor is selected by the public sector to deal with the project delivery from pre-procurement to operation. The delivery partner coordinates the underlying procurements, so they convey a general resource or service to the procuring body. This mode of contracting is mostly suitable for long-term project, as it requires a flexibility approach.

**393.** There are also public/private joint projects. These types of project are either corporate or contractual. It is corporate when it establishes a corporate vehicle possessed by public and private sectors, while contractual when there is no separate entity and the two parties corporate under the provisions of a commercial contract. The joint venture structure is generally used to advance commercial activities once completed in the public sector, for the reciprocal benefit rather than makes new public infrastructure assets<sup>385</sup>.

**394.** One of the important public bodies that assume a role in the UK PPP market is the European Commission that establishes the EU public procurement authority

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<sup>383</sup> Other types of PPP utilized in UK are Government-owned, contractor-operated companies, Adaptable or hybrid projects: these are specifically planned one-off structures for especially huge or complex projects, where a procuring body requires a custom-made methodology; for instance, where a long term PPP relationship is wanted however it is unimaginable to define the service necessity or estimating pricing for the full time frame. They can get components (borrow) from several of the above structures.

<sup>384</sup> For example, the M6 toll road, the Second Severn Crossing and the QE2 Bridge at Dartford.

<sup>385</sup> HM Treasury, "Joint Ventures: a guidance notes for public sector bodies forming joint ventures with the private sector", March 2010.

structure and manages the provision of State help for private sectors. Also, the HM Treasury that sets and supervises fiscal strategy and general policy on PPP and approves project business cases. Moreover, the Cabinet Office supervises the proficiency of government capacities and procurement sets the approach system for government procurement and affirms individual procurement courses and structures. There is also the Infrastructure and Projects Authority (IPA), which gives expertise in infrastructure and the financing, conveyance, and confirmation of significant projects to the entire government<sup>386</sup>.

**395.** The promotion of UK PPP projects is generally made under the general legislative, common law powers of the government, and other public bodies. Unlike numerous jurisdictions, there is no PPP system enabling legislation. The UK has a common law system, which means that case law and legislation affect every commercial transaction and principle behind the allocation of risk. The interpretation of legislation is based on judicial precedent as well. However, this legal framework offers somehow clarity and flexibility to investors. In that sense, England does not have a particular law dedicated to PPP. However, there is satisfactory certainty and elasticity within the statutory and common law framework to allow and recognize PPP.

Therefore, the powers of central government departments and other public bodies are unrestricted in principle unless they are restricted by common law and legislation. However, these have, for the most part, proved to be adequate to advance PPP. The Localism Act 2011 has extensively emphasized the powers of local government, where fundamental, minor legislation has been enacted to address explicit insufficiencies in powers.<sup>387</sup>

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<sup>386</sup> There are also procuring bodies: divisions and executives offices of focal government, local government authorities and other public bodies. Procuring bodies structure and procure ventures, enter into and deal with the PPP contracts and pay for the service. Independent regulators: various regulators manage specific areas of activity (for instance environment, wellbeing and security and data protection) and specific areas (for example, gas and power, water, rail and communications). Planning authorities: grant development assent for projects. Their identity contrasts by area and kind of project (with a unique streamlined system for nationally critical infrastructure projects). Comptroller and Auditor General/National Audit Office: investigates public spending for the benefit of Parliament.

<sup>387</sup> For example, the National Health Service (Private Finance) Act 1997.



**396.** The general EU and UK legal systems apply to PPP projects in a typical manner, such as the law of contract, company law, competition, and public procurement law, employment law, and tax law. Given the wide scope of PPP activities, there is no single standard way to deal with PPP contracts. However, the way to deal with PFI/PF2 ventures is, to a great extent, standardized and is set out in HM Treasury's "Standardized of PF2 Contracts" report (SoPC)<sup>388</sup> and the standard equity investment documentation.<sup>389</sup>

**397.** In layout, the present structure is to obtain an approval from the Cabinet Office previous of procurement. Then, the project must continue through an arranged assurance process as the procurement continues, operated by the IPA. Thereafter, obtaining an approval from the Strategic Outline Case (SOC) that is required at the project starting, Outline business case (OBC) dedicated at the pre-market phase, and Final business case (FBC) for before final negotiations.

These approvals are acquired by the procuring body and not the successful bidder. The successful bidder needs to get the licenses and assents required by any business undertaking the relevant activity. For example, there are no PPP-precise consent prerequisites in planning (development) consents and environmental permits.

#### **A- Bidding and award procedure**

**398.** The EU Directives on public procurement and the UK Regulations that perform them into UK law include the procurement of works, goods, and services by public sector bodies. The updated Directives came into power on 17 April 2014, and the EU Member States had two years to incorporate them into domestic law. The main Directive (2014/24/EU) was performed in the UK through the Public Contracts Regulations 2015, which oversees all pertinent procurement methodology initiated after 26 February 2015.<sup>390</sup> These Regulations were enhanced by the Concession

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<sup>388</sup> Standardization of PF2 Contracts, HM Treasury, December 2012. However, note that Infrastructure and Projects Authority has refreshed and finalized the SoPC, due during the first half of 2017.

<sup>389</sup> Published by HM Treasury in July 2013.

<sup>390</sup> These 2015 Regulations replaced the Public Contracts Regulations 2006. Other Directives and UK Regulations are concerned with procurement in the fields of defense and security and utility activities (i.e., water, energy, transport and postal services), including by public bodies.

Contracts Regulations 2016, which came into force in April 2016.<sup>391</sup> EU law imposes general prerequisites for equivalent treatment of bidders and transparency. The Directives and Regulations, with constrained exceptions,<sup>392</sup> require public bodies to follow one of various indicated competition procurement strategies. These indicate the least timescales for specific components of the procedure, such as the time permitted to react to an invitation to tender (ITT), with an expedited system for pressing prerequisites.

**399.** Before 2006, the system normally embraced for UK PFI procurement was the “negotiated” strategy. This adaptable methodology is reasonable for complex procurements as it enables the procuring power to negotiate the agreement with at least one shortlisted bidder. In any case, since 2006, government strategy has been to utilize the “competitive dialogue” system presented by the 2006 Regulations. The competition dialogue strategy includes the procuring body taking part in dialogue exchange with shortlisted bidders to create indicated areas of the agreement to meet its prerequisites. Once the dialogue has been closed, and a successful bidder has been chosen, very restricted further changes to the agreement are permitted<sup>393</sup>.

### **1- Expressions of interest**

**400.** The procuring body is obliged to advertise transparently by publishing an agreement notice in the EU Official Journal. The notice is normally joined by a pre-qualification survey looking for data about bidders and a manual for the prequalification process.<sup>394</sup> Generally, the pre-qualification assessment should survey

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<sup>391</sup> These Regulations implement EU Directive 2014/23, which is a new instrument governing the award of concessions for works or services.

<sup>392</sup> Public bodies may be exempt from the general requirement to hold a competitive procurement procedure in a range of narrowly construed circumstances, which include: (1) where for technical reasons, or reasons connected with exclusive rights, only one contractor can perform the contract; (2) where there is extreme urgency due to unforeseeable events; and (3) where additional works or services become necessary due to unforeseeable circumstances (in each case, subject to conditions).

<sup>393</sup> Although competitive dialogue has for the most part demonstrated adequate for PFI, the amended EU Directive of 2014 has loosened up the previous restrictions on the utilization of the negotiated procedure (renamed the competitive procedure with negotiation) and adjusted them to those applying to competitive dialogue. It will be important to see whether this new type of negotiated procedure turns into the procedure of decision again.

<sup>394</sup> The EU Directive includes, at Article 53(1), a requirement that the procurement documents are

just the technical or professional ability and economic or financial standing bidders. There is an additional reason for required or discretionary exclusion, covering matters, such as criminal convictions, bankruptcy, and professional misconduct. The EU Directive and UK Regulations explicitly permit poor performance on previous public contracts to be considered as a discretionary ground for rejection.

#### **a) Requests for proposals and unsolicited proposals**

**401.** The procuring body invites bidder to tender (ITT) when the prequalified bidders are chosen. The invitation to tender will contain precise guidelines on the bid procedure, substance, and format of bids and a submission deadline. Bidders may ask explanation inquiries up to a predefined deadline, and organized dialogue or dealings may take before the submission of bids.

**402.** Generally, bidders are required to confirm acknowledgment of the proposed contract terms or to signal those pieces of the agreement they are not ready to acknowledge (with clarifications). Deviations from the proposed terms are hard to happen. However, they are normally considered by risk adjusting the bid cost. The dialogue or negotiation strategy limits bidders' issues with the agreement by the time of bid submission. The awards resulting from unsolicited proposals are commonly not consistent with procurement law. If a public body wanted to procure a project proposed in an unsolicited proposal, it would, in any case, be required to run an advertised competitive tender.

#### **b) Evaluation and award**

**403.** The procuring body's assessment of bids is required to distinguish which bid is the “most economically advantageous”.<sup>395</sup> The detailed criteria for such assessment should be unmistakably expressed in the ITT and afterward applied. Further dialogue

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made available to candidates as from the date of publication of the contract notice in the EU Official Journal. The extent of this relatively new requirement is unclear, but it may be interpreted as requiring the authority to make available the invitation to tender and draft contract as from that publication date.

<sup>395</sup> This enables the evaluation of the financial impact of risk allocation in addition to the bid price.

or negotiations may occur after the submission of initial bids<sup>396</sup>. Once the procuring body has chosen to award an agreement, it must notify all bidders (with reasons) and permit a “standstill” time of at least ten days to elapse before the agreement signature. This is intended to allow disappointed parties to challenge the award legally because the procedure has been defective.<sup>397</sup> The number of procurement challenges by disappointed bidders in the UK courts has consistently expanded over the late years. Yet, it remains moderately low contrasted with other European jurisdictions. The PPP contract and related consortium, financing, development, and services subcontracts are signed at the same time, as a major aspect of the general procedure of “financial close”.

### **c) Subsequent amendments to the PPP agreements**

**404.** In case a PPP agreement falls inside the EU Directive and UK Regulations and is awarded in accordance with these standards, there are constraints on the degree to which the project agreement may be amended in this way without setting a prerequisite for new competition. The legislation determines that any “significant adjustment” must be treated as leading to another agreement that must be returned to tender, except if a particular exception applies. An adjustment will be viewed as significant if it renders the agreement “materially different in character”, changes its financial equilibrium or broadens its extension extensively, or if the changed parameters would have pulled in various bidders or prompted an alternate successful bidder in the original competition.

Therefore, the parties to a PPP understanding falling inside the scope of the procurement legislation should carefully consider at the beginning of the contract how to meet the potential need to introduce modifications during the term of the PPP project.

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<sup>396</sup> An extra bid stage, typically called a “best and last offer”, might be utilized if it is beyond the realm of imagination to conclude the award procedure based on the initial bids.

<sup>397</sup> This is a statutory requirement introduced in response to the ECJ’s judgments in the Alcatel case (Case C81/98) and Commission v. Austria (C212/02).

## **2- The contract characteristics**

**405.** This part centers on the guidance for PF2 contracts, which is set out in SoPC as some procuring bodies have built up their format documents dependent on SoPC. The direction gives detailed drafting to be fused into the agreement, either on a “required” premise or a “recommended” premise. Contracts for different kinds of PPP vary fundamentally, however, regularly utilize the PF2 approach as a beginning stage.

### **a) The process of Payment**

**406.** There should be a solitary unitary charge for the services, which for the most part, contain making facilities available, provision of maintenance, and related services. Capital contributions might cover some restricted capital costs for the partnership. Installments are exposed for deductions in case of failure or non-availability to satisfy required service guidelines.

### **b) Distribution of risks**

**407.** PF2 includes a broad risk allocation structure. The most important risks are examined below. The contractor is protected against three classes of events: Compensation or relief events, and Force majeure. The compensation events are basic circumstances of agreement rupture by the procuring body, where the contractor receives compensation and relief from its commitments. The relief events are occasions outside the contractor’s control, however, which the latter is best placed to oversee, where the contractor gets relief from default end. The force majeure is any occasion outside the contractor’s control and which the contractor can't oversee, where the affected commitments are suspended<sup>398</sup>.

**408.** Moreover, the contractor is ensured against discriminatory changes in law (those affecting just the contractor or the particular project) and explicit changes in the law (those affecting the relevant category of services or businesses). The contractor is not secured against different changes in law except if they require further

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<sup>398</sup> Clough A., Wyles D., and Butcher P., “The Public-Private Partnership Law review”, third edition, 2017.

capital expenditure. The contractor is additionally required to impact indicated protections for the services and project resources, with some assurance where risks become uninsurable. The procuring body has the option to step into the services in specific conditions, such as crises. The sponsors do not, as a rule, ensure the contractor's commitments; however, they might be required to give assurances to the funders<sup>399</sup>.

### **c) Adjustment and revision**

**409.** There is adaptability to make changes to the services and contract, if the changes do not concern “substantial adjustment” under the procurement rules. As per the procurement legislation,<sup>400</sup> alterations are considered significant when they render the original contract “materially different”. Contract revisions other than service changes ordinarily require mutual consent.

The contractor can make service changes with mutual understanding. Generally, the consent of the procuring body is required for alteration, termination, or substitution of the contractor supporting project contracts. The agreement contains a detailed protocol for indicating, pricing, and agreeing on service changes, with autonomous determination in case of disagreement.

### **d) Early termination of PPP contract**

**410.** The procuring body may terminate early for contractor default, which incorporates, for instance, material or persistent breach, breach of certain key provisions, subject to the contractor's right to remedy the breaches (if capable for being redressed) within a particular period. The procuring body may likewise reserve

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<sup>399</sup> *ibid.*

<sup>400</sup> Article 72 of Directive 2014/23 and Regulation 72 of the Public Contracts Regulations 2015, which build upon principles initially laid down by the European Court of Justice in *Pressetext Nachrichtenagentur GmbH v. Austria (C-454/06)*. Where there is a substantial modification, the procuring body must undertake a new competitive tender process, unless an exemption applies. However, no such obligation arises if the modifications were provided for in the initial procurement documents in ‘clear, precise and unequivocal review clauses’.

an option to terminate “for convenience” on notice. The procuring body's privileges to terminate early for default are dependent upon the funders' right to step into the project. The contractor's rights to terminate early for procuring body default are typically constrained to non-installment, confiscation, and a breach that disturbs the contractor's implementation of its commitments. Either party may end early for long-term force majeure.

### **C- The modes of Financing**

**411.** The predominant model for the financing of PFI/PF2 projects in the UK is to utilize project finance, with debt and equity given by funders on a restricted plan of recourse premise<sup>401</sup>. Funders' recourse has been constrained to the incomes of the project and the project resources. However, the worldwide financial crisis additionally prompted creativity as traditional resources of funding dried up. The government and the private sector have adapted to the situation and conveyed new financing solutions for the market.

#### **1- Equity mode**

**412.** Equity finance for UK PFI/PF2 undertakings is given as a share subscription monies and subordinated debt loaned by shareholders. In the beginning, the equity suppliers were the contractors that were bidding for the project and the basic subcontracts. As the market developed, capital limitations for the contractors prompted the improvement of third-party investor funds that put resources into Greenfield projects as a financial investor. Thus, the contractor created fund offshoots that would buy completed projects from the contractor, empowering them to reuse capital again into projects.

**413.** The PF2 model implies that the government will fund a portion of the equity prerequisite for an undertaking, but just a minority interest. The advancement of a more profound equity market has likewise empowered the government to stipulate that PF2 projects should incorporate equity financing competitions.

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<sup>401</sup> Ordinarily debt has funded around 90 percent of project costs, while equity has given the staying 10 percent.

## **2- Debt mode**

**414.** Most of the finance for UK PFI/PPP projects is given by method of senior debt. The first transactions were financed with bank debt and a profound market of project finance banks that granted debt on competitive terms. The UK PFI/PF2 market has profited too from important debt provision by the EIB, giving up to half of the debt necessity for projects, whether alongside business banks or investors. Brexit may evacuate the EIB as a source of financing for UK infrastructure projects, which do not add to the EU inward market. In any case, this kind of funding would typically be compliant with WTO rules, to which the UK, the EU, and its Member States are subject.

**415.** In November 2016, the government declared in its Autumn Statement that the UK Guarantee Scheme would proceed until 2026. After consulting with industry, it might build up a type of construction-only guarantee, de-risking the construction stage of infrastructure investment. This is probably going to make infrastructure investment more appealing to institutional investors<sup>402</sup>.

### **D- Examples of recent decisions**

**416.** There have been various general agreement cases over the previous years managing moderately restricted points of the law that are applicable to PPP contracts.

#### **1- Tees Esk & Wear Valleys NHS Foundation Trust V. Three Valleys Healthcare Limited and Bank of Scotland PLC**

**417.** By 2018, the court held that the capacity to end a project agreement should be done under a FDA - funders' Direct Agreement - in accordance to the service of termination notices. Accordingly, the public authority should provide two definite notices. The dispute arose between the funders with regard to the legitimacy of the second notice on the premise that the notification was to detail amounts owed by the project company to the public authority and different commitments of the project

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<sup>402</sup> Sombra T., and Moreira T., *supra* note 368.



company, but didn't contain such data and was subsequently invalid. The second notification aimed to offer the funders the opportunity to evaluate whether it needed to step into the project. The funders argued that the subsequent notification delivered by the public authority was invalid as it contained inadequate detail. The funders likewise contended that no proof was presented that the public authority had made “appropriate enquiry”. The court ruled against the funders, enumerating that if the funders had decided to step into the venture following the subsequent notification, it would have only been liable for quantified liabilities. In all case, quantifying different obligations was not necessary for the public authority. Yet, there was no (tacit) obligation on the public authority to give proof of its inquiries for the notification to be legitimate.

## **2- SRCL Ltd v. The National Health Service Commissioning Board**

**418.** A notable procurement law decision in 2018 involved *SRCL Ltd v. The NHSCB*<sup>403</sup>. This case covers the public body's duties with regard to abnormally low tenders. The court held that discretion should be recognized to the public body in order to decide whether a tender is abnormally low. If it suspects this, the bidder must be empowered to justify its prices. Additionally, the public body is not compelled to exclude the tender, except in restricted situations.

## **3- Ocean Outdoor UK Ltd v. Hammersmith and Fulham LBC**

**419.** This case draws direction regarding when certain concession arrangements fall inside the full scope of the EU procurement system or whether public bodies are allowed to negotiate directly<sup>404</sup>. The case covers leases for advertising space allowed by a local authority on its property. Accordingly, the court figured out that concessions that did not include any express obligations to build or convey facilities to the public body were not covered by the procurement system. Although, rental installments being made on the assumption advertising services would be embraced and the termination right exists if rent was not paid.

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<sup>403</sup> [2018] EWHC 1985 (TCC)

<sup>404</sup> [2018] EWHC 2508 (TCC)

**420.** A comparative decision has been rendered by the Court of Appeal in *Faraday Development Ltd v. West Berkshire Council and St Modwen Developments Ltd*<sup>405</sup>. The court held that development agreements that had an absence of directly or by indirectly enforceable commitments to deliver public works or services would likewise be excluded. Hence, the Development Agreement (not tendered as per the EU procurement system) was the first UK agreement to be rendered unsuccessful; as it had involved enforceable commitments to perform works within the leases, which the developer could call down as far as certain requirements were met.

Again, the four aforementioned cases in the UK common law system demonstrate an express inclination to litigate procurement matters and to challenge public body verdicts.

**421.** Lastly, it could be concluded that private financing will persevere in playing a significant role in the UK infrastructure on the long run. However, there is no clarity about the models to be used in procuring such investments. Therefore, a new PPP model would probably address the different political and financial challenges with regard to PFI/PFI2.

On the other hand, §(2) addresses the PPP law and important experiences in France.

## **Paragraph 2: PPP experience in France**

**422.** France has known the kind of private financing through PPP since 1988, which means after approximately one year of its launch in the UK<sup>406</sup>. In 2004 France issued a legislation that provided a legislative umbrella to these contracts known as “Mission d’appui aux partenariat public-privé” (MAPPP).<sup>407</sup> The MAPPP aims to check and ensure that the contractor’s authorities prepared primary assessments of the project and are valid. Therefore, the public body can take advantage of PPP to assign

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<sup>405</sup> [2018] EWCA Civ 2532

<sup>406</sup> Queen Elizabeth bridge.

<sup>407</sup> Le portail de l'Économie, des Finances, de l'Action et des Comptes publics <http://www.economie.gouv.fr/ppp/accueil>

a complete mission to a firm, under a long-term contract. After some time, the public body will give in return payment to the selected firm<sup>408</sup>.

**423.** In hypothetical terms, although PPP was a new concept in French law, and was developed from several management practices, few researches addressed and studied this phenomenon. In experimental terms, while articles address specific cases<sup>409</sup>, there has been just a single endeavor to complete a quantitative study of French PPP: the study is conducted by “PricewaterhouseCoopers” in 2011. Despite the useful results of this study, it should be noted that the scope of the study only focused on just one phase of PPP, which is the period between the signature of the contract and the completion of the infrastructure project. Hence, this study disregarded the operational period of the contract when the infrastructure is delivered.

**424.** According to France, PPP is a public-private arrangement in the broad sense: a legal and financial agreement establishing a partnership between the public and the private sector to provide services and execute public infrastructure works. This type of contracts is perceived as complementary to the traditional public procurement systems<sup>410</sup>. These are public procurement contracts, which achieve goals without transferring risk to the private sector, and public service delegations, which achieve service goals, but transfer the risk of demand (or use) to the private sector<sup>411</sup>. A PPP contract empowers a public body to assign an entire project to a private company, under a long-term contract. Besides, the implementation of the project will be accompanied by corresponding payments done by the public entities to the selected company. Public bodies can utilize these types of contracts to guarantee that a needed

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408 In 2011 and the first quarter of 2012, with more than 150 contracts signed at that date. Figures dated August 1, 2012 (MaPPP).

<sup>409</sup> See for instance, Campagnac E., Deffontaines G., “Une analyse socio-economique critique des PPP”, *Revue d’Economie Industrielle*, 2012

<sup>410</sup> Created by Order No. 2004-559 of June 17, 2004.

<sup>411</sup> The order extends older contract formulas such as montages domaniaux complexes [complex arrangements in respect of state lands] (administrative long-term leases or temporary occupancy permits together with a non-severable management agreement) and “sectoral” partnerships (in the areas of domestic security, justice and health).

service to carry their tasks is available<sup>412</sup>. The main reason for requesting this tool is the unsuitability of delivering public services through concession contracts, or the inability to use concession contracts based on a court decision. Some services do not lend themselves to an operation based payment strategy, and specifically to a user based technique. Hence, the aim was to robust the investment in the infrastructure projects tended to provide public utilities, especially in areas when the payer is not the user.

## **A- General Overview of PPP**

**425.** In France, concessions command the historical backdrop of public services and infrastructure; these could be illustrated by several examples, such as the Roman realm, medieval age, and “Ancien Régime”, Canal du Midi, Paris structures and metro, and railroads. The motivations to rely on private partners are usually the same: innovativeness of private persons, need for equipment, and absence of intrigue or public financing.

**426.** To solidify the legal understanding, it must be comprehended that other than contemporary European Directives, concessions in France are executed within a different legal system compared to other PPP projects. In France a concession is considered as transfer of a designated power to a private sector associated with all related risks. Hence, does not consider that risks and financial matters will be shared between both sectors. In this manner, it is preferable to distinguish the differences in the legal systems of concession and PPP projects<sup>413</sup>. In that context, the European “Works’ Directive” presented significant amendments to the legal premise<sup>414</sup>. These modifications enforced into French law in 1991 and provide efficiency and viability to the community law principles, such as non-discrimination, fairness for applicants, and straightforwardness in selection procedures. This permitted the introduction of an

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<sup>412</sup> Models contain the accessibility of public works (an emergency clinic or jail, an office building, a telecommunications network, a railroad, etc.) or resources (drinking water, meals, heat, etc.).

<sup>413</sup> For example, the concession of toll motorways in France depends on the Law of 18 April 1955, later reconsidered by the Law of 22 June 1989, the “Code de la voirie routière”.

<sup>414</sup> The European Council ‘Works’ Directive, 93/37/EEC, covering co-ordination procedures for public works contracts, replaced by the European Parliament and Council Directive, 2004/18/EC, covering co-ordination procedures for public works, supplies and services contracts.

official procedure for competitive bidding. In France, other PPP projects are based on the formation of the PPP contract by Order of 17 June 2004. Subsequently, from its date of issuance until 2009, no infrastructure project dependent on this order has been executed. The framework of this order involves strict guidelines on several sides of PPP transactions, such as financing, contract duration, and investment.

**427.** The PPP legal framework in France was reconfigured a few years ago by the transposition of the European directives relevant to public procurement and concession understandings under Ordinance No. 2015-899, dated 23 July 2015<sup>415</sup>. This Ordinance is related to public procurement and partnership understandings (the Partnership Contract Ordinance) and its implementing Decree No. 2016-360, dated 25 March 2016 (the Partnership Contract Decree), and Ordinance No. 2016-65, dated 29 January 2016,<sup>416</sup> relating to concession understandings (the Concession Agreement Ordinance) and its implementing Decree No. 2016-86, dated 1 February 2016 (the Concession Agreement Decree).

**428.** Despite the trials to modernize and explain the French legal structure, the legal standards administering public procurement understandings (counting partnership agreements) and concession understandings stayed scattered in around 30 different texts. Therefore, by 2018, a Public Procurement and Concession Agreements Code were adopted. The principal reason for this codification venture is to assemble all the relevant public procurement and concession understanding standards only in one document. This would offer all organizations better access to it, with attention on small and medium-sized organizations (i.e., there are no changes on the substance of the legal provisions)<sup>417</sup>.

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<sup>415</sup> Ratified under Article 39 of Law No. 2016-1691 dated 9 December 2016.

<sup>416</sup> Ratified under Article 40 of Law No. 2016-1691 dated 9 December 2016.

<sup>417</sup> The Public Procurement and Concession Agreements Code was finally enacted toward the end of 2018 through Ordinance No. 2018-1074, dated 26 November 2018, Decree No. 2018-1075, dated 3 December 2018 and Decree No. 2018-1225, dated 24 December 2018. This new Code went into force on 1 April 2019.

Year	Events related to PPPs contracts <sup>418</sup>
1988	The first form of partnership forms in France is administrative leasing and private financing.
1994	Temporary licenses for private bodies to work in public services sector.
2002-2004	Sector based reforms to promote partnerships between public and private sectors.
2003	Launching of a public hospital with an important partnership with the private sector.
2004	Entry into force of the “Ordonnance” whereby PPP is legally introduced under the supervision of the “Mission d’appui aux partenariats public-privé” (MAPPP).
2005	Establishing and starting MAPPP operations on the ground.
2008	Granting legal facilities for those concerning such contracts.
2011	Financial termination of one of the biggest PPP project in France which is “TGV tours De Bordeaux”
2011	France became the leader in the PPP market in Europe.

Table 6: Events related to PPP contracts in France.

**429.** The road sector is one of the main sectors, where PPP projects have been established. From the 11,000 km of highways in France, about 8,500 km have been surrendered to private parties. In 2009, the concession network comprised of 14 privately owned businesses<sup>419</sup>. The State can execute road concessions within the principal transport network. It can likewise start strategies after consultation with

<sup>418</sup> European PPP expertise centre (EPEC), “Cadre institutionnel & Unités de PPP en France”, 2012, p. 10.

<sup>419</sup> Three organizations still have public or semi-public possession: ATMB, SFTRF, CCIH.

nearby or local bodies. The rest 2,500 km of highways are state-financed national highways. The State additionally operates around 5,000 km of Express road.

There are several ministries responsible for national roads, such as the Ministry of Energy, Ecology, Sustainable Development, and Spatial Planning, using its Directorate-General for Infrastructure, Transport, and the Sea (DGITM)<sup>420</sup>.

**430.** The primary highway strategy in France was set up in 1955. The ruling “user pays for use policy”<sup>421</sup> prompted the first concessions being granted in 1958. The principal concessions (historical concessions) were conceded under competitive bidding, and they were subject to “adossement”<sup>422</sup>. The state remained the dominant part shareholder of the concession. Later concessions were liable to European competition rules. This enabled new competitors to enter the market. This bidding strategy brought competitiveness among prominent bidders and led to more prominent transparency in the determination of parties and contract’s awarding. Following this improvement, most authentic concessionaires were totally privatized after 2005<sup>423</sup>. The historical concessions focused on the North to Southeast associations with Paris as the center point<sup>424</sup>.

**431.** The concessionaire of French road is conferred with the State’s rights and duties as indicated by the design, construct, finance, operation, and maintenance (DBFOM) formula. Once the concessionaire signed the contract, he is in charge of all exercises that lead to the actual completion of the infrastructure activities until the end of contract. The realization of the agreement additionally includes preliminary studies, consultations with neighboring property proprietors, collectives, and land

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<sup>420</sup> CEDR, Conference of European directors of Roads, “Public Private Partnerships (PPP)”, May 2009

<sup>421</sup> Highway users in France have the possibility to select free toll roads.

<sup>422</sup> Adossement is an instrument by which the concession is granted for any new section to the closest existing concession company based on negotiation but without competition.

<sup>423</sup> The two tunnel concessions exploited by ATMB (the Mont-Blanc tunnel) and SFTRF (the Fréjus tunnel) are for the most part publicly owned.

<sup>424</sup> In ongoing decades, the Southwest associations turned out to be increasingly developed while the network turned out to be progressively decentralized from the Paris hub.

acquisition. In return, the State controls the work's implementation and issues the approvals for the operation of the highway.

## B- Types of contracts in France

**432.** There are two groups of contracts in France<sup>425</sup>. The first one is the partnership contract and equivalent contracts known as “le contrat de Partenariat et les contrats equivalents” (CPE). Under the latter, all PPP contracts and agreement are involved, such as the partnership contract “le contrat de partenariat” (CP); administrative lease contract “le Bail Emphytéotique Administratif” (BEA); hospitalization lease contract “le Bail Emphytéotique Hospitalier” (BEH); Approval of temporary use “l’Autorisation D’occupation Temporaire”(AOT) and lease contracts with purchase option “ La Location avec option d’Achat” (LOA). The table below presents the main characteristics of CPE contracts.

**433.** The second group is the delegation of public services so-called “La Délégation de service public” (DSP). This contractual kind relates to the assumption that the user is equal to the purchaser. Namely, the beneficiary of the service has to pay the service's cost. Furthermore, this kind of contract between the government and the private sector is mostly characterized in concession contracts to deliver public services, where the government grants to the private partner through this kind of contract the mission of commercial maintenance and public operation utilities.

	Partnership contract (CP)	BEA/BEH	AOT/LOA
Scope of the contract	Holistic contracts to design, construct, operate, and maintain the assets.	Linked to construction (some limited services)	Linked to the public interest with the private partner's commitment to construct with the ability to buy the assets from a public person.
Sectors	All sectors	Justice, health,	Police, defense,

<sup>425</sup> European PPP expertise center (EPECP) supra note 419 at 11-14.



		social housing, police, rescue services.	Justice.
<b>Public authority</b>	All public institutions	Health institutions and local groups	Government and local groups.
<b>Asset's ownership of the project</b>	Public	Transfer to the private partners within the duration of the contract.	Transfer to the private partner within the duration of the contract.
<b>Design of the project</b>	The design could be from a public authority side or a private partner.	Design from the private partner.	Design from the private partner.
<b>Duration of the contract</b>	Related to the life duration of the assets (99 years)	Within 18 and 99 years.	Mostly 70 years.

Table 7: Characteristics of CPE contracts in France.

**434.** France had used partnership contracts in several sectors such as health, infrastructure, justice and environment sectors<sup>426</sup>. Therefore, it could be said that France has almost successful PPP experience that reached all sectors. In that context, It is important to note that the French PPP experience is considered as an example to follow for francophone countries, such as Algeria and others<sup>427</sup>. The successful result of these partnership contracts in France returns to the effective implementation of the law in question, which is the law, issued in 2004. The latter enabled the relevant authorities to diversify the contracts so that the contracts of CP, BEA, BEH etc. have a horizontal partition to allow the application of each form of partnership in a suitable sector. On the other hand, there is a vertical partition through differentiation between local contracts CPL and centralized contracts CPE to allow local authorities to have contractual relations with the private sector in a direct way.

**435.** Despite the financial challenging atmosphere observed by several public experts and the diminishing number of implemented agreements, a conceivable reestablishment of investment in PPP in 2017 appeared. In that context, several new

<sup>426</sup> European PPP Expertise Centre (EPEC) *supra* note 419 at 17.

<sup>427</sup> AlAmin L., "The public Private partnerships in Algeria: Case study: SEOR", 2014.

laws have been adopted to reform the legal provisions applicable to contracts<sup>428</sup>, the administrative procedure<sup>429</sup>, and the procurement procedure<sup>430</sup> concerning transparency, anti-bribery and the economy's modernization.

**436.** The above changes encouraged PPP projects to be more dynamic in France. A few of partnership contracts were executed in France in 2016, however, it should be noticed that several notable projects have been implemented in the education sector. There are two main examples of these projects: A partnership contract for a period of 28 years to finance, design, construct, and support a new facility for the “Ecole Centrale Supélec” close to Paris by a consortium formed by BOUYGUES, FIN Partner I and HICL Infrastructure Company Limited; and a partnership contract for a period of 25 years to finance, plan, develop, operate, and maintain two University of Lorraine's buildings by Eiffage Concessions.

**437.** In addition to the implemented projects in educational sector, several concession agreements were held in the transport sector: (1) the A355 Strasbourg bypass motorway concession<sup>431</sup>; and (2) a concession agreement of a period of 55 years to finance, design, develop, operate, and maintain the A45 Lyon-Saint Etienne bypass highway concession<sup>432</sup>. In December 2016, specific provisions concerning the immediate railroad connected to Charles de Gaulle Airport (CDG-Express) had been adopted<sup>433</sup>. This law prepares the ground for launching a concession agreement related to financing, planning, constructing, operating, and maintaining of such infrastructure. As previously expressed, the intended aim in France in 2016 was to transpose the 2014 European directives of public procurement contracts and concession agreements into French law. This transposition intends to elucidate and simplify both PPP and concession legal system.

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<sup>428</sup> Ordinance No. 2016-131 dated 11 February 2016

<sup>429</sup> Decree No. 2016-1480 dated 2 November 2016

<sup>430</sup> Law No. 2016-1691 dated 9 December 2016

<sup>431</sup> Comprising of around 24 kilometers, conceded by the state to a consortium driven by “Vinci Concessions” on 2 February 2016

<sup>432</sup> Comprising of roughly 47 kilometers to be allowed by the state.

<sup>433</sup> Law No. 2016-1887 dated 28 December 2016.

**438.** Accordingly, the 2014/24/EU and 2014/25/EU directives were transposed into the French Partnership Contract Ordinance<sup>434</sup>. This Ordinance provides another legal structure for the procurement contracts. It classified the PPP contract as a specific sort of public procurement contract, and renamed it “marché de partenariat (rather than contrat de partenariat).” Based on this definition, this ordinance tended to embrace all various forms related to PPP under French law, such as long administrative lease or administrative emphyteutic lease, into one sort of agreement. This legal structure applied on partnership contracts takes into consideration the French ongoing PPP practice. It verifies and fortifies the system of partnership contracts by incorporating French and European standards set out by case law.

**439.** Concerning concession agreements, the relevant transposition into the French legal structure happened through the Concession Agreement Ordinance and the Concession Agreement Decree<sup>435</sup>. The aim of this ordinance and decree was to rearrange, elucidate and standardize the existing legal system that oversees the concession agreement’s awarding and implementation as per ongoing French and European case law. This legal framework of concession agreement went in force on April 2016.

**440.** As stated above, the legal distinction between concession and partnership contracts is very important. It should be noted that French law perceived both concession and PPP contracts as administrative contracts. The Concession Agreement Ordinance defined concession as an agreement, in which the grantor assigns the project implementation and management of a service to single or multiple economic entities for a specific duration. There are three main features of these contracts. First, the risk is transferred to the economic entity in return of the right to operate the said service. Secondly, a fee would be added in favor of the economic entity to such operation right. Thirdly, the risk that is transferred to the economic entity would be exposed to the market’s fluctuation.

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<sup>434</sup> Directives 2014/24/EU and 2014/25/EU related to public procurement, which were approved by the European Parliament on 15 January 2014 and adopted by the Council on 11 February 2014.

<sup>435</sup> Ordinance No. 2016-65 of 29 January 2016 about concession agreements.

On the other hand, the Partnership Contract Ordinance defined partnership contracts as entrusting a private party by the grantor to the design, construct, maintain, operate or manage the works for a specified time. Therefore, concessions and partnership contracts could be distinguished by their payment terms. In a PPP contract, the grantor will pay rent to the private party in exchange of project implementation. In contrast, the compensation of the concessionaire, under a concession agreement, is mainly from payments made by users of the service.

**441.** For partnership contracts executed by the state, the ministries that are concerned will rely upon the specific contract's scope. In PPP contracts, the approval of the Minister of the Economy and the Budget is moreover a prerequisite before contract signature<sup>436</sup>. Besides, the Partnership Contract Ordinance offers a list including all potential procuring authorities. It should be noted that the granting authorities would be the same as those stated in the Concession Agreement Ordinance<sup>437</sup>. However, focal administrations, public health offices, and public cooperation structures that used to be grantors before the European Directive, will no longer have the option to go into partnership contracts<sup>438</sup>. Another significant entity relevant to PPP in France is the PPP Support Service (FIN INFRA). The FIN INFRA is located within the Ministry of the Economy. This entity is dedicated to assist grantor to successfully implement PPP contracts and projects<sup>439</sup>. The FIN INFRA is essentially in charge of the approval of the primer assessments arranged by grantors prior to launching a tender.

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<sup>436</sup> See Article 1-II of Decree No. 2012-1093 dated 27 September 2012. The minister of Budget and Economy must approve and sign the partnership contract before the signature of the state or any public institution. Such approval will be presumed if no reply is given within one month from the transmission of the contract. For local authorities, the principle of their free administration exempts them from any requirement for state approval. us such authorization by the Minister of the Economy and the Budget is not needed.

<sup>437</sup> Article 10 of the Partnership Contract Ordinance and Article 9 of the Concession Agreement Ordinance.

<sup>438</sup> Article 71 of the Partnership Contract Ordinance.

<sup>439</sup> Before 2016, the FIN INFRA was the MaPPP, which was created by Ordinance No. 2004-1119 dated 19 October 2004 and modified by Decree No. 2016-522 of 27 April 2016.

The FIN INFRA intends to advise and support the relevant public authorities during the arrangement and negotiation phases of partnership contracts and other complex public contracts, inferring an innovative financing plan. As indicated by the Partnership Contract Ordinance, the FIN INFRA will still be a noteworthy actor, given that it will likewise need to examine the financial sustainability of every partnership contract<sup>440</sup>.

### **1- General requirements for PPP contracts**

**442.** There are different prerequisites for each of PPP and concession contracts' preparation. According to Concession Agreement Ordinance, the concession agreements must specify the contract duration and tariffs applicable to service users. It additionally incorporates arrangements relating to sustainable development and social objectives. As an outcome, these agreements must specify that the concessionaire is required to give a yearly report to the grantor. Besides, the latter should every year publish essential information relating to the concession (i.e., kind of investment, tariffs).

**443.** However, the utilization of PPP contracts is strictly regulated. The project must be concerned with the development or transformation, upkeep, support, activity, or manage the work for public service. Initially, a primer assessment must be made to prove the project meet these criteria. As a result, a report must be written outlining the project, the goals of the procuring authority, an examination of the expenses with and without the PPP contract, and the significant budgetary designation. As mentioned above, the relevant State procuring authorities, such as ministries or other public institutions must present their primary assessment to the FIN INFRA for its approval.

**444.** Accordingly, the objective of the Partnership Contract Ordinance is to simplify this method. Since April 2016, the grantor is only qualified to enter into a PPP contract if the economic efficiency criterion is fulfilled. The grantor must also issue prior evaluations concerning the project implementation alternatives methods as

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<sup>440</sup> Article 76 of the Partnership Contract Ordinance.

well as the project financial sustainability study. A partnership contract must incorporate a few essential provisions, such as the agreement length, conditions of risks-sharing between the grantor and its co-contracting party, and the required performance objectives assigned to the co-contracting party, payment terms and the results of the end of the agreement.

Thus, both kinds of contracts are entered into for a period specified by the investment depreciation period or financing terms.

## **2- The Year 2019 in review**

**445.** The French market for PPP projects remains appealing although the occurrence of some political events that have weakened this market<sup>441</sup>. In that context, several PPP projects within the transportation sector have been refinanced, such as the A65 motorway project, which is at first financed in 2007; the A355 motorway project; and the high-speed railway Sud Europe Atlantique, which was the greatest rail PPP venture at any point propelled in Europe and financed at first in 2011<sup>442</sup>.

**446.** Also, 2018 was a productive year in the European Union for the definition of public investment programs and Juncker Plan implementation. According to the European Commission and the EIB, in July 2018, a joint report was published stated that between 2015 and 2018 more than €335 billion had been invested in the European Union, exceeding the initial target of €315 billion for this period. As French organizations were allocated €10.4 billion within this period, France has subsequently been the EU nation that profited the most from the Juncker Plan. This Juncker Plan was first a three-year European investment program (2015–2018); however, it has been extended until 2020<sup>443</sup>.

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<sup>441</sup> In January 2018, the state put an end to the Notre-Dame-des-Landes airport project. This termination echoes the termination of the Ecotaxe partnership contract by the French state in 2014.

<sup>442</sup> Throughout 2018, several public institutions signed many PPP ventures, such as construct, operate, maintain of the future biology- pharmacy- chemistry situated in Paris by an investment around €283 million. In addition to that, an investment around €20 million were spent on financing, planning, constructing and maintaining of childhood improvement centers and schools in the municipality of Fréjus. Furthermore, €21 million was spent on financing, planning, developing and supporting of a social complex in the municipality of Arcachon. Lastly, an investment around €20 million was spent on the same stages previously mentioned of a nursing home for elderly individuals in the municipality of Bar-le-Duc.

<sup>443</sup> Nowadays, there is a plan to fund an investment for a base measure of €500 billion to date, specifically in the vitality and innovative work areas, with the main focus on small and medium-sized

**447.** Several PPP venture declarations in the transportation and green energy sector have additionally been made in France. The current French President<sup>444</sup> announced in 2018 that in the next years, about six offshore wind farms projects would be implemented. It worth mentioning, that these projects will be implemented as PPP projects, which in turn indicates a remarkable degree of private investment (assessed around €2 billion for each undertaking at the time of writing). In addition, in the mid of 2018, the construction period of the main photovoltaic power plant was launched<sup>445</sup>. In September 2018, the French Minister of Transport<sup>446</sup> revealed a two-stage project program for transport infrastructure and the improvement and the refurbishment, railroad, and river systems. In this context, an investment of €13.4 billion is considered normal for the first stage from 2018 to 2022. In the second stage, €14.3 billion would be spent in 2023–2027 period<sup>447</sup>.

### **3- Bidding and award procedure**

**448.** Methods of Bidding and awarding partnership contracts are firmly regulated. The Concession Agreement Ordinance and the Concession Agreement Decree direct the bidding and award techniques to achieve concessions of a value more noteworthy than or equivalent to €5,225,000. The new legal structure relevant for concessions will stay flexible with the purpose to guarantee efficient and impartial access for every potential bidder (counting small and medium-sized organizations). The Partnership Contract Ordinance gives that three allowing strategies can be performed: competitive dialogue<sup>448</sup>, a negotiated procedure<sup>449</sup>, and restrained call for tenders<sup>450</sup>.

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organizations. However, this financial support from EU to encourage innovation may extend beyond 2020. In fact, the European Commission in the mid of 2018, stated that such EU investment approach ought to be tended to in the following long-term budgetary EU system (2021–2027) through a new policy tool named “InvestEU” that will catch up on the Juncker Plan.

<sup>444</sup> French president Emmanuel Macron

<sup>445</sup> This 17 Mwc project which implies an investment of €17 million is about implementing 47,000 panels on an artificial lake in the Vaucluse region.

<sup>446</sup> Elisabeth Borne.

<sup>447</sup> Borne detect an eager program to finance investment to maintain and restore of the high-speed train system. This program likewise designs a plan to improve the present system by constructing new railroad connections (i.e., Bordeaux to Toulouse, Montpellier to Perpignan, Marseille to Nice). Also, this program states that the Lyon-Turin fast line venture, worth €26 billion, still has a change to take off, despite the hesitation of the government of Italy. Notwithstanding the mentioned PPP transportation ventures declared, there are five new projects to be built in the following five years.

<sup>448</sup> Article 42 of the 2015 Ordinance. The grantor conducts a dialogue with the candidates admitted to

### **a) Expressions of interest**

**449.** To permit effective competition among candidates of partnership and concession contracts, advertisements of these projects must be adequately publicized<sup>451</sup>. In addition to that, there are specific cases, in which partnership contract can be utilized. These cases are the following: (1) If the immaterial sources' value surpasses €2 million or if the agreement focuses on performance standards; (2) If the network infrastructure value surpasses; or (3) If it surpasses €10 million in the other cases<sup>452</sup>.

**450.** The publication prerequisites of concession agreements are less stringent. The notice of public tender must be published in two approved newspapers, the first newspaper must be concerned with displaying legal announcements, while the second one must be concerned with economic news. The notice should likewise indicate the applications procedure and the basic features of the concession agreement, which are mostly the project purpose and nature. Likewise, granting authorities may request the drafting of bidders' reports along with their applications (i.e., the introduction of sufficient professional and financial assurances to guarantee public service). In the two cases, the publication notice must indicate the due date for applications.

### **b) Requests for proposals and unsolicited proposals**

**451.** The tender documents will be shared with the selected candidates in both concession and PPP contracts<sup>453</sup>. In the case of concession agreements, the grantor

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the procedure with the aim of developing one or more suitable alternatives capable of meeting the specified requirements.

<sup>449</sup> The negotiated procedure is defined as the procurement procedure in which 'the contracting authorities consult the economic operators of their choice and negotiate the terms of contract with one or more of them'. e negotiation process enables grantors to negotiate the terms of the contract. Article 42 of the 2015 Ordinance.

<sup>450</sup> Article 42 of the 2015 Ordinance.

<sup>451</sup> For now this requirement is outlined in 2014/23/EU, 2014/24/EU and 2014/25/EU Directives.

<sup>452</sup> Article 75 of Ordinance No. 2015-899 of 23 July 2015.

<sup>453</sup> In the case of concession agreements, after ascertaining from the financial and professional



will provide the candidate the relevant project documents outlining the desired benefits from quantitative and qualitative point of view, and the suitable service cost to the service users. In case of partnership contracts, during the competitive dialogue, the grantor needs to specify in detail the requested ascertaining needs and targets from the project delivery and then communicate and dialogue that with the chosen candidates. In addition, partnership contract has several specificities; one of them is enabling any private individual to propose a project to the grantors to be implemented through PPP<sup>454</sup>. However, proposing projects does not necessarily lead to sign a partnership contract. After that, the grantor will conduct an initial assessment and if it is beneficial to proceed, the private partner will be selected after making the promulgated competitive procedures. It should be noted that the probability of an unsolicited proposal is not thought about for the concession agreements.

### **c) Evaluation and grant**

**452.** In case of partnership contract, a dialogue will take place with each applicant to delimit solutions based on the functional program. Commonly, the dialogue includes two to three stages, which usually take place over a period of nine to twelve months. After the end of the dialogue, an invitation will be sent to applicants by the procuring authority to present the tender documents dependent on the discussed solutions. After the bids' investigation, a partnership contract will be awarded to the candidate with the most economically favorable tender as per the criteria set out in the contract notice or the tender procedure.

**453.** It is worth mentioning that the awarding criteria must incorporate the tender expenses<sup>455</sup> and performance targets expressed as per contracts. Once the favored bidder is chosen, the non-selected bidders should be informed by the contracting

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capabilities of the applicants to ensure the continuity of public services and equality in their provision, the public authority will set out a list of all applicants who have been passed.

<sup>454</sup> Article L1414-11 of the General Code for Local Authorities.

<sup>455</sup> The Ordinance of 2004 specified that the tender expenses are the amount, in current value, resulting from designing, financing, constructing or conversion, upkeep, maintaining, operating or managing of works, equipment and intangible assets.

authorities that their proposals are rejected. After that, 16 days break should be taken between the date of choice notifications and contract execution<sup>456</sup> to consider any dispensed candidate to start a summary procedure challenge on the grounds of a break of the pertinent procurement rules<sup>457</sup>.

If the state or any public institution intends to enter into a PPP project, a pre-survey should be made by the FIN INFRA to examine the project financial feasibility before its implementation. In addition to that, once signing any partnership project, an executed copy should be sent to the FIN INFRA.

**454.** After completing the awarding process, it is obligatory to send a notification within 30 days to the official EU newspaper. With regard to concession agreements, the grantors should select the eligible applicants against the criteria stated in the publication notice prior to the negotiation stage<sup>458</sup>. After completing the selection process, the selected applicants should submit tenders, which will be consulted with the contracting authority. Once completing the negotiation process, they will choose a concessionaire. Besides, the rejected applicants' proposals will be informed. A suspension period will, in any case, be respected<sup>459</sup>.

### **C- The PPP Contract and its implications**

**455.** As mentioned earlier, concession and partnership contracts are distinguished as per their payment terms. In case of concession agreement, the concessionaire bears the operation risks. This bearing exposes the concessionaire to the potential market fluctuations. Accordingly, the pay of the concessionaire is connected to the outcome

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<sup>456</sup> The break time is usually 11 duration 11 or 16 days based on certain criteria (i.e., if the awarding results will be sent by electronic systems).

<sup>457</sup> Article L551-1 of the Code of Administrative Justice

<sup>458</sup> Article 22 of the Concession Agreement Decree.

<sup>459</sup> Article 1-1 of the Decree No. 93-471 of 24 March 1993 and in 2016, Article 29 of the Decree No. 2016-86 of 1 February 2016.

of such activity. Thus, the remuneration of concessionaire primarily emerges from service users.

**456.** In contrast, installments of partnership contracts are rents paid by the grantor to the private party during the agreement duration. These installments are paid in return for the services provisioned by the private party (supplies, and services) and are partitioned into segments. The remuneration likewise considers the services provisioned by the private party. Lastly, the partner's remuneration should include the expenses of maintenance for main support and the reestablishment of specific infrastructures.

**457.** In partnership contracts, the rents calculation and its distribution should be specified in detail, and this might be month-to-month, quarterly, or semi-annually. In case of partnership contracts, the remuneration is not really specified as it can consider: the fulfillment of performance objectives – the remuneration of the private partner may rely the partnership contract's performance target. Premiums or rewards might be paid (e.g., if the project implementation completed before the stipulated date in the contract). In like manner, penalties (e.g., if there is a delay in the completion) may lessen the amount of the rent paid by the grantor. The collection of ancillary revenues<sup>460</sup> – through the Partnership Contract Ordinance, the private partner has the ability to benefit from the complementary incomes by creating its own structures and equipment.

**458.** The Partnership Contract Ordinance specifies that a partnership contract should incorporate the exchange of public service management; the contractor may get immediate installments from service users in the interest of the public authority in charge of this service. Accordingly, every party should be explicitly recognized to avoid any disarray with the legal structure relevant to concessions.

**459.** In France, there are no clear government guarantees dedicated to PPP. However, in mid-2009, a guarantee system was built by the government for the

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<sup>460</sup> These revenues are perceived as financial incentive for both public and private party. Indeed, the rent paid by the public body may be reduced depending on ancillary revenues collected by the partner.

priority PPP projects in light of the financial emergency<sup>461</sup>. In contrast, the state, and local authorities, in concession and PPP contracts, may ensure loans bought in by the project company. Additionally, the contracting authority (counting the state) has the ability to enter into a direct agreement with the funders and the private party to handle particular issues (annulment or nullity of the concession agreement or the partnership contract) and protect the lenders' interest.

**460.** PPP depends on a reasonable allocation of risk between the relevant parties. This assignment of risks is consulted by the parties and is normally the object of a risk matrix'. Except for the risk of utilization of the works, the risk matrix is genuinely close to concession agreements and partnership contracts<sup>462</sup>. Agreement risks, such as delays in the fulfillment and conveyance of the works, archeological disclosures, and design risk are, for the most part, borne by the private entity. In France, specific consideration is given to public authority powers (i.e., power to alter or end the agreement on general interest grounds unilaterally).

### **1- Adjustment and revision**

**461.** As PPP is long-term agreements, they frequently incorporate particular clauses for reviewing contractual terms, such as tariff - variation provisions, indexation clauses<sup>463</sup>, and meeting provisions. Revisions can likewise be entered into, however, just if the general structure of the agreement is not materially changed. As expressed *supra*, based on the French administrative case law, the public authority can unilaterally modify the agreement for general interest reasons. Usually, this happen by regulating the amendment in a way that does not interrupt the overall agreement structure. In contrast, the administration co-contracting party's rights are ensured by

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<sup>461</sup> The MaPPP inspected four projects worth a sum of over €13 billion, however just one project – under a concession agreement plan – was chosen to benefit from the assurance: the fast railway, Sud Europe Atlantique, which was the greatest rail PPP ever propelled in Europe (financing of €7.8 billion). This concession agreement was conceded by “Réseau Ferré de France” to a consortium driven by “VINCI” and the state ensured a €1.06 billion senior secured debt to the lenders.

<sup>462</sup> Under concession agreements, the risk of the works being used by the end user is borne by the concessionaire.

<sup>463</sup> Usually, these clauses must be compatible with the Monetary and Financial Code, more precisely Articles L 112-1 to L 112-3. This code prohibits, with certain exceptions; indices based on overall inflation and require the use of indices related to the obligations whose price is indexed.

the French Administrative case law. Indeed, the monetary balance of the agreement must be kept up, so the private co-contractor is sufficiently compensated for the harm suffered<sup>464</sup>.

## 2- Ownership of underlying assets

**462.** In accordance to the concession agreements' legal system, there are three sorts of assets:

The first sort is the mandatory reversion asset. These assets will automatically return to the public authority at the end of contract duration. Since they are central to providing public service, these assets are considered, when the agreement does not address the issue<sup>465</sup>, as the property of the public authority *ab initio*, in other words, from the moment the concessionaire has an asset or finishes specific works.

The second sort is the optional inversion asset. These assets are important to the public service delivery but do not guarantee its continuity. During the contract duration, the proprietor of these assets is the concessionaire. They just become the property of the public authority if the public authority practices its recovery directly after the end of the concession agreement.

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<sup>464</sup> As to concession agreement, all period, which is more than five years, will be resolved in light of the period expected to amortize the investment required. Furthermore, the Concession Agreement Decree clarifies the legal structure relevant to concession agreement' revisions by expressing six alternatives cases permitting a substantial modification of the concession agreement. The provisions of the Concession Agreement Decree relating to the modification of the concession agreements will apply notwithstanding for concession agreements went into before 1 April 2016. This is a genuine improvement as the modification of a concession agreement used to be carefully regulated, which had prompted an absence of flexibility in the performance of concession agreements.

<sup>465</sup> The contract may assign: (1) ownership of the works to the concessionaire for the duration of the contract, which, although necessary for the operation of public service, are not established as the property of a grantor; or (2) rights on such property (Supreme Administrative Court, 21 December 2012, Commune de Douai, No. 342788). At the end of the contract, if assets of compulsory reversion are not fully amortized, the co-contracting party is entitled to a payment equal to the net book value shown on the balance sheet if the depreciation period of the assets involved is less than or equal to the duration of the contract, or the net book value resulting from the depreciation of these assets over the term of the contract, when the term of the agreement is less than the normal depreciation period of the assets.

The third kind of assets is the assets that belong to the concessionaire. These assets shall not be returned to the public authority since they are not intended to ensure the public service continuity.

**463.** In case of partnership contracts, the proprietor of the assets is the private party. So that, the private party covers the following financial expenses (1) the obtaining of assets; (2) the expense of the works; and (3) the expense of support and reestablishment. Thus, the public sector pays to the private partner for obtaining interests in specific assets. Once the contract ends, the assets will be transferred to the contracting authority. The private partner can be the proprietor of the assets that are not cited in the financing base (i.e., not gained by the grantor through the lease). In any case, they might be dependent upon a legally binding provision providing their exchange against installment to the public authority at the end of the arrangement.

### **3- Early termination**

**464.** The early terminations' arrangement is the same in PPP and concession contracts. There are specific legal structures available for two kinds of terminations: end on the grounds of general interest and end for contractual breach by the contracting authority.

#### **a) Termination on the grounds of general interest**

**465.** If the grantor is a public body, it has the right to unilaterally terminate a public law contract based on the grounds of general interest. . In all cases of terminations, the amount of indemnity that the private partner will receive is the most noteworthy.

#### **b) Termination for contractual breach by the public authority**

**466.** The concessionaire cannot terminate the concession contract on the ground of contractual breach by the grantor. The concessionaire must demand such an end before the relevant administrative jurisdiction. Accordingly, the concessionaire is qualified to be compensated as per the standards set up by administrative case law,

specifically, to be indemnified regarding misfortunes suffered, and the loss of profits. Recently, several case laws confirmed the likelihood to incorporate into an agreement a provision enabling the partner to end the agreement if the public authority makes any contractual breach<sup>466</sup>. Therefore, some PPP contracts that are not linked with the public service delivery could incorporate such contractual provision.

### **c) Termination for inability to accomplish the commitments as states by the Court of Justice of the European Union**

**467.** The Ordinances of partnership and concession contracts provide that in case the Court of Justice of the European Union expresses that the agreement does not conform to the European directives (as written under Article 258 of the Treaty on the Functioning of the European Union), the agreement should be ended.

Outside the three kinds of termination, the parties can freely negotiate the terms and conditions of other different types of termination.

**468.** In case that a force majeure occasion or an unexpected occasion happens, the agreement might be ended. Usually, the agreement states that the private party's indemnification will be based on the hypothesis of "useful expenses", which was developed by the Supreme Administrative Court.<sup>467</sup> As it is a jurisprudential hypothesis, it is still hard to figure out which expenses are regarded as valuable, and like this are to be indemnified. In any case, financial costs should be indemnified.<sup>468</sup> One of the significant points of both the Partnership Contract Ordinance<sup>469</sup> and the

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<sup>466</sup> Supreme Administrative Court, 8 October 2014, Société Grenke Location, No. 370644. It must be noted that: (1) the case law did not concern a concession agreement or a partnership contract but there is a reference to administrative contract; and (2) the termination is not automatic. Indeed the public authority shall have the possibility to contest the termination.

<sup>467</sup> Supreme Administrative Court, 19 April 1974, Société Entreprise Louis Segrette, No. 82518.

<sup>468</sup> The Supreme Administrative Court has recently held that financial expenses can be considered as useful expenses (Supreme Administrative Court, 7 December 2012, Commune de Castres, No. 351752). However, it must be specified that in this case, the concession agreement was not terminated on the grounds of a force majeure.

<sup>469</sup> Article 89 of the Partnership Contract Ordinance.

Concession Agreement Ordinance<sup>470</sup> is the enrichment of the standard of indemnification of financial costs incurred under the partnership or the concession agreement in the event of judicial retraction following a third-party challenge.

**469.** At last, both the Partnership and concession ordinance state that, if specified in the agreements, the compensation clause is regarded as distinguishable and separable from the remainder of the said contracts. Regardless of termination case, it is desirable to specify the financial results and terms of payment of owed reimbursements in the contract.

#### **D- Financing procedures**

**470.** PPP projects, in France, are normally financed according to project finance scheme. The main element of financing a project is the “off-balance-sheet” financing for the sponsors. Usually, project finance includes high debt-to-equity proportions relying upon the specific project and market.

**471.** Based on the Partnership Ordinance, it is mandatory to notify the procuring authority in case of any amendments to the project company shareholding. In this context, it is obligatory for the contract to contain relevant clauses to this notification, and as relevant, the terms of revenue sharing in case of the closeout of the project company. The project company is the borrowing entity, in particular, a new vehicle with new purpose (without business recording). Its role is to finance, structure, construct, operate, and maintain the project. Usually, project companies, in France, are frequently incorporated as liability companies or partnerships. The project company’s reimbursement of the project loans depends on the projected future money flow to be produced from the project operation (principally designated to operating expenses and after that to debt service).

**472.** Lenders are primary concerned about the project bankability, which relies on numerous variables. For example, the project revenue stream capacity, mitigation of risks among all partners, the project company's legally binding documentation, and

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<sup>470</sup> Article 56 of the Concession Agreement Ordinance.



the security bundle should be analyzed to guarantee the fruitful financing of a PPP in France. Numerous resources to finance the project are accessible, incorporating commercial lenders (banks, insurance agencies, etc.), sponsors' equity, public bodies, worldwide multilateral or bilateral agencies, and bondholders. These entities may be situated in France or abroad.

**473.** The Partnership Contract Ordinance intends to see if the procuring authority can contribute to fund the project, as it was prohibited under the 2004 Ordinance. However, certain public institutions are currently qualified to have a minority stake in the project company. For this situation, the risks allocation must be clearly specified based on the laws of the project company between the investors and the measures implemented to avoid any conflict of interest<sup>471</sup>. Based on the Partnership Contract Ordinance, the partnership contracts are qualified for subsidies or other financial commitments. The terms and the installment timetable of the subsidies and other financial commitments can be adjusted to the length of the agreement. The 2004 Ordinance already gave such an arrangement. The Partnership Contract Ordinance specifies regarding the financing adjustment that the procuring authority may allow the adjustment of the financing terms referred to in the final tender, given that this change may not affect the condition of the bidding procedure<sup>472</sup>.

**474.** As mentioned earlier, the finance parties should be guaranteed by a security package. Accordingly, the project bankability, namely the financial soundness of the project as a borrower will be improved. According to French law, a security interest is, for the most part, created in the favor of the creditors of the secured obligation<sup>473</sup>.

**475.** In France, the most typical kinds of security interests utilized in PPP project

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<sup>471</sup> Article 80 of the Partnership Contract Ordinance.

<sup>472</sup> Article 82 of the Partnership Contract Ordinance.

<sup>473</sup> Despite the fact that there is no concept of parallel debt provision, French law perceives the role of security agent. Compliant with Article 2328-1 of the Civil Code, a security agent might be accountable for setting up, enrolling, overseeing and implementing any security interest for the benefit of the secured creditors. In reality, security interests are allowed for every lender and not just for the benefit of the security agent, which implies that every one of the lenders may be qualified for act individually in implementing its specific security interest rights (subject to any limitations in the financial documentation). The security agent is therefore delegated by the creditors and acts under a power of attorney allowed by the lenders.

financing transactions are: pledge over bank accounts<sup>474</sup>; a pledge over securities accounts<sup>475</sup> including a pledge over shares or other financial securities. Moreover, there are pledges over the project company's progressing business<sup>476</sup> including lease rights, logo and corporate name, business furniture, equipment and machines used in the production process, and certain intellectual property rights. Also, there are pledges over equipment<sup>477</sup>, intellectual property rights<sup>478</sup>; and a pledge over receivables – including future receivables<sup>479</sup>.

At the closing date, lenders will ask the borrower to conform to a set of conditions precedent, such as organization and presence of the project company, operational and conveyance process of service and other financial documents, accessibility of assets and funds, and the enforceability of project contracts.

#### **E- Recent decisions and outlook**

**476.** The administrative judges have ruled on some significant decisions influencing the legal regime for PPP in 2018. Based on a decision issued on 5 February 2018, the case law was developed by the French Supreme Administrative Court to study the probability of concluding a concession contract without implementing a prior tender procedure<sup>(480)</sup>. In such case, the French Supreme Administrative Court affirmed a precedent ruling dated 14 February 2017<sup>(481)</sup> in which it expressed that the duration of such concession understanding cannot surpass either: the required duration to start and execute a new prior tendering procedure, or the required duration to appropriately prepare the service provision by the public authority itself.

**477.** Moreover, based on the decision issued on 5 February 2018, the French Supreme Administrative Court stated that concluding a temporary concession agreement based solely on a financial interest set forth by the public authority

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<sup>474</sup> Represented by Article 2355 et seq. of the Civil Code.

<sup>475</sup> Represented by the arrangements of Article L211-20 of the Monetary and Financial Code.

<sup>476</sup> Administered by Article L142-1 et seq. of the Commercial Code.

<sup>477</sup> Represented by Article L525-1 et seq. of the Commercial Code.

<sup>478</sup> Represented by Article 2355 et seq. of the Civil Code.

<sup>479</sup> Represented by Article 2355 et seq. of the Civil Code.

<sup>480</sup> Supreme Administrative Court, 5 February 2018, No. 416581.

<sup>481</sup> Supreme Administrative Court, 14 February 2017, No. 405157.

couldn't be justified <sup>(482)</sup>. The French Supreme Administrative Court ruled on March 2018 the conditions under which a concession understanding in force might be changed through an agreement amendment <sup>(483)</sup>. It has been decided that it is not possible to change a substantial provision based solely on agreement amendment. In this context, a contract amendment can neither modify the primary reason of concession agreement nor any significant change in the economic balance such as its length, the amount of investment required, or the income gathered from service users <sup>484</sup>.

The "Tribunal des conflits" <sup>(485)</sup> in another decision dated 14 May 2018, specified the premises that the French administrative court can settle the disputes emerging from direct agreements <sup>(486)</sup> performance <sup>(487)</sup>.

**478.** Furthermore, in two other decisions, the French Administrative Supreme Court explained the legal system applicable to the termination of the tendering procedure:

In a decision dated 4 April 2018 <sup>(488)</sup> the Court affirmed that the public notification of the invitation to submit bids must be respected distinctively once the tendering process is launched by the French State or by another public entity. It should be noted

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<sup>482</sup> In this case, the court held that the city of Paris couldn't justify the signing of a temporary service concession with the risk of losing revenues in the case of termination of the information boards' local services.

<sup>483</sup> Supreme Administrative Court, 9 March 2018, No. 409972.

<sup>484</sup> Based on a decision issued on 9 March 2018, the court held that if the contract amendment increases the prices above 31%, then this is substantial amendment, which exceeds what parties can legally amend.

<sup>485</sup> Tribunal des conflits, 14 May 2018, No. C4119. The Tribunal des conflits is a court responsible for settling conflicts of jurisdiction between the two French orders of jurisdiction, judicial and administrative.

<sup>486</sup> Usually, once PPP project is completed under a finance framework, an agreement is directly established among the main component of the project, namely the grantor, financing parties, and the project company with the aim of ensuring a decent and direct flow of communication between them. Furthermore, specifying the situation in which the financing parting can intervene to address the default under the project documents.

<sup>487</sup> Based on this ruling, it could be concluded that, in certain situations, direct agreements may be categorized as public contracts. In this context, the funding practices for these projects may be modified in accordance with the legal systems of public contracts (legal challenges from third parties, termination terms and conditions, etc.). Nonetheless, the repercussions of this ruling are not clearly defined; the future additional provisions that will be developed by French Administrative Supreme are vital to comprehend the practical standpoint.

<sup>488</sup> Supreme Administrative Court, 4 April 2018, No.414263.

that posting a public notification of the invitation to submit bids is just a statement of intention without prejudice to the final decision at the end of the process. Despite the submitted bids, the French government stays free to dismiss all proposals. However, other public authorities are, in that case, considered compelled to embrace a formal public notice of invitation to tender.

In a decision dated 17 September 2018 <sup>(489)</sup> the French Supreme Administrative Court stated that a public authority that have propelled a tendering procedure is not bound to select an offer under specific conditions. In this context, the Court states that the absence of competition among the proposed proposals is considered a sufficient reason not to select any proposal.

**479.** Moreover, in a decision dated 18 July 2018 <sup>(490)</sup>, the Administrative Court of “Cergy-Pontoise” stated that the government choice to end the “Ecotaxe PPP”<sup>(491)</sup> based solely on the reason of public interest was not justified and thusly illegally. Therefore, the organizations that endured an immediate and specific harm based on this error could be compensated.

**480.** At long last, the legal system applicable to manage the obligatory reversion resources was developed by the French Supreme Administrative Court. In a decision dated 29 June 2018,<sup>(492)</sup> it has been held that all the benefits and assets of the concessionaire prior the signing of concession arrangement essential for public service provisions are additionally categorized as resources of necessary reversion. Accordingly, in the normal cases, at the end of contract duration, ownership of such resources is given to the public sector.

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<sup>489</sup> Supreme Administrative Court, 17 Sep. 2018, No. 407099.

<sup>490</sup> Administrative Court of Cergy-Pontoise, 18 July 2018, No. 1507487.

<sup>491</sup> In 2011, the state and the company Ecomouv entered into a 13-year partnership contract for the design, financing, delivery and operating of a heavy-vehicle satellite tolling project. But in 2014, the state, facing heavy political lobbying from truck drivers and consumers against the tax over pass-through costs, terminated the agreement on the ground of public interest just before the beginning of the operating phase.

<sup>492</sup> Supreme Administrative Court, 29 June 2018, No.402251.

**481.** According to what mentioned above, it is noted that the EU directives of 2014 relating to concession understandings and public procurement significantly changes the current French PPP laws, which incorporate several systems with solid specificities (i.e., administrative long term leases, temporary occupation licenses, partnership agreements, and concession understandings).

**482.** To summary the France PPP evolution, it is beneficial to re-mention that the main date relevant to French PPP law is 1<sup>st</sup> April 2019. In this date, the code of the new Public Procurement and Concession Agreements went in force. This new Code will not substantially change the legal guidelines administering public procurement and concession understandings, as it just targets totaling existing legal standards. Drafting this code was based on compiling appropriate laws and decrees as well as legal standards emerging from existing EU and specifically French case law, in the condition that these cases are stable over time. The passage into force of this Code, containing 1,747 articles, will, without a doubt, simplify the legal system overseeing PPP contracts, which will profit public authority, organizations, and experts. Such changes, alongside the recharged support of specific local elements, are probably going to trigger recognizable elements relevant to PPP projects in several domains (e.g., transport, health, education, urban equipment, environment, energy proficiency, and telecommunications)<sup>(493)</sup>.

It could be say that France is in continuous development of PPP legal framework, which reflects that PPP projects are relatively changeable and need a continuous development. This should trigger the Syrian legislator to benefit from the different international experiences to build the most suitable legal form for PPP projects.

## **Section II: Comparative contexts of PPP in Asia**

**483.** After studying the different PPP experiences in the UK and France, we will travel to the other side of the world and analyze the PPP experiences in China (§1)

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<sup>493</sup> Vaissier F., Le Bars O., and Houriez D., “The Public-Private Partnership Law Review” fifth edition, Law Business Research, 2019, p.57.

and the United Arab Emirates (UAE) in §(2). The purpose of this overview is to analyze and compare the PPP law perspectives and concepts through four different legal systems.

**Paragraph 1: PPP experience in China**

**484.** In the territory of China, PPP is characterized as the partnership between the government and the social capital county or upper-level governments responsible for executing the PPP projects. Social capital incorporates local and foreign enterprises proceeding as legal persons.<sup>494</sup> The participation of foreign investors in PPP ventures is additionally subject to market entry arrangements and policies.

**A- PPP History Overview**

**485.** China has experienced three phases to accept the model of PPP. It is noted, that the 1990s are the principal stage, in which the government started using the Build-Operate-Transfer (BOT) model to build power stations. This development was followed by investments in toll streets. The subsequent phase was in 2004 by the issuance of landmark administrative standards by the Ministry of Construction. The administration of concessions, as of which BOT, Transfer-Operate-Transfer (TOT), Build-Own-Operate (BOO), and different models turned out to be officially acknowledged in several domains of public utilities, such as streets, water supply offices, and gas stations.

**486.** At the start of the third stage, China has witnessed a significant development in PPP projects. At the beginning of 2014, The government of China has begun to advance PPP in further parts of public services, such as transportation, water conservation, ecological assurance, farming, science and innovation, public health, instruction, and culture.

**487.** The necessities for PPP investment expanded reliably. In 2016, it was unofficially announced that in the library of PPP project set up within the Ministry of

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<sup>494</sup> See the Guidelines for Implementation of Mode of Cooperation for Government and Social Capital (Trial Version) (the MOF PPP Guidelines) and the Notice of the General Office of the State Council on Forwarding the Guiding Opinions on Promoting the Public-Private Partnership Mode in Public Service Field (the Guiding Opinions).

Finance, the required investment of PPP projects exceeded 10 billion Yuan<sup>495</sup>. In 2016 the Chinese government kept on building up the PPP model and included relevant substance in the Government Work Report of 2016.<sup>496</sup>

**488.** The applicable PPP relevant documents were considered relatively low in the legal hierarchy. However, in 2016, it was reported that a law overseeing PPP is being drafted. There were various views and opinions in specific businesses and fields in regards to whether the MOF or the NDRC should be the organizing body for developing PPP. There are several important PPP related rules, such as a notice on conducting more joint and effective work relevant to PPP<sup>497</sup>, the notice of effective implementation of the PPP related Work in the Traditional Infrastructure Fields<sup>498</sup>, the Interim Financial Measures on PPP Projects<sup>499</sup>, the notice on strengthening the PPP projects of Public Services<sup>500</sup>, and the notice on announcing the guidance and rules relevant to the implementation of PPP projects in Traditional Infrastructure Fields<sup>501</sup>.

Also, on 21 December 2016, both the NDRC and the China Securities Regulatory Commission (CSRC) have given the Notice on strengthening the securitization assets relevant to PPP projects in the Traditional Infrastructures Field<sup>502</sup>, energetically advancing and supporting securitization of PPP projects on the plan.

**489.** Other than publishing rules, based on the MOF and the NDRC, the PPP projects have developed by advancing the libraries of the PPP projects. In 2016, administrative procedures were issued for the PPP project library in the Traditional Infrastructure Field to strengthen the management of PPP project library.

**490.** In 2018, the MOF incorporated PPP data platform project management library, which has an aggregate of 8,557 projects, with an investment amount of

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<sup>495</sup> The Law Reviews, “The Public-Private Partnership Law Review”, Fifth edition 2019.

<sup>496</sup> Improving the PPP model, making good use of the 180 billion yuan in seed funds, and strictly honoring contracts in accordance with the law, so as to bring the enthusiasm of private investors to the table was written into the PRC 2016 Government Work Report.

<sup>497</sup> Cai Jin [2016] No. 32/2016

<sup>498</sup> Fa Gai Tou Zi [2016] No. 1744/2016

<sup>499</sup> Cai Jin [2016] No. 92/2016

<sup>500</sup> Cai Jin [2016] No. 90/2016

<sup>501</sup> The Guiding Rules, Fa Gai Tou Zi [2016] No. 2231

<sup>502</sup> Fa Gai Tou Zi [2016] No. 2698

12.836365 trillion Yuan<sup>503</sup>. However, till now Chinese government does not yet have a particular law on PPP. The legislative system of PPP chiefly comprises applicable laws, guidelines, and regulatory documents. The PPP related documents in force are generally low in the legal hierarchy. In July 2017, the Legislative Affairs Office of the State Council had promulgated the Regulations on PPP in the field of Infrastructure and Public Services (Draft for Comment), and the full content of the clarification requests assessments from all sectors of the society, and includes the PPP guidelines for the legislative work plan of the State Council in 2018. The public remarks period for the draft has closed. In any case, the authorities will direct further draft and change works dependent on these public remarks. At the time of composing, the draft has not been officially declared, however has been included for the legislative plan.

## **B- General Framework of PPP**

**491.** PPP has an extraordinary and far reaching effect on China in 2018. Since 2014, several field of infrastructure and public services have been utilized the PPP model. However, several challenges happened, like the misuse of PPP, the illegal loan guarantees of pseudo-PPP, surpassing the red line of monetary consumption. For correcting these issues, avoid and solve the significant risks, and advance the sustainable development of PPP in China, the years of 2017 and 2018 were expected to be the years of reform and improvement of PPP. The MOF, National Development and Reform Commission (NDRC), State-Owned Assets Supervision and Administration Commission (SASAC) and different departments have progressively given a series of regularizing documents and the management requirements for PPP and completed the correction and the management of PPP projects.

### **1- Types of Public-private partnership**

**492.** The PPP sorts that are referenced in the guidelines of MOF predominantly incorporate operations and maintenance (O&M), the Management contract (MC), BOT, BOO, Build-Own-Operate Transfer (BOOT), TOT, and Rehabilitate- Operate

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<sup>503</sup> Moro, M.A., McKnight, U.S., Smets, B.F., Min, M., Andersen, M.M, “The industrial dynamics of water innovation”, A comparison between China and Europe, International Journal of Innovation Studies, 2018.



Transfer (ROT). The kind of PPP projects is selected based on the particular conditions of each project. So, even though the Build Transfer (BT) model was formally used in the past in some public utility activities, it is not practically considered from the PPP types in China. In general, public projects are not allowed to use BT as it is regarded as a hidden type of government debt rising. Furthermore, under BT, the Projects' O&M are not covered, no long-term life cycle participation, and the model of sharing risks is different of PPP ventures<sup>504</sup>.

#### **a) The relevant authorities**

**493.** At the level of focal government, States' ministries are responsible for directing and supervising the promotion of PPP in related fields as per the division of capacities. Usually, the MOF and NDRC handle the coordination of creating PPP in various fields by setting up project libraries, organizing assessments and approvals, and developing the applicable frameworks and systems. Broadly, planning process of public services should be done by MOF. In contrast, the NDRC is accountable for organizing PPP in the field of traditional infrastructure.

Practically, PPP projects are almost launched by municipal, or upper level governments. In addition, the local level governments are in charge of declaring explicit policies and manage the implementation according to the existing arrangement.

**494.** There is an implementation institution appointed by the government for implementing the PPP project. This institution will be responsible of preparation, procurement, transfer work and supervision of the project. Practically, one or more companies that are government representative will be in charge of forming a SPV<sup>505</sup>.

#### **b) General requirements for PPP contracts**

**495.** In China, two forms of contract exist to oversee PPP. Usually, these forms of contracts are the guidelines for PPP contracts that have been published by MOF and the NDRC. It should be noted that none of the proposed forms are mandatory to be used. Generally, PPP contracts pursue some important principles, such as contractual legality and consistency, equal government and social capital rights and

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<sup>504</sup> "The Public-Private Partnership Law Review", *supra* note 496

<sup>505</sup> *ibid*

commitments, public welfare, honesty, fairness, proficiency, and adaptability. The PPP contract usually contains the project members, the reason for the agreement, the guideline of risk allocation, investment construction, activity and maintenance, transfer, installment mechanism, rights and commitments, breach contract, dispute settlement, and other center and key provisions. Practically, the PPP agreement's substance depends as per the region of industry, project features, and implementation method of each project.

The social capital will be chosen through a legal process as per the PPP procurement measures. Therefore, it is important to know how the bidding procedures are done.<sup>506</sup>

## **2- Bidding and award procedure**

**496.** The selection of the social capital will be through a legal procedure based on the guidelines of MOF in addition to the Procurement Measures for PPP. The PPP procurement provides five strategies in that regard: public bidding, invitation bidding, competitive consultation, competitive negotiation and single-source procurement.<sup>507</sup> If public bidding technique is not chosen, the implementing authority needs the finance department's approval from a specific level of government.

**497.** The guiding rules of NDRC likewise state that the selection process of social capital will be through public bidding, invitation bidding, two-phases bidding, and competitive negotiation. However, these rules further state that for PPP projects that are contracted for engineering examination, planning, development, supervision, and supply of significant equipment or materials, the selection of social capital must be made by bidding based on the bidding law.

### **a) Expressions of interest**

**498.** In this regard, the procedures of MOF and NDRC are comparable. A declaration of pre-assessment of qualification will be announced using the government procurement data media assigned by the related financial department or

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<sup>506</sup> See the MOF Guidelines and the Concession Measures.

<sup>507</sup> See the Measures for Administration of Government Procurement in Public-Private Partnership Projects (Cai Ku [2014] No. 215) (the PPP Procurement Measures).

on media selected by the NDRC (for project recorded in the project library of NDRC)<sup>508</sup>. A number of three social capitals, at least, should pass the pre-assessment of qualifications to proceed with the arrangement of bidding documents. In case the pre-assessment of qualifications qualified less than three social capitals, the implementing authority performs another pre-assessment of qualifications after amending the content in the declaration of the pre-assessment of qualifications.

**499.** All the relevant procedural and substantive requirements will be provided through the bidding documents. Usually, these requirements are assessment method and criteria, draft contracts and other legal instruments for the PPP venture. The PPP bidding documents will likewise explicitly express the project agreement submission to the central government at the corresponding level for approval.

**500.** The MOF further states that, when following a competitive negotiation or competitive consultation procurement strategy, the relevant documents will determine the content that could be modified by the assessment group dependent on negotiations with social capitals.

#### **b) Requests for proposals and unsolicited proposals**

**501.** Usually, the bidding documents are requested in the documents calling for bids. If the social capital for the PPP is selected through bidding, then bidders' proposals will react to the substantial requirements and conditions as given in the documents calling for bids.<sup>509</sup> The other techniques such as the method for competitive negotiation and consultation, generally give more space to the social capitals to change some details. In brief, during the process of competitive consultation, the members may change some technical and service requirements of the procurement and terms of the draft agreement dependent on the consultation documents.<sup>510</sup>

**502.** Usually, both the government and social capitals can propose PPP projects,

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<sup>508</sup> The timeframe for submission of application documents for pre-assessment of qualification shall not be under 15 working days from the date of release of the declaration (prerequisite of the MOF) or five days after the bidder issues the pre-assessment invitation report (necessity of the Bidding Law).

<sup>509</sup> See Article 34 of the Implementing Regulations of the Government Procurement Law.

<sup>510</sup> See Article 20 of Interim Measures for the Management of Competitive Consultation in Government Procurement.

however it regularly made by the government. Based on the guidelines of MOF and NDRC, the ability of social capitals to propose PPP ventures was confirmed. If this is the case, the proposed project will be submitted to the financial departments (PPP center) as a project proposal.<sup>511</sup> The Administration Measures on PPP Project Database in the field of Traditional Infrastructure Field (Trial) given by the General Office of the NDRC stated that a PPP project could be filled in and presented by industrial departments, public institutions and different sorts of enterprises to the undertaking database to be recorded in the PPP project library.

### **C- The PPP contract characteristics**

**503.** In China, three fundamental sorts of payment instruments in PPP projects exist: government installment, user charges, and the Viability Gap Fund (VGF). These installments are applicable to all PPP projects. Public transportation, for instance, subways, and trams, and public infrastructure to supply heat and water are based on user charges installment. Usually, VGF is practiced by the government for PPP projects to cover the gap through governmental subsidies, that is, when the project expenses exceed the user charges, and thus without reasonable profit. Practically, there are several structures of VGF, for example, investment subsidies, equity investment, concessional loans, the grant of other developing and working rights and interests identified with concession projects.<sup>512</sup>

**504.** The Guiding Opinions indicated that the public utilities' price usually incorporates cost remuneration, fair return, asset preservation, high quality and significant price, and equitable burden sharing. Practically, the cost is chosen during the PPP procurement methodology. However, at the same time is dependent upon the limitation by the government. For the PPP project applying the user charges mechanism, the cost will depend upon the price service bureau's approval if it is listed in the list of costs fixed by the government.<sup>513</sup>

**505.** Based on the NDRC and MOF rules relevant to PPP agreements, the parties

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<sup>511</sup> The MOF PPP Guidelines, Article 6.

<sup>512</sup> See Article 17 of the Concession Measures and the definition of VFM in the MOF Guidelines.

<sup>513</sup> See the Price Law of China.

should give the modification of cost in the PPP contract. This modification is usually based on the project implementation circumstances and performance assessment outcomes.<sup>514</sup> According to the 2014 General Contract Guidance on PPP Projects, the PPP projects agreement will indicate through which technique the private capitals will be compensated.<sup>515</sup>

### **1- State guarantee**

**506.** As indicated by Chinese law, the government is forbidden from giving a guarantee.<sup>516</sup> The related guidelines give that the government side might take the minimum requirement risk of a PPP venture. The measures for the government to take this risk in a project will be given in the venture proposition prepared by the implementation institution.

**507.** Regularly, the government payment will be made based on its fiscal budget. In practice, the most prevalent technique for the local government to guarantee its installment to the social capital as per the PPP agreement is to affirm to the social capital that the consumption of the PPP undertaking will be recorded in the local annual budget of the pay year.<sup>517</sup>

### **2- Distribution of risk**

**508.** The MOF Guidelines provided that risks would be assigned to the government and the social capital must be in accordance with the rules for allocating risk improvement, equalizing risks and returns, and risk controllable. On a basic level, the social capital will usually bear the project structuring, designing, financing, and operating, and maintaining, while the laws and minimum requirements will be borne by the government. The parties will bear the Force majeure and different risks

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<sup>514</sup> See Article 10 of the Guiding Opinions.

<sup>515</sup> See Article 8 of the 2014 General Contract Guidance.

<sup>516</sup> See the Guarantee Law of China.

<sup>517</sup> Government organs are now prohibited to issue this kind of comfort letter. See Notice of the Ministry of Finance, the National Development and Reform Commission, the People's Bank of China and the China Banking Regulatory Commission on Deterring the Illegal Financing Behavior of Local Governments (2012).

mutually on a reasonable premise.

### **3- Adjustment and revision**

**509.** Principally, a PPP agreement usually includes a general term stating that the agreement could be amended or adjusted through mutual understanding among the parties. The revisions should be officially written and signed by the two parties. Even though that the PPP agreements do not contain this term, the contract law confirmed this right if there is a mutual understanding to modify the agreement. The Consultation Draft of the PPP Law demands the parties to consent to a supplementary agreement through negotiation when it is important to adjust the cooperation time frame. Furthermore, the material change to the cooperation understanding will be submitted to the original authority for approval.<sup>518</sup>

#### **a) Ownership of underlying resources**

**510.** The transfer of the responsibility for basic resources relies upon the diverse kind selected (for instance, BOT, BOOT, TOT, and so forth.) on the PPP contract conditions. A few kinds of PPP undertakings do not need ownership transfer, for example, BOO. However, most sorts of PPP projects have at least one asset ownership transfer step. For instance, in a BOOT venture, the social capital (mostly through its SPV) builds and owns the project asset, and works particularly as indicated by the PPP contract.

**511.** Transfer incorporates the transfer of occupation, and the transfer of proprietorship. PPP contracts, for the most part, prohibit the asset being utilized as security for different ventures. Other than those mentioned above, relevant authorities, for the most part, utilize the performance test to ensure the asset's ideal function and the validity of the intellectual property rights and technical documents.

#### **b) Early termination**

**512.** PPP agreements might be ended early in the following circumstances: (1)

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<sup>518</sup> PPP Law of People's Republic of China (Consultation Draft), Article 32.

early termination is a right of social capital by default of the government (2) early termination is a right of government partner by default of the project company; (3) the government partner singularly ends the agreement under precise conditions as indicated by its legal power, which has to observe the law and joined by satisfactory compensation; (4) either party can terminate the agreement due to force majeure cases; or (5) a mutual understanding reaches to end upon negotiation.<sup>519</sup>

#### **D- Financing procedures**

**513.** Other than conventional bank loans, financing of PPP ventures is enabled by new related financial strategies. In this context, there are several public funds that aim to finance project through debt, and other ways, such as social security funds, protection funds, and others. Moreover, SPVs are urged to direct basic financing and issue venture-gaining bonds, project earning notes, and asset-backed notes<sup>520</sup>.

**514.** The Guidelines for the Issuance of Special Bonds for the PPP Project were issued by the NDRC in 2017. This guidelines aim to energize and underpin the relevant companies or social capital investor for the PPP projects to issue special bonds for the PPP activities<sup>521</sup>. Likewise, resource securitization is additionally a significant financing strategy for PPP.

**515.** In 2017, a notice on enhancing PPP projects' securitization assets in the field of traditional infrastructure was issued by the Stock market of Shanghai and Shenzhen to energize and support of PPP ventures. In June 2017, a notice on regulating PPP projects' security assets was issued by the MOF, which is related to the China Securities Regulatory Commission, and the People's Bank of China, urging PPP

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<sup>519</sup> The Guide on Contracts for PPP Projects (30 December 2014, MOF) mentioned the first four occasions.

<sup>520</sup> The debt financing instruments dependent on undertaking income are still in the preliminary phase of improvement in China. The first venture-gaining bond was issued effectively by the Fourth Refuse Incineration Power Plant Project in Guangzhou in 2014. On 5 August 2015, the NDRC discharged the Interim Measures for the Administration of the Project Earning Bond, which gives direction on the principle parts of the bonds.

<sup>521</sup> In this manner, Guangzhou Zhujiang Industrial Group Co., Ltd., Shanxi Construction Investment Group Co., Ltd., Meishang Ecological Landscape Co., Ltd. furthermore, numerous different organizations have raised funds through the issuance of PPP venture special bonds.

organizations to make advanced financing arrangements for resource securitization.

### **E- Recent decisions and outlook**

**516.** As indicated by the Administrative Litigation Law and the Explanation of the Supreme People's Court in regards to the Administrative Litigation Law, a concession understanding is an administrative agreement. The law suits against the government's inability to perform the concession understanding, or illegally alter or end at an early stage the concession understanding, should be heard by the court as per the Administrative Litigation Law. In the relevant PPP arrangements of the MOF and NDRC, where the undertaking implementing agency, effective bidder, and social capital have disputes in the implementation of the PPP project contract and cannot arrive at an accord through consultation, they may apply for arbitration or file a civil claim. In the PPP Regulations (Draft for Comment) on Infrastructure and Public Services issued in 2017, it states:

*“Disputes arising from the implementation of the cooperative project agreement may apply for arbitration or bring a lawsuit in a people’s court in accordance with the law . . . with regard to specific administrative acts related to the implementation and supervision and administration of cooperative projects undertaken by relevant government departments, if the social capital party considers that they have infringed on its legitimate rights and interests, it shall have the right to make representations and arguments, and may file administrative reconsideration or administrative proceedings in accordance with the law.”*

Thus, there must be suitable dispute resolution depending on the kind of dispute.

**517.** Back to 2018, with the PPP organizational arrangement and corrections, the purchasing power parity circuit in China slowed to more stable levels. In 2019, PPP projects had landed at a slower pace than at any other time, yet developed more



regularly. Currently, the draft for Regulations on PPP in Infrastructure and Public Services are closed for remarks and they look forward to including it in the annual legislative plan. The issuance of these guidelines will successfully advance the conflict of PPP policies between the NDRC, the MOF, and different divisions, and PPP ventures will be better managed and guided.

On the other side, the PPP experience in the United Arab Emirates (UAE) is studied and presented in the following §(2).

## **Paragraph 2: PPP Experience in the UAE**

**518.** Interest for PPP projects has increased steadily in the Gulf Region. Some Gulf Cooperation Council (GCC) countries have responded to this by explaining their PPP guidelines. This paragraph plans to address a short overview of these advancements. Then, we will concentrate on the specific legal PPP circumstance in the UAE.

### **A- General Overview of PPP**

**519.** The UAE has achieved noteworthy and fast evolvement during its entire history. They have turned into the home of numerous high-profile projects and set new principles in the entire region. After some time, a dynamic private sector in the UAE was established. In this way, the PPP tools have been dependent upon guidelines and institutionalization in various structures and approaches across the country<sup>522</sup>. However, PPP in the UAE or the broader GCC is not new. Such projects have generally been attempted through specific legislation or approvals. In that context, there are the examples of “Mubadala” Development Company started PPP in the UAE with UAE University in 2007, Paris-Sorbonne University Abu Dhabi in 2008, and Zayed University in 2009. Moreover, Dubai has already partially recognized the PPP as activity and support contracts like the Dubai Metro rather than the full PPP. Likewise; the governments in GCC countries have witnessed an efficient history in implementing quasi-PPP in different fields, such as electricity and water (like the ADWEA IWPP program)<sup>523</sup>.

**520.** The PPP’s advantages relevant to governments of GCC differed initially from

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<sup>522</sup> Meyer-Reumann & Partners, “Private Public Partnership in the UAE”, German Legal Expertise in the Middle East since 1981

<sup>523</sup> Abu Dhabi Water and Electricity Authority (ADWEA), Independent Water and Power Project (IWPP) Program.

those of different governments. In addition to the need of significant infrastructure programs without paying for them in advance, GCC governments focused on acquiring new aptitudes, better allocation of risk to the private sector (counting completion on-time and on-budget), and mitigate the usage of carbon within their economies. In any case, due to the drop in the value of oil, the governments of GCC have urged to reconsider the choice of PPP. Like Dubai, Kuwait (which additionally has a PPP law), Oman, Qatar, and Saudi, have all been considering PPP structures to help with their infrastructure programs<sup>524</sup>.

### **B- An Impression over PPP in the Region**

**521.** In reference to GCC region, historically, Kuwait has taken the lead with regard to PPP. In this context, Kuwait has developed several relevant draft legislations. It also defined an obvious structure to arrange the PPP procedures among the concerned Ministries. Based on the Kuwait Authority for Partnership Projects, three PPP projects were launched in 2018: the Labor City, “Kabd” Municipal Solid Waste, and “Umm Al-Hayman” Wastewater projects.<sup>525</sup>

**522.** In Saudi-Arabia, PPP appears to be in continuous advancement as it has just been prominently reflected in the ongoing Vision 2030, which is considered as an ambitious reform and improvement plan. In the structure of this arrangement, the Kingdom has set up the National Center For Privatization and PPP (NCP) through the Council of Ministers Resolution 355 on 6/7/1438H corresponding to 3/4/2017 under the Council for Economic and Developmental Affairs (CEDA). However, lately, the Kingdom followed the traditional government procurement instead of PPP. Various PPP projects in Saudi-Arabia are arranged, in tender or, as the “Prince Mohammad Bin Abdulaziz International Airport” in Medina in a Build-Operate-Transfer structure in operation<sup>526</sup>.

**523.** Also, Oman has eleven PPP projects in arranging or implementation in various

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<sup>524</sup> Allen & Overy LLP, “Dubai Embraces PPP ... again”, 2016.

<sup>525</sup> Bhatia N., “Kuwait to launch three PPP projects in 2018”, Construction Week, 27 Sep. 2017.

<http://www.constructionweekonline.com/article-46505-kuwait-to-launch-three-ppp-projects-in-2018/>

<sup>526</sup> <http://www.tavhavalimanlari.com.tr/en-EN/Documents/MED-Airport-Profile.pdf>

stages<sup>527</sup>. A PPP Law has been announced in April 2019<sup>528</sup>; however, it does not appear to be evident that the declared law has been entered into force today. At last, various PPP projects in Bahrain are reported to being enacted.

### **C- Public-Private Partnership law in the UAE**

**524.** Other than the advantages resulting from PPP for included parties, it may struggle with specific standards, especially when the public sector intervenes in reasonable competition among private projects to award a PPP to one of them. It should be noted that UAE legislators have made continuous endeavors to direct this issue at a more in-depth level. UAE has an unusual structure unlike other GCC countries, which is its Federal structure. In that regard, PPP is established in various domains; they may be affiliated with the federal government as the case with UAE legislation and executing institutions.

**525.** On the Federal level, the center of legislation is the instituted Cabinet Resolution (1/1) of 2017, which thusly is legally founded on another Cabinet Resolution No. (32) of 2014 on Procurement Regulation and Storehouse Management in Federal Government (CR-32/2014). As a rule, this guideline specifies the general principles for acquirement techniques, supply contracts, service arrangements. In addition it specifies the powers of the Minister, the Secretary, and CEO with respect to the methods for affirming purchase orders, assignments, supply agreements, services, and undertaking work on tenders, and auctions<sup>529</sup>.

#### **1- Article 48 of CR-32/2014**

**526.** Article 48 of CR-32/2014 is exceptionally committed to PPP. Letter A of Art. 48 of CR-32/2014 provides that PPP projects can be financed and operated through a partnership between a Federal Government Entity and at least one private sector institution. Letter B from the same article allows the Ministry of Finance to be broadly responsible for PPP and their establishment from the federal government's

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<sup>527</sup> Times New Service, "Oman plans projects worth \$ 2 billion in Public private partnership", Oct. 2017 <https://businessgateways.com/news/2017/10/12/Oman-plans-projects-in-public-private-partnership>

<sup>528</sup> Decree No. 52/2019, United Arab Emirates Ministry of Finance Website, <https://www.mof.gov.ae/en/lawsandpolitics/cabinetresolutions/pages/pocurementregulationstorehouses.aspx>

<sup>529</sup> *ibid.*

side and to set the general standards.

**527.** According to the letter C of Art. 48 CR-32/2014 a Federal Government entity is qualified to make PPP projects under the following conditions: government financial assets are not sufficient; the private party can give a superior assistance quality than a Government element; the private party can implement the project faster than a Government element; no legal complaint to integrate the private party in delivering the project; possibility to recover the expenses from the clients of the service in a moderately short timeframe; advance Government element experiences through long term partnership with the private party and a possibility of encouraging economic development.

At last, letter D of Art. 48 CR-32/2014 summaries the types of contracts that PPP might take on Federal Emirates Level: structuring, constructing, financing, operating and maintaining.

**528.** Typically, the resolution restrict piecemeal purchases that aim to override the powers and requests Federal entities to adhere to the following standards: Maintain proficient integrity, pursue open competitiveness methods, and treat competitors fairly; consider the continuous improvement and evolving needs, and pull in the best-qualified providers; safeguard impartiality and self-sufficiency; declare buys and tenders and keep away from conflict of interests.<sup>530</sup>

**529.** The framework intends to accomplish the best VFM. It additionally requests not to solely rely on the price factor while evaluating the agreement and award it to bidders who proposed the lowest cost. Therefore reassuring the best financial possibilities dependent on the real requirements for supplies, work, and services requested, just as the accessibility of essential appropriations.<sup>531</sup> Based on the mentioned issues, a Resolution (1/1) on PPP was issued by the Cabinet in 2017. This Resolution takes the form of a strategic guide for PPP between federal elements and the private sectors.

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<sup>530</sup> UAE Ministry of Finance, *supra* note 529 .

<sup>531</sup> *ibid.*

**530.** The Ministry of Finance's roles was to develop and oversee approaches and policies relevant to federal substances tasks and activities to simulate the best international standards. The guide was set up to improve investment opportunities and raise the governance productivity and adequacy of risk management. This aims to enhance the instruments for building strategic infrastructure ventures and develop the quality of service through implementing partnership contracts with the private party. Therefore, the guide gives a general framework to the venture lifecycle of partnership with the private sector.

## **2- Dubai PPP law**

**531.** On Emirates' level, Dubai has taken the lead by issuing a PPP Law, which is Dubai Law No. 22 of 2015. This law is only applicable in Dubai, and then is not applicable on a federal level<sup>532</sup>. The law applies to all agreements that might be concluded between the government and other private partner in Dubai, such as partnership contracts or joint venture agreements. However, it expressly excludes projects in the field of electricity and water, and others exempted by the Supreme Committee for Financial Policy (the Committee). Moreover, according to the general international practice and PPP enactment in other jurisdiction, it excludes PPP contracts that exceed 30 years.

**532.** The objectives of Dubai PPP law are stipulated in Article 3. These include: empowering private sector contribution to ventures' development; expanding investment to serve in the economic and social development of Dubai; empowering the State to perform vital undertakings productively and successfully, in general, to get the best services at the least cost and expanding profitability; developing the public sector by receiving new knowledge and experience from the private to the public sector; limiting the governments' financial risk; and expanding rivalry for projects (locally, provincially and globally).

**533.** The law likewise esteems the principles of fairness among service users, publicity, straightforwardness, competitiveness, equivalent chances, equality,

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<sup>532</sup> Douglas G., Mondaq S., "Dubai's Public Private Partnership law", connecting knowledge & people, 2017.

<http://www.mondaq.com/x/611510/Government+Contracts+Procurement+PPP/Dubais+Public+Private+Partnership+Law>

declaration of competition, and the public interest<sup>533</sup>. Projects should be affirmed by several entities: (a) by the chief general of the relevant government department, if the expenses do not exceed USD55m, (b) the Department of Finance (DoF), if total expenses are more than USD55m and less than USD135m and (c) the Committee, if the expenses are higher (Article 8). Accordingly, any financing received for the project must be endorsed by the related government department (in coordination with DoF)<sup>534</sup>.

**534.** It is not clear whether the approval of Article 8 will be determined based on capital expenses calculation or entire life project costs (30 years). However, given the thresholds, mostly all projects will require Committee approval. . Moreover, Article 5(C) clarifies that no PPP agreement can be implemented if the government substance does not allocate the sufficient budget for the entire project. Given that Dubai's budget is allocated on a yearly basis, reflects the idea that most of the projects will demand Committee approval, notwithstanding Article 8. This mirrors the methodology of Sorbonne and Zayed. Increased Committee approval could be seen positively, as it should assist to bring consistency to enormous scale projects.

**535.** In any case, the main advantage of the PPP law in Dubai is that it codifies the pre-procurement process, just like the procurement procedure, that should be proceed by government institutions to implement any PPP project. It is trusted that, by codifying these procedures, public stakeholder "acceptance" will be requested for each project at the start, considering the premature completed projects in the region. Article 24 incorporates the procedure that should be proceeded in cases of canceling any tender. However, in-accordance with international market practice, no remuneration is allowed to be paid to any bidder in this case.

**536.** Articles 26, 32, and 34 include the least requirements relevant to PPP contract. However, it should be noted that the law is silent about the risk allocation terms or whether there is a standard form. It is comprehended that this degree of detail will be clarified in the regulations and guidelines to be issued by DoF under Article 9, which is consistent with other PPP legislation over the world.

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<sup>533</sup> Articles 14 and 29 of the law.

<sup>534</sup> Article 36 of the law.

Article 36 states that only Project Company is responsible if there is a third party to finance the project. It seems to block any corporate financing or support from any shareholder of the project company. However, it is planned to prevent the government from guaranteeing any third party debt (as opposed to PPP contract payments, about which the law is silent) and most likely should be interpreted accordingly. Article 39 supersedes any other laws within the limits of any dispute, which is supposed to include Dubai Public Debt Law<sup>535</sup> in view of Articles 8 and 36<sup>536</sup>.

#### a) Law Challenges

**537.** The primer challenge for the Dubai PPP law is establishing a pipeline of projects that attract sponsors. This means focusing on specific sectors, so that the same types of sponsors are willing to bear the bid costs knowing that if they are not successful, they can simply transfer their resources to the next project under preparation in the pipeline. Traditionally, governments of GCC implemented effective projects in the sectors of electricity and water. Also, Turkey focused its projects on medicinal services projects and recently on schools) as already Abu Dhabi did (by focusing on universities). On the other hand, Kenya, for instance, has organized its main 50 infrastructure necessities<sup>537</sup>. Likewise, a sector-focused pipeline helps with the governments' "VFM" and "affordability" challenges, as it takes into account the private party to augment bid productivity and decrease bid expenses and execution time to present the most alluring proposal conceivable.

**538.** The subsequent challenge is guaranteeing that allocation of risks and pricing are adequately appealing to the international funders of the project. Diminished oil incomes are affecting government sources of income. In addition to that, it affects local banks' capital reserve and, in this way, liquidity altogether. However, this doesn't imply that the government should pay more, but rather it should have a more focus on VFM. For instance, the necessity to give a performance bond to project life (Article 26.8) does not give "VFM" but rather is an additional cost (roughly 1-2% of the capital expenses of the project per annum).

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<sup>535</sup> Dubai Decree No. 24 of 2007 and Committee Decision No. 1 of 2008

<sup>536</sup> In any case, most of the above is dependent upon exemption should the Committee (Article 7(5), 15(2), 26(18), 27(B), 31 and 38) or DoF (Articles 7(5), 9, 21(B), 26(18) and 29(B)) so approve.

<sup>537</sup> Allen&Overy, *supra* note 525.

In this way, while the presentation of the Dubai PPP law is a welcome indication of Dubai's goal, there stay noteworthy difficulties to PPP re-beginning in GCC countries and in particular Dubai.

#### **b) Governing law and dispute resolution**

**539.** Based on the PPP Law, the Partnership Agreement must be consistent with the UAE Federal laws, which is applicable in the Emirate of Dubai based on local Dubai law. Sometimes, the Partnership Agreement may not stipulate the provision of international arbitration. In this case, disputes will be settled based by arbitration based on the ICC Rules, or in the Dubai International Arbitration Center (DIAC). We additionally comprehend that the Government of Dubai interprets the given section to allow arbitration in the LCIA-DIFC Arbitration Center in the Dubai International Financial Center, a forum wherein numerous foreign investors are frequently comfortable.

#### **c) UAE projects realized under PPP agreements**

**540.** PPP requires precise project readiness and planning, proper management of the procurement stage boosts rivalry among bidders. Likewise, they required cautious in designing contracts to set assistance guidelines, assign risks, and reach a satisfactory balance between business risk and returns. The examination perspective is intriguing to view the recent UAE projects acknowledged under PPP agreements. There are numerous current continuous projects, and it could be helpful to partition them into three parts, first one when the tender is closed, and the second when the tender is still open. Lastly, projects with allocated tender.

**541.** In the primary group, one should refer to Mohammed Bin Rashid Stadium Project, Dubai Mega Waste-to-Energy Plant, Dubai's Route 2020 Metro Project, and Sharjah International Airport Expansion Project. Among the projects with open tenders, there are Abu Dhabi Street Lightning Project, Ras Al Khaimah International Airport Project, University of Birmingham's Dubai Campus, Desalination Water and Power Project in the Emirate of Umm Al Quwain, Umm Al Quwain Waste Management Facility, Union Oasis Mixed-Use Project, Ghantoot Highway Rest Area BOT Project, Abu Dhabi BOT Community Centers. Concerning ventures with tender



allocated worth referencing are “Mirfa” Independent Water and Power Project, Expansion of Fujairah Destination Plant, Abu Dhabi Airport Midfield Terminal, and Dubai Supreme Court Car Park.

**542.** In 2017, the Council of Ministers issued Resolution 1/1 for 2017, on provisions and procedures of partnership contracts guide between federal agencies and the private party. The aim of this guide is to promote investment opportunities, increase the efficiency and effectiveness of governance and risk management, thereby diversifying the mechanisms for developing strategic infrastructure projects and improving the services quality. The guide additionally provides the overall structure for the life cycle of private sector partnership projects<sup>538</sup>.

**543.** By 2021, the UAE is planning to reduce its carbon use, thus, it plans to generate 27% of the total energy through non-carbon technologies. Accordingly, UAE has mobilized the private international investors and experts to contribute to achieving this objective through a long-term partnership with the public sector. The current and expected project in the infrastructure field include: three utility scales renewable based on photovoltaic solar technology, Abu Dhabi’s Masdar solar and wind projects across a range of different geographies, Dubai’s Roads and Transport Authority projects including the Union Square development and the upcoming route 2020 project, expected to extend Dubai Metro from Jebel Ali to the Expo 2020 site<sup>539</sup>.

### **Comparative table and analysis**

**544.** The table below has as objective to lay down the main points of different PPP experiences, and laws in the countries studied above, which are: the UK, France, China and UAE. We add to the comparative table Syria to shed light and compare the similarities and differences between these countries and Syria.

State	PPP law	Summary

<sup>538</sup> The United Arab Emirates’ Government Portal, official guide. <https://www.government.ae/ar-ae/information-and-services/business/public-private-people-partnership/public-private-partnership>

<sup>539</sup> Weatherstone N., “UAE’s PPs unlock private capital for renewable energy”, Special to Gulf News, Dec. 2016.

<p><b>UK</b></p>	<ul style="list-style-type: none"> <li>• UK doesn't have a specific law dedicated to PPP. However, there is satisfactory flexibility in the common law framework to recognize PPP.</li> <li>• Concessions Contracts Regulations 2016 No. 273</li> <li>• Infrastructure Act 2015</li> <li>• Public Contracts Regulations 2015 No.102</li> <li>• Single Source Contract regulations 2014 N.0000</li> </ul>	<ul style="list-style-type: none"> <li>• The dominant type of PPP is the PFI, which is now the PF2. PPP projects are generally promoted under general legislative and common law powers of the government and other public bodies.</li> <li>• The general EU and UK legal system applies to PPP projects.</li> <li>• The way to deal with PFI/PFI2 projects is generally set in HM treasury's "Standardized of PF2 contracts" report (SoPC).</li> <li>• Procurement of work, services, and goods are represented by the EU directives on public procurement and the UK regulation, which makes that EU law imposes general prerequisites for equivalent treatment and transparency of bidders.</li> <li>• The model for the financing of PFI/PFI2 projects has been to use project finance with debt and equity being given by funders on a limited plan of action base.</li> <li>• PF2 includes a broad risk allocation structure; the contractor is protected against three classes of events: compensation, relief, force majeure, discriminatory changes in the law, and explicit changes in the law.</li> </ul>
<p><b>France</b></p>	<ul style="list-style-type: none"> <li>• Order No. 2004-559 on partnership contracts.</li> <li>• Loi No.2008-735 relative to Partnership contracts.</li> <li>• Ordinance No. 2015-899.</li> <li>• Decree 201-86 (concessions</li> </ul>	<ul style="list-style-type: none"> <li>• There are two types of contracts in France: Partnership contracts such as CPE, CP, BEA, and the delegation of public services.</li> <li>• To simplify the complexity of the legal system of the partnership contracts and concessions agreement, the 2014/24/EU and 2014/25/EU public procurement directives were transposed into the French law in 2016.</li> <li>• The Partnership Contract Ordinance qualified the partnership contracts as a specific sort of public procurement</li> </ul>

	<p>decree).</p> <ul style="list-style-type: none"> <li>• Ordinance No. 2016-67 (Concessions ordinance).</li> <li>• Decree No. 2016-360</li> </ul>	<p>contract called “le marché de partenariat”.</p> <ul style="list-style-type: none"> <li>• Concessions agreements and partnership contracts are both considered administrative contracts in French law. These two types of contracts can be differed by their payment terms and by the prerequisites of each contract.</li> <li>• Regarding the bidding process, there are specific strategies that are allowed: the competitive dialogue and the negotiated procedure.</li> <li>• In France, specific considerations are given to public authority powers such as the power to unilaterally alter or terminate the agreement on the ground of general interest.</li> <li>• PPPs are generally financed under a project finance plot. The project finance usually includes high debt-to-equity proportions relying on the specific project and market.</li> <li>• The borrowing element is a project company. The specific purpose vehicle that will finance structure, operate, maintain, and construct the project.</li> </ul>
<b>China</b>	<ul style="list-style-type: none"> <li>• The MOF Notice on Issues relating to Promoting PPP September 2014.</li> <li>• Guidelines for Mode of cooperation for Government and Social Capital November 2014.</li> <li>• Measures for the Administration of government</li> </ul>	<ul style="list-style-type: none"> <li>• In China, PPPs are viewed as the partnership between the government and the social capital (local and foreign enterprises).</li> <li>• Chinese experience in PPPs passed through 3 phases: the first one was by utilizing the BOT model, the second stage was the issuance of an administrative standard in 2004, and the third stage was a kind of PPPs development in China.</li> <li>• PPPs projects are implemented as per principles and rules to PPP and concessions. Noting that NDRC and</li> </ul>

	<p>Procurement in Public Private Partnerships Projects, December 2014.</p> <ul style="list-style-type: none"> <li>• Circular on Further Effectively and jointly Implementing Public Private Partnerships (Cai Jin {2016} No.32) in May 2016 by MOF ND NDRC.</li> </ul>	<p>MOF separately have PPP project libraries.</p> <ul style="list-style-type: none"> <li>• The PPP project library will be used as a significant premise to organize government investment, decide and adjust costs, issue corporate bonds, and decide privilege to specific PPP policies.</li> <li>• The project library has three classifications: the storage project library, the implanting project library, and the demonstration project library.</li> <li>• Social capital will be chosen through a legal process. Public bidding is the most acknowledged decision.</li> <li>• There are three main sorts of payment tools in PPP projects in China: government installment, user charges, and the Viability Gap Fund (VGF).</li> <li>• Regarding finance, there are new allowed financial strategies other than traditional bank loans such as social security funds, protection funds, and other public funds through debt-equity investment and different ways.</li> <li>• The main difficulty faced by social capital remains the insurance issue, although the income of PPP projects might be used as a pledge to help loans; there is no legal support from the law.</li> </ul>
<p><b>UAE</b></p>	<ul style="list-style-type: none"> <li>• Law No. 22 of 2015 of the Organization of Partnerships between the public and the private sectors in the Emirates of Dubai.</li> </ul>	<ul style="list-style-type: none"> <li>• PPPs in the UAE or the broader GCC countries are not new. The instruments of PPPs have been dependent upon guidelines and institutionalization in various structures and approaches all through the nation.</li> <li>• On the federal level, the center of legislation is the Instituted Cabinet Resolution on PPP of 2017. It was</li> </ul>

	<ul style="list-style-type: none"> <li>• Instituted Cabinet Resolution on PPP (1/1) of 2017.</li> <li>• Procurement Regulation and Storehouse Management in Federal government (CR-32/2014).</li> </ul>	<p>founded on another resolution related to Procurement Regulation and Storehouse Management in the Federal government.</p> <ul style="list-style-type: none"> <li>• The PPP Dubai law No.22 of 2015 applies just in Dubai and not in the other Emirates of the UAE. This law applies to all partnerships or joint venture arrangements made between any government agency and private organizations in Dubai, excluding projects and works in the electricity and water sectors. It additionally excludes PPP contracts for the duration of which is superior to 30 years.</li> <li>• The main advantage of Dubai law is that it classifies the pre-procurement process as the procurement procedure that the government offices must follow to get a PPP project. However, there is a challenge of guaranteeing that risk allocation and pricing are adequately appealing to international project financiers to fill any local bank void.</li> <li>• The PPP law gives that the partnership agreement must be governed by the Federal laws of the UAE as applied in the Emirates of Dubai and by local Dubai law.</li> <li>• Partnership agreement may not accommodate the resolution of disputes to be determined by arbitration outside the Emirate. This provision would enable arbitration to be directed locally under ICC rules, for instance, or in the Dubai International Arbitration Center (DIAC).</li> </ul>
<p><b>Syria</b></p>	<ul style="list-style-type: none"> <li>• Law No. 5 of 2016 Public Private Partnership law.</li> </ul>	<ul style="list-style-type: none"> <li>• The concept of partnership in Syria was prepared, even in an indirect way, a longtime before the issuance of the present PPPs law. The Syria Tenth Five year Development Plan (2006-2010) laid the basics of its foundation and implementation until the demonstration of the first draft of the National</li> </ul>

		<p>Partnership Document presented in the conference of a partnership between the private and public sectors in 2009, organized by the British Syrian Society.</p> <ul style="list-style-type: none"> <li>• The institutional and organizational framework of partnership in Syria was built through establishing a committee that aims to prepare the legislative and institutional frameworks of partnerships, in addition, to establish several units in many ministries such as the ministry of transportation. In 2011, a centralized partnership unit affiliated with the ministry of finance had replaced the centralized unit of partnerships affiliated to the council of ministries.</li> <li>• As the two sectors alone have failed to reach the targeted goal in development and investment, the only way was to work together as partners under a partnership agreement.</li> <li>• Before the agreement of choosing a partnership between public and private sectors for implementing any project, there are three phases: the first is to decide on the feasibility of the project based on an assessment and an appropriate investment plan. The second one is to decide on the contracting of the project. After choosing the partnership method to implement the project, the third phase would be the preparation of conditions document, tender, and procurement assessment, private partner selection and concluding the contract.</li> <li>• By late 2010, Syria's first-historically speaking thorough Draft PPP Law was set up following two years of work embraced by Syrian and French legal lawyers. Despite the support it got, there were a few issues in the draft that required more consideration, and nothing was expected to delay its enactment. An initial couple of weeks</li> </ul>
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		<p>of the distress in Syria, unmistakably PPPs were no longer at the forefront of anyone's thoughts. Justifiably, the Draft Law was abandoned. Subsequently, the government's plans in 2010 are unconnected to Syria's future today.</p> <ul style="list-style-type: none"> <li>• Since the private sector's contribution alongside its financial capacities and aptitude in conveying certain public services is perceived as a vital segment of the rebuilding procedure. The present Law No.5/2016 tried to offer investment motivation for private sector partners to progress toward becoming stakeholders in special purpose vehicle, which incorporate the privilege of budgetary repatriation by foreign investors.</li> </ul>
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Table 8: Comparable table of PPP international experiences.

## Conclusion of title II

**545.** Studying the Syrian PPP law and the comparative contexts of several countries led us to the central concern, which is the positioning of the partnership in Syria between the concept and the implementation. Why this concern? As mentioned above in title I, the damages are colossal in the economy in general, and infrastructure and public utilities in particular. This, in its turn, led to wonder about Syria before and after the PPP law No.5/2016. We have seen that in 2009, the national partnership document defined the partnership as a long-term contract between the public and the private sectors to establish good infrastructure. This would be done through benefiting from the capabilities of the private sector. In contrast, the draft PPP law in 2010 stated expressly that there are two conditions to partnership: construct, rehabilitate, maintain, and operate the necessary infrastructure to provide services; and finance the total or the partial of those cited works. However, the PPP law No.5/2016 in force defines the partnership as a contractual relationship for an agreed period between a public side and a private partner to design, establish, construct, implement, maintain, rehabilitate, develop, manage, or operate a public utility or a public project.

**546.** Having several drafts for the PPP law No.5/2016 led us to wonder if the law conserved the concept of international institutions and the partnership arguments? We can first notice that the law did not restrict or limit the period of the contractual relationship. In contrast, other countries did specify the time and the possibility of renewal. Besides, the said law does not mention the funding expressly, although it is an essential matter, and allows all public projects and assets, other than infrastructure and public utilities, accessible for private investment. Moreover, the law permits the possibility of a partnership with Syrian non-governmental organizations. In that way, the law might lead to a misunderstanding of the partnership concept due to these unclear provisions. Consequently, several ministries rush to propose projects on partnership premises that are not relevant at all to the PPP purposes, such as a proposal from the ministry of local administration of shopping centers, the proposal of the ministry of culture of a cultural channel TV, the proposal of the ministry of communication of constructing a commercial tower and hotels. In other words, the concept of partnership does not apply to those projects; however, the PPP law does. Therefore, we can notice a problematic between the substantial concept of partnerships and its realization. This problematic was shown through the comparative study mentioned above.

**547.** The idea of partnership could not be isolated from the idea of the economic development of any country, as the partnership should emerge from the overall goals of the economy. So, the value of the projects and the size of investments are approved after setting those goals. Here comes the question: Do we implement the project on a partnership basis, or does the government implement it? Or what are the criteria to approve PPP projects? The steps of implementation are still slow and not sufficient. The concept of procedural partnership is the subject of the second part of this research. This part entails the procedures of PPP implementation and the criteria to approve partnership projects.



## **Part II: Procedures of PPP Implementation and Disputes Resolution**

**548.** Since the private and the public sector have several tasks to handle in a partnership, both parties are concerned with the implementation process of a PPP project. Generally, the government, through PPP, undertakes to implement new infrastructure projects and to provide new services. At the same time, the private sector considers that new job vacancies will be created from building the infrastructure and, in principle; count on the government for stable payment. However, PPP' implementation and practices should be controlled and well planned to achieve the requested targets. Therefore, the project implementation stage is an essential part of a project's success or failure for both the contracting public entity and the private partner<sup>540</sup>.

**549.** The second part of this thesis discusses and explores the implementation perspectives of the PPP projects. Therefore, to guarantee an effective implementation of the PPP project, every single idea should be clearly expressed and stipulated while designing the contract as well as their dispute resolution mechanisms. These subjects are studied through two titles. The first title studies the regulatory structure of PPP' functioning. In contrast, the second title triggers the PPP' contractual requirements and their dispute resolution mechanisms.

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<sup>540</sup> Albalade D., Bel G., & Geddes R., "Do Public-Private partnership enabling laws increase private investment in infrastructure?" Research institute of Applied Economics, 2018.

## **Title I: Regulatory Structure of PPP Functioning**

**550.** Governments usually look forward to “good” and fruitful PPP projects that could make an “added value” for the national economy. In this case, PPP give better Value for Money (VFM) over customary public procurement and are fiscally efficient. Those are the primary criteria for a project. In any case, the project has to be completely planned, and the bids are received to evaluate these criteria mentioned above. Indeed, the government would not like to incur extensive expenses of building up PPP except if the project meets the criteria. However, it cannot confirm that it meets the criteria until the project has been developed.

**551.** The procedures of planning are divided into progressively more intensive and costly stages. Indeed, there are several stages to achieve the PPP contract conclusion, and then the project’s implementation. These stages go from the procedures of planning, identifying the project’ applicants to managing the PPP contract. It should be noted that each stage is checked to ensure it keeps on meeting the criteria required for effective PPP<sup>541</sup>. In that regard, it is important to note that there is no universal agreement on what should be included in each phase or when a phase should start or end<sup>542</sup>. The Syrian PPP law has other nomenclature regarding the stages of PPP implementation development and procedures. Therefore, at each station, the Syrian PPP law will be presented to achieve a comprehensive view.

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<sup>541</sup> Inter-American Development Bank (IDB), “Fundamental principles in PPP laws: A review of Latin America and the Caribbean”, 2019. ; Also see, Arimoro A., “Legal framework for public-private partnership: South Africa and Nigeria in focus”, University of Maiduguri Law Journal, 2018.

<sup>542</sup> Many views differ, for example on what is the definition of “structuring” or even “feasibility of a project contract. Besides, there are many views on the appraisal activity and its outcome.

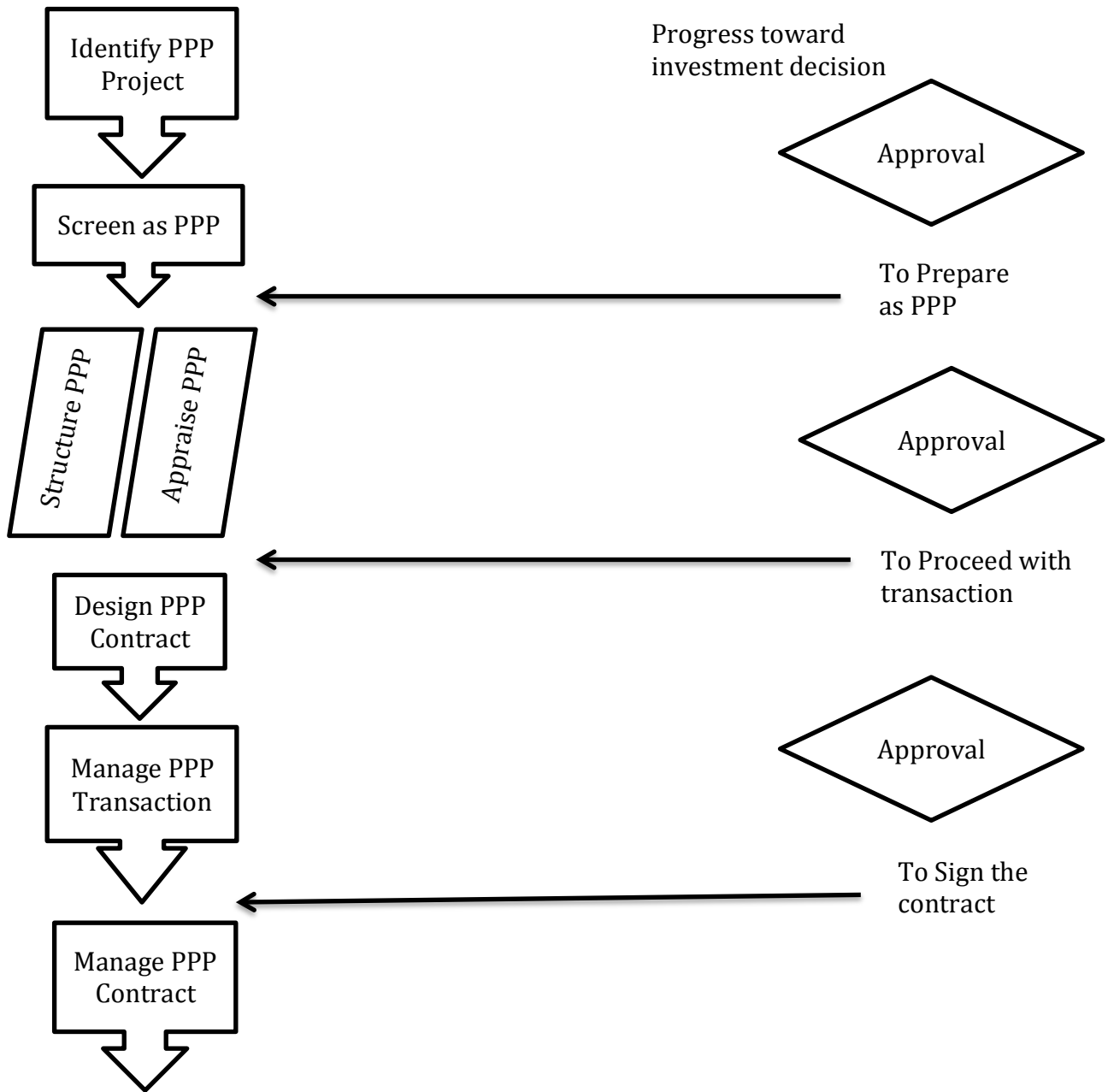


Figure 1: PPP Development and Implementation Process

552. Under this title, chapter (I) will study how a PPP project is prepared and developed within a regulatory framework. In contrast, chapter (II) is addressing the mechanisms and processes of managing a PPP transaction.

## **Chapter I: Conceptualizing PPP Project Development**

**553.** This chapter gives clarifications on each phase concerning the development and the implementation of a PPP project. These phases start from identifying candidate projects to overseeing PPP contracts over the project duration. Therefore, The preparatory procedures of the PPP project are studied in section I of this chapter. In contrast, in section II, the PPP structuring and appraising are described and explained.

### **Section I: The Preparatory Procedures of PPP Projects**

**554.** This section provides the iterative phases for developing a PPP (as shown in the scheme above). The first procedure in a PPP development is detecting a priority public investment through a clear plan and selection process of public investment projects. Eventually, in this procedure, the proposed projects are screened for their ability to operate as PPP projects. The applicants who pass the “screening” successfully are thus developed and appraised<sup>543</sup>.

**555.** Before the PPP transaction’s performance, the draft PPP contract should be prepared by refining the PPP structure and setting out its subtleties in a suitable legal language<sup>544</sup>. It should be noted that managing a PPP transaction is a complex procedure. In that regard, a well-planned transaction procedure is essential to accomplishing VFM from the PPP. This can incorporate marketing the PPP, checking bidders’ capabilities, assessing proposals, communicating with bidders during the procedure, and concluding the agreement with the chosen bidder. At the end of the transaction, where the proposals are received, the government will identify the PPP project’s expenses and risks<sup>545</sup>.

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<sup>543</sup> See also: Nistorescu T., and Bogheanu M., “Considerations on the methodology for identifying and prioritizing public investment projects in Romania”, Editura Universitaria Craiova, 2012.

<sup>544</sup> Son S., “Legal analysis on Public-private partnerships regarding model PPP rules”, Faculty of Law at the Dankook University in Republic of Korea, June 2012.

<sup>545</sup> Public-Private Partnerships Reference Guide Version, *supra* note 154 at 117.

**556.** In this section, we study the detection process of PPP's potential projects in §(1) by mentioning how to prioritize and screen public investment projects and how the selection and planning process will be selected. In contrast, §(2) tackles PPP' preparatory framework by shedding light on establishing an appropriate policy framework, technical preparation, institutional structure, and capacity building.

### **Paragraph 1: Identifying PPP Projects**

**557.** The initial effort towards effective PPP is identifying a potential PPP project. Since PPP is considered a matter of public investment, the best PPP projects begin with a more wide public investment planning process. In this procedure, priority projects for public investment should be screened for their capability to accomplish better VFM whenever implemented as PPP; several governments have set up tools and agendas to help this screening process<sup>546</sup>.

As appeared in the figure above, project identification stage's output is regularly a PPP idea, and an initial evaluation (sometimes called a strategic business case or outline) of the reason for seeking after the project to be as PPP. In numerous countries, project identification stage must be officially approved before proceeding to develop the PPP further.

**558.** In Syria, the preparatory procedures start by forming for every partnership project a committee (formed by the contracting public authority) to assess the proposal and to select a suitable proposal fairly and professionally<sup>547</sup>. This committee will pertain to the terms and references for a project consultant, selection of the project consultant, preferred option to launch the project, the feasibility study, solicitation request for proposal, selection of the best bidder, and the final version of the contract<sup>548</sup>. Thus, according to the Syrian PPP law, the preparatory procedures should be done for the project before the announcement of the request for proposal or the request for initial qualification<sup>549</sup>.

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<sup>546</sup> The online toolbox for PPP in India gives a decent outline of PPP project screening process. India, Ministry of Finance PPP Toolkit for Improving PPP Decision-Making Processes, New Delhi, 2010

<sup>547</sup> Public- Private Partnership Law No. 5 of 2016, art. 11

<sup>548</sup> Public- Private Partnership Law No. 5 of 2016, art. 12

<sup>549</sup> Public- Private Partnership Law No. 5 of 2016, art. 15 - a.

## A- Identifying Priority Public Investment Projects

**559.** Firstly, identifying potential PPP is considering as priority projects for public investment. Numerous legislatures have well-defined procedures and methodologies for public investment planning. This may reach out from setting out sector or infrastructure systems, surveying project choices to meet targets, directing definite feasibility study, and money-saving advantage investigations, to extend prioritization in a general public investment plan<sup>550</sup>.

**560.** A comprehensive planning and management for public investment are vital to the success of PPP projects<sup>551</sup>. However, it needs also to address specific objectives that are key for sector needs<sup>552</sup>. Sometimes PPP project ideas may likewise rise out of from different sources other than planning process of public investment, such as the sector reform processes<sup>553</sup> and unsolicited proposals from businesses<sup>554</sup>. However, suppose the PPP project idea is created outside the typical way of the public investment planning process. In that case, it may increase the risk of inadequacy with the infrastructure plans and sectors' needs. Therefore, any project idea should be passed under the same process and screening as any proposed public investment project<sup>555</sup>.

### 1- Screening for PPP potential

**561.** During the identification of priority projects for public investments, or the sector reform choices, projects will be screened for their capability to be operated as PPP. In light of the accessible data, this screening aims to recognize whether the project may give better value if it is operated as PPP. Practically, various governments do this PPP screening at different stages. Some countries screen all projects including

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<sup>550</sup> Shiferaw A., and Klakegg O., "Linking Policies to Projects: The key to Identifying the Right Investment Projects", Project Management Journal, Aug. 2012.

<sup>551</sup> ADDA D., and Mazurkiewicz M., "Concessions, marches publics et contrats de partenariat : choisir une procédure de dialogue pour les projets complexes", Le Moniteur, 2004, p. 96

<sup>552</sup> The World Bank Website area on Public Investment Management gives an abundance of resources and models on this point.

<sup>553</sup> Sector reform process is when the government decides to make reforms for an under-performed infrastructure sector and considers the PPP as an option to introduce private contribution to improve performance of the concerned sector.

<sup>554</sup> See *infra* chapter II- Section II Dealing with Unsolicited Proposals at 314.

<sup>555</sup> "Public-Private Partnerships Reference Guide", *supra* note 154 at 112

PPP through the process of “procurement options analysis”. Others may consider PPP only for certain types of project types, as might be set up in the PPP Policy<sup>556</sup>.

**562.** For the sake of developing the screening procedure, numerous countries present criteria or checklists for a PPP project, against which projects can be compared<sup>557</sup>. Once again, the idea behind the screening stage is to check whether the criteria are met sufficiently to proceed to the next level of project development<sup>558</sup>.

## **2- PPP selection in the public investment Planning Process**

**563.** The PPP procedure can be viewed as a “branch” of the larger public investment management. Eventually, a project is chosen as potential PPP, and from that point, it pursues a PPP-specific procedure. However, this “branching” may occur at different phases, such as after budgeting as a public investment project, after project appraisal, and after a pre-feasibility analysis, and a detailed project assessment<sup>559</sup>. The best evidence of this is the used process in the Republic of Korea, in which a potential PPP project is determined after a “pre-feasibility” analysis and a detailed appraisal of the project. Also, South Africa followed a comparable methodology, where PPP implementation is considered a major aspect in analyzing and assessing the needs and options of a public investment project. Therefore, well-defined PPP processes commonly reflect public investment management procedures, such as requiring approvals by similar bodies<sup>560</sup>.

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<sup>556</sup> Rapp L., and Malinvaud Ph., “Partenariat Public-privé”, File 430, Action construction law, 2018/2019.

<sup>557</sup> PPP Potential Screening Factors in South Africa gives an example of such agenda, from the South Africa PPP Manual Public Private Partnership Legal Resource Center, “National Treasury PPP Manual”, South Africa PPP Manual, Module 4, 2004.

<sup>558</sup> The South Africa PPP guide records the below as variables to think about when choosing whether a venture could accomplish a value for money as a PPP: Scale of the project—are transaction costs will be supported? Opportunities for risk transfer (and other PPP value drivers)— is there valid justification to accept that a PPP will offer value for money contrasted with the option of customary public procurement? That is: to accomplish fitting risk allocation—so risks are generally allocated to the party best ready to control or bear them. Market capacity and appetite—is there a possibly suitable commercial project and a degree of market enthusiasm for the undertaking? Surveying market appetite may require initial market sounding with potential investors. Source: South Africa PPP Manual, *ibid*.

<sup>559</sup> Public-Private Partnerships Reference guide, *supra* note 154 at 120.

<sup>560</sup> Irwin T., & Mokdad T., “Managing Contingent Liabilities in Public-Private Partnerships: Practice in Australia, Chile, and South Africa”, The World Bank, Public-Private Infrastructure Advisory Facility, 2010.; Kim J., Kim J., Shin S., & Lee S., “Public-Private Partnership Infrastructure Projects: Case Studies from the Republic of Korea: Volume 1: Institutional Arrangements and Performance”, Asian Development Bank, Manila, 2011, p. 63.; South Africa, *supra* note 646 at 1-13.

For example, In Syria, the partnership council is the responsible body to approve the start of the initial qualification process, which occurs at the end of the preparatory stage<sup>561</sup>.

**564.** After recognizing the possibility to implement PPP projects based on sector's priority investment, organizations frequently need support to overcome the hesitancy to adopt PPP. The PPP units usually practice this support. It should be noted that usually running a PPP transaction is more costly than the procedure for a conventional public investment project, which may reflect resistance to PPP from several offices<sup>562</sup>. The result of the screening procedure is a pipeline of PPP projects, which is identified based on general infrastructure and sector strategic plan. The making of this PPP pipeline public can be a decent method to construct private sector enthusiasm for putting resources into PPP in a country<sup>563</sup>.

### **B- Developing an initial PPP Pipeline**

**565.** Project selection in countries with relatively new PPP programs often means sifting through the different project conceptions previously created by sector agencies and screening them for PPP potential utilizing the methodology described *supra* in paragraph 1 (A-1)<sup>564</sup>. In this circumstance, governments may likewise consider extra criteria in choosing which potential PPP projects should be implemented first. Regularly, the priority is to build experience and momentum in the PPP program by accomplishing project successes in a short period<sup>565</sup>.

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<sup>561</sup> Public- Private Partnership Law No. 5 of 2016, Part Three-Chapter one "Request for proposals"- art. 18

<sup>562</sup> The best evidence is the Infrastructure Development Fund of India, which was built up as a rotating fund to support a maximum of 75 percent of PPP project advancement costs. India, Ministry of Finance Scheme and Guidelines for India Infrastructure Project Development Fund, New Delhi, 2008

<sup>563</sup> The Chilean PPP Unit, "Coordinación de Concesiones de Obra Pública", shares all related data about the project pipeline on their website. "Farquharson et al" states the benefits of outlining the 'investment framework' for a PPP program including the PPP pipeline, and other complementary investment on the planned infrastructure. Farquharson E., Torres de Mästle C., Yescombe E., and Encinas J., "How to Engage with the Private Sector in Public-Private Partnerships in Emerging Markets", The World Bank, Public-Private Infrastructure Advisory Facility Washington, D.C., 2011, p. 21-22.

<sup>564</sup> See *supra* sub paragraph A (1) Screening for PPP Potential at 256.

<sup>565</sup> A few components may be included into this procedure. For instance, PPP Center in Philippines states that the activities in its PPP program pipeline (on its "PPP List") were chosen dependent on the



**566.** Normally, a PPP project's objectives will be a subgroup of the general objectives for the overall sector reform. Thus, selecting a suitable PPP option is based on an analysis of several elements, such as the sector's technical restrictions and objective, the legal and regulatory limits, the institutional matters, the interest of the market, the financial requirements, etc. In other words, the local context of the PPP application should be taken into account. The options offer a menu of contract types that could be amended to fit special project requirements. Therefore, it might be possible to integrate different components of different contract types or combine several contracts.

**567.** However, selecting a PPP option is strongly impacted by the objectives of governments. For example, is it a priority of the government to reduce the cost of service? Thus, several options may be more appropriate to provide them with a project depending on the objectives. It is worth mentioning that each form of PPP has a set of preconditions for a fruitful implementation. For example, some forms of PPP that transfers significant risks to the private sector require a more rigorous legal and regulatory framework<sup>566</sup>.

**568.** On the other hand, the private sector's interest in selecting options, such as concession agreements, may meet the government's objectives. However, the level of risk might be intolerable to potential private partners and investors. Therefore, the probable level of interest might be evaluated through an analysis of previous investments in the region or the country, as well as assessing the market interest. Normally, bidders are invited to submit their comments on the proposed project before the official procurement process. The opportunity is frequently cited in an

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below criteria: Project status and phase of readiness— a few projects had developed before being implemented as PPP, decreasing the rest of the project improvement cost; Responsiveness to the sector's needs—the request for implementation of PPP projects should be lined up with generally speaking area needs inside the strategic plan—as it were, PPP ought to be key to the improvement of the sector, not fringe projects whose advantages may end up being peripheral, or which may divert from key needs; High “implementability”— organizing PPP ventures with a high probability of achievement, that are viewed as destined to attract private sector attention, and for which there is a point of reference in the local or regional market.

<sup>566</sup> Menard C., and Oudot J.M., “L'évaluation préalable dans les contrats de partenariat”, Revue Française d'administration publique, 2009.

“Information Memorandum”, a summary of the project’s characteristics, the operating environment and anticipated financing<sup>567</sup>.

**Paragraph 2: Preparatory framework of PPP work**

**569.** Generally, the preparatory work falls under the sector analysis and tackles the constraints specified through sector analysis<sup>568</sup>. This stage ends when a sound environment is achieved to maintain a clear PPP process. The legal analysis will be the outcome of existing laws, regulations, and contracts that outline the PPP’ characteristics. Gaps are also identified where new legal tools are required. These may report directly to PPP or be more generic and relate to company law, and labor law. On the other hand, the PPP structure should reflect the dispute resolution procedures, tax regime, concession rights, etc. Likewise, the regulatory regime, including arrangements for pricing, customer services, and market structure, might need some changes. Therefore, the potential PPP option has to be weighed with the existing regulatory system, fill the regulatory gaps<sup>569</sup>, or change the PPP structure.

**A- Establishing appropriate Policy Frameworks**

**570.** The potential PPP project should be consistent with the existing framework of public policy that incorporates explicit legitimate and regulatory settings. The legal analysis will have brought about an inventory of existing laws, guidelines, contracts, and other legal documents that characterize the attributes of PPP or those that must be changed. Gaps are likewise distinguished where new legal instruments are needed. These instruments may be related directly to some PPP requirements (privatization law, sector licensing, and so forth), or be of increasingly wide and general significance (company law, labor laws, environment laws, foreign exchange guidelines, and so forth.). It might be conceivable to change the "direct" ones to encourage the PPP; however, the "general" ones should be perceived and pursued regularly<sup>570</sup>.

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<sup>567</sup> Prud'homme R., and Kopp P., “Projets en PPP, contraintes budgétaires et choix des investissements”, UFR d'économie, Université de Paris-I, 4 Oct. 2005.

<sup>568</sup> Such as Legal, regulatory, technical, institutional, capacity building and economic issues.

<sup>569</sup> The gaps might be as follows: the need for more explicit regulations to be included in the contract; improving existing regulatory institutions; training regulators and developing procedures.

<sup>570</sup> Asian Development Bank (ADB), *supra* note 254 at 50

**571.** The PPP structure needs to mirror the prevailing tax system, concession rights, dispute resolution systems, public service laws, and labor laws. Corporate structures need to be consistent with the company laws and other legitimate prerequisites. In other words, laws must be modified to accomplish the desired PPP projects, and the timetable should mirror a reasonable period for this. Additionally, the regulatory system, including oversight plans for pricing estimation, client service, operations, and market structure, may be changed or recently made. The ideal PPP option must be compared with the plans stated by current regulatory systems. Therefore, the resulting regulatory gaps should also be filled, or the PPP structure should be changed.

Covering these gaps may need several modifications, such as (i) state clear regulations and necessities of the operator (to be implanted in agreement, guidelines, or rule); (ii) developing regulatory establishments (for example, an independent regulator, and an organizational unit within the government); (iii) training regulators; and (iv) evolving procedures whereby the regulator requests and gets data. All entities' roles that are involved in performance examinations (boards, ministries, auditors, monitors) and regulation (ministries, regulators) should be portrayed and justified by assigned authorities<sup>571</sup>.

### **1- Technical Preparation**

**572.** The technical provisions of the potential PPP project should be clarified and determined in the term of reference (ToR) and protected in the PPP contract. Indeed, the preparation stage develops initial specifications; however, the project's final technical specifications are a repetitive process built on the feedback from the market. Therefore, designing a project technically begins with identifying the potential coverage targets and service standards. These preparations are based on the analytical work that has been performed in studying the sector analysis and the road map. Therefore, the ToR should keep the balance between being too restrictive and too flexible.

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<sup>571</sup> *ibid*

**573.** In case the technical specifications are too constricted, it will mean to the bidders that they are forbidden from using the most economical technical solution. In case the technical specifications are too flexible, it may lead to a significant discrepancy in proposals from each other. The solution here might be through focusing on specifying the expected technical outputs rather than imposing the inputs to be employed. Thus, the ToR will allow bidders to comprehend the requested outputs and estimate the resulting operating performance<sup>572</sup>.

**574.** The technical design of a project starts by identifying its required objectives and service standards. These beginning stages assess the expense of these services (calculating in assumed productivity gains), and cost recovery levies are conceivable. The government can set up these cost recovery tariffs, subsidize cost-recovery, or return to the initial targets and service standards.

## **2- Institutional structures and capacity building**

**575.** The PPP process demands restructuring in sector roles. Namely, the private sector will be committed to undertaking activities that were controlled originally by the public domain. The public sector will become a monitor playing a restricted role in service provision. Numerous countries have a gap in institutions that are required to manage and implement the PPP process. In principle, the institutional engagements that support PPP are the PPP units, project implementation office or unit, technical assistance.

**576.** It is worth to mention that in the Syrian PPP law, the names of the organizational and institutional entities are different but have the same functions as those mentioned below. Firstly, the prime minister and deputies from several ministries should establish a partnership council. This council aims to regulate and coordinate partnership projects between the public and the private sectors<sup>573</sup>. The

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<sup>572</sup> European Commission, “ Guidelines for Successful Public–Private Partnerships”, Brussels, March 2003. Available: [http://ec.europa.eu/regional\\_policy/sources/docgener/guides/ppp\\_en.pdf](http://ec.europa.eu/regional_policy/sources/docgener/guides/ppp_en.pdf)

<sup>573</sup> Syrian Public- Private Partnership Law No. 5 of 2016, art. 7. The article 7 provides a long list of the responsibilities and functions of the partnership Council. This means that the law provided numerous competencies to this council.

council also approves of the projects that can be included in the PPP law and ratify the RFP for partnership contracts.

In a second step, there is the partnership bureau. This bureau is composed of experts and specialists and aims to provide technical, administrative, legal, financial, and other necessary consultations to the council<sup>574</sup>. Moreover, the ministries or the contracting public authority could establish a committee for the partnership after the council's approval<sup>575</sup>.

#### **a) The PPP unit**

**577.** The PPP units are considered a center of coordination, and quality control relevant to PPP projects in one or several sectors. They can be part of the ministries or a stand-alone agency. This unit is useful for both partners. For the private partners, the unit provides transparency and uniformity, and for the public partner, the unit can distribute information and provide specific management<sup>576</sup>.

**578.** The unit works to ensure that the relevant stakeholders to PPP follow a reliable methodology and agree on guidelines such as the project prioritization, encouraging competition, due diligence of opportunities, etc. The unit's focus has shifted a little bit from focusing on identification and bidding of the project to focusing more on the possible role that it can play in managing the contract when launched. Another consideration is maintaining a transparent relation of the PPP unit with the line of ministries and other government levels. As PPP' activity may happen on a national or subnational level, the unit's location should be linked to the market activity<sup>577</sup>.

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<sup>574</sup> Syrian Public- Private Partnership Law No. 5 of 2016, art. 8

<sup>575</sup> Syrian Public- Private Partnership Law No. 5 of 2016, art. 9 and 11

<sup>576</sup> Ping Tserng H., Russell J., Hsu C., and Lin C., "Analyzing the role of National PPP Units in Promoting PPP: Using New Institutional Economics and a Case Study", *Journal of Construction Engineering and Management*, 2012.

<sup>577</sup> Regan M., "Public Private Partnership Units", Mirvac School of Sustainable Development, Bond University, Australia, 2012.

### **b) Project implementation office/unit (PIU)**

**579.** As its name said, this body serves to plan and implement projects. It could be related to the line ministry, but also it could be a quasi-independent vehicle. This unit is established mostly for supporting large capital investment, and its life cycle is linked to the life of the project. Its function and role are dependent on the funding agency's requirements, the type of the project, and its context. What is beneficial from this unit is that it will be considered a central point of accountability and management as it monitors and reports the project's progress and will handle project procurement. In case the implementation office and PPP unit exist, there should be regular and close coordination between them.

**580.** PIUs are usually used as a driver to direct employees towards significant activities. They are staffed with internal government staff and with external assets or a blend of both. Recent investigation has addressed whether PIUs are viable in the broader development of project management limits inside governments, especially when staffing is external. The favorable circumstance to building up a PIU is the establishment of a central point of responsibility and management. The PIU provides regular reports on project progress after a lengthy monitoring process. In addition, it is responsible for accounting, handling the financial management, and managing project procurement. In the case, that both units PIU and PPP exist, deep coordination is required<sup>578</sup>.

### **c) Technical assistance**

**581.** The government with little or no PPP experience should hire specialist advisors, lawyers, financial data analysts, economic expert, sociologists, and sector specialists to support the government. These advisors and experts could be hired as a team or individually. In the latter case, the coordination and communication flow among them should be ensured. They will play an essential role in developing strategies, assist in developing public information, performing analysis of PPP options. Those advisors and experts should be brought in the early stages of the process and be combined with government counterparts.

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<sup>578</sup> *ibid.*

**582.** Therefore, after a project's approval to be implemented as PPP, the government should determine potential local staff, develop a PPP unit or implementation unit, and train staff to their new tasks and work. In best cases, the technical assistance and advisors could remain assistance through contract conclusion and maybe beyond. As the bid and negotiation process need repeated clarifications on the bid documents, it should be well organized to lead to a good outcome. In case there is no external support to the government in this phase, the main government officials should be trained on the requested negotiation skills and bid information package.

### **B- Procedures for PPP projects selection and Areas of Application in Syria**

**583.** Once the conditions for effective PPP are fulfilled, the following movements should be proceeding to select the project on a partnership premise:

#### **1- The phases of a proposed project dependent on the partnership approach**

**584.** According to important scholars, a competent authority should make the partnership choice before the implementation approval of the partnership project<sup>579</sup>. This choice can be accomplished in two stages: The first stage can be classified by drawing up an index, including four components. These components are derived from the goals of economic and social arrangements in Syria. Generally, one of the necessities and requirements that Syria will use in the forthcoming time frame is reconstruction and development. Therefore, these components are: Firstly, the capital made out of three things: the size of investment spending, the availability of foreign currency in financing the project, financial structure, and the borrowing requirement to fund the project. The second component is the project's capacity to make local employment opportunities and its commitment to decreasing of Syrian joblessness rates. In other words, this component is represented by the number of new existing

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<sup>579</sup> Akitoby B., Hemming R., and Schwartz G., "Public Investment and Public-Private Partnerships", International Monetary Fund, Vol. 40, 2007, P. 10.

local jobs and the rate of subcontracting services. Thirdly, to what extent the new project could bring advanced technological innovation. It comprises of two items: the source of technology and the transfer of knowledge. Lastly, the project nature, this component mirrors the financial side of the project. The latter comprises of four items: the proportion of financial support to the public service, the arrangement of the project as per fund, incomes got for the venture, and project lifetime<sup>580</sup>.

**585.** After project identification, as indicated by Syrian development objectives, the second stage is to arrange project by settling the best way to implement them; for example, through a traditional route or partnership premise. There would be a need to distinguish projects that can be implemented by the public sector. The partnership council should approve the projects listed as partnership projects. This phase is called "Project Approval"; and to reach this phase, the Public Sector Comparator (PSC) is utilized to assess the private partner's offers and comparing them to select the favored offer that provides the better VFM<sup>581</sup>.

**586.** Public Sector Comparator represents the balanced expense for the potential risks of the venture after competitive neutralization impacts of the project. The project will be balanced in the wake of figuring the expenses of the transfer of risk expecting that will be executed, financed, and structured through the public sector (traditional construction technique)<sup>582</sup>.

**587.** Project total expense is considered and compared with a certain period as per the following: Traditional buying contracts and alternative financing and procurement. The first one would be the public sector's absolute evaluated costs if it implemented the project through customary construction contracts, known as the public sector comparator<sup>583</sup>. Besides, the other alternative is financing and procurement: which is the total assessed costs caused by the public sector if they

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<sup>580</sup> Cihan University- Erbil Scientific Journal, Special Issue No. 2 (Part-B), September 2018.

<sup>581</sup> Russel A., and Nelms., "The Public Sector Comparator: Uses and Abuses", working paper, University of British Columbia, Oct. 2006.

<sup>582</sup> Sarmiento J., "Do Public-Private Partnerships Create Value for Money for the Public Sector? The Portuguese Experience", OECD Journal of Budgeting, Volume 1, 2010.

<sup>583</sup> Infrastructure Ontario, "Assessing Value for Money: A Guide to Infrastructure Ontario's Methodology", Queen's Printer for Ontario, Canada, 2007, P. 4.



implemented a similar venture at similar details. This is done by alternative financial agreements, which are recognized as Adjusted Shadow Bid (ASB).

In conclusion, the economic and social feasibility studies are compulsory to approve a partnership project. In that sense, partnership projects should produce prosperity, monetary advantages, and stability. Therefore, it is important to spread awareness among the society to be familiar with the partnership idea.

## 2- Proposed ideas for partnership projects in Syria

**588.** Based on the United Nations development programs' historical experiences and partnership, it is noticed that every nation's particular conditions decide the public and private sectors' role. As per Syria's financial, social, and political conditions, Syria suffers from the following<sup>584</sup>: a decrease in public incomes and a huge shortfall in the State budget; rising unemployment rate to record levels, especially among youth; significant destruction of infrastructure, such as roads, bridges, dams, airport, residences, hospitals, schools. In addition to that, there is a deterioration of human capital and a departure of countless experts, specialists, and scholastics; and capital flight abroad, low domestic investment funds, and high inflation rates [...].

**589.** Therefore, a researcher proposed<sup>585</sup> several projects listed in the table below.

Project Name	Sector	Sub-sector	Stage	Type	Area
Road Improvement and maintenance	Transportation	Roads and Bridges	Operating and maintenance	BOT	Each Governorate on its own
Electrical Power Generation	Energy	Renewable Energy	Design, operation and maintenance	BOT	Each Governorate on its own

<sup>584</sup> Presidency of the Council of Ministers, "Financial Statement of the Government", Syrian Arab Republic, 2010-2017.

<sup>585</sup> Syrob R., "Public-Private Partnership in Syria, A Comparative Analysis of Financial Alternatives." Ph.D thesis, Damascus University, 2013.

Money transfer and Postal Parcels	Telecommunications and technology	Postal services	Operation	Concession contracts	All governorates
Development and rehabilitation center	Administrative development	Continuous learning	Design and operation	BOOT	All governorates
Waste treatment	Water	Sewage plan	Operation and maintenance	BOT	Affected areas
Hospitals building	Health	Infrastructure	Design and operate	DPOOT	Aleppo
Tourism buses	Tourism	Transportation	Design and operation	Administrative contract	Tourist areas
Passenger terminal Damascus international airport	Transportation	Airports	Design operation and maintenance	BOOT	Damascus-Lattakia And Al Qamishli
Hotels management and regional tourism	Tourism	Tourism resorts	Design, operation and maintenance	Administrative contracts	Hotels in different provinces

Table 9: Suggested Syrian projects based on partnership<sup>586</sup>

**590.** The researcher cannot prioritize the proposed projects because the State is the main element for deciding Syrian requirements for the up and coming period. Therefore, the above table presented a few predictable projects with the following four central matters:

The first concern is the project's capacity to accomplish rapid incomes and streamlining for existing infrastructure, such as money transfer, postal and parcel services, without requiring more public spending. Then, there is the probability of establishing jobs opportunities and qualifying human cadres through the

<sup>586</sup> Cihan University- Erbil Scientific Journal, *supra* note 580 at 58.

implementation of projects that is totally operated manually, such as road maintenance or projects that increase the laborers' aptitudes and empower them to enter the labor market. Thirdly, there is the matter of attracting advanced technology (producing power through renewable energies sources, building hospitals with advanced medical equipment. Lastly, there are the concerns of social and service sectors improvement because of the deterioration of health and sanitation (e.g., waste management). Therefore, there must be a broad analysis of government organizations before presenting any partnership project.

## **Section II: Appraising and structuring PPP projects**

**591.** Appraising the PPP project implies checking if it promises well to build up the project, and to implement it under the form of PPP. Numerous fruitful PPP programs build up PPP "appraisal criteria"; these criteria are used to choose if a proposed PPP project is a wise investment choice.

**592.** §(1) sets out the PPP project appraisal criteria, where the evaluation criteria ordinarily require some inquiries to be tended. Does the project satisfy guideline projects examination criteria, such as technical feasibility and cost-benefit justified? Is the PPP' opportunity financially alluring to the market? To what extent would the project convey more VFM whenever conducted as PPP rather than under traditional procurement? Is the project financially capable? In §(2), the structuring and designing of a PPP project are studied and explained by mentioning how risks are identified and allocated between them.

### **Paragraph 1: PPP Project Appraisal Criteria**

**593.** The governments need to survey whether or not the PPP is decent resource utilization when choosing to seek after a project. This includes evaluating the proposed projects according to four key criteria: feasibility and economic viability of the project, commercial viability, VFM of the PPP, and fiscal responsibility.

**594.** First, the feasibility and economic viability of the project imply that the project is essential to policy priorities, sector, and infrastructure plans. It includes at that point feasibility studies to check if the project is conceivable, and if it is cost-benefit justified. This examination might be done before identifying the project as potential PPP, or as a component of the PPP advancement process. Commercial viability assesses if the project is likely to attract good-quality sponsors and moneylenders by offering reasonable monetary returns. In that context, this is confirmed through the bidding procedure. The third criterion is to verify that the project achieves better VFM compared with other choices. This incorporates comparing against the alternative of public procurement. It can likewise incorporate comparing the proposed project with other PPP structures, to ensure that the proposed structure gives the best value. The fourth criterion is to check if the project's overall revenue requirements are affordable for users, and public authority, is called fiscal responsibility. This includes checking the project's fiscal cost, and building up whether this can be accommodated inside a prudent budget plan and other monetary limitations<sup>587</sup>.

#### **A- Assessing Project Feasibility and Economic Viability**

**595.** Most governments apply to the proposed PPP projects, a similar technical and monetary evaluation as some other significant project of public investment. There are normally two wide components to this appraisal. The first one is studying and assessing the feasibility of the project concept. The second one is comparing and appraising to deduce if the proposed investment project is a decent investment choice.

**596.** As mentioned previously (section I: Preparatory procedures of PPP Projects), this assessment may happen before considering a project as PPP. In other cases, it might be considered as a feature of the PPP appraisal process. In both cases, assessing the feasibility and economic viability of the PPP project should be conducted similarly to other significant projects of public investment. This part illustrates such analysis as it might be applied to potential PPP projects.

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<sup>587</sup> Yescombe E., "Public-Private Partnerships: Principles of Policy and Finance", 2nd edition, Oxford, 2013. Also see European PPP Expertise Centre, "The Guide to Guidance: How to Prepare, Procure, and Deliver PPP Projects", Luxembourg, 2011.

## **1- Outlining project and checking feasibility**

**597.** Defining the project should be prior to the appraising process. That is, the project should be clear on its physical outline, the used technology, the outputs and the expected clients. The same clear definition and assessment are required for the capital, operating, maintenance costs, and any income expected to be generated. These assessments and definitions should be broad in scope to be applied to projects conveyed as either PPP or a traditionally publically financed project.

**598.** The project concept is ordinarily tested for practicality across several measurements, such as technical feasibility, legal feasibility, and environmental and social sustainability. The technical feasibility is to question if the project can be implemented as planned with utilizing proven technologies and without unreasonable technical risks? In contrast, the legal feasibility is to check if there are any legal obstructions to the project? For PPP, this incorporates checking if the government has any limitation to go into a PPP contract.

**599.** There is also environmental and social sustainability; this implies asking if the project conforms to the national environmental standards. Sometimes, a higher bar might be set; for example, the project should be consistent with the equator standards<sup>588</sup>. For the most part, responding to these inquiries includes engaging specialists to undertake concrete studies, such as technical feasibility studies, legal examination, and environmental and social effect appraisals<sup>589</sup>. In that regard, the Syrian PPP law has dedicated several provisions for those studies and documents<sup>590</sup>.

## **2- Appraising project Economic Viability**

**600.** Several countries embrace some economic viability examination to determine if a proposed project is good for public assets. Foremost, a project can be considered as economically viable when the project's economic benefits surpass its economic

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<sup>588</sup> Based on the World Bank Group principles.

<sup>589</sup> For further direction, see the detailed guides distributed by the Chile government, in addition to several governments, such as Germany, the United Kingdom, and Peru to conduct feasibility studies for public investment ventures.

<sup>590</sup> For example, Syrian Public-Private Partnership Law No.5 of 2016, art. 29 and 71

costs. Practically speaking, it is known that the project economic costs are equal to its financial costs. However, in several situations, some non-market costs are considered, like the environmental harm. The economic benefits are represented by the value that the project will convey to individuals. For instance, the benefits of improving transportation can surpass the fees paid on a highway. A high school education is valued by improving the lives and prospects of the children who attend, even if there is no fee charged. Economic viability analysis can likewise incorporate “cost-effectiveness” analysis; to decide if the project is the lowest cost to accomplish the specified benefits<sup>591</sup>.

**601.** It should be noted that several countries require PPP projects to meet the stated criteria concerning feasibility and financial viability. Other times the necessities are characterized specifically for PPP ventures. In any case, the content of the appraisal is regularly the same<sup>592</sup>. Implementing organizations should likewise keep in mind that work is done to assess project feasibility and establish the foundation for the rest of the PPP appraisal. The project definition gives the premise of building up the PPP budgetary model and commercial and fiscal viability analysis, as well as quantitative VFM analysis. Therefore, the assessment of technical feasibility, social and ecological sustainability will give a premise to the risk analysis.

### **B- Considering Commercial Viability**

**602.** After confirming that the project is viable, the following stage is to think whether the PPP project is appealing to the market. Therefore, the question is: will the private party consider the opportunity as something appealing to seek after? Generally, the private party considers a project commercially viable if it offers great financial returns, and does not require from the private party to bear unreasonable

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<sup>591</sup> There are several literature and guidance reports on the project appraisal as well as cost-benefit analysis. According to the British Green Book, the main aim of project appraisal is to ensure that no project is adopted without answering to key questions: Is this way the best one to achieve the intended objective? And Are there better uses for these resources?

<sup>592</sup> For instance, the government of Philippines set out a process, where all PPP projects, especially infrastructure one must undergo through it. This is well-organized feasibility and evaluation process and it stated on an official manual. Moreover, Chile government through its concessions law states that the PPP projects must be confirmed by the ministry of planning. Therefore, the concessions council is responsible to revise the assessment enabling the PPP project to be implemented.

risks<sup>593</sup>. It should be noted that if the revenue generated from user exceeds the costs in addition to the commercially required return on capital, the venture will be generally commercially alluring (if risks are viewed as reasonable). However, if this scenario did not happen, the government may conduct a financial analysis for evaluating the required government contributions.

**603.** Governments frequently evaluate the potential partners' readiness for proposed PPP, before launching the tender advertisement officially into the market. This evaluation may incorporate a study of the extent to which these proposed projects are operated as PPP in the region. It can also include testing of market interest through market exploration, which introduces potential financial investors to the basic criteria for a project (usually the project idea and initial structure).

### **1- Assessing Value for money**

**604.** The primary goal of most governments in implementing PPP is to achieve better value for money in building the requested infrastructure projects. "Value for money" signifies accomplishing the ideal combination of benefits and costs, in conveying services clients need. Numerous fruitful PPP programs require an evaluation of whether PPP are probably going to provide highest value for the public interest rather the customary public procurement; this is regularly called "VFM analysis". VFM comparison should be possible for a particular proposed PPP venture. It could likewise be possible at a program level, for ventures that have same attributes<sup>594</sup>. VFM analysis commonly includes a blend of qualitative and quantitative methodologies. Qualitative VFM analysis includes checking the justification for utilizing PPP. That is, soliciting whether a proposed project is likely to be appropriate to be financed by the private party and verify if the conditions are in place for the PPP to accomplish VFM<sup>595</sup>.

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<sup>593</sup> Asian Development Bank, *supra* note 254 at 17-18.

<sup>594</sup> For instance, the guide cited by United Kingdom Treasury stated how VFM should be evaluated at both the program and venture levels—however that philosophy was later viewed as one-sided and reviewed only by government.

<sup>595</sup> The World Bank, "Value for Monet Analysis, Practices and Challenges: How governments choose when to use PPP to deliver public infrastructures and services", Public-Private Infrastructure Advisory Facility, 2013.

**605.** Some PPP programs likewise require a quantitative appraisal of VFM. This appraisal is conducted through comparing the selected PPP option against a PSC; that is, what the project would resemble whenever conveyed through customary procurement. This correlation can be made in various manners. The most widely recognized manner is to compare the fiscal expense under the two choices: comparing the risk-adjusted expense with the government of procuring a similar project through conventional procurement, to the expected expense to the government of the PPP (pre-procurement) or the real PPP bids (post-procurement)<sup>596</sup>.

**606.** VFM analysis, in particular the use of quantitative “public sector comparator” procedures, has witnessed extensive debate. Some wonder about the importance of a PSC method, which can appear to be more “scientific” than the situation, and it could conceivably be misleading decision-makers. In that context, World Bank launched a report on VFM analysis based on several countries’ experiences and trends concerning the extent of using VFM analysis and the relative benefit of quantitative and qualitative methodologies<sup>597</sup>.

## **2- Standard PSC, comparing fiscal cost**

**607.** The most widely recognized quantitative tool for VFM appraisal of a PPP venture is obtained from the methodology initially utilized in the United Kingdom's PFI program in the mid-1990s. It is based on comparing the financial cost of delivering the project through a PPP against the traditional public delivery choice.

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<sup>596</sup> Rekulapally D., “Public Sector Comparator for public Private Partnership Projects in India”, India Institute of Technology, 2009.

<sup>597</sup> For more debate on approaches to deal with surveying value for money, and their relative favorable circumstances and inconveniences, see too:

- Farquharson et al's area on “selecting projects”, which quickly portrays a value for money and money saving advantage investigation, and thinks about the value of qualitative versus quantitative methodologies.
- Grimsey and Lewis' article on PPP and Value for Money incorporates a sector on “ways to deal with value for money”, portraying instances of various nations' methodologies.
- The OECD's distribution on PPP, which likewise portrays the scope of strategies utilized by various nations, on a range of multifaceted nature, from just depending on rivalry, to full money saving advantage examination of various procurement alternatives.
- The World Bank toolbox for PPP in Roads and Highways has an area on value for money and the PSC, which depicts the rationale behind value for money investigation, and how the PSC is utilized.



The focal point of the Fiscal Cost way to deal with VFM analysis is the development of a PSC, the cost to government of performing the project through conventional public procurement. The PSC calculation is somehow complicated, as several amendments are needed to guarantee a fair comparison<sup>598</sup>.

### **3- Assessing Fiscal Implications**

**608.** A PPP should be economically feasible and viable and the suitability of the project will be demonstrated through VFM analysis. In any case, the government in charge also needs to choose whether the PPP project is affordable and financially capable. Numerous governments have entered into PPP projects and have not fully recognized the cost involved. This can make a huge monetary risk for governments. Therefore, governments should evaluate the project financial affordability while appraising any PPP venture to stay away from this trap.

**609.** Fiscal commitments can be categorized into contingent or direct commitments. The latter are the commitments that government recognizes that it should directly perform if the PPP venture proceeds. The former are the commitments that may be emerged in certain cases. Governments need to survey the conceivable expenses of the two kinds of commitments. Once the fiscal costs are identified, the government needs to evaluate whether those costs will be affordable. For instance, this can incorporate comparing annual cost evaluations against the projected spending plan of the contracting authority, considering the effect on debt sustainability, or presenting specific limits on various sorts of PPP' commitments<sup>599</sup>.

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<sup>598</sup> Organization for Economic Co-Operation and Development, "Public-Private Partnerships: In Pursuit of Risk Sharing and Value for Money", Paris, 2008, p. 71-72.

This kind of PSC can be utilized at two phases of the procurement procedure, as depicted in the OECD book's part on the financial aspects of PPP. These are: Before the bidding procedure—the PSC can be contrasted and a "shadow" or "reference" PPP, or "market comparator"; a model of the expected expense of the undertaking under the PPP alternative. This can help recognize whether the PPP can be relied upon to offer value for money, before choosing to proceed with detailed preparation and procurement. During the bidding procedure, the PSC can likewise be compared with real PPP bids got, to survey whether the bids offer value for money. This methodology is utilized in Australia, and is depicted in a PSC Technical Note.

<sup>599</sup> A World Bank note on performing a structure for overseeing financial responsibilities from PPP gives an overview on the typical sorts of monetary duties to PPP activities, and on the surveying process of these sorts.

## **C- Demonstrating success: France case study**

**610.** It is contended that governments, which apply the proper criteria standards, are bound to be fruitful in PPP<sup>600</sup>. The below case study shows in detail that a well-governed project that applies the standards mentioned in this chapter accomplish noteworthy advantages. Let us explore the French case study in the healthcare sector, entitled “The Centre Hospitalier Sud Francilien”<sup>601</sup>.

**611.** In the wake of propelling a two-year tender procedure in July 2004, the Center Hospitalier Sud Francilien (CHSF) was granted a special purpose company established by “Eiffage”, Europe's seventh most significant construction and concession group. This arrangement was the result of a competitive tendering process, in which Eiffage group won it among the other French rivals Bouygues and Vinci due to its past involvement in PPP projects. It included a contract for a four-prison program that became the first major French PPP to reach a financial close in 2006.

**612.** The prison deal was as an outline for the CHSF. However, CHSF took only a month and a half to close after the agreement was initially awarded. It should be noted that the cost of this arrangement was € 315 million, which is considered at one of the largest deal of its kind. The venture was intended to last 30 years from the commercial operation initiation date, with construction enduring four years.

### **1- Financing and guarantees of the CHSF**

**613.** The arrangement was organized as pursues: “A” Long-Term Facility; The repayment of this facility, which is equivalent to 268 million euros, amortizing a large loan totaling 80% of capital expenditures. This section of the deal profited specifically from the Daily PPP Ordinance of 17 June 2004, which permitted the hospitals to give the assignment of the irrevocable receivable. B” long-term facility; a large amortization loan of € 45 million had been prepared for managing project performance risks. In contrast, the A facility had a normal life of about 23 years and a

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<sup>600</sup> United Nations- New York and Geneva, “Guidebook on Promoting Good Governance in Public Private Partnerships”, United Nations Economic Commission for Europe, 2008, p. 88.

<sup>601</sup> The contract of construction and exploitation of the hospital center in the south of Ile-de-France, in Essonne, was considered as on from the largest public-private partnership signed in France.

35-year maturity. The B facility was set up to have a 24-year normal life and a 33-year maturity<sup>602</sup>.

Equity Bridge Facility; the three mandated lead arrangers gave a € 24 million equity bridge loan to pre-finance the infusion of shareholders' funds, in this way improving overall shareholders' returns. "Eiffage"<sup>603</sup> ensured this facility, and it was reimbursed with shareholders' funds at the underlying commercial operation date, both as equity and the shareholders' loan.

**614.** At least in terms of financing, this transaction is bizarre because of the degree of guarantees that were conceded by Eiffage throughout the construction time frame and afterward by the CHSF from thereafter. "Eiffage" allowed the lenders and swap providers an assurance that secured the construction risk associated with the project since the private sector could have more capacity to bear the risk. This corporate assurance segregates lenders from the construction risk along these lines enabling the two long-term facilities to profit by better pricing during the construction period of the venture. This functioned admirably for the public sector since the French government expected to move as many risks as would be feasible to the private sector during this period of the arrangement. As stipulated in the previously mentioned Daily PPP Ordinance, the PPP grantors could now embrace to make specific installments to the project company in the PPP understanding itself. This reconsidered French PPP structuring policy, combined with the risk-oriented methodology taken by Eiffage, took into consideration probably the most reduced financing conditions offered for this sort of arrangement.

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<sup>602</sup> The VAT portion of the financing was set up as a € 7 million revolving facility through cash, with the VAT amounts to be paid by the borrower. This facility is completely verified by the assignment of VAT repayments from tax authorities.

<sup>603</sup> Eiffage worked alone on the project. No technical or financial partner, it is the policy of the house "La politique de la maison". "The group wants to be present on all components of PPP contracts, from financing to operation", said Jérôme Fleury. Scandella J.S., "L'hôpital du Sud francilien: le plus gros des PPP", 2007.

## **2- The benefits of this experience**

**615.** The public partner achieves several benefits from implementing this project. Firstly, the record duration between closing the arrangement and the implementation of construction was significant as the hospital could be opened sooner than expected. Therefore, the efficiency of this project was achieved through the completion of the arrangement and the development of a fast construction plan and has benefited both private and public sectors. Based on the high readiness and preparation of the private sector to bear financial risks in the construction of this project, they took on the relevant construction financial risks, hence, they isolated lender from bearing any relevant construction risks. Additionally, selecting projects through transparent and competitive bidding leads the government to choose the best company to perform the project. Understanding that new enactment was required to coordinate the developing opportunities exhibited by PPP, several measures were organized by the French government organized to simplify the PPP to reach an arrangement.

**616.** By exploiting the advantages managed by the private part, both partners benefited. Economically, the arrangement was implemented in a record duration with a reasonable allocation of risk, which boosted taxpayers' money while likewise remunerating the private element. Regarding social advantages, once the hospital is built up, its patients will directly get better healthcare facilities that cannot be conceivable without forming the project as a PPP. Different nations can learn from how the private sector choose to take a great deal of the risk of this project; and the entirety of the construction risk; given that, it was generally ready to bear the risk burden. In addition, the efficiency reached by this project shows how this type of partnership can provide private healthcare facilities that would not have been imagined without it before.

### **Paragraph 2: Way of structuring PPP Projects**

**617.** “Structuring a PPP projects” signifies designating obligations, responsibilities, rights, and risks that are relevant to each sector in the PPP contract. This designation should be written clearly and in detail in the PPP contract. The structuring process is usually developed repetitively and progressively, instead of drafting a definite

agreement straight away. The initial step is to transform the underlying project concept into key business terms; which is the necessary outputs, the duties and risks that each party will bear, and how the payments will be paid to the private sector. These business terms are ordinarily written in detail to empower experts to appraise the proposed PPP, before submitting the resources expected to build up the draft PPP contract in detail.

**618.** It was mentioned in the prologue of this chapter that PPP structuring and PPP appraisal are parallel and iterative procedures. This operation is fed by the information of each of the feasibility study and the economic viability, such as identifying the key technical risks. The aim is commonly to structure PPP that will meet the pertinent evaluation criteria that are technically feasible and economically practical, commercially feasible, fiscally responsible, and offer value for money.

**619.** As mentioned before, the beginning stage in structuring PPP is the project concept. Most resources on structuring PPP project focuses on identifying and allocating project risks. This makes sense since proper risk allocation is affected by a large number of the PPP' Value Drivers. Following this methodology, different PPP structure components, such as the agreed allocation of obligations and the payment system, come from the risk allocation. For instance, the private party may be assigned to bear the construction risk party, based on its high readiness to oversee construction process. This implies that the private party manages all responsibilities related to construction choices. This system of allocating commercial risk to the private party is usually defined in a "user-pays" payment mechanism.

### **A- Identifying Risks**

**620.** The initial move toward structuring the PPP is regularly to assemble an extensive list of the considerable number of risks related to the project. This list is known as a "risk register". In this specific circumstance, a "risk" is an unexpected change in the value of the project, from the perspective of a few or all partners, emerging from a given essential "risk factor". For instance, "demand risk" occurs

when the demand on the project's services are less than expected and hence, leads to reduce the value and income of the project<sup>604</sup>.

**621.** PPP risks differ depending on several factors such as the countries where the venture is performed, the project nature and the assets and services included. However, certain risks are basic to numerous sorts of PPP venture. These are typically gathered into risk classifications, which are frequent chances related to a specific capacity (for example, development, operations, or financing), or with a specific project stage (for example, termination)<sup>605</sup>.

### 1- PPP Risk categories

**622.** The classifications of risk are basic to numerous PPP, and these classifications could be illustrated in the table below:

<b>Risk categories</b> <sup>606</sup>	<b>Meaning</b>
<b>Site</b>	Risks related to the accessibility and nature of the venture site, for example, the expense and timing of acquiring the site, required permits or guaranteeing privileges of the way for a road, the impact of geological or other site conditions, and the expense of satisfying ecological guidelines.
<b>Design, Construction, and commissioning</b>	The risk of construction not being completed on time and exceeds the expected costs, or that the plan or development quality methods is not satisfactory to meet undertaking prerequisites.
<b>Operation</b>	There are several risks related to have effective operation process, such as the risk of service outages or resource accessibility or the expenses of working and keeping up the asset is not the same as was expected.
<b>Demand and other commercial</b>	The risk that the user's appetite towards the services may not be as expected, or that incomes are not flowed as estimated.

<sup>604</sup> Irwin T., "Government Guarantees: Allocating and Valuing Risk in Privately Financed Infrastructure Projects", World Bank, Washington, D.C., 2007.

<sup>605</sup> tribunal administratif de marseille, (3e chambre ) arrêt du 12 février 2019

<sup>606</sup> Irwin, Timothy C, *supra* note 604.

<b>risks</b>	
<b>Regulatory or political</b>	Risk of regulatory or political choices or changes in the sector regulatory system that unfavorably influence the project. For instance, this could incorporate the inability to renew endorsements fittingly, ridiculously brutal regulatory choices, or in the extreme, breach of agreement or seizure.
<b>Default</b>	The risk that may appear through the monetary and operational incapability by the private party in performing the project.
<b>Economic or financial</b>	The risk that may arise due to any changes in the rate of interests, exchange rates, or inflation level that may unfavorably influence the project outcomes.
<b>Force Majeure</b>	The uninsurable risk of exterior risks beyond the control the parties to the agreement, for example, catastrophic events, war, or natural disaster, influence the project.
<b>Asset ownership</b>	Risks related with ownership of resources, including the risk that the technology gets outdated or that the estimation of the assets toward the end of the agreement is not quite the same as was expected.
<b>Change in legal Framework</b>	The risk that an adjustment in general law or guideline adversely influences the project, for example, changes in general corporate taxation, or rules overseeing currency conversion, or profit returns.

Table 10: PPP risk categories.

**623.** It should be noted that, sometimes, several resources provide “standard” risk lists and favored risk allocation, for specific venture types. The aim of setting standard risk lists is to help parties to identify the risks for specific PPP project. However, each PPP project has specific features or conditions, such as the specific geological conditions on the course of a proposed road. This implies that performing agencies should hire experienced consultants counsels for the aim of identifying a risk list relevant to the project <sup>607</sup>.

**624.** As shown in the table above, several main risks need to be allocated and controlled in order to guarantee a right and fruitful funding of the project. Therefore,

<sup>607</sup> Abd Karim N., “Risk allocation in Public-Private Partnership Project: A review on Risk factors”, International Journal of Sustainable Construction Engineering Technology, Dec. 2011.

the allocation of the above mentioned risks should be with the best-placed party to carry and manage them in a cost-effective way<sup>608</sup>.

**625.** For clarification, we will explain each one of these categories<sup>609</sup>. Regarding the construction and completion risks, the completion cost will be basic to the undertaking's financial feasibility as the financial proportions are subject to the assumed expense of project construction. The project lenders will require several mechanisms to deal with the risk in case the project company's completion costs exceed the expected expenses that are set out in the financial close. Accordingly, the project company will try to lock certain costs, for example, expenses of commodities, as early as conceivable in the project, to constrain price inflation.

**626.** Completion means finalizing the project construction phase. The construction contractor will be responsible for liquidated damages in case of delay in completion. Along these lines, the meaning of "completion" will largely affect the construction contractor's risk. The lenders will need to guarantee that completion necessitates the attempts to be an adequate condition to justify the construction contractor's release from delay liquidated damages liability. The works will, in this way, be dependent upon certain technical tests and show of implementation limit before completion is achieved. The project company will need to guarantee that the criteria placed on completion can be allotted impartially as per the construction contract and that the lenders do not reserve the right to reject completion due to their abstract assessment of the works. This may include technical testing performed by autonomous experts, or by standard measures or tests with results that can be clearly verified and not subject to unreasonable variance.

**627.** With regard to the operating risks, the project financial model, and feasibility assumptions are subject to the estimated costs of activities. In case of any increase of operation costs, lenders need to be secured that the revenue flow will not be impacted. For example, the main costs relevant to a power generation project are the costs of

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<sup>608</sup> This could be other than the private sector.

<sup>609</sup> The world Bank Group PPPLRC, "Risk Allocation, bankability and mitigation in Project Financed Transactions", 2018 <https://ppp.worldbank.org/public-private-partnership/financing/risk-allocation-mitigation>



fuel, water treatment, and the energy cost. The expenses can be locked in, somewhat, hedging by future contract and through information agreements<sup>610</sup>. However, it is likely to happen that a few costs will not be covered. The moneylenders will need to be certain that these are constrained (for example, the tariff calculation will reflect any increase in the energy or water treatment expenses). Another key expense in operations is the employees' wages. An assumption for wage inflation is generally incorporated with the understanding by reference to an index, for example, the retail price index. It is essential to guarantee that the index covers increments in some types of expenses caused by the project<sup>611</sup>.

**628.** Also, performance is considered as a real risk in operations. The project lenders and investors are probably going to select a skillful operator to operate the venture. However, there will be risks related to operations, such as some pieces of the plant being broken without insurance. The lenders will try to release these risks through guarantees and step-in rights<sup>612</sup>.

**629.** As for the demand risk, the project will probably not generate profits until the operation process is completed. Thus, it is vital for lenders and investors to ensure that the future income streams after the implementation are precise. Future forecast of demand, cost, and a sector guideline in any applicable site nation will be critical to private sector investors considering the project's income possibilities.

Concerning force majeure and change in Law, it is noted that the financing understandings will exclude force majeure or change in law arrangements. In these cases, it is obligatory to reimburse the loans. The moneylenders will need to review the arrangements and documents relevant to both cases in the project to guarantee that they are back-to-back (as far as possible) with the concession understanding.

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<sup>610</sup> Also see, Hovy P., "Risk Allocation in public-private partnerships: Maximizing value for money", International Institute for Sustainable Development (IISD), 2015.

<sup>611</sup> *ibid*

<sup>612</sup> Step- in rights are rights provided to lenders in project-financed arrangements to "step in" to the project company's position in the contract in order to take control of the infrastructure project where the project company is not performing. There may be prohibitions in the law on lenders having step-in rights. This will be an obstacle to attracting private sector finance and will need to be addressed by the government.

**630.** Given that the transactions of project financing have extended into developing nations, worries about political risk have developed. In consequence, several primary risks may emerge, which are related to decisions the government may take, such as to drop a project or to change the terms of the agreement or not to satisfy its commitments, political or regulatory risk in neglecting to implement the tariffs increments settled upon in the agreement, the risk of expropriation or nationalization of venture assets by a government. A portion of this will be overseen in the project agreement with the government bearing certain risks in terms of compensation to be paid based on one-sided end or expropriation. Yet, not every single political risk is probably going to be borne by the government.

**631.** Commercial lenders might be set up to take on a limb at a level of political risk. However, in certain countries, the apparent political risk delays or even counteracts projects' financing, which generally may be feasible. Since the commercial protection market can just retain a restricted level of true political risk; many venture sponsors have gone to multidimensional agencies or export credit agencies to bear a few or the entirety of this burden. In the latter, the issues, which regularly emerge in connection to such cover, include the extent of "political risk", including administrative risk and regulatory risk, regardless of whether political risk includes events for more than one country or various states of the host nation<sup>613</sup>. Also, the connection between political risk and other "typical" venture risks (for instance completion risk); the degree to which an investor (especially a local investor) can impact events which contain political risk; and the outcomes of a political risk occasion happening and how it influences, for instance, investor obligations to accomplish fulfillment, the liability of investors under reimbursements provided to send out credit agencies or the fundamental liability of the borrower.

**632.** The environmental and social laws and guidelines will impose liabilities and limitations on a venture. The compliance cost could be serious and should be allocated between the project company and the grantor. Similarly, attracting

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<sup>613</sup>Yates A., and Sashegyi B., "Effective risk allocation in major projects: Rhetoric or reality?", a survey on risk allocation in major WA. East Perth, Australia: Chamber of Commerce of Western Australia, 2001.

international lenders, specifically International Financial Institutions (IFIs), require from the project to meet several environmental and social prerequisites that may surpass the available prerequisites issued by the available laws and guidelines. This procedure is made simpler where local law underpins comparable degrees of consistency<sup>614</sup>.

**633.** The Equator Principles<sup>615</sup> comprise a voluntary code of conduct initially created by the International Financial Corporation (IFC) and a center group of business banks. However, they are now perceived by a large number of the international commercial banks dynamic in project finance. These banks have made a deal to prevent projects from loaning if they do not adhere to the Equator Principles. They commonly pursue the IFC arrangement of categorizing ventures, identifying the projects that are most vulnerable to the environmental or social effect, and requiring expert evaluation where suitable. It should be noted that during the implementation of project, the borrower must prepare and comply with the environmental management plan (EMP). Environmental due diligence in relation of such projects and in relation of the legal system within which they are being evolved, and assessment of the environmental necessities of all parties participating in the project, is pivotal if the project company and moneylenders are to conduct an assessment of the risks involved.

**634.** We have also to take into consideration the Social risk. Infrastructure projects, for the most part, importantly affect local communities and personal satisfaction, especially the delivery of basic services, such as water and electricity or toll roads. The project's impacts on society, consumers, can often lead to resistance from local interest groups, which in its turn may delay the implementation of venture and thus increment the cost.<sup>616</sup> This social risk should be priority in the lenders' due diligence agenda, however, usually this not the case. In this context, both lenders and Project Company regularly look to the grantor to deal with this risk. Thusly, the grantor may

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<sup>614</sup> Molenaar K., Anderson S., and Schexander C., "Guidebook on risk analysis tools and management practices to control transportation", National Cooperative Highway Research Program, 2010.

<sup>615</sup> For further discussion of environmental risk and the Equator Principles, see <http://www.equator-principles.com> and also Environment.

<sup>616</sup> Delmon J., "Implementing Social Policy into Contracts for the Provision of Utility Services", World Bank Group, Public-Private Infrastructure Advisory Facility, 2007.

think little of its significance, since the social risk worldview for public utilities is altogether different, the grantor might not have experience of its implications for private investors.

**635.** Usually, project finance debt is sourced from international lenders and in foreign currencies. However, project revenues are, for the most part, designated in local money. The exchange rate diverges between revenue and debt currency and the expense of debt can increment, frequently significantly. Even though under the hypothesis of purchasing power equality, inflation pressures on the devaluated cash will, in the long run, take the foreign exchange scale back to equality, project finance lenders are commonly not set up to stand by so long (with normal times of around ten years). Where revenues are to be earned in some currency other than that in which the debt is designated, the lenders will need to see the revenue stream is adjusted to compensate for any pertinent change in exchanging rate or devaluation. If this is not accessible, the lenders will need to see suitably strong supporting courses of action or other components to oversee currency exchange risk.

#### **a) Assessing and prioritizing risks**

**636.** It would be helpful to think about the significance of the different risks in order to focus effort when identifying risks. Some risks will be more substantial than others. That is in terms of the probability of the risk happening, and the seriousness of its effect on project results, or both. Risks can be evaluated either quantitatively or qualitatively<sup>617</sup>. Practically, many implementing organizations adopt a more qualitative strategy at this stage<sup>618</sup>. That is a qualitative risk evaluation approach in which the risks are categorized based on their probability of occurrence<sup>619</sup>. Therefore, the efforts should be directed to deal with those risks recognized as being both high probability and high impact.

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<sup>617</sup> The Infrastructure Australia guidance note on calculating the PSC gives detailed direction both on distinguishing risk, and utilizing different quantitative procedures to assess risks. An ADB handbook for risk analysis in project assessment likewise incorporates a chapter portraying quantitative methods for evaluating risk.

<sup>618</sup> Guidance on risk management by the Victoria Managed Insurance Authority gives supportive guidance on a risk “heat map”

<sup>619</sup> Farquharson, E, Torres de Mästle, E. R., Yescombe & Encinas J., “How to Engage with the Private Sector in Public-Private Partnerships in Emerging Markets”, World Bank, Washington, D.C., 2011.

637. After a full identification of project risks, a mitigation procedure should happen; wherein, in light of a cost-benefit analysis, some project attributes, or procedural steps might be balanced. For example, extra land studies or traffic studies might be directed before the tender to diminish vulnerability and contain bidding costs. Performance necessities that are not basic to project achievement and may make an unacceptable risk to private operators might be canceled<sup>620</sup>.

### **b) Allocating Risks**

638. In the context of PPP, allocating risk implies choosing which party to the PPP agreement will bear the cost (or receive the reward) of an adjustment in project results emerging from each risk factor. Thus, the good allocation of risks is an essential factor for PPP to achieve value for money. A focal standard of risk allocation is that every risk should be apportioned to whoever can oversee it best<sup>621</sup>. Applying these standards does not suggest moving the greatest possible risk to the private sector, as stated in the OECD's publication on risk sharing and value for money in PPP. Thus, transferring to the private party the risks that it is better ready to control or relieve can bring low the general venture cost, and improve value for money. However, the complete risk transferred to the private party, the higher the return or risk premium, the equity investors will require, and the harder it will be to raise debt finance. It is

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<sup>620</sup> PPP knowledge Lab, "Identifying risks", PPIAF, PPI Database <https://pppknowledgelab.org/guide/sections/58-identifying-risks>

<sup>621</sup> Irwin, Timothy C, *supra* note 604. Irwin's book on guarantees and PPP risk, characterizes this guideline more precisely, expressing each risk ought to be allocated to the party: Best able to control the probability of the risk happening; for instance, the private party is as a rule accountable for project construction, since they have the most expertise in that area. This likewise implies they should bear the expense of construction cost over-runs or postponements; Best able to control the effect of the risk on venture results, by surveying and foreseeing a risk well and reacting to it. For instance, while no party can control the risk of an earthquake, if the private firm is liable for venture design, it could utilize strategies to lessen the harm should an earthquake happen; Able to retain the risk at lowest cost, if the probability and effect of risks can't be controlled. A party's expense of retaining a risk relies upon a few factors, including: the degree to which the risk is corresponded with its different resources and liabilities; its capacity to pass the risk on (for instance, to clients of the service through value changes, or to outsiders by safeguarding); and the idea of its definitive risk bearers. For instance, the capacity of governments to spread risk among citizens implies they may have lower risk bearing expense than private firms, whose extreme risk bearers are their investors.

noted that the standards and practice of risk designation in PPP is additionally the main subject of scholarly research and literature<sup>622</sup>.

**639.** Regarding the different limitations on risk allocation, there are some limitations to how risks can be distributed in a PPP project. These incorporate the level of detail of the risk allocation. As a rule, risks are designated in groups, sometimes with exemptions for certain important risks. For instance, the private party may bear all construction risks, aside from certain key geological risks, against which the government could give a specific indemnity. There are specific risks that cannot be transferred through the PPP contract. For instance, the private party will consistently bear certain political risks; specifically, the government's risk will renege on the agreement or expropriate the assets. It should be noted that international institutions like the Multilateral Investment Guarantee Agency (MIGA), provide political risk insurance to help mitigate the risk.

**640.** The extent of risk transfers to a private party; the equity holders of the private party to the PPP contract, the PPP Company, are just presented up to the value of their equity stake. Besides, moneylenders will regularly accept a generally low degree of risk, corresponding with their expected returns. Practically speaking, this implies the degree to which risk can be transferred is restricted by the degree of equity in the project company. If losses because of a risk end up being more prominent than the equity stake, the equity holders can leave the project. Since the government is eventually liable for ensuring that services are given, the rest of the project risk stays with the government. A mix of these constraints can imply that country qualities influence the potential outcomes of risk transfer.

**641.** The outcome of the risk allocation process at this stage is regularly a risk allocation matrix. The risk allocation matrix lists risks, frequently arranged by

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<sup>622</sup> For instance, Ng and Loosemore's article on risk portion in PPP portrays PPP risk classes and allocation approach, and gives a contextual analysis of risk designation in the New Southern Railway venture (an underground airport - city rail connect) in New South Wales, Australia. Bing et al's article on risk portion in PPP/PFI projects in the United Kingdom evaluates how risks have been allocated in PFI projects practically speaking, to recognize risk allocation inclinations. An IDB survey of the Spanish PPP experience incorporates a few instances of risk allocation utilized in various sorts of project, from streets to hospitals.

classification, and determines who bears each risk. This risk allocation is then tried by incorporating suitable provisions in the PPP contract<sup>623</sup>. Several governments capture the risk identification standards described above in “favored risk allocations”, regularly displayed as a favored risk allocation matrix. These favored allocations might be generic or specific to areas or sorts of projects. They are normally a beginning stage for allocating risk on a specific project since ventures regularly have specific qualities that may mean an alternate risk allocation that would give better value for money. The risk allocation matrix should be rechecked prior to the contract signature to survey the duties of each party before it is legally binding. This last review could likewise fill in as an extra gatekeeping system<sup>624</sup>.

## **2- Translating Risk allocation into Contract Structure**

**642.** A significant part of the PPP literature centers around risk allocation. Some of them consider that when a favored risk allocation has been settled, this can somehow translate smoothly into a detailed contract. The latter consideration might be misleading since many experienced PPP specialists will experience an intermediate step where they characterize other elements in the agreement structure, such as “who will do what?”, and “in what manner will the installments flow?” However, few resources portray how the risk allocation is converted into a general contract structure. The World Bank's toolkit for PPP in water services is a special case, and expressly sets out a procedure of apportioning responsibilities and risks together; since every responsibility is commonly connected with a bundle of risks. For instance, the private party might be responsible for income collection, which conveys the risk that some

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<sup>623</sup> See *supra* note 621, Farquharson et al gives a model “risk register” (or matrix) for a PPP project.

<sup>624</sup> The following are instances of favored risk allocations and risk allocation matrices: Infrastructure Australia has delivered “standard commercial principles” for both financial and social framework projects, which portray in detail how risks and duties will be distributed; Hong Kong's Introductory Guide to PPP gives a definite case of a risk matrix for PPP of a water treatment plant; The Government of Rio de Janeiro's PPP Manual gives a case of a risk matrix for a PPP infrastructure project; South Africa's PPP Manual, Module 4: PPP Feasibility Study, incorporates an institutionalized PPP risk matrix—listing risks, and portraying for each risk a typical risk relief mechanism and allocation.

clients will not pay. The private party might be accountable for construction that involves a series of risks.

**643.** Summing up, this approach proposes that it might be useful to consider arriving at a “PPP type” from thinking whether the public or private party is better ready to carry out each of the key “functions” (Design, Build, Operate, Maintain, and Finance). This allocation of functions might be founded on an analysis of which party is best ready to hold up the risks naturally connected with each function. In addition to that, the different considerations of institutional connections and political limitations will be a factor in choosing which party can execute which function.

**644.** Besides the allocation of functions, another key component in the contract structure is how the payments flow. Payment systems may pursue from the allocation of capacities and risks. For instance, if the private party is better ready to oversee collection risks and demand risks, then the private party will probably be compensated legitimately from user charges. However, if the private party can oversee collection risk but is not asked to take demand risk, at that point, the payment structure may include the private party collecting user charges and transmitting them to the public authority. In contrast, the public authority pays the private party for asset accessibility, with a reward for accomplishing significant levels of collections.

**645.** At last, there is also an essential supplement to defining the payment instrument is characterizing how implementation will be estimated, observed, and enforced. For instance, the government’s payment might be conditional on asset’s availability, to transfer most operating risk to the private partner. In practice, this risk transfer can only be achieved if the standards required as aspect of “available” are clear and practicable<sup>625</sup>.

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<sup>625</sup> The following resources give further guidance on the linkages between responsibilities, risks, rights, and installment instruments, which can improve the agreement structure: Elisabetta L., Giancarlo S., and Mercedes V., “Best Practices on Contract Design in PPP: Checklist”, World Bank, Washington, D.C., 2007, p. 26-31; India, Ministry of Finance, “PPP Toolkit for Improving PPP Decision-Making Processes”, New Delhi, 2011.



## **B- Governance Challenge: Cooperative Sharing and Mutual Support**

**646.** A theory in project finance proposes that risks should be borne by the party best ready to oversee them, however numerous PPP projects regularly fail because the parties cannot concede to the allocation of risk, with each side attempting to move the risk to the other. It is also hard to calculate risks, particularly in the transition economies, when the rate of economic development is sometimes surprising.

**647.** PPP permit risk that is generally ready to be overseen by the private party, to be transferred to them. However, governments likewise need to acknowledge their share and moderate those allocated to the private party in mutual support. Adjusting risk is critical to PPP' advancement, as PPP' primary profit emerges from the transfer of risk to the private part. However, such a transfer and the extent of the acceptance of the private sector to accept it sometimes impede the achievability of the project. In general, lenders will avoid high risks. They will turn down even the most socially attractive project if they see it to have an excessive number of risks; a reality, which disappoints the public sector. Furthermore, governments ought to recognize risks toward the beginning of ventures. A decent beginning stage might be to utilize an agenda of the risks, which regularly apply to infrastructure service projects<sup>626</sup>.

**648.** The helpful tool to both government and the private sector is the risk matrix, which should be applied to each project stage, setting out the government's favored situation on allocation. During the pre-tender and tender stages, it can help government specialists in posting all the important project risks and their proposed allocation. During negotiations, it can be as a checklist to guarantee all risks are tended to. After signing the contract, it may be a helpful summary of the risk allocation imposed by the agreement.

**649.** Governments can utilize various instruments, such as insurance, to mitigate the risk of a "force Majeur" event, which could harm a state-owned network basic to the private part of the venture. Such frameworks might be insurable by attempted

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<sup>626</sup> The United Nations Development Program, "Fighting Corruption to Improve Governance", New York, 1998.

research before issuing tenders and determining wanted results of the venture (while considering government strategy). Since the project is in the general public interest, it is likewise basic to give transparent regulatory procedures, particularly at the bidding stage. When the undertaking begins, the government should build a risk-monitoring framework to guarantee performance specifications and conveying services. In like manner, this will take into consideration the payment for services to be suitably checked. At the same time, continuous surveillance will screen that the project is advancing as planned.

**650.** The governments need to address political risk, including the concern that governments will come in singularly and change the rules (the swing from a positive way to deal with PPP to a negative methodology and cancel PPP after an election commonplace in certain nations)<sup>627</sup>. Likewise, reacting to private sector concerns over “red tape”, a further challenge the private sector faces concerns the troubles in getting the required planning and different approvals to begin ventures since red tape and unnecessary interference can delay the project. As for “red tape”, governments can intervene to cover up such issues to facilitate the project to begin on schedule.

**651.** Governments can change the conditions of the understanding in light of the long length of projects. However, it is significant before the change is made, that the private partners are completely counseled. Additionally, a government can “step in” or end the agreement if the project is performed incorrectly. Here the private part's tensions can be tended to by contractual clauses, which make termination and step in measures of last resort<sup>628</sup>. Numerous projects, particularly in transport, require massive private sector investment, and here the private sector may not accept one of the different business risks for these ventures<sup>629</sup>. Therefore, the public sector should

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<sup>627</sup> In some cases, however, the PPP can survive. For instance, the A1 road project in Poland survived eight changes of government during its negotiation process.

<sup>628</sup> In case of a step in, it should relate only to emergency access and where there had been a material service default (which includes continuous or repeated non-material defaults); and in the case of termination, it should seek to ensure that “cure periods” are fair and that as far as possible, the conditions under which termination or government step-in may happen, are clearly specified and limited to material defaults so as to avoid hair trigger termination events.

offer support to a project and lower the risks adequately to stimulate private sector investment level<sup>630</sup>.

**652.** There are different types of support that the government can provide for a project to mitigate the risk to the private sector. For example, certifications might be a fitting type of government intervention, specifically to shield the private sector from risks that it cannot foresee or control. These kinds of guarantees and supports by governments must be provided with care. It must be noticed that under this plan, governments take on liabilities, which have significant fiscal implications. There is a risk too that unintentionally the government makes a “guarantee culture” where the private area looks for guarantees as an alternative to dealing with the risk themselves. Governments must remain focused on how the project’s general purpose improves the performance of the project, which is done by utilizing the risk to its ventures as a motivating force to the private sector to perform well<sup>631</sup>.

**653.** Each circumstance is unique and there are no rigid principles or models for risk allocation. Regularly governments can present less conventional and adaptable tools in risk sharing, which can have welcome advantages. For instance, more than thirty years ago, the Spanish government, with an end goal to update its roads around its coastal seaside resorts to support tourism, made a courageous choice. It accepted the exchange rate risk on the project, something that, as indicated by regular practice, may have been viewed as ill judged. Exchange rate protection proceeds up to the present day. However, in light of a calculation of the expenses of considering such a risk and not taking the externalities of the advantages from the tourism industry spilling out of the improvement in the roads, it appears that over this period the government lost nothing in accepting this risk.

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<sup>629</sup> These enclose: the risk that in the promotion and development phase of the project, there is still no guarantee that the project will take place; the high risk construction stage because of the likelihood of cost overruns during the lifetime of the project; and the uncertain revenues once a project begins operating and the possible for policy changes to undermine the viability of the project.

<sup>630</sup> For example, if the public sector does not plough enough resources or fails to offer other ways of lowering commercial risk, then projects such as TENS, which require massive private sector investment to be completed, will not be realized.

<sup>631</sup> United Nations Economic Commission for Europe, “Guidebook on Promoting Good Governance in Public Private Partnerships”, New York and Geneva, 2008.

**654.** After a PPP venture, for example, prison, school, or hospital is built, the degree of risk falls significantly. This is because, with the facility manufactured, the facility's risk of not being finished on time vanishes. Accordingly, banks become responsive to reviewing the interest cost it charges and to cut the loan expenses. This prompts the formation of financial surplus and raises the issue of who should gain from the achievement, remembering that it has been normally the private sector that has taken the construction risk in the first phase of the project? The practice recommends that all parties, instead of one only, partake in the gains and that gains could be shared by a formula concurred by the different parties before the agreement is signed<sup>632</sup>.

## **Conclusion of chapter I**

**655.** As understood in this chapter, the PPP should be performed within an inclusive reform strategy. Therefore, a PPP project's objectives will be a subgroup of the general objectives for the overall sector reform. Therefore, the project implementation stages as per the partnership approach start from identifying PPP projects, then screening these projects as PPP potential projects, and ending by choosing a private partner and the establishment of a company project. The selection of private partner and the foundation of Project Company are made through an invitation to qualified bidders, which have been chosen under the pre-qualification procedures.

**656.** The implementation stage utilizes economic and social feasibility studies of the project and government preparation of the tender. The subsequent stage is prequalification quotations for candidates who wish to contribute, and afterward requesting costs offers. The government should prepare documents structures and books of technical and financial conditions, contractual understanding, the terms of the proposal, and the arrangement of a public sector comparator.

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<sup>632</sup> IMF, Hungarian Ministry of Finance, International Center for Economic Growth—European Center, “International Seminar on Strengthening Public Investment and Managing Fiscal Risks from Public-Private Partnerships”, Hungary, 7 and 8 March 2007.

**657.** The desire to rapidly implement a project on a partnership basis with paying little attention to how the implementation and prerequisites achievement are fulfilled will make uncertain outcomes. This requires adequate time to study projects to be introduced on a partnership premise, particularly projects with social development prospects. Thus, partnership projects should be formed and adjusted according to the development of new economic components. Therefore, creativity and innovation are key factors in implementing PPP projects and ensure success.

## **Chapter II: Operational Context of PPP Implementation**

**658.** In this chapter, the operational context of PPP implementation is studied by explaining the process of managing a PPP transaction, which is the subject of section (I). In section (II), the implementation process of the Unsolicited Proposals (UPs) is analyzed and studied to show their advantages and disadvantage in a PPP process.

### **Section I: Managing PPP Transaction**

**659.** In the transaction phase, the private partner will be chosen by the government to perform the PPP project. This stage follows the structuring, evaluation, and detailed arrangement of the PPP mentioned in the previous chapter. This phase ends as soon as the PPP arrives at the financial close. This means when the government chooses the private party and signs the contract. Then, the private party verifies that the essential financing exists and can begin used it in the project.

**660.** The PPP transaction's objective phase is two-folded. The first aspect is choosing a specialized company or consortium, while the second aspect is distinguishing between the best and most productive solutions for the objectives of the proposed project, from two points of view: a technical view and value for money one. The procedure normally builds up a kind of quantitative settings of the agreement: the amounts due by the government, or the expenses related to assets and services for which the clients will be bound to pay. The achievement of these

objectives normally needs a competitive, effective, and straightforward procurement process<sup>633</sup>.

**661.** Since most governments utilize a competitive selection procedure or direct negotiations to procure PPP contracts, this section addresses how a competitive procedure is pursued. Practically, there might be a couple of conditions where direct negotiation could be a decent choice. Therefore, we will present how the procurement strategy is selected (§1), then, we will address the functional context of qualifying bidders (§2).

### **Paragraph 1:           Selecting the procurement strategy**

**662.** A competitive selection process is usually advisable for obtaining PPP contracts. The favorable circumstances for that are transparency and competition to pick the best proposition (most likely to offer VFM). The option, in contrast to a competitive procedure, is to envisage a direct-negotiation with a private firm based on valid justifications. However, this option is not always open and its valid justifications are moderately few<sup>634</sup>. These valid justifications include small undertakings, where the expenses of a competitive procedure are restrictively high given the degree of expected returns; situations where there will be no competitive interest (e.g. extensions of an asset for which an agreement is set up), and the need for fast procurement on cases of crises and catastrophic events, where speed will be highest from a VFM considerations.

**663.** Normally, there is a certain set of reasons to negotiate directly with a PPP-private actor. These reasons could be misleading<sup>635</sup>. For instance, some argue that negotiation is more rapid, albeit eventually, challenges in the procedure can

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<sup>633</sup> As set out for instance in the World Bank Group, “Toolkit for Public Private Partnerships in Roads and Highways”, Public-Private Infrastructure Advisory Facility, Washington, D.C., 2009; and by Farquharson et al, *supra* note 619.

<sup>634</sup> See for instance Michel K., Gray R., Irwin T., Levesque C., Taylor R., and Michael K., “Concessions for Infrastructure: A Guide to Their Design and Award”, World Bank Technical Paper, March, Washington, D.C., 1998, p. 109-110. Or World Bank, “Approaches to Private Sector Participation in Water Services: A Toolkit”, Public-Private Infrastructure Advisory Facility, Washington, D.C., 2006, p. 170.

<sup>635</sup> See for instance PPIAF's toolbox for PPP in Roads and Highways, World Bank *supra* note 633.

frequently end up consuming more time. Moreover, direct negotiation is taken into account when a PPP project has started as an UP from a private actor. However, there are likewise manners to present competition for this situation that help secure the value for money from the resulting project. In light of these considerations, several countries do not permit non-competitive procedures forms at all, such as Brazil<sup>636</sup>. Somewhere else, direct negotiation might be permitted in specific conditions<sup>637</sup>. In Syria, the PPP law has stated three contracting methods for partnership contracts, which are: Request for Proposals, Non-competitive procedures, and spontaneous proposals<sup>638</sup>.

The transaction steps could be illustrated as follow<sup>639</sup>:



Figure 2: PPP Transaction steps.

**664.** The Transaction stage ordinarily incorporates five stages, as appeared in the figure above. These stages are deciding on procurement strategy, this includes the method and criteria for choosing the PPP contractor; marketing the coming PPP project to attract the attention of the potential bidders (as well as prospective lenders and sub-contractors); identify eligible bidders through a qualification procedure. This might be done as a step apart before mentioning the proposition, or might be a part of the bidding procedure. Also, there is the stage of managing the bid procedure, including planning and issuing a RFP, communicating with bidders to get ready for proposition, and assessing bids received to choose a favored bidder, perform the PPP contract, and guarantee that the conditions are met to reach contract viability and

<sup>636</sup> For example, Brazil, under the Federal PPP Law of 2004, Brazil Law 11079, Federal PPP Law, 2004, Brasilia.

<sup>637</sup> For instance, Puerto Rico's PPP Act likewise considers direct negotiations if investment value is under US\$5 million, there is lack of interest after issuing a RFP, the typical procurement process is troublesome, nonsensical, or impractical, or the technology required is just accessible from a single organization, Puerto Rico Law 29/2009 , Article 9(b).ii.

<sup>638</sup> Public-Private Partnership Law No. 5 of 2016, art. 17.

<sup>639</sup> "Public-Private Partnerships Reference Guide", *supra* note 547.

financial close. This could necessitate obtaining final approval of the agreement from government oversight organizations.

#### **A- Deciding the procurement Strategy**

**665.** The initial phase in dealing with a PPP transaction is determining the procurement strategy. The process incorporates identifying the main parts of the procurement procedure. Firstly, there is the pre-qualification stage, then, the bid process (whether to utilize a single-stage procedure to choose the favored bidder, or a multi-stage process). Moreover, after the bid process, there is the stage of negotiation with bidders, where it should be noted that the discussions with bidders might prompt modifications in the underlying draft contract (during the bidding procedure or after final bids have been submitted). Finally, there is the stage of basis for award comes, whether to rank proposals and pick the favored bidder dependent on a single financial or value related rule, or some weighted assessment of financial and technical criteria.

**666.** On the other hand, the Syrian legislator has determined three stages in the contracting procedure that shall occur after the conclusion of the preparatory stage. These stages are the initial qualification, mentioned above as “pre-qualification stage”, the proposal, and the contracting<sup>640</sup>.

**667.** The general objectives of the procurement strategy are represented in finding the best solution for the project's targets (from a technical and VFM point of view), and choosing a competent firm or consortium to execute that solution. This normally needs a reasonable, transparent, competitive, and efficient procurement process. Nonetheless, the best procurement methodology to accomplish these targets may rely upon the specific situation and context. For instance, permitting dialogue with bidders can prompt stronger proposals, as depicted below. Though, it can likewise make the procedure less transparent, so it may not be the adequate decision in a country where accomplishing transparency and limiting the risk of corruption are a more significant matter. This implies that the best procurement procedure may rely upon the country

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<sup>640</sup> Public-Private Partnership Law No. 5 of 2016, art.18 and 19



setting, the nature and limit of the government institution required, just as on the qualities of the specific project<sup>641</sup>.

**668.** On the other hand, there are some limits on the way the procurement strategy could be defined. Any laws or guidelines on generally speaking government procurement might limit the procurement procedure for PPP. Also, numerous governments decide to enact specific procurement norms, such as PPP laws, regulations or guidance material. This implies characterizing the procurement technique for the integral PPP agenda, instead of on a project-by-project method. This can improve the transparency of PPP procurement. At last, if the relevant project includes financing from a multilateral development bank or other organizations, the procurement alternatives may likewise be limited by the procurement rules of the funding office<sup>642</sup>,

### **1- Qualifying bidders**

**669.** Generally, bidding procedures set out “qualification criteria” that every participating firm should meet. It should be noted that when the bidders set out their qualifications, the probability of ensuring a competent firm with the ability to perform the project is high. Moreover, the clearness of the qualification requirements can likewise urge competent firms to take part and put resources to provide quality proposals. Also, it can lessen the risk of undermining bidding procedure by low-quality firms that submit low bids.

The majority of governments request from bidders to conduct a “pre-qualify” process before the beginning of the tendering procedure. Normally pre-qualification includes ranking potential bidders as per specific qualification criteria. The top-ranking bidders are commonly welcomed to submit their proposals<sup>643</sup>.

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<sup>641</sup> Ibid.

<sup>642</sup> For instance, the World Bank publishes and regularly updates its Guidelines: Procurement of Goods, Works, and Non-Consulting Services, which any project with World Bank funding must pursue. The World Bank has not distributed specific rules for procurement of PPP; Clause 3.14 of these rules expresses that for PPP ventures, “Open competitive bidding strategies decided acceptable by the Bank” ought to be utilized.

<sup>643</sup> Public-Private Partnership Law No. 5 of 2016, art. 20.

**670.** The other option is to set “pass and fail” qualification criteria and invite proposals made by the companies that have passed. This methodology could be utilized in a pre-qualification process, but also it is done simultaneously with the bidding procedure, in some cases entitled “post-qualification”. According to this methodology, bidders could self-screen against the distributed qualification criteria prior to invest resources in setting up a proposal.

**671.** The prequalification process has pros and cons. The fundamental benefit is in restricting the bidders’ number. By doing so, the likelihood of achievement and success increase, and bidders might be boosted to put more exertion in developing a proficient project and showing a competitive bid. Simultaneously, the exertion and resources required by the government to assess bids could be diminished. In contrast, the main weakness is the public character of the list of pre-qualified bidders, which may enable fraud conduct. In addition, pre-qualification of a specified number of bidders could mean that the same highly-rated companies will be invited to bid in a particular sector, which may lead to further temptation to conspiracy in the bid process. However, in certain developing countries, with new PPP programs, the issue can be that there are too few bidders instead of too many bidders. In this situation, there might be no benefit from pre-qualification, and it might be pointless to expand the procurement procedure<sup>644</sup>.

## **2- Bid Process**

**672.** The bidding procedure is the procedure from issuing RFP to choosing a favored bidder. The fastest and simplest process is a single-stage bid procedure, whereby bidders submit the technical and financial propositions to assessment in order to choose the favored bidder. The other option would be a two-or multi-stage bid procedure. Under this methodology, bidders submit an initial proposal, that

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<sup>644</sup> More discussion and details related to the upsides and downsides of pre-qualification are provided as following:

- PPIAF’s Toolkit for PPP in Roads and Highways, which includes a section on “Concessions: Main Steps in competitive bidding”;
- A World Bank Technical Note on Procurement of Management Contracts portrays the advantages and disadvantages, and how some issues of pre-qualification can be survived;
- Farquharson et al depicts the pre-qualification process, some of its preferences and disservices, and the potential traps. The authors likewise depict the alternative of a "pre-revision" stage, in nations where pre-qualification isn't permitted by procurement law.

contains remarks for the RFP and draft contract, and could incorporate a financial bid. In light of these propositions, the government reviews the RFP and draft agreement, and requires revised proposals accordingly. In that context, the government can participate in discussions with bidders to a differing degree, as illustrated *infra* under “Negotiation with bidders: during the bidding process”. The government can likewise dispense certain bidders at this stage. The modification procedure might be repeated more than once. At that point, bidders submit their last proposals, including a last financial bid.

**673.** The procedure that is composed of multi-stage could have more favorable advantages than the single stage procedure, especially when there are huge infrastructure projects and where room for innovation is available. This could secure appropriate solutions for needs and improve the final value of proposals. However, it should be noted that the multi-stage process is longer, more complex to oversee, and more costly for the parties included<sup>645</sup>. Several countries’ PPP systems leave the door open of whether to utilize a single or multi-arrange bidding process, based upon the nature and type of the PPP project<sup>646</sup>.

The PPP law in Syria has as granted the single-stage procedure, but also has stated the possibility of two- stage proposal procedures. The latter could be made under the following condition: in case the project is complex, and does not allow submitting their final proposals<sup>647</sup>.

### **3- Negotiation with bidders: during and post bidding process**

**674.** The level of negotiations of the government or the contracting public entity with bidders is considered as the main difference among the countries’ procurement approaches. The negotiation is challenging at any stage, and risks decreasing the

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<sup>645</sup> Farquharson et al *supra* note 619 at 113-114; World Bank, “Sample Bidding Document: Procurement of Management Services”, Washington, D.C. , 2007, p. 22-33

<sup>646</sup> For instance, in South Africa there is a single stage process with a clear winner however the best and final offer might be mentioned from at least two bidders. South Africa, National Treasury, “PPP Manual”, Johannesburg , Module 5, 2004, p. 51-52.

<sup>647</sup> Public-Private Partnership Law No. 5 of 2016, art. 23

transparency of the bid procedure. Therefore, some governments do not permit negotiation on the agreement at any phase of the procedure.

**675.** The government could decide to negotiate with bidders in between the stages of a multi-stage bidding process. Accordingly, this would assist in explaining the aspects of the RFP, draft agreement, and bidders' initial proposals, and expected proposal result that firmly meets the government's prerequisites. In other countries, such as Syria, governments may go into negotiations with a single bidder, after a favored bidder has been chosen (highest ranked bidder)<sup>648</sup>. For instance, according to the EC the government, after receiving the initial bids, can enter into a dialogue with bidders on all part of the RFP, agreement or proposal, before the re-issuance of the last form of RFP and the last bidding invitation<sup>649</sup>.

**676.** After identifying the preferred bidder, might enter again into negotiations, which means further dialogue to arrange the PPP contract. It should be noted that most governments restrict the degree of post-bid negotiation to clarification and fine-tuning proposals. Others do not permit it by any means, especially where the procedure's transparency is an essential concern.

**677.** The requirement for post-bid negotiation regularly emerges for two motives: Either the RFP prerequisites, or the draft contract are not clear, or they are not suitable to bidders and their lenders (e.g. the proposed risk allocation). For both reasons, bidders may join changes in their proposals, which means the proposition never again meets the government's necessities<sup>650</sup>. In that regard, it is worth to note that the Syrian legislator has expressly stated to not include any of contractual conditions or items referred to in the request for proposals in the final negotiations. They are considered non-negotiable<sup>651</sup>. The ideal approach to keep away from the need for post-bid negotiation is to set up clear RFP and draft contract.

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<sup>648</sup> Syrian Public-Private Partnership Law No. 5 of 2016, art. 31(a)

<sup>649</sup> The European Commission presented the "competitive dialogue" methodology for procuring PPP in the European Union, 2004.

<sup>650</sup> See in that context: The EPEC's Guide *supra* note 587; Yescombe, E. R. *supra* note 587.

<sup>651</sup> Syrian Public-Private Partnership Law No. 5 of 2016, art 31 (b).

### **a) Basis for Award**

**678.** As mentioned earlier, the government has to assess the received proposals, rank the proposals and select the best bidder. The criteria for this procedure normally incorporate the technical merit of the proposition, and their cost. There are two general choices for the way the proposals are assessed, and the favored bidder is selected. These are the selection based on financial criteria and the selection based on financial and technical criteria.

**679.** The selection dependent on financial criteria is a methodology to attempt the assessment in two phases. In that context, the final selection will depend on the financial bid variable(s). Under this methodology, the first step would be the assessment of technical proposition, on a pass-fail premise, however, the bidders that passed the technical assessment can continue to the financial assessment. The winning bidder is chosen based on the best financial proposition, among those that succeeded the technical assessment.

**680.** The assessment of the proposals could be done based on balanced combination of financial and technical criteria. The latter represents the idea of optimizing VFM. Then again, shaping adequate quantitative criteria and how to weight them can be challenging and dependent on the evaluation team's autonomy.<sup>652</sup> The best choice, and the particular financial and technical criteria, may rely upon project qualities and features. Likewise, it might rely upon the public sector's ability to conduct more complex assessments or on the risk of corruption, or perceived corruption, which enable transparency to be the most significant target<sup>653</sup>.

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<sup>652</sup> Further resources depict these choices: PPIAF's Toolkit for PPP in Roads and Highways, in its "Concessions: Main Steps in competitive bidding" section, portrays assessment rules, budgetary assessment criteria, and the different parameter approach. This segment additionally shows the assessment criteria for 13 Latin American street concessions; Kerf et al Guide to Concessions has segments on technical and financial proposition assessment. These depict decision of technical criteria and of financial criteria, and the advantages and disadvantages of a consolidated score approach, with examples for each situation; The World Bank Technical Note on Procurement of Management Contracts depicts assessment choices—from least cost choice, to quality-based selection, and gives direction on how criteria can be set and weighted for each situation.

<sup>653</sup> In Brazil, both the Federal Concessions Law (for user pays PPP) and the Federal PPP Law (for government-pays PPP), Brazil Law 11079, Federal PPP Law, *supra* note 636 at Article 12. This article permits the two methodologies. In all cases, the methodology and criteria ought to be set ahead of time, and unmistakably conveyed to potential bidders.

## **b) Approach to Bid Costs and Payments**

**681.** Preparing a PPP proposal could be a costly exercise. At the same time, setting up a high quality procurement process is too a costly exercise for the government. Governments have various ways to deal with managing offer costs and commitments. Numerous governments expect bidders to present a bid bond, to guarantee their commitment to the procedure, and preclude the winning bidder from withdrawing without a good purpose. For instance, the Spanish procurement law states that bidders must give a temporary guarantee in support of their proposal and increment it to meet the final guarantee once the agreement is awarded<sup>654</sup>.

## **B- Marketing the PPP**

**682.** The aim of marketing the PPP is to help attracting bidders and investors, especially at the beginning stage of a PPP program. In this stage, the governments have to make an important effort to increase bidder interest, and increment competitive pressure. The marketing process additionally helps in recognizing the potential bidders. In that context, there should be a promotion of the tender process launching to market the PPP. It should be noted that there are some governments that have requirements for the way the PPP tendering process should be promoted. For instance, the EPEC Guide to Guidance notes that EU governments must publish a notice in the Official Journal of the European Union<sup>655</sup>.

**683.** Few governments adopt a more proactive strategy to marketing, with the end goal of triggering investor interest preceding the formal launch of the project. This strategy can comprise the investor's presentations, meetings, or "roadshows" to present the project. The scale of the meetings and their venues can be customized on demand for the prospective interested investors (local or international). Thereafter, a

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<sup>654</sup> Philippines (1994) Law 7718, Manila, [Section 7.1 Clause b (vi)]. The Philippines BOT Law implementing guidelines require a bid bond of somewhere in the range of 1 and 2 percent of the assessed venture cost.

<sup>655</sup> Another example in the South Africa PPP Manual that portrays that the procurement must be promoted in the Government Gazette, on the organization's site, and through press commercials.

“teaser” material regarding the venture could be released, including publishing material for industry publications<sup>656</sup>.

### **1- Transparent, Neutral and Non- Discrimination selection**

**684.** A gap could be identified while sorting out the competitive tenders, particularly at the local level. The bidder’s choice has to follow a determination procedure based on transparency, neutrality and non-discrimination. The latter procedure should advance competition and figure out some harmony between the need to decrease the time and cost of the bid procedure and acquiring the best proposition.

**685.** Transparency implies, in PPP procurement, guaranteeing the accessibility of the interested party to PPP procurement data, administration organization system, and individual PPP opportunities<sup>657</sup>. Simultaneously, transparency calls for procurement arrangements and practices, which are believed to be reasonable in all regards. Transparency supports open and competitive procurement systems along these lines helping the government office and the private part element to accomplish economic advantages. Supplier assessment and agreement award criteria should be known to every interested competitor with regard to progress for every individual project. Moreover, all members should know any changes identifying with singular PPP opportunities.

**686.** Also, detailed records of individual agreement award procedures should be kept. Interested individuals, such as media, citizens, and investors should have the option to get familiar with the substance of the agreement. This will improve the contribution of partners and make the systems conceivable. Furthermore, the strategy for procurement picked should be the most transparent conceivable. As a rule, the basic core value is to guarantee that standards and goals are built up to keep a

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<sup>656</sup> Farquharson et al quickly depicts the benefit of releasing data about the undertaking preceding the formal launch, to draw in bidder interest. It likewise depicts the value of marketing a pipeline of projects, as opposed to a single chance. Especially for new PPP programs, this gives investors a more grounded motivator to engage.

<sup>657</sup> Transparency refers to the openness of procurement policies and practices. The premise for proposal evaluation has to be made public.

transparent procurement procedure. However, at the same time there is a need to guarantee the privacy of the bid, particularly because certain data of the bid could profit a competitor. Likewise, it might be imperative to keep privacy in certain cases of patent and copyright protection, or national security reasons<sup>658</sup>.

**687.** Finally, the activity of the whole procurement and award process should be perceived as neutral and reasonable. For instance, potential suppliers and providers should have enough time to get ready and present their bids. Moreover, the choice and award criteria should be neutral and non-discriminatory and have to remove any extension for discretion<sup>659</sup>.

## **2- Providing only a framework of rules is not sufficient**

**688.** Perceiving that giving only a structure of rules is not enough, there must likewise be a way to enforce rules and hold the parties responsible<sup>660</sup>. Firstly, in case the PPP procurement has been conducted with inconformity with the law, the potential provider shall have the right to fill up a complaint before an independent local tribunal. This court should have jurisdiction to impose the reform of an infringement or compensation for loss or harms endured by the interested supplier. In the due course of the court procedure, the latter must have jurisdiction to decide urgent measures as well, namely the suspension of the tender process, addressing infringements and the protestation of business opportunities.

**689.** Secondly, there is an essential role for an independent monitoring authority in monitoring the standards' usage by individual procuring elements. This authority has the power to self-start examinations concerning the PPP procurement practices. The

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<sup>658</sup> "Public-Private Partnerships Reference Guide", *supra* note 154.

<sup>659</sup> Neutrality refers to determine and predictable rules that don't provide scope for discretion and prevent any conflict of interest and provide a way of complaint and controlling the performance of the rules. Non-discrimination refers to all fair and equal treatment of all economic entities, public, private, local and foreign in the competition for PPP contracts.

<sup>660</sup> For example, a little local authority in Denmark executed a new PPP financing framework where public assets were sold to private enterprises and afterward rented back. No Danish community up until that time had the option to offer such high expectations of service through public funds. In any case, following a newspaper examination it was asserted that organizations had offered cash to the soccer club as a byproduct of getting contracts from the local authority – and the mayor was a shareholder of the organization and chairman of the company set to play in the new soccer arena.



institutional system should separate between those who carry the procurement work and those who oversee it. In such a manner, it is commonly prudent to set up an agency that has the responsibility for procurement approach formulation in the PPP. Thirdly, an autonomous auditor must have no connections to both the public and the private parties included. He should partake the project at early stages to build up an intensive comprehension of the project to keep up a total and unprejudiced audit of the program. Finally, the selection procedure has to be performed without conflict of interest. In that context, the contracting authority has to be independent *vis-à-vis* projects and organizations engaged with the bidding, to maintain a strategic distance from a conflict of interest. Although these issues may not be visible during the selection of procedures, any occurrence of corruption can tarnish the reputation of the contractual parties. Therefore, it is critical to be as mindful of conflicts of interest as possible.

**690.** It is significant that procedures do not differentiate between organizations and provide opportunities for all of them regardless of the country of origin. Therefore, the formation of specific rules for the principle of non-discrimination is an important step toward the achievement of this principle. The success indicator of this principle is the number of foreign organizations that win bids. At the same time, when a government invites bidders from different nations, the counterpart government should also be based on the mutuality and that it is correspondingly open in its approach.

**691.** It is worth noting the important endeavors of the various international and regional agreements in providing best practices in making procedures open. In that regard, the UN Commission on International Trade Law enacted the UNCITRAL Model Law related to Procurement of Goods, Construction and Services. The intentions of the UNCITRAL Model Law are to advance competition among providers and contractors, provide reasonable and fair treatment to all suppliers and contractors, and to accomplish transparency in procurement methodology.

On the other hand, strict standards for open government procurement apply in the EU. Few of EC directives deal with public procurement of supplies and works, including the areas of development and communication. The EC has power to impose sanctions for the breach of the EU's competitive bidding rules in public sector procurement and

construction. The primary reason for the EU directives is to set a standard methodology for the award of public division contracts to stimulate rivalry. Under EU legislation, on a fundamental level, public tendering is required for contracts with a value over 200,000 euros. The directive must be transposed into domestic law<sup>661</sup>.

## **Paragraph 2: Functional Context of Qualifying bidders**

**692.** The subsequent stage is the implementation of the pre-qualification process for the bidders to choose the organizations and consortia to be invited to submit proposals. It should be noted that countries generally assess qualifications as part of open bidding process, such as Syria but not every country select qualified bidders in advance. This paragraph addresses the pre-qualification process. This procedure comprises planning and issuing the Request for Qualifications (RFQ), alongside publicizing the launch of the tender procedure and assessing the data received to choose a group of qualified bidders<sup>662</sup>.

### **A- Preparing and issuing the RFQs**

**693.** The procurement procedure is officially propelled when the RFQ is issued for procurements, which incorporate a pre-qualification stage. The RFQ ordinarily includes enough data for the project for potential bidders to choose whether they are interested. Moreover, it should clearly set out the procedure and prerequisites for the qualification procedure. The project information and data could incorporate an outline of technical and service necessities, key business terms (however, it is not typically a draft contract), and a list of the additional data that are accessible at the procurement stage<sup>663</sup>.

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<sup>661</sup> United Nations Economic Commission for Europe, “Guidebook on promoting Good Governance in Public-Private Partnerships”, United nations, New York and Geneva, 2008.

<sup>662</sup> Farquharson et al depicts the reason for pre-qualification, typical sorts of criteria and forms, and gives brief direction on venture launch. The EPEC Guide to Guidance likewise gives a helpful review of the pre-qualification process.

<sup>663</sup> The following resources portray further the typical substance of RFQ documents: South Africa PPP Manual procurement module diagrams the substance of the RFQ record. This incorporates data about the project, procurement forms, guidelines to respondents, data required about bidders, and the assessment procedure; Singapore's PPP Handbook lists RFQ substance, featuring that it isn't required to incorporate the draft contract at this stage; Australia's National PPP Practitioners' Guide calls the RFQ Expressions of Interest (EoI). List the substance that Request for EoIs ought to incorporate—

694. In some governments, the RFQ documents should be approved prior to the issuance of the procurement notification as mentioned in the previous part “Marketing the PPP”. The procurement notice commonly advises organizations on the most proficient method to get the RFQ bundle.

### **B- Evaluating the information received**

695. After receiving data of qualifications from involved companies, the implementing organization or the designated evaluation team should evaluate those qualifications against pre-defined qualification criteria. These criteria can be distinguished and applied on the basis of success / failure or used to classify companies. Once the assessment is finalized, the implementing agency has to notify both the qualified companies or associations and those that have not been effective.

696. As said before, one of the objectives of the procurement procedure is to choose a competent firm, which has the ability to implement the project. This implies it is essential to consider the qualification of the organizations behind every proposal. This should be possible through a pre-qualification procedure to recognize bidders or as a major aspect of the main phase of the tender procedure (so-called “post-qualification”). In either case, clear qualification criteria should be built up before starting the procurement procedure<sup>664</sup>.

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background, venture scope and timetable, budgetary and business data, assessment criteria, general terms and conditions, and EoI reaction prerequisites and the World Bank's toolbox for concessions in roadways section on "prequalification" depicts the data that ought to be included for the RFQ, and the data that ought to be mentioned from organizations.

<sup>664</sup> The following give discussion and instances of firm qualification criteria:

- World Bank Technical Note on Procurement of Management Contracts, depicts in detail and gives instances of pre-qualification criteria intended to limit mistakes of incorporation and prohibition;
- Kerf et al Guide to Concessions, gives instances of pre-qualification criteria and strategies utilized in a determination of PPP ventures;
- Australia National PPP Practitioner's Guide segment on "Assessing Expressions of Interest", which incorporates a definite portrayal of the criteria to be applied at the EOI stage;
- Pakistan's Procurement Guidelines for PPP Projects, gives three instances of assessment criteria, bidder's ability and quality, deliverability, and undertaking awareness;
- The Philippines “Implementing Rules and Regulations” under the BOT Law, which depict three classifications—legal necessities, experience or track record and budgetary ability.

## C- The management of the Bid Process

**697.** The focal step of procuring PPP project is, for the most part managing the bid procedure. The bidding procedure closes with the choice of a favored bidder. Thus, the specific steps in managing the bid procedure will fluctuate and will rely upon the picked bid procedure and reason for the award. This part provides direction on the management of the bid procedure, such as preparing and issuing RFP documents, interacting with bidders within the bidding time frame, receiving bids, evaluating bids to choose the favored bidder, dealing with issues and finalizing the agreement with the favored bidder<sup>665</sup>.

**698.** The bidding procedure officially starts when the government issues RFP documents to partaking bidders. These documents fix the project structure and prerequisites, in addition to the features of the bid procedure. RFP documents regularly incorporate the information on the PPP' venture opportunity<sup>666</sup> and information on the bid process<sup>667</sup>. After the RFP has been issued, bidders will prepare a detailed proposition reacting to the necessities of the RFP. In the meantime, the government needs to characterize how and to what degree it will interact with bidders as they set up their proposals. It should be noted that usually in a PFR, rules on the permitted subjects for interaction with bidders are indicated and fixed. The interaction commonly includes providing data to bidders and responding to requests for clarifications on the RFP. As a result, the government may take into account revising the RFP documents in some cases. The typical channels for these sorts of communication include data room (which can be a physical or virtual space), question and Answer cycles, and bidder's Conferences, where the implementing organization presents the project and react to inquiries from bidders.

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<sup>665</sup> Farquharson et al gives an outline of the bid procedure, and features some of the significant point for implementing organizations to consider at this stage.

<sup>666</sup> This could include: An Information Memorandum portraying the key highlights of the undertaking and the business terms of the PPP, a draft project agreement, that is, the result of the a detailed PPP contract configuration process portrayed in chapter 7, a copies of any permits or endorsements acquired for the venture and a description of the detailed technical data amassed during the project planning stage that will be given to bidders in an information room.

<sup>667</sup> This could include a detailed bid principles and guidelines to bidders, setting out the procedure and necessities, a timetable, which should work in sufficient opportunity to enable bidders to get ready quality proposition, Evaluation Criteria and the Bid security necessities (assuming any).

**699.** In a reliable framework of bids, it is important to guarantee bids are held confidentially to avert any chance for bid tampering and secure commercially delicate data in bids. The bids are regularly delivered in hard copy in sealed envelopes. Typically, the technical and financial bids are conveyed in hard copy in separate envelopes. Financial bids are only opened for bidders that have technical evaluation clearance and are regularly opened publically to avoid any probability of bid tampering<sup>668</sup>.

**700.** The selection of assessment criteria can be vital to guaranteeing the PPP offer value for money. It is worth to note that the assessment criteria should be chosen in advance, and fixed in the RFP documentation. Therefore, some countries determine assessment criteria choices in legislation. Assessment criteria normally consolidate technical and financial components. These might be assessed independently, ordinarily with a pass/fail technical assessment, followed by ranking on financial criteria, or joined and weighted to rank bids.

**701.** Numerous PPP are positioned based on a financial criterion, subject to passing other technical and financial requirements. The most common option for a financial assessment criterion is the remuneration of the private sector. This could be the lowest tariff to users or the most reduced expense to the government (regardless of whether as government- pays PPP, or subsidy client charges). Once the technical prerequisites have been clearly set out in the proposition, technical assessment requires checking consistency with those requirements<sup>669</sup>.

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<sup>668</sup> For instance, the Philippines BOT law rules and guidelines set out a two-envelope framework for receiving bids. The World Bank sample bidding documents for output and implementation based road contracts likewise depict a fixed envelope bid framework, yet take into account utilization of an electronic fixed bid framework as another option. One favorable position of an electronic framework is that it keeps bidders from monitoring or interfering with physical bid delivery.

<sup>669</sup> The following assets give further direction and models on picking assessment criteria: EPEC's Guide to Guidance quickly talks about the criteria that could be utilized for bidder choice; The World Bank Toolkit for PPP in the water segment depicts and gives instances of assessment criteria choices for awarding a user pays PPP contract in the water sector including technical, financial, and consolidated methodologies. Australia's National PPP Practitioners' Guide depicts a more all-encompassing way to deal with assessing bids. It incorporates quantitative and qualitative Value for Money, business and financial assessment, service conveyance assessment, and project design assessment.

**702.** There are cases in which one bid is received only. This might raise worries on whether that bid will provide value for money<sup>670</sup>. In that regard, there are two broad options for this case that depend on the motive for receiving only one bid, which are re-package and re-tender, and conduct thorough due diligence and select the sole bidder. On the other hand, there are other cases where despite the multiple bids being received, no favored bidder is clearly chosen. The latter case could happen either because no bids fit in with prerequisites, or non-compatible bid seems to deliver a better value for money choice than compatible bids.

The common reason for this issue is the poor quality of the RFP documents. The multi-stage and competitive dialogue strategies addressed in the section of “Deciding the Procurement Strategy” play a role in avoiding this matter, by enabling modifications to the RFP during the bid procedure that ensure last bids are all comparable and consistent. As mentioned above, in case no bids conform, and none have high quality, the solution is to re-package and re-tender the project. The alternative is to expand the procurement procedure to identify a favored bidder<sup>671</sup>.

**703.** Governments usually enter into final negotiation to finalize the PPP contract with the favored selected bidder. Some degree of negotiation might be essential to explain the proposition or contract’s components, especially when the bid procedure has not included considerable interaction<sup>672</sup>. In that regard, the Syrian legislator

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<sup>670</sup> EPEC's Guide to Guidance, supra note 419 at 29-30. There are two general options for this situation, depending on the purpose behind just receiving one bid: Re-package and re-tender—this might be the best approach if the low turnout is because of insufficiency in the tender; Conduct thorough due diligence and select the sole bidder, might be a better choice if it appears that the bidder believed the procedure would be competitive, and is in full consistence with the necessities. World Bank procurement rules note that dismissal of all bids is defended where there is an absence of effective competition, however says "in any event, when just one bid is submitted, the bidding procedure might be viewed as valid, if the bid was sufficiently promoted, the qualification criteria were not unduly prohibitive, and costs are sensible in correlation with market value". The United Kingdom Government's direction on the competitive dialogue procedure gives further direction.

<sup>671</sup> See Australian Government, “National PPP Guidelines: Practitioners’ Guide”, Department of Infrastructure and Regional Development, 2011, p. 27-28. , which depicts two choices in situations where no favored bidder can be chosen—going into a “Best and Final Offer” (BAFO) process with two bidders, or organized dealings.

<sup>672</sup> Numerous governments characterize and limit the degree of negotiations conceivable at this stage. For instance, the EPEC's Guide to Guidance supra note 39 at 31 depicts a European Union principle that no issues that are material to the procurement can be changed, that implies that no change that could have brought about an alternate outcome from the bidding procedure ought to be joined during the post-bid arrangement stage. Where changes are permitted at this stage, the last agreement is regularly liable to further endorsement.

stated that in case the negotiation of the contracting public entity with the selected bidder did not lead to signing a satisfactory contract, the contracting public entity has the right to halt the negotiation and give a time limit to offer a final proposal. Thereafter, if the final proposal is still unacceptable, the contracting public entity ends the negotiation and invites the second ranked best bidder to negotiations. This procedure continues till reaching a satisfactory contract<sup>673</sup>. In the opposite case, where during negotiation the two parties reach an agreement, the contracting public entity should announce the name of the contracting and then prepare the draft of the partnership contract<sup>674</sup>.

#### **D- Reaching contract efficiency and finance close**

**704.** Once the PPP contract is signed by the both government and the favored bidder, the parties are committed to implement the contract. However, there are few extra steps before the start of the project implementation. The favored bidder may need to finish the financing understandings for the PPP. Also, the favored bidder normally needs to sign contracts with different parties in the PPP structure, for instance, sub-contractors and insurers. Moreover, as we will see in the next chapter, the next chapter, detailed protocols and manuals of contract management are regularly advanced during this period<sup>675</sup>.

**705.** After the signature of the all financing documents of the targeted project, and the conditions of those documents are met, the financial close happens. Some could consider that the financial close conditions are usually circular, which mean that the PPP contract does not get compelling until funding is available (that is, financing accessibility is a Condition Precedent for contract effectiveness), and vice-versa<sup>676</sup>. This procedure regularly requires a detailed work and exertion by both public and private parties, to closing the transaction stage and starting venture implementation.

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<sup>673</sup> Syrian Public-Private Partnership Law No. 5 of 2016, art. 31(c).

<sup>674</sup> Syrian Public-Private Partnership Law No. 5 of 2016, art. 32 (a).

<sup>675</sup> European PPP Expertise Center, *supra* note 587.

<sup>676</sup> EPEC Guide to Guidance briefly depicts basic Conditions Precedent, and includes a checklist for governments for finishing the PPP agreement and reaching financial close. Example prerequisites include: Finalizing all project agreements and contracts; securing final approval from relevant government elements; securing licenses and planning approvals; commencing or completing project land acquisition.

**706.** As stated at the beginning of this chapter, that there are several contracting methods for partnership contracts. One of these methods is spontaneous proposals or also called “unsolicited proposals”. In section (II), the implementation mechanisms of unsolicited proposals are addressed to understand the advantages and disadvantages of this contracting method in a PPP transaction.

## **Section II: Dealing with unsolicited proposals**

**707.** An “unsolicited proposal” is a proposal made by a private party to undertake a PPP venture. The UPs are submitted at the private firm’s initiative, rather than in response from the government. In general, accepting unsolicited proposals enable governments to profit from the private sector know-how. However, on the other side, unsolicited proposals could create challenges as they risk giving poor value for money, especially if the government decides to negotiate PPP directly with the project proponent<sup>677</sup>.

**708.** This section will describe the benefits and pitfalls of unsolicited proposals. The section will then discuss how some economies have presented explicit policies for managing unsolicited proposals for PPP. These policies are regularly intended to give incentives to the private sector (to varying degrees) to submit high-quality PPP proposition; to deflect low-quality proposals; to present competitive tension, and to promote transparency.

### **Paragraph 1: Pros and Cons of Unsolicited Proposals**

**709.** Unsolicited proposals have an essential advantage for the government, which is enabling the governments to benefit from the know-how of the private sector. The private sector also provides the government with data related to best commercial opportunities and market interest.

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<sup>677</sup> Osei-Kyei R., Albert C., Ayirebi D., Ofori-Kuragu J., Kingsford Owusu E., Motivations for adopting Unsolicited Proposals for Public-Private Partnership Project Implementation: A survey of international Experts”, *Journal of Financial Management of Property and Construction*, April 2018.



**710.** However, unsolicited proposals additionally make substantial difficulties<sup>678</sup>. To begin with, most PPP require government financial support: the government normally accepts risks, and the related contingent liabilities, regardless of whether direct subsidies are not required. Secondly, unsolicited proposals have not been started as a part of a government planning process. This could raise the question of whether the service proposed is adequately incorporated with other sector plans for demand and benefits to be powerful to changing conditions and needs. In addition, the unsolicited proposal may redirect government consideration from a planned approach to deal with infrastructure as a whole. Thirdly, negotiation with a project proponent based on the unsolicited proposal can create issues without a transparent or competitive procurement process. It could lead to poor value for money from the PPP venture, given an absence of competition tension. It could likewise give chances to corruption. Moreover, it could give rise to objections about the transparency of the procedure, if an organization supposedly benefits from PPP without opening the chance to competitors. This absence of transparency can undermine the legitimacy and support for the PPP program<sup>679</sup>.

### **A- Managing Unsolicited proposals**

**711.** There is no worldwide standard for managing proposals<sup>680</sup>. Some legislatures have thought that it was easiest not to permit them by any means. However, the

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<sup>678</sup> World Bank Group, “Unsolicited Proposals- An Exception to Public Initiation of Infrastructure PPP”, Aug. 2014.

<sup>679</sup> The PPIAF toolbox for PPP in Roads and Highways section on unsolicited proposal, further depicts these difficulties of unsolicited proposal. It sets out the “current view” the World Bank as pursues: “...There is a place for genuine and innovative [unsolicited] proposals, but these are the exceptional case. The private sector must put up strong independently analyzed cases for unsolicited proposals at an early stage, before governments are sucked in to supporting projects that are financially weak, high risk, will take up significant human resources of the government, and will likely take a longer than normal time to implement because of these difficulties”. As indicated by the World Bank's PPP in Infrastructure Resource Center Website segment on unsolicited proposal, the World Bank “thinks about that unsolicited proposal ought to be managed with extreme caution, and doesn't allow the utilization of unsolicited proposal in Bank-financed venture”.

<sup>680</sup> Of the multinational organizations, UNCITRAL maintains guidelines for managing unsolicited proposals through its Legislative Guide on Privately Financed Infrastructure Projects. The UNCITRAL Guide specifically addresses the issue of unsolicited proposals (Section II.E). However, the UNCITRAL Guide does not provide an extensive framework for channeling unsolicited proposals into a competitive process, rather it only offers general suggestions. The World Bank's Guidelines: Procurement under IBRD Loans and IDA Credits mandates national and international competitive bidding procedures for outsourced project components. However, the document does not specifically

majority of governments permit unsolicited proposals, but they do not have unique procedures for overseeing them. The best approach governments can have is an articulated basis for unsolicited proposals and for comparing publicly accessible techniques for their management. At the same time, proponents should be aware where they could introduce their proposals, what data is needed, and the means and timeframe for choices to be taken.

### **1- Competitive tension and dealing with intellectual property**

**712.** Several private companies submit UPs with the aim to directly negotiating an agreement for the proposed project, which might create the issues described previously. Competitive Procurement or Direct Negotiation sets out several methodologies:

First, there is the access to the best and final offer, which is a two-stage bid procedure where the high ranked bidders from the principal stage are welcome to submit their last proposition in a subsequent stage. Then there is the developer's fee where the proponent is paid a fee by the government or the winning bidder. This fee could be considered as a simple reimbursement of some project development costs, or be defined to give a return on developing the project idea and proposal. There are also the bid bonus, and the Swiss challenge which are addressed in details further in the chapter<sup>681</sup>.

**713.** Private investors might be hesitant to submit UPs if the proposal would be subject to competition. Moreover, they would be hesitant in case the offer does not clarify the protection of intellectual property or sensitive data at stake throughout the bidding procedure. There are various ways to manage intellectual property in such proposal, which may rely upon the proposition's nature.

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address unsolicited proposals and allows direct contracting in a few unique circumstances, such as (a) extending existing contracts, (b) standardizing new equipment with original equipment, (c) proprietary rights to required equipment, (d) if only one source can meet design specifics, or (e) natural disasters (Section 3.7).

<sup>681</sup> See *infra* at 326.

**714.** The UNCITRAL Legislative Guide regarding infrastructure projects that are financed by private stakeholders, in light of unsolicited proposals, provides two options: The first option is when the government, if possible, can competitively tender the project, by determining required outputs, and not the necessary technology to convey those outputs. This methodology is compatible when there is good practice in defining output-based performance prerequisites for PPP. In contrast, the second option is where intellectual property is vital to the project, the UNCITRAL guidance recommends direct negotiation where they are warranted, alongside with strategies to benchmark project costs<sup>682</sup>.

## **2- Defining clear processes**

**715.** Defining a clear process for unsolicited proposals can be very helpful in several aspects, such as transparency, spread confidence among stakeholders about the idea of value for money, and urge potential competitors to take part in the bidding procedure. Initially, a privately owned business presents an unsolicited proposal, besides clear substance and presentation necessities. This proposition is screened, regularly following a similar methodology as mentioned in (screening for PPP potential). If the proposition passes the initial screening, the proponent is welcome to finish any essential studies before the proposition is evaluated against the same criteria as any PPP, such as the appraisal criteria. In case it is affirmed, any developers' fee or bonus will apply is concurred at this stage.

**716.** Thereafter, the responsible government agency plans the bids documents given the final proposal, and conducts a tender procedure. The process for assessing,

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<sup>682</sup> The Government of New South Wales in Australia gives direction to professionals on dealing with intellectual property, which pursues a comparative way to deal with UNCITRAL, permitting direct negotiation of the PPP in specific conditions Australia, New South Wales Treasury, Intellectual Property Guideline for Unsolicited Private Sector Proposals Submitted Under Working with Government, Sydney. The Partnerships Victoria Practitioner's Guide additionally gives direction, and adopts a marginally extraordinary strategy. Proponents concur must recognize any intellectual property they wish to ensure (subject to concurrence with government). The venture is then tendered dependent on yield particulars without uncovering technology information if conceivable. In the event that the intellectual property is "essential to the presence of the service need", the government consults with the proponent to get the rights to the important intellectual property, before procuring the project competitively.

approving, and bidding an unsolicited proposal<sup>683</sup> is considered in numerous countries by determining timeframes for each step that will be taken. From one perspective, the setting specific deadlines from the government for managing the unsolicited proposal can be useful to assure to the private sector that their proposition will not languish in the process.

**717.** Then again, some countries present tight confines on time taken into consideration competing proposals, which could prevent rivalry. For instance, in the Philippines, the BOT Law of 1993<sup>684</sup> expects authorities to publicize an opportunity for three weeks, and enable 60 days for competitors to react, which is probably not going to enable competitors to accomplish the necessary due diligence to set up an excellent proposition.

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<sup>683</sup> Hodges, John T. & Georgina Dellacha, “Unsolicited Infrastructure Proposals: How Some Countries Introduce Competition and Transparency”, PPIAF Working Paper, Washington, D.C. 2007.

<sup>684</sup> Philippines (1994) Law 7718, Manila.

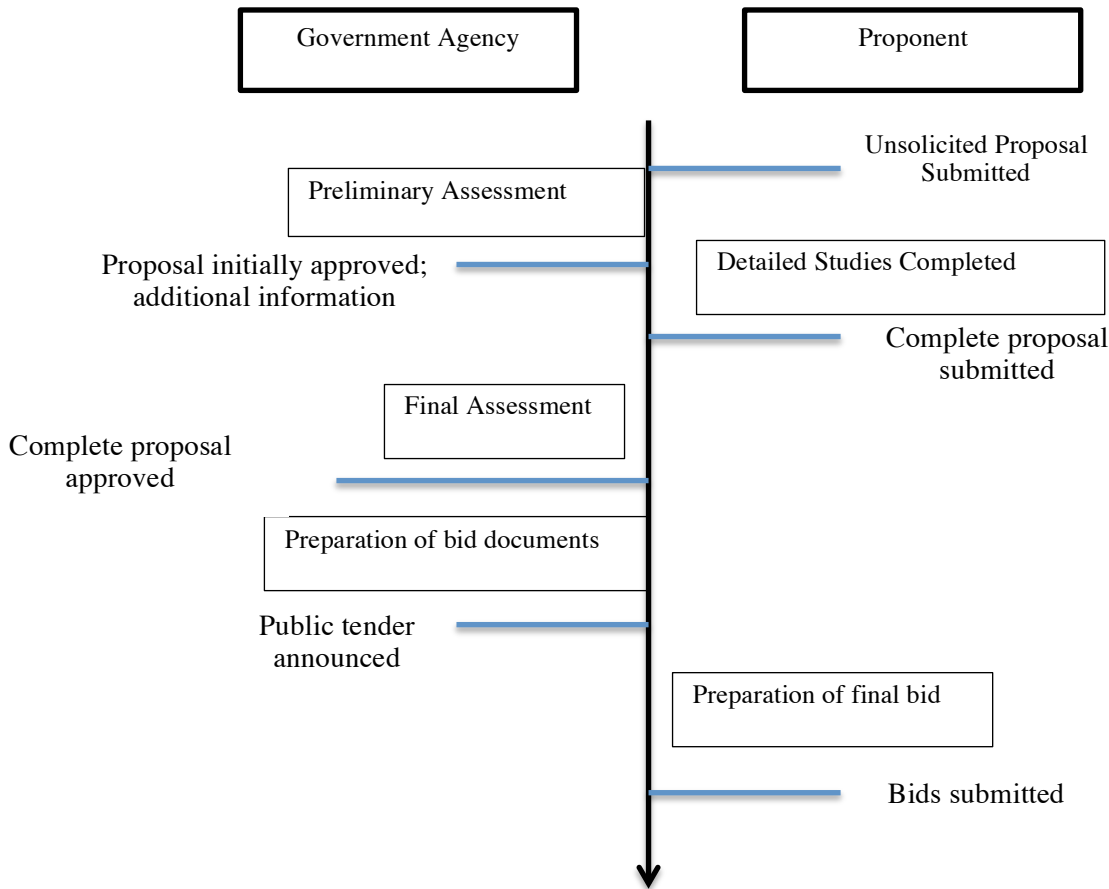


Figure 3: Process for assessing, Approving and Bidding an Unsolicited Proposal<sup>685</sup>

### B- Unsolicited Infrastructure Proposal

**718.** Governments might be given unsolicited proposals for infrastructure projects by private sector entities. Reacting to these unsolicited bids and managing them while maintaining transparency in the procurement procedure is relatively difficult<sup>686</sup>. To this end, an example is set below:

The UNCITRAL has delivered the useful Legislative Guide regarding Privately Funded Infrastructure Projects that tackles these issues in paragraphs 96 to 117. It sets out proposed legislative language in provisions 20 to 23 of its text Model Legislative Provisions on Privately Financed Infrastructure Projects. The UNCITRAL, when the

<sup>685</sup> Hodges, John T. & Georgina Dellacha, *supra* note 683 at 7.

<sup>686</sup> <https://ppp.worldbank.org/public-private-partnership/ppp-overview/ppp-procurement-bidding/unsolicited-proposals/unsolicited-proposals>

host government accepts an unsolicited proposal, prescribes that the authority initially considers whether the proposition is in the public interest. Assuming this is the case, the authority demands additional data from the proponent to make a full assessment. If the authority chooses to proceed with the project, it decides if the undertaking includes intellectual property, trade secret, or other exclusive privileges of the proponent. With regards to projects that exclude these rights, a full selection process is pursued, with inviting the proponent to participate in the selection. If it does include the proponent's intellectual property, a full selection strategy should not be pursued<sup>687</sup>.

**719.** Governments throughout the world have been progressively looking after the private part to fill up the emergent gap between the demand and supply of infrastructure services. Subsequently, private participation in infrastructure (PPI) in developing nations expanded significantly in the previous fifteen years<sup>688</sup>. Numerous governments have perceived that the private sector can be a significant component for carrying technical and administrative skill to the construction, operation, maintenance, and financing of infrastructure ventures. The unsolicited proposal, as mentioned above, are not requested by the government and typically start inside the private part. These proposals normally originate from organizations with binds to a specific industry, for example, developers, providers, and financiers that go through their very own money to create basic undertaking details. At that point, they directly contact governments to get the necessary official endorsements<sup>689</sup>.

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<sup>687</sup> For more information, we have the examples of Australia and Chile. In Australia the New South Wales (NSW): The Guide for Submission and Assessment of Unsolicited Proposals (2017) plots a straightforward and streamlined methodology that will encourage the NSW Government and private sector cooperating to create and convey innovative thoughts. It has been created to help those thinking about making a submission to affirm similarity with the prerequisites of the procedure. Its key goal is to give consistency and assurance to private sector members concerning how their unsolicited proposals will be evaluated inside a straightforward structure with key drivers for the NSW Government being the way the proposition helps meet a vital Government target and value for money. While Chile has adopted a methodology whereby the undertaking proponent is required to partake in a completely competitive tender procedure, however is given extra points in connection to the assessment. The procedure to oversee unsolicited proposition is found in detail (in Spanish) in a guideline (secondary enactment) to the law (reglamento) Reglamento 956 Chilean Concession Regulations 956.

<sup>688</sup> Representing more than \$850 billion in committed new venture between 1990 and 2005. See PPI Database, World Bank, <http://ppi.worldbank.org/>.

<sup>689</sup> Hodges T., and Dellacha G., *supra* note 685.

**720.** Unsolicited proposals have a reputation related to an absence of competition and transparency. A major part of the discussion comes from governments conceding exclusive development rights to private proponents without a transparent tendering process. Private proponents ordinarily contend they have intellectual property rights to project ideas, are the main developer interested in the venture, or can save the government time and money by sole-source negotiating venture subtleties.

**721.** Another significant issue is the notable numbers of unsolicited proposals presented to governments in both developing and developed nations. Since unsolicited proposals are starting to represent a critical share of overall project activities in numerous nations and these propositions can make negative public perceptions, numerous policymakers have started to understand the need to directly address them in PPI enactment.

### **1- Private sector incentives**

**722.** The overall public perspective on unsolicited projects is that they serve special interests or they could be tainted with corruption. This controversial issues related to unsolicited proposals do not come from the project idea. Instead, they come from the project being only negotiated with the original private sector proponent without adequate transparency or rivalry.

**723.** Generally, the private proponents have a specific objective of proposing projects, which is avoiding competitive process to decide the project developer. In case the proponent obtains exclusivity for a specific project, he will directly negotiate the project subtleties with the government away from public scrutiny<sup>690</sup>. Moreover, sometimes the private proponent claims that there are some particular circumstances that require sole-source some project proposals, such as intellectual rights, lack of

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<sup>690</sup> For example, the following reasons: A venture developer has intellectual property rights to key methodologies or technologies; A lack of private-part interest because of the little scale, remote location, or political risk of the project; Organizing a public tender may not be cost proficient for governments, bidders, or both the speed of project development would be progressively fast through arrangements, particularly during emergencies or widespread shortages.

private sector interest, public tender cost efficient issue for government, and the speed of the project development.

### **a) Intellectual Property Rights**

**724.** Numerous companies intend to submit unsolicited proposals under the pretext that they will bring new techniques or technologies that are not available elsewhere. These technologies might be represented by specialists, such as special engineering information to construct more tough streets. In this way, the private proponent would propose specific data and technology. Therefore, the government shouldn't violate the proprietary privileges of the proponent by exposing its data and technology in a competitive procedure. In that context, several procurement laws of a few nations approve exclusive negotiation to ensure the private proponent that they will secure their techniques<sup>691</sup>. Although the private proponents claim that there is no comparable quality to the proposed service, the government should investigate if there are other alternatives that may provide the same quality. In that regard, whenever there are several alternatives, the government should define a selection process to specify the project output disregarding the use of specific technology.

Accordingly, every bidder is ready to propose its own procedure or strategy to achieve the requested outputs, and then compare them with the unsolicited proposal<sup>692</sup>. Moreover, it could happen that the government requires specific proprietary techniques from a private proponent, although that the private proponent is not the desired party to create or operate the undertaking. At that point, the government is capable to provide a licensing arrangement for the requested proprietary techniques.

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<sup>691</sup> See United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Privately Financed Infrastructure Projects (2001), 93, <http://www.uncitral.org/pdf/english/texts/procurem/pfip/guide/pfip-e.pdf>.

<sup>692</sup> *ibid.*



## **b) Lack of Private sector interest**

**725.** The main reason behind enabling unsolicited proposals exclusive negotiations is when the project ‘features may not appeal sufficient bidders. Numerous unsolicited proposals are focused on isolated areas where the market is restricted for competition, as whenever the area is far away from the cities, the private proponent argue that there is not many interested bidder and so no vital competition. In these cases, the government should adapt innovative facilities to the project to address the lack of interest<sup>693</sup>.

**726.** Therefore, even with just a single bidder, organizing a tender procedure may give benefits. Awarding ventures that lacks competitive bidding to unsolicited proponents makes makes public questions of the venture's legitimacy since corruption can be covered more easily. At times, corruption may not exist, however, the absence of transparency will subject the ventures to accusations by political opponents. Hence, opening tender with only the original proponent, may prove the government’s intentions towards improving transparency in the procedures.

## **2- Cost efficiency and Speed of Project Development**

**727.** In the private proponents’ view, the governments should avoid proceeding with tender process if they are mostly sure about the proponent that will win. This can save several unnecessary costs that government could pay. At the same time, the cost implications of implementing a rapid tender procedure, such as not considering the risks, may exceed, over the long-term, the money-saving advantages of quick project procurement.

**728.** The government could define the sector’s development objectives by setting up environmental and economic conditions through a competitive bidding process. With negotiated unsolicited proposition, private proponents will utilize their negotiation abilities to build up criteria without respect for legislature’s long-term

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<sup>693</sup> Michael Klein, “Infrastructure Concessions-To Auction or Not to Auction?” Public Policy for the Private Sector 159, Washington, DC: World Bank, 1998. , <http://rru.worldbank.org/Documents/PublicPolicyJournal/159klein.pdf>.

system. As an outcome, the exclusively negotiated unsolicited task may prompt long-term bottlenecks in overall infrastructure improvement, particularly on account of network infrastructure. Hidden costs are another significant issue. Contingent liabilities regularly become a piece of sole source negotiated, unsolicited proposition understandings<sup>694</sup>.

**729.** Under special conditions, governments legitimize some directly negotiated unsolicited proposals as satisfying urgent necessities. However, the practices of several countries have proved that sole-source negotiation often requires additional time to proceed and usually it postpones the project implementation<sup>695</sup>. Although sorting the process of the design and implementation of competitive bidding requires significant time, the project will be smoother and promising in the future.

**730.** As a result, although several arguments for exclusive negotiations expressed above, several governments may refuse to allow unsolicited proposal. However, the decision of the government to allow unsolicited proposals may be one of the most encouraging factors for PPI. If the unsolicited proposals are permitted, the lesson lies in how to attract private sector participation during the venture conceptualization stage and at the same time increasing the standard of transparency and effectiveness to a competitive tendering process<sup>696</sup>.

**731.** After presenting the general pros and cons of the unsolicited proposal, it is beneficial to address how unsolicited proposal should be performed. This will be through identifying the performance mechanisms of unsolicited proposals. Furthermore, in the conclusion we will state how Syria perceives these kinds of proposals.

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<sup>694</sup> In Malaysia, for instance, the government signed a Build- Rehabilitate-Operate- and -transfer (BROT) concession understanding for enhancements to Kuala Lumpur's sewerage framework, with ensuing extension to the national framework. So as to get the project finished, the government likewise gave soft loans totaling nearly \$200 million and an ensured post-tax return to the investors. Berhad, "Discount for Three Years," *Business Times Malaysia*, August 4, 1995.

<sup>695</sup> In Indonesia, for instance, numerous unsolicited proposals have taken quite a while to negotiate, frequently not bringing about financial closure since final understandings couldn't be come to. The Bangkok Elevated Road and Train System (BERTS) in Thailand and the Dabhol Power Plant in India were each persistently negotiated for right around 10 years on the grounds that the ventures were cancelled and afterward rebuilt under new governments.

<sup>696</sup> The governments of Argentina, Chile, Korea, the Philippines, South Africa, and Taiwan have been exploring different avenues regarding different systems for achieving this goal.

## **Paragraph 2: Unsolicited proposals performance mechanisms**

**732.** In countries that adopted a determine system to deal with unsolicited proposals usually have two stages. The first stage is comparative in most cases and happens from the time the proponent displays the project to the government until every single internal assessments and approvals are done. The subsequent stage includes a competitive tender procedure<sup>697</sup>.

### **A- Approving Unsolicited infrastructure proposals**

**733.** The addressed nations in this paragraph have advanced frameworks for overseeing unsolicited proposals pursue explicit processes during the primary stage. Some nations just contain general ideas (for instance, Argentina, Chile, Costa Rica) and others with detailed data (for instance, Korea, South Africa). The first step is when the private proponent initially presents a preliminary depiction of the project to the relevant organization or ministry.

**734.** The second step proceeds after finalizing the auditing process. The office or ministry gives a primer reaction, for the most part, surveying whether the undertaking contributes to the "public interest" or is fit-for-purpose to the strategic infrastructure plan of the federal, state, or provincial government. Throughout the audit process, the organization or ministry may likewise demand extra-legal, money related, and environmental investigations that the proponent will be asked to direct it at its own expense.

**735.** The third step is in the case that the preliminary project depiction is confirmed; at that point, the proponent generally gets formal acknowledgment for the project concept and concludes the preliminary proposal.<sup>698</sup> At this level, the assigned office or ministry should have data on (a) the capacity of the concessionaire organization to implement and operate the project, (b) a technical feasibility study, (c) specifying the potential project's cost and financing plan, (d) revenue and expenditure

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<sup>697</sup> World Bank, "Policy Guidelines for managing unsolicited proposals in infrastructure projects", Public-Private Infrastructure Advisory Facility, Volume II, 2015.

<sup>698</sup> For instance, In Chile, the proponent is required to submit a detailed proposal within 180 days. Concession law, 1996 (modified in 2010 by law 20.410)

plan for the activity, (e) the justification of project need, and (f) environmental or other social impact studies.

**736.** The fourth stage is when the detailed proposition is reviewed regularly through changed negotiations between the proponent and the relevant office or ministry to develop project characteristics, such as in South Africa, and Taiwan.<sup>699</sup> Some organizations or agencies may require extra endorsement from another government agency, such as in Korea, and Philippines. Toward the end of the stipulated period, the undertaking might be endorsed for a competitive procedure or dismissed. If the project is dismissed, the project proponent may resubmit a changed form in certain nations, or the government might utilize the idea in a public bid after a stipulated period (e.g. two years in Argentina; three years in Chile).

## **B- Tendering Unsolicited Infrastructure Proposals**

**737.** Whenever acknowledged, the project proceeds onward to stage two, where a competitive procedure is commonly done under one out of three frameworks: Bonus, Swiss challenge, or a best and final offer system. These frameworks take place when the private proponent proposes an unsolicited proposals, then the government opens public tender. Therefore, these frameworks exist to ensure the original proponent's rights and protection.

### **1- Bonus System**

**738.** The respective governments of Chile and Korea utilize a bonus system to advance unsolicited proposals in formalized bidding system to the original undertaking proponent. This bonus could embody numerous structures. However, it is an extra theoretic value related to the initial proponent's technical or financial proposal for merely bidding purposes. In the latter cases, the original proponent's offer is chosen if it is inside a specified ratio of the top proposal/bid in the competitive

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<sup>699</sup> The detailed project review period is 90 days in the Philippines, 120 days in Korea, 9 months in South Africa, and 1 year in Chile. In actuality, further delays are often allowed (for example, in the Philippines) and additional time is allowed for the government to prepare the tender documents (3 more months in South Africa, 1 more year in Chile).

procedure. In other cases, the bonus converts into extra points in the total score while assessing the proposal<sup>700</sup>. After the completion of the audit procedure of the first stage, the following technique occurs according to a bonus system:

**739.** Immediately after the project is officially, the original project proponent is officially awarded the bonus. The office or ministry determines the value of the bonus, which is normally within a maximum (for instance, the percentage in Chile and Korea is 10 %). The venture is declared in an official register or newspaper and opened to public bid under the ordinary tendering forms sketched out in the tender documents, just as in general structure laws (e.g., PPI laws, build-operate, and transfer (BOT) laws, concessions laws). The announcement must incorporate the value of the bonus granted to the original proponent and the evaluated reimbursable expenses for proposition improvement. Competitors are permitted to submit competing bids for an assigned time.<sup>701</sup>

**740.** Throughout the public bidding stage, the ventured proponent might bid on the venture or concession utilizing the bonus or decide not to bid. In Chile, the original proponent may likewise sell the bonus to another bidder. In the event that the original project proponent loses the bid or decides not to bid, the winner bidder may likewise need to remunerate the proponent for venture development costs, stipulated in public bid documents, such as Chile. The original proponent is granted the venture if it is the only bidder. For instance, a proponent of the unsolicited proposal is awarded 10 percent as bonus after it proposed a new cost road to the proper organization or ministry and experienced the necessary endorsement methods. In return for this bonus, the government can make changes to the toll road proposition and can require an open tendering process<sup>702</sup>.

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<sup>700</sup> For example, In Korea, bonus points awarded have been within 0–4 percent out of a total 1,000 evaluation points, which means the original proponent received 20–40 points more than a third party. Furthermore, when an original proponent submits a modified proposal in the process of inviting alternative proposals, then it loses the right to receive the bonus points.

<sup>701</sup> The closing date to receive bids is specified in the tender documents, usually not before a minimum of 2 months in Chile or Korea.

<sup>702</sup> UN-ESCAP, “A primer to Public-Private Partnerships in infrastructure development”, 2008.

## 2- Swiss Challenge System

**741.** A typical framework for bringing unsolicited PPI proposals into a competitive procedure is the Swiss Challenge. This method is well known in the Philippines, and utilized in India (the states of Andhra Pradesh and Gujarat), Italy, Taiwan, and the U.S territory of Guam. This system is like the bonus framework in that it enables an outsider to bid on the venture during the assigned time. Rather than giving a pre-decided advantage, however, the original proponent can counter-match any superior offers. After the first phase of the procedure is finished (see (A) Approving Unsolicited Proposals), the following procedure happens<sup>703</sup>:

**742.** The undertaking is announced in an official register or periodical and accessible to public bid under the ordinary tendering forms defined in the tender papers. For example, In the Philippines, the original project proponent should likewise present a bid bond comparable to that mandatory in the tender papers for a possible competitor. This latter bond is proposed to verify that the original proponent has intended to satisfy the undertaking. The agency or ministry included has the discretion to distribute information for the original proposition (e.g., original project pricing and specifications) or to lead a blind challenge<sup>704</sup>. If the original project proponent does not coordinate the price, the project will be awarded to the lower value project proponent of the Swiss challenge<sup>705</sup>.

## 3- Best and Final Offer System

**743.** Varieties of the bonus and Swiss challenge frameworks have been established in numerous nations. The key component of many of these is several rounds of

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<sup>703</sup> Podile V., and Rao N., “Swiss Challenge Method: An innovative Public-private partnership Model in India”, Asian Journal of Research in Business Economics and Management, 2017.

<sup>704</sup> For example in the Philippines and Guam, when a lower price proposition is submitted and affirmed, the original project proponent will have 30 working days to coordinate the cost. The Enabling Act in Andhra Pradesh doesn't determine a time frame for the proponent to coordinate the best bid.

<sup>705</sup> In the Philippines, the project will be promptly granted to the original project proponent if the price is matched. See Law Annex No. 2, Republic Act No. 6957, later amended by Republic Act No. 7718, <http://www.botcenter.gov.ph/botlaw/index.htm>. In Guam, when another proponent presents a lower price proposition and the original proponent coordinates that cost within 30 working days, at that point the BOT committee will distinguish which proposition has more noteworthy technical merit and present its proposals to the top board of directors for disposition. In Gujarat, the original proponent is additionally given 30 days to coordinate the best offer.

tendering, in which the original proponent is given the advantage of consequently taking an interest in the last round. For instance, South Africa utilizes this best and last offer framework, which is, to some degree, like the Swiss challenge system. Argentina's methodology comprises components of a bonus, nearly 5 percent, and the Swiss challenge framework. In many cases, like the Chile procedure, the winning bidder should likewise repay the original proponent for venture improvement costs, which are specified in the public bid documents (for instance, Argentina and Costa Rica).

**744.** As a rule, certain of these latest hybrid models pursue a comparable methodology that takes into account the best and last offer. As soon as the project proposition finishes the initial assessment (see *supra* Stage 1: Approving Unsolicited Proposals) and the tender documents are prepared, the government will invite competent proposals from different developers. The technique proceeds as follows: The project is advertised in the official register or newspaper inviting proposals from third parties. Information about the bid price is not disclosed to other bidders, and the proponent needs to resubmit a proper bid. Then, bids are received, assessed, and ranked<sup>706</sup>. In any case, if the contrast amongst the top bid and the initial proponent's bid is superior to five percent yet under twenty percent, at that point, the two bidders will be invited to present their best and final offers in a second round. The second round happens where best and final offers are mentioned uniquely from those chosen in the first round. Information about bid costs isn't disclosed. The favored bid may be chosen in the second and final round<sup>707</sup>.

**745.** Therefore, in case one government aims to seek after a PPI program, then effectively, the private sector will advance its proper thoughts. Despite that under no commitment to acknowledge unsolicited proposition, governments will be compelled by special interests to think about some of them. The experiences investigated that the

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<sup>706</sup> In South Africa, the two most invaluable offers are chosen in the first round, from which a last round of offering will happen. In the event that the first advocate isn't one of these two chose, it would at that point naturally be permitted to contend in the last round also. The national Treasury Practice Note No. 11 of 2008/2009.

<sup>707</sup> In Argentina, if the original proponent's bid isn't chosen in this last round, the chose bidder will at that point repay proposition improvement costs equal to 1 percent of the assessed venture cost, as indicated by the bidding documents. In South Africa, the winner bidder is additionally required to repay the proponent for venture improvement costs, which are stipulated in public bid documents.

government is better prepared to deal with these pressures if a transparent framework for unsolicited proposals management is already set up<sup>708</sup>.

**746.** A competitive component is basic to decide the final project developer and to oversee the unsolicited proposals. Although a few exceptional conditions may legitimize sole-source negotiation with the original proponent (for example, natural catastrophic events), a predefined competitive component will help policymakers to protect against the regular contentions for selectiveness frequently displayed by private developers. Building up a successful framework to oversee unsolicited proposal is not simple, in any case. Policymakers must address questions, for example, the amount of reimbursement (assuming any) for venture advancement expenses to the original proponent, any possible constraints during the endorsement and challenging forms, planning among different organizations, effectively planning for sector-wide improvement, and finding the proper motivation for the private sector to initiate ventures.

## **Conclusion of chapter II**

**747.** The transaction phase in the PPP implementation procedure is very important, because it is the phase that follows structuring, evaluating and the detailed arrangement of PPP is the transaction phase. In other words, it is when the government chooses the private party to execute the project. Indeed, this phase passes through selecting the appropriate procurement strategy. The latter demands a competitive selection process to secure PPP contracts. The procurement strategy for PPP is done qualifying bidders according to “pre-qualification” criteria. Then, there is the bid process, which is the procedure of issuing a favored bidder. Here the government needs to assess the proposals received to rank the proposals and select the favored bidder. Creating Competitive Tension portrays how the rivalry can be presented.

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<sup>708</sup> World Bank, “Negotiations and Best and Final Offer (BAFO)”, Procurement guidance, 2018.



**748.** It was important to shed light on the direction and assets on dealing with Intellectual Property in unsolicited proposals. In other words, defining clear processes depicts and gives instances of procedures for getting, evaluating, and performing unsolicited proposals for PPP ventures. Indeed, even with just a single bidder, organizing a tender procedure may provide benefits. Awarding projects to unsolicited proponents without competitive bidding regularly makes public questions of the venture's legitimacy since corruption can be covered more easily when the awarding procedure is not adequately transparent.

## **Conclusion of title I**

**749.** There are several necessary phases before the contractual procedures. We have seen that the first phase is to set the macroeconomic objectives, such as the rate of development, unemployment rate. Then, the second phase is to accomplish those objectives and set the sector's priorities. Therefore, the government should approve the project's assessment and the size of the investment that should be implemented to achieve the said objectives. Hence, the third phase is to implement the PSC (public sector comparator) to approve whether the projects could be implemented on a partnership basis or not. Then, there is the phase of approving a list of projects that would be implemented on a partnership basis.

**750.** Three sides of implementation are expressly stated in the PPP law No.5/2016, which are the offers, non-competitive procedures, and the unsolicited offers. Therefore, it could be said that the partnership project differs from other projects because providing offers is not permitted for everybody. Accordingly, the public side that desires to contract is supposed to announce what is called "initial qualification" for the bidding procedure. Thus, based on the criteria, the numbers of bidders that can implement the partnership projects are selected. Afterward, the bidding procedure is proceeding to select the winning bid based on two main criteria: the value for money and risk-sharing. In that regard, it should be noted that the Syrian PPP law is different from the other laws in different countries in regard to unsolicited proposals. It is

notable the law does not utilize the same name and does not indicate the performance mechanisms of these kind of proposals.

**751.** We observed the importance of negotiation and agreement with the winning bid for the allocation of risks in addition to the rest of the contract's provisions. The slow procedures towards partnerships in Syria could be because of the lack of knowledge if the projects are indeed approved for being PPP projects. Finally, it could be said that the partnership is a three-way relationship between three sides. The public sector aims to provide public services in the least burden on the government. In contrast, the private sector seeks the maximum profits, and the citizen wishes to have lower prices and best services with high quality. The solution is to find a convergence point of these three interests.

## **Title II: PPP Contractual requirements and Dispute resolution mechanisms**

**752.** Normally, after the promulgation of the PPP law, Syria must witness new types of contracts and agreements between the public and private sectors. In fact, after studying in the previous chapters the PPP project selection implementation process, it is important to study the result of this stage, which is the drafting of the final contract between the parties involved. Given the complexity and versatility of PPP, it is a necessity to present the structure and design of the PPP contract as well as its management. This motivates the research to highlight the PPP contractual framework in chapter (I).

**753.** Consequently, one of the main provisions that a PPP contract should contain is the dispute resolution mechanism. Under PPP arrangements there is a nearly permanent room for disputes due to the complex legal documents and long-term contractual form. In that context, it is essential to study the different mechanisms for dispute resolution and the relevant investment protection treaties. Hence, the last chapter (II) of this research is dedicated to the PPP dispute resolution and investment protection.

## **Chapter I: PPP Contractual Framework**

**754.** This chapter tackles the “PPP contract”, that is, the relevant contractual documents that oversee the connection and relationship between public and private parties in PPP. Practically, after the conclusion of the partnership contract between private and public sectors, a project company is established for the sole purpose of implementing the project. The project company usually conducts several agreements with public and private entities. Therefore, “PPP contract” may contain several documents. For instance, a PPP to design, build, finance, operate and maintain a new power plant controlled by a government-owned transmission organization might be represented by a Power Purchase Agreement (PPA). This agreement would be between the transmission organization and the PPP project company. In addition, every agreement may include several annexes to set out specific subtleties, for instance, detailed performance necessities and measures.

**755.** Besides the PPP contract, there are several agreements between the private party entities of the PPP. The main agreements among them would be contracts made between the project company and its Engineering Procurement Construction (EPC) contractor, and financing agreements between the project company and its shareholders and equity investors. Accordingly, once these agreements are concluded the PPP contract will be compelling

**756.** Therefore, section I of this chapter is devoted to address the different mechanisms necessary in the contract design phase, such as payment and termination mechanisms in an attempt to clarify the PPP’s contractual complexity. On the other hand, section II presents the performance framework of these contracts through studying the management of PPP contracts, the implication of the project company as well as the financing mechanisms in the PPP contract.

## **Section I: PPP Contracts Design Stage**

**757.** The PPP contract is the focal point of the partnership. It characterizes the connection and relation between the parties, their particular rights and obligations, and assignment of risks<sup>709</sup>. The contract should be well planned and clear to establish certainty for the contracting parties. It should be noted that the complex, long-term nature of the PPP contracts makes them incomplete. This means that they cannot completely determine and predict what could happen in the future. Therefore, the PPP contracts need to have a sort of flexibility to manage any potential change. In that regard, The PPP contract design aims to ensure certainty and create flexibility.

**758.** This section sets out some key considerations in several areas of the PPP contract design. The areas of performance requirements and payment mechanisms are the subjects of §(1), while the adjustment mechanisms and termination provisions are studied in §(2). It is worth to note that these sets of provisions and mechanism are essential to define the risk allocation in the contract.

### **Paragraph 1: Performance requirements and payment mechanisms**

**759.** The performance requirements and payment mechanisms are the main concerns that are prepared by designing the PPP contract. Performance requirements mean the definition of the requested quality and quantity of assets and services. Besides, it defines the monitoring and enforcement mechanisms (including penalties). On the other hand, the payment mechanisms are set to define how the private party will be paid and how bonuses and penalties are set<sup>710</sup>.

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<sup>709</sup> EPEC Guide to Guidance, *supra* note 587 at 23. World Bank, “Toolkit for Public Private Partnerships in Roads and Highways”, Washington, D.C. 2009

<sup>710</sup> Debouzy O., and Apelbaum R., “Contrats de partenariat public-privé: le réchauffement de la planète juridique?”, Dalloz, 2008.

**760.** It should be noted that several countries have standard elements of PPP' contract design. This will assist in decreasing the cost of developing the contract for every PPP contract. In that regard, some legislation establishes model contracts or contract clauses. Others include some elements in overall legislation to govern all PPP contracts<sup>711</sup>.

**761.** In the PPP design phase, the draft PPP contract is commonly required before a RFP is given. A detailed contract design takes considerable time and resources. Therefore, the approval is frequently requested before investing resources and time to design the contract in detail. Normally, RFP documents that are sent to potential bidders contain the draft of the PPP contract. In some cases, the attached PPP contract with RFP cannot be modified. In contrast, in other cases it is possible to change it based on the negotiation with bidders during the transaction procedure<sup>712</sup>.

#### **A- Performance requirements**

**762.** The contract should clearly contain what is expected from the private party regarding the quality and quantity of the assets and services to be provided. For instance, specifying this could incorporate the required standards to maintain roads, or determining the necessary service quality. Generally, the indicators and targets of performance are set up in the annex of the PPP contract.

**763.** A special feature of PPP is the determination of the performance based on the desired outputs (for example, road surface quality), instead of inputs (for example, roads surfacing materials and structure) wherever possible. This empowers the creativity and innovation ability of the private PPP Company in reacting to the different requirements<sup>713</sup>. The specification of outputs rather than inputs will assist in

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<sup>711</sup> For instance, in Chile the dispute resolution instrument is set up in the Concessions Law. Also see, the World Bank's online PPP Infrastructure Resource Center, at the following connection: [http://ppp.worldbank.org/open\\_private-association/content/understandings](http://ppp.worldbank.org/open_private-association/content/understandings), World Bank, "PPP Arrangements / Types of Public-Private Partnership Agreements", Washington, D.C. 2011

<sup>712</sup> Australian Government, "National PPP Guidelines: Practitioners' Guide", Department of Infrastructure and Regional Development, 2011.

<sup>713</sup> Farquharson et al, *supra* note 619 at 34. Hong Kong Efficiency Unit, "A User Guide to Contract Management, Hong Kong", China, 2007, p. 32-33, and United Kingdom, MOD Private Finance Unit Output-Based Specifications for PFI/PPP Projects: Version 0.2 Consultation Draft, 2010, London.

maintaining competition as open as could be expected under the circumstances. In that sense, the World Bank's sourcebook on governance in the electricity sector gives an important example about power sector procurement. In this procurement, the RFP requests a special technological technique with the aim of restricting competition. In consequence, as long as this restriction exists, it may facilitate corruption.

**764.** Eventually, the PPP contract must contain the following: first, the quality and quantity requirements of the project <sup>714</sup>. Then, it should set out how the implementation will be monitored. In other words, it means the data that must be gathered (by whom and reported to whom?). In case of failure for reaching these performance targets, there are specified consequences. These could include: specifying penalties payments, liquidated damage <sup>715</sup>, and specifying payment deductions for poor performance.

**765.** The other element that a PPP contract should set out is the step-in rights for the contractual parties. This right enables the intervention of a third party to be in place of one of the parties to PPP, in case that party fails in accomplishing its obligation under the contract. For example, the step-in right for the public party could be to take control of the contract (normally temporarily) under specific conditions. The goal is to enable step-in to oversee issues threatening service provisions that public party might be more ready to manage, such as environmental, and security issues <sup>716</sup>.

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<sup>714</sup> Ibid Farquharson et al, at 34-36.

<sup>715</sup> United Kingdom, Her Majesty's Treasury, Standardization of PFI Contracts: Version 4, London, 2007, section 4, depicting when and how liquidated damage or performance bonds might be utilized.

<sup>716</sup> For example see Kerf et al *supra* note 634 at 70-74; United Kingdom, 4Ps Public Private Partnerships Programme, "Review of Operational PFI and PPP Projects", 2005, London, p. 7-10; South Africa, *supra* note 646 at 121-133; United Kingdom, Scottish Government, "Output Specifications: Building our Future", Scotland's School Estate, 2004, Edinburgh; United States, Federal Highway Administration, "Key Performance Indicators in Public Private Partnerships: A State-of-the-Practice Report", Washington, D.C., 2011.

## **B- The Payment mechanisms**

**766.** The main way of allocating risk between the contracting parties to a PPP contract is through the payment mechanism. It is also perceived from the most difficult aspects of PPP development. Therefore, it is important that the payment mechanism reflects each of the levels of service required and the level of the most cost-effective transfer of risk to the private sector. Other than providing the agreed mean of allocating risk between both partners, the payment mechanism incentivizes the private party through performance-based payments<sup>717</sup>.

### **1- Basic elements of a Payment Mechanism**

**767.** There are some basic elements that are likely to be used in PPP payment mechanisms, and particularly in PPP infrastructure project. These elements are user charges (service users' payments that are directly collected by the private party, e.g., toad tolls), government payments (these payments could be: usage based payments, availability based payments and performance based payments), and bonuses and penalties, or fines<sup>718</sup>. A PPP payment mechanism could incorporate some or all of these components mentioned above. It should be noted that these components have to be clearly defined in the contract.

Normally, the appropriate use of the elements mentioned above would depend mainly on the specific features of each project. More precisely, it will depend on the desired risk allocation between the two parties.

**768.** In that context, it should be noted that the public sector, under a PPP, is interested in delivering the service instead of the construction of the asset. Therefore,

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<sup>717</sup> Department of the Environment and Local Government, "PPP- Ireland -Payment mechanisms", Public-Private Partnership Guidance Note 12, 14, April 2000.

<sup>718</sup> The fundamental components of PPP installment systems can include: User charges, that is, payment collected by the private party directly from clients of the service; Government installment, that is, payment by the government to the private party for services or resources provided. These installments could be: Usage-based, for instance, shadow tolls or output-based subsidies. Based on accessibility, that is, restrictive on the accessibility of a benefit or service to the predetermined quality. Bonuses and penalties or fines—deductions on installments to the private party, or penalties or fines payable by the private party, due if certain predetermined outputs or measures are not come to; or on the other hand, bonus payment because of the private party whenever determined outputs are reached.



developing the payment mechanism should address several principles. Among these principles, the services that will be provisioned must be specified in the output details. Also, the payment should start when the service is ready based on the requested documents. It should be noted that those payments have to be based on measures, such as usage, performance. In addition to that, the payment mechanisms have to set out deductions in case for unsatisfactory performance of the private sector, however, the latter should be able to manage the transferred risks <sup>719</sup>.

## **2- Developing a Payment Mechanism**

**769.** Payment mechanism development starts at the beginning of the procurement stage of the PPP map. It should be noted that at the appraisal phase, an initial output specification and a primary risk assessment are already prepared. Also, the concerned procedure will be selected and a decision will be made regarding the transfer of the potential risk to the private party. Therefore, payment mechanism procedure must be addressed and discussed at the appraisal stage. It is worth noting that the “contracting authority” (the public sector) should pay attention to clearly define the risks and the private sector’s willingness to accept those risks, to enable the development of the payment mechanism. Consequently, it would permit prior overall pricing by tenderers<sup>720</sup>.

## **3- Proper use of deductions and penalties**

**770.** Given that the payment instrument is sufficiently planned, the public party should completely implement it to stimulate the private partners’ performance. The VFM of the delivered service relies upon the capacity of the Authority to keep up reasonable and fair pressure on the private partner. The Authority should clarify at the beginning that deductions, and penalties are not intended to be punitive; however, just an approach to guarantee the proper conveyance of the services.

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<sup>719</sup> Department of the Environment and Local Government, *supra* note 717.

<sup>720</sup> Maryouri L., “A comparative Analysis PPP financing Mechanisms for Infrastructure projects”, PPP international conference, UK, 2013.

771. So, the Authority may, in specific conditions, not choose to apply its contractual right to impose deductions or penalties if there is an overriding interest in doing that. This is specifically true when, despite a formulated agreement, it is difficult to build up precisely the responsibilities of the private party. Accordingly, the private party should be informed by the relevant authority about its choice not to enforce its contractual right<sup>721</sup>.

772. With the aim of reducing the time and investing the resources used in contract design, many countries have attempted to standardize the design elements of PPP contracts. Thus, they have developed standardized contractual provisions (some examples presented in the table below). At the same time, other countries chose to integrate specific PPP contract design elements in legislation that govern all PPP contracts.

In Syria, the PPP law has stated general provisions for partnership contracts, indicating the minimum of provisions and conditions that both parties can draft in the contract<sup>722</sup>.

<b>Jurisdiction</b>	<b>Standard</b>
India	Descriptions of model arrangements for PPP in a variety of transport sectors <sup>723</sup> .
New Zealand	Draft standard PPP contract <sup>724</sup>
Australia	Infrastructure Australia Guidelines on standard commercial principles for PPP in both social and economic infrastructure <sup>725</sup> .
Netherlands	Standard PPP contract for DBFM in buildings and DBFMO in infrastructure <sup>726</sup>
Philippines	Standardizing a PPP contract sample in bulk water supply, solid waste management and urban mass transit <sup>727</sup> .

<sup>721</sup> European PPP Expertise Centre, Guidance for sound management, “Managing PPP during their contract life”, March 2014, p. 25.

<sup>722</sup> Syrian Public-Private Partnership Law No.5 of 2016, art. 46

<sup>723</sup> Former Planning Commission, 2004  
<http://planningcommission.gov.in/sectors/index.php?sectors=infrastructure>

<sup>724</sup> National Infrastructure Unit, 2013.

<sup>725</sup> Infrastructure Australia’s PPP guidelines, 2017.

<sup>726</sup> Ministry of finance Publications, 2017

South Africa	Standardized PPP provisions published in line with the South Africa PPP manual <sup>728</sup> .
United Kingdom	Standardized contracts for PFI projects <sup>729</sup>

Table 11: Example of standardized PPP contracts.

### C- Flexibility in PPP contract

**773.** During the lifetime of the PPP, it happens that the project faces challenges with dealing with unforeseen circumstances that were not stated during the planning stage. This can lead the project to exceed its time frame and budget. To illustrate this issue, we have two examples: The case of the court of audit in the Netherlands in 2013, where an investigation has been conducted upon five Design, Build, Finance and Maintain<sup>730</sup> ‘DBFM’ projects in the Netherlands. The result was a total of 157 uncalculated changes, this indicates that there is an important opportunity for improvement in managing changes in DBFM contracts. The other case is in the United Kingdom; where the UK National Audit Office in 2008 estimated that the public bodies had paid a huge amount around 200 million pounds to private finance initiative contractors to undertake changes in 2006<sup>731</sup>.

**774.** Several relevant authors think that PPP contracts are difficult to be implemented due to their complexity in particular when it comes to infrastructure projects. They embrace a high level of uncertainty due to the long-term contract. Other than that, the interaction between several stakeholders and multiple actors in complicated projects are the most flagrant source of changes<sup>732</sup>. Therefore, given the PPP’s long commitment, it will be affected by changing circumstances, especially that

<sup>727</sup> Public- private partnership Center, “PEGR sample contracts”, 2009. [http://www.neda.gov.ph/wp-content/uploads/2014/01/ICT-Sample\\_.pdf](http://www.neda.gov.ph/wp-content/uploads/2014/01/ICT-Sample_.pdf)

<sup>728</sup> National treasury standardized PPP Provisions, 11 March 2004

<sup>729</sup> UK treasury, standardization of PF2 Contracts, 2012.

<sup>730</sup> The private sector designs, builds and finances an asset and provides hard facility management or maintenance services under a long-term agreement (20-30 years).

<sup>731</sup> Demirel H., Leendertse W., Volker L., and Hertogh M., “Flexibility in PPP contracts- dealing with potential change in the pre-contract phase of a construction project”, *Construction Management and Economics Journal*, 2017.

<sup>732</sup> Ward S., and Chapman C., “Stakeholders and uncertainty management in projects”, *Construction Management and Economics*, Volume 26, 2008.

neither the contract outcome nor the project's environment is stable. Thus, change is assumed in construction projects and should be handled concerning its context. That is why PPP stakeholders in the pre-contract phase prefer to foresee the potential changes. Hence, the PPP contract should include clauses that allow an effective response to changing circumstances during the contract. Most authors of the pre-contract phases of the project emphasize the causes and effects of the changes and how to deal with them<sup>733</sup>. However, in design-build Finance and Maintain (DBFM) contracts, include a standard mechanism to monitor and manage changes called "change procedures". The latter is part of a legally binding contract, which helps cope with the contract term changes.

**775.** The importance of the contracts flexibility is shown through several areas such as finance, contract law, business, and systems designs. Indeed, flexibility is integrated into contracts through social methods that depend on a decent relationship among the partners rather than the contract itself. Thus, the contract itself does not often enclose mechanisms for dealing with emergencies. According to some authors, flexibility can be distinguished into two perspectives: the legal point of view and the business point of view. Therefore, there is a necessity to have a close cooperation between contract formulators and implementers, to attenuate the problems with contract flexibility<sup>734</sup>.

### **1- Potential changes in the contract**

**776.** There are limited studies that tackle the issue of potential changes in long-term PPP contracts. However, several publications indicate changes within the context of a particular case study with general classification. The studies that address a useful classification embrace different approaches. For instance, the scholars Koppinen and Rosqvist<sup>735</sup> clustered uncertainties into four general groups: Market-oriented changes;

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<sup>733</sup> Price A., and Chahal K., "A strategic framework for change management", Construction Management and Economics, 2006.; Sun M., and Meng X., "Taxonomy for change causes and effects in construction projects", International Journal of Project Management, 2009.

<sup>734</sup> Saleh J., Mark G., and Jordan N., "Flexibility: a multi-disciplinary literature review and a research agenda for designing flexible engineering systems", Journal of engineering design, 2009.

<sup>735</sup> Koppinen T., and Rosqvist T., "Definitions, Concepts and Scope of Engineering Asset Management, 2010.

Technological changes; Network changes, and societal changes. In contrast, other scholars like “Love et al.”<sup>736</sup> state that dynamics emerging from a project are resulting from three sources: planned activities, attended dynamics and uncertainties, and unattended dynamics (internal uncertainty linked to the project, the organization, finance and external uncertainty related to the government, legal, social, force majeure etc.). For the scholars “Sun and Meng”, they classified the changes in sort of hierarchical structure like the following: changes are classified according to their causes (external, internal and organizational causes) then, determining the factors of change (environmental, social, political), and identify the root causes of the changes (changes in government policies, changes in legislation and culture etc.).

777. The latter statement could be the most comprehensive and coherent one because it presents a sort of summary of the findings. Another distinction can be made or added to the above with regards to technical (planning, design, safety considerations etc.) and administrative (change of work rules, decision-making authority, etc.) dimensions. Therefore, the changes identify within different categories, described above, are important to be considered in the pre-phase of PPP contract; if any of them is likely to occur, they have an opportunity to be prepared and negotiated in advance with the relevant entities.

## **2- Best practices on flexibility and renegotiation**

778. The design of the contract should be flexible to restrict the need for contractual changes. These latter are usually classified as predictable. The predictable changes contain, for instance, a possible change in capacity or quality of the specified output, which might be due to unpredicted increase in demand. Therefore, at the contract drafting stage, an important work should be done in the contract design to anticipate potential changes and especially to describe and regulate these changes in the original contract. In case the anticipated changes concern major changes in the amount of the outcome, their pre-specification in the original contract could be done easily and will become incorporated in the part of the bids in the initial competitive

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<sup>736</sup> Love P.E.D., Holt G., Shen L., Li H., and Irani Z., “Using systems dynamics to better understand change and rework in construction project management systems”. International journal of project management, 2001.

selection process. Likewise, any other change that can be precisely predicted has to be determined as a conditional output in the original contract, and an integral part of the initial bid for the pricing of the potential changes at the competitive stage.

**779.** In cases where potential changes are anticipated, but their exact form is not clear, which is rare, it will not be possible to pre-specify the change in the original contract. However, if the predicted changes are small in size, they can agree to insert a provision in the contract, stating that the private party has to implement changes that the public partner needs within certain limits. In contrast, the private party will be compensated for extra costs<sup>737</sup>. The ability to determine in the contract that the compensation should be based on a cost-reimbursement with a contractual obligation to confirm value for money for the public sector should be taken into account.

**780.** The commitment of ensuring VFM to the public sector should be maintained through setting criteria and standards on the profit margin and the subsequent cost evaluation. These standards are established by the private party in case of occurrence of any change to guarantee that expected costs are at the market level. In such a case, the intervention of a third party, like a board of experts, could be incorporated to support the cost change approval process prior the implementation to avoid misuse of the flexibility resulted from the cost reimbursement plan<sup>738</sup>.

**781.** Transparency is an essential feature when talking about the contract change process. Therefore, the contract should identify a detailed “change protocol,” which will organize the process through which any suggested change is requested, in detail. In that sense, there should be incentives to promote transparency and accountability of changes, by the interference of a third party such as an arbitrator or a panel of technical experts, as a supervisor on changes as well as the governance sides of changes.

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<sup>737</sup> Small changes, for example linked to adaptation to particular user needs, should not require changes in payments but mentioned in the provision of original contract and they may follow a faster procedure. For large changes that require pricing, transparency and value for money for the public sector become essential.

<sup>738</sup> See: Cour d'appel de Paris - Pôle 01 ch. 02, 15 Nov. 2012 / n° 12/01556.

**782.** In case the private sector requests changes and implicit revision of prices, the change protocol should contain conditions, on the third party and the public sector. In case these requests of changes concern confirming and clarifying that the requirement of change was not a part of reasonable business risk, which the private partner would have expected and priced in the initial bid, the changes will be accepted. It should be noted that it could be established in the contract significant fees to complete the contract change requests of the private party. These fees will not be applied when the public sector refuses the request. Therefore, it will prevent impractical demands and open the door to serious ones.

**Paragraph 2: Adjustment and termination Mechanisms**

**783.** PPP projects are long-term commitments and are regularly characterized to be risky and complex. For instance, building a paid highway may involve several challenges, like the decreasing or increasing demand, requiring more interchanges in the future, or installing novel traffic technologies. Moreover, such complicated PPP projects like water concession contracts, could be more susceptible to unanticipated changes.

This implies that PPP contracts are not complete; which means they cannot fully determine all future possibilities. In this manner, the PPP contract should be flexible, which facilitate managing any upcoming changes inside the contract without resorting to contract renegotiation or termination. Such adjustment instruments aim to make a clear procedure and limits for change.

**784.** In civil law systems, the concept of “financial equilibrium” is frequent and gives a wide mechanism to manage several sorts of change. However there are other systems that are more specific, such as mechanisms for changes to service necessities, changes to tariff formulae, and others based on the market changes, or managing refinancing gains. However, there is always room for discretion while rules and

procedures are determined for changes. Therefore, the agreement should characterize a procedure that assures the interests of both parties<sup>739</sup>.

**785.** The “financial equilibrium” clauses in PPP contracts are normally embraced in civil law frameworks. They might be set up in administrative law, characterized within any PPP law. These clauses qualify the operator to make changes to main financial terms relevant to the agreement to compensate certain external cases that could affect revenues. Therefore, adjustments usually depend on a mutually agreed financial model that will be held over the contract duration. Three reasons for sudden changes are normally characterized, such as Force Majeure (significant natural events or civil aggravations), “factum principis” (government action), and “ius variandi” (economic unexpected changes)<sup>740</sup>.

**786.** It might be hard for the contracting authority to precisely envision service prerequisites over the length of the agreement. Agreements regularly work in approaches for dealing with service requirements changes, in light of evolving conditions<sup>741</sup>. Tariffs or installments are frequently indicated by formulae, to permit standard modifications for factors, such as inflation. The PPP agreement may likewise work in systems for checking on these formulae, regardless of whether periodic or one-off changes in exceptional circumstances<sup>742</sup>.

**787.** Several PPP contracts sometimes demand “market test” or benchmark of certain sub-services in the contract, to adjust expenses according to market situations. This is ordinarily done where a PPP incorporates the provision of a seemingly long-lived asset, (for example, a school or hospital facility) along with “soft” services, in which such contracts are normally of shorter duration (for example, cleaning). This methodology is generally basic in PPP contracts in the UK PFI tradition. The aim is to adjust the price charged or the soft services per market situations, through occasional challenges or benchmarking practices. Another aim to make market test for “soft”

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<sup>739</sup> As portrayed in the EPEC Guide to Guidance, the administrative courses of action and procedures for dealing with change are regularly characterized as part of the contract management framework and materials.

<sup>740</sup> World Bank, “PPP in Infrastructure Resource Center for Contracts”, Law and Regulation, 2011.

<sup>741</sup> Hong Kong Efficiency Unit, “An Introductory Guide to Public Private Partnerships”, China, 2008, p.68-71.

<sup>742</sup> World Bank, “Body of Knowledge on Infrastructure Regulation”, 2012, Washington, D.C.



services is that service providers would ordinarily be hesitant to give a fixed cost for such services over a significant time, on the grounds that the real expenses are probably going to escape line with the indexation<sup>743</sup>.

In the implementation process, changes relevant to the project risk or capital markets allowed the private company to enter into renegotiation process to improve the favorable terms of its original debt. In this regard, numerous PPP contracts state instructions for determining and sharing the refinancing benefits.

**788.** Generally, PPP contracts have defined term. The agreement regularly specifies the termination of the contract, just as plans for the contract close and hand over assets. Usually, the PPP contract and in certain cases the PPP Law, must likewise, determine conditions in which the agreement might be ended early, and outcomes of termination for each situation<sup>744</sup>.

**789.** The most widely recognized methodology is for the government to select the agreement term in the draft contract. This is the estimate time required to accomplish the necessary return at reasonable tariffs or installment levels by the private party. A subsequent choice, with a comparable outcome, is to characterize tariffs or annual installments and empower the bidders to dictate the agreement length as one of the key bid factors. This methodology was utilized, for instance, in the program of toll road in Mexico, in which concessions were awarded to the bidder proposing the shortest term<sup>745</sup>. A third option is to give concession duration a chance to be determined endogenously<sup>746</sup>, by inviting bids based on the least present value of

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<sup>743</sup> United Kingdom Treasury, “Operational Taskforce Note 1: Benchmarking and Market Testing Guidance”, 2006, London. The United Kingdom's Department of Health has likewise delivered a code of best practice on benchmarking and market testing in emergency clinic PFIs; United Kingdom, National Audit Office, “From Private Finance Units to Commercial Champions: Managing complex capital investment programmes utilizing private finance”, 2010. See also United Kingdom, National Audit Office, “Lessons from PFI and other projects”, 2011.

<sup>744</sup> Syrian Private Public Partnership Law No.5/2016, article 47.

<sup>745</sup> Fisher and Babbar, “Private Financing of Toll Roads”, World Bank RMC Discussion Paper Series 117, p. 7-8.

<sup>746</sup> Kerf, Michael, R. David Gray, Timothy C. Irwin, Celine Levesque, Robert R. Taylor & Michael Klein, *supra* note 634 at 83

revenue (LPVR). This implies that the concession ends when that value is reached. This methodology was set out by “Engel, Fischer, and Galetovic”<sup>747</sup> as an approach to deal with the risk of fixed-term concessions. It has been utilized for toll roads in Chile and Colombia<sup>748</sup>.

**790.** The transmission process of the assets that will usually occur at the end of the contract duration should be determined in the PPP contract. This ordinarily incorporates characterizing how the quality of the assets will be identified and evaluated, whether an installment will be made upon delivery of the assets, and how the installments will be calculated<sup>749</sup>. It could be very complex to characterize handover criteria at the beginning of a long-term contract<sup>750</sup>.

**791.** The PPP contract needs to set out the conditions under which the agreement might be ended right on time, in which case the responsibility for project assets returns normally to the public sector<sup>751</sup>. There are three broad potential reasons behind early termination: termination resulting from a default of the private party, end by the public party, whether because of default or for public interest and early termination based on certain external reasons (force majeure)<sup>752</sup>. For each situation, the government normally pays a payment to the private party and control over the project assets (which might be re-tendered under another PPP contract). Some of these ways to deal with characterizing the termination payment, especially when connected to the value of the project assets, require cautious definition<sup>753</sup> as summarized in the table below: Kinds of Early Termination and Termination Payments.

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<sup>747</sup> Eduardo R., Ronald F., and Galetovic A., “A New Approach to Private Roads”, Regulation, 2002.

<sup>748</sup> Ibid.

<sup>749</sup> Syrian Public-Private Partnership law No.5 of 2016, Article 52

<sup>750</sup> World Bank, supra note 81 at Module 5, Stage 5; EPEC Guide to Guidance supra note 419 at 42.

<sup>751</sup> Syrian Public-Private Partnership law No.5 of 2016, art. 53

<sup>752</sup> Syrian Public-Private Partnership law No.5 of 2016, Article 51

<sup>753</sup> EPEC Guide to Guidance portrays every one of these reasons for end and the alternatives for characterizing end installments for each situation. European PPP Expertise Centre, “Termination and force majeure provisions in PPP contracts”, Luxembourg, 2013; Ehrhardt D., & Irwin T., “Avoiding Customer and Taxpayer Bailouts in Private Infrastructure Projects: Policy toward Leverage, Risk Allocation, and Bankruptcy”, World Bank Policy Research, 2004, p. 46-49; Clement-Davies C., “Public-Private Partnerships in central and eastern Europe: structuring concessions agreements”, European Bank for Reconstruction and Development, 2007, p. 46.

792. Despite the exact provisions stated within the contract, the early end is normally expensive for the two parties. It is the final option once they depleted all the different avenues. As depicted in the EPEC Guide<sup>754</sup>, this implies that the contractually defined termination installments are significant regardless of whether termination does not occur, since it characterizes the “fallback” position of each party in any dispute resolution or renegotiation. Early end installments are typically custom-fitted, so that debt providers consistently have an interest in keeping the agreement alive.

### 793. Kinds of Early Termination and Termination Payments

Termination	Typical causes	Identifying Termination Payment
<p><b>Private party default</b></p>	<ul style="list-style-type: none"> <li>- Failure to accomplish the construction</li> <li>- Insistent failure to meet implementation standards.</li> <li>- Insolvency of Project Company.</li> </ul> <p>Lenders are classically given “step-in rights” to empower them to resolve issues resulting from the underperforming contractor; termination happens if this is ineffective, or lenders decide not to do so.</p>	<p>Termination installments are regularly characterized to guarantee equity-holders bear the burden of default. Lenders may likewise be presented to some conceivable misfortune, to fortify their incentives to correct issues, although this can influence bankability. Choices include:</p> <ul style="list-style-type: none"> <li>- Full value or a predetermined extent of extraordinary debt;</li> <li>- Depreciated book estimation of assets;</li> <li>- Net present estimation of future incomes (subtracting costs of termination);</li> <li>- Proceeds of re-tendering the concession on the open market, accordingly additionally conquering the</li> </ul>

<sup>754</sup>European PPP Expertise Centre, “The Non-Financial Benefits of PPP: A Review of Concepts and Methodology”, Luxembourg, 2011, p. 40.

		conceivable difficulty of finding budget space for end installment commitments that realize unexpectedly.
<b>Public Party default</b>	Public party fails to meet its obligations under the contract.	A reasonable agreement ought to guarantee that the private party does not miss out if the public party decides to default. End installments for this situation are commonly set to the value of debt in addition to some measure of equity. They may likewise incorporate lost future profits (assuming any).
<b>Termination for public interest</b>	Many PPP or public procurement laws permit the contracting authority element to end the contract for the public interest.	Normally, they should be similar to the public party default, otherwise making perverse incentives to voluntarily end instead of the default (or vice versa).
<b>Prolonged “force majeure” damage</b>	Should be cautiously defined in the contract, and constrained to clear, prolonged force majeure events that prohibit the performance of obligations.	Normally in between the two alternatives above, since neither party is at fault.

Table 12: Kinds of Early Termination and Termination Payments.

## **Section II: Managing PPP contracts**

**794.** Overseeing PPP contracts includes observing and enforcing the requirement of the PPP contract, and dealing with the connection between both parties. The management phase of contract sustains over contract duration, from the date of agreement effectiveness to the end of the agreement time frame. PPP are long term and complex, and agreements are essentially incomplete as explained before, which means they cannot fully determine all future possibilities. Therefore, the PPP contract management has several aims, such as guarantee the services are conveyed ceaselessly with high standard, as per the agreement, and installments or penalties are made accordingly. Moreover, it has an aim to ensure that the contractual duties and risk allocation are maintained; and the changes in the external environment are spotted and followed up on successfully<sup>755</sup>.

**795.** The §(1) addresses the aim behind establishing contract management structures into practice for PPP ventures. The establishment of contract management organizations defines and builds up the duties and communication instruments that will empower a viable connection between the public and private partners to the agreement<sup>756</sup>. On the other hand, in §(2), it is essential to comprehend the rationale and implication of the Project Company or so-called SPV (Special Purpose Vehicle) that could result from the PPP contract.

### **Paragraph 1: Contract Management Structures**

**796.** Building up the contract management structures implies characterizing contract management responsibilities inside the government, in addition to defining how to oversee the relationship with the other party. This incorporates assigning a

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<sup>755</sup> United Kingdom, 4Ps Public Private Partnerships Programme, “A Guide to Contract Management for PFI and PPP Projects”, 2007, London; South Africa, *supra* note 646; European PPP Expertise Centre, “Managing PPP during their contract life: Guidance for sound management”, Luxembourg, 2014.

<sup>756</sup> The United Kingdom Treasury's Operational Taskforce, part of the PPP Unit, has delivered extensive direction notes covering a few points on contract management for PPP, United Kingdom, Her Majesty's Treasury, *supra* note 717.

PPP contract manager (or management team) within the implementation office, and defining the roles of different elements inside the government in dealing with the PPP. The government should be sure in which cases the agreement manager has full autonomy, or need certain approvals from specific relevant entities, such as the Ministry of Finance. It likewise requires setting up communication and contract management conventions for the relationship with the private party<sup>757</sup>.

#### **A- PPP contract manager and management roles**

**797.** The primary role for the implementing agency is to be responsible for managing the contract. Usually, this agency appoints a contract manager who will be responsible for communication within the government for all issues identifying with the PPP. The PPP contract normally assigns a specific element as the contractual counterpart, for instance, a Health Board for a new hospital. Likewise, the agreement may indicate the individual contract point.

**798.** Practically, the contract management is not limited to the stated steps in the agreement. The PPP contract manager, or management team, needs adequate resources. Based on the complexity level of the agreement, and resource access, the manager may have productive team, with individuals responsible for various tasks of the agreement. A similar individual or group could likewise oversee one or several contracts<sup>758</sup>. Besides, the contract manager needs to have appropriate aptitudes<sup>759</sup> and abilities required for a contract manager. The United Kingdom Operational Taskforce direction<sup>760</sup> accentuates five key abilities: communication, negotiation, change management, financial competence (to comprehend the payment mechanism), and analytical aptitudes. This Taskforce was itself set up to a limited extent as a reaction to worries about an absence of commercially skilled contract management in public

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<sup>757</sup> The United Kingdom Treasury Operational Taskforce venture transition guidance is a useful review resource for building up contract management organizations. The guide covers resource-planning contract management, setting up monitoring and the management plans, and building up the communication approach.

<sup>758</sup> Farquharson et al., *supra* note 619.

<sup>759</sup> United Kingdom, 4Ps Public Private Partnerships Programme, *supra* note 716 at 15 and 16.

<sup>760</sup> United Kingdom, Her Majesty's Treasury, *supra* note 717 at 2

authorities<sup>761</sup>. Moreover, the procedure of organizing a contract management team is effective when established early, which means in the phase of structuring the contract<sup>762</sup>.

### **1- Roles of other entities in Contract Management**

**799.** In government, there are many institutions that may be responsible for carrying out specific task relevant to PPP contract; they work regularly with the contracting authority and the responsible group for contract management. These can include sector regulators, which regularly check service standards and oversee tariffs for PPP organizations giving services directly to the public. For instance, in Peru, contract management duties in the transport sector are generally assigned to OSITRAN “Organismo Supervisor de la Inversión en Infraestructura de Transporte de Uso Público” an organization responsible for directing and overseeing the management of public transport infrastructure. OSITRAN was responsible for observing the concessionaire's consistency with the Concession Contract. This incorporates monitoring economic, commercial, activity, investment, the regulatory, and financial aspects of the agreement<sup>763</sup>.

The Finance Ministry is frequently included, especially where any potential changes could impact the financial side of the contract. For instance, in Chile, based on the concessions law, if any change appears during the implementation process, it should be settled through a Supreme Decree of the Ministry of public works and that the Ministry of Finance must approve the Decree<sup>764</sup>. The central PPP units or other

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<sup>761</sup> South Africa, *supra* note 646 at 15 and 16.

<sup>762</sup> “4Ps Public Private Partnerships Programme”, *supra* note 716 at 8-10

<sup>763</sup> Ugarte Z., Carlos J., “Concesiones en el Perú: Lecciones Aprendidas” (Concessions in Peru: Lessons Learned), 2011, Fondo Editorial de la USMP.

<sup>764</sup> Chile, Ministerio de Obras Públicas, “Ley y Reglamento de Concesiones de Obras Públicas”, 2010, Santiago

particular support units may have a role in supporting the authority's contract management team<sup>765</sup>.

## **2- Communication and Contract management protocols**

**800.** The structure of the communication between the implementing public office and the private entity should be specified in the government. This regularly demands connections at various levels of the two associations, from the more senior levels to the operational staff. For instance: The 4Ps Guide to Contract Management for PFI and PPP Projects in the United Kingdom<sup>766</sup> portrays the set-up suggested for municipal council in the United Kingdom, which includes a “partnership board” at the most senior level, a “contract management board”, and an "operational management group" to manage everyday management. Moreover, PPP guide in South Africa relevant to the management of contract additionally addresses a comparable structure, identifying the key players to drive communication at the three levels of management.

**801.** A few governments officially set up a management plan to oversee the communication and relationship in the guide of contract management. The 4P Guide<sup>767</sup> gives the proposed substance to an operational agreement manual, which incorporates characterizing the government structure and communication approach. The nature of the connection between the government office and the private party is as significant as the formal protocols<sup>768</sup>.

## **3- Adopting a user-friendly contract management manual**

**802.** It is commonly known that relying on a manual of contract management is considered a good practice in managing PPP contracts. It would be an occasion to

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<sup>765</sup> Farquharson et al., note this can be especially valuable for managing complex issues, such as renegotiating, that may happen once in a project lifetime. Farquharson, Edward, Clemencia Torres de Mästle, E. R. Yescombe & Javier Encinas, *supra* note 619 at 137 and 138.

<sup>766</sup> “4Ps Public Private Partnerships Programme”, *supra* note 716 at 11-13.

<sup>767</sup> *Ibid*, at 19-20.

<sup>768</sup> The United Kingdom Operational Taskforce note on venture transition portrays the significance of building great relations with the contractor.



identify the management strategy and provide a clear, and modular content. The contract management manual gives a guide or a so-called road map on the best way to manage the agreement proficiently for every one involved directly or indirectly in the relevant procedure. The manual should not replace the agreement, which will consistently remain the "reference" document.

**803.** This manual could be considered as a multipurpose document. Firstly, the manual intends to simply clarify, without legal jargon, what is expected from the Authority in concrete terms to (i) satisfy its practical commitments to the private partner and (ii) assume its obligations as far as development and monitoring. The manual gives the Authority a method for planning and setting out its own organizational arrangements. These issues are ordinarily not covered in the PPP contract itself, as the Authority is regularly hesitant to share to the private partner data for its arrangements. This is commonly the situation of internal systems, including various departments inside the Authority's administration.

Concerning ventures that include various public partners (for example schools, clinics), the manual's extent might be expanded to manage the cooperation among the key public stakeholders' public players<sup>769</sup>.

**804.** The manual also gives a chance to set out the operational management methodology and have it endorsed at the fitting level of the decision-making chain. Specifically, such a methodology addresses the particular risks of the project that should be overseen by the Authority. Thus, when drafting the document, the Authority should give specific consideration to featuring the main risks of the project and guarantee that the methodology that is going to concur will give all the necessary tools and procedures to alleviate those risks. Finally, the manual the guide will be considered as perspective document over the contract direction, encouraging any handover that may be required between various individuals from the operational management team.

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<sup>769</sup> In some cases, it may be useful to produce a separate manual dedicated to the users of the facilities (e.g. teachers in a school, doctors in a hospital) describing (i) the general principles of the PPP contract and (ii) the provisions that directly affect them.

**805.** It is frequently fruitful to draft the manual through the collaboration of the operational management team, in a joint effort with the procurement team and legal counselors. This methodology has three points of interest: it guarantees that the language of the manual will be comprehensible to all relevant operational management members; it supports sharing of data between procurement participants and post contract signature stages; and it encourages the operational staff to use and adopt the PPP agreement and its appendices and deeply comprehend of the substance. Some parts of the manual, particularly those managing the interface between the Authority and the private partner (for example information assortment, performance estimation, billing approval process) may helpfully be shared to the private partner to get input and guarantee that it also will build up a comparably well coordinated organizational set-up.

**806.** As the manual is created before the entry into force of the agreement, it should be continuously updated over the contract duration to assess internal changes to the contract itself (predominantly resulting because of alterations), or external changes (for example, changes in the law, changes in the manner the Authority is organized). The first version of the manual can concentrate basically on structure and construction matters. At the same time, those relating to the operating time frame can be created during the project's development stage.

### **B- Monitoring and managing PPP delivery and risk**

**807.** The government should check and ensure that the allocation of risks and duties are put into practice to guarantee the projects' VFM. Hence, the contract manager should throughout the lifetime of the agreement monitor contract consistency and service performance by the private party, and ensure penalties or rewards are paid properly. Moreover, the manager should guarantee and monitor that the government practices are in line with its responsibilities under the contract<sup>770</sup>.

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<sup>770</sup> See: Fortea, Carlos Sorni, Emilio Gardeta Torrodellas, Sergio Herrán Vitoria, Juan Pablo Matute Tejerina & Jorge Vitutia San Millán (2011) Proyecto Fin de Master: Seguimiento de una concesión, Universidad Politécnica de Madrid, Madrid , which describes the project monitoring process in Spain.

## **1- Enforcing service performance and contract compliance**

**808.** The implementing office needs to guarantee that the private party meets its commitments under the partnership, by observing outputs, or service standards. Usually, this does not include checking the construction performance, which is the responsibility of the private party. Instead, it implies checking against the performance markers built up in the agreement. Usually, the contract manager and other relevant groups are responsible for checking the performance of the delivered service in line with the agreement. For PPP in regulated sectors, the sector regulator may likewise undertake the responsibility of a few or all-monitoring responsibility. In either case, sources of monitoring data can include data provided by the private party, independent experts, and service users<sup>771</sup>. Ordinarily, the private party is liable for giving venture implementation information in regular reports to the contracting authority. The substance, format, and frequency of these reports should be determined in the agreement.

**809.** The implementing agency likewise needs to guarantee enforcement systems are performed as suitable, given the monitoring information received. This could incorporate adjusting installments (for government-pays PPP) adhering to the contract's guidelines, or extreme cases, calling performance bonds. It additionally incorporates communicating with the contractor, and monitoring endeavors to correct performance deficits.

## **2- Managing government responsibilities and risks**

**810.** A pivotal component in guaranteeing good implementation and the provision of supported services under the PPP contract is checking and monitoring the risks and duties designated to the government. A focal instrument regularly utilized by implementing agencies in doing so is a "risk management plan". This plan usually records all the risks that the government bears, especially the main risks that may undermine the continuity of the project. For each risk, the plan should likewise recognize the data expected to screen the risk, and potential activities to relieve the

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<sup>771</sup> Australia, Partnerships Victoria, "Contract Management Guide", Melbourne, 2005, p. 54-55

risk or its effect. These information prerequisites should be a part of the detailing necessities characterized in the agreement.

**811.** Prior to the commencement of the agreement, the contract manager must formulate a risk management plan and then act as a resource and guide during the term of the agreement. Additionally, the contract manager collects the risk monitoring data from the private party, and the applicable outside data to update the plan. The contract manager then needs to monitor indicators against expected levels, to recognize rising risks. It also needs to take the planned mitigating actions, for instance, if the government infrastructure projects are behind schedule, the plan is to transfer the project implementation to another team or to the private part.

### **3- Dealing with issues arising from the contract**

**812.** Over the contract duration, which is usually between 10 to 30 years, unavoidable events may happen that could have not been anticipated when the agreement was concluded. Commonly, the parties will get into disagreement about how the agreement should be translated, or whether the two parties have been implementing as concurred. At times, these disagreements may lead to terminate the contract early. Although these risks cannot be avoided, they can be managed<sup>772</sup>.

**813.** The “change” circumstances can be helpfully examined in four classifications: planned reviews and modifications, renegotiations, disputes, and contract expiry or termination. Numerous PPP contracts are regularly renegotiated at the beginning of the contract lifetime<sup>773</sup>. The “Renegotiation” mechanism alludes to changes in the contractual provisions, rather than through an adjustment component provided in the agreement. However, renegotiation is something to avoid where conceivable,

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<sup>772</sup> United Kingdom, National Audit Office, “Managing the Relationship, to Secure Successful Partnership in PFI Projects”, 2001; Quick, Roger, “Long-term ties: Managing PPP contracts”, 2003, Public Infrastructure Bulletin, 1; United Nations Economic & Social Commission for Asia & the Pacific, “A Guidebook on Public-Private Partnership in Infrastructure”, Bangkok, 2011.

<sup>773</sup> Guasch L., “Granting and Renegotiating Infrastructure Concessions: Doing it Right”, World Bank, Washington, D.C. 2004.

therefore, good utilization of adjustment provisions can deter the requirement for renegotiation.

**814.** Regarding the contractual disputes, they emerge once a party believes that the other partner did not accomplish a task that was authoritatively binding. However, the other party differs regarding what its commitments were, or what ought to be done to remedy the circumstance. A helpful distinction between service delivery issues and disputes could be made (see *infra*).

The difference between issues and disputes<sup>774</sup>:

Service Delivery Issues	Disputes
Require not to include any difference of point of view or position between the parties.	Include a difference of opinion or position between the parties (by definition).
Include an interruption or other disturbance to service delivery	Need not involve any interruption to service delivery.
May trigger a reduction of service charges or other remedies.	Commonly will not in themselves trigger a reduction of service fees.

Table 13: Difference between issues and disputes.

**815.** The Partnerships Victoria Contract Management Guide likewise includes sample templates determine how disputes might be raised and settled. The practical advice is usually around the desirability of rapid informal resolution of disputes, understanding the other side's position and avoiding inappropriate dispute forms. However, countries with various regulatory and legal traditions and capacities will not think that it is proper to look for informal dispute resolution. Alternatively, it will frequently be desirable to pursue the formal steps set out in the agreement<sup>775</sup>.

<sup>774</sup> Australia, Partnership Victoria, “Contract Management Guide”, Melbourne, 2003

<sup>775</sup> The PPP contract gave a debate goals component under which the legislature could probably have accomplished the change whenever looked for, and in reality won harms from the contractual worker. Be that as it may, as depicted in an audit of the question case Triantafilou, Epaminontas (2009) No Remedy for an Investor’s own Mismanagement: The award in the ICSID case Biwater Gauff vs Tanzania, International Disputes Quarterly, Winter, 6-9 , page 6: “While the contractual relationship was headed inevitably towards dissolution, Tanzanian Government officials, motivated by electoral concerns, among others, took a series of drastic measures that went far beyond the contractually

**816.** The last task in dealing with a PPP contract is to deal with asset handover and operations toward the end of the agreement term. The way to deal with this handover should be plainly defined in the agreement, such as in the Syrian PPP law where it has defined specific provisions for payment and transfer of ownership of assets<sup>776</sup>. This normally incorporates determining how the assets' quality will be measured and surveyed, regardless of whether an installment will be made on asset handover, and how the amount of any installment will be resolved. Alternatives incorporate specified handover necessities or the contribution of independent assessors<sup>777</sup>.

**817.** It is important in this thorough study, to clarify and point out the private law side of these contracts. Therefore, the finance structure of PPP and the applicable law on the Project Company created from the PPP contract (Noting that the applicable law on the project company will be the relevant company law of the targeted country, for example, the Syrian companies law) are very important in the PPP implementation process. To this end, §(2) presents in detail this point.

## **Paragraph 2: The implications of the Project Company**

**818.** As presented before, the fundamental component of the project structure is the PPP contract<sup>778</sup> between the authority and the private partner<sup>779</sup>. The project

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mandated process for termination of the Project Contracts. In May 2005, Tanzanian Government officials, causing public furor, repudiated unilaterally and rather publicly the lease agreement with City Water while calling on the performance bond posted by BGT, reinstated the previously waived VAT on purchases by City Water, repossessed forcibly the assets previously leased to City Water, and deported City Water's BGT-appointed management".

<sup>776</sup> Syrian Public-Private Partnership Law No. 5 of 2016, art. 53.

<sup>777</sup> As noted in The World Bank's toolbox for PPP in roads and highways section on hand back of facilities at contract end, there has been moderately restricted pragmatic involvement with consummation of PPP understandings. Similarly, there is restricted direction on managing this phase of contract management.

<sup>778</sup> The contract will normally consist of one single document and its attachments detailing certain matters (such as the technical requirements and payment mechanism), this PPP Guide uses the term "contract" in a broad sense, so as to potentially include other agreements that may link the private partner with other public sector parties rather than the procuring authority (for example, in the case of off take agreements with a third party authority or body). The PPP contract may also be referred to as the PPP agreement.

<sup>779</sup> APMG International. <https://ppp-certification.com/ppp-certification-guide/61-introduction-basic-ppp-project-structure>

structure will likewise mirror the financial structure (how the compensation process for the private party will be done) and the PPP contract (that is, how the extent of responsibilities is qualified as far as risks), just as other provisions. The installment component is at the core of the financial and risk structure.

### **A- Finance Structures of PPP**

**819.** Usually, the result of the PPP contracts is a particular Project Company managed by the private party, frequently called a SPV<sup>780</sup>. In that regard, it should be noted that, the creation of Project Company depends on whether the private partner solely will undertake directly the project or he will contract with other public or private entities through a project company<sup>781</sup>. The investment capital of this company is regularly gathered from its investors, bank loans, or through bonds or other financial related instruments. The financial structure is the blend of equity and debt, and contractual connections between the equity holders and lenders. Typical PPP Project Structure shows a typical contract structure for a PPP venture. Accordingly, the main connection is between the government relevant institutions and the project company. Regularly, this could be followed by a direct agreement between the contracting authority and lenders; although this agreement is often constrained by provisions in favor of the lender, such as step-in rights or senior debt repayment guarantees.

**820.** The underlying equity investors are regularly called project shareholders. Typical equity investors might be project designers, engineering or construction companies, infrastructure management organizations, and private equity funds. On the other hand, lenders to PPP projects in developing nations may incorporate commercial banks, multilateral and bilateral development banks and financial

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<sup>780</sup> Creating a SPV brings the following advantages for the parties: A SPV is a standard prerequisite by moneylenders so as to provide fund through project finance methods, as this takes into consideration better control of the credit risks. Project finance strategies enable equity investors to restrain their exposure to risk, and they give high influence without the requirement for investors to (generally) provide corporate assurances. Moreover, the money is usually viewed as "off balance sheet" from the holding point of view of the equity investors. The public party likewise profits by the presence of a SPV, as it implies that public party's partner might be devoted to the particular PPP contract. It is regular for both public party (through the Request for Proposals and the agreement) and lenders to preclude the SPV from developing different projects so its lone item is the conveyance of the PPP works and services.

<sup>781</sup> Syrian Public-Private Partnership law no.5 of 2016, Article 3.

establishments, and institutional investors, such as pension funds and insurance companies. The typical PPP project structure could be illustrated by the scheme below to have a better understanding.

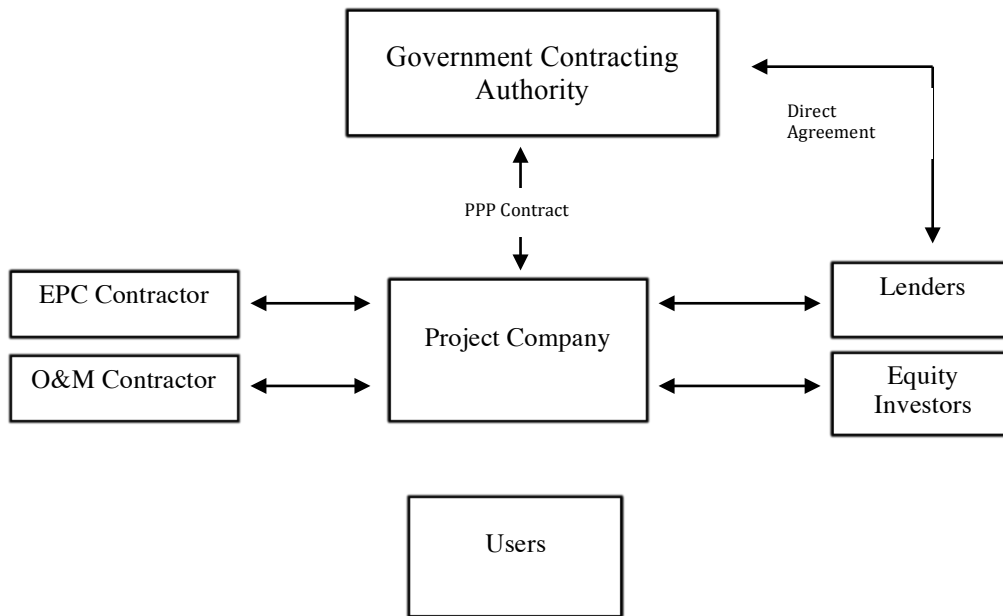


Figure 4: Typical PPP project structure.

**821.** As appeared in Typical PPP Project Structure, the Project Company will conclude contracts with firms to oversee design and construction (normally known as an Engineering, Procurement, and Construction, or EPC agreement), and operations and maintenance (O&M). These contractors might be subsidiary with the equity investors. The main goal of the project shareholders and their advisors in establishing the financial framework is regularly to limit the project financing costs. Since equity is costlier than debt, venture shareholders utilize a high extent of debt to fund the project. In every nation, this extent may change from project to project, dependent upon the risks expected by the PPP operator.



## **B- Special Purpose Vehicle as a common feature of PPP**

**822.** The government (the procuring authority) contracts with a private operator for the PPP for a new or upgraded infrastructure project. Regularly, the government will grant the agreement to a company or group of companies (consortium). In the wake of awarding the agreement, the consortium should integrate a particular company<sup>782</sup> (the SPV) as per the relevant legislation overseeing the companies' formation. The SPV will sign the agreement with the procuring authority (called also "commercial closing"<sup>783</sup>). The consortium members will execute the shareholders' understanding. By the agreement signature, the private partner accepts the commitments and obligations depicted in the agreement.

**823.** After signing the agreement, the SPV usually makes the following: enter into the insurance agreements for the implementation bond; enter into the protection understandings and policies; enter into the financing understandings, that is, the loan agreements<sup>784</sup>, likewise usually alluded to as "financial close" and enter into the "downstream" contracts, for example, the agreements with the construction or EPC contractors, and O&M contracts with the O&M contractors.<sup>785</sup> In certain projects, the authority will go into a direct agreement with lenders<sup>786</sup>.

### **1- The implementation process of the SPV**

**824.** Construction will commonly begin once the procuring authority issues the construction request. This happens once getting the approval on the final design of the project and other predetermined conditions are met. Some of these prerequisites may

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<sup>782</sup> The SPV may already be a publicly owned existing company, or the public party will participate as shareholder in the constitution of the project company in situations specified in the PPP law.

<sup>783</sup> Contract signature may be also referred to as commercial close or contract "execution", referring to the act by which the specific contract becomes valid and enforceable.

<sup>784</sup> Sometimes (e.g. in certain countries) financial agreements will be executed the very same day as contract signature. In other situations, it may be possible to defer the fund raising and, as a result, the construction initiation will also be deferred by several months. The most common instrument for debt finance is debt loan agreements. However, in some markets, and depending on the risk profile of the project, project bonds (i.e. bond issuance to capture finance in the capital markets) may be also used. Section 7 explains the debt options for the project finance structure.

<sup>785</sup> Even if O&M will not start after construction is completed, O&M contracts have to be duly executed (signed) at least at financial close, as both lenders and investors require certainty regarding cost and risk transfer to the O&M contractor.

<sup>786</sup> APMG international, *supra* note 779.

be the responsibility of the procuring authority (e.g., to give the right of way or the land), and others might be prerequisites of the lenders, (e.g., final clearance of certain permits).

**825.** The cost of the construction contract shall be paid to the contractor in a dynamic manner as agreed upon in the agreement. In certain ventures, it might get an advance installment to buy some devices and equipment, and in different projects, it might get a relevant portion of the cost at completion of the works. However, the most widely recognized methodology is monthly progressive installments against the progressive and fractional invoicing of the works executed. Usually, the work will be evaluated from technical advisors delegated by the lenders<sup>787</sup>.

## **2- Payment installment mechanisms**

**826.** In many ventures, the procuring authority just approves the beginning of payment installment once construction is finished and the works are commissioned. If the contract is of a user-pays type, the SPV is permitted to begin charging users. However, when the agreement is of a government pays type, the SPV will be permitted to begin invoicing the procuring authority as per the agreement (for instance, month to month) and according to the installment component characterized in the agreement.

**827.** After collecting the fund, O&M costs will be reimbursed by the project company. Furthermore, the SPV will pay the taxes and put aside the estimated reserves necessary by the law and by the agreement. The rest of the fund is usually utilized to pay interest and reimburse debt, just like the dividends to the equity holders. The O&M contractors' charges will be paid for a fixed or variable annual amount (as a level of income, particularly when the project company's' income stream depends on request or volume). These fees will typically be dependent upon similar deductions and additionally liquidated harms that influence original income of

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<sup>787</sup> Chowdhury N., Chen P., and Tiong R., "Establishing SPV for power projects in Asia: An analysis of critical financial and legal factors", *Journal of Business Economics and Management*, June 2012.

the SPV, partially or absolutely transferring the O&M performance risks to the O&M contractors.

**828.** During the operations phase, there will be various investments to be made (renewals or reinvestments, sometimes called "significant maintenance" or "life-cycle costs") to keep the asset in suitable condition during the whole existence of the agreement. The O&M contractor generally does these works, yet they may be dealt with and contracted independently under a particular agreement for renewals. The reimbursement profile of the loan and the equity distributions are generally characterized ahead of time in the financial understandings, and they are developed to meet the Debt Service Cover Ratio. Incomes might be paid to equity holders just when O&M costs, taxes and debt commitments are paid as scheduled and reserves are appropriately funded. The financial understandings typically include extra limitations for installments to equity holders<sup>788</sup>.

### **3- The Hand-back process**

**829.** Except if an early termination happens (that is, the agreement is ended before the original term lapses because of a serious default by the private partner, a force majeure occasion happens, or there is a one-sided choice by the procuring authority), the agreement will terminate as per its terms. Then, the infrastructure will return to the hands of the government, which may re-tender the asset management in a new agreement, contract the O&M of the asset in shorter-term agreements, or decide to directly deal with the asset itself. The handover of the asset for public hands is generally alluded to as "hand-back". It is a great practice to require the private party to hand-back the infrastructure in a predefined condition. To meet these prerequisites, the private party should make some investments preceding hand-back. This is regularly done during the last years (1 to 3 years) before the agreed termination date<sup>789</sup>.

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<sup>788</sup> Gomez C., and Gambo M., "Evaluating of special purpose vehicle organization skill sets taxonomy for effective PPP infrastructure project delivery", *Journal of Construction in Developing Countries*, January 2016.

<sup>789</sup> Ibid.

## Conclusion of chapter I

**830.** As seen in this chapter, PPP contracts are the backbone of the targeted project. It implies all PPP' considerations and transactions, namely rights, responsibilities, bidding process, payment mechanisms, termination aspects, and dispute resolution. The private partner's primary objective when executing a public work or providing a public service is to amortize its costs and earn profits. Therefore, payment for services is essential for PPP arrangements. It is significant, along these lines, how installments are made. Therefore, the project must have a clear and characterized revenue structure in the contract that will be adequate to cover its expenses. These expenses incorporate operation and maintenance costs, service principal and interest installments on the project debt over the term of the loans, and a return on equity relative to the development and risk of long term venture taken by equity investors.

**831.** PPP is long-term contracts, and the conditions of the project may change, affecting its execution. These changes could conceivably be predictable. Some changes may not effectively be incorporated using a programmed alteration mechanism. The parties may want to exclude them from such a mechanism. These changes may happen because of legislative or regulatory improvements or by unexpected moves in economic conditions. Therefore, legislations might provide examples of foreseeable changes that impact a contract and outline mechanisms to address these changes<sup>790</sup>.

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<sup>790</sup> The European Union Directive has the same concepts regarding contract changes for both European common law and civil law countries.

## Chapter II: PPP Disputes Resolution and Investment Protection

**832.** In previous chapters, the several stages and operation of a partnership project, starting from the designation of the project to its execution in accordance with the PPP Law were studied. The contract resulting from this partnership is the binding charter signed between the parties. Actually, the contract of PPP is complicated because it includes several documents. The complexity can arise due to the versatility of PPP, in which there is a network of interdependent contracts that involves other legal relationships and parties. So, problems are to be expected both in terms of the interpretation of the contract provisions or on the obligations and rights of parties contracting, either at the termination of the contract or of other issues to be resolved. This is why the dispute resolution clause is important in the said contract. As a result, it is necessary that the parties are very vigilant and attentive to this clause to be well written taking into account at all possible disputes methods.

**833.** However, even though the dispute resolution clause has been well drafted, disputes remain expected. In this case, it is necessary to clearly explain, within this clause, the manner in which the parties must resort. In other words, what are the appropriate methods of settlement for the parties and especially for the private party? We have seen in the introduction of this research that the private partner usually prefers and for several reasons, the use of alternative means of dispute resolution. This means the settlement of the dispute amicably, if not, it should be resolved by internal or international arbitration depending on the arbitration clause contained in the contract. In that context, does Syrian law; in particular, does the PPP law expressly allow it?

**834.** This phenomenon incentivizes the study to analyze the possible PPP disputes and the preferred settlement methods, which is generally the choice of arbitration<sup>791</sup>. Hence, it is beneficial to dive into arbitration provisions that should be used and drafted to attract investors and settle PPP disputes in an efficient and fair manner<sup>792</sup>. Accordingly, it is essential to study how Syrian and foreign investors could be legally protected by the different relevant laws, such as the investment law and the internal

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<sup>791</sup> See: Marques R., "Is Arbitration the right way to settle conflict in PPP agreements?" *Journal of Management in Engineering*, January 2018.

<sup>792</sup> Marques R., and Berg,S., "Risks, contracts and private sector participation in infrastructure", *Journal of Construction Engineering and Management*, 2011.

arbitration law. This would help to clarify the legal framework that governs the PPP when the private sector is a local or a foreign investor. At the same time, it is crucial to address the international standard of investors' protection and identify to what extent these international protection standards are adopted in Syria.

**835.** Therefore, the dispute resolution provision in the context of the contractual relations should take into account the diversity of relations and contracts. Thus, it may need several dispute resolution methods based on the project's phase, parties involved, and disputes' type<sup>793</sup>. Section I of this chapter focuses on the main disputes that may arise from the PPP project and the preferred method of settlement of these disputes. In that context, it is important to see how the local and foreign investors are protected in section II.

### **Section I: PPP Disputes and regulations**

**836.** Encouraging investors, lenders, and contractors to participate in PPP projects would require great confidence in the dispute resolution system. In other words, they have to be confident that any dispute that may arise from the contract will be resolved fairly and efficiently. In that regard, the legal framework of the host country of the investment should enable some basic principles, such as guaranteeing the same conditions for local and international firms, the right of choosing the applicable law by the parties should be affordable, enforceability of foreign judgments and arbitral awards, and autonomy of the parties in choosing the appropriate dispute resolution mechanism.

**837.** Disputes may arise at the beginning of the contract or during the term of the contract. In the event that the dispute arises early in the contract award process, it occurs in the form of objections to bids or appeals against decisions of the contracting authority, especially upon the final selection of a private partner. Usually, these types of disputes will be handled according to available procedures concerning review and

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<sup>793</sup> Kangari R., "Construction documentation in arbitration." *Journal of Construction Engineering and Management*, 1995.

dispute settlement based on the state's public procurement laws<sup>794</sup>. This section triggers the main disputes arising from the implementation stage and post-completion of the PPP project, through classifying the disputes in three general categories (§1). Accordingly, after presenting the categories of potential PPP disputes, § (2) addresses the preferred method of dispute settlement.

**Paragraph 1: Main disputes arising from PPP contracts**

**838.** The disputes arising from the PPP implementation phase of the contract and post-completion of the project could be classified in three general categories. The first category comprises the disputes that may arise between the private partner and the contracting authority and other public entities. The second category is related to the disputes that may arise under contracts between the project promoters or the private partner and the relevant parties involved in the implementation of the project. The third category is for disputes that may arise between the private partner and other parties<sup>795</sup>.

**A- Disputes between the contracting authority and the private partner**

**839.** As we saw earlier in the study, the PPP contracts are subject to administrative law in civil law countries, while in other countries PPP contracts are in principle subject to the general law of contracts, which is complemented by special provisions related to government contracts to provide public services. Therefore, this system could have consequences on the dispute settlement mechanism agreed by the parties to the PPP contract.

**840.** Since PPP contracts are executed over a long duration with the participation of many companies in the construction and operation stage, they often involve government agencies and attract the public interest. Hence, the need to establish mechanisms that avoid disputes between the two parties and maintain the work

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<sup>794</sup> UNCITRAL, “Legislative guide on public-private partnerships”, Vienna, January 2020

<sup>795</sup> See: Nagelkerke M., and Valkenburg M., “Dispute resolution in PPP infrastructure contracts, the Dutch conundrum”, UNICITRAL Conference, Wenen, July 2017. ; Harisankar K., and Sreeparvathy G., “Rethinking dispute resolution in PPPs for infrastructure development in India”, Journal of infrastructure development, 2013.

relationship between them<sup>796</sup>. As a result, it will avert the interruption of construction work or services delivery. Accordingly, what are the key considerations for the diverse stages of PPP implementation?

### **1- Methods for prevention and settlement of disputes**

**841.** There are several concerns that lead to disputes over the PPP contract duration. Usually, these problems are related to potential agreement violations during the construction and operation stage of the infrastructure facility, or related to PPP contract termination. These disputes can be very complicated and usually include technical issues that should be resolved quickly to avoid the disruption of the projects' construction or operation works. Accordingly, the parties should put in place mechanisms that permit the selection of competent experts to help reaching a settlement.

**842.** In order to achieve the aforementioned goals, several dispute settlement clauses are stipulated by the PPP contract to avoid to the maximum, the possibility of arising disputes. These clauses often set out a chain of steps that begin with early warning of problems that may turn into a conflict. Usually, when a disagreement occurs, the PPP contract requires the exchange of information and negotiation to achieve a potential solution. In case the parties are not able to resolve the dispute, either party can request the interference of an impartial third party to find them an appropriate resolution. Generally, when these conciliatory methods cannot settle the disputes, the parties resort to adversarial dispute settlement methods.

**843.** It should be noted that the freedom of the parties to choose some dispute resolution methods might be restricted. These restrictions could result from the subject of the dispute, or from the governmental character of the contracting authority (depending on the legal system of the country). Some legal systems have limited the ability of government and its related entities to agree on certain methods of dispute resolution, such as arbitration, depending on the subject of the contract. However, in

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<sup>796</sup>Chahid-Nourai N., and Lazerges R., "La resolution des litiges dans les contrats de partenariat", AJDA 2009, p. 1925.



some countries, this restriction does not apply to public institutions linked to an industrial or commercial activity, because their relations with third party depend on private or commercial law.

**844.** The legal nature of a PPP contract is an important factor related to limitations on the freedom to agree to settle disputes, including arbitration. In countries where PPP contracts are considered administrative contracts, usually in civil law systems, disputes that arise may be resolved through the host country's judiciary or administrative courts. In contrast, other legal systems may clearly include similar limitations in their legislation or judicial precedents related to PPP contracts.

**845.** Countries wishing to allow the use of alternative dispute resolution mechanisms as an alternative or complement to local courts to resolve PPP disputes should remove all potential legal obstacles and provide explicit consent to local authorities to accept alternative dispute settlement that they deem most appropriate. However, the non-existence of this kind of legislative authority may raise concerns about the validity of the dispute settlement clause and therefore it may delay the settlement of the dispute. For example, if the arbitral tribunal declares that the arbitration agreement was successfully concluded despite any justification later that the contracting authority does not have the approval to execute it, the question may arise again at the stage of the recognition and enforcement of the award before a court in the host country or before a court in a third country where the award must be recognized and enforced. Therefore, what are the methods to prevent and settle possible disputes?

## **2- Used methods to prevent and settle disputes**

**846.** The following paragraphs identify the basic features of the methods used to prevent and settle disputes. Moreover, these methods should be suitable for several phases of the project, especially the construction phase, the operational phase, and the post-completion phase. It is true that a PPP contract usually contains a dispute settlement clause, but care should be taken to avoid complex procedures or impose multiple layers of different procedures. These methods are as follow.

### **a) Early warning method**

**847.** An early warning could be an essential provision to avoid disputes. According to this method, when a party feels that there is an event likely to cause potential conflicts, he must draw the attention of the other party to this event as soon as possible. The delay in presenting such claims has a negative effect on the parties, as it is likely to surprise the other party and thus create hostility. Moreover, these delays can make claims difficult to prove. Therefore, the claimant party is required to submit a specific quantitative claim with the necessary evidence within the appropriate time limit.

**848.** In order to ensure the effectiveness of these provisions, a sanction could be foreseen for the non-compliance with the provision. This sanction could be the loss of the right to pursue the claim, or increase the burden of proof. It should be noted that providing early warning provision are very important in infrastructure project, as they may refer to events that may adversely affect the quality of work, or the delivery of services. Therefore, these provisions are considered useful during the lifetime of a PPP project.

### **b) Mediation and conciliation methods**

**849.** Mediation is a broad term referring to proceedings by which an independent third person or a panel helps the parties in an impartial way to reach an amicable settlement of their dispute<sup>797</sup>. Mediation differs from negotiations between the parties, as the mediation is the involvement of a third independent and impartial party to resolve the dispute. In return, the negotiation does not include any third party. At the same time, mediation also differs from arbitration, where the arbitration award is binding and final, while mediation may end with an agreement or disagreement between the parties and is not binding on them<sup>798</sup>. In practice, the term “mediation” may be referred to in various terms, including conciliation. Although some

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<sup>797</sup> Treacy T., “Use of alternative dispute resolution in the construction industry.”, *Journal of Management in Engineering*, 1995.

<sup>798</sup> Silberman, A. “Mediation is not arbitration.”, *Journal of Management in Engineering*, 1997.

practitioners distinguished between these two expressions in terms of the methods used by the third party or the level of their involvement in the process.

**850.** Mediation is increasingly being practiced all over the world, including regions where it was not generally practiced before. This practice is reflected in the enactment of mediation legislation in several numbers of States, repeatedly according to the UNCITRAL Model Law on International Commercial Conciliation<sup>799</sup>. It should be noted that it was followed by the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation in 2018<sup>800</sup>. A settlement agreement resulting from mediation can be enforced based on local procedures and substantive laws, which vary widely in both the impacts of the settlement agreement and the enforcement process. Therefore, the United Nations Convention on International Settlement Agreements Resulting from Mediation<sup>801</sup> addresses this issue by providing an effective and standardized system of cross-border recognition and a settlement agreement modeled on the highly successful Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958.<sup>802</sup>

**851.** Generally, mediation is informal and is easy to pursue. Therefore, it can be considered fast and inexpensive. Moreover, the procedure is confidential and private, although some jurisdictions would enhance transparency in mediation that involves public entities, by publishing settlement agreements. As mentioned earlier, the procedure is non-binding because the role of the mediator is to direct the parties' attention to potential solutions with a view to facilitating the settlement. The advantage of this procedure lies in the presence of many parties involved, such as the

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<sup>799</sup> UNCITRAL Model Law on International Commercial Conciliation, 2002. This text is reproduced in the Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), annex I.

<sup>800</sup> The official text of the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018, is reproduced in the Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17), annex II.

<sup>801</sup> For the official text of the “Singapore Convention on Mediation”, as it is known, see General Assembly resolution 73/198 of 20 December 2018.

<sup>802</sup> For the official text of the “New York Convention”, as it is known, see United Nations Treaty Series, vol. 330, No. 4739, reproduced in the Register of Conventions and Other Instruments Concerning International Trade Law, vol. II (United Nations publication, Sales No. E.73.V.3).

case of the PPP, where it is difficult to reach an agreement through direct negotiation. In case the parties opt for mediation in the PPP contract, certain procedural concerns should be addressed to increase the chance of a settlement. These concerns are addressed by incorporating a set of rules, such as the UNCITRAL Conciliation Rules into the contract<sup>803</sup>.

### **c) Independent experts**

**852.** In general, technical disputes occurring during the construction phase of the PPP project could be reviewed by independent experts appointed by both parties. Therefore, this method is useful in case of disagreement about technical aspects of the construction of the relevant infrastructure facility.

**853.** The parties can, for example, appoint an inspector or a supervisor engineer to review disagreement on inspection and approval of the design. Hence, the appointed independent expert should have expertise and knowledge in the design and construction of such projects. It should be noted that the contract of PPP has to mention the responsibilities and power of the independent expert, such as the possibility of the independent expert to make recommendations or binding decisions. In some cases, usually on large infrastructure projects, the private partner may seek the advice of an independent expert in the event of a disagreement with the contracting authority regarding the compatibility of design and construction aspects with applicable contractual obligations.

### **d) Dispute review boards**

**854.** Dispute review boards are usually established in large infrastructure projects. These boards are composed of experts appointed by both parties to resolve disputes arising from the construction or operation phases. Boards can be ad hoc or permanent,

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<sup>803</sup> See Official Records of the General Assembly, Thirty fifth Session, Supplement No. 17 (A/35/17), para. 106 (Yearbook of the United Nations Commission on International Trade Law, vol. XI, 1980, part one, chap. II, sect. A (United Nations publication, Sales No. E.81.V.8)). The use of the UNCITRAL Conciliation Rules was recommended by the General Assembly in its resolution 35/52 of 4 December 1980.

and this will depend on the expected size of the dispute and the parties' assessment of the cost and effectiveness of any of the alternatives. It should be noted that the appointment of a dispute review board assists in preventing misunderstandings and from turning the disagreement to a formal dispute that would need to be settled in arbitration or judicial proceedings. Indeed, the strength of this method resides in its effectiveness in preventing disputes; especially when the board is given the power to issue binding decisions<sup>804</sup>.

**855.** Under this method, the parties should select, at the beginning of the project, three experts known for their expertise in the project to form the board. It could happen that in some big infrastructure projects several boards may be formed. For example, one board could be devoted only to technical matters, such as engineering design, while another could be devoted to contractual or financial matters, such as late compensation amounts. The members of the boards are usually provided with periodic report on the progress of the construction and operation work of the facility, and they can be directly informed if any dispute arises between the parties. In that regard, they have the capacity to act as agents to prevent disputes, therefore, they may make visits to the site and meet with the parties to maintain their follow up on the project work.

**856.** In the event that a dispute is detected, the board proposes solutions that the parties would be likely to accept due to the expertise of the board members. The referral of the dispute prompts an informal assessment by the board done normally by discussion with parties. Then, the board will meet privately and will seek to formulate a recommendation or a decision. However, if the parties reject this recommendation, the board would be, upon the consent of the parties, in a sole position to settle the dispute due to its knowledge and familiarity with the project and the problem.

**857.** As mentioned earlier in the thesis, the flexibility of the PPP contract is very important to have the possibility to cover the changes that could happen throughout

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<sup>804</sup> Yates J., and Duran J., "Utilizing dispute review boards in relational contracting: A case study.", *Journal of Professional Issues in Engineering Education and Practice*, 2006.

the long duration of the contract. However, there are changes that are difficult to incorporate in automatic adjustment mechanisms. Therefore, the parties have to establish mechanisms for dealing with disputes arising from changing circumstances. This is very important, especially for the operational phase of the PPP project. In the event that the parties agree on the rules that allow the review of the PPP contract under certain circumstances, the question will be whether these particular circumstances have occurred and, if so, how the terms of the contract will be reviewed. In that regard, the review board should be informed on the extent the terms of the contract could be changed or supplemented. In such cases, the parties may not have the ability to rely on domestic courts or arbitral tribunal for that purpose. The reason is that in some legal system arbitrators are not competent to change the terms of the contract, while in other legal systems it is allowed for the courts and arbitrator if the parties provide their explicit consent.

**858.** The ability of the parties to authorize the court or the arbitrators to review a decision of the dispute review board is determined by the law that governs the arbitration or the judicial systems. The early provisions on dispute review boards did not stipulate that their recommendations would become binding if they were not challenged in arbitration or judicial proceedings. However, in practice, the persuasive power of the recommendations of the independent experts that the parties have agreed upon led to the voluntary acceptance of the recommendation from the contracting authority and project companies. It should be noted that contract provisions in dispute review boards usually stipulate that although the board's decision is not immediately binding on the parties, it becomes binding unless if the parties refer the dispute to arbitration or to judicial proceedings within a specified period.

**859.** The parties may agree to make the board's decision final and binding, although this case is very rare. However, despite the parties' desire to abide by the council's decision, it may not be enforceable in the summary procedures in some legal systems. Therefore, it is advisable to have accurate terms of PPP contracts regarding the extent of conferring the authority to the review dispute board. The contract can also determine the functions of the board and the nature of issues that they may handle, such as making findings of fact. In case the parties are allowed, after the issuance of the decision, to start judicial or arbitral procedures, the parties could

determine that findings of fact done by the board should be considered as conclusive in judicial or arbitral procedures. With regard to the term of the board's functions, the contract may specify that the board's work can continue to serve for a specified term above the end date of the contract, with the aim to handle the issues that can happen at that period.

**860.** The last method to prevent and settle dispute is arbitration. Since this method is being considered more by investors, we will present it in more details further in the chapter.

#### **B- Disputes between project promoters and between the private partner and its lenders, contractors and suppliers**

**861.** Traditionally, in international commercial dealings, domestic laws recognize the freedom given to the parties to achieve an agreement on the dispute settlement forum. In that regard, it should be noted that in international dealings the most preferred method is arbitration. Therefore, the different agreements and contracts concluded between the private partner and lenders, suppliers, and contractors related to the PPP project are deemed commercial agreements. Hence, the parties of these contracts are free to choose the suitable dispute settlement method for their potential disputes, as mentioned above, this choice will likely be arbitration.

#### **C- Disputes involving customers or users of the infrastructure facility**

**862.** The private partner could provide good and services; however, this depends from the type of the project. This provision of good and services is done to several entities and persons, such as a public contracting authority buying electricity or water from the private partner with the aim to resell it to the end-users. In that regard, the disputes settlement resulting from these legal relations may vary based on the parties and the circumstances in which those services are provided. It should be noted that when the persons are the ultimate-users of the service provided via the private sector, rules on consumers' protection should be taken into consideration. Some legislation requests from service providers to have simple and efficient methods for dealing with claims made by customers. This particular regulation is normally restricted to industrial sectors and relates to purchases of goods or services by customers.

**863.** In the event the customer is a commercial enterprise or a utility company (like a power distribution company) that freely selects the services provided by the private partner, the parties would settle their dispute by typical methods in trade contracts, including arbitration. Therefore, there may be no need to refer to legislation related to PPP in order to resolve these disputes. On the other hand, if the private partner's customer is a government owned entity, then the choice of dispute resolution methods will be limited to the administrative law rules that apply to the settlement of disputes involving government entities. Concerning the legal systems that permit non-judicial mechanisms for resolving the disputes that may arise between the private partner and its government- owned customers, it will be essential to remove any legal obstruction and provide express authorization to refer to those methods<sup>805</sup>.

**864.** Eventually, the three general categories of the disputes that can arise in PPP projects were presented and studied in §(1). Therefore, this study focuses on a preferred method of dispute settlement in PPP through showing the rationale of non-judicial systems in § (2)<sup>806</sup>.

## **Paragraph 2: Preferred method for dispute settlement**

**865.** In the first paragraph we mentioned several dispute resolution mechanisms that can result from a PPP contract and project, however, the preferred dispute settlement assumed in this study is arbitration. In fact, arbitration is used more and more for resolving disputes in PPP. Therefore, this paragraph addresses the rationale of choosing arbitration, the framework of the arbitration agreement and presents the Public-Private arbitration cases in different jurisdictions.

### **A- Recourse to arbitration**

**866.** The legal system of certain countries mandates referring to arbitration in settling disputes arising from public contracts, including those concerning PPP. It should be noted that in the event of a PPP dispute, arbitration could be used for the

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<sup>805</sup> See Inter-American Development Bank, "Fundamental principles in PPP laws: A review of Latin America and the Caribbean", 2019.

<sup>806</sup> Ibid., p.9.



settlement of disputes related to the construction or operation phase of the infrastructure service and after the completion of the project; namely the disputes linked to the termination of the contract. It is known that arbitration procedures are less formal than judicial procedures, and are better suited to the characteristics of a potential PPP dispute. Consequently, arbitration is preferred to private investors and lenders and is even required in many cases. The parties may select as arbitrators persons with high expertise in the relevant project. Moreover, they can choose the location of the arbitration proceeding as well as the language to be used in the proceeding. Furthermore, the possibility of preserving the confidentiality of the arbitration process, unlike judicial proceedings, is another reason justifying the choice of this method by the parties, especially in commercial disputes. It should also be noted that the broad acceptance of the 1958 Convention on the Recognition and Implementation of Foreign Arbitral Awards facilitates enforcement of arbitral awards in countries other than the country in which the award was issued.

**867.** Therefore, it is important to remember certain question when resorting to arbitration, such as the question of severing immunity, the effectiveness of the arbitration agreement and enforceability of the award, and finally the judicial proceedings. These questions are treated in the following points.

### **1- The question of sovereign immunity**

**868.** Sometimes, the legislator would like to review the laws linked to sovereign immunity and even identify the specific areas where the contracting authorities have or not plead sovereign immunity. The concept of state immunity implicitly indicates that the state is not subject to the jurisdiction of foreign courts, called immunity from jurisdiction and that its property located in foreign territory is not subject to attachment and execution, called immunity from execution. If, for example, the parties of the PPP contract have agreed on arbitration, the application of the arbitration agreement might be obstructed if the contracting authority could plead sovereign immunity. The obstructions could be shown through forbidding the starting of the arbitration procedures or challenging the recognition and enforcement of the

arbitral award. Therefore, this might be a source of concern for the related parties such as the private partner, the lenders or the promoter of the PPP project.

**869.** In the case that an arbitral award was issued against the contracting authority, the latter may file a lawsuit for immunity from execution against public property. In that context, there are several approaches to the matter of sovereign immunity from execution. In some legal systems, the immunity of national law does not apply to governmental entities when they are involved in commercial activities. Also, in other legal systems, national laws request to have a link between the property to be attached and the related claim. This means that immunity cannot be sought for funds earmarked for economic or commercial activity, which is governed by private law, or for assets that the government allocates to pursue its commercial activities. In some countries, it is believed that it is up to the government to establish that the assets to be seized are in a non-commercial use.

**870.** In the case of some contracts involving entities that may claim sovereign immunity, there are clauses that must be included to make clear that the government is waiving its right to defend sovereign immunity. This waiver could be incorporated in the PPP contract or international agreement, and it should be noted that it could be restricted to recognizing that certain property is used or intended to be used for commercial aims. Therefore, these written clauses are essential to have a clear statement that the conclusion of arbitration agreement by the government body represents an implicit waiver of sovereign immunity from execution.

## **2- Effectiveness of the arbitration agreement and enforceability of the award**

**871.** The effectiveness of the arbitration agreement is based on the legislative system of the arbitral tribunal seat. In the event that the legislative system for arbitration in that country is deemed inadequate, for example, because it is found to impose unreasonable restrictions on the party autonomy, one of the parties may desire to agree to a place for arbitration outside the host country. Thus, it is imperative to ensure in the host country that the domestic legislative system of arbitration resolves the major procedural issues in a manner appropriate to international arbitration. This

kind of system is included in the UNCITRAL Model Law on International Commercial Arbitration or the “Arbitration Model Law”.<sup>807</sup>

**872.** In the event that the arbitration is conducted outside the host country or if there is a need to enforce a decision issued abroad, its effectiveness will be subject to the legislation governing the recognition and implementation of arbitration awards. In that context, the convention on the Recognition and Implementation of Foreign Arbitral Awards<sup>808</sup> address the recognition of arbitration agreement and the rationale upon which the court may refuse to recognize the award. Being (host country) a member state of the Convention is a key component in evaluating the legal certainty of binding obligations. Moreover, it helps in ensuring the reliability of the arbitration method in settling disputes, as well as facilitating the enforcement of the arbitration award issued in the host country abroad.

### **3- Judicial proceedings**

**873.** As mentioned before, there are some legal systems that refer to the settlement of disputes resulting from the provision of public services to the exclusive jurisdiction of the national judiciary or administrative courts. Moreover, in some legal systems, governmental entities do not have the power to agree to arbitration, however, in other legal systems, the parties have the option to agree either on judicial proceedings or on arbitration procedures. In this latter case, the contracting authority may leave the dispute to be settled by the courts of the host country because it believes that these courts are more familiar with the law of the country and especially the laws related to the PPP contract. It should be noted that the contracting authority and its related entities that are involved in the dispute usually prefer local courts due to their familiarity with the procedures. Despite the fact that not all domestic legislations have experienced judges about technical matters and PPP disputes, some countries do

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<sup>807</sup> The official text of the Model Arbitration Law was originally adopted in 1985, and is reproduced in Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17), annex I (Yearbook of the United Nations Commission on International Trade Law, vol. XVI, 1985, part three, annex I (United Nations publication, Sales No. E.87.V.4)). The official text of the revised articles of the Model Arbitration Law, as adopted in 2006, is reproduced in Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17), annex I.

<sup>808</sup> See the Convention on the Recognition and Implementation of Foreign Arbitral Awards, paragraph 13

specialize courts that deal with complex commercial or public contracts. It should be noted that State domestic courts might have more effect on the PPP disputes if these disputes are related to public policy or the protection of public interest, because domestic courts are considered as more aware of what could be incompatible with public policy.

**874.** On the other hand, this opinion is not shared with the other partners, namely investors, financiers and other private sectors. Therefore, these parties prefer arbitration to judicial proceedings because in arbitration they can adapt the procedure according to their needs. Moreover, in light of the complex technical disputes that may arise in infrastructure projects, the parties may prefer to choose arbitrators chosen upon their knowledge and expertise. As we will see further in the study that the investors, and in particular the foreign investors may be hesitant to submit their dispute to jurisdiction of local courts that are unfamiliar with them. Therefore, permitting the parties to choose a dispute settlement mechanism would attract foreign investors to develop their infrastructure investment.

**875.** Ultimately, when considering whether a dispute should be resolved in judicial proceedings or through an arbitration agreement, several aspects must be taken into account. These aspects are to see if this option is allowed under the applicable law, the confidence of the parties in the impartiality of the courts and that their disputes will be resolve without excessive delays, and there is also the availability of forms of judicial remedies that are suitable to disputes arising under a PPP contract. Thus, the parties should know which dispute resolution would be better to deal with the technical issues in the area where the dispute might happen under PPP contract.

## **B- Framework of the arbitration agreement**

**876.** The arbitration agreement is usually referred to as the “foundation stone” of arbitration. It should be noted that what composes an arbitration agreement may vary among jurisdictions. For example, the United Nations Commission on International Trade Law UNCITRAL Model Law on International Commercial Arbitration offers

two options for defining arbitration agreements in national arbitration legislation<sup>809</sup>. The first option, which is considered expensive, defines arbitration agreement as an agreement between the parties stating that certain or all disputes will be subject to arbitration where an arbitration clause can be incorporated in the contract or on a separate agreement<sup>810</sup>. Also, according to the Arbitration Act of England and Wales defines an arbitration agreement as an agreement to subject current and future disputes to arbitration<sup>811</sup>. In the same context, the New York Convention also defines an arbitration agreement in the framework of the obligation on contracting states to recognize arbitration agreement<sup>812</sup>.

**877.** Based on the different definitions mentioned above, it can be understood that parties can arbitrate contractual or non-contractual disputes<sup>813</sup>. The possibility of arbitrating a precise dispute will be based on the exact terms of any agreement to arbitrate. For instance, an agreement to arbitrate in a particular contract may be limited to contractual disputes alone or may contain other disputes such as claims in tort resulting from the contract. Otherwise, parties might agree to submit all disputes between them to any issue to arbitration. It is important to the practitioners to consider carefully two issues. The first is when the agreement is entered, namely when the scope of the agreement is determined. The second is when the arbitral proceedings are commenced, which means when confirming that the dispute falls under the agreement to arbitrate. Therefore, most of the arbitration institutions recommend standard arbitration agreement clauses<sup>814</sup>.

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<sup>809</sup> Article 7 of the UNCITRAL Model Law on International Commercial Arbitration.

<sup>810</sup> An example of a Model Law jurisdiction that has adopted this definition of an arbitration agreement is Singapore in section 2A of the International Arbitration Act Chapter 143A.

<sup>811</sup> Section 6 of the Arbitration Act 1996 of England and Wales: "...an agreement to submit to arbitration present or future disputes (whether they are contractual or not)".

<sup>812</sup> Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958: "An agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration".

<sup>813</sup> Novovic M., "Arbitration agreements (legal framework, formation and validity, interpretation, non signatory issues)" University of Oslo, department of Private Law, 2015.

<sup>814</sup> Generally drafted to include all contractual and non-contractual disputes resulting from a given contract.

**878.** It could happen that in some circumstances, one party could challenge the validity of the arbitration agreement. According to the “competence-competence” principle<sup>815</sup>, the arbitral tribunal is competent to rule on matters affecting the tribunal’s jurisdiction to hear arbitration. A different issue occurs where the arbitration clause forms part of a contract where one party claims to be void or voidable. In these cases, the arbitration clause is considered separable from the rest of the contract. It, therefore, remains valid regardless of any determination relevant to the contract as a whole<sup>816</sup>.

**879.** What cannot be subject to arbitration are generally the criminal prosecutions as they are considered as a matter of public interest involving a public body, which is the prosecutor. However, parties may request to arbitrate civil disputes in relation to an activity that might be considered criminal or illegal in one or more countries. Illegality could be raised in any arbitral proceedings in support of an award. Mentioning that the New York Convention permits the State party to refuse the enforcement of an award in the event the latter is contrary to the public policy of that State<sup>817</sup>. For instance, in England and Wales, the state can refuse to enforce an award on the ground that it is affected by “serious irregularity”<sup>818</sup>.

**880.** It should be mentioned that procedures become more complicated when contracts have an international element. The consideration of public policy relevant to illegality and criminality could be more complex. This is when a particular act or behavior is legal in one jurisdiction but illegal in another jurisdiction; therefore, this should be considered on a case-by-case basis. We can take the example of the court in England and Wales to see what principles it has developed regarding the exercise of the court’s discretion to endorse or allow enforcement of awards. The first principle is

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<sup>815</sup> The principle of competence-competence is one of the most central pillars supporting international arbitration where a tribunal is empowered to make a determination as to its own jurisdiction to deal with the substantive claims in dispute. However, the fact that a tribunal can determine its own jurisdiction does not give it exclusive power to do so and absolutely does not preclude an enforcing court that is not at the seat of the arbitration from re-examining the tribunal's jurisdiction.

<sup>816</sup> For example, in the UK the “Separability doctrine” has been integrated legislatively in AA 1996.

<sup>817</sup> Article V 2(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

<sup>818</sup> Serious irregularity means circumstances where the award is obtained by fraud or the way in which the award was procured was contrary to the public policy.

the case where the contract is legal in its performance<sup>819</sup>; the second principle is that the enforcement of the award can be refused in England if it is illegal in its place of performance even if its performance is legal in England. The third one is that enforcement of an award can be refused if its enforcement breaches international public policy rules.

**881.** Generally, when considering whether to arbitrate, some pre-arbitration considerations should be taken into account. This means not only considering the law of the state in which the arbitration will occur but also under the applicable law of any other states relevant to the arbitration. For instance, different laws can be applied to the arbitration agreement, substantive contract, and the country of recognition of the award. In this case, whereas the dispute could be arbitrated under the applicable laws in the arbitration agreement and the substantive contract, it may not be the case under the applicable law of the country of enforcement. Therefore, it would be better to determine this case at the beginning of the arbitration.

**882.** Therefore, some key questions should be taken into account when reviewing or drafting a dispute resolution clause. It should avoid any confusion regarding the law governing the clause and determine if there is any form of jurisdiction for dispute resolution specified in the clause. Therefore, a distinction should be made between the governing law clauses and jurisdiction clauses. The law of the contract may differ from the country where the disputes will be heard. For instance, a governing law clause is worded as follows: “This agreement is governed by and shall be construed per country law”. In case that there is no specific dispute resolution, it is usually the courts of the host country that will have jurisdiction by default. However, this is not always the case, therefore, it should be verified with local counsels. In case the parties have no problem being subject to local court jurisdiction, it would be better to express it clearly by a clause specifying so<sup>820</sup>.

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<sup>819</sup> It might not be contrary to English public policy to enforce a contract only because it would be illegal if performed in England, this was shown by the case of *R v V; Westacre Investment v Jugoimport-SDPR Holding*.

<sup>820</sup> See, Tenailleau F., “Les conventions triparties conclues avec les credits-bailleurs sont des contrats de droit privé”, *AJDA* 2007, p. 42.

**883.** In case the parties are willing to be subject to courts in a specific jurisdiction, the contract should specify this. It will be possible also to specify a particular court within the country's court system, such as commercial courts or arbitration mechanisms managed by the courts. The laws responsible for determining the applicable jurisdiction to a particular situation can be confusing and even conflicting, especially when a transaction involves several nationals or services provided by a third country with several relevant competent courts to claim jurisdiction. Therefore, to prevent this possibility, there is a provision called an "exclusive jurisdiction clause", but their interpretation will vary in practice<sup>821</sup>. It could happen that the parties, in some instances, wish to have flexibility concerning jurisdiction, for example, in such cases, a non-exclusive jurisdiction clause may be suitable. This could be profitable where enforcement of awards may happen abroad. Furthermore, it should be considered that each state has its sovereign immunity to jurisdiction and execution, as it is the result of the belief that it would be unsuitable for one State's courts to call another State under its jurisdiction.

### **C- Public-Private arbitration cases in different jurisdictions**

**884.** It is necessary to note that in many jurisdictions such as Lebanon and Syria, recourse to arbitration for local and foreign investors in procurement projects was limited and restricted prior to the promulgation of the PPP law. This limitation is mainly due to the lengthy approval process often associated with political connotation. We can take a Lebanese case entitled "Libancell and Cellis" to illustrate the situation before the PPP law enactment and how the recourse to arbitration was uncertain.

Libancell and cellis are two mobile companies whereby their contracts provided for arbitration clauses. In fact, they resorted to arbitration when the government terminated their contracts prematurely. Accordingly, the highest administrative court in Lebanon, called the State Council issued an opinion, in 2000, stating that the arbitration clauses were void and null. Consequently, the government could not be a party to the arbitration. However, after nearly two years, in 2002, an amendment was

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<sup>821</sup> This clause could be worded as follows, "the parties irrevocably submit to the exclusive jurisdiction of {X} courts for the determination of disputes arising under this contract".



done to article 762 of the Lebanese Code of Civil Procedures, which allows the recourse to arbitration in a dispute with a State-entity<sup>822</sup>. Although thus amendment, recourse to arbitration would still uncertain as the validity of arbitration clause is subject to the issuance of a decree by an executive power. Therefore, it can be said that in the absence of "political" consent, resorting to arbitration will be paralyzed.

**885.** Therefore, as mentioned previously, many jurisdictions have restricted the extent to which public bodies can refer disputes to arbitration. However, recent years have witnessed a decrease in these restrictions. For instance, in France, according to article 2060 of the Civil Code, the public bodies are prohibited from entering into arbitration agreement. However, the increased commercial collaborations over the years between the public and the private sectors led to several exceptions to this rule<sup>823</sup>. In a case called “Galakis”, the *Cour de Cassation* rules that a French public body can consent to an arbitration agreement related to an international commercial contract<sup>824</sup>.

**886.** However, in another decision called *INSERM v Fondation Letten F Saugstad*<sup>825</sup>, it was recognized that, while the judicial courts will normally review an award between a French public body and a foreign legal entity, public-private arbitration awards should be subject to review by the administrative rather than the judicial courts where “mandatory rules of French public law” are implicated<sup>826</sup>. This decision, which is not the last decision on this matter, could be viewed as representing a reappearance of the public-private law divide in French arbitration law<sup>827</sup>.

**887.** This reappearance can also be observed in the amendments to the procedure for arbitration proceedings. In fact, under French law, arbitration procedures are largely the same whether the proceedings involve private or public entities, but in an

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<sup>822</sup> Law No. 440 of 29 July 2002

<sup>823</sup> See Conseil d’Etat, Legal Opinion (Avis) of 6 March 1986, No 339710.

<sup>824</sup> See, for example, Law No 75-596 of 9 July 1975. See Brabant T.A., “Arbitration and Company Law in France”, 2015, 12 Eur Company L 144, 144-148.

<sup>825</sup> Tribunal des Confits, 17 mai 2010, No 3754. See also CE, 9 novembre 2016, societe’ Fosmax LNG.

<sup>826</sup> Cour de Cassation 2 May 1966, 1966 Bull Civ I 199. See also Batiffol H., “Arbitration Clauses Concluded between French Government-Owned Enterprises and Foreign Private Parties”, 1968.

<sup>827</sup> cf the decision of the Cour de Cassation (8 July 2015) in “Syndicat mixte des Aeroports de Charente v Ryanair” Arrêt n° 797 du 8 juillet 2015 (13-25.846).

amendment to the French Arbitration Law in 2011, the principle of confidentiality of arbitration proceedings, which usually applies hypothetically to local arbitration, did not extend to International Arbitration<sup>828</sup>.

As is generally agreed upon, one of the main reasons for this distinction was to ensure that when arbitration is involving public bodies, it is conducted in a transparent way. Likewise, in Brazil, the Arbitration Act enacted in 2015, stated that public-private arbitration would be subject to “the principle of publicity” and all related laws that govern transparency in public affairs<sup>829</sup>.

**888.** Finally, being aware that the private investor party, an operator, especially a foreign one may be discouraged from subjecting himself to an unfamiliar court system and controlled by the idea that the local courts will be in favor of the government interest. Therefore, the preferred option for them would be arbitration; thus, it is essential to study how the Syrian law protects investment of both local and foreign investors in section II. In that context, the internal arbitration law No. 4/2008, Decree No. 8/2007 on investment promotion and PPP law No.5/2016 will be studied. On the other hand, section II will also address the protection of investors and investment by bilateral and multilateral treaties.

## **Section II: Legal Protection of foreign and local investors**

**889.** The real protection of investment consists of the existence of clear laws guaranteeing the rights and obligations of all partners in an investment contract. These laws allow the investors to have the freedom to choose how to settle their potential disputes. Therefore, given the idea that the private sector forms an integral part of the PPP, mostly the investors, either domestic or international investors should have basic protections of their investment. The Syrian PPP law has conferred three options for the parties to settle the potential disputes: the Syrian administrative Court, the internal arbitration and the international arbitration<sup>830</sup>. The article in the Syrian

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<sup>828</sup> Decree No 2011-48 of 13 January 2011; See also: Gaillard E., and de Lapasse P., “Commentaire analytique du decret du 13 janvier 2011 portant reforme du droit francais de l’arbitrage”, 2011.

<sup>829</sup> Law No. 13129 of May 26, 2015, Article 1 § 1o and Article 2 § 3o.

<sup>830</sup> Syrian Public-Private Partnership law No.5 of 2016, art. 78

PPP law concerning the dispute resolution is an important point to mention, as it constitutes a major difference between the draft PPP law of 2010<sup>831</sup> and the same law in force. This section displays this difference and addresses how the local and foreign investors are protected through Syrian relevant laws in §(1), while several international conventions, and treaties would also ensure the protection of investors in PPP projects §(2).

### **Paragraph 1: Protection of investors in Syrian law**

**890.** It is essential to clarify that the Syrian legislator in the PPP law did not differentiate between local and foreign investors. This is shown through the possibility of the private partner; either domestic or international; to choose from three aforementioned options the appropriate settlement method for their disputes. However, this paragraph will address the different mechanisms of investors' protection existing under Syrian legislations. In that regard, in (A) we present shortly a specific important article in the Decree8/2007, while in another point (B), the options presented by the Syrian PPP are studied, which are the Syrian administrative court and the national arbitration law. The §(2) addresses the relevant international conventions and treaties for investors' protection.

#### **A- Protection of investors according to Decree No.8**

**891.** It is necessary to shed light on the article of the Investment Law in Syria devoted to settling disputes, and to find out whether the PPP Law has taken into account the existence of such a provision as other legislators, such as the Lebanese legislator, have done. For example, the Lebanese PPP law<sup>832</sup> has clearly stated in article 16 that PPP operation should not prevent local and foreign investors to benefit from the protection of the Lebanese investment law<sup>833</sup>. In addition, the mentioned investment law permits the recourse to arbitration, however after a lengthy authorization process<sup>834</sup>. Therefore, the Lebanese legislator has granted a complementary legal framework for investment protection in the PPP law and the

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<sup>831</sup> Draft of the Syrian Public-Private Partnership law in 2010, art 42.

<sup>832</sup> Law No. 48/2017 "Regulating Public-Private Partnerships".

<sup>833</sup> Investment Law No. 360/2001.

<sup>834</sup> Investment Law No. 360/2001, article 18.

investment law in addition to existing international agreements entered by Lebanon<sup>835</sup>.

**892.** On the other hand, the Syrian legislator has stated in the Decree on investment promotion mentioned earlier several incentives and facilities that both local and foreign investors can benefit from them. In addition, article 7 of this Decree states that whenever there is a dispute between an investor and a Syrian public body, it should firstly be settled amicably. In the event, the parties did not reach a settlement within a specified period, each party can have the right to resort to the several options, such as arbitration, relevant Syrian courts, Arab investment Court created pursuant to the Unified Agreement for the Investment of Arab Capitals in the Arab states in 1980, and the Investment Insurance and Protection Agreement between Syria and the investor's country or any Arab or international organization.

**893.** Therefore, it is worth to mention that the Syrian PPP law does not explicitly refer to investment law (decree No.8) and does not make connection between them. The legislator treated each law as a separate legal identity, even though; both are related to investment projects, but with different degree. This makes an implicit understanding that the investment law (decree No.8, art.7) grants the parties to go to arbitration for investment projects; while the partnership law allows partners to recourse to international arbitration for partnership projects (art.78). This could be considered as a gap that should be recovered by an amendment of the PPP law to link those two texts related to the legal protection of investment.

### **B- Protection of investors according to PPP law**

**894.** Article 78 of the PPP law No.5/2016 determines the different possibilities to resolve the disputes that can arise from PPP contracts without distinction between local and foreign investors. First, we will discuss the option of referring the dispute to the Syrian Administrative Court, and then the option of referring the dispute to internal arbitration will be presented.

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<sup>835</sup> Nassar M., "Arbitration under the Lebanese Public Private Partnership Law", Kluwer Arbitration Blog, 2018. <http://arbitrationblog.kluwerarbitration.com/2018/06/23/arbitration-lebanese-public-private-partnership-law/>.

## 1- Syrian administrative court

**895.** In first place, it should be noted that the option of referring the dispute arising from PPP to Syrian administrative court is the main difference that was added in the PPP law in force compared the 2010 law version. In fact, the latter did not include this option and the provision indicated expressly that the parties have only the option of either domestic or international arbitration. This could raise a question of the rationale behind including such option for the parties; especially since this is the most option normally discarded by private partners either local or foreign. However, this option has been added to the final version of the law to cover cases where it is necessary to apply to the administrative court, as they are the competent court for the administrative PPP contract. In all events, it remains an optional way representing the original competency of administrative issues. Therefore, it does not affect the main goal of the PPP law to enable parties to go to international arbitration.

**896.** The State Council is the head of administrative justice and its law governs the administrative judiciary in Syria<sup>836</sup>. The administrative judiciary is competent on the disputes arising from administrative contracts. According to the law of State Council, the administrative contracts are those entered into by a public moral person with the aim to run a public facility, where the intention of applying public provisions is shown. This should be evident by containing those contracts unfamiliar terms in the private law or by permitting the contractor with the administration to contribute directly in the operation of the public service. The claims that are under the jurisdiction of the full judiciary take several forms, such as claiming the nullity of the contract, amount of compensation, nullify some of the actions issued by the administration in violation of its contractual obligation, and the claim could aim to terminate the contract.

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<sup>836</sup> State Council law No. 55 of 1959

## 2- Syrian Arbitration law

**897.** The first arbitration law in Syria was issued in 2008 and is inspired by The Model Law on International Commercial Arbitration developed by the United Nations Committee on International Commercial Law and approved by the General Assembly in 1985<sup>837</sup>. This step was considered as a very significant and advanced legislative and judicial step towards enhancing the investment climate in particular, and for tribunal arbitral in general<sup>838</sup>. It should be noted that this law replaced the arbitration provisions that were previously applicable in the procedural law.

**898.** There are some important features of this law in comparison with prior legislations, such as adopting the concept of international commercial arbitration, strengthen the principle of “competence-competence” and the principle of arbitration clause independence from the original contract, and the removal of appeal methods and introduce instead claims of invalidity of the arbitration clause. In fact, the issuance of the arbitration law in Syria has formed an important development in the Syrian legislation. This has a positive impact in the economic, judicial aspects inside and outside Syria. The main legislative achievements of the Syrian legislator with regard to international arbitration and comparative law are its inspiration from the French Civil Procedures Law under Decree 354 / of 1980 related to internal arbitration, and Decree No. 500 / of 1981 related to international arbitration<sup>839</sup>, and the international achievement represented by the Model Law aforementioned.

**899.** It was clear that the Syrian legislator has been greatly influenced by the Model of Law; however, it has withdrawn the provisions quoted from this Model on the Syrian arbitration law. It contented itself only with a definition of international commercial arbitration, but without dedicating specific provisions that distinguish it from the national arbitration treatment, in particular with regard method of appeal and award enforceability. In practice, despite adherence to the New York Convention of 1958, international arbitration has sometimes indicated the

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<sup>837</sup> Mansour M., “Main Characteristics of New Syrian Arbitration Law”, *Almohamoun magazine* (in Arabic), 2009.

<sup>838</sup> *Ibid.*

<sup>839</sup> Delvolvé J., “Présentation du texte proposé par le comité français de l'arbitrage pour une réforme du droit de l'arbitrage”, *Rev- Arb*, 2006.

inconsistency of positions regarding the enforceability of the arbitral awards abroad (outside the original country).

**900.** According to the law of the arbitration, the establishment of an official Arbitration Center is possible. A list of accredited arbitrators should be declared<sup>840</sup>. As a result of the law of arbitration, the first Center of arbitration was established in December 2009, called the Hammurabi Arbitration and reconciliation Center, especially for economic arbitration issues. The establishment of that Center has responded to foreign investors' requests to protect local, Arab, and foreign investment in Syria<sup>841</sup>.

**901.** It worth to mention that the Syrian arbitration has expressly excluded its application on administrative contracts. In fact, the arbitration law states that it applies for contracts that are of economic nature, while in another article, it states that the administrative contracts are excluded from the scope of the law and are governed by article 66 of public contracts law 51/2004<sup>842</sup>. Therefore, one could be confused about this when choosing to refer a dispute arising from a PPP contract to internal arbitration. In the contrary, the Egyptian legislator, for example, has expressly stated in the arbitration law that it applies on administrative contracts that are of economic nature (which is the case of PPP contracts)<sup>843</sup>.

**902.** The question that may arise when domestic arbitration is at stake is whether domestic arbitration provisions shall be distinguished from those of international arbitration, on what criteria and basis? This distinction is important as it has an impact on identifying the methods of appeal of arbitral awards and their enforcement on Arab legislations and other legislations that distinguished between internal arbitration and international arbitration<sup>844</sup>.

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<sup>840</sup> See, ghazzawilawfirm.com, Arbitration law and conciliation.

<sup>841</sup> See PPP in Infrastructure Resources Center for Contracts, Laws and Regulations, PPIAF, April 2008 <http://www.worldbank.org/ppp>

<sup>842</sup> Syrian arbitration law No. 4/2008, art. 2 (2)

<sup>843</sup> Egyptian arbitration law No. 27/1994.

<sup>844</sup> Mayer P., "Faut-il distinguer arbitrage interne et arbitrage international", Rev. Arb. 2005, p. 370; Fouchard Ph., "Quand un arbitrage est-il international, Rev. Arb. 1970, P. 59.

- **International Commercial and internal arbitration**

**903.** The idea of distinguishing international and national arbitration is not invented but exists in practice. This was the result of the requisites of International Commercial Arbitration (ICA). According to the international commercial traders, the preferred method for settling cross border disputes is the ICA. In addition to that, there are several factors that contributed to develop the idea of ICA, such as political and international factors.

**904.** From political point of view, the signatories' members of the declaration of Helsinki, related to the agreement on Cooperation and Security in the world found that ICA is one of the peaceful means to exclude disputes between nations<sup>845</sup>. In the context of proving the importance of the international and economic dimensions of arbitration, there is the quotation of the French professor "Oppetit": "the arbitration become a form of relation between the West and the East"<sup>846</sup>.

**905.** From the international view, the United Commission on International Trade Law has dealt since its establishment with issues of international trade arbitration. Therefore, in 1975, there was the issuance of international arbitration rules known as UNICITRAL<sup>847</sup>. This United Nations (UN) committee has achieved a Model Law of International Commercial Arbitration in 1985. Perhaps what the French professor Fouchard said, that the arbitration become in the last quarter of the twentieth century the spoiled child of the UN, is the best proof of the importance of arbitration and international arbitration in particular<sup>848</sup>. Moreover, there are the international conventions related to arbitration, such as the New York convention for enforceability of foreign awards, Geneva Convention of 1961 related to ICA and Washington Convention of 1965 related to investment disputes between the States and nationals of other States<sup>849</sup>.

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<sup>845</sup> RAHAL A., "l'exécution des sentences arbitrales dans les pays de moyen orient", thèse, Paris I, 2000, p. 150.

<sup>846</sup> OPPETIT B., "Philosophie de l' arbitrage commercial". J.D.I. 1993, P. - 6 (361. P. 1995. Arb. Rev.81)

<sup>847</sup> Approved by the General Assembly by the resolution No. 31/98 of 1976.

<sup>848</sup> Fouchard P., les travaux de la CNUDCI, "le règlement d'arbitrage", clunet 1979, p. 816 et s.

<sup>849</sup> The Syrian Arab Republic ratified this convention with Legislative Decree No. 188 dated 2005/5/29



**906.** However, there is no reliable definition of “international arbitration”, but in a simple way, it can be defined as arbitration with some components of an international character. Despite the fact that Arbitration’s meaning is well established there is no generally agreed definition of the necessary “international character”<sup>850</sup>. In general cases, the parties to arbitration will pay for the provisions of the service, including the tribunal, which makes the decision and the venue. However, arbitration is consensual because it depends on the parties’ agreement to resolve their disputes by arbitration. The public understanding of domestic arbitration comprises parties, contracts and disputes in the context of one jurisdiction. The reason to make a distinction between domestic and international arbitration is that some countries have special and different treatment for each type.

**907.** There are some substantive differences between pursuing international arbitration and domestic arbitration in several jurisdictions. Domestic arbitration purely concerns national issues, namely all aspects of the arbitration procedures are linked to a single jurisdiction. For example, the location of performance of the contract, the nationality of the parties, the governing law of the contract will be related to the same jurisdiction. On the other side, the international arbitration will cross borders of a single jurisdiction. Generally speaking, the national laws of several jurisdictions implement one of the following three approaches to determine whether arbitration is accurately international.

**908.** The approaches are the nature of the dispute approach, which means when the dispute concerns a cross border commercial activity. The second approach is the party nationality approach, in case the parties have several nationalities or their main places of business are in a different jurisdiction. The third approach is the hybrid approach, which means that both the nature of the dispute and the nationality of the parties are considered in determining if the arbitration is international. The hybrid approach is represented by UNCITRAL, which has been used in several jurisdictions to establish a statutory framework for international arbitration. Hence, according to the Model

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<sup>850</sup> International arbitration – an introduction to the key features of international arbitration, produced in partnership with Thirty Nine Essex Street. Lexis.

Law, the arbitration is international if the parties have at the time of the contract conclusion their business in different countries<sup>851</sup>.

**909.** Commonly, many countries have completely different laws or rules for both domestic and international arbitrations, such as Syria, and Switzerland. However, in other countries such as England, after the introduction of the Arbitration Act of 1996, there is no longer distinction between domestic and international arbitration. Therefore, the distinction between domestic and international arbitration remains meaningful and even in the UK due to the different regimes in place for enforcing arbitral awards. In domestic arbitration the complete procedure, including all jurisdictional, and substantive issues, are identified according to a single jurisdiction. In contrast, in international arbitration the existence of different local laws can lead to raising several issues during the procedures, such as the validity of the arbitration agreement, as the validity will be determined according to the local law. There are also procedural issues, which are usually governed by the law of the seat of the arbitration.

- **International Investment and commercial arbitration**

**910.** There is a distinction made between investment arbitration and commercial arbitration although they are similar in several aspects<sup>852</sup>. The latter means arbitration of disputes between parties to contracts containing arbitration clause. In contrast, investment arbitration means arbitration of disputes between the host States and the investors in those States. Generally, the agreement between parties that are in nature related to international commercial activity may agree to refer their potential disputes to arbitration, frequently as per rules of recognized arbitration institution. However, in

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<sup>851</sup> Article 1(3) of the Model Law, “{...} one of the following places is situated outside the State in which the parties have their place of business:

- i) The place of arbitration if determined in, or pursuant to, the arbitration agreement;
- ii) Any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or
- c) The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.”

<sup>852</sup> Willis L., “International Investment and Commercial Arbitration: An industry Perspective”, *Arbitration Law Review*, 2011.

investment arbitration, the agreement may not incorporate agreement concerning disputes between the host State and the investor. Their disputes are rather a result of the application of interstate treaties designed to promote investment usually made between developed and developing countries<sup>853</sup>.

**911.** Therefore, the legal framework that governs ICA and investment arbitration is different. It should be noted that the only relevant treaty for ICA is the New York Convention, whereas, treaties of international law are the basics of investment arbitration. Also, they differ in terms of domestic laws' role. In ICA, from procedure perspective, the legal system of the "seat" governs the arbitration, thus provide national courts of the seat supervisory jurisdiction on the arbitral proceedings. On the other hand, investment arbitration, from the procedure perspective, the mandatory provisions of the domestic law are relevant only if arbitration is not governed by treaties, such as ICSID, and NAFTA, but rather governed by non-governmental organizations like the London Court of International Arbitration (LCIA) or the International Chamber of Commerce (ICC)<sup>854</sup>.

**912.** The disputes that may arise from ICA are usually related to the scope and consent of the arbitration clause, while in investment arbitration the extents of the disputes are relatively wide. In that context, the consent to arbitration is made under a treaty. Today, the vast majority of investment arbitrations are instituted based on consent offered in treaties. Most bilateral investment treaties contain clauses referring to investor-State arbitration<sup>855</sup>.

**913.** There is a possibility to obtain a third party funding for arbitration because of the high cost of investment arbitration. The parties in investment arbitration have to cover individual, institutional, tribunal costs and legal fees of counsels. This third party funding is a procedure by which the external party of the arbitration accepts to fully or partially fund the legal costs of one of the parties in return of an agreed

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<sup>853</sup> Newman L., and Zaslowsky D., "The Practice of International Litigation-2<sup>nd</sup> Edition", Juris Legal Information, 2010.

<sup>854</sup> Sagar F., and Pednekar S., "International Investment Arbitrations and International Commercial Arbitrations: A Guide to Differences", India Corporate Law, May 2019.

<sup>855</sup> Hepburn J., "Domestic law in International Investment Arbitration", The Journal of World Investment & trade, Aug. 2019.

percentage of the award in case of success. However, costs in ICA differ according to the arbitration location, and if it is ad hoc or institutional arbitration<sup>856</sup>.

**Paragraph 2: International procedures relating to investors' protection**

**914.** The investment treaties could be either bilateral investment treaties (BIT) or multilateral investment treaties (MITs). In addition to providing substantive protections, BITs and MITs include procedural rights. One chief attraction for investors is the secured protection against violation of any of substantive rights, which is directly enforceable against the host State in light of breach and through international arbitration. Generally, investment treaties will permit investors to pursue arbitration before the International Center for the Settlement of Investment Disputes, a part of the World Bank system, or under the Arbitration Rules of the UNCITRAL Rules<sup>857</sup>. Therefore, it is important to study these mechanisms.

**915.** In this regard, it is important to study these mechanisms to protect investments by international treaties to which the host countries are signatories. In (A) we present the kinds of international investment protection treaties that are bilateral and multilateral. In (B), we address the compliance of the PPP law with the UNCITRAL model law.

**A- Investment protection treaties**

**916.** Treaties are one of the several sources of international law on foreign investment: customs, general principles of law, and judicial decisions. In that context, these treaties are made to legally and financially protect nationals in the view of developed countries. The majority of investment treaties are concluded among developed countries and developing countries or economies in transition. It could be said that those treaties are a diplomatic tool and real treaties laying down strong legal obligations for the host state that is hosting the target investment and have enforceable rights for the foreign investor<sup>858</sup>.

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<sup>856</sup> F. Sagar and S. Pednekar, *supra* note 854.

<sup>857</sup> UNCITRAL Arbitration Rules, New York, 2014.

<sup>858</sup> Dunn G., "Bilateral and Multilateral Investment Treaties: What all dealmakers need to know", Gibson, Dunn & Crutcher LLP, 2015.

**917.** There is a need to mention the most common organization designated by BIT and MIT treaties is the Convention on the Settlement of Investment Disputes (ICSID) between States and nationals of other contracting States. Moreover, PPP infrastructure projects involving foreign investors need a framework for settling disputes between the contracting authority and foreign companies participating in the project. Usually, this framework is provided through joining the ICSID<sup>859</sup>. The latter is an organization designated to manage the resolution of investment disputes. Besides, it is one of the five organizations that constitute the World Bank Group<sup>860</sup>. What characterizes this body is that it carries out conciliations and arbitrations; however, it is limited in the types of cases it may hear, which might not be the case of other arbitration bodies. In general, ICSID hears legal disputes resulting directly from an investment between a contracting State and a national of another contracting State.

**918.** According to article 25 of the ICSID convention<sup>861</sup>, there are some conditions to apply ICSID jurisdiction: first, the existence of a legal dispute, for example, dispute concerning the scope of a legal right or obligation and not only a conflict of interest. Second, it should be arising directly from an investment between a contracting state and a national of a contracting state and thirdly the existence of consent in writing. Despite the requirement that the consent should be expressed in writing, there is no mandatory form for it. That is why it usually takes one of the three forms, firstly, by an arbitration clause in an investment agreement between an investor and a Contracting state to submit future disputes to ICSID. It is possible, but rare, to submit an existing dispute to ICSID arbitration by a standalone agreement. Secondly, it might take the form of where a contracting state's national investment legislation provides a general offer to resolve investment disputes by ICSID arbitration. The third form is the insertion of a set of articles in a BIT offering ICSID arbitration to nationals of one

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<sup>859</sup> United Nations Treaty Series, vol. 575, No. 8359.

<sup>860</sup> ICSID is based at the World Bank headquarters in Washington DC, USA, and the ICSID Convention is often referred to as the Washington Convention

<sup>861</sup> Art 25(1) of the ICSID Convention states that ICSID's jurisdiction extends to any legal dispute arising directly out of an investment between a " Contracting State (or any constituent subdivision or agency of a Contracting State designed to [ICSID] by the State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to [ICSID]".

of the parties to the BIT against the other party to the BIT. It is appropriate to report the two kinds of treaties separately. Therefore, we have the BITs in point (1), and MITs in point (2).

### **1- Bilateral investment treaties (BITs)**

**919.** BITs are international agreements between two countries, in which they provide special rights and legal protections for individuals and companies when they invest in a foreign country called a host State. These types of treaties are generally known for promoting investment in host States and to set terms and conditions for private individuals and companies from one country to invest in another country. To this end, BITs are considered an important pillar of investment protection at the international level<sup>862</sup>. The history of BITs comes back to the 90s, where a massive proliferation of bilateral treaties happened between countries<sup>863</sup>.

**920.** Some considered that drafting such treaties could indicate an ideological change of position of a State that was unfriendly towards foreign investment towards an acceptance of investment protection standards and international arbitration to settle investment disputes. From the year 1980, bilateral investment treaties were considered a relatively new phenomenon in the international investment scene, including Syria<sup>864</sup>.

**921.** BITs are generally planned to provide guarantees for foreign investors from the respective countries. Consequently, the idea of incorporating duties for investors,

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<sup>862</sup> Dolzer R., and Stevens M., "Bilateral Investment treaties", Nijhoff The Hague, 1995.

<sup>863</sup> The first country to start entering into BITs was Germany (in 1959), closely followed by Switzerland (in 1961). See Sornarajah M., "the international law on foreign investment", third edition, Cambridge University Press, 2012, p.172.

It was estimated that by 2008 there were about 2600 BITs worldwide. Countries with particularly active BIT programs are Germany (135 treaties), China (121 treaties) and Switzerland (114 treaties). Developing States have also negotiated an increasing number of BITs among themselves. Some free trade agreements ('FTAs') contain sections dealing with the protection of investments. See Schreuer C., "Investment, international protection", January 2011.

<sup>864</sup> On August 9, 1976, Syria has signed an investment guarantee agreement with the US that protects investments from nationalization and confiscation. Similar agreements are also in force with Germany, France, Switzerland, Pakistan, China, Indonesia, Russia, Belarus, Iran, Italy, Bulgaria, Ukraine, Romania, Kuwait, the UAE, Morocco, Sudan, Yemen, Egypt, Lebanon, Jordan, Tunisia, Algeria, Bahrain, Turkey, Cyprus, Greece, Senegal, India, Nigeria, North Korea, Austria, Slovakia, Armenia and Libya. In addition, a number of bi-national committees have been established with Arab, Asian, and European countries to explore private and mixed joint ventures and improve bilateral trade.

such as certain environmental and labor standards, is moderately new to be reflected in the treaty's practice. Also, what is contestable in BITs is that they are frequently concluded between unequal partners. Both developed and developing countries intend to ensure a stable legal environment for international investment, they do not perceive the problem from the same perspective<sup>865</sup>. Despite the existence of inequality, there is an external validity to these treaties. In other words, once the country has voluntarily signed the treaty, it will have to be bound by it.

**922.** In the following points, it would be useful to explain the main provisions contained in a bilateral investment treaty. The latter commonly comprises, not limited to, the following provisions: a broad definition of the notion of “investments”; a definition of “investor”; provisions with regard to the admission of investments, the fair and equitable treatment (‘FET’)<sup>866</sup>; the full protection and security standard, and guarantees against arbitrary and discriminatory treatment; provisions cover also national treatment (National Treatment, Principle), most-favored-nation treatment (Most-Favored-Nation Clause), warranties against expropriation, and warranties regarding the free transfer of payments; provisions with regard to settlement of disputes between the contracting States as well as between the host State and the investor, comprising arbitration. Certain chief standards are enlightened below.

#### **a) Fair and equitable treatment (FET)**

**923.** FET standard is the most frequently invoked standard in investment disputes. According to its broad concept, the FET standard is often considered to protect foreign investments where no other protection is available. In that sense, states have to maintain stable and consistent environments compatible with the reasonable

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<sup>865</sup> Investment Compact Regional Roundtable on Bilateral Investment Treaties for the Protection and Promotion of Foreign Investment in South East Europe, 28 and 29 May 2001, Croatia

<sup>866</sup> Dolzer R., “Fair and Equitable Treatment: A key Standard in Investment Treaties”, American Bar Association, 2005. ; C. Schreuer “Fair and Equitable Treatment in Arbitral Practice”, 6 Journal of World Investment & trade 357-86, 2005

investor expectations. However, it should be noted that the concept's broadness and scope might vary according to the wording of the clause<sup>867</sup>.

**924.** The primary purpose of this standard is to ensure absence of interference of the host state in the legal conduct of business by foreign investors. Several commentators and arbitral tribunals have considered that the FET principle involves an engagement to fairness, transparency, and due process. The roots of the FET standard can be taken back to the Havana Charter for an International Trade Organization<sup>868</sup>, where the article (11) of the Charter enabled the International Trade Organization to encourage “agreements on measures designed to assure just and equitable treatment for the enterprise, skills, capital, arts, and technology brought from one member country to another”.

**925.** Most modern investment treaties comprise a FET provision with the notice that some countries refuse to include a FET provision in the investment treaties to which they are parties<sup>869</sup>. It should be noted that there is considerable debate as to whether the FET standard refers to customary international law, which is reflected in the international minimum standard of treatment or whether it is an independent standard standing above general international law<sup>870</sup>. In fact, in 2001, three state parties from the North American Free Trade Agreement (NAFTA)<sup>871</sup> have published a joint note of interpretation stating that an article from the NAFTA containing a FET provision “prescribes the customary international law minimum standard of treatment to be afforded to investments of investors of another Party”<sup>872</sup>.

**926.** Other than NAFTA cases, numerous international tribunals have applied an autonomous standard of FET. Through continuous attempt to define this autonomous

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<sup>867</sup> Klager R., “Fair and Equitable Treatment in International Investment Agreements”, Cambridge University Press, 2017.

<sup>868</sup> The Havana Charter for an International Trade Organization, “the Charter”, 1948

<sup>869</sup> Examples of countries that consistently refuse to include the FET provision, Brazil and Singapore, and examples of treaties that are lacking this provision are the Croatia-Ukraine BIT, Australia-Singapore BIT, etc.

<sup>870</sup> Tirado J., and Vicente E., “Protections for foreign investors in investment treaty arbitration.” <https://www.lexisnexis.com.ezproxy.rgu.ac.uk/uk/lexispsl/arbitration/document/407801/592R-XRT1-DXSN-64NY-00000-00/Protections-for-foreign-investors-in-investment-treaty-arbitration>.

<sup>871</sup> NAFTA is a treaty established between Canada, Mexico, and the United States “US” in 1992 and addresses both matters of trade and investment in the agreement.

<sup>872</sup> See article 1105 of NAFTA.



standard, international tribunals have endeavored to determine specific principles and investor rights covered by this standard. For instance, the arbitral tribunal in the case of “*Biwater Gauff v Tanzania*<sup>873</sup>” has set out a convenient overview of what constitutes a FET standard, such as good faith, if the host state has acted in good faith then this is improbable to form a breach of the FET standard.

**927.** There are also the principles of transparency, consistency, and non-discrimination and protection of legitimate expectations that should be taken into account. The goal of the FET standard is to ensure international investment treatment that does not affect the basic expectations of the foreign investor in implementing the investment. These expectations are legitimate and relied upon by the investor to execute the investment. Although the legal and regulatory framework constitutes the basis for the formation of legitimate expectations, the arbitral tribunal has found that host states are authorized to rationally amend legislation when such changes are made for the sake of the public interest. On the other hand, the arbitral tribunals have also stressed that the host states are obliged to provide a stable and predictable regulatory framework for the investors. To illustrate this, there is the case of “*Eiser Infrastructure Limited and Energia Solar Luxembourg sarl v the Kingdom of Spain*<sup>874</sup>”, where the investor’s claim was based on specific representations done to the investor by the host state at the time of investment, there exists a more accurate basis of establishing rational reliance by the investor and the formation of legitimate expectations.

#### **b) Full protection and security of investment**

**928.** This principle is usually found in BITs and concerns the physical protection and provision of security for investments by the host state. This concept aims to ensure that a host state takes active measures to protect and prevent foreign investment from adverse effects of actions of the host State, its entities, or even third

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<sup>873</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, award on 24 July 2008

<sup>874</sup> *Eiser Infrastructure Limited and Energia Solar Luxembourg Sarl v Kingdom of Spain*, ICSID Case No. ARB/13/36, 4 May 2017 (award published in Spanish only).

parties. Often the obligation is written in BITs so that the host state must protect the same standard that it applies to its nationals. The arbitral tribunal in the case of “*Asian Agriculture Products v Republic of Sri Lanka*”<sup>875</sup> has shown to what extent the host state is obliged to provide protection and security for investments and found that the standard was not a severe liability standard. However, it was necessary to determine malice and negligence.

**929.** Other cases have considered if full security and protection could be extended to all kinds of protection (involving legal and physical protection). For example, in the case mentioned earlier, “*Biwater v Tanzania*” the tribunal determined that full protection and security “implies a state’s guarantee of stability in a secure environment, both physical, commercial and legal”. There is still disagreement among arbitral tribunals concerning the extent of the protection and security. This disagreement is because there is no system of binding precedent in investment treaty arbitration. The judgments of arbitral tribunals in previous cases are of credible value and are usually relied upon in submissions on the interpretation and scope of BIT protections.

### **c) National treatment and protection of investors from domestic laws**

**930.** This standard means that a host state must not treat foreign investors differently or in any worse manner than it treats its local investors and domestic corporations in like situations or circumstances<sup>876</sup>. It should be noted that it is important to look carefully at the language and wording of the given BIT with all aspects of investment treaty claims. Some BITs restrict the extent of the national treatment standard so that it will not apply to a particular sector or industry. It should be mentioned that some BITs are prepared to provide both the national treatment standard and the “most favored nation” treatment (defined below) as part of the same clause.

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<sup>875</sup> *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, 1990, with the applicable investment treaty of Sri Lanka-United Kingdom BIT in 1980.

<sup>876</sup> The wording of the phrase “like circumstances” has been defined by arbitral tribunals as “same sector or same business”. For example the case of *S.D. Myers v Government of Canada*.

**931.** The wording of the national treatment clauses can be bordered to limit their application to the post-entry stage of an investment or cover both the pre and post entry stages. The post-entry-stage resides in protecting the investment after it is incorporated in compliance with the legislation of the host state of the investment<sup>877</sup>. In contrast, the pre and post-entry-stage could be extended to the establishment, expansion, and operation of the investment<sup>878</sup>. Regarding the protection of a foreign investor from domestic laws remains in key protection offered by the majority of bilateral investment treaties, which is to allow international arbitration in the event of an investment dispute, rather than letting foreign investors sue the host-State in its courts.

#### **d) Most-favoured Nation treatment of investors**

**932.** The “most favoured nation” standard abbreviated as MFN is a level of status given to one country by another and enforced by the World Trade Organization. The MFN clause is granted by one country to another country when there is interest in increasing trade with that country. Countries that attain the MFN status are offered specific trade advantages, such as reduced tariffs on imported goods. However, to establish a violation of the MFN clause, the investor has to prove a less favorable treatment based on the investor’s nationality. In this case, it is required to compare the treatments provided to two foreign investors in like circumstances.

**933.** MFN has a similar side of the national treatment standard of protection. It provides protection by the host state in preventing any less favorable treatment of foreign investors than foreign investors of a third country under other treaties. In case there is no MFN clause, then each state party to the bilateral treaty will be free to discriminate between the investors from different countries. The main aim of these clauses is to standardize the protection levels provided to foreign investors under BITs signed by the host state. In other words, if in one BIT, the substantive protection offered by the host state is less than that it has provided in a BIT with another state, the

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<sup>877</sup> For instance, the post entry model is seen in the Egypt-Jamaica BIT, article 3(2) and in the Argentina-Morocco BIT, article 4(1-b).

<sup>878</sup> For example, this stage approach can be found in the United States-Uruguay BIT, article 3(1) and in the Canada-Mongolia BIT, article 4(1).

investor can seek to rely on the MFN clause<sup>879</sup> to bring the higher standard of protection from the more favorable BIT.

**934.** It could be said that the structures of BITs have basic similarities. It is known that the treaty starts with the preamble statement and the purpose of the treaty. The latter is usually the mutual protection of investment flows between the two countries. Then it is followed by an identification of the types of property that are protected and the nature of the link of nationality to one of the parties that entitle the foreign investor to the protection of the treaty<sup>880</sup>.

#### **e) Umbrella clauses in investment arbitration**

**935.** Umbrella clauses<sup>881</sup>, also called an umbrella agreement or an observance of undertakings clause forms an essential provision within the given BIT. Through the latter provision, the state agrees to fulfill all its obligations owed to foreign investors. We could argue that an umbrella clause is a provision that secures the fulfillment of obligations expected from the host State for investments. Therefore, an umbrella clause could be very beneficial to investors as it may permit the investor to argue that issues normally governed by local law and jurisdiction<sup>882</sup> could be categorized as a breach of an investment treaty obligation by virtue of the umbrella clause<sup>883</sup>. Under

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<sup>879</sup> For example, the UK-Argentina BIT includes, in article 3, the following MFN provision: “Neither contracting Party shall in its territory subject investments or returns of investors of the other contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State. Neither Contracting party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any third State”.

<sup>880</sup> See in this meaning Bilateral Investment Treaties (BITs) definition by OECD “There are a variety of standards of treatment provided for in bilateral investment treaties. They would usually contain one article on treatment standards but that article would identify several different standards of treatment. These include national treatment, a fair and equitable standard of treatment, an international minimum standard of treatment and full protection and security. There would be references to the most-favoured-nation standard treatment, but the operation of this standard is not internal to the treaty as it depends on the identification of standards of treatment in other treaties so that the best standard offered could be determined...”

<sup>881</sup> In its most comprehensive version the umbrella clause reads: “Each contracting party shall observe any obligation it may have assumed with regard to investments”.

<sup>882</sup> For example, breach by the state of its contractual obligations owed to the investor.

<sup>883</sup> Wälde T., “The Umbrella Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases”, 6 *Journal of World Investment & Trade*, 2005.

the BIT protective umbrella, the investor may be able to raise its dispute with the state to the international forum. To this end, the fact that a clause can raise domestic law obligations is subject to debate and interpretation as there will be a matter of identifying the obligations that can be elevated.

**936.** The words of the UK-Argentina BIT umbrella clause is thought-provoking<sup>884</sup>, it states the following:

*“ Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy the protection and constant security in the territory of the other Contracting Party. Neither Contracting Party shall impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of the other Contracting Party ”*

As observed, the last sentence is the typical language used within umbrella clauses in several BITs. Given that the provision is broadly drafted, the investor can seek to rely on elevating the breach of investment contract claims to a violation of investment treaty under international law. In that sense, the accurate drafting of an umbrella clause is essential to identify the scope and impact. These disparities in drafting have been considered carefully by investment treaty tribunals. They have resulted in a large space for analyzing the application of umbrella clauses<sup>885</sup>.

**937.** Tribunals are usually requested to rule on the scope and effect of umbrella clauses. It is important to note that each decision turns on its facts and its specific wording of the given clause. There are two principles issues; the first one is the extent to which an umbrella clause can raise a breach of contract claim into a breach of the BIT. The second is whether the umbrella clause can eject the jurisdiction clause

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<sup>884</sup> Article 2(2) of the UK-Argentina BIT.

<sup>885</sup> Ben Sanderson of DLA Piper, “Umbrella clauses in investment arbitration”, LexisNexis

agreed by the parties for such a breach of contract<sup>886</sup>. However, any trial to categorize the extent of decisions on the scope and application should be approached with attention. Each decision turns on the specific drafting of the clause and the fact of a specific case<sup>887</sup>. In that context, the distinction between treaty claims and contract claims is a very controversial topic both among academics and arbitral tribunals. Hence, there might be contradictory decisions on this topic<sup>888</sup>.

## 2- Multilateral investment protection treaties (MITs)

**938.** Under both bilateral investment treaties and multilateral investment treaties, the host country typically undertakes specified minimum levels of treatment for foreign investors. These treatment levels can range from a commitment of no discrimination towards foreign investors in favor of local companies to a promise not to nationalize or expropriate an investment without payment of suitable and fair compensation<sup>889</sup>.

**939.** The beginning of efforts regarding the formation of multilateral treaties among different countries dates back to the 1950s and 1960s<sup>890</sup>. MITs are international agreements made between several countries with the aim to protect the investment of the individuals or companies. There are some known examples of MITs, such as the Energy Charter Treaty and NAFTA. Specific fields of investment law is covered by Multilateral treaties, namely the Convention on the Settlement of Investment Disputes “ICSID Convention”<sup>891</sup>, which delivers a framework for investor-State dispute settlement (arbitration and conciliation).

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<sup>886</sup> There are many cases on the scope and application of umbrella clauses that identify approaches adopted by tribunals such as the narrow approach (whereby no breach of contract may elevate to a violation of treaty), the broad approach (whereby violations of a contract become treaty violations), etc.

<sup>887</sup> Sinclair A., “The origins of the Umbrella Clause in the International Law of Investment Protection”, Arbitration International, 2004.

<sup>888</sup> Tawil G., “The distinction between contract claims and treaty claims: An overview”, International Council for Commercial Arbitration, 2007; Kaufmann-Kohler G., Walde T., Soderlund C., “Investment Arbitration and the Energy Charter Treaty”, 2006.

<sup>889</sup> International Institute for Sustainable Development, “ Assessing the impacts of investment Overview of the evidence”, IISD report, 2017.

<sup>890</sup> Schreuer C., “investment, international protection”, Encyclopedia of Public International Law, January 2011.

<sup>891</sup> Syria has ratified it on 2006.

**940.** The ICSID framework has received several criticisms for its lack of transparency, lack of an appeal mechanism, and being bias in favor of the investors from developed countries<sup>892</sup>. For this end, the idea of creating a complementarity forum for dispute settlement between States and investors was supported. Hence, the formation of Mauritius Convention on transparency was to respond to the concerns arising from the application of ICSID framework<sup>893</sup>.

#### **a) Mauritius Convention**

**941.** By 2017, the Mauritius Convention entered into force with the aim to promote more widespread application of the UNCITRAL rules on Transparency in treaty-based investor-State Arbitration. The parties to investment treaties have to express their consent to apply the Rules on Transparency of the said convention. These rule of transparency are a set of procedural rules, such as making public access to hearings, disclosure of case available information. By default, the transparency rules apply to all investor-state arbitrations conducted under the UNCITRAL Arbitration Rules in accordance with treaties concluded on or after April 1, 2014 (i.e. the date on which the Transparency Rules come into effect). Applying the rules of transparency to arbitration under previous treaties requires a further expression of consent. The Mauritius Convention reads in Article 2(1) and (2) that the Rules on Transparency apply to disputes initiated based on international investment agreements<sup>894</sup>.

#### **b) Scope and impact of application**

**942.** The said convention applies to investor-State arbitrations made pursuant to investment treaties. The respondent would be a party to the convention, while the claimant would be one of the States that is party to the convention. Once these requirements are met, the convention states for the mandatory application of the rules

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<sup>892</sup> Grant K., “The ICSID Under Siege: UNASUR and the Rise of a Hybrid Regime for International Investment Arbitration”, 52 OSGOODE HALL L.J. 6, 2015. ; Fiezzoni S., “The Challenge of UNASUR Member Countries to Replace ICSID Arbitration”, 2 BEIJING L. REV. 136, 2011.

<sup>893</sup> See Lee D., “Critics of Trans-Pacific Partnership Trade Deal Warn About Arbitration Clause”, LA TIMES, 2015. <http://www.latimes.com/business/la-fi-trade-court-dispute-20150819-story.html>.

<sup>894</sup> United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (the 'Mauritius Convention on Transparency'), UNCITRAL <http://www.uncitral.org/uncitral/en/uncitral-texts/arbitration/2014TransparencyConvention.html> [hereinafter United Nations Convention](January 3, 2017), the journal of international business & law.

of transparency, except if the defendant party (respondent) or the claimant's country of origin has made a "relevant reservation". Therefore, a party, under a specific treaty, can exclude the application of this convention from arbitration by doing such reservation.

**943.** It should be noted that the convention's authors stated about the importance of this convention in enhancing the transparency rules in investor-State dispute settlement and that it would permit States to apply those rule to arbitrations resulting from several investment treaties<sup>895</sup>. Moreover, this convention could be considered as an important example of how to reform an investment law system in a multilateral manner. Besides, the convention would have a positive contribution on the way investment treaty arbitration is conducted. In case it is widely applied, transparent treaty arbitrations between investors and States will become more common<sup>896</sup>.

In that context, there are several features that should be noted in this convention. These features increase the convention's potential scope of influence, as it covers arbitrations conducted under any set of arbitration rules, other than UNICTRAL Arbitration Rules. Moreover, the convention is not restricted to States but also permits "economic integration organizations", such as the EU, to be a party.

**944.** On the other hand, there are some limitations on the impact of the convention, at least on the short term. This lies in the limited willingness of States to ratify it. In fact, the signatory countries of the convention are 23, but ratified by six States<sup>897</sup>. In that context, it is important to mention that Syria signed the convention on March 24, 2015, just one week after France, which signed the convention on March 17, 2015. Furthermore, it should be noted that this convention does not apply to arbitration processes between investors and States that were initiated according to contracts or local investment protection laws.

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<sup>895</sup> Wasiak B., "The Mauritius Convention on Transparency Enters into force", Oxford University Press, Investment claims, 2017.

<sup>896</sup> *ibid*

<sup>897</sup> The signatories States are Australia, Belgium, Benin, Bolivia, Cameroon, Canada, Congo, Finland, France, Gabon, Gambia, Germany, Iraq, Italy, Luxembourg, Medagashkar, Mauritius, Netherlands, Sweden, Switzerland, Syria, Great Britain, and the United States of North America. However, the States that ratified the Convention are Australia, Cameroon, Canada, Gambia, Mauritius and Switzerland.



Finally, we think that the Mauritius Convention can serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism<sup>898</sup>.

### **B- Syria's compliance and membership in BITs and MITs**

**945.** Investments by Syrian nationals and entities, including sovereign wealth funds, are protected under international law due to a series of bilateral and multilateral treaties entered into by Syria over the last three decades. Syria is a contracting party to the ICSID Convention and has signed around 35 bilateral investment treaties with developed and developing countries; 29 are currently in force.<sup>899</sup> Syria has entered into BITs with Middle Eastern and African states, including Algeria, Egypt, Jordan, Kuwait UAE, Lebanon, Morocco, Sudan, Tunisia, Turkey, Yemen, Libya, Senegal, Nigeria, and Bahrain. It also has BITs with the European states, including Austria, Belgium & Luxemburg, Czech Republic, Finland, France, Germany, Italy, Poland, Romania, Switzerland, Cyprus, and Greece<sup>900</sup>. Asian states, including China, Malaysia, Indonesia, North Korea, and India. Eastern European/CIS states, including Azerbaijan, Belarus, and Tajikistan.

**946.** Syria BITs usually protect Syrian nationals; companies constituted or organized under Syrian law and the Syrian government, where they have invested in the other Contracting Party's or "host State's". Syrian BITs do not share a common definition of the concept of an "investment". However, the term is defined broadly in most BITs and confers different degrees of investor protection according to their terms. However, generally speaking, most Syrian BITs and MITs share the same common features mentioned above. Therefore, concerning investor-State Dispute Resolution (ISDS), most Syrian BITs provide for some form of dispute settlement mechanism between investors and the host State. In some cases, Syrian BITs provide for international arbitration. It provides that a Syrian investor may refer an investment

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<sup>898</sup> Gabrielle Kaufmann-Kohler and Michele Potestà, *Analysis and roadmap*, Section VII, pp. 75–93,

<sup>899</sup> OECD, "International investment law: Understanding concepts and tracking innovations", 2008.

<sup>900</sup> The European Union and Syria also have started an agreement in 2004 under the aegis of the Euro med program. This agreement should create a free-trade zone for a period of 12 years between the European Union and Syria, and provide a legal frame for European aid intending to improve the political framework, as well as the economic and financial development of the country, especially in the following fields: science, technology, environmental protection, resources exploration, production and infrastructures, currently might stopped because of the war.

dispute to the ICSID. Moreover, there are some multilateral investment treaties where Syria is membership. It is important to present at least two of them, such as:

**a) Arab SID convention 1974**

**947.** The Arab Convention on the Settlement of Investment Disputes (SID) is between States hosting Arab investments and citizens of other States. Numerous Arab countries, including Syria (entered into force on 16 April 1977), ratified it. However, the 1974 Convention has been superseded by the 1980 unified agreement related to the investment of Arab capital amongst Arab States. The latter agreement is fully inspired by the ICSID Convention model and was envisioned to settle any dispute that may arise from an investment project between a host State, or any of its domestic agencies or corporations, and investors of another Arab State (individual or entity) in order to deliver an investment-friendly climate that would stimulate Arab investments<sup>901</sup>.

**b) The 1980 Arab Unified Agreement**

**948.** The 1980 Agreement entered into force the following year, by 1981. It established an Arab Investment Court *in favorem* investor-state contracting parties. The 1980 Agreement was amended by 2013. The amendments broadened the scope of investors covered by the Agreement so that a given investor is only required to own "Arab capital". The investor has thus to "invests in the territory of a State Party of which it is not a national, provided that the Arab investor holds directly at least 51% of the share capital"<sup>902</sup>.

**949.** Besides, the amendments introduced a broad Fair and Equitable Treatment provisions. At the same time, it removed limitations on the free transfer of capital and refrained actions that might violate public order, morality, or involve illegitimate gains. The amended treaty is silent on its relationship with Arab BITs. So, while the Unified Agreement may be amended to consolidate the complex network of over 100

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<sup>901</sup> Ziadé N., "ICSID and Arab Countries", Vol. 5, No. 2 Summer 1988.

<sup>902</sup> League of Arab States, "Unified Agreement for the Investment of Arab Capital in the Arab States", Economic Documents, No. 3 1982, Original language: Arabic

existing Arab BITs, it is assumed that such intra-Arab BITs continue in force in the meantime<sup>903</sup>.

**950.** For the purpose of avoiding several obstacles, investors always claimed an international arbitration clause, based on investment protection treaties to resolve any eventual conflict with the host State in the future. Thus, there is a universal principle on this matter: recourse to international investment arbitration. After the adoption of the ICSID convention in 1965<sup>904</sup> and its ratification by Syria in 2006, matters have changed significantly. Hence, private parties “investors” can avoid the classic and traditional procedure of diplomatic protection, and national jurisdiction, and act directly against the relevant State, where the investment was made. This system facilitates to the investor the possibility to act directly against the State and, at the same time, fill this gap in procedures, which was one of the main goals of ICSID convention. Thus, The investor-state process allows the investors to challenge a wide range of governmental measures in a final and binding arbitral decision<sup>905</sup>.

There is an important point to be addressed in this context. The question is to what extent the Syrian PPP law is compatible with the UNCITRAL model law.

### **C- Compliance of PPP law with the UNCITRAL model**

**951.** The UNCITRAL has the mandate to synchronize international trade law. It is known for its important role in developing and harmonizing the law of international trade through adopting legislative and non-legislative tools in several key areas of commercial law. Furthermore, it has an important role in contemporary arbitration practice. The general assembly has adopted and produced several key recommendations and models on improving the provision and management of infrastructure and public services in addition to models on privately financed infrastructure projects. Those were the most important legislative documents related

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<sup>903</sup> *ibid.*

<sup>904</sup> Convention on the settlement of investment disputes between states and nationals of other states, signed on 18 March 1965; The ICSID Convention entered into force for Syrian Arab Republic on February 24, 2006.

<sup>905</sup> Since the late 1990s, disputes brought under investment treaties have increased phenomenally: In 1997, there were 19 known cases brought against states. By 2007, there were almost 300 known cases, and, according to UNCTAD, 514 by the end of 2012.

to PPP<sup>906</sup>. These legislative documents, particularly the Model Legislative on Provisions, become the principal source of motivation for legislative reform in developing countries and transition economies in the field of PPP. However, it is accepted that the more than ten-year-old document needs to be updated to be in line with today's realities. To this end, the international PPP center of excellence developed a revised and updated Model Legislative Provisions or developing a Model PPP law<sup>907</sup>.

**952.** The importance of the PPP model lies in enabling PPP to trigger the infrastructure-funding gap, especially in developing countries, and contributing to sustainable economic and social development<sup>908</sup>. The Model PPP law contains a template for national legislation, sufficient detail for national law, limited options and flexibility, legal framework, and implementation regulations. Some core factors could be included to allow flexibility, such as the project for the design, construction of infrastructure, provision of associated services, and payment for services either by a public authority or end-users or both<sup>909</sup>. Regarding the dispute resolution, the UNICTRAL rules on arbitration are usually used in investment arbitration<sup>910</sup>.

**953.** It could be said that the Syrian PPP law came in compliance with the rules and regulations mentioned in UNCITRAL Model concerning the funding of infrastructure by the private sector. This legislation is considered as a complement to the infrastructure projects that the UNCITRAL had launched in 2001 under the title of legislative guide to the privately financed infrastructure projects. The resolution

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<sup>906</sup> Model legislative Provisions on Privately Financed Infrastructure Projects, 2003 and the Legislative Guide on Privately Financed Infrastructure Projects, 2000

<sup>907</sup> UNICTRAL Model Legislative Provisions and the Legislative Guide on Public-Private Partnerships 2019

<sup>908</sup> Another point to promote the preparation of Model PPP Law is to widening infrastructure need, which is estimated to be US\$ 750 billion per year between 2009 and 2020 in Asia, ADB-ADB 2009 study, Infrastructure for a Seamless Asia.

<sup>909</sup> There are some other public private partnerships to be considered such as PPPs for maintenance-type services only and institutional PPPs.

<sup>910</sup> The official text of the UNCITRAL Arbitration Rules, as revised in 2010, is reproduced in Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17), annex I (Yearbook of the United Nations Commission on International Trade Law, vol. XLI, 2010, part one, chap. I, sect. A, annex I (United Nations publication, Sales No. E.13.V.8)).

adopted by the general assembly of the United Nations, which has approved that Model as a basis, assumed that it took into consideration the role the public-private partnership plays in promoting and introducing public services and developing infrastructure. In a way that it provides an adequate environment for private investment in infrastructure.

**954.** The General Assembly has also confirmed the importance of the effectiveness and transparency of bidding procedures of the infrastructure project contracts, as well as the fairness and long-term sustainability and deregulation of private sector contribution in infrastructure development. In this context, it can be noticed that the Syrian legislator in its legislative plan in modernizing the laws within the economic and political reforms, has purposefully taken the international criteria and standards stated in the UNCITRAL Model. At the same time, it complied with the known national constraints and limits<sup>911</sup>.

## **Conclusion of chapter II**

**955.** Previously, settling investment disputes between investors and the State was in national courts or through diplomatic protection methods. However, when a dispute arises, the first impression might be that there is no equal balance and power between the two parties (a private party and the public party). Therefore, the existence of a legal framework of protection of foreign investments in disputes settlement between state and investor is essential, especially in PPP. In that context, the parties to a PPP contract would likely to refer to arbitration as an alternative from national courts.

**956.** The parties of the contract will likely choose arbitration. The question of using domestic or international arbitration should also be determined as if the local arbitration is appropriate. In this case, it will be important to understand whether an arbitral award in the local country can be invalid by the courts. However, if international arbitration is chosen, the agreement indicating institutional arbitration will include the rules of one recognized arbitral institution. In contrast, in case of an

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<sup>911</sup> UNCITRAL Legislative guide on Public Private Partnerships, *supra* note 794.

ad hoc arbitration, the agreement may identify its own rules or adopt the arbitration rules of international arbitration or UNCITRAL rules.

**957.** Therefore, arbitration methods are the most used for dispute settlement arising under PPP. PPP's parties usually resort to Arbitration for settling the dispute emerging during the construction stage of the project and also from disputes emerging from the expiry or termination of PPP contract. Therefore, arbitration is usually the preferred option chosen by the private parties given its several advantages, such as its fitness to the parties needs, less formal than judicial system. However, the enforceability of the arbitral award is a crucial consideration that should be taken into account when drafting the arbitration clause.

**958.** It is important to recall the role that international treaties for investment and investors protection play in reassuring the contractors, lenders, and investors. Indeed, the MITs and BITs for investment protection provide the basic protection provisions that the investor should have, especially for foreign investors. In that context, Syria is signatory member in several BITs and MITs, such as ICSID, which reflects that Syria is committed to implement international standard in investment protection.

## **Conclusion of title II**

**959.** In this research, we have seen before that the partnership passes through several stages to reach the partnership contract and other secondary agreements. The core of the partnership is based on a three-relationship contract: the public sector, the private sector, and the citizen. The third element of this relationship is, indeed, informal and implicit. The contract is the core stone of PPP, as it lays down the risk allocation, the value for money, the capability to bear the financial costs and the dispute resolution mechanisms. The contract should identify the nature of risks and the way to deal with it. Moreover, the main outcome of a PPP contract is the formation of the Project Company or SPV.

**960.** The SPV will be administered by a separate agreement, which will outline the rights and commitments of the private consortium's individuals (a shareholders' agreement). At that point, the SPV will enter into different contracts, for example, with a construction contractor, to build the venture. The contractor will enter into different sub-contracts, and these sub-contractors will often go into sub-sub-contracts to achieve specific tasks. The role each party plays in the PPP undertaking will affect the technique for settling disputes, which may ultimately emerge among the parties. Various components must be considered in determining which dispute resolution technique ought to be implemented. In some instances, speed and effectiveness are liked and required to avoid expensively overwhelms and delays. This is particularly valid during a venture's construction stage.

**961.** It was noticed in the previous chapter in this research, that the Syrian PPP law has some gaps that could be misused. Besides, the law contains some contradictions, such as in Article (3) and (6), where the Project Company is not deemed as a binding condition. In contrast, in Article (29), the Project Company is a criterion of project assessment criteria. However, the Project Company is one of the PPP pillars. Also, in Article (6), the contracting public authority is not allowed to partner in the Project Company. However, there are other provisions such as Articles (27, 29, and 44) that state expressly the public side's contribution in the project company.

**962.** We can deduce that the essential factor for PPP implementation is the legal framework in the host country for the settlement of disputes. Investors, contractors and lenders are encouraged when they have confidence that any disputes occurred from the contract is resolved fairly. As PPP contains interrelated contracts and other legal connections involving various parties, dispute settlement provisions should consider the diversity of these relations. This may need different dispute settlement methods that depend on the phase of the project, the parties involved and type of the dispute.

## General Conclusion

**963.** At the end of this study, it is evident that several laws have been enacted to encourage the private sector in Syria, such as the investment law No.10/1990, and Decree No.8/2007. These laws had a significant impact in Syria's transformation from an economy dominated totally by the public sector to an economy in which both public and private sectors contribute. Hence, this contribution has resulted in a partnership between the two sectors through the preparation of a PPP law in 2009-2010. This preparation had high expectations in advancing the investment in Syria; however, the conflict has delayed its promulgation till 2016. The Syrian Parliament has approved the PPP law in 2015 and promulgated it in 2016 to prepare the ground for reconstruction and the rehabilitation of infrastructure in coordination with the private sector.

**964.** Almost countries, including Syria, and international organizations have defined the PPP concept based on their legal systems. It has been concluded that almost definitions use different wording but give similar meaning. Generally, almost definitions advocate for common characteristics, such as the long-term agreement between the two sectors, sharing of risks and providing public services. In that sense, the PPP definition given by the Indian government is, amongst the several studied definitions, the most comprehensive one, as it specifies the parties, purpose, mode of financing, duration, risk sharing, conditions for payment, and performance standard of the partnership<sup>912</sup>. However, the World Bank is the pioneer in terms of launching initiatives made for providing practical knowledge about PPP implementation, such as PPP Knowledge Lab initiative.

**965.** The main types of PPP arrangements adopted by the European Union and several countries are the purely contractual PPP, such as concessions, and

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<sup>912</sup> The Indian definition is as follow: "An arrangement between a government / statutory entity / government owned entity on one side and a private sector entity on the other, for the provision of public assets and/or public services, through investments being made and/or management being undertaken by the private sector entity, for a specified period of time, where there is well defined allocation of risk between the private sector and the entity and the private entity receives performance linked payments that conform (or are benchmarked) to public specified and pre-determined performance standards, measurable by the public entity or its representative".



institutionalized PPP. The partnership in a purely contractual arrangement is only based on contractual links where rights and duties are specified according to administrative contracts and other contracts. In contrast, in a partnership of an institutional partnership arrangement, both sectors are collaborating within a distinct entity held jointly by them, where they are guaranteed in accordance to the company's law and by the shareholder agreement. It should be noted that this kind of collaboration might be positive to the government where it is possible to adjust the service according to the changing needs and where the public sector acquires the know-how from the private sector. Therefore, given the huge reconstruction operation of almost sectors of Syria, it may be useful for the government to rebuild and acquire the know-how at the same time through the institutionalized PPP arrangements.

**966.** Based on the analysis of the Syrian PPP law in this study, several positive sides have been deducted. In general terms, it has been observed that the existence of a specific law dedicated to regulate PPP is the best option in a country, rather than having several systems to several models of PPP, such as anglo-saxon legal systems. In that sense, a law dedicated to govern PPP would guarantee certainty of the legal framework of the partnership and would be a proof of the country willingness to promote PPP projects. Therefore, the Syrian PPP law has been considered as a development step towards the country reconstruction and openness to private investment.

**967.** After studying the Syrian PPP law and the comparative contexts of several countries, it led us to a central concern, which is the positioning of the partnership in Syria between the concept and the implementation. We have seen that the PPP law in Syria, as well as Dubai, France, the United Kingdom and China, has passed through several stages in developing and updating the laws related to PPP. The comparison among these countries shows that the main differences and challenges are not in the text law itself. However, it was instead in the way that PPP law is interpreted and implemented. It should be noted that the Syrian legislation and the English one have a similarity in protecting the private partner contractor from changes in the law that could affect the project (article 61). On the other hand, the Syrian legislator did not expressly mention the financing methods, while other legal system did, such as France, the UK, and China. Moreover, the Syrian legislator did not specify the types

of partnership contract (article 5); this competence is given for the PPP council that will lay down the types of partnership, then, the contracting authority sets, upon its convenience, in the bid offer the contractual type of the partnership. This ambiguity in specification appeared also in the contract duration where the Syrian legislator did not restrict or limit the period of the contractual relationship (article 1). In that way, the law might lead to a misunderstanding of the partnership concept due to these unclear provisions. It did not state the criteria and standards of what are the sectors' projects that can be implemented as PPP. Consequently, several ministries rush to propose projects on partnership premises, which are not vital to the Syrian economic targets in the current situation, such as a proposal from the ministry of local administration of shopping centers, the proposal of the ministry of culture of a cultural channel TV, the proposal of the ministry of communication of constructing a commercial tower and hotels. Therefore, we can notice a problematic between the substantial concept of partnerships and its realization.

**968.** In that context, the experience of PPP in Syria is modest; there are few massive projects mostly implemented under other qualifications, such as BOT. The only experience of PPP project, but unofficial, was the project of " Extension of Adra" within Syrian free zones in 2008. The importance of this experience consists of the fact that it proves the benefits of projects carried out in partnership between public and private sectors. The success of the "Adra Extention" experience played a role in the necessity to recourse to Partnership model. It demonstrated timesaving and delivering value for money.

**969.** As a result, national legislature should define the sectors and activities likely to benefit from partnership projects and clarify the reasons why this arrangement is preferable to public projects. Despite the large potential for PPP in almost all sectors, they have been traditionally used in the transportation, water, and waste management sectors. Legislation must explicitly detail which activity or sectors can pursue a PPP and which cannot. This measure provides security and clarity for investors. It is not ideal for legislation to have prior restrictions on activities and sectors, but rather should provide a clear mechanism that allows the procurement authority to decide whether to procure a PPP.

**970.** Based on international PPP experiences and literature review, the implementation of PPP projects, especially in Syria, needs long preparatory procedures, such as social, economic, and financial feasibility analysis to identify the primary priority project and sectors needs. Therefore, there is a need to set up enough time for accomplishing those analyses to avoid proposing projects that are not priority for the reconstruction of Syria. In that context, monitoring and organizational frameworks are from the most important contexts related to PPP's implementation. In that context, there are several ways to supervise the execution of PPP projects: the establishment of a PPP management team, specific supervision related agreement provisions, application of penalties for failure to comply with schedules and performances, periodical report submission, and performance assessment through pre-established key performance indicators. In that sense, legislation should determine a public body empowered with regulatory authority that should implement PPP supervision and monitoring.

**971.** Since Syria would be the center of local and foreign investments, the government would proceed with offering bids and it may receive many unsolicited proposals, which are directly proposed by the private entity. In both cases, guaranteeing effective selection of bidders demand implementing the international standards of competitive procedures which will in turn ensure the best value for money for the project.

**972.** Once the selection process is finalized, the contract of PPP will be concluded between the parties. Based on several legal perspectives, there are certain provisions that should be taken into account, while drafting and designing the PPP contract, such as provisions expecting unforeseen political and economic changes and adjustments to ensure contract flexibility. In that context, it is essential to mention that the Syrian PPP law (article 45) grants to the private partner to the contract the freedom to choose the appropriate legal formula that regulates the relations between the private partner and its stakeholders partners.

**973.** Moreover, the Syrian PPP law came in compliance with the rules and regulations mentioned in UNCITRAL Model concerning the funding of infrastructure by the private sector and the dispute resolution. Accordingly, this law,

in article 78, has allowed the parties, without differentiating between local and foreign investors, to opt to either national arbitration or international arbitration, where, for example, Dubai PPP law did not expressly allowed the recourse to international arbitration. Therefore, this could be considered as a very positive point in favor of the Syrian PPP law as it could play a role in encouraging private investment.

**974.** Based on the above outcomes, we are in view of proposing some recommendations and open questions for further researches on the same topic. These recommendations are proposing amendments that could be done to the legal framework and to the institutional frameworks concerning the partnership and investment in Syria.

**975.** From the legal perspective, there are three relevant laws at stake, which are the PPP law, the investment law and the arbitration law. We recommend some amendments related to these laws. In this context, it is noted that the Syrian Arbitration Law explicitly excludes administrative contracts from the scope of its application, and disputes arising from these contracts will be resolved under the provisions of Public Law Contracts No.51/2004. In the contrary, the Egyptian arbitration law No.27/1994 provides that it applies on administrative contract, which have an economic nature. It is recommended to follow the Egyptian model and to amend the relevant provision of the Syrian arbitration law to encompass the administrative contracts that have an economic nature as well as the PPP contracts, because they are administrative contracts with economic nature.

**976.** Secondly, we have seen that the Syrian PPP law provided, in article 78, three options of dispute resolutions for the private partner in a PPP contract, which are: Syrian administrative courts, domestic arbitration, and external arbitration. However, the provisions of this law do not clearly allow the private partner to benefit from the provisions of the investment law (Decree No. 8/2007). In contrast, the Lebanese PPP law N.48/2017 expressly states in article 16 that the private partner can benefit from the provisions of investment law No.360/2001 concerning the protection and privileges granted to investors. In other words, the Lebanese legislator in its PPP law has expressly referred to the incentives and rights provided by the Lebanese

investment law. In this context, it is recommended to follow the example of the Lebanese PPP Law and amend the Syrian PPP in order to obtain an integrated legal framework for investment protection granted by the PPP Law and the Investment Law. In this case, the private partner will benefit from the provisions of the investment law related to the development of investments in Syria.

**977.** Thirdly, there are sounds of promulgating a new investment law soon. Therefore, the upcoming new investment law could include the aforementioned legal recommendations, and in this way it will have a positive impact on the PPP law and the arbitration law.

**978.** From an institutional perspective, we would like to suggest that it is important to establish a Ministry of International Cooperation and Reconstruction, in addition to establishing partnership units in each government ministries. Such units might be linked to the main unit established in the suggested ministry. Every unit should be composed of legal, economic, financial, administrative, and technical experts. Its task would be to propose projects and provide feasibility studies for each project. On the other hand, all kinds of investment and PPP projects should be under the authority of the above-mentioned ministry. A single umbrella-ministry should exclusively cover the different investment projects, either made under the PPP law or under other investment laws. Furthermore, among the many tasks of the suggested Ministry of International Cooperation and reconstruction, there is a high need to perform training to qualify Human Resources in the public sector and to monitor partnership contracts, such as guaranteeing the formulation of agreements, good implementation, quality control service to ensure the accomplishment of the targeted objectives.

**979.** Finally, as the topic of this research is “PPP: An investment tool to rebuild Syria”, we aimed at focusing on this tool and proving that it would be an effective and important investment tool to rebuild Syria. In fact, given the tremendous cost of rebuilding, we might suggest that there would be a need for international intervention in the process in parallel with the PPP law. In that context, PPP law might not be the only remedy and tool for rebuilding. It would advance stronger in line with other regulations and laws of investments, such as the upcoming law of investment.

**980.** To this end, and taking into account what has been suggested above, a potential international “Plan” for Syria reconstruction could be a comprehensive solution, such as " Marshall Plan " for the recovery of Europe 1945. The idea of an international reconstruction plan has already been developed by the creation of the Syria Recovery Trust Fund (SRTF)<sup>913</sup>. We also could refer to sovereign funds to be the main funding institutions to this Trust Fund, such as Kuwait Fund for Arab Economic Development (KFFAED), Abu Dhabi Fund for Development (ADFD), Saudi Fund for Development (SFD) and OPEC Fund for International Development (OFID), European Funds and others. Thus, we believe that this tentative step could be transformed thanks to an international motivation to a plan for Syria recovery. This could be the best solution for Syria reconstruction. Therefore, the suggested equation is: International Will + Recovery plan (SRTF) + Donors (Funds)/World Bank = rebuilding Syria.

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<sup>913</sup> Syrian Recovery trust Fund" (SRTF) on 2 September 2013, by eleven States (USA, UK, France, Germany, Kuwait, UAE...) called Friends of Syrian People, seated in Germany. This fund was dedicated to alleviate the suffering of the Syrian people. This fund has recently done an initiative towards the sanitary crisis of covid-19, by donating 5 million Euros to Syria- “The SRTF Approves EUR 5.3 Million Projects to Mitigate the Spread of COVID-19 in Syria”, Amman – Wednesday, 27th May 2020

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