

REGULATING PUBLIC PRIVATE PARTNERSHIP TO ATTRACT INVESTMENT
IN KEY DEVELOPMENT PROJECTS: A NAMIBIAN PERSPECTIVE.

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DECLARATION

I, Helena-Tashiya Walenga, hereby declare that the work contained in this thesis for the purpose of obtaining my Master of laws is my own original work and that I have not used any other sources than those listed in the bibliography and quoted in the references.

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SUPERVISOR'S CERTIFICATE

I, DR. Tapiwa V. Warikandwa, hereby certify that the research and writing of this thesis was carried out under my supervision.

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DEDICATION

I dedicate this work to:

1. My lovely late aunt, Sirkka Maija Nghihalwa (1964-2007), who raised me from my infancy. I am because you were!
2. My precious mother, Julia Ndapwomupya Ndiimonena Nghipuyoonda lifo, my angel of love!
3. My fathers, Tate Mapolo and Tate Hafeni Vilho, I can never repay your selfless commitments to my life, I am forever indebted to you for your sacrifices.
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5. Hee-Dee Walenga, the world is your oyster; your duty is to find the pearls!

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ABBREVIATIONS

AFDB	African Development Bank
BEE	Black Economic Empowerment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CIDA	Canadian International Development Agency
CRC	Convention on the Rights of the Child
DPLG	Department for Provincial and Local Government
EPA	Economic Partnership Agreements
ESCR	Committee on Economic, Social and Cultural Rights
EU	European Union
FDI	Foreign Direct Investments
FHWA	Federal Highway Administration
IMF	International Monetary Fund
MDG	Millennium Development Goals
MFMA	Municipal Finance Management
MSA	Municipal Systems Act

NAMPA	NAMIBIA PRESS AGENCY
NDP	National Development Plan
NEEF	New Equitable Economic Empowerment Framework
NIC	Namibian Investment Centre
OECD	Organization for Economic Cooperation and Development
PFI	Private Finance Initiative
PFMA	Finance Management Act
PPP	Public-Private Partnerships
SADC	Southern African Development Community
SEP-14	Special Experimental Project Number 14
WTO	World Trade Organisation

ABSTRACT

This research examines the suitability of the Public-Private Partnership (PPP) Act, in efforts aimed at attracting investments (both local and foreign) in order to promote sustainable development in Namibia. The PPP Act in its current form does not promote private sector participation, does not advance principles of transparency and probity in the procurement process, does not make provision for risk allocation and sharing and does not promote involvement of previously disadvantaged Namibians. The research also aims at ensuring that local investors, through the concept of Black Economic Empowerment (BEE) and other relevant legislation, play a significant role in ensuring the basic needs of the Public are realised and the public's interests are protected. This delicate balance of interest must culminate in service delivery for the public whilst at the same time ensuring that investors retain value for their money through PPPs. The research points out that the world has adapted techniques and concepts that can assist it to best develop and adapt to the cosmopolitan expectations of its citizenry. Namibia can therefore draw lessons from countries such as South Africa and Kenya in so far as the implementation of PPPs is concerned. PPPs have gradually evolved over the centuries on their form and element and similarly have great benefits to a country only if the regulatory framework around it is comprehensive and suitable to ensure that it caters for all the needs of the people involved in the PPP arrangement, without the one having to suffer at the expense of the other. The research advocates for a PPP regulatory framework that promotes the spirit, tenor, history,

political and economic setup and objectives of the Republic of Namibia. This can only be achieved by amending the current PPP Act of Namibia, by including the establishment of the PPP Unit, standard terms that should be contained in a PPP contract, how the PPP committee will be appointed, how current PPP projects will be accommodated and how risk should be shared, how previously disadvantaged Namibians will be accommodated and how the act will apply to ensure that this inadequately drafted Act, achieves sustainable national objectives such as BEE and investment growth.

CHAPTER 1

INTRODUCTION

1.1 Background to the Research

Public-Private Partnerships (PPPs) have attracted so much attention in Namibia. The newspapers have advanced numerous comments on the discourse. Some of the newspapers' headlines regarding PPPs in Namibia include but are not limited to the following: "*Namibia's Public-Private Partnership Policy Analysis*"¹; "*Public-private partnership framework planned*"²; "*PPPs to be closely monitored to ensure output requirements*"³; and "*Ground breaking public-private partnership in silo construction*"⁴ The above headlines are indicative of the fact that PPPs, as a form of investment to protect public interest in Namibia, have generated considerably rich, interesting and thought provoking debates and discussions among many stakeholders, which include the Government,⁵ economic⁶ and political

¹ Dan-Aohoaeb, R .2016. "Namibia's Public Private Partnership analysis". *The Namibian Newspaper* available at: <https://www.namibian.com.na/152571/archive-read/Namibias-Public-Private-Partnership-Policy-Analysis> last accessed on 18 January 2017.17.

² Weidlich, B.2010. "Public –Private partnership framework planned". *The Namibian*, 1.

³ 2016. "" PPPS to be closely monitored to ensure output requirements". *The Namibian New Era* available at <https://www.newera.com.na/2016/11/11/ppps-to-be-closely-monitored-to-ensure-output-requirements/> last accessed on 18 January 2017.

⁴ Shlechter, D .2013. "Ground breaking Public Private Partnership silo construction", *Namibian New Era*: at <https://www.newera.com.na/2013/12/02/groundbreaking-public-private-partnership-silo-construction/> last accessed on 18 February 2017.

⁵ Suneja, S. 2016. GRN Portal - Ministry of Finance: *Updates on PPP Unit activities and overview of legislative framework*, available at <https://www.google.com.na/url?sa>, last accessed on 02 March 2017.

⁶ Konstantinus, E. 2017. *Why the PPP Bill was rejected | New Era Newspaper Namibia*, available at <https://www.newera.com.na/2017/02/21/why-the-ppp-bill-was-rejected/>, last accessed on 02 March 2017.

commentators,⁷ international observers⁸ and the general public⁹. It is important to state that, the idea of PPPs as a form of investment to protect public interest has been received with mixed feelings in Namibia; it has received both plaudits and criticism which raises interesting questions.¹⁰

It is without doubt, that no country exists without its people or natural legal subjects. The existence of natural legal subjects in a country does not constitute the totality of statehood. The natural legal subjects must realise what Namibia as an industrializing country is trying to offer infrastructure and services to its citizens such as education, healthcare, access to water and sanitation, power and renewable energy, adequate housing and transport. One of the key ways that Namibia can secure these services to its citizens is if they use PPPs¹¹ as a form of investment.

PPP arrangements refer Government's practice of outsourcing its function to private service providers.¹² The contemporary discourse is that PPPs exist in Namibia in different forms¹³ such as "corporate social responsibility", concessions

⁷ Tshabalala, S. 2015. *Quartz Africa; In South Africa, Corruption is a "Public- private partnership" that protesters want broken*. Available at www.qz.com/513090/in-South-Africa-corruption-is-a-public-private-partnership-that-protesters-want-broken-up/ last accessed on 02 March 2017

⁸ International Monetary Fund.2018. "*Technical Assistance Report—Assessing and Managing Fiscal Risks from State-Owned Entities and Public-Private Partnerships*". Available at www.imf.org; last accessed 10 February 2019

⁹ Tshabalala (2015:1).

¹⁰ Dan-Aochoab (2016:1)

¹¹ The term PPP is a legal term of art that may be used in legislation.

¹² Ghobadian, A., O'Regan, N., (Eds) .2004. *Private-public partnerships: policy and experience*. Palgrave Macmillan.12

¹³ Corporate social responsibility is a form of PPP

and co-locations or leases.¹⁴ and recent developments are that they are now regulated by the Public Private Partnership Act,¹⁵ as enacted into law on the 24th March 2017.¹⁶

Further, Namibia has Vision 2030 goals,¹⁷ poverty eradication¹⁸ and other Millennium Development Goals (MDGs) and the Harambee¹⁹ Prosperity Plan²⁰ they wish to achieve. Inadequate resources to finance long-term developments has forced the Government into attracting investments through PPPs as one of the strategies to restore the economy of the country as advocated for by policy makers at the national, regional and international levels.²¹ For Namibia to achieve these goals, it needs to adhere to the global rules on regulating PPPs and most importantly ensure that its national legal framework on PPPs is adequate enough to achieve these goals.

¹⁴ Ministry of health and social services. 2014. *Public Private Partnership framework discussion paper*. available at www.mhss.gov.na; last accessed on 20 February 2019

¹⁵ Public-Private Partnership Act No.4 of 2017.

¹⁶ Namibian Press Agency (NAMPA).2017. Namibian Broadcasting Corporation: *National Assembly passes PPP law*; available at <https://www.nbc.na/news/national-assembly-passes-ppp-bill.3179> Last accessed 31 March 2017.

¹⁷ The country's development path is guided by five-yearly National Development Plans (NDPs). These NDPs stress the importance of investment/development projects to alleviate chronic unemployment, low industrialization, poverty, and income inequality.

¹⁸ The President of the Republic Of Namibia, Dr Hage Geingob together with his government has launched a poverty eradication action plan towards prosperity for all called the Harambee Prosperity Plan 2016/17-2019/20.

¹⁹ The ministry of health offers access to privately donated funds and equipment

²⁰ Harambee Prosperity Plan is Namibia's development programme from 2016 to 2020.

²¹ United Nations.2005.*Rethinking the Role of Foreign Direct Investment*. United Nations Publications. Available at http://unctad.org/en/docs/gdsafrica20051_en.pdf Pg.10, last accessed on 18 February 2017.

PPPs are by no means a novel construction around the globe.²² PPPs have existed in early 1800s in different forms and for different reasons.²³ In 1980s and 1990s PPP were promoted at an international level as a tool for good governance, increasing the legitimacy and effectiveness of multilateral policies.²⁴ What is a novel construction however, are PPPs within the purview of the global foreign direct investment (FDI) platform.

PPPs have a long history in some member states of the European Union (EU),²⁵ whilst being a more recent phenomenon in developing countries like Namibia.²⁶ Although PPPs as a form of investment are a novel construction in Namibia, they have been promoted on various international platforms.²⁷ The World Trade Organisation (WTO),²⁸ the Organization for Economic Cooperation and Development (OECD),²⁹ Southern African Development Community (SADC)

²² The Law Teacher.2018. The Origin of Public Private Partnerships available at:www.lawteacher.net last accessed on 4 July 2018.

²³ In Europe and America, PPP existed in the form of concession agreements for the reasons to develop the infrastructure of their countries such as road developments and modern highways.

²⁴ Pattberg, P. Biermann, F. et al.2012.Public Private Partnerships for sustainable Development Emergence, influence and legitimacy. Edward Elgar Publishing Limited. Cheltenham. Pg.2. Partnerships for sustainable development have been promoted at the Johannesburg World Summit on Sustainable Development (WSSD) and have also been registered with the United Nations Commission on Sustainable development (UNCSD)

²⁵ EU has promoted PPP through Economic Partnership Agreements (EPA) which contain norms on International investment law. European Commission Directorate-General Regional Policy *Guidelines for successful Public Private Partnerships*. March 2003. Available http://ec.europa.eu/regional_policy/sources/docgener/guides/PPP_en P.4.

²⁶ Ministry of Finance.2016. *Namibian Public Private Partnership policy*. Available at www.mof.gov.na/; last accessed on 20 February 2019

²⁷ Such as the World Trade Organisation, WTO.

²⁸ WTO has established systems which contain rules on investments such as Government Procurement, the General Agreement on Trade and Services (GATS), General Agreement on Trade and Tariffs (GATT), Trade Related Aspects of Intellectual Property Rights TRIPS, Trade Related Investment Measures (TRIMS).

²⁹ In 1995, OECD launched negotiations for a Multilateral Investment Agreement encouraged by the establishment of WTO.

Protocol,³⁰ and the African Charter are some of the international and regional organisations as well as instruments that have dealt with PPP.

In recent years investments and private domestic income have become very important drivers of economic growth and employment creation in many developing countries such as Kenya, Uganda and South Africa, with most of their projects concentrated in the renewable energy sector, transport and water and sanitation.³¹ Therefore, efforts to attract investment to developing countries like Namibia have been supported with the view that Foreign Direct Investment (FDI) supplements domestic income, creates employment, supports economic growth, facilitates transfer of skills and technology and helps developing countries to emerge out of the underdevelopment status.³²

The Namibian Government concerns itself with developing viable policies that ought to drive economic growth in the country and the SADC region and beyond. However striking a balance between policy makings, protecting the public interest and ensuring that the public services that have been delivered are affordable and accessible to the ordinary citizen is not always easy.³³ PPP as a form of investment is concerned with the Government sub-contracting its public functions to be carried

³⁰ The SADC Protocol on finance and investments has promoted PPPs.

³¹ Fida, R. 2018. Infrastructure & Africa's development- The PPP Imperative available at blogs.worldbank.org/ppps/infrastructure last accessed on 04 July 2018.

³² Festus Natangwe Nghifwenwa. 2009. *Factors Influencing Investment: A Case Study of the Namibian Economy*. Unpublished LLM Thesis: University of Namibia, p 3.

³³ Payne, G. 1999. *Making Common Ground Public –Private partnerships in land housing*. Intermediate Technology Publications. London. P 10.

out by the private sector such as generating electricity and providing safe water.³⁴ The Government's main focus should thus be on policy making, while their implementation role is passed on to private parties. This is so because, if the public entity concerns itself with policy making and implementation, one or the other duty or function will greatly be compromised.³⁵

It is assumed that investment does not only bring more stable capital inflows but also greater technological know-how, higher-paying jobs, entrepreneurial and workplace skills, and new export opportunities.³⁶ Through this assumption, it is vivid that Namibia can benefit more from PPPs as a form of investment than just capital injection. Namibia has pursued free-market economic discourse with a view to attracting investment.³⁷ This free market discourse can further be carried on by PPPs as a form of investment because PPPs encourage cross-border participation.³⁸ However, the successful furtherance of this discourse can only be achieved once Namibia enacts a plausible and substantive legal regulation around PPPs.

³⁴ Fida (2018;1).

³⁵ UNCTAD(2015) *Annual Report 2015 Delivering On A Sustainable Agenda* Available at:http://unctad.org/en/PublicationsLibrary/dom2016d1ipub_en.pdf last accessed on 03 March 2017 Pg 11.

³⁶ Prasad E et al. 2003. *Effects of financial globalization on developing countries: Some empirical evidence. IMF Occasional Paper 220*. Washington, DC: International Monetary Fund.pg 220.

³⁷ Namibian High Commission .2017. Available at www.nhcdelhi.com last accessed on 19 August 2016.

³⁸ OECD, *Competition issues in Public Private Partnerships*, Available at www.oecd.org last accessed 19 August 2016.

Namibia currently has a PPP Act.³⁹ However, this Act is not adequate to regulate PPPs in Namibia because it excludes key factors necessary for PPPs to succeed such as clear sharing and allocation of risks and public consultations. Regulation usually follows the guidelines of the policy and has to ensure that they are met.⁴⁰ Hence the need to strengthen our PPP regulatory framework by amending key sections in the Act such as introducing promotion of investments and private participation.

If there is no adequate legal regulation around PPPs in Namibia, allocating such a large risk, such as the financial risks associated with infrastructural developments, such financial risks would have to be paid by the ministry of finance from its national budget. The Government would also require to take up further loans to support such funding, the government stands a chance to expose itself further to more complexities, failure, poor service delivery and not reaping the full benefits of investment as they would alternatively have if there existed an adequate regulatory framework for PPPs.

According to research carried out by the World Bank, a legal framework is usually examined by private investors to see its ability to ensure the effectiveness of long-term PPP contracts.⁴¹ Private investors are uncomfortable when issues such as,

³⁹ The PPP Bill was tabled in Parliament in December 2016 and underwent consultations with the National Council.

⁴⁰ Hoekman, B.2 012. *The WTO and Trade in Services volume II*. Edward Elgar Publishing Inc. Cheltenham. p 593.

⁴¹ Hoekman(2012:14).

dispute resolution, taxes, government's risk and support, repatriations of profit, procedures, and amendments bring uncertainty.⁴² A regulatory framework is thus also vital in attracting investment.

Investment plays an extremely important role in any country's economic development. It is therefore imperative to establish a regulatory framework which, while not prejudicing the State's essential interests, will be sufficiently attractive to potential investors; providing them with both credible security guarantees and legal stability, and clear regulations and straightforward, rapid procedures which all lack in the current PPP Act.

To augment domestic savings and investment levels, the Government passed the Foreign Investment Act,⁴³ the Namibia Investment Promotion Act⁴⁴ as a legal framework for attracting investment into the country. The law also established the Namibian Investment Centre (NIC) in the Ministry of Trade and Industry, as the body charged with administering investments, promotion and facilitation of foreign investments in Namibia.⁴⁵ African countries have been urged by the Organisation for Economic Co-operation and Development (OECD) to redesign⁴⁶ their microeconomics, trade and industrial and legal structures to attract investment.⁴⁷

⁴² Ibid.15.

⁴³ Act No 27 of 1990.

⁴⁴ Act No. 9 of 2016.

⁴⁵ Ministry of trade and Industrialisation.2013. *Growth at Home*. Available at www.mti.gov.na>nic last accessed on 19 August 2016.

⁴⁶ Redesign is necessary to avoid: a mix of unsustainable national economic policies, poor-quality services, closed trade regimes, and problems of political legitimacy.

⁴⁷ OECD. 2002. *Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs*. Paris: OECD. Available at

Namibia should be no exception to this redesign and should utilise PPPs projects to make the most of foreign investments.

States are aware that foreign investments are necessary and therefore seek to promote them through avenues such as PPP. Once foreign investors have expressed an interest to invest, their investing must be facilitated. Thereafter, having invested in a State, investors require legal protection. Pursuant thereto, Namibia has taken numerous initiatives to provide for the above. On the evidence outlined above, it is submitted that a binding legal framework exists at a national level thereby protecting, promoting and facilitating investments in Namibia. It is against this background that PPPs should be used as a form of investments because foreign investments in Namibia are well protected and should be utilised to promote PPPs in Namibia.

1.2 Problem statement

In Namibia, PPPs exist and are now regulated by a PPP Act.⁴⁸ The regulatory framework is relevant because it needs to protect the interest of the consumer as an end user. The current PPP framework does not integrate the consumer in the process of PPP, a development which implies that the current PPP Act remains

<https://www.oecd.org/investment/investmentfordevelopment/1959815.pdf>, last accessed on 12 March 2017.

⁴⁸

The recently enacted regulatory instrument used in Namibia, is the PPP Act of 2017.

inadequate. The PPP regulatory framework in Namibia fails to address salient issues that are relevant for PPPs to succeed in Namibia such as, promotion and protection of investments through PPP, involvement and promotion of private sector in the initiation and finalisation of the PPP process, risk allocation and sharing. An adequate regulatory framework is thus salient to outline and deal with some of these issues such as risk sharing, private participation in the PPP process, no PPP Unit established by the Act, outlining its functions and powers, and no interactions of public consultations are made provision for the Namibian citizenry.⁴⁹

It is without a doubt that we need PPPs. Such PPPs must be implemented successfully. As such, emphasis will be placed on the words of the then Minister of Trade and Industry Calle Schlettwein who once stated that: "Such a policy framework might be advantageous for some service provision and for developing Namibia's infrastructure."⁵⁰ It is emphasized that such a partnership can only be successfully implemented if regulated by an adequate and comprehensive legal framework.

Namibia needs a system that can impose obligations, duties and responsibilities to the parties involved while at the same time safeguarding and protecting the public interest of the consumer. Namibia's PPP Act, does not impose obligations, duties and responsibilities on the private sector. It thus fails to safeguard and protect the interest of the public. The PPP Act largely imposes duties and

⁴⁹ A policy can never carry out the duties of an Act or regulatory instrument because it is simply a guiding tool.

⁵⁰ Weidlich, B. 2010. "Public Private Partnership framework planned". *Namibian Newspaper*, page 1.

responsibilities on the public sector, throughout the entire procurement process, the Act sounds like a public procurement Act. The only thing that can impose these duties and responsibilities successfully is the law. That is why I advocate for a substantial legal reform on PPPs in Namibia.

It is trite that human rights have infiltrated every aspect of daily life and this includes trade as the core function of business. Therefore, trade has a key role to play in the promotion of human rights the world over. PPP Act should therefore not deter but promote local and foreign investments as it currently does not

1.3 Research objectives

The objectives that the research wishes to achieve is to highlight the importance of a regulatory framework that governs PPPs and ensure a successful implementation of PPP projects by unpacking the concept of PPP and analysing how foreign investments will impact Namibian Citizens, government and local service providers through PPP.

The research further aims to highlight the importance of ensuring that PPP regulation conforms to national and international instruments by analysing what national and international instruments are applicable to PPPs and investments and how they can ensure that the public interest is protected. Lastly, this research is aimed at highlighting the strengths and weaknesses of the PPP Act by providing lessons that Namibia can learn from countries who have implemented PPP regulatory framework and how Namibia can improve its own PPP Act, to ensure a successful implementation of PPPs in Namibia.

Once the above objectives are met, not only will the dignity and integrity of the people be upheld and maintained if PPP are implemented and executed successfully, the government's objectives to economically emancipate its people, poverty eradication and economic growth would too be achieved.⁵¹

1.4. Research questions

The questions which this research seeks to answer are as follows:

- a) Whether or not the PPP Act, in its current form is adequate or not.
- b) What is meant by PPP and analyse how foreign investments can be achieved through PPP in Namibia and how it will impact Namibian citizens, government and local service providers through BEE?
- c) Which national and international legal instruments are applicable to PPP and FDI in Namibia and how they protect the public interest?
- d) What can Namibia learn from other countries that have implemented PPP such as South Africa and Kenya?

1.5 Hypothesis

⁵¹ 2016. *Harambee Prosperity Plan 2016/2017;2017/2018*. Available at www.po.gov.na; last accessed 03 May 2016.

If PPPs are adequately regulated, consumer services are best taken care of as we are likely to have better compliance and service delivery. However, in Namibia there is no adequate regulation of PPP therefore the possibility of having the public interest protected and consumer services successfully delivered to the end user is diminished.

1.6 *Theoretical Framework*

In the purview of commercial law, there are a number of theories that best suit the legal position as indicated in the hypothesis. When reference is made to consumer protection, there exists the law and economic school of thought that best suit the concept of consumer protection. This study will focus on the law and economic school of thought and briefly discuss the other relevant theories such as the positive and normative theory and Hayek's theory of nomos, taxis and cosmos. The law and economics school of thought has been selected because, "the impact of economics on law is enormous and a realistic approach cannot neglect this fact."⁵²

The origins of this school of thought, is for some authors deeply rooted in the article by Ronald Coase and his theorem.⁵³ It is Coase who has shown how much

⁵² Golecki M. et al (2002) German Working Papers in Law and Economics Volume 2002 Paper 13 *economics of law as a jurisprudential theory* University of Lodz. Available at <http://www.bepress.com/gwp> last accessed on 18 February 2017 P. 1.

⁵³ Coase, R.H. „(1960) *The Problem of Social Cost*”, *Journal of Law and Economics* 3), p. 1.

economy depends on a sound legal system, especially on acknowledgement of private rights and liabilities.⁵⁴

Different authors have simplified the rationale of the economic analysis of law as alluding to the implementation of economics to legal decision-making processes.⁵⁵

The principle above draws a distinction between positive and normative theory of law. The Positive theory claims that law, at least common law, is in fact based on efficiency principle and that judges, even if using other terms such as justice, still treat efficiency enhancement as the main purpose of law.⁵⁶ The normative theory states that if some parts of the legal system are not promoting efficiency, such rules should be changed to reflect the efficiency-enhancing attitude of the whole legal system.⁵⁷ Both the normative and positive theories are applicable to this discourse. If we regulate against PPPs, regulation will have an adverse impact on trade, in particular foreign investments. Namibia has proposed a New Equitable Economic Empowerment Framework (NEEF Bill),⁵⁸ which can be viewed as a deterrent to attracting foreign investments and potentially threatening foreign investments. Zimbabwe came up with an Indigenization and Economic Empowerment Act⁵⁹ which negatively impacted on foreign investments. All these

⁵⁴ Golecki et al (2002:2).

⁵⁵ Golecki et al (2002:3).

⁵⁶ About the notion of economic man (resourceful evaluating maximizing man) in social and economic sciences.

⁵⁷ Golecki (2002:17).

⁵⁸ NEEF, aims to promote economic empowerment for its previously disadvantaged Namibians. Economic empowerment may be organized in the following forms of ownership: public, private, joint public-private, cooperative, co-ownership, and small-scale family owned.

⁵⁹ This act was signed into law by the President of Zimbabwe, Robert Mugabe in September 2008 and aims to promote and encourage indigenous people of Zimbabwe to take control and ownership of 50% of foreign owned companies. The act defines an indigenous

regulations can be seen as “not promoting” efficiency as far as PPPs as a form of foreign investments is concerned because both regulations promote local investors and the need for the indigenous local people to take control of their economies.

Every theory has critics. Critics help us to better understand and develop theories. One of the strongest critics of the normative and positive theories is Ronald Dworkin.⁶⁰ Dworkin points out that the initial allocation of rights cannot be instrumental i.e. based on efficiency principle because the argument is deteriorated by its circularity.⁶¹

The law and economics school of thought is described to be the most powerful teaching in today as it completely dominates and has a significant presence in other fields.⁶²

Law seems to rule the economic system, thereby shifting some sectors of economic activity between market, firm and government by virtue of the level of the foreign investor. To this end, the regulation I am advocating for is not rigid regulation because, rigid regulation will scare away investors.⁶³ The current PPP Act is rigidly regulated as it does not favourably promote local investors' interests as far as the local investors' participation in the PPP projects is concerned. If the

Zimbabwean as “any person who before the 18th of April 1980 was disadvantaged by unfair discrimination on the grounds of his or her race, and any descendant of such person.”

⁶⁰ Golecki (2002:14).

⁶¹ Golecki (2002:14).

⁶² Kronman A.T. 1980. *Wealth Maximisation as a Normative Principle*”, Journal of Legal Studies Volume 9, Number 2 p. 227. Available at <http://www.journals.uchicago.edu/doi/abs/10.1086/467637> last accessed 30 March 2017

⁶³ OECD.2011. *Policy Framework for investment user's toolkit*. Available at investment.oecd.org; last accessed on 09 July 2018.

local investors are deterred from investing in Namibia, this takes us back to the point we are trying to move away from where the Namibian Government does the policy making and the implementation. We can also not afford to go back to allowing the Government to deal with the policy making and the implementation because not only do they not have the skilled personnel, they also do not have the capital required, relevant technology and suitable machinery. The Nature of the law around PPPs in Namibia is seemingly highly centred on a pro poor approach, for the benefit of the Namibian indigenes.⁶⁴ This appears to be a rather theoretical approach not suitable for the Namibian person as the PPP Act together with the PPP Policy, cannot be used to reduce the economical deadlock⁶⁵ of land, property, energy, water and drought currently being experience in the Country.⁶⁶ The local investors are largely left out of the PPP process and there does not exists a lack of constructive interactions between the public sector, the private sector and the Namibian indigenes to enable the public sector and the private sector to reduce some of the challenges faced by the Namibian citizens such as poverty, drought and property woes⁶⁷. This is so because, according to Coase, law thus creates the kind of framework of economic system.⁶⁸

This legal theory creates certainty about the legal position which is the limit of the instrumental purpose oriented legal decision-making process.⁶⁹

64 Dan-Aohoeb (2016:16)

65 Dan-Aohoeb (2016:16)

66 Dan-Aohoeb (2016:16)

67 Dan-Aohoeb (2016:1)

68 Coase (1960:1)

69 Golecki (2012:8)

According to Hayek *nomos, taxis* and *cosmos* theory⁷⁰, *thesis* and *nomos* should not be blend but rather separate since there is a real threat of domination of public law over private law, because the state has a natural inclination to growing and broadening the scope of the public regulation.⁷¹ This assumption is however difficult to reconcile with contemporary structure of legal order, where the norms of private and public law interfere between themselves.⁷² Hayek refers to *thesis* at the rules governing public law and *nomos* as the rules governing private law.⁷³

Thus, one may sum up that according to Hayek's theory, legal system plays double role: it provides expectation of behaviour of economic agents and it ensures enforcement of legal obligations.

1.7 Significance of the research

The significance of this research is woven in the fact that the research covers a very broad spectrum of our law. On the one hand it covers the law of contract and partnership and on the other hand it covers national and international law. It further

⁷⁰ Hayek F.A., 1973. *Law, Legislation and Liberty. A New Statement of the Principles of Justice and Political Economy*, vol. 1: Rules and Order 1973, vol. 2: The Mirage of Social Justice 1976, vol. 3: The Political Order of a Free People 1979, London: Routledge and Kegan Paul. Pg 39.

⁷¹ Hayek (1973:39)

⁷² Hayek (1973:39)

⁷³ Hayek (1973:132)

covers the fundamental human rights of an individual and to what extent these fundamental human rights are to be protected.

PPP is a relatively new concept to Namibia through the drafting of the National PPP Policy, enactment of the PPP Act and the establishment of the PPP directorate under the ministry of finance the issue of regulation and implementation of PPP as a form of investment has not yet been exhausted as opposed to the issue of foreign investments and PPP itself.

In the past fifteen years, FDI has been the dominant form of capital flow in the global economy, even for developing countries.⁷⁴ PPP are often promoted as a solution to deadlocked intergovernmental negotiations, to ineffective treaties and overly bureaucratic international organizations, to power-based state policies, corrupt elites and many perceived problems of the sustainability transition⁷⁵ and are rarely promoted as a form of FDI. PPPs are not only useful in solving the state's problems, but can largely be used as a beneficial tool if the appropriate legal environment is created by the state to attract the right FDI for purposes of PPP.

1.8 Scope of the research

⁷⁴ Nunnenkamp P. 2002. Kiel Institute of World Economics. *Foreign Direct Investment in Developing Countries: What Economists (Don't) Know and What Policymakers Should (Not) Do!* CUTS Centre for International Trade, Economics & Environment. Bani Park, India p.6

⁷⁵ Pattberg et al (2012:1)

This research is predominantly interested in the sub-set of PPPs as a form of investment and how it can be successfully achieved through the PPP Act, while protecting the public interest.

1.9 Methodology

This study will adopt the qualitative research methodology.⁷⁶ This type of research will be carried out by doing desk top research, internet searches and case analysis with South Africa and Kenya that will address the challenges that Namibia faces in implementing PPP as a form of investment.

1.10 Literature review

“Regulation provides assurance to the private partner that the regulatory system includes protection from expropriation, arbitration of commercial disputes, respect for contract agreements, and legitimate recovery of costs and profit proportional to the risks undertaken” (Jamali, 2004).⁷⁷

This discussion will depict the necessary and relevant literature around PPPs as a form of local and foreign investment.

⁷⁶ Oslen, W. 2004. “Triangulation in Social Research: *Qualitative and Quantitative methods can really be mixed.*” in Holborn, M. *Developments in Sociology*. Ormasik: Causeway Press, p 2.

⁷⁷ Ministry of Home affairs. (2013). *Public-Private Partnerships in developing countries, a systematic literature review*. Ministry of Home Affairs, Netherlands. P 39

According to the European Community-Southern African regional Strategy Paper, Namibia's PPP maturity is very low.⁷⁸ PPP projects are complex, long-term partnerships. PPP projects work well only if government monitors and enforces performance of well-drawn contracts.⁷⁹

According to the views put forth by the World Bank, PPPs are difficult to deliver in an unstable policy environment. It is therefore, a necessity to establish a clear policy framework that helps both the public and the private entities to understand the core rationale of PPPs and how the public entity should go about their implementation.⁸⁰

According to Abdumanapova, if the host state does not respect/protect the rights of its own citizens, it may not be possible to expect a foreign investor operating in its territory to be obliged to honour the obligations either.⁸¹ One of the key ways to protecting the rights of the citizens is by having a stable legal framework and abiding by the existing international laws.

Weidlich opines that, the PPP concept, which is relatively new to Namibia, will involve substantial transfer of project life cycle risks to the private entity. "The

⁷⁸ European Community-Southern African Region, Regional strategy paper 2012, available at https://eeas.europa.eu/sites/eeas/files/east_africa_2008_2.pdf, last accessed 02 June 2016 p 12

⁷⁹ Ministry of Home affairs (2013:12)

⁸⁰ Regional Strategy paper (2012:13)

⁸¹ Abdumanapova.A. 2005. *The notion of Socially Responsible Investment in the context of State Investor Agreements: human rights or economic returns*. LLM dissertation in International Human Rights Law. University of Essex, page 21.

public entity will retain a significant role in a project either as the main purchaser of the service or as the main enabler⁸² the protection of foreign investment is a means toward this end, and is by no means the only one.

The World Bank, in a study commissioned in 2006 found the potential foreign investors to Namibia were deterred by the increased business risk due to the uncertainty surrounding incentives approval, which tends to counteract any positive incentive effect.⁸³ The existence of a robust legal framework can suppress some of this uncertainty.

Lomus postulates that, “to succeed, a country must have the laws and institutions required to prove itself to international financial markets as a secure destination for their money.”⁸⁴ The PPP is based on three essential elements – a contractual arrangement, substantial risk transfer, and outcome based financial rewards to the private entity.⁸⁵

Lomus further comments that similarly, there is no point in building a school, hospital or road unless the project also imposes maintenance and operating obligations throughout the contract term. A private entity contractor will do exactly what the contract requires and no more.⁸⁶ Consequently, the contract must be

⁸² Weidlich, B. 2016. *Insight magazine: Go PPP go!*. Admin. Windhoek
⁸³ Namibia: Investment Legislation, Incentives, and Institutions Study done in 2006 by the World Bank Group/Foreign Investment Advisory Service.
⁸⁴ Lomus, J. 2016. *Lessons from the UK*. The Namibian Newspaper, p 10
⁸⁵ Lomus (2016:10)
⁸⁶ Lomus (2016:10)

thoroughly considered and firmly negotiated. In that process, the PPP unit's expertise and advice is crucial.⁸⁷

Payne further opines, that failure for a state to ensure that a regulatory and administrative framework is adapted, would render partnerships more of a public relations exercise than a transformative government role.⁸⁸ This is so because PPP as a form of local and foreign investment brings to a state more than just capital; it invests beyond the intended purposes of providing a public function.

Payne further contends that any system which depends upon the perpetuation of outmoded and unrealistic regulation runs the risk of institutionalizing corruption and inefficiency. The PPP Act as that which we have in Namibia is not sufficient to curb inefficiency, and corruption. Thus, we submit to Payne's views above because as much as a policy is a giant, it is a toothless giant. In Payne's final analysis, a stable and transparent framework is necessary to give all parties confidence and encourage good governance.⁸⁹

In the final analysis and in concurrence with Yona,⁹⁰ observed that in order to promote foreign investment there is a need to promote a proper regulatory framework that enhances law and order and that can encourage foreign

⁸⁷ Lomus (2016:10)

⁸⁸ Payne(1999:10)

⁸⁹ Payne (1999:217)

⁹⁰ Yona, L. 2011. *International Finance for Developing Countries*. Author House: United Kingdom, p 78.

investments inflows. Where there are no proper laws, Namibia will condemn itself to an economy without much need foreign investment.

Hoekman is of the view that, service negotiations between public and private interactions are very complex and subject to constant scrutiny. There is therefore a need to establish channels that will be the communication to the society and the service negotiation to pre-omit misunderstandings and consolidate national positions.⁹¹ We support these views as the only way these channels can be created will be through a regulatory framework that sets out the procedures of consultation.

I agree with the views of Payne when he describes the relationship of Public private partnership actors to be a marriage of convenience between partners speaking different languages. This view is key because this marriage needs to be regulated and governed by some form of regulatory framework that will ensure that in the end, the partners get to speak the same language.⁹²

According to Cotula, a country needs a robust national legal framework in place that will assist in determining how prepared the country is to maximise on the outcomes of the investment.⁹³ Cotula further reminds us that, 'in addition to

⁹¹ Hoekman, B.2012. *The WTO and Trade in Services volume II*.Edward Elgar Publishing Inc.Cheltenham. p 397

⁹² Payne (1999:8)

⁹³ Cotula, L. 2010. *Investment contracts and sustainable development: How to make contracts for fairer and more sustainable natural resource investments*, IED, London. P. 13

protecting foreign investments, international treaties affirm that the fundamental human rights and internationally recognised environment principles that must be respected in project implementation”⁹⁴

Grimsey et al opined that, “due to the fact that some PPPs engage many parties and their resources over a long term, there is a need to have support from suitable legislation, firmly embedded in the legal structure of the country”. This is so because parties want to eliminate some ambiguities and expect clear legal statements and an effective PPP implementation tool.⁹⁵

According to a PPP project regulation guide⁹⁶ investors always examine the host country’s legal framework to test its ability to ensure effectiveness of long-term PPP. Thus, the need to strike a balance between a fixed and flexible legal framework that is able to respond to the PPP developments, the investor’s preference for clarity, certainty and detail in the legal framework.⁹⁷

Lastly, Dr Keyter, contradicts himself by emphasizing that generally, PPPs may be implemented in Namibia in the current environment as his analysis indicates. It is not an impending need to have an enacted legislation, although it may assist.⁹⁸ He

94

Cotula (2010:15)

95

Grimsey et al (2004:235)

96

The World Bank, ICA Secretariat et al.2009.*Attracting investors to African Public –Private Partnership* : A project regulation guide. Washington. The World Bank.p.14-15

97

The World Bank(2009:15)

98

Dr. Keyter, 2009. *Effectiveness and Efficiency of a Public-Private Partnership Arrangement: A Case Study of Perceptions on the Ward Contractor System In the City of Windhoek, Namibia*

further, in the same breath states that, it is generally acknowledged that the current regulatory regime is a significant impediment to the creation of an active market for PPPs, and progress on legislation is crucial for further developing PPPs in the country. Very little sense can be drawn from the former statement.

Moura et al opined that FDI also brings problems and difficulties and not only investment, that is why, the host countries authorities have a key role in creating the conditions that allow for the leverage of the positive effects or for the reduction of the negative effects of FDI on the host country's economic growth.⁹⁹

Large amounts of investments can be secured by host states if that host state has a predictable legal system, which among other things respects the sanctity of contracts and facilitates a level playing field. ¹⁰⁰This is so because recent world crises have magnified perceptions of regulatory risks and greater attention is now being focused on the legal framework and the rule of law.¹⁰¹

Espirages *et al*, pointed out the need for the government to establish an enabling legal environment for the foreign investor and also establish itself as a credible partner with appropriate regulatory and oversight mechanisms. This is a very

⁹⁹ Moura R., Forte R. (2010) *The effect of foreign direct investment on the host country-economic growth, empirical evidence- FPI Working papers, Research work in progress*, Universidade do Porto. P 1

¹⁰⁰ Report of the Working Group of the Capital Markets Consultative Group (2003) *Foreign Direct Investment In Emerging Market Countries* available at <https://www.imf.org/external/np/cm/cg/2003/eng/091803.HTM> and last accessed February 2017 p. 5

¹⁰¹ *Ibid.*(2003:5)

important requirement because sectors of the Government are usually administered by decentralised local authorities that have to deal with major private participants.¹⁰²

Different authors have put their thoughts and feelings to paper and have made their positions clearly known with regards to PPP or FDI, perhaps not PPP as a form of FDI. These positions have however, left an open gap of knowledge that needs to be filled with regards to the regulation of PPP as a form of FDI in Namibia and the protection of Public Interest.

1.11 Limitations

There are inevitable limits to the practicality of any research especially in an area as complex as PPP.¹⁰³ The research, aims to explain why there is a need for a substantive legal reform around the legal framework of PPP. What limits the full potential and extent of explaining the need for a legal reform around this study is unavailability of literature in Namibia. There exists vast literature on the topic of PPPs. The literature that exists on the topic is written in the context of PPP for sustainable development instead of in the context of PPP as a form of investment

¹⁰² Espigares JLN, Torres E.H *Public-Private Partnerships as a new way to deliver Healthcare services*. University of Granada P. 2

¹⁰³ The World Bank, ICA Secretariat et al. 2009. *Attracting investors to African Public –Private Partnerships*. Washington. The World Bank.p.5

or PPP for sustainable development achievable through investments.¹⁰⁴ Important pioneering work has been done with regards to the subject of PPP; however, the current literature available has not theoretically and empirically evolved.¹⁰⁵

1.12 Ethical considerations

This work is purely a desk top research in which all primary and secondary sources used will be referenced. As such no individual or group interviews/questionnaires will be used as an instrument s of research with the objective of holding discussions concerning any topics or issues that might be sensitive, embarrassing or upsetting. No criminal or other disclosures requiring legal action and having potential adverse effects, risk or hazards for research participants will be made in the respect of the study. There is therefore no need for arrangements to be made in respect of insurance and /or indemnity to meet the potential legal liability of the University of Namibia for harm to participants arising from the conduct of the research.

1.13 Conclusion

This chapter gave a general background of the research. It introduced the research and provided an outline of leading scholars who have written on the subject amidst the limitations. It further identified the research question, problem statement, significance of the research, theoretical framework, ethical considerations in the purview of PPP and the scope of the research.

¹⁰⁴ Pattberg, P. Biermann, F. et al. 2012. Public Private Partnerships for sustainable Development Emergence, influence and legitimacy. Edward Elgar Publishing Limited. Cheltenham. P 1

¹⁰⁵ Pattberg (2012:4)

1.14 Chapter outline

The research will be segmented as follows;

Chapter 1 will introduce the research paper. It will provide the problem statement, research questions that will be answered in this research, it will outline the objectives of this research. It will further discuss the literature review, the methodology that will be used to carry out this research and the limitations associated with carrying out this research. Chapter 1 will also provide the ethic consideration and introduce the hypothesis.

Chapter 2 will give the historical background of PPP in Africa and around the world. It will provide a general overview and evolution of PPP around the World. Specific discussions will refer to the evolution of PPPs in Europe, Africa, United States and Australia. This discussion will give the historical context of PPP, with and understanding that discussion of PPP trend on the continent does not reflect the history of PPP of individual countries within those continents.

Chapter 3 will unpack the concept of PPP. It will discuss the meaning of PPP, the different types of PPP, advantages and disadvantages of PPP and how this concept differs from Privatisation.

Chapter 4 will critique the PPP Act. By focusing on the objectives of the PPP act, and looking into their practical implementation. The objectives will not all be discussed singularly, but reference will be made to them. The objectives that stand out for the purpose of this discussion is the sharing of risk, the promotion of private participation and public interest.

Chapter 5 will give a comparative analysis for specific jurisdictions in Africa, namely South Africa and Kenya. These two jurisdictions stand out as they both have adopted PPP legislation. South Africa is also ranked as having one of the best managed PPP systems in the world. Kenya too has a plausible PPP regulation; it is however not without flaws or difficulty in implementation.

Chapter 6 will give a conclusion, and recommendations

CHAPTER 2

HISTORICAL CONTEXT OF PUBLIC PRIVATE PARTNERSHIP

*The use of private innovation and finance in public infrastructure is not a new concept but rather an old tradition experiencing a new revival.*¹⁰⁶

2.1 Introduction

¹⁰⁶ Osborne, S. 2002. *Public-private partnerships: Theory and practice in international perspective*. Routledge. Pg 12

The concept of PPP has existed for thousands of years. It is thus important to trace its origins and how it has evolved over the years. This chapter will provide general overview of how PPP originated and evolved over the years. The chapter will also focus on the continental origins of PPP specifically focusing on Europe, United States, Australia and Africa.

2.2 General overview of the origin and evolution of PPP

The beginnings of partnership between private and public sectors can be traced as far back as the Roman Empire two thousand years ago.¹⁰⁷ A network of postal stations was developed to accompany the vast expansion of the highway system under the Roman regions.¹⁰⁸ The postal stations, which were actually small communities centered around large stables, warehouses, workshops, hotels and military barracks, were constructed and managed by a private partner for a five year period, sometimes including maintenance of associated highway, under a contract referred to as “*manceps*” and awarded by municipalities under competitive bidding.¹⁰⁹ The Romans also notably conceded the construction and operation of ports and inland harbours.¹¹⁰

¹⁰⁷ PPIAF.2009. Overview of PPP Experience. available at <http://ppiaf.org> last accessed on 09 March 2017

¹⁰⁸ PPIAF (2009:34)

¹⁰⁹ PPIAF(2009:34)

¹¹⁰ Grimsey, D., & Lewis, M. 2007. *Public private partnerships: The worldwide revolution in infrastructure provision and project finance*. Edward Elgar Publishing. United Kingdom p.235

However, this procedure disappeared with the fall of the Roman Empire and reappeared only during the middle Ages for the construction of new fortified towns and the occupation of new lands in the south western region of France during the 12th and 13th centuries.¹¹¹ Occupancy contracts for fortified towns concede whole villages to their occupants under collective emphyteutic contracts which compelled the occupants to improve their village.¹¹² Moreover, the practice of concessions on activities under monopoly in the community (mill, press, baker, bridge etc.) as well as their associated tolls, generally on bridges and highways, in which the concessionaire paid a proportion of his income to the community to finance new works, was well-established under medieval custom.¹¹³

During the 16th and 17th centuries, European sovereigns, and particularly in France, began much more expansive public works concession programs in canal construction, road paving (actual road concessions), waste collection, public lighting, mail distribution and public transportation.¹¹⁴

The 19th century industrialization in Europe brought rapid urbanization and expansion of public networks in transport (railways, tramways, metropolitan), water

¹¹¹ PPIAF (2009:34)

¹¹² PPIAF (2009:34)

¹¹³ PPP - definition, origin and evolution, available at, http://ppp4krakow.net/About_PPP/Definition,_origin_and_evolution/ last accessed on 09 March 2017.

¹¹⁴ Wagenvoort, Rien (2010), *Finance Infrastructure in Europe: Composition, evolution and crisis impact*, available at, http://www.eib.org/attachments/efs/eibpapers/eibpapers_2010_v15_n01_en.pdf, last accessed 09 March 2017.

supply and sewerage and energy. This expansion, achieved largely by private entrepreneurs, marked the golden age of concessions in Europe.¹¹⁵

The creation of railways took place under “concessions” in all European countries.¹¹⁶ In the North and the South, liberal ideas spawned by the French revolution and particularly the principle of free enterprise played an influential role in the systematic choice of concession. This period was one of weak administrative structures in all fields of delegated public action.¹¹⁷

The 20th century European wars reversed the trend. The role of the State was increased by wars, both in preparing for them as well as in dealing with their consequences.¹¹⁸ The disruption of countries, economies and long-term contracts was strongly felt in all European countries. Rare before 1914, inflation and its effect upon contracts became clear during the Great Depression of 1929.¹¹⁹ The ensuing creation of the welfare state increased the role and resources of post-war states substantially.¹²⁰ As a result of economic turmoil and contractual standby or damage during war years, concessions in many fields were cancelled and rarely re-established. The notion of state-owned companies was born to avoid the financial vulnerability of traditionally very long-term contracts, a movement which grew throughout Europe during the post-war periods, and consequently the size of

¹¹⁵ PPIAF (2009:34-35)

¹¹⁶ PPIAF (2009: 35)

¹¹⁷ Dr Rory Hearne (2009), *Origins, Development and Outcomes of Public Private Partnerships*, available at http://www.combatpoverty.ie/publications/workingpapers/2009-07_WP_PPPsInSocialHousingRegeneration.pdf, last accessed on 09 March 2017.

¹¹⁸ PPIAF (2009:35)

¹¹⁹ PPIAF (2009: 35)

¹²⁰ PPIAF (2009:35)

the civil service sector increased considerably.¹²¹ In addition, with influence from communist ideology, collectivism was considered as a viable and desirable alternative to free market principles.¹²²

Thus, after World War I, new public infrastructure was mainly designed, constructed and financed from public funds and prior to 1982 there was very limited private financing of transport infrastructure in developing or transition countries.¹²³

One major exception in Europe was the tolled motorway construction programs in France and Spain from the 1960s financed by private consortia, mainly contractors and banks.¹²⁴ However, the economic shocks from the oil crises of the 1970s resulted in financial difficulty for many of the concession companies with many being subsequently nationalized - in Spain five out of twelve companies and in France, three out of four.¹²⁵

In the USA, PPPs have played a much less prominent role in the development of transport infrastructure.¹²⁶ Although private investors built the canals and railroads that transformed the country in the 19th century, the modern highways that were built in the 1930s and 1940s were built by public companies held by state and local governments. Tolls were preferred in the eastern part of the country while western states used revenues from a dedicated gasoline tax to finance untolled

¹²¹ PPIAF (2009:35)

¹²² *Overview of PPP experience: historical context*, available at, <https://ppiaf.org/sites/ppiaf.org/files/documents/toolkits/highwaystoolkit/6/pdf-version/1-21.pdf>, last accessed on 09 March 2017

¹²³ PPIAF (2009:35)

¹²⁴ PPIAF (2009:35)

¹²⁵ PPIAF (2009:35)

¹²⁶ PPIAF (2009:35)

“freeways”.¹²⁷ From the 1950s, the creation of the national Highway Trust Fund, funded by a national fuel tax of four cents a gallon, allowed the construction of the interstate highways system.¹²⁸

Throughout the industrialized and developing world, there has been a renewed move to liberalization and privatization of infrastructure activities from the 1980s and increasing dramatically into the 1990s.¹²⁹ The first decade of the years 2000 has seen some consolidation of certain PPP programs, stagnation of others and expansion in new markets, notably in Asia. Several developing countries have participated in this movement, pioneering improved forms of PPP.¹³⁰ Market leaders among emerging economies such as Chile, Brazil, China, Hungary and, recently, India have gone further in introducing the private sector in infrastructure development and maintenance than many industrial countries.¹³¹

Simultaneously, initiatives aiming at outsourcing maintenance activities to private firms are being implemented in Africa, Asia and to a larger extent in Latin America.¹³²

The above overview/ discussion indicate that the evolution of PPP differs from continent to continent. Therefore, in order to fully understand, the historical background of PPP fully, it is crucial to look at the origin and evolution of it on a

¹²⁷ PPIAF (2009:35)

¹²⁸ PPIAF (2009:35)

¹²⁹ Hodge, G. A., & Greve, C. (2007). Public-private partnerships: an international performance review. *Public administration review*, 67(3), 545-558.

¹³⁰ PPIAF (2009:35)

¹³¹ PPIAF (2009:35)

¹³² PPIAF (2009:35)

continental level. The following section will discuss the historical, origin and evolution of PPP in Europe, Asia, US, Australia and Africa.

2.3. Continental origin and evolution of PPP

2.3.1. Europe

The PPP sources in Europe specifically might be found in the concession contracts.¹³³ The history researchers show that as early as 1438, the French nobleman Luis de Bernam was granted a river concession to charge the fees for goods transported on the Rhine.¹³⁴ Another well-known literature example of the concession of this type was the one that had been granted in 1792 in France to the brothers Perrier for water distribution in Paris.¹³⁵ Soon the French legal practice formed the so-called public works concession (*concession de travaux publics*).¹³⁶ The broad participation of private capital in public investments has found widespread use in the period since the turn of the seventeenth and eighteenth centuries to the end of the nineteenth century, when construction of infrastructure facilities (water channels, roads, railways) in Europe and later in America, China and Japan was funded by private sources under concession contracts.¹³⁷

¹³³ Krakowie .2011. The origin and development of PPP in Europe, available at, http://ppp4krakow.net/About_PPP/Definition,_origin_and_evolution last accessed on 09 March 2017

¹³⁴ Krakowie (2011:1)

¹³⁵ Krakowie (2011:1)

¹³⁶ Krakowie(2011:1)

¹³⁷ Krakowie (2011:1)

After the period of expanded government intervention in the infrastructure sector during the period from the late nineteenth century to the 1970s of the twentieth century the transformation of the infrastructure into market-oriented economy became very popular in the 1980's and 1990's. In 1992 the UK began to implement Private Finance Initiative (PFI) a comprehensive program of the government, which was to cover the state-owned enterprises.¹³⁸ Under PFI, the public sector became a purchaser of services provided by an entrepreneur, while the latter provided the necessary fixed assets for their implementation.¹³⁹

One of the leading models of the infrastructure management and development under PFI have become contracts that were involving the transfer to a private party of the obligation to carry out the infrastructure project or the provision of public services together with the simultaneous transfer of specific risk onto that entrepreneur.¹⁴⁰ In return, the investor would obtain a temporary (usually 15-30 years) right to use the facility or service, with the possibility of charging fees to external users or simultaneous payments from the budget of a public entity.¹⁴¹ The largest projects carried out under this scheme were the Channel Tunnel, the Second Severn Crossing and the Channel Tunnel Rail Link.¹⁴² Under the PFI scheme the task in the areas such as roads, subways, prisons, national defence,

¹³⁸ Krakowie (2011:1)

¹³⁹ Krakowie (2011:1)

¹⁴⁰ Krakowie (2011:1) This commonly came to be known as privatization of public goods and functions to the private Sector

¹⁴¹ Blanc-Brude, F., Goldsmith, H., & Valila, T. (2007). Public-private partnerships in Europe: An update. Available at http://www.eib.org/attachments/efs/efr_2007_v03_en.pdf last accessed 09 March 2017

¹⁴² Blanc-Brude et al (2007:4)

health care, housing for the administration and computerization are successfully implemented.¹⁴³

In France, a popular model for establishing cooperation between public entities and private partners has, in the 1990's, become the delegation de service public institution. This model is characterized by raising revenues from fees of users (possible to be achieved, after all, payments charged to a public body) of the infrastructure managed and maintained by the concessionaire (depending on the model of law - also construction infrastructure).¹⁴⁴ Concessions and PPP integrated gradually into the legal systems of other European Union countries. The most of the duplicated ones were the British and the French models. The contracts of this type for construction and infrastructure management in countries such as Germany, Italy, Spain, Portugal, the Netherlands, Scandinavian countries, Ireland, Greece, Czech Republic, Bulgaria, Romania, Hungary reached hundreds of millions of Euros, but often also concern small, local projects.¹⁴⁵

2.3.2. United States of America (USA)

PPP agreements are not new in the United States. In 1990, FHWA's Special Experimental Project Number 14 (SEP-14) authorized the use of innovative contracting techniques, including design-build and, as reported by the FHWA PPP Guidebook, 42 states, the District of Columbia, Puerto Rico, and the Virgin Islands have the ability to deliver transportation projects through design-build.¹⁴⁶ Private

¹⁴³ Blanc-Brude et al (2007:5)

¹⁴⁴ Krakowie (2011:1)

¹⁴⁵ Krakowie (2011:1)

¹⁴⁶ Buxbaum J.N., Ortiz I.N 2009. Public Sector Decision making for Public-Private Partnerships: Synthesis of Highway Practice, available at

sector participation in road development dates back to the 1790s, with the development of the Philadelphia and Lancaster Turnpike in Pennsylvania.¹⁴⁷ The private role in highway development, however, diminished over time. Toll facilities were developed by public turnpike authorities after World War II.¹⁴⁸

In addition, with the development of the Interstate Highway System and a higher reliance on gas taxes for road development, private sector involvement in highways was mainly through either design contracts between state Department of Transport (DOTs) and architectural/engineering firms or construction contracts.¹⁴⁹ In the late 1980s, states began to explore the potential for increased private sector participation in highway development.¹⁵⁰

In Virginia, the Dulles Greenway was authorized by legislation in 1988, and developed under one of the first PPP agreements in the United States. This project was the precursor of the Virginia Public-Private Transportation Act of 1995 (PPTA), one of the first state PPP-enabling legislations. Some of the early PPPs for development of toll roads in the 1990s, such as the Pocahontas Parkway in Virginia and the Southern Connector in South Carolina, included the creation of 63-20 non-profit corporations to issue debt. California enacted PPP legislation in

<https://books.google.com.na/books?id=jmeSmr0n6RMC&pg=PA9&lpg=PA9&dq=Modern> last accessed on 03 march 2018

¹⁴⁷ FHWA PPP Core Toll Concession Contract guide .2014. available at https://www.fhwa.dot.gov/ipd/pdfs/p3/model_p3_core_toll_concessions.pdf last accessed 09 March 2017

¹⁴⁸ BuxBaum et al: (2009:9)

¹⁴⁹ BuxBaum et al: (2009:9).

¹⁵⁰ FHWA PPP Core Toll Concession Contract guide .2014. available at https://www.fhwa.dot.gov/ipd/pdfs/p3/model_p3_core_toll_concessions.pdf last accessed 09 March 2017id.).

1989, allowing for four pilot PPP projects. Two, the SR-91 Express Lanes and the South Bay Expressway, were developed under the Build-Transfer-Operate model with private finance.¹⁵¹ On the federal side, Special Experimental Project Number 14 (SEP-14) was created in 1990, allowing states to experiment with innovative contracting options, such as cost-plus-time bidding, lane rental, and the use of warranties for certain project elements.¹⁵²

Subsequent transportation acts, such as ISTEA¹⁵³, TEA-21,¹⁵⁴ and SAFETEA-LU¹⁵⁵ created pilot programs and innovative finance tools that added flexibility for implementation of tolling and also encouraged states to pursue private participation in transportation infrastructure.¹⁵⁶ For example, the Transportation Infrastructure Finance and Innovation Act of 1998 (TIFIA) was created to leverage federal resources and stimulate private capital investment by providing credit assistance for large transportation projects. The precursor to the creation of this credit assistance program was the Alameda Corridor.¹⁵⁷ Recent PPPs that have been approved for TIFIA loan assistance include the refinancing and funding of the Pocahontas Parkway (for a future extension), SH-130 Segments 5 and 6, SR-125, and the I-495 Capital Beltway high-occupancy toll (HOT) lanes. Interest in the

¹⁵¹ Brian P., & Brandon D. 2006. Design –build in Transportation: Quality and innovation available at http://www.nossaman.com/Files/6734_BGP_BJD_Dateline_4.1.06.pdf last accessed 14 March 2017.

¹⁵² Brian P. (2006:2).

¹⁵³ BuxBaum et al (2009:9).

¹⁵⁴ BuxBaum et al (2009:9).

¹⁵⁵ Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU)

¹⁵⁶ FHWA.2005. *A summary of Highway Provisions in SAFETEA-LU*. Available at <https://www.fhwa.dot.gov/safetealu/summary.htm> last accessed 13 March 2017

¹⁵⁷ FHWA (2005: 1)

TIFIA pro- gram has increased recently owing to relaxed rules emerging from SAFETEA-LU, coupled with the recent credit crunch that has raised significantly the cost of private debt, making TIFIA credit assistance more attractive.¹⁵⁸ SAFETEA-LU amended the Internal Revenue Service Code to allow tax-exempt Private Activity Bonds (PAB) for privately developed and operated highway and freight facilities, authorizing up to \$15 billion through 2009.¹⁵⁹

As of March 2008, \$3.3 billion had been allocated to various projects, including the Port of Miami Tunnel in Florida (availability payment concession) and the I-495 Capital Beltway in Virginia (HOT lane concession), among other projects.¹⁶⁰ FHWA created the Special Experimental Program 15 (SEP-15), which allows for experimentation on new PPP approaches to project delivery, focusing primarily on four major components including contracting, compliance with environmental requirements, right-of-way acquisition, and project finance.¹⁶¹

Although many of the toll roads developed in the late 1990s included private participation, some, including the Pocahontas Parkway and Southern Connector, were financed through tax- exempt bonds, TIFIA assistance, and commercial debt, with no equity from the private sector.

¹⁵⁸ FHWA.2017. *Centre for finance support: Project Profile: Capital Beltway High Occupancy Toll (HOT) Lanes (I-495)* available at https://www.fhwa.dot.gov/ipd/project_profiles/va_capital_beltway.aspx last accessed on 14 March 2017

¹⁵⁹ FHWA (2017:1)

¹⁶⁰ FHWA (2017: 1)

¹⁶¹ FHWA.2017. *Centre for finance support: PPP* Available at <https://www.fhwa.dot.gov/ipd/p3/> last accessed 14 March 2017

PPPs in recent years have involved private equity investment in DBFO (e.g., Texas SH-130 Segments 5 and 6 and Virginias I-495 Capital Belt- way HOT lanes) and long-term leases (e.g., Chicago Skyway and Indiana Toll Road), and some of the toll roads financed in the 1990s through non-profits have been refinanced in recent years through transfers to private investors (e.g., Pocahontas Parkway and Dulles Greenway, and the Northwest Parkway toll road outside Denver) after failing to meet traffic and revenue projections.¹⁶²

2.3.3. Africa

In Africa, perhaps unsurprisingly, South Africa has led the way with a successfully implemented PPP programme. It began regulating PPPs in 2000 and has since successfully closed a large number of PPP projects across all sectors. Highlights include the N4 toll road from Witbank to Maputo in Mozambique in 1997, the Inkosi Albert Luthuli Hospital project in 2001 and the Gautrain Rapid Rail Link project in Johannesburg.¹⁶³ Elsewhere in Africa, the PPP model has successfully rolled out in Kenya across various sectors. Early success includes the Jomo Kenyatta International Airport Cargo Terminal in Nairobi and the Mombasa Grain Terminal both in 1998, the Malindi Water Utility in 1999 and the Kenya- Uganda Railway project in 2006.¹⁶⁴

¹⁶² FHWA (2017:1)

¹⁶³ Nagayasu, J. (2002). *Does the Long-run PPP Hypothesis Hold for Africa? Evidence from a Panel Cointegration Study. Bulletin of Economic Research*, 54(2), 181-187.

¹⁶⁴ Nagayasu (2002:181)

In Uganda, the Uganda-Kenya rail project from Mombasa to Kampala was considered a landmark rail project for Africa when it closed in 2006, although it later ran into significant troubles.¹⁶⁵ The similarly controversial 250MW Bujagali Hydropower Plant at the Bujagali Falls Dam was the first large hydropower PPP project seen in Africa.¹⁶⁶

In Nigeria, early projects to launch under the PPP model included the controversial Murtala Muhammed Domestic Airport project in Lagos, the Tinapa business and leisure resort in Cross Rivers State and numerous port terminal concessions have also been granted. However, there have been a number of failed PPPs, including most notably the Lagos-Ibadan expressway project.¹⁶⁷

In Namibia, PPP projects have been in existence since 1996 with the formation of the Northern Electricity power utility which was contracted by the Ministry of Regional and Local Government and Housing to operate state owned assets in densely populated northern region.¹⁶⁸ The Northern Electricity project agreement was later not renewed by the Electricity Control Board to form a joint venture between National utility company, Nampower and several local and regional governments.¹⁶⁹ The unwillingness of the Electricity Control Board was influenced

¹⁶⁵ Ngayasu (2002:181)Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Bahmani-Oskooee, M., & Gelan, A. (2006). Testing the PPP in the non-linear STAR Framework: Evidence from Africa. *Economics Bulletin*, 6(17), 1-15.

¹⁶⁸ The world Bank.2018. PPP KNOWLEDGE LAB:NAMIBIA. Available at <https://pppknowledge lab.org/countries/namibia> last accessed on 29 July 2018

¹⁶⁹ Farlam, P.2005. Assessing Public-Private Partnerships in Africa. Available at <http://www.oecd.org>, last accessed on 25 June 2018 pg 34

by political commitments and the local authorities having been extended the responsibility by law in 2000 to provide electricity.¹⁷⁰

PPP projects in the early 2000s in Namibia, were mainly for the provision of electricity to the Rehoboth town through Reho-Electricity¹⁷¹ and the water and sewerage reticulation system in Windhoek called the Goreangab Water Plant.¹⁷²

Another notable PPP that was entered into in the year 2000 in Namibia is the Walvis Bay Corridor Group which consists of a diverse range of stakeholders including ministries and the private sector associations involved in the transport and logistics industry.¹⁷³

Namibia adopted a PPP policy in 2015.¹⁷⁴ This policy sets out guidelines for PPP project development in the Country. The PPP policy was not adopted without criticism from the public. The finance ministry of the Republic of Namibia, in adopting the PPP policy, indicated that this policy would be adventitious to Namibia in the provision of services and infrastructural development¹⁷⁵. The local trade analysts indicated that the PPP policy will not defuse the land, water, energy and drought problems in Namibia as there lacks constructive interactions necessary to

¹⁷⁰ Farlam (2005:35)

¹⁷¹ The World Bank (2018:1)

¹⁷² The world Bank (2018:1)

¹⁷³ Schade,K.2017. Public-Private Partnerships- What can we expect? Available at www.ean.org.na last accessed on 28 June 2018.

¹⁷⁴ Shade (2017:1)

¹⁷⁵ Weidlich (2010:1)

resolve these problems.¹⁷⁶ Further, that the PPP policy is ore theoretical rather than practical approach.¹⁷⁷

In 2017, PPPs around energy and power gained momentum with the formation of Ejuva One & Ejuva Two solar plant, Rosh Pinah PV plant and Karibib power plant.¹⁷⁸

2.3.4. Australia

PPP use in Australia can be broadly separated into two periods: pre-2000 and post-2000. The establishment of Partnerships Victoria within the Victorian Department of Treasury and Finance in 2000 marked a watershed in PPP implementation and development. This reform resulted in a number of significant outcomes. First, the term 'public private partnership' was formally adopted to cover the range of PPP models that had previously been separately identified by acronyms.¹⁷⁹ Second, the delivery of core state-subsidised hospital and corrective services was removed from private sector provision in PPP arrangements.¹⁸⁰ Third, Victoria began developing a suite of comprehensive PPP-specific steering

¹⁷⁶ Dan-Aohaeb,2016, *Namibia' Pubic Private Partnership policy analysis*. The Namibian Newspaper. Pg 16

¹⁷⁷ Dan-Aohaeb (2016:16)

¹⁷⁸ The World Bank (2018:1)

¹⁷⁹ Prior to 2000, the two most common PPP models were the 'build, own, operate' ('BOO') model and the 'build, own, operate, transfer' ('BOOT') model. In this period, Australian PPPs included delivery by private consortia of core hospital and corrective services. Loan Council rules, which changed in 1996, were influential in PPP packaging in the period from 1980 to 1996: see Linda M English. 2016. Public Private Partnerships in Australia: An overview of their nature, purpose, incidence and oversight. Vol(29(3) available at www.workspace.unpan.org/srtes/internet/documents/UNPAN96648.PDF last accessed on 18 February 2018 Guthrie, 'Driving Privately Financed Projects in Australia: What Makes Them Tick?' (2003) 16 *Accounting, Auditing and Accountability Journal* 493.

¹⁸⁰ In the 1990s, Australia outsourced the delivery of core medical and correctional services management in PPP hospitals and prisons. In the United Kingdom ('UK'), by contrast, health services have never been privatized. However, correctional services have always been contracted out in private finance initiative ('PFI') prisons.

mechanisms. These mechanisms were based on the United Kingdom's ('UK') private finance initiative ('PFI') model¹⁸¹ which established a set of procedures to govern the pre-contractual decision-making stage leading to the signing of a PPP contract, and monitoring and oversight in the construction and operating stages.¹⁸²

PPP policies in other Australian jurisdictions are based on the Victorian policies. In 2005, the federal and all State governments formally agreed to harmonise their approach to PPP development and implementation.¹⁸³

Common to all PPPs is an arrangement where a private consortium contracts with a public sector agency to finance, design and construct (or refurbish) a facility under a time and cost-specific contract. Following construction, which is undertaken and financed by the consortium, services are provided under a long-term contract. A revenue stream is used to repay debt, fund operations, deliver contracted services and provide a return to investors. Payments are not made until the asset is commissioned and operational.¹⁸⁴

¹⁸¹ Department of Treasury and Finance, Victoria, Partnerships Victoria (2000) Partnerships Victoria [http://www.partnerships.vic.gov.au/CA25708500035EB6/WebObj/Policy/\\$File/Policy.pdf](http://www.partnerships.vic.gov.au/CA25708500035EB6/WebObj/Policy/$File/Policy.pdf), last accessed on 09 Mar. 17.

¹⁸² Linda M English, 'Using Public-Private Partnerships to Achieve Value for Money in the Delivery of Health Care in Australia' (2005) 1(1/2) *International Journal of Public Policy* 91.

¹⁸³ Hughes, D., Ludlow m., & Allen L. 2005. 'PPP Reforms to Allay Concerns', *Australian Financial Review* (Sydney), 9 June, PG 3.

¹⁸⁴ Department of Treasury and Finance, Victoria, *Practitioners' Guide* (2001) Partnerships Victoria [http://www.partnerships.vic.gov.au/CA25708500035EB6/WebObj/PVGuidanceMaterial_PracGuide/\\$File/PVGuidanceMaterial_PracGuide.pdf](http://www.partnerships.vic.gov.au/CA25708500035EB6/WebObj/PVGuidanceMaterial_PracGuide/$File/PVGuidanceMaterial_PracGuide.pdf) at 15 October 2006.

2.4. Conclusion

This chapter indicated that the use of private innovation and finance in public infrastructure is not a new concept but rather an old tradition experiencing a new revival.¹⁸⁵ This chapter further indicated that the trend of PPP development, origin and evolution, differs from continent to continent. It is for this reason that the pattern of PPP development in various selected continent has been discussed. However, the discussion of PPP trend on the continent does not reflect the history of PPP of individual countries within those continents.

CHAPTER 3

THE CONCEPT OF PPP

“PPPs are not ends by themselves, but means towards ends, it is therefore essential and critical to determine their objectives from the outset.”¹⁸⁶

¹⁸⁵ Osborne, S. (2002). *Public-private partnerships: Theory and practice in international perspective*. Routledge.

¹⁸⁶ Mfunwa, M., et al. 2015. Public-Private Partnerships For Social And Economic Transformation In Southern Africa: Progress And Emerging Issues1: Regional Conference On Building Democratic Developmental States For Economic Transformation In Southern

3.1. Introduction

There is no specific legal meaning ascribed to the term PPP.¹⁸⁷ There is therefore, no wrong or right definition of the term PPP. PPPs are broad, narrow, comprehensive and sometimes misunderstood.¹⁸⁸ There is however elements that should be evident in any PPP definition which are: *'the public and private entities working together in some way to carry out a function'*.¹⁸⁹

The World Bank has mapped out a definition for PPP to be:

*"A long-term contract between a private entity and a government agency for providing a public asset or service, in which the private entity bears significant risks and management responsibility"*¹⁹⁰

The Organization for Economic Co-operation and Development (OECD has comprehensively defined PPPs to be:

"An agreement between the government and one or more private partners (which may include the operators and the financiers) according to which the private partners deliver the service in such a manner that the service

Africa. Pretoria. <http://www.developmentalstatesconference.com/wp-content/uploads/2015/07/28-Zebulun-Kreiter.pdf> Last accessed on 02 November 2016. P 8.

¹⁸⁷ World Bank, ICA Secretariat et al.2009.*Attracting investors to African Public –Private Partnership* : A project regulation guide. Washington. The World Bank.pg 7

¹⁸⁸ Mfunwa, M., et al. 2015. P 7

¹⁸⁹ The World Bank (2009:7)

¹⁹⁰ World Bank Institute (2012). "Public-Private Partnerships Reference Guide", <https://wbi.worldbank.org/wbi/Data/wbi/wbicms/files/drupalacquaia/wbi/WBIPPIAFPPReferenceGuidev11.0.pdf> last accessed on 02 November 2016.

delivery objectives of the government are aligned with the profit objectives of the private partners and where the effectiveness of the alignment depends on a sufficient transfer of risk to the private partners.”¹⁹¹

Namibia’s national PPP policy defines PPP as follows:

“A PPP is a contract between a government institution and a private entity for the provision of public infrastructure assets and/or services for use, either directly or indirectly, by the public through investments made by and/or management undertaken by the private entities for a specified time period.”¹⁹²

It is prudent to mention that, from the three definitions above, it would make no sense for this dissertation to define PPP in isolation without having objectives in sight. A clear and concise meaning of PPP however, give specific direction as to the execution, rationale, scope, objectives and implementation of projects, this should never be taken for granted. This dissertation does not wish to redefine or establish a new definition for PPP as there is no specific project or objectives to align such a definition to. The PPP Act, has not assigned a specific definition to the terms “PPP”, it has however, defined a PPP agreement and a PPP project.¹⁹³

This chapter will discuss the concept of PPP in Namibia. In doing so, it will first look at what PPP should not be confused for. Secondly it will discuss the forms

¹⁹¹ OECD Public Governance Committee (2008). “Public-Private Partnerships: In Pursuit of Risk Sharing and Value for Money”, Working Party of Senior Budget Officials, <http://www.oecd.org/mena/governance/41767985.pdf> last accessed on 02 November 2016

¹⁹² Ministry of Trade and Industry, Namibia Public Private Partnership Policy, 2012, Section 4, p.21

¹⁹³ PPP Act No. 4 of 2017

and types of PPP, the benefits of PPP, the regulatory and policy framework around PPP in Namibia. Lastly this chapter will discuss how the international community has responded to the promotion of PPP in Namibia. This will not be discussed extensively as it is not the research's main focus.

3.2. PPP is not privatisation

Regardless of how policy makers wish to define PPP, it is important to note that this definition should never overlap with the term privatization. PPPs are not privatization, even if privatization contains a public element. Privatization is when the delivery and accountability of public services is wholly or partly transferred to the private entity.¹⁹⁴ The difference between the two concepts is outlined below.

3.2.1. PPP

With PPP, the public entities remain accountable for delivery of public services to the citizens. However, both PPP and Privatization may be subject to legal regulation.¹⁹⁵ PPP is however, a form of privatisation because privatization creates a new partnership between the private and public entity. This link of PPP in privatization is very obvious.

¹⁹⁴ The World Bank (2009:7)

¹⁹⁵ The World Bank (2009:7)

3.2.2. Privatization

Meredith M. Brown as cited by Likosky M.¹⁹⁶ defined privatization as “the transfer of ownership of enterprises from state to the private entity”. Likosky adds that, this transfer is however, rarely complete or permanent.¹⁹⁷ The common characteristics that both PPP and privatization are made of is the fact that their main objective is for the public entity to link with the private entity to regulate or produce a project in a risk-taking manner.

3.3. Forms and types of PPP

While the assumption that the public entity is responsible for the delivery of basic services remains deeply entrenched in many countries. The methods by which these services are created, procured and delivered are changing. This reflects a greater need and desire for the public entity to work with and harness the benefits of the private entity. There are different forms and types of PPP. However, this paper will only focus on the form of PPP arrangements that involve the public entity transferring the delivery of its commitment to provide public services to the private entity, the public entity accepting such a commitment as a form of investment and the public entity potentially harnessing benefits from such investments:

¹⁹⁶ Likosky M.B (2006) Law, Infrastructure and Human Rights. Cambridge University Press. Cambridge p.18

¹⁹⁷ Likosky M.B (2006:18)

3.3.1. Concession PPP

These forms of PPP arrangements require the private entity to invest in designing, building, financing and operating and assume the risk of demand to use an infrastructure asset owned by the public entity for a long period between 25-30 years.¹⁹⁸ If the concession is a low level investment, this is referred to as a franchise.¹⁹⁹ The citizens are required to pay a user charge defined by the concession contract or concessionaire.²⁰⁰ A Namibian example of this arrangement is the Windhoek Goreangab Operating Company (PTY) Ltd (WINGOC) water supply system at the city of Windhoek, which is a system that rehabilitates and recycles refuse water for consumption by the Windhoek citizens who pay a charge to access such. This is a concession PPP where the company contracted to provide this essential need²⁰¹ is based and manages the system in Netherlands. This arrangement has existed and still exists since 1969.²⁰²

3.3.2. Availability- Based PPP

There is no difference in the arrangement and set-up of concession agreements and availability-based agreements except in the method of how investments will be recovered. Availability-based PPP, the private entity designs, builds, finances and operates for purposes of providing a public service and the public entity

¹⁹⁸ The World Bank (2009:9)

¹⁹⁹ The World Bank (2009:9)

²⁰⁰ The World Bank (2009:9)

²⁰¹ The essential need is water

²⁰² Jimenez B., Asano T. 2008. *A scientific and technical report no 20, Water Reuse: An international survey of current practice, issues and needs.* IWAR Publication. UK. P 449

instead of the citizens pay for the service to be secured and delivered to the citizens.²⁰³ The demand and risk and affordability remains with the public entity. This type of arrangement is quite common. A Namibian example of this type of arrangement is how the ministry of Health and social services, has since independence, secured certain healthcare necessities through PPP such as, Maintenance of certain hospital machinery, equipment, repairs and provision of spare parts, security services and catering services.²⁰⁴

3.3.3. Transitional PPP

Transitional PPP are currently and most common arrangement used in most developing countries.²⁰⁵ Transitional arrangements clearly indicate the public entity and private entity involvement and contribution to the PPP.²⁰⁶ There are common types of PPP schemes²⁰⁷ such as Build-Operate Transfer (BOT),²⁰⁸ Build-Own-Operate Transfer (BOOT)²⁰⁹ Design-Build-Finance and Operate (DBFO).²¹⁰

²⁰³ The World Bank (2009:10)

²⁰⁴ Ministry of Health and Social Services. 2014, *Directorate: Policy, Planning and human resources Development*. Available at www.mhss.gov.na, Retrieved 28 April 2016.

²⁰⁵ The World Bank (2009:11)

²⁰⁶ The World Bank (2009:11)

²⁰⁷ Some sectors have their own technical terms that describe the form of Scheme. For instance, in Namibia, Nampower, a public electricity utility has PPP schemes defined as IPP (Independent Power Producers)

²⁰⁸ This scheme is popular and actively promoted by the United Nations International Development Organization(UNIDO)

²⁰⁹ These are usually used to construct a new part of a service.

²¹⁰ The World Bank (2009:8)

Most developing countries want to move away from this type of PPP because of its common character to increase the risk and pressure placed on government. This is due to the fact that, transitional PPP are complex in nature as they involve more jurisdictions and multiple procurement authorities.²¹¹ The more decentralized the procurement and management of PPP is from the public entity, the more challenges will arise for the private entity and the government as the private entity cannot solve jurisdictional matters without overlapping on the mandate of the public entity.²¹²

3.4. Benefits of PPP

There are beneficial reasons as to why the Public would contract with the private entity. However, dissertation is not focused on the pros and cons of PPP in general but rather on the benefits of PPP as a form of FDI. If a PPP project is built and designed properly and supported by a sound legal framework, the following benefits can be harnessed by the state and its nation through PPP as a form of FDI:

3.4.1. Financial Benefits

This perception has been questioned by economists as they do not seem to economically understand how it is easier to source capital from the private entity

²¹¹ The World Bank (2009:11)

²¹² The World Bank (2009:11)

when the government can access the greatest borrowed funds free of insurance and minimal interest.²¹³ The minister of Finance, Calle Schlettwein presented a 2016/2017 mid-year budget review policy statement to cabinet stating the precarious state of affairs the country's finances are in. In some PPP arrangements, the private entity absorbs some of the financial risks from the public entity, enabling the public entity to manage its finances better, decrease budget deficits, debt and administrative costs. PPP can make any country's balance sheet appear to be solvent if managed properly.

3.4.2. Improvement in the procurement of public services

Majority of PPP are secured through bids. The successful bidder is usually the one that can offer the best services at the most competitive price. Public entity can thus absorb quality and efficient services that will be provided by the private entity. This accommodates the private sector to participate in the procurement process and transfer their skills, technology and human capital. In the event of foreign investors procuring these services, an opportunity ought to be created for the foreign investors to partner up with local investors as a growth incentive, skills and technology transfer technique.

²¹³ Hart., O. (2003) *Incomplete Contracts and Public Ownership: Remarks, and an Application to Public-Private Partnerships*. The economic journal accessed from <http://onlinelibrary.wiley.com/doi/10.1111/1468-0297.00119/full> retrieved 01 November 2016

3.4.3. Infrastructure development

Infrastructure development through PPP's are one of the key reforms proposed by the Minister of Finance as a vehicle to enable Namibia to escape the precarious situation the countries finds itself in, financially.

3.5 Namibian policy and regulatory framework

Article 98 (1) of the Namibian Constitution reads: "The economic order of Namibia shall be based on the principles of a mixed economy with the objective of securing economic growth, prosperity and a life of human dignity for all Namibians".²¹⁴

Prior to the implementation of the PPP policy in Namibia, governments ministries and their agencies or utilities already had PPP arrangements at their levels specific to their objectives only. The following legislation/ instruments are examples and need to be borne in mind when drafting or enacting a generic PPP regulation. This is so because, PPP do not advance in isolation, there are too many factors to consider.²¹⁵

The Ministry of Regional and Local Government, Housing and Rural Development in Namibia, has defined the Namibian Governments definition of PPP as follows:

²¹⁴ The Namibian Constitution, 1990

²¹⁵ Axis Consulting Group. 2013. Public Private Partnerships Country Paper. Submitted to SADC3. Wehrheim.p8

“Public-Private Partnership describes a range of possible relationships between public and private actors for the cooperative provision of municipal services. It therefore offers alternatives to full privatisation by combining the social responsibility environmental awareness and public accountability of the public entity, with the finance technology, managerial efficiency and entrepreneurial spirit of the private entity”²¹⁶

3.5.1. PPP Policy

The Cabinet approved the public-private partnership policy in Namibia in 2012. This was a step in the right direction for the government as it is an assurance as to the commitment the government has towards ensuring, securing and protecting the public interest and human rights.²¹⁷ Namibia has labelled PPP as an integral part of its infrastructural development.²¹⁸ The PPP policy was the foundation in as far as regulating PPP is concerned.

The Policy, amongst other salient elements, outlines key principles as to the establishment, implementation and management of PPP. The principle most relevant to this paper is the protection, safeguarding and promotion of public interest. The policy advocates for the design and implementation of PPP to focus on serving public interest. Affordability, accountability, value for money, transparency, risk allocation, and output orientation are other key principles to be considered when establishing and implementing PPPs.

²¹⁶ The Ministry of Regional and Local Government, Housing and Rural Development
²¹⁷ Ministry of Trade and Industry, Namibia Public Private Partnership Policy, 2012, p.1
²¹⁸ Republic of Namibia (2012). “*Namibia’s Fourth National Development Plan*”, available at http://www.npc.gov.na/?wpfb_dl=37, retrieved on 17 March 2017

Further, the Policy has established a PPP Unit within the ministry of finance whose functions and mandate includes but is not limited to advising line agencies, overseeing vetting and bidding process, agreement and feasibility

3.5.2. PPP Act

The Republic of Namibia has received funding from the African Development Bank to finance the Institutional Strengthening for Public-Private Partnerships (ISPPP) Project.²¹⁹ The principal objectives of this project are to (a) Provide capacity building, technical assistance and advisory services to assist the Government of Namibia in the operationalization of the PPP framework; (b) Attract private investment in infrastructure and other strategic areas of the economy; and (c) enhance budget, cash and public debt management capacity.²²⁰

PPP legislation²²¹ is has been passed as law by the National Assembly after rounds of stakeholder consultations have already taken place. The PPP Act was discussed at the Cabinet Committee on Legislation (CCL) and passed on to legal drafting and subsequently to the Attorney General's office (AG).²²².

²¹⁹ General procurement notice. 2015. Institutional Strengthening for Public-Private Partnerships
http://www.afdb.org/fileadmin/uploads/afdb/Documents/Procurement/Project-related-Procurement/GPN_-_Namibia_-_Institutional_Strengthening_for_Public-Private_Partnerships_%E2%80%93_10_2015.

²²⁰ (Ibid.).

²²¹ PPP Act No. 4 of 2017

²²² Ministry of Finance.2016. available at <https://www.ean.org.na/wp-content/uploads/2016/03/Public-private-partnershipsand-role-in-funding-energy-infrastructure-Saurabh-Suneja-Ministry-of-Finance-EnergyConf2015.pdf> last accessed 2 November 2016

A detailed analysis of the PPP Act is discussed in chapter 5 of this dissertation.

3.6 PPP Unit

The Public Private Partnerships Directorate (i.e. the 'PPP Unit') at the Ministry of Finance is tasked with the core mandate of facilitating private entity investment and management expertise for development of Public Private Partnership (PPP) projects. The PPP Unit is responsible for providing guidance to other public entities in preparation and taking to market credible PPP projects, capacity building in the area of PPPs, and review of project documentation submitted by various government offices / ministries / agencies for transaction approvals at key stages of a PPP development.

The PPP Unit being fairly new is relatively small and currently has 7 employees including the Director of the Unit. In January 2016 the Unit advertised requesting for expression of interest from reputable consulting companies to provide transaction of advisory services for affordable housing PPP Project.²²³ The capacity of this unit to ensure PPP projects are successfully executed is however questionable. The Unit, needs to be governed by an Act that can outline the duties, composition and processes to be carried out by the Unit, which is currently not provided for in the PPP Act,

²²³ The Government of Namibia has received funding from the African Development Bank (AfDB) towards the Institutional Strengthening for a Public-Private Partnerships Project (ISPPP), and intends to apply part of the funds towards transaction advisory services for development of a pilot PPP project in the country.

3.7 PPP on an international level

One of the main focus of a study conducted by the International Monetary Fund, (IMF) is the improvement of a legal framework that will solidify regulations to make them more favourable towards a sound implementation of PPPs in Namibia.²²⁴ This focus to date remains relevant

The Canadian International Development Agency (CIDA) has actively promoted PPP in Namibia and has to date spend millions of dollars to this effect. CIDA stated that:

“To develop public-private partnerships training programmes that will be taught in local institutions through the region. In Southern Africa, public-private partnerships are an important part of encouraging foreign investments in the region and promoting greater social and economic equity”.²²⁵

3.8 Conclusion

In conclusion, although it is evident that the concept of PPP in Namibia has been resisted many times, it safe to state that, the PPP concept can only be beneficial. Everything discussed above, even that which is already operational like the PPP Unit, needs to be governed by legislation. This is to avoid the efforts already imparted in the promotion of PPP in Namibia being a waste.

²²⁴ Ministry of Trade and Industry, Namibia Public Private Partnership Policy, 2012, p.2
²²⁵ Ruiters G.2004. The age of commodity: Water privatization in Southern Africa.Routledge.

CHAPTER 4

THE PUBLIC- PRIVATE PARTNERSHIP ACT, (ACT NO 4 OF 2017): A CRITICAL APPRAISAL

4.1. Introduction

A Public-Private Partnership (PPP) Act²²⁶ (hereinafter referred to as the Act) was passed as law by the National Assembly²²⁷ and signed into law by the President on the 09th of June 2017. This Act will regulate all processes and policies regarding PPP projects.²²⁸ One of the thorny and thought-provoking aspects pertaining to the time at which the PPP Act²²⁹ was tabled in the National assembly is that, the tabling was done at a time when the government was struggling to fund infrastructure projects.²³⁰

It is against this background that this chapter will seek to provide an in-depth analysis of the PPP Act's scope and outline; the impact it will have on the Namibian economy and the black economic empowerment agenda; and the impact it will have on foreign direct investment before coming to a contextualized conclusion.

²²⁶ Public Private Partnership Act, (Act No 4 of 2017)

²²⁷ Namibian Broadcasting Corporation available at <https://www.nbc.na/news/national-assembly-passes-ppp-bill.3179> last accessed 31 April 2017

²²⁸ PPP role in funding energy infrastructure available at <https://www.ean.org.na/wp-content/uploads/2016/03/Public-private-partnershipsand-role-in-funding-energy-infrastructure-Saurabh-Suneja-Ministry-of-Finance-EnergyConf2015.pdf> last accessed 2 November 2016

²²⁹ This bill was tabled on the 14th November 2016.

²³⁰ Ndapewoshali Shapwanale, (2017) Parliamentarians blast PPP Bill: published on 08 February 2017 .The Namibian Newspaper, Windhoek, Namibia

The general principle in law is that, an Act of law will have a binding effect.²³¹

Therefore, the PPP Act requires compliance with all procedure and substantive requirements as outlined therein. Its applicability to PPP projects will be different from the current PPP policy that currently exists, which only serves as a guiding tool, with no binding effect. Laws are ordinarily governed by policy.²³² Policies outline the aims and objectives of a certain ministry, and may also necessitate to passing legislation, as witnessed in the PPP law making process.²³³

This means that PPP projects that are undertaken need to comply with all requirements²³⁴ set out in the Act thereto as it will be used as authority in any competent court of law, in disputes alleging noncompliance or irregularities of any PPP project undertaken.²³⁵

The lawmakers need to be applauded for initiating the process to regulate PPPs in Namibia, however, this initiative does not come without challenges such as the issue of risk sharing, the procurement process, and the involvement of the private sector as will be discussed in this chapter. PPPs are very complex, broad and

²³¹ Legal Assistance Centre: How laws are made: LAC, available at <http://www.lac.org.na/projects/huricon/Pdf/howlaws.pdf>, last accessed on 7 February 2017

²³² The Policy and law making process available at <http://www.etu.org.za/toolbox/docs/govern/policy.html> last accessed on 20 November 2017.

²³³ Ibid. The Policy and law making process

²³⁴ Some of the requirements that PPP projects should meet are that: 1. There project should be undertaken by a public and private entity, for the purpose of carrying out a public function. 2. The risk should be optimally shared, 3. There are compulsory bidding stages that the private entity is exposed to, undertaken by the public entity, 4. Previously disadvantaged Namibians should be given preference

²³⁵ Legal Assistance Centre, How laws are made: LAC, available at <http://www.lac.org.na/projects/huricon/Pdf/howlaws.pdf>, last accessed on 7 February 2017

difficult to successfully implement.²³⁶ It is therefore, very important to draw a contraposition between the strength of the regulatory framework²³⁷ and its effective practical implementation.²³⁸

It is on this premise that the discussion below will be centred on the objectives of the Act to ensure that the research does not incorporate ideas that are contrary to the objectives of the Act. This chapter will analyse the PPP Act, with specific attention to how the act promotes private sector participation in PPP projects, the advancement of the principles of transparency and probity, public participation and public interest.

This is the most important chapter of this research, as it will provide answers to research questions outlined in chapter one.

4.2. Analysis of the Public-Private Partnership (PPP) Act

The PPP Act, as well as the PPP policy of Namibia seeks to achieve the following objectives:

- a) promote private sector participation in the provision of public services through public private partnership projects;²³⁹**

²³⁶ The Economist Intelligence Unit: (2015). *Evaluating the environment for public-private partnerships in Africa: The 2015 Infrascope*. EIU, London. (P.10)

²³⁷ The regulatory framework in this instance will be the PPP Act.

²³⁸ The Economist Intelligence Unit (2015:10)

²³⁹ Section 2(a) of the PPP Act No 4 of 2017

Private sector participation is key in the PPP process because PPP arrangements were mostly driven by limitations in public funds and or constraints on the national budget to provide public needs, services, functions and to increase the quality and efficiency of public services.²⁴⁰ Private sectors are perceived to have access to finance and are driven by profit, hence the pressure to provide quality services. It is therefore important to promote the private sector involvement in the provision of public services and functions.²⁴¹

b) enable private sector investment in the provision of public infrastructure assets or services;²⁴²

There exists a great potential for the supply of infrastructure services will create a bottleneck to developmental growth of the country.²⁴³ One of the ways the Government can ensure that this inherent challenge is overcome, is by enabling the private sector to invest in the provision of infrastructure assets or services.²⁴⁴

c) to create frameworks and ensure oversight and governance on projects selected for development through the public private partnership mode;²⁴⁵

²⁴⁰ European Commission.2016.Policy guidelines on successful Public-Private partnerships. European Commission, last accessed on 20 November 2017 from http://ec.europa.eu/regional_policy/sources/docgener/guides/ppp_en.pdf p.7-8

²⁴¹ Ibid, p8-10.

²⁴² Section 2(b) of the PPP Act No 4 of 2017

²⁴³ Harris, C. (2003) Private Participation in Infrastructure in Developing Countries: Trends, Impacts, and Policy Lessons, <http://web.mit.edu/urbanupgrading/waterandsanitation/resources/pdf-files/Harris-PrivateParticipation.pdf> Last accessed on 20 November 2017. Pg 2-3

²⁴⁴ Ibid pg 2.

²⁴⁵ Section 2(c) of the PPP Act No 4 of 2017

The success of PPP projects largely requires an effective and controlled framework to ensure that the rules and principles of the legislation is being applied and correctly.²⁴⁶ It is therefore, imperative for the economic, political, legal and social frameworks around PPP to be sound.

d) enable the creation of adequate institutional capacity for processing and regulating public private partnership projects;²⁴⁷

Public awareness is key throughout the PPP cycle, from initiation to completion of a PPP project. The public needs to be engaged and to be actively consulted on factors such as relative costs, benefits and risks of the PPP project to enable them to act as watch dogs monitoring service quality.²⁴⁸ These public engagement and consultations can only be realised if the political leadership and institutional framework has set responsibilities for government to define and pursue strategic goals.²⁴⁹

e) ensure fairness, transparency, equity and competition in the process of awarding public private partnership projects;²⁵⁰ and

The Competition Act of 2003²⁵¹ establishes the legal framework to “safeguard and promote competition in the Namibian market.” There ought to be synergies

²⁴⁶ Ibid, pg 6

²⁴⁷ Section 2 (d) of the PPP Act No 4 of 2017

²⁴⁸ OECD (2012) Recommendation of the Council on Principles for Public Governance of Public-Private Partnerships; retrieved from <https://www.oecd.org/governance/budgeting/PPP-Recommendation.pdf>, last accessed on 30 June 2017. Pg 4

²⁴⁹ OECD(2012:4)

²⁵⁰ Section 2 (e) of the PPP Act No 4 of 2017

²⁵¹ The Competition Act 2 of 2003

between the Competition Act and the PPP Act. Currently, the PPP Act is silent. It is reported that, although corruption in Namibia is not as high compared to other African countries, it is quite common and the legislation in place to curb corruption, these legislations are not consistently applied.²⁵² It is therefore important for the Public Entity to ensure the integrity of the procurement system is upheld by guarding against corruption. It is also very important to ensure the Private sector realises value for money in these projects, otherwise it will be difficult for the Public entity to lure the private entity to actively participate in PPP projects.

f) provide for principles, framework and guiding procedures to assist public entities during the initiation, preparation, procurement, management and implementation of public private partnership projects.²⁵³

Accountability is key in any setup, and PPP projects are no exception. It is therefore imperative, that the PPP Act, ensures prudent procurement processes, clear and transparent channels are in place to ensure that PPP projects are enforced by officers that are equipped with the right skills to initiate and implement PPP projects.²⁵⁴

²⁵² GAN Business Anti-corruption Portal.2017. Namibian Corruption Report. Last accessed on 19 November 2017 from <http://www.business-anti-corruption.com/country-profiles/namibia>

²⁵³ Section 2 (f) of the PPP Act

²⁵⁴ OECD(2012:4)

4.2.1 The application of the PPP Act

The application of the PPP Act is not well-defined and can be easily misinterpreted.

This Act applies to:

- a) the initiation, preparation, procurement, management and implementation of public private partnership projects.²⁵⁵

This Act does not apply to the procurement of goods, works or services contemplated in the Procurement Act.²⁵⁶ Below, is an extensive discussion of the application of the PPP Act.

The application of the act is not extended beyond what is stated above. The simplicity and specificity are plausible, however, the implementation of the application of the Act can be debateable. The debate will emanate from the Fact that the act does not apply to goods, works and service procured under the Public Procurement Act.²⁵⁷ The PPP Act regulates partnerships created between a private entity and a public entity, in this instance, the public entity's procurement is holistically covered under the Public Procurement Act.²⁵⁸

The overlap explained above, causes great concern for issues such as black economic empowerment, which is a clear objective of the Public procurement

²⁵⁵ Section 3 (1) of the PPP Act

²⁵⁶ Section 3 (2) of the PPP Act

²⁵⁷ Act No. 15 of 2015

²⁵⁸ Section 3 of the Public Procurement Act.

Act²⁵⁹ but is not at addressed in the PPP Act which ought to have given preferences to certain disadvantaged persons or guidelines on the risk sharing aspect to enable the act to accommodate black economic empowerment, the lack of clarity with regards to this specific aspect, is worrisome.

The Public procurement Act is deliberate in unambiguously stating that it applies as follows:

- a) to all procurement of goods, works and services and disposal of assets undertaken by a public entity;²⁶⁰ and
- b) to contract management of goods, works and services procured or disposed of by a public entity.²⁶¹

Lastly the Public Procurement Act states that:

- c) The extent to which this Act or directives made under it conflict with any other law, regulations, rules or directives on matters relating to public procurement of goods, works or services, or disposal of assets by a public entity, the provisions of this Act or directives prevail.²⁶²

²⁵⁹ Section 2 (b) (iv) of the public procurement Act No 15 of 2015
²⁶⁰ Section 3 (1) (a) of the Public Procurement Act No. 15 of 2015
²⁶¹ Section 3 (1) (b) of the Public Procurement Act No. 15 of 2015
²⁶² Section 3 (2) of the Public Procurement Act No. 15 of 2015

The contradistinction between the application of the Public procurement Act and the PPP Act is vital in creating relevance as to the practical implementation of the PPP Act. It is thus very important that there exist synergies between the two acts, which currently lacks. The two acts are both not qualified in terms of how and to what extend the public entity who should be a party to the public-private partnership falls within the ambits of the application of the PPP Act.

There exists a fundamental component of the two acts, which is how they will each accommodate the other to ensure there exists synergies and successful implementation of the both Acts. The failure of this fundamental component to exist in either of the Acts, dictates that neo-liberalism should prevail.²⁶³ Although the Public Procurement Act is silent on how it will accommodate PPP projects and has not imposed a threshold as to projects that would have otherwise be applicable under the PPP Act by exempting²⁶⁴ such projects in its Act, the PPP Act's silence on the identification of public works, goods and services as falling within the application of the PPP Act calls for great concern.²⁶⁵

4.2.2 Promotion of private sector participation through PPP Projects

²⁶³ Should neo-liberalism prevail in this instance, the purpose of regulating procurement in the country will be defeated as it will not be practical to pursue the regulations anymore.

²⁶⁴ Section 4 of the Public Procurement Act No 15 of 2015

²⁶⁵ Section 3 (1), Section 16 and 39 of the PPP Act

The accomplishment of a PPP project requires an underlying foundation of a shared vision between the private entity and the Public entity.²⁶⁶ It is paramount, although not practical in a capitalist economy, to ensure equilibrium between the requirements to complete a PPP project to the benefit of the public and to ensure the private entity's involvement matches the needs of the project and public and does not use the realisation of such a public benefit as a platform to achieve undue profit.²⁶⁷

Clear challenges will be realised in trying to strike this particular balance of the need to provide a service on the one hand, and the need to make a profit on the other. Challenges such as corruption will be on the rise, as the Private entity will go to all lengths to ensure their forecasted profits are not reduced or hindered, the quality of the service may be compromised as the Public entity may want to procure the service that is more affordable, the risk allocation will be a major challenge as discussed below and the end user may not be able to afford the services being provided.

Private sector participation can be pursued through the competitive bidding process provided for by the PPP Act.²⁶⁸ The mere selection of the preferred bidder,

²⁶⁶ Corrigan, Mary Beth, et al. 2005. Ten Principles for Successful Public/Private Partnerships. Washington, D.C.: ULI—the Urban Land Institute, 2005.pg 8

²⁶⁷ World Bank Group; European Commission Directorate-General Regional Policy (2003) Guidelines for Successful Public Private Partnerships Retrieved from http://ec.europa.eu/regional_policy/sources/docgener/guides/ppp_en.pdf last accessed on 29 June 2017. Pg 9

²⁶⁸ Section 20 of the PPP Act

however does not guarantee that the private entity will be an active²⁶⁹ participant in the PPP project. It is easier to have a passive participant²⁷⁰ in a PPP project if risk is not allocated properly. Risk identification and allocation is critical in the success of a PPP project implementation.²⁷¹

4.2.2.1 Risk allocation:

The Act defines a PPP project as an agreement between a public entity and a private entity, in terms of which -

- (a) the private entity provides public infrastructure assets or services for use, either directly or indirectly, by the public;
- (b) investments are made by or management of the infrastructure asset or service is undertaken by the private entity for a specified time;
- (c) risk is optimally shared between the private entity and the public entity; and
- (d) the private entity receives performance linked payments;

²⁶⁹ The word active is given its literal and grammatical meaning, defined as :' participating or engaged in a particular sphere or activity' retrieved <https://www.google.com.na/search?q= form> last accessed on 30 June 2017

²⁷⁰ A passive participant is defined to be someone not participating readily or actively. Retrieved from www.dictionary.com/browse/passive, last accessed on 30 June 2017

²⁷¹ Kakati M., Baruah P. (2016) Optimal risk allocation in Public –Private Partnerships (PPP) Projects in India. Boston, USA. P144. Retrieved from http://ageconsearch.umn.edu/bitstream/207820/2/2007_1B_PartFin_paper.pdf, last accessed on 30 June 2017

The Act correctly defines a PPP project because risk is optimally allocated to the entity which can best manage them at the lowest cost,²⁷² however, the Act does not set out any guidelines on how this risk sharing will be achieved, this calls for clarity! It is important for the public and private entity to assess all the potential risks to enable them to analyse, research and manage them.²⁷³ The PPP Act, does not specifically deal with how the private party will be involved in the risk allocation process to ensure that there exists clear and efficient risk allocation and this is a significant weakness of the PPP Act.

The current legal framework runs a potential of encountering contractual misallocation of risks which is a leading cause of disputes in PPP projects.²⁷⁴ The PPP act, according to the definition of a PPP project above, intends to optimally share risk between the private entity and the public entity, certain provisions within the act are however, devoid of such intent. At no time, from the initiation of the PPP arrangement to the implementation of the PPP project does the public entity, consult with the private entity on how and to what extent risk will be shared between the two entities.

Section 33 (1) of the Act states that:

²⁷² Pauline Hovy (2015) Risk Allocation in Public private Partnerships: Maximising value for money. Retrieved from IISD.org last accessed on the 30 June 2017.pg 1

²⁷³ Kakati M., Baruah P. (2016:148)

²⁷⁴ Kakati M., Baruah P. (2016:144)

Prior to the conclusion of a public private partnership agreement the public entity, must establish a management team –

- (a) to be headed by a manager, assisted by a team with financial, technical and legal expertise; and
- (b) which must include the project officer and the project officer must remain as a member of the management team until the public private partnership agreement is concluded.

(2) The management team established in terms of subsection (1), is responsible for the preparation and implementation of the management plan

Section 33 (1), is deliberate in advocating for a management team²⁷⁵ to be established by the Public entity prior to the conclusion of the PPP agreement. The Act is however; silent on whether this management team should be established prior to the accounting officer²⁷⁶ obtaining approval of the PPP agreement from the PPP Committee²⁷⁷ or whether the PPP committee should approve such a management team. The establishing of a management team, ought to have been the first stage of active participation of the private entity in the PPP project after

²⁷⁵ The management team will be headed by a manager, assisted by a team with financial, technical and legal expertise; and which must include the project officer and the project officer must remain as a member of the management team until the public private partnership agreement is concluded.

²⁷⁶ The act defines accounting officer as an accounting officer of a public entity.

²⁷⁷ Section 31(1) of the PPP Act; The act establishes the PPP Committee under section 5 of the Act and outlines the powers and functions of such PPP Committee as follows under section 6 of the act: - (a) provide for transaction approvals in respect of public private partnership projects; (b) develop best practice guidelines in relation to all aspects of public private partnership projects in Namibia; (c) advise the Minister on policies in relation to public private partnership projects in Namibia; (d) oversee the functioning of the Unit; and (e) exercise powers imposed on and perform functions assigned to the Committee in terms of this Act.

the conclusion of the PPP agreement. It would be at this stage, were regular and active consultations²⁷⁸ would be initiated with the private entity and the end user to ensure that the public entity understands how the private entity has organised its legal, institutional and contractual structures and to what extent risks are accepted in the regular markets.²⁷⁹

Regardless of the fact that the management team consists of no member or anticipated input from the private entity, the Act expects the management team to successfully prepare and manage a management plan²⁸⁰ which includes mechanisms to manage unanticipated developments and mitigating risks through efficient risk management.²⁸¹ Common risk factors influencing the success of PPP projects are the private entity's ability to manage and tolerate risks.²⁸² The non-inclusion of the private entity in the management team and or not making provision for regular consultations with the private entity has a high potential of putting the public entity at the receiving end because private entities are typically risk-averse.²⁸³ The act however permits the parties to amend the PPP agreement after conclusion if they so wish upon written approval from the PPP Committee,²⁸⁴ and

²⁷⁸ OECD (2012) Recommendation of the Council on Principles for Public Governance of Public-Private Partnerships; retrieved from <https://www.oecd.org/governance/budgeting/PPP-Recommendation.pdf>, last accessed on 30 June 2017. Pg 8

²⁷⁹ Pauline Hovy (2015:5) This is very important for the public entity to understand as risks should also be informed by market conditions.

²⁸⁰ Section 33(2) of the Act

²⁸¹ Section 34(1)(c) of the Act

²⁸² Kakati M., Baruah P. (2016:158)

²⁸³ This means that private entities are unwilling to accept much risk because they are profit oriented.

²⁸⁴ Section 32 (1) of the Act

such approval may only be granted if the amendment continues to provide value for money, affordability and optimum risk transfer to the private entity.²⁸⁵ This freedom however, may be very controversial as it will go against the tenor of the public entity's unwillingness to accept unreasonably high risk in terms of direct financial commitments, indirect and contingent liabilities²⁸⁶ and the spirit of public interest.²⁸⁷ The only participation for the private entity in the PPP agreement anticipated by the lawmakers is that the private entity is expected to provide the public entity with the names, roles and contact details of key individuals to the PPP project which will serve as repository of management procedures and resources of the management plan.²⁸⁸

It is common cause that some risks are difficult to predict at the bidding stage.²⁸⁹ However private entities are often exposed and have experience in undertaking such projects and can thus assist in mitigating and or managing some of the risks²⁹⁰ through clear and regular consultation channels with the public entity. It is therefore very important to ensure that when policy makers attempt to regulate law and economics as anticipated by contemporary jurisprudential theories, they have to do so in a pragmatic manner.²⁹¹ It is not sufficient for to merely mention objectives which bear no realistic implementation as these objectives cannot be

285 Section 32(2) of the Act
286 Section 17 (2)(g) of the Act
287 Section 17(1) of the Act
288 Section 32(2)(c)
289 Kakati M., Baruah P. (2016:155)
290 Kakati M., Baruah P. (2016:160).
291 Golecki M. et el (2002:1).

effectively accommodated by the law and economic theories. How the law makers have anticipated private sector participation in the act confirms the crisis faced by legal theory in contemporary jurisprudential theories in that an economic analysis of the law can be impractical.²⁹²

4.2.2.2 *Black economic empowerment and Foreign Investment*

Local private entities, in particular SMEs, are engaged in smaller scale PPP arrangements with local authorities across the country.²⁹³ This shows that the Namibian government has strategized to ensure private participation in the securing and procurement of public services.²⁹⁴ The inconsistency in this regard, rises from how those small-scale PPP projects will be accounted for in the PPP legal framework. The local authority is mandate with the authority to compile its own regulation and rules to govern the quality of service delivery and standard of supply.²⁹⁵ It is therefore a great concern that the PPP Act does not create a dais for harmonisation of existing rules and regulations regarding PPP or how PPPs

²⁹² Golecki M., et el (2002:17).

²⁹³ Axis Consulting (2013:8).

²⁹⁴ Dr. Keyter,(2009) Effectiveness of the Ward contractor system in the city of Windhoek, Namibia. P19.

²⁹⁵ Pietilä P.,(2006) Role Of Municipalities In Water Services In Namibia And Lithuania. Tampere University of Technology Retrieved from https://www.researchgate.net/publication/258181268_Role_of_Municipalities_in_Water_Services_in_Namibia_and_Lithuania last accessed on 30 June 2017

undertaken prior to the enactment of the Act will be accommodated in the PPP act.²⁹⁶

The Act, ought to make provision for foreign investors and any requirements that will be imposed on them and non-compliance orders. This is a very vital provision because, there will be very large projects undertaken in partnership with foreign investors due to the fact that, the local investors are at risk of not possessing adequate machinery, expertise, human capital or financial capital²⁹⁷ obligatory requirements should be imposed upon these foreign investors to enable the local investors to leverage from their skill and intellectual property. An example can be seen from the requirements imposed by the South African legal framework such as, local black and female management of a certain percentage should be party to the agreement or should own a certain percentage in equity.²⁹⁸ In Namibia, this will assist in partly alleviating poverty and promoting women empowerment.²⁹⁹

The need for the Act to make provision for foreign investment is based on the position that Namibia is branded as follows:

²⁹⁶ Local authorities such as the City of Windhoek Municipality, promote small scale PPP where SMEs are contracted to carry out public service delivery such as refuse removal, solid waste material, servicing of land and water reclamation systems.

²⁹⁷ Prasad E et al. (2003). Effects of financial globalization on developing countries: Some empirical evidence. *IMF Occasional Paper 220*. Washington, DC: International Monetary Fund.

²⁹⁸ National Treasury PPP Unit, <http://www.ppp.gov.za/Pages/whatisppp.aspx> last accessed 23 November 2017

²⁹⁹ These disparities are all in line with the Harambee Prosperity Plan of 2016 if women are encouraged and promoted to take part in business particularly PPP projects.

4.2.2.2.1 Categorised by low competition

According to international competitive ratings,³⁰⁰ Namibia is characterised by low competition.³⁰¹ The private sector of Namibia is not competitive enough to successfully carry out PPP projects.³⁰² This suggests that the foreign investors or the rich local investors are likely to benefit from the PPP Act with monopolies being advance. The disparity between the SMEs and the bigger service providers could not be remedied by the regulatory reform which was created to promote competition.³⁰³ The lack of competition leads to various factors³⁰⁴ that inhibit the Government's role to advance the course for private sector involvement in PPP projects.³⁰⁵ Contracts that are preferential of local investments through BEE and affirmative action strategies do not get awarded to these local investors because competitiveness lacks and are largely awarded to foreign investors.³⁰⁶

4.2.2.2.2 Unfavourable investment climate

Although Namibia has successfully created a legal framework that promotes and protects foreign investments in Namibia,³⁰⁷ the challenges remain and the PPP

³⁰⁰ Axis Consulting (2013:21)

³⁰¹ Pietilä P.,(2006:407)

³⁰² Axis Consulting(2006:20)

³⁰³ Competition Act No 2 of 2003, which was enacted to promote competition in the Namibian market

³⁰⁴ Some of the factors encountered are the state owned enterprises dominance in the Namibian economy, this does not make provision for private entities such as SMEs to enter the same market dominated by State owned enterprises.

³⁰⁵ Axis Consulting (2013:21)

³⁰⁶ Majority of the Construction contracts are awarded to Chinese companies- Pietilä P.,(2006:408)

³⁰⁷ Namibia Investment Promotion Act No. 9 of 2016

regulatory framework cannot turn a blind eye to these challenges faced by foreign investors. Besides the Namibian populace being approximately 2 million³⁰⁸ and a natural deterrent to foreign investors,³⁰⁹ Namibia has skill shortages, restrictive labour laws, infant industry protection, shallow financial markets and high regulation which deteriorate the investment climate of Namibia turning it into an unfavourable investment market.³¹⁰

Namibia, is also a politically stable environment³¹¹ and has an independent judicial system,³¹² which is positive to the growth of its infant industries in the colour of attracting foreign investments. The PPP Act however, does not make provision for local investors or infant industry to joint venture with foreign investors to carry out PPP projects and close some of the gaps that feed the concept of Namibia being an unfavourable investment climate.

4.2.2.2.3 Racially tinted colonialism

The apartheid regime has left the Namibian people damaged and excluded from the productive economy, crippling their entrepreneurial and professional

³⁰⁸ Axis Consulting (2013:20)

³⁰⁹ Foreign investors are discourage to invest in a country whose population is not big enough- Pietilä P.,(2006:407)

³¹⁰ Axis Consulting (2013:21)

³¹¹ The political ruling party of Namibia (SOUTH WEST AFRICA PEOPLE'S ORGANISATION) successfully held democratic presidential party elections on 25 November 2017, to elect the ruling Party's President. There are more than three political Parties in Namibia, a positive sign of democracy

³¹² Namibia's Judicial system consists of lower courts, High and Supreme court, which are all independent and equipped with impartial Judges.

development.³¹³ This deficit has led the government to craft strategies such as BEE and affirmative action to advance the black Namibian person to actively partake and be involved in the economic development of the country.³¹⁴ The implementation of these strategies are however not without challenges.³¹⁵ Lack of education and access to information continues to haunt the Namibian nation and contracts are largely awarded to a few well connected black individuals resulting in higher rural poverty and more income disparities.³¹⁶

We ponder on whether the law and economics theories can accommodate the concept of black economic empowerment and foreign investments in the procurement of public service through a PPP project without losing their characteristics. An extension to the above, is the positive theory that advocates for regulation to promote efficiency as it is the main purpose of the law, from the discussion above, it is hard to conclude as to whether or not the PPP act promotes efficiency or not. The normative theory is more evident in the regulation of PPP because, it advocates for regulation to be changed if the laws do not reflect efficiency in the enhancement of the whole legal system. The PPP concept is very broad and encapsulates almost the whole legal system thus, the PPP act cannot afford to diminish the efficiency of business or the legal system.

³¹³ Pietilä P.,(2006:407)

³¹⁴ Ibid pg 407.

³¹⁵ Ibid pg 407.

³¹⁶ Ibid pg 407.

In conclusion, the PPP Act, in its current state, fails to address the issue of colonially induced injustices in Namibia. It does the country at large no justice to enter into PPP arrangements merely for the sake of undertaking a PPP project and giving relevance and significance to the PPP Act and related acts. The degree of private involvement and BEE contribution needs to be clearly and unambiguously stated in the PPP Act. The level of private sector involvement whether of a local or international level needs to be pragmatic and matched to the objectives of the PPP Act. The risks allocation of a PPP project and the ability to effectively managing and implementing a PPP project is of paramount importance to the PPP Act. As the roles of government in public-private partnerships are not only to provide services, but also to monitor the marketplace and its efficiency, a well-defined regulation framework is essential.

4.2.3 Public Interest and Participation

There exists a third tier to the PPP arrangement that is often overlooked, the people.³¹⁷The relevance and importance of citizens in the participation of a PPP arrangement is entirely ignored. Citizens are prime partners to a PPP arrangement because they can significantly assist the private entity with payment of service charges in turn also contribute to accountability, improved service quality and service delivery.³¹⁸

³¹⁷ Shafiul, A.A., Ali, S.M. (2005): People as partners: Facilitating people's participation in public-private partnerships for solid waste management, Vol 30, issue 4. Pg 781-796, University of Loughborough, UK.

³¹⁸ Ibid pg 781.

The lawmakers overlooked the importance of public interest in the procurement and implementation of PPP projects. There is no mention of procuring good and services through PPP in the interest of the public. According to Coase,³¹⁹ legal regulation of consumer protection requires acknowledgement of private and public rights and liabilities.³²⁰ This leaves us wondering on whether the lawmakers have acknowledged the rights and liabilities of the general public, if their rights and responsibilities are not protected by the PPP act.

The only time the act, mentions public interest is when a public entity is applying to the minister for exemption from a provision of this Act.³²¹ The purpose of the PPP Act is to regulate the relationship between a public entity and a private entity. By inference, all public entities are bound by this Act. It is therefore imperative that the exemptions in this regard are clearly and concisely qualified. If the minister decided to exempt all the public entities that apply for exemption, then the Act clearly serves no purpose. This will also be essential in circumventing challenges such as corruption and self-enrichment.

³¹⁹ Ronald Coase and his theorem: Coase, R.H. „(1960) *The Problem of Social Cost*”, *Journal of Law and Economics* 3), p. 1.

³²⁰ Ibid pg 1.

³²¹ Section 39 of the PPP Act No 4 of 2017 states that A public entity may apply to the Minister to be exempted from a provision from this Act.

(2) The Minister, after consultation with the Committee, may - (a) grant an exemption, with conditions or without conditions; or (b) decide not to grant an exemption. (3) The Minister may grant an exemption in terms of this section only if this is assessed to be in the public interest and is consistent with the objects of this Act

Local newspaper reported that during Public Hearings/ nationwide consultation by the national council on the Public-Private Partnership (PPP) Bill, stakeholders who attended the consultation meeting criticized the bill, some saying that consultations should had been done for public inputs before it is tabled in the National Assembly.³²² Hence these stakeholders felt that the Public-Private Partnership (PPP) Bill will have a significant impact on various economical aspect of the country and thus it required the public's input prior to it being tabled in the National Assembly. ³²³

Section 37 of the PPP act, as an afterthought, requires information to be disseminated to the public to ensure adequate transparency.³²⁴ One then wonders, what are the law makers intention in ensuring information regarding the PPP project is disclosed to the general public, if the same general public was not considered in the procurement process of this PPP project?

The PPP Act, does not dwell on the fact that goods and services are to be procured for the interest of the public. Local newspaper reported that during Public Hearings/

³²² The last consultation was held on the 6th February 2017, at the Prime minister's office, Windhoek , Namibia

³²³ Sun newspaper, 2017, 27 January , Public Private Partnership bill criticised, Windhoek, Namibia

³²⁴ (1) The public entity must make available information regarding the public private partnership project to the general public to ensure adequate transparency, and for this purpose, it must - (a) document all the information in relation to the public private partnership agreement, construction, project operation and maintenance and termination; (b) document and maintain on an on-going basis all information relating to performance of the private entity with respect to the provisions of the public private partnership agreement; (c) document the reasons for declaring information as commercially sensitive and not subject to disclosure; and (d) comply with any additional requirements for information disclosure in accordance with applicable legislation.

nationwide consultation by the national council on the Public-Private Partnership (PPP) Bill, stakeholders who attended the consultation meeting criticized the bill, some saying that the consultation should had been done for public inputs before it is tabled in the National Assembly.³²⁵ Hence these stakeholders felt that the Public-Private Partnership (PPP) Bill will have a significant impact on various economical aspect of the country and thus it required the public's input prior to it being tabled in the National Assembly. ³²⁶

By inference, PPP projects are designed in and for the public's interest, thus their participation in the procurement process is very important. The public's participation however, needs to be designed-into the PPP procurement process, not assumed-in.³²⁷ The PPP act, can thus not be promulgated to benefit the public, amongst other benefits, and the public's interest is not protected. If the public is involved in the procurement process of PPP projects, they can effectively assume the role of an unofficial watchdog, as they would know what to expect, how the work ought to be carried out and the quality of the goods and or services.³²⁸

³²⁵ The last consultation was held on the 6th February 2017, at the Prime minister's office, Windhoek , Namibia

³²⁶ Sun newspaper, 2017, 27 January , *Public Private Partnership bill criticised*, Windhoek, Namibia

³²⁷ Lowdens V., Sulliva. H., (2006) Like a Horse and Carriage or a Fish on a Bicycle: How Well do Local Partnerships and Public Participation go Together? Retrieved from <http://dx.doi.org/10.1080/0300393042000230920> on 22 June 2017

³²⁸ OECD (2012) Recommendation of the Council on Principles for Public Governance of Public-Private Partnerships; retrieved from <https://www.oecd.org/governance/budgeting/PPP-Recommendation.pdf>, last accessed on 30 June 2017. Pg 4

During the National Council meetings with Stakeholders on the Public-Private Partnership (PPP) Bill, some Stakeholders who attended the meeting criticized it, saying that if the bill assented as law, its impact will be that it will move Namibia from being a mixed economy to a capitalist economy because of the emphasis the bill puts on profit-making.³²⁹

The non-involvement of the public's input in the PPP procurement process places the public's interest at a great risk and in turn all the parties to the PPP project. If risks are not mitigated well, they do not disappear, they are passed on to the public consumer³³⁰ below are some factors that will greatly expose the public's interest and diminish delivery of goods and services through PPP projects.

4.2.3.1 Corruption

Section 4 of the PPP act, encourages every public entity to adhere to the principles of probity and transparency during the initiation, preparation, procurement, management and implementation of PPP projects.³³¹ The lawmakers were very

³²⁹ The Namibian Sun Newspaper , 27 January 2017. Available at <https://www.namibiansun.com/news/mixed-feelings-on-ppp-bill>, last accessed 7 February 2017.

³³⁰ Kakati M. (2016:153)

³³¹ Every public entity must adhere to the following principles of probity and transparency during the initiation, preparation, procurement, management and implementation of public private partnership projects -

(a) the public entity must carry out its responsibilities relating to the initiation, preparation, procurement, management and implementation of public private partnership projects with complete probity and in a fair and transparent manner; (b) the public entity may not include in the procurement documents any condition or specification which favours or is likely to favour any individual bidder or a group of bidders unduly; (c) the project officer, transaction advisor, procurement

deliberate in clearly applying this section to every public entity and not any other party or stakeholder of a PPP project. The oversight of from the lawmakers to include other stake holders in the application of section 4 of the Act is however not without remedy as provisions of the anti-corruption Act of Namibia³³² would generally apply to the omitted stakeholders. Corruption has been on the rise in Namibia, even though there exists a sound regulatory framework on corruption, the application of this framework is inconsistent.³³³ Corruption in the public procurement sector has increased insanely, because of unproportioned competition between, SMEs and bigger corporations,³³⁴ and companies fronting to be SME³³⁵ to benefit from awarding of tenders which are preferential to black economic empowerment.³³⁶

committee members and members of the management team, may not have direct or indirect interest in public private partnership projects that the public entity is intending to implement and must disclose such interest to the accounting officer before any decision is taken by the public entity with respect to a public private partnership project; (d) the accounting officer must - (i) evaluate the conflict of interest contemplated in paragraph (c) and take the necessary action to prevent such continued conflict of interest, such as instructing the non-participation by the person concerned in any position where the conflict of interest could influence a decision by the public entity; and (ii) keep or cause to be kept a record of disclosures made in terms of paragraph (c); (2) The accounting officer must keep or cause to be kept a record of actions and decisions taken by the public entity in respect of a public private partnership project, including tender proceedings.

³³² Anti –Corruption Act No 8 of 2003

³³³ GAN Business Corruption Portal, retrieved from <http://www.business-anti-corruption.com/country-profiles/namibia>, last accessed on the 30 June 2017

³³⁴ There exists an influx of Chinese owned companies that do not adhere to tender regulations and are favoured in the award of tenders owing to their expertise.

³³⁵ Majority of the tenders in Namibia are to the benefit of black economic empowerment, some businesses coat themselves as falling within the threshold of black economic empowerment when they actually do not fall within this bracket of black economic empowerment

³³⁶ GAN Business Corruption portal, 2017

Part 2 of the PPP act, establishes the PPP Committee³³⁷, outlines the powers and functions of the Committee³³⁸, the composition of the Committee³³⁹, disclosure of interest³⁴⁰ and disqualification to be members of the PPP Committee.³⁴¹ This part of the act does not apply the principles of probity and transparency as it does not indicate how the appointments of the committee members will be made or who qualifies to be a member of the Committee. A quarter of the Namibian citizens do not have faith in the public service procurement system as they perceive all public officials corrupt or corruptible.³⁴² This uncertainty and lack of faith in the system, can only be fixed by practically applying the principles of probity and transparency and directly involving the public in all the process of PPP that will eventually have an impact on them as citizens of the Country.

PPP projects are carried out for public usage in the public's interest. It is therefore pivotal as it is necessary to ensure that the PPP Act, clearly indicates that the amendments anticipated in section 32³⁴³ of the Act are in the public's interest to ensure the principles of probity and transparency are held in high spirit as required by section 4 of the Act. It would be necessary for public to participate in this process

³³⁷ Section 5 of the PPP Act No 4 of 2017

³³⁸ Section 6 of the PPP Act No 4 of 2017

³³⁹ Section 8 of the PPP Act No 4 of 2017

³⁴⁰ Section 10 of the PPP Act No 4 of 2017

³⁴¹ Section 11 of the PPP Act No 4 of 2017

³⁴² Global Corruption Barometer, 2015-2016 retrieved from, <https://www.transparency.org/country/NAM>, last accessed on the 04 July 2017

³⁴³ Section 32 of the PPP Act states that, Any material amendment, including material variations relating to the outputs or waivers provided for in the public private partnership agreement must only be made after receipt of a written approval by the Committee. (2) The Committee may only approve an amendment in terms of subsection (1), if the Committee is satisfied that the public private partnership agreement, if so amended, will continue to provide value for money, affordability and optimum risk transfer to the private entity.

through consultations as they are the end users and they need to give their input regarding the amendment.

The public, often misunderstands or is not well informed regarding the concept of PPP.³⁴⁴ It is thus important to hold regular PPP consultations to inform the public on PPP projects and to engage them in difficult decisions that would need to be made such as tariffs and fees.³⁴⁵ The PPP Act, lists the principles of probity and transparency as brass tacks that should be adhered to by the public entity, it does not practically commit to these principles by applying them across board in the PPP Act. The act is thus susceptible to corruption from the initiation stage of a PPP project to the finalisation stage.

4.2.3.2 Lack of Strict Enforcement Measures

The PPP Act, does not make provision for any enforcement measures that can be used to curb non-compliance and corruption. The Act does not apply strict timelines, or penalties to any of the processes mentioned in the Act and or consequences of non-compliance with same. This will result in project delays and unnecessary prolonging of processes making the whole procurement process vulnerable to corruption and undue processes and leaving the end user in destitute.

³⁴⁴ Infrascopes (2015:19)
³⁴⁵ Ibid pg 19

4.2.3.3 PPP Unit

Section 6 (1) (d) fails to make establish what is perceived to be the most important tool driving PPP in the country, the PPP Unit. The PPP Unit is already established in the ministry of finance and is described by the PPP Policy in Namibia to be the driving force behind ensuring success of implementing and executing PPP Project in the country making it the backbone of PPP success in Namibia.³⁴⁶ The PPP Unit, is another body that can act as “watchdog” on the procurement of public goods and services for the public interest.

At a public consultation (where I was in attendance) held by the National Council on the PPP Bill, the Permanent secretary of Finance, Erica Shafudah,³⁴⁷ informed the public that the PPP unit was only established to drive the project of creating for a period of 3 years a PPP regulatory framework in the country and will be dismantle by next year. It is thus not logic, to merely conceive the “Unit” under section 6 (1) (d) and not ensure that it is at the centre of all the PPP processes.

The fact that the PPP Unit, powers and functions are not defined in the act is a colossal oversight from the lawmakers and will be to the detriment of the public interest.

³⁴⁶ Ministry of finance. Public Procurement Policy.2017. Available at <http://www.mof.gov.na/documents/2.pdf/e63c1488-ed76-4a7c-b8d8-ab74cdc2b38e> P.5 last accessed on the 18 February 2018.

³⁴⁷ Namibian Sun Newspaper, 21 February 2017.National Council Rejects PPP Bill, Windhoek, Namibia

4.3. Conclusion

In conclusion, the discussion above is evidence that a regulatory framework around PPP needed to be urgently put in place. The discussion explores different dynamics significant to the success of a PPP project and relationships and how they will participate in the PPP process. Concerted efforts as well as challenges were demonstrated. A lot needs to be done in the implementation of this poorly conceived act, if we want to ensure a successful, stable and decent regulatory framework.

The PPP Act, in its current form is not adequate to successfully implement PPP projects. In hindsight, it fails to address many issues that can be perceived to be paramount to the successful implementation of PPP in Namibia, such as black economic empowerment, risk allocation and coloniality induces injustices in Namibia. The tenor of the PPP Act, does not favour local investors, because the local investors are disadvantaged by lack of access to finance and technology. It directly favours foreign investors.

The exist operational differences between the PPP Act and the Public procurement Act, however, synergies are needed between these two Acts. This is paramount to ensure there are no unnecessary overlaps with the two Acts.

CHAPTER 5

COMPARATIVE STUDY OF PPP LEGAL AND INSTITUTIONAL ENVIRONMENT FROM SELECTED JURISDICTIONS IN AFRICA

5.1. Introduction

Africa has enjoyed more than a decade of rapid economic growth, especially Sub-Saharan Africa, with the continent producing some of the fastest-growing economies between 2011 and 2015.³⁴⁸ Building on this momentum will, however, require rapid infrastructure development. This infrastructure bottleneck threatens to slow the continent's progress, and effective models of infrastructure development are now essential to achieve sustainable growth. Public–Private Partnerships (PPPs) are emerging as a powerful tool to support this process. A growing body of international evidence points to the importance of a favourable regulatory environment and robust institutional framework in developing sustainable and efficient PPP infrastructure projects.³⁴⁹ This chapter will look into two African Jurisdictions, South Africa and Kenya that have both implemented PPP

³⁴⁸ The Ivory Coast is Africa's fastest growing economy, according to the IMF's latest World Economic Outlook. The West African nation's GDP is expected to grow by 8.5% this year. Following in second place is Tanzania, with projected growth of just under 7% this year. Senegal completes the top three, with 6.6%. Countries from across Africa feature in the top 10, emphasizing the economic gains being felt around the continent.

³⁴⁹ The World Bank. 2015. "Private Participation in Infrastructure Database." Available at [<http://ppi.worldbank.org/>]. last accessed on 19 November 2017

laws in their respective jurisdictions. Both Kenya and South Africa are favorable jurisdiction to compare to Namibia as they appear to have the best practices that can be used as benchmarks in Namibia, as it will become apparent in the paragraphs below.

PPPs are on the agenda of African policymakers, with many countries³⁵⁰ passing new laws, policies and regulations to facilitate PPPs, particularly during the last six years.³⁵¹ Although a unified or comprehensive PPP legal framework is lacking in some places (example Ghana), most African countries have adopted a national policy or guidelines, or have PPP laws in the pipeline.³⁵² The challenge is ensuring strong rules and regulations, as well as effective implementation.³⁵³

³⁵⁰ For example in Ghana, a National Policy on PPP has been developed and was launched in October 2011. In line with this, the World Bank is supporting the Government to prepare the legal framework and administrative and management systems for the implementation of PPPs. Also it is helping to build the capacity of relevant bodies for the adoption of PPP as a major strategy to finance public infrastructure. Namibia is also one of the many examples as it recently passed the Public Private Partnership Act in 2017.

³⁵¹ Countries such as Egypt have passed the Egypt PPP Act No. 67 of 2010 also referred to as the concession law No 67 of 2010. Morocco has a PPP law published on the 24 December 2014.

³⁵² Public Private Partnerships model: opportunities and challenges
<https://www.linkedin.com/pulse/public-private-partnerships-model-kenya-opportunities-agnes-gitau>

³⁵³ Farlam., P. (2005) Assessing Public-Private Partnerships in Africa: Nepad Report Series No 12. The South African Institute of International Affairs, Pretoria

A brief profile of the PPP legal environment of South Africa³⁵⁴ and Kenya³⁵⁵ will be provided. Lastly, a discussion on what lessons Namibia can learn from some of these countries will be undertaken.

5.2. South Africa

5.2.1. Overview of South Africa PPP legal environment

The point of departure in addressing the legal and institutional environment of Public Private Partnership in South Africa will be the words of the Former Finance Minister, of South Africa, Trevor Manuel, who was quoted in August 2004 saying that:

“This is what PPPs are about. The public gets better, more cost-effective services; the private entity gets new business opportunities. Both are in the interests of the nation.

³⁵⁴ South Africa is one of the leading countries in the world as far as the maturity and level of development of its Legal, Policy and Institutional Structures for PPPs are concerned. SA's public service delivery record has improved through the usage of PPPs in the past decade, and its PPP project pipeline continues to grow, both in numbers and in the innovative PFMA approach it has adopted. Government has in terms of the PFMA issued a series of National Treasury PPP Practice Notes. These notes constitute a PPP Manual and standardized practice Notes that Government departments and provinces use to guide them through the project life cycle of a PPP.

³⁵⁵ Kenya has made significant progress in the PPP landscape over the past few years. Guidelines were passed in 2009, marking the first set of regulations governing concession projects.

PPPs in South Africa are derived from section 76 of the Public Finance Management Act, 1999 (PFMA)³⁵⁶. The National Treasury of South Africa, issues instructions and regulations that set out how the PFMA will be applied to carry out its functions successfully and reach its objective.³⁵⁷ Regulations such as the Treasury regulation 16 to the PFMA, 1999 was issued to specifically provide for a framework for PPP.³⁵⁸ National Treasury also issues out notes, which set out the practice of PPP procurements such as the National Treasury practice note number 06 of 2004.³⁵⁹

The Treasury Regulation 16 of South African law defines a PPP as a contract between a public entity institution/municipality and a private entity, in which the private entity assumes substantial financial, technical and operational risk in the design, financing, building and operation of a project.³⁶⁰

South Africa's PPP environment is ranked the highest in Africa, with a solid track record in delivering major projects including Africa's largest PPP: the Gautrain rail

³⁵⁶ National Treasury Manual.2006. available at <http://www.ppp.gov.za/Legal%20Aspects/PPP%20Manual/Module%2005.pdf> last accessed on 16 October 2017

³⁵⁷ Section 76(4)(g) of the PFMA, 1999

³⁵⁸ Section 16 specifically deals with the PPP approvals and the contracting of PPP agreements through treasury approval

³⁵⁹ This National Treasury PPP Practice Note Number 06 of 2004 'PPP Procurement' applies to departments, constitutional institutions, public entities listed or required to be listed in schedules 3A, 3B, 3C and 3D to the PFMA, and subsidiaries of such public entities. National Treasury of South Africa has issued up to 10 practice notes in 2004 varying from different stages of the PPP cycle. The Practice notes start with Standardized PPP provisions, South African Regulations for PPPs, Code of good Practice for BEE in PPPs, PPP Inception, Feasibility study, PPP Procurement, Managing the PPP Agreement, Auditing PPPs, Accounting Treatment for PPPs and the tenth practice note being An introduction to project finance.

³⁶⁰ Accounting Standards Board, South Africa. 2008. "Guideline on Accounting for PPPs."

project.³⁶¹ The country has a strong business infrastructure, a sophisticated financial sector, and comparatively high standards in accounting, regulatory structures and law.³⁶² The current PPP framework largely dates back to 1997, with the formation of a task force to support PPPs, followed by the publication of a strategic framework in 1999 and Treasury regulations in 2000, which continue to govern aspects of PPPs.³⁶³

A technical and professionalised PPP unit was eventually formed and is well capacitated.³⁶⁴ The government, through the PPP Unit, plays a lead role in identifying the need for a PPP, developing a business case, designing the project, procuring a private entity, ensuring that procedures are complied with, and monitoring performance.³⁶⁵ PPPs generally involve the private entity raising debt and equity to finance the project, by means of a special purpose vehicle (SPV), the sole function of which is to deliver the project. Procurement and bid processes

³⁶¹ National Treasury PPP Unit, <http://www.ppp.gov.za/Pages/whatisppp.aspx> last accessed 23 June 2017

³⁶² Partnership as a Tool for Supporting the Corporate Social Responsibility of Project Stakeholders Towards Affordable Housing Development: Learned Lessons from South Africa
http://www.academia.edu/22490904/Partnership_as_a_Tool_for_Supporting_the_Corporate_Social_Responsibility_of_Project_Stakeholders_Towards_Affordable_Housing_Development_Learned_Lessons_from_South_Africa last accessed 23 June 2017

³⁶³ National Treasury. 2007. "Introducing Public Private Partnerships in South Africa." Available at [\[http://www.ppp.gov.za/Documents/Final%20Intro%20to%20PPP%20in%20SA%2021%2009%2007.pdf\]](http://www.ppp.gov.za/Documents/Final%20Intro%20to%20PPP%20in%20SA%2021%2009%2007.pdf). last accessed on 19 June 2017

³⁶⁴ National Treasury PPP Unit, <http://www.ppp.gov.za/Pages/whatisppp.aspx> last accessed 23 June 2017

³⁶⁵ National Treasury PPP Unit, <http://www.ppp.gov.za/Pages/whatisppp.aspx> last accessed 23 June 2017

have built-in safeguards of disclosure, oversight and internal and external audits; risk allocation is generally assigned to the party best able to bear it.³⁶⁶

While PPPs continue to be largely governed by regulations from the early 2000s, they are influenced by the more recent Broad-Based Black Economic Empowerment Act that determines quotas for black ownership and management control in private enterprises. Bidders are rated on a scorecard system for their empowerment credentials, which is a factor in the decision-making process in awarding the project.³⁶⁷

PPPs in South Africa are regarded as a specialized form of procurement. In addition to the legislation regulating procurement in general, the following legislation regulates the feasibility, procurement, and implementation of PPPs: Treasury Regulation 16 to the PFMA (adopted in 2005 and amended in 2007 and 2013), the PPP Manual issued as various National Treasury Practice Notes by the PPP Unit in the National Treasury, the Standardized PPP Provisions issued as National Treasury PPP Practice Note 1 of 2004, and Practice Note 11 of 2008-2009 on Unsolicited Proposals.³⁶⁸

In South Africa, one of the goals of PPPs is to drive black economic empowerment (National Treasury of South Africa, 2004).³⁶⁹ All PPP projects are required to have

³⁶⁶ National Treasury. 2010. "A Treasury View on South Africa's PPP Programme." Available at [http://digitalknowledge.cput.ac.za/jspui/bitstream/11189/1438/3/01_Aiello.pdf

³⁶⁷ South Africa. 2003a. Broad-Based Black Economic Empowerment Act No.53 of 2003.

³⁶⁸ National Treasury, South Africa. PPP Manual and Modules released by the PPP Unit. [<http://www.ppp.gov.za/Pages/default.aspx>

³⁶⁹ National Treasury of South Africa (2007). "Introducing Public Private Partnerships in South Africa", <http://www.ppp.gov.za/Documents/Final%20Intro%20to%20PPP%20in%20SA%2021%2009%2007.pdf>

NEPAD (2014)

- (i) "Institution" means a department, a constitutional institution, a public entity listed, or required to be listed in schedules 3A, 3B, 3C and 3D to the Act, or any subsidiary of any such public entity.

This above definition triggers a most important question as to which national and provincial government institutions are subject to Treasury Regulation 16.

Institution(s)' in Treasury Regulation 16 are all national and provincial government departments; all constitutional institutions listed in schedule 1 to the PFMA and all national and provincial public entities listed in schedules 3A, 3B, 3C and 3D to the PFMA and any subsidiary of any such public entity. The major public entities listed in schedule 2 to the PFMA are not subject to Treasury Regulation 16. Municipalities are not subject to the PFMA or to its regulations.

- (ii) "Private party" is defined as a party to a PPP agreement, other than an institution to which the Act applies; a municipality or a municipal entity under the ownership control of one or more municipalities; or the accounting officer, accounting authority or other person or body acting on behalf of an institution, municipality or municipal entity.

The above definition indicates that the regulation defines a private party to a PPP agreement in the negative, explicitly excluding public institutions. PPPs in South Africa are thus specifically defined to exclude public-public partnerships. Not-for-profit entities are not excluded from the definition of a private party but their capacity to carry substantial financial, technical and operational risk in a project will determine the role they are able to play in a PPP.

- (iii) “public private partnership” is defined as a commercial transaction between an institution and a private party in terms of which the private party –
- (a) Performs an institutional function on behalf of the institution; and/or
 - (b) acquires the use of state property for its own commercial purposes; and
 - (c) assumes substantial financial, technical and operational risks in connection with the performance of the institutional function and/or use of state property; and

The above definition suggests that PPP in the context of SA means A PPP is a contract between a public sector institution and a private party, in which the private party assumes substantial financial, technical and operational risk in the design, financing, building and operation of a project.³⁷¹

The way PPP is defined in provision 16.1 further makes it clear that a PPP is not a simple outsourcing of functions where substantial financial, technical and operational risk is retained by the institution, secondly it is not a donation by a private party for a public good neither it is privatization or divesture of state assets and/or liabilities. The definition further suggests that a PPP is not the ‘commercialization’ of a public function by the creation of a state-owned enterprise. Lastly it does PPP in South Africa does not constitute borrowing by the state.

³⁷¹ National Treasury PPP manual module 1: South African regulations for PPPs, available at <http://www.ppp.gov.za/legal%20aspects/ppp%20manual/module%2001.pdf>, last accessed on 15 Sep. 17.

Another key issue which one can learn from the definition of the PPP as per the Treasury Regulation 16 is the types of PPP the regulation caters for.

Treasury Regulation 16 caters for a wide variety of PPP types. It allows such projects to be developed in South Africa with a range of different characteristics, combining private party risk in various ways for designing, financing, building, operating, infrastructure and services, and for owning and transferring assets. This wide variety of PPP types is reflected in international experience.

What PPP financing structures and funding sources³ does the regulation provide for?

Treasury Regulation 16 is not prescriptive about the financing structure of a PPP. It is assumed that these will vary widely from project to project and sector to sector, and will be closely linked to the funding sources that can be secured for each deal. However, PPPs typically involve the private party raising both debt and equity to capitalize the project. National Treasury's Standardized PPP Provisions have been developed for this typical PPP financing structure and sources of funding.

PPPs may involve a degree of capital contribution by the institution to the initial costs of the project. Some PPP projects do not involve debt finance at all, being initially funded either wholly through corporate finance or by a combination of government funds and private equity. In end-user-pay projects there may also be an element of government funding support to either or both the capital and the operating costs of the project.

- (iv) A “project officer” is defined as a person identified by the accounting officer or accounting authority of an institution, who is capable of managing and is appropriately qualified to manage a PPP to which that institution is party from its inception to its expiry or termination.
- (v) “transaction advisor” is defined as a person or persons appointed in writing by an accounting officer or accounting authority of an institution, who has or have appropriate skills and experience to assist and advise the institution in connection.

It is important to state that the above definitions are not the only ones as per the Treasury regulation.

5.2.2.2 Exclusive competency of accounting officers and accounting authorities

Provision 16.2 of the Regulations provide for the exclusive competency of accounting officers and accounting authorities. It indicates that only the accounting officer or the accounting authority of an institution may enter into a PPP agreement on behalf of that institution.

5.2.2.3 Project inception³⁷²

Provision 16.3 in summary is the PPP cycle, it enables the three regulatory tests of affordability, value for money, and risk transfer to be applied at every stage of preparing for, procuring and managing a PPP agreement. Regulation 16 sets out six distinct phases to the project cycle. It requires that the institution apply these

³⁷² The process for choosing the preferred bidder is covered in Module 5: PPP Procurement.

tests throughout, and that specific treasury approvals are given at phases II and III of the project cycle.

5.2.2.3 Feasibility study

Provision 16.4.1 provides that to determine whether the proposed PPP is in the best interests of an institution, the accounting officer or the accounting authority of that institution must undertake a feasibility study.

This provision in summary indicate that whatever the PPP type, structure, payment mechanism, or sources of funding, all South

African PPPs governed by Treasury Regulation 16 are subjected to three strict tests:

- Can the institution afford the deal?
- Is it a value-for-money solution?
- Is substantial technical, operational and financial risk transferred to the private party?

5.2.2.4 Procurement

Provision 16.5 deals with procurement, in summary the regulation sets out clear PPP procurement steps that must be followed by institutions, and prescribes distinct treasury approvals that must be obtained in this phase.

The Promotion of Administrative Justice Act, 2000³⁷³ (PAJA), imposes a range of obligations arising from section 33(1) of the Constitution of the Republic of South Africa to effect citizens' rights to fair administrative action. These values are lawfulness, reasonableness and procedural fairness.

Each administrative action in a PPP procurement process must be in accordance with the law and prescribed procedures; there must be accountability, responsiveness and openness in the decision-making of the institution; all bidders at each stage of a procurement process must have an equal chance of competing for the contract; and no action taken by government may prejudice their competitiveness.

5.2.2.5 Contracting PPP agreements

Provision 16.6.1 of the regulation suggest that after the procurement procedure has been concluded but before the accounting officer or accounting authority of an institution concludes a PPP agreement, that accounting officer or accounting authority must obtain approval from the relevant treasury that the PPP agreement meets the requirements of affordability, value for money and substantial technical, operational and financial risk transfer as approved in terms of regulation 16.4.2 or as revised in terms of regulation 16.4.4. secondly that accounting officer or accounting authority must obtain approval from the relevant treasury that the PPP agreement has a satisfactory due diligence including a legal due diligence has been completed in respect of the accounting officer or accounting authority and

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Act No. 3 of 2000.

the proposed private party in relation to matters of their respective competence and capacity to enter into the PPP agreement.

5.2.2.6 Management of PPP agreements

The accounting officer in or the accounting authority of the institution that is party to a PPP agreement in section 16.7.1 is responsible for ensuring that the PPP agreement is properly implemented, managed, enforced, monitored and reported on, and must maintain such mechanisms and procedures as approved in Treasury Approval.

5.2.2.6 Agreements binding on the state

Provision 16.9.1 in summary provide that a PPP agreement or an agreement amending a PPP agreement, binds the state only if the agreement was entered into on behalf of an institution by the accounting officer or accounting authority of that institution; and if all treasury approvals required in terms of regulation 16 have been granted by the relevant treasury in respect of the PPP.

5.2.2.7 Exemptions

The last provision which will be discussed is 16.10, which provides in sum the relevant treasury may, subject to any terms and conditions that it considers appropriate and upon written application from an institution, exempt that institution whether in relation to a specific PPP or in general, from complying with any or all of the provisions of this regulation 16.

5.2.3 PPP challenges in South Africa

While South Africa's regulatory and legal environment of PPP is generally of a high standard, some challenges remain. At the regulatory level, municipal legislation is more complex than at the national level, and risk is generally greater for local projects. Some private-sector players consider local content requirements to be too demanding, and there are cumbersome administrative processes. Some investors claim that the procurement process disproportionately favours government, and that it has lost some of its transparency and objectivity.³⁷⁴

The PPP Unit attributes the problems and challenges at the Municipal level to "the fact that Municipal outsourcing, including PPPs, are governed by two different pieces of legislation – the Municipal Systems Act of 2000³⁷⁵ (MSA) and the Municipal Finance Management Act of 2003³⁷⁶ (MFMA) - and at least two sets of MFMA regulations - Regulations 309 (dealing with PPPs) and 868 (dealing with municipal procurement).

Any Municipal PPP Guidelines must be agreed upon by the respective ministries - the Department for Provincial and Local Government (DPLG) in terms of the MSA, and National Treasury for the MFMA and the existing Municipal PPP Regulations.³⁷⁷ Challenges facing Municipalities finds the legacy of complex and interlinked legislation often involving inherent confusion and duplication to be a

³⁷⁴ PPP Country paper: South Africa, available at, http://www.sadcpppnetwork.org/wp-content/uploads/2015/02/south_africa_27012014.pdf, last accessed on 15 Sep. 17.

³⁷⁵ Act No.32 of 2000.

³⁷⁶ Act No. 56 of 2003.

³⁷⁷ PPP Country paper: South Africa, available at, http://www.sadcpppnetwork.org/wp-content/uploads/2015/02/south_africa_27012014.pdf, last accessed on 15 Sep. 17.

major hurdle. Both the MFMA and the Municipal Systems Act (MSA) require feasibility studies to be undertaken before a Municipality can proceed with a PPP. A Municipality is faced with the challenge of having to satisfy the requirements of both Acts, which is often perceived to be a difficult task. The PPP Unit confirms that a feasibility study in terms of Section 78 of the MSA takes approximately 2 years.³⁷⁸

Perhaps the biggest challenge for South African PPPs is the broader macroeconomic and political volatility including labour unrest and currency volatility. Government, while broadly supportive of PPPs, especially in renewable energy, has been less committed and coordinated in recent years. Trade unions are somewhat sceptical of PPPs and sometimes conflate them with privatisation of government assets and potential job losses.³⁷⁹

The public also has its share of sceptics, and service delivery protests, sometimes violent, have been a feature of unrest in South Africa of late. Citizens object to price changes related to PPPs, with some refusing to pay electronic tolls on Gauteng's new highways, for instance. Private investors have also been unnerved by the sudden cancellation of some tenders.³⁸⁰

³⁷⁸ African Development Bank, Southern Africa Regional Integration Strategy Paper, 2011-2015,

2011.
³⁷⁹ Collaboratory for Research on Global Projects, Public-Private Partnership Agencies: A Global Perspective, Christine Farrugia, Tim Reynolds, Ryan J. Orr, Working Paper #39, August 2008

³⁸⁰ National Treasury. 2007. "Introducing Public Private Partnerships in South Africa." [<http://www.ppp.gov.za/Documents/Final%20Intro%20to%20PPP%20in%20SA%2021%2009%2007.pdf>].

5.3. Kenya

5.3.1 Overview of Kenya PPP legal environment

Kenya has made significant progress in the PPP landscape over the past few years. Guidelines were passed in 2009, marking the first set of regulations governing concession projects. Previously, projects were awarded based on general law, and subsequently through the law governing public procurement. Concession awards were mainly driven by the Ministry of Energy, with one concession in the transport sector. The 2009 Public Private Partnerships Regulations were gazetted on 10th March, 2009, with the aim to enhance economic stimulation; promoting investment and creation of value for money, which is a collection of several factors. The 2009 Guidelines were followed by the PPP Act in 2013, which governs private investment in public projects, irrespective of the government agency contracting out the service or asset.³⁸¹ The Public Private Partnership Act, No. 15 of 2013 which was designed to provide for the participation of the private sector in the financing, construction, development, operation, or maintenance of infrastructure or development projects of the government through concession or other contractual arrangements. In addition to this, it also provides for the establishment of the institutions to regulate, monitor and supervise the implementation of project agreements on infrastructure or development projects and for connected Purposes. This full-fledged law has made PPPs an integral part

³⁸¹ East African Chamber of Commerce, Industry and Agriculture. 2014. "Attracting funding of PPP through an action plan and accompanying guidelines and hand book for advocacy and awareness creation for the management of PPP deals based on business climate assessment and gap analysis."
[<http://www.enablebusiness4pppseastafrica.com/wp-content/uploads/2014/10/Draft-Policy-Framework-Report.pdf>].

of the Kenya's Private entity Development Strategy, and has been assessed positively by external commentators.³⁸²

5.3.2 Analysis of the PPP Act of 2013

Key provisions of Kenya PPP Act of 2013 will be discussed and analysed below:

5.3.2.1 Interpretations

The Act in section 2 defines various terminologies pertaining to PPP. The Act defines "public private partnership" to mean an arrangement between a contracting authority and a private party under which a private party undertakes to perform a public function or provide a service on behalf of the contracting authority; receives a benefit for performing a public function by way of compensation from a public fund and charges or fees collected by the private party from users or consumers of a service provided to them.

In order to best understand the meaning of PPP in the context of Kenya as defined above, key concepts namely "private party", "contracting authority" will be discussed.

The Act in section 2 further defines a "private party" as a party that enters into a project agreement with a contracting authority and is responsible for undertaking a project on behalf of the contracting authority under the Act.

³⁸² Kenya. 2014. The public private partnerships act (No. 15 of 2013)—petition committee guidelines, 2014.

Contracting authority is defined in section 2 of the Act as follows as a State department, agency, state corporation or county government which intends to have a function undertaken by it performed by a private party.

It should be noted that other concept pertaining to PPP in Kenya are also defined in the Act.³⁸³

5.3.2.2 Institutional design

In terms of institutional design, three bodies play a significant role in the current process in Kenya: the PPP Committee; the PPP Unit and the “Nodes”.

(i) PPP Committee

The PPP Committee is established in terms of section 4 (1) of the PPP Act which provides that there is established a Committee to be known as the Public Private Partnership Committee.

Section 7 of the Act provides for the function of the PPP Committee. Some of the major functions of the PPP Committee is to ensure that each project agreement is consistent with the provisions of the Act; formulate policy guidelines on public private partnerships and ensure that all projects are consistent with the national priorities specified in the relevant policy on public private partnerships. The Committee further have the functions to approve project proposals submitted to it by a contracting authority and to formulate or approve standards, guidelines and procedures for awarding contracts and standardized bid document. The

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These concepts include “feasibility study”, “privately initiated investment proposal”, “proposal evaluation team”, and “special purpose vehicle” among others.

Committee also examine and approve the feasibility study conducted by a contracting authority under this Act. Lastly, they have the function to review the legal, institutional and regulatory framework of public private partnerships and oversee the monitoring and evaluation by contracting authorities, of a public private partnership from the commencement to the post completion stage.

(ii) PPP unit

The PPP unit is established in terms of section 11 of the Act which provide that there is established, within the State department responsible for matters relating to finance, a unit to be known as the public private partnership's unit. The Cabinet and county governments also play an approval role. Domiciled at the National Treasury, the PPP Unit oversees project preparation and planning, and serves as a national centre for PPP expertise.

The functions of the PPP unit are provided under section 14 of the Act. The Unit provide technical support for PPP implementation, specifically around monitoring of liabilities and accounting issues related to projects.³⁸⁴

The Unit also makes recommendations on the approval or rejection of projects prior to submission of projects prior to submission to the PPP Committee—the entity that approves project proposals and interfaces with higher levels of government, including the Cabinet.

(iii) PPP Node

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Kenya. 2011. "Policy Statement on Public Private Partnerships."

The final stakeholder is the “PPP Node”, headed by the accounting office of the relevant contracting authority. It facilitates identification and screening of PPP projects, appraises each project agreement to ensure viability, ensures that parties comply with the PPP Act, and undertakes tender processes and monitoring.³⁸⁵

The PPP node is established in terms of Section 16 of the Act.

The PPP Node functions are outlined in terms of sections 17 which among its major roles is to identify, screen and prioritize projects based on guidelines issued by the Committee and prepare and appraise each project agreement to ensure its legal, regulatory, social, economic and commercial viability. The Node also carries the role to ensure that the parties to a project agreement comply with the provisions of the Act and undertake the tendering process in accordance with this Act and any other written law. Lastly it must also monitor the implementation of a project agreement entered into with

5.2.3.3 Privately initiated investment proposal

One of the uniqueness of the PPP legal environment is that it provides for privately initiated investment proposal. Privately initiated investment proposal means a proposal that is originated by a private party without the involvement of a contracting authority and may include information that enables a complete evaluation of the proposal as if it were a bid.

Section 61 of the Act provides that a contracting authority may consider a privately initiated investment proposal for a project and procure the construction or

development of a project or the performance of a service by negotiation without subjecting the proposal to a competitive procurement process where there is an urgent need for continuity in the construction, development, maintenance or operation of a facility or provision of a service and engaging in the competitive procurement process would be impractical: Provided that the circumstances giving rise to the risk of disruption were not foreseeable by the contracting authority or the result of an unreasonable failure to act by the contracting authority.

Section 61 further provides that a contracting authority shall not consider a project for procurement under this section unless it is satisfied that the project shall provide value for money; the project shall be affordable; and lastly the appropriate risks are transferred to the private party. This is interesting as neither Namibia nor South Africa have similar provisions in their frame work.

5.3 Lessons Namibia can learn from Kenya and South Africa

An analysis of this chapter indicates that PPPs are on the agenda of most African policymakers, with many countries passing new laws, policies and regulations to facilitate PPPs. Although a unified PPP legal framework is lacking in some places, most African countries have adopted national policies or guidelines, or have a PPP law in the pipeline. This chapter indicates that South Africa is ranked the highest on the African continent when it comes to the regulation of PPP. Although most of the countries discussed in this chapter have yielded success from PPP, they are nevertheless also facing a number of challenges that need to be tackled. The study further indicates that it is very difficult to regulate PPP due to its complex nature.

The most important lesson Namibia can learn from all these African countries, is the importance of having a regulatory framework that governs PPP arrangements in the country. This will curb some of the challenges that remain if provisions are not made for in the regulatory framework.

The first and most important lesson Namibia can learn from South Africa, is the differentiation of the PPP act, from the municipal arrangements. Namibia currently does not, in its PPP legislation make provision for local authorities.

Namibia can learn another unique trait from the Kenyan regulatory framework is the weaving in of the PPP node in its regulatory structures. The node will be overseeing the implementation and smooth operation of the PPP agreement which is currently not made provision for in our law. The PPP Unit can focus on the administration of the procurement process and the PPP node focus on the implementation.

Further, it is important to ensure that the institutional framework is stable. Institutional and legal frameworks are intertwined as the one depends on the other for success. It would be of little sense to have a regulatory framework in an unstable and unreliable political setting.

5.4 Conclusion

For Kenya to build on its progress, there are four areas requiring attention. The first is to harmonise the institutional framework established by the PPP Act with existing regulations that pre-date the law. This is particularly relevant for sectors that undertook PPPs prior to the Act, such as the energy sector.

A second challenge will be harmonising the institutional framework between national and county levels. The process of setting up PPP Units at the county level is ongoing, and will make PPP project implementation clearer—especially in cases where projects involve the use of natural resources (e.g. wind) which are owned by the counties. The third challenge concerns human resources. Units at both national and county levels need to be staffed with trained personnel with PPP-specific knowledge. At the moment, most transactions rely on international advisors. Nonetheless, the country remains faced with a challenge where some PPP contracts are carried out without involving PPP stakeholders. Finally, the legal framework is a relatively new piece of legislation that has borrowed from international best practice, but has not yet been tested for effectiveness since there is no single PPP project that has been successfully undertaken from commencement to completion under this Act. Time will test the laws and their robustness.³⁸⁶

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East African Chamber of Commerce, Industry and Agriculture. 2014. "Attracting funding of PPPs through an action plan and accompanying guidelines and hand book for advocacy and awareness Creation for the management of PPP deals based on business climate assessment and gap analysis. available at[<http://www.enablebusiness4pppseastafrica.com/wp-content/uploads/2014/10/Draft-Policy>- last accessed on 30 February 2018

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

6.1 Conclusion

PPP Projects are not merely entered into for the taking or for the country to receive a gold medal on the global stage. PPP projects involve human life, from all angles, hence the importance to enhance public benefit, the degree of private participation be matched to the risk and objective of the project and the public. It is thus paramount that the risks, costs, ability to effectively manage and implement PPP projects in any political, institutional and economic framework are necessary consideration in selecting a PPP project.

A sound and strong harmonisation legal framework is imperative for the success of PPP in Namibia; this should be carried out without prejudice to the institutional framework required for success PPP projects. If the above outlined recommendations are considered, there exists a higher chance for the regulation of PPPs in Namibia, to be a resounding success. The PPP Act, in its current form, was a poorly conceived and drafted.

In view of the above, this research has confirmed the hypothesis in that there is a need to revise the PPP Act in Namibia. This will ensure that the consumer's services are best taken care of and it will yield better compliance and service delivery.

The research indicated that the concept of PPPs in Namibia is not new. Local authorities have been carrying out PPP projects on a small scale for public service delivery such as refuse removal, solid waste material, servicing of land and water reclamation systems.³⁸⁷ The novelty around PPP projects in Namibia is the regulation aspect. PPP does not have one definition; various institutions and instruments such as the World Bank³⁸⁸, OECD³⁸⁹ and the PPP policy³⁹⁰ define it differently. However, there exist, key elements that are common in all definitions. The research also appreciates the different types and forms of PPP arrangements. PPPs are essential in assisting governments to procure essential services at the behest of best industry practices and good service delivery.

Due to the increasing demand of PPP arrangements and the realisation of its recent importance, the government of Namibia has realised the need for PPPs to be regulated.³⁹¹ The PPP Act of Namibia thus provides a PPP regulatory framework, regulates the establishment,³⁹² management,³⁹³ implementation and execution³⁹⁴ of the PPP projects and establishes a PPP committee³⁹⁵. Although, I applaud the law makers for the initiative of regulating the PPP framework in Namibia, a lot still needs to be done, in the general context, as far as Namibia is

387 Keytler (2009:19)
388 World Bank (2009:7)
389 OECD (2008:1)
390 Ministry of Trade and Industry, PPP National Policy (2012:21)
391 The National Assembly enacted a PPP Act, No 4 of 2017.
392 PPP ACT No 4 of 2017, Part 3, section 16
393 PPP ACT No 4 of 2017, Part 7, section 33-34
394 PPP ACT No 4 of 2017, Part 5, section 19-29
395 PPP ACT No 4 of 2017, Part 2, section 19-29

to adequately make use of this legislation to its full potential. The Act is there for the Public entity to make use of, however, the questions and discomfort around the PPP Act remain, and this is attributed to the inconsistencies witnessed in the Act and lack of synergies with other relevant Acts such as the Procurement Act³⁹⁶ and Competition Act³⁹⁷.

The decision of Namibia to regulate PPPs is not uncommon among African countries. This study indicated that PPPs have been on the agenda of some African countries such as, South Africa³⁹⁸ and Kenya³⁹⁹. These countries have passed PPP laws, with stable regulatory frameworks. However, challenges still remain. Namibia's regulatory framework, cannot copy other legal frameworks. Nevertheless, there are important lessons Namibia can learn from these jurisdictions in so far as the implementation of PPP projects is concerned. The PPP regulatory framework of Namibia should be tailor made for Namibia's needs, historical background and visions.

There are advantages and disadvantages to this PPP concept and the public is enthusiastic on making use of it. However, its inadequacy makes it very difficult to implement as the public entity is failing to lure the private entity to participate in PPP projects. This simmers down to the issues such as lack of risk sharing indicators, lack of private sector involvement in the procurement process, lack of promotion of investments and non-solicited bids that are not well placed in the Act,

³⁹⁶ Act No. 15 of 2015

³⁹⁷ Act No.2 of 2003

³⁹⁸ South Africa regulates their PPPs through section 76 of the Public Finance Management Act of 1999 and Treasury Regulation 16.

³⁹⁹ Public Private Partnerships Act No 15 of 2003.

as there are no guidelines. The private entity will be reluctant to participate in a project that does not clearly identify and narrow down the risks that it will usurp to enable it to measure it against its benefits and value for money.

It is necessary for the PPP legal framework to promote and protect local investments through the vein of black-economic empowerment and foreign investors in order for the public entity, local investments and the consumers to harness the benefits foreign investments may bring through PPP⁴⁰⁰. These benefits that foreign investments may bring are such as, capital inflows, technological, machinery and skill transfer⁴⁰¹.

Through this PPP concept, Namibia can grow its various industries and ensure that the investors, local and foreign are attracted to investing in Namibia and benefit from economical, institutional and political stability in Namibia. It is therefore, important, that the Act, clearly sets out how it will accommodate black economic empowerment and how it sets itself apart from any other foreign investment regime.

In a nutshell, the PPP Act has ten main parts, such as the preliminary bidding stage which describes what contracts qualify for PPPs⁴⁰². The Act allows for the establishment of a PPP Committee in the Finance Ministry to make key decisions on contracts⁴⁰³. Members of this committee will be appointed on three-year

⁴⁰⁰ Dan-Aohoeb (2016:16)

⁴⁰¹ Ministry of Health and Social Services. 2014, *Directorate: Policy, Planning and human resources Development*. Available at www.mhss.gov.na, Retrieved 28 April 2016.

⁴⁰² Part 1 of the PPP Act 4 of 2017

⁴⁰³ Part 2 of the PPP Act No 4 of 2017

contracts, and comprise a chairperson and officials from state agencies or the private entity⁴⁰⁴.

The Committee will approve partnerships; develop guidelines and policies, while the chair will be appointed by the finance minister⁴⁰⁵. Others will come from state bodies such as the National Planning Commission and the Attorney General's office⁴⁰⁶.

A PPP Unit will be created in the Finance Ministry to assist the committee⁴⁰⁷. A feasibility assessment will be done to decide if the proposed PPP project is in the public interest, and whether the government can afford it⁴⁰⁸.

A close analysis of the PPP Act indicates that it will have a great impact on the local and foreign investors, the consumer and the public entity. The Act, in its current state is however, not adequate to carry out PPP projects and requires amendment to improve its current state.

This research, will succinctly suggest improvements that could be made to the Act, which are according to the comparisons in chapter 5 and to the spirit of the Namibian Constitution and the contemporary PPP environment in Namibia. However, the cosmetic improvements to the Act are not considered in this discussion.

404 Section 8 of the PPP Act No 4 of 2017
405 Section 6 of the PPP Act No 4 of 2017
406 Section 6 of the PPP Act No 4 of 2017
407 Section 6 of the PPP Act No 4 of 2017
408 Part 4 of the PPP Act No 4 of 2017

6.2 Recommendations

The research indicates the following changes to be made to the current PPP Act:

1. There is a need for further consultations with the relevant stakeholders for them to give their input. Consultations with the relevant stakeholders will assist in ensuring that probity and transparency is achieved and that the Act addresses any legal discrepancies that may have been missed and that it is in line with the Namibian spirit, history, visions, goals and PPP environment.
2. The research recommends further developments to improve the current state of the PPP Act: These improvements should include but are not be limited to:
 - a) The application of the Act in Section 2⁴⁰⁹ should be revised to clearly define the goods, works and services that apply to it and clearly indicate to what extend the Public entity is exempted from procuring goods, works and services under the PPP Act. The Research proposes that the Act provides a threshold in amount of the goods and services that may be procured under the PPP Act, as the current PPP Act does not provide for this.

- b) Transparent procuring process that includes public participation and consultation as a mandatory step in all PPP projects before the bidding process is initiated and after the Public entity has recommended the PPP project. The Public should also be kept abreast with all or quarterly progress reports provided to the Public entity from the Private Entity. The current PPP Act does not provide for this. This is important to promote the principles of probity and transparency and to curb corruption.
- c) Strict timelines as to any process mentioned in the Act and consequences for non-compliance with these time lines should be imposed, no sanctions are provided for in the Act should any party not comply with the Act. This is important to ensure that all parties strictly adhere to timelines to avoid a carte blanche approach to the projects from either of the parties.
- d) The Act should clearly state how it will accommodate existing PPP projects that were initiated before the Act was passed as law and how it will accommodate all other local authorities and municipalities given the mandate to carry out PPP projects by their respective regulatory frameworks. PPPs that have been operation since 1996, such as the Goreangab water plant would require clarity on whether it will conform to the PPP Act or not.
- e) The Act should clearly and concise indicate how the risk in a PPP project will be shared. The research, proposes that it be clearly

stated in the Act, that the risk in any project be allocated to the Party that can best manage it unless otherwise agreed by the Parties.⁴¹⁰

- f) The Act should clearly state when the management team will be established and the Research proposes that a technical and financial staff of the Private Entity be party to such a management team.⁴¹¹
- g) The research proposes that the Act's tenor and focal point should be around previously disadvantaged Namibians, in that, all and any Private entity bidding for a PPP Project should as a pre-emptory requirement, be majority Namibian owned, with a component of previously disadvantaged and should comprise of 10 % female owners to promote women involvement in the private sector. It should clearly state how the previously disadvantaged Namibians will be accommodated in each and every project.⁴¹²
- h) Part 2 of the PPP Act should clearly indicate how the PPP Committee members will be appointment. The Research proposes that the Act sets out a process on the appointments of the PPP Committee members to curb corruption.

⁴¹⁰ Kakati M., Baruah P. (2016) Optimal risk allocation in Public –Private Partnerships (PPP) Projects in India. Boston, USA. P144. Retrieved from http://ageconsearch.umn.edu/bitstream/207820/2/2007_1B_PartFin_paper.pdf

⁴¹¹ Axis Consulting (2013:21)

⁴¹² Axis Consulting (2013:21)

3. The Research proposes that the PPP Unit be established in the Act to create defined powers and functions and to avoid multiplicity of duties with the PPP Committee.⁴¹³
4. The Act should contain standard terms expected to be in a PPP contract, regardless of the sector or industry.
5. Further, the research recommends that in order for Namibia to address PPP implementation in Namibia, it requires an effective mechanism or committee, which can facilitate cross-ministerial decision making and direct implementation of legal reforms. Building on the series of inter-ministerial economic strategy workshops that are organized by the Cabinet Secretary and using the expertise of the PPP Unit, the government should establish a mechanism for regular and sustained public-private dialogue. This body could have as its functions to:
 - make recommendations on the assignment of specific ministerial roles and responsibilities and how they are linked to PPP,
 - advise on investment objectives and priorities,
 - make recommendations on investment policy,
 - publicly monitor and evaluate progress towards goals, and develop objective measures of investment performance and collect annual data on progress towards their improvement.
 - Ensure when acts and policies are enacted, there exists inter relations, synergies and communications between the relevant ministerial

stakeholders to ensure that the proposed acts and policy do not clash or overlap on objectives.

BIBLIOGRAPHY

Books

Abdumanapova, A. 2005. *The notion of Socially Responsible Investment in the context of State Investor Agreements: human rights or economic returns*. LLM dissertation in International Human Rights Law. University of Essex

Corrigan, Mary Beth, et al. 2005. *Ten Principles for Successful Public/Private Partnerships*. Washington, D.C.: ULI—the Urban Land Institute

Cotula, L. 2010. *Investment contracts and sustainable development: How to make contracts for fairer and more sustainable natural resource investments*, IED, London.

Denzin, NK.1978. *Sociological Methods*. New York: McGraw-Hill

Espigares JLN, Torres E.H *Public-Private Partnerships as a new way to deliver Healthcare services*. University of Granada

Ghobadian, A., O'Regan, N., (Eds) .2004. *Private-public partnerships: policy and experience*. Palgrave Macmillan.

Grimsey, D., & Lewis, M. 2007. *Public private partnerships: The worldwide revolution in infrastructure provision and project finance*. Edward Elgar Publishing. United Kingdom

James, R. 2007. *The Creation of States in International Law (2nd Edition)*, Oxford: Oxford publisher

Jimenez, B, Asano T. 2008. *A scientific and technical report no 20, Water Reuse: An international survey of current practice, issues and needs*. UK: IWAR Publication.

- Likosky M.B. 2006. *Law, Infrastructure and Human Rights*. Cambridge University Press.
- Nunnenkamp, P, 2002. *Kiel Institute of World Economics. Foreign Direct Investment in Developing Countries: What Economists (Don't) Know and What Policymakers Should (Not) Do! CUTS Centre for International Trade, Economics & Environment*. India: Bani Park
- Osborne, S, 2002. *Public-private partnerships: Theory and practice in international perspective*. Routledge.
- Oslen, W. 2004. "Triangulation in Social Research: Qualitative and Quantitative methods can really be mixed." in Holborn, M. *Developments in Sociology*. Ormasik: Causeway Press
- World Bank, ICA Secretariat et al. 2009. *Attracting investors to African Public – Private Partnership: A project regulation guide*. Washington. The World Bank.
- Yona, L, 2011. *International Finance for Developing Countries*. United Kingdom: Author House
- Pattberg, P, Biermann, F. et al. 2012. *Public Private Partnerships for sustainable Development Emergence, influence and legitimacy*. Edward Elgar Publishing Limited. Cheltenham.
- Payne, G. 1999. *Making Common Ground Public –Private partnerships in land housing*. London: Intermediate Technology Publications
- Prasad, E et al. 2003. *Effects of financial globalization on developing countries: Some empirical evidence*. IMF Occasional Paper 220. Washington, DC: International Monetary Fund.

Ruiters G.2004. *The age of commodity: Water privatization in Southern Africa*. South Africa: Routledge

The World Bank, ICA Secretariat et al.2009.*Attracting investors to African Public –Private Partnership: A project regulation guide*. Washington. The World Bank

Journal Articles

Christine Farrugia, Tim Reynolds, Ryan J. 2008. *Collaboratory for Research on Global Projects, Public-Private Partnership Agencies: A Global Perspective*

Coase, R.H. (1960) "The Problem of Social Cost", *Journal of Law and Economics*

Keyter, 2009. "Effectiveness and Efficiency of a Public-Private Partnership Arrangement: A Case Study of Perceptions on the Ward Contractor System in the City of Windhoek", Namibia

English I.m. and Guthrie, J. 2003. "Driving Privately Financed Projects in Australia: What Makes Them Tick?" 16 *Accounting, Auditing and Accountability Journal* 493.

Bahmani-Oskooee, M. & Gelan, A. (2006). "Testing the PPP in the non-linear STAR Framework: Evidence from Africa". *Economics Bulletin*, 6(17), 1-15.

Farlam, P. 2005. "Assessing Public-Private Partnerships in Africa": *Nepad Report Series* No 12. The South African Institute of International Affairs, Pretoria

Hayek, F.A., 1973. "Law, Legislation and Liberty. A New Statement of the Principles of Justice and Political Economy." vol. 1: *Rules and Order* 1973, vol. 2: *The Mirage of Social Justice* 1976, vol. 3: *The Political Order of a Free People* 1979, London: Routledge and Kegan Paul.

Hodge, G. A., & Greve, C.2007. "Public-private partnerships: an international performance review". *Public administration review*, 67(3), 545-558.

Hoekman, B.2 012. "The WTO and Trade in Services" *volume II*. Edward Elgar Publishing Inc. Cheltenham.

Hughes, D., Ludlow m., & Allen L. 2005. "PPP Reforms to Allay Concerns", *Australian Financial Review* (Sydney), 9 June

Keyter, 2009. "Effectiveness and Efficiency of a Public-Private Partnership Arrangement: A Case Study of Perceptions on the Ward Contractor System in the City of Windhoek", Namibia

Ministry of Home affairs. 2013." Public-Private Partnerships in developing countries", *a systematic literature review*. Ministry of Home Affairs, Netherlands.

Moura R. Forte R. 2010. "The effect of foreign direct investment on the host country-economic growth, empirical evidence" - *FPI Working papers*, Research work in progress, Universidade do Porto

Nagayasu, J. 2002. "Does the Long-run PPP Hypothesis Hold for Africa? Evidence from a Panel Co-integration Study". *Bulletin of Economic Research*, 54(2), 181-187.

Shafiul, A.A., Ali, S.M. 2005: "People as partners: Facilitating people's participation in public-private partnerships for solid waste management" *Vol 30, issue 4*, University of Loughborough, UK

The Economist Intelligence Unit. 2015. *Evaluating the environment for-private partnerships in Africa: The 2015 Infrascopes*. EIU, London.

Wehrheim.Axis Consulting Group. 2013. *Public Private Partnerships Country Paper*. Submitted to SADC3.

Van der Walt ADJ. 1990. "Towards the development of post-apartheid land law: An exploratory survey" *De Jure Vo*. 23. 1 – 45.

Legal instruments

Broad-Based Black Economic Empowerment Act No.53 of 2003.

Competition Act No. 2 of 2003

Finance Management Act, 1999 (PFMA)

Foreign Investment Act No 27 of 1990

Harambee Prosperity Plan 2016/17-2019/20

Indigenization and Economic Empowerment Act of 2008

Interpretation of Laws proclamation No.37 of 1920

Kenya Public Private Partnerships act (No. 15 of 2013)—petition committee guidelines

Municipal Finance Management Act No 56 of 2003

Namibia Investment Promotion Act No. 9 of 2016

Namibia Public Private Partnership Policy, 2012,

Public Finance Management Act, 1999

Public Private Partnership Act No. 4 of 2017

Public Private Partnership Act, No. 15 of 2013

Public Procurement Act No. 15 of 2015

Treasury Regulation 16 of South African

Newspapers

Lomus, J. 2016. "Lessons from the UK". *The Namibian Newspaper*

NAMPA. 2016. "PPPS to be closely monitored to ensure output requirements". *The Namibian New Era*

NAMPA. 2017. "National Council Rejects PPP Bill" *Namibian Sun Newspaper*

NAMPA. 2017. "Public Private Partnership bill criticised", *Sun newspaper*

Shapwanale N. 2017. "Parliamentarians blast PPP Bill", *The Namibian Newspaper*,

Weidlich, B. 2010. "Public Private Partnership framework planned". *Namibian Newspaper*

Weidlich, B. 2016. "Go PPP go! Admin". *Insight magazine*

Unpublished sources

Festus, N.N. 2009. *Factors Influencing Investment: A Case Study of the Namibian Economy*. Unpublished LLM Thesis: University of Namibia

lifo, T. 2014. *University of Namibia; the need for a legal regime under land reform*, unpublished. University of Namibia, Windhoek

Internet references

Abbey, Richard A. 2014. *PPP law expected by close of year*. *Business & Financial Times*. Available at <http://thebftonline.com/content/ppp-law-expected-close-year>; last accessed 16 June

African Development Bank (AfDB), 2013. *Annual Report 2013*. Available at http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Annual_Report_2013.pdf; last accessed 02 June 2016

African Development Bank, 2011. *Southern Africa Regional Integration Strategy Paper 2011-2015*. Available at www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Annual_Report_2013.; last accessed 02 June 2016

Blanc-Brude, F., Goldsmith, H., & Valila, T. 2007. *Public-private partnerships in Europe: An update*. Available at http://www.eib.org/attachments/efs/efr_2007_v03_en.pdf last accessed 09 March 2017

Brian, P. & Brandon D. 2006. *Design –build in Transportation: Quality and innovation* available at http://www.nossaman.com/Files/6734_BGP_BJD_Dateline_4.1.06.pdf; last accessed 14 March 2017

Dan-Aohoeb, R .2016. *The Namibian Newspaper. Namibia's Public Private Partnership analysis*, available at: <https://www.namibian.com.na/152571/archive-read/Namibias-Public-Private-Partnership-Policy-Analysis> last accessed on 18 January 2017.

Department of Treasury and Finance, Victoria, *Partnerships Victoria* .2000. *Partnerships Victoria* [http://www.partnerships.vic.gov.au/CA25708500035EB6/WebObj/Policy/\\$File/Policy](http://www.partnerships.vic.gov.au/CA25708500035EB6/WebObj/Policy/$File/Policy); last accessed on 09 Mar. 17.

Department of Treasury and Finance, Victoria, *Practitioners' Guide*. 2001. *Partnerships Victoria* 5 http://www.partnerships.vic.gov.au/CA25708500035EB6/WebObj/PVGuidanceMaterial_PracGuide/File/PVGuidanceMaterial_PracGuide.pdf; last accessed 15 October 2016.

East African Chamber of Commerce, Industry and Agriculture. 2014. "Attracting funding of PPPs [<http://www.enablebusiness4pppseastafrica.com/wpcontent/uploads/2014/10/Draft-Policy-Framework-Report.pdf>]; last accessed 02 March 2017

European Commission Directorate-General. 2003. *Regional Policy Guidelines for successful Public Private Partnerships*. March 2003. Available http://ec.europa.eu/regional_policy/sources/docgener/guides/PPP_en.P.4; last accessed on June 2017

European Community-Southern African Region, *Regional strategy paper 2012*, available at https://eeas.europa.eu/sites/eeas/files/east_africa_2008_2.pdf, last accessed 02 June 2016

FHWA PPP *Core Toll Concession Contract guide* .2014. available at https://www.fhwa.dot.gov/ipd/pdfs/p3/model_p3_core_toll_concessions.pdf last accessed 09 March 2017

FHWA.2005. *A summary of Highway Provisions in SAFETEA-LU*. Available at <https://www.fhwa.dot.gov/safetealu/summary.htm> last accessed 13 March 2017

FHWA.2017. *Centre for finance support: PPP* Available at <https://www.fhwa.dot.gov/ipd/p3/> last accessed 14 March 2017

FHWA.2017. *Centre for finance support: Project Profile: Capital Beltway High Occupancy Toll (HOT) Lanes (I-495)* available at https://www.fhwa.dot.gov/ipd/project_profiles/va_capital_beltway.aspx last accessed on 14 March 2017

GAN Business Anti-corruption Portal.2017. *Namibian Corruption Report*. Last accessed on 19 November 2017 from <http://www.business-anti-corruption.com/country-profiles/namibia>

General procurement notice. 2015. *Institutional Strengthening for Public-Private Partnerships* available at http://www.afdb.org/fileadmin/uploads/afdb/Documents/Procurement/Project-relatedProcurement/GPN_Namibia_Institutional_Strengthening_for_PublicPrivate_Partnerships_%E2%80%93_10_2015 last accessed on 17 March 2017.

Global *Corruption Barometer*, 2015-2016 Available at, <https://www.transparency.org/country/NAM>, last accessed on the 04 July 2017

Golecki M. et el .2002. German Working Papers in Law and Economics Volume2002 Paper 13 *economics of law as a jurisprudential theory* University of Lodz. Available at <http://www.bepress.com/gwp> last accessed on 18 February 2017

Guion, L.A (et al) .2007. *Triangulation: establishing the validity of Qualitative Research*. Available at <http://edis.ifas.ufl.edu/fy394>. last accessed on 20 May 2016

Harris, C. .2003. *Private Participation in Infrastructure in Developing Countries: Trends, Impacts, and Policy Lessons*. Available at <http://web.mit.edu/urbanupgrading/waterandsanitation/resources/pdf-files/Harris-PrivateParticipation.pdf> Last accessed on 20 November 2017.

Hearne, R. 2009, *Origins, Development and Outcomes of Public Private Partnerships*, available at http://www.combatpoverty.ie/publications/workingpapers/200907_WP_PPPsinSocialHousingRegeneration.pdf, last accessed on 09 March 2017.

Issam Al-Asali. Hart., O. 2003. *Incomplete Contracts and Public Ownership: Remarks, and an Application to Public-Private Partnerships*. The economic journal Available at <http://onlinelibrary.wiley.com/doi/10.1111/1468-0297.00119/full/International>. last accessed 11 September 2017.

Kakati,M., Baruah P. 2016. *Optimal risk allocation in Public –Private Partnerships (PPP) Projects in India*. Boston, USA. P144. Available at http://ageconsearch.umn.edu/bitstream/207820/2/2007_1B_PartFin_paper.pdf, last accessed on 30 June 2017

Konstantinus, E. 2017. *Why the PPP Bill was rejected | New Era Newspaper Namibia*, available at <https://www.newera.com.na/2017/02/21/why-the-ppp-bill-was-rejected/>, last accessed on 02 March 2017.

Legal Assistance Centre: *How laws are made*: LAC, available at <http://www.lac.org.na/projects/huricon/Pdf/howlaws.pdf>, last accessed on 7 February 2017

Likosky M.B. 2006. *Law, Infrastructure and Human Rights*. Cambridge University Press.

Lowdens V., Sulliva. H. 2006. *Like a Horse and Carriage or a Fish on a Bicycle: How Well do Local Partnerships and Public Participation go Together?* Available at <http://dx.doi.org/10.1080/0300393042000230920> on 22 June 2017

Lumina C. 2004. "Free trade or just trade? The World Trade Organization, human rights and development (Part 1)". *Law and Development Journal*, p 26. Available at: <http://www.saflii.org/za/journals/LDD/2008/11.pdf>; last accessed 30 July 2016

Mfunwa, M., et al. 2015. *Public-Private Partnerships for Social and Economic Transformation in Southern Africa: Progress and Emerging Issues1: Regional Conference on Building Democratic Developmental States for Economic Transformation in Southern Africa*. Pretoria. Available at <http://www.developmentalstatesconference.com/wpcontent/uploads/2015/07/28-Zebulun-Kreiter.pdf> Last accessed on 02 November 2016.

Ministry of Finance.2016. available at <https://www.ean.org.na/wp-content/uploads/2016/03/Public-private-partnershipsand-role-in-funding-energy-infrastructure-Saurabh-Suneja-Ministry-of-Finance-EnergyConf2015.pdf> last accessed on 18 August 2017

Ministry of Health and Social Services. 2014. *Directorate: Policy, Planning and human resources Development*. Available at www.mhss.gov.na, last accessed on 28 April 2016.

Namibian High Commission .2017. Available at www.nhcdelhi.com last accessed on 19 August 2016

Namibian Press Agency (NAMPA).2017. Namibian Broadcasting Corporation: *National Assembly passes PPP law*; available at <https://www.nbc.na/news/national-assembly-passes-ppp-bill.3179> Last accessed 31 March 2017

<https://www.oecd.org/governance/budgeting/PPP-Recommendation.pdf>, last accessed on 30 June 2017.

OECD Public Governance Committee .2008. "Public-Private Partnerships: In Pursuit of Risk Sharing and Value for Money", Working Party of Senior Budget Officials, <http://www.oecd.org/mena/governance/41767985.pdf> last accessed on 02 November 2016

OECD, *Competition issues in Public Private Partnerships*, Available at www.oecd.org last accessed 19 August 2016

OECD. 2002. *Foreign Direct Investment for Development: Maximizing Benefits, Minimising Costs*. Paris: OECD. Available at <https://www.oecd.org/investment/investmentfordevelopment/1959815.pdf>, last accessed on 12 March 2017

Pauline Hovy .2015. *Risk Allocation in Public private Partnerships: Maximizing value for money*. Available at IISD.org last accessed on the 30 June 2017

Pietilä, P. 2006. *Role of Municipalities in Water Services in Namibia And Lithuania*. *Tempere University of Technology* Available at https://www.researchgate.net/publication/258181268_Role_of_Municipalities_in_Water_Services_in_Namibia_and_Lithuania last accessed on 30 June 2017

PPP Country paper. 2014. *South Africa*, available at, http://www.sadcpppnetwork.org/wpcontent/uploads/2015/02/south_africa_27012014.pdf, last accessed on 15 Sep. 17.

Report of the Working Group of the Capital Markets Consultative Group .2003. *Foreign Direct InvestmentInEmergingMarketCountries* available at <https://www.imf.org/external/np/cm/cg/2003/eng/091803.HTM> and last accessed February 2017

Republic of Namibia.2012. “*Namibia’s Fourth National Development Plan*”, available at http://www.npc.gov.na/?wpfb_dl=37, last accessed on 17 March 2017

Shlechter, D .2013. *Namibian New Era: Ground breaking Public Private Partnership silo construction*, December 2, 2013, available at <https://www.newera.com.na/2013/12/02/groundbreaking-public-private-partnership-silo-construction/> last accessed on 18 February 2017.

Suneja, S. 2016. GRN Portal - Ministry of Finance: *Updates on PPP Unit activities and overview of legislative framework*, available at <https://www.google.com.na/url?sa> , last accessed on 02 March 2017.

The origin and development of PPP in Europe, available at, http://ppp4krakow.net/About_PPP/Definition,_origin_and_evolution/ , last accessed on 09 March. 17.

The Policy and law-making process available at <http://www.etu.org.za/toolbox/docs/govern/policy.html> last accessed on 20 November 2017.

The World Bank Group. 2015. “*Private Participation in Infrastructure Database.*” Available at [<http://ppi.worldbank.org/>]. last accessed on 19 November 2017

UNCTAD. 2015. *Annual Report 2015 Delivering on A Sustainable Agenda* Available at:http://unctad.org/en/PublicationsLibrary/dom2016d1ipub_en.pdf last accessed on 03 March 2017

United Nations. 2005.*Rethinking the Role of Foreign Direct Investment*. United Nations Publications. Available at http://unctad.org/en/docs/gdsafrica20051_en.pdf Pg.10, last accessed on 18 February 2017

Wagenvoort , R. 2010. *Finance Infrastructure in Europe: Composition, evolution and crisis impact*, available at, http://www.eib.org/attachments/efs/eibpapers/eibpapers_2010_v15_n01_en.pdf, last accessed 09 march 2017.

World Bank Group Institute .2012. "*Public-Private Partnerships Reference Guide*",<https://wbi.worldbank.org/wbi/Data/wbi/wbicms/files/drupalacqua/wbi/WBIPPIAFPPPReferenceGuidev11.0.pdf> last accessed on 02 November 2016