



Proposal of

**COMPLEMENTARY LAW ON PUBLIC-PRIVATE PARTNERSHIPS, LARGE
SCALE PROJECTS AND BUSINESS CONCESSIONS**

Maputo, 26 October 2010

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Justification

Mozambique has been undertaking efforts towards attracting investments and providing greater involvement of the private sector in vital sectors for promoting national economic and social development, by means of, namely, the establishment of business partnerships between economic actors of the public and private sector, referred to as Public-Private Partnerships (PPPs), as well as Large Scale Projects (LSPs) and business concessions (BCs).

Considering the existence of PPPs, LSPs and BCs awarded pursuant to economic legislation in force some of which are already operating by means of concession contracts, contracts for assignment of operations and management contracts, as well as investment project approvals, this draft bill intends to complement the existing legislation in respect of matters not covered therein concerning the different types of PPPs, LSPs and BCs with a view towards the development and the efficient operation and management of undertakings of economic or social activities destined for the provision of goods or services required to meet the needs of the internal market and for export.

For the purpose, under the responsibility and at the expense of the private partners and investors, the process of financing and carrying out of the required and agreed investments as well as the operation of the relevant activities should take place, including the management and maintenance of the respective undertakings, on a enduring, stable and sustainable commercial basis and observing the user-pays principle in order to ensure its economic-financial feasibility of such undertakings.

PPP undertakings, in particular, are, under the terms of the draft law, primarily aimed at ensuring the efficient delivery of public services or goods the provision of which is, by their nature or specificity, the responsibility of the State to provide or ensure their provision to society, ensuring, simultaneously, the economic appreciation of the property assets and other resources integrated in the contracting of each PPP, including the resource "land", which has been assigned by means of the corresponding DUAT, as the fundamental asset owned exclusively by the State.

In turn, the LSPs and BCs are primarily aimed at developing, in the Country, the national capacity of efficient operation and maintenance of natural resources and other national assets with a view towards the provision of goods and services for to meet the needs of the national market or for export and enabling the generation or saving of financial and foreign exchange resources for the Country.

This draft Law is also aimed at achieving for the Country a greater economic-financial contribution from the undertakings carried out in the national territory, by means of:

- sharing, with equity, of expected benefits for each PPP, LSP and BC undertaking between the contracting parties, the funders, the State, the national economy and the Mozambican society;
- contribution in the promotion of the development of the national capital markets by means of promotion of economic inclusion of Mozambican citizens in PPP, LSP and BC undertakings;
- promotion of social inclusion in the PPP, LSP and BC undertakings, by means of pursuit of programs, projects and actions of social responsibility, sustainability and development of local communities in the areas surrounding those undertakings or in their area of economic influence; and
- prevention and mitigation of risks, in particular in PPP undertakings.

With the sharing, equitably, of benefits, together with the necessary prevention and mitigation of risk in all phases of the PPP, LSP and BC undertakings, the State will be assured of savings or collection of more budget and foreign exchange resources, thereby contributing to the strengthening of the strategy and internal capacity for the progressive reduction of the budget deficit and the relative weight of the Country's dependence on aid to external financing [sic].

This bill, in addition to the glossary, includes 6 chapters and 40 articles, of which the following matters addressed herein may be highlighted:

- the object and scope of application of the Law;
- the guiding principles and the legal and contractual regime of PPPs, LSPs and BCs;

- the institutional framework of PPPs, LSPs and BCs, namely sectoral and financial oversight and sector- or subsector-specific regulatory authorities;
- the principles to be observed in the prevention and mitigation of risks, in PPPs as well as in the sharing of benefits;
- the sharing of (financial and socio-economic) benefits expected from each undertaking;
- the contractual regime and modalities, and the time limits and formalities for the contracts;
- the irregularities that may occur in the different phases of the process of the PPP, LSP and BC undertakings and their administrative treatment; and
- vesting the Government with responsibilities to regulate the Law and the PPPs and BCs [sic] on the provincial, district and municipal decision-making and control levels.

Hence, under these terms, this draft bill is submitted for the consideration and approval by the Assembly of the Republic.

Maputo, 26 October 2010

**BILL FOR A COMPLEMENTARY LAW ON PUBLIC-PRIVATE
PARTNERSHIP, LARGE SCALE PROJECTS AND BUSINESS
CONCESSIONS**

**LAW n°/2010
of ... of**

To complement the economic legislation in force and with a view towards promoting, on one hand, greater involvement of private partners and investors in the pursuit of investments in public-private partnerships, large scale projects and business concessions and, on the other hand, greater efficiency, effectiveness and quality in the use of natural resources and other national property assets as well as the efficient provision of goods and services to the society and the sharing, with equity, of the respective benefits, pursuant to paragraph 1 of Article 179 of the Constitution, the Assembly of the Republic determines:

**Chapter I
General Provisions**

*Article 1
Definitions*

The definitions of the terms used in this Law are set forth in the attached glossary, which shall be an integral part thereof.

*Article 2
Object*

1. This Law has as its purpose to establish the guiding rules for the process of contracting, implementing and monitoring undertakings of public-private partnerships, large scale projects and business concessions.
2. For the purposes of this Law [the terms below have the following meanings]:

- a) Public-private partnership, in abbreviation PPP, an undertaking carried out in a public domain area, excluding that of mineral and petroleum resources or in an area of provision of public services, in which, under contract and with full or partial financing of the private partner, the latter undertakes, vis-à-vis the public partner, to accomplish the necessary investment and to operate the respective activity, for the efficient provision of services or goods provision of which is the responsibility of the State to guarantee its availability to users [sic];
- b) *Large Scale Project (in abbreviation LSP)* means the undertaking of an investment authorized or contracted by the Government, the value of which exceeds 12.500.000.000,00MT (twelve thousand and five hundred million Meticais)[sic]; and
- c) *Business Concession (in abbreviation BC)* an undertaking the object of which is the prospecting, exploration, extraction and/or use of natural resources or other resources or national property assets, carried out under the terms of the respective contract or other means of creating title to the rights granted by the Government in the scope of that undertaking.

Article 3

Scope of application

1. This law applies to all PPP, LSP and BC undertakings carried out in the Country, at the initiative or decision and control of public entities of either the central, provincial and district levels or the Municipalities.
2. The following are excluded from the scope of application of this Law:
 - a) contracting of simple provision of services or supply of goods to State institutions, including the contracting of public works and consulting services by the State;
 - b) non-profit public-private partnerships of an altruistic, social, humanitarian, cultural, sporting nature or other similar nature.

Article 4
Guiding principles

The contracting of PPP, LSP or BC undertakings is subject to the conformity with the following guiding principles of each undertaking, concretely:

- a) its due location in the policy, strategy and development plans of its respective economic or social sector;
- b) its contribution to the development of the effective capacity for efficient and rational use and economic appreciation of national resources and goods;
- c) equity in the sharing of benefits arising from each undertaking, among the contracting parties, actors and concerned or affected parties;
- d) commitment to the prevention and mitigation of risks inherent in each specific undertaking;
- e) business freedom and competitiveness and removal of restrictions which may jeopardize the feasibility and economic appreciation in the pursuit of the undertakings;
- f) creation and maintenance of jobs and professionalization and transfer of know how to Mozambican employees and managers;
- g) its contribution to the development of the national capital markets and the promotion of greater economic inclusion of Mozambicans in each undertaking;
- h) establishment of business partnerships between the PPP, LSP and BC undertakings and the micro, small and medium enterprises, as well as the transfer of technology and know-how; and
- i) pursuit of programs, projects or actions of social responsibility and sustainability, and social development with the local communities.

CHAPTER II INSTITUTIONAL FRAMEWORK, PROCESS AND PROCESSING

Article 5 Sectoral oversight

1. PPP, LSP and BC undertakings are subject to sectoral oversight conducted by the Government entity responsible for the area or sector in which each is located.
2. The functions and responsibilities of the sectoral oversight over PPP, LSP and BC undertakings are complemented by the duties and powers of the respective sector or subsector-specific regulatory authority.
3. In particular, it is the responsibility of the sector regulatory authority, in the respective sector or subsector-specific area, to ensure the economical-financial balance between the contracting parties, the protection of the users' interests and the maintenance and sustainability of the undertaking.

Article 6 Financial oversight

1. The financial oversight of PPP, LSP and BC undertakings is carried out by the Government entity that oversees the Finance area, which shall, for the purpose, define and establish mechanisms and procedures for permanent inter-institutional coordination with each entity responsible for sectoral oversight.
2. It is the responsibility of the Government to nominate and capacitate the entity responsible for the inter-sectoral coordination and centralization of the economic-financial analysis and evaluation of PPP, LSP and BC undertakings, as well as for the monitoring of the equitable sharing of benefits and the prevention of risks in the respective undertakings.

Article 7

The implementing entity of the PPP, LSP and BC undertaking shall:

- a) take the form of a commercial company, under the terms of the applicable legislation;
- b) have its purpose clearly defined and capable of being monitored the implementation of the respective undertaking;
- c) have a duration of not less than the period of duration of the contract]related to the undertaking.

Article 8

The undertaking process

1. The process of PPP, LSP and BC undertakings is comprised of the entire cycle, from the phase of identification and conception of each undertaking up to the term or extinguishment of the respective contract.
2. It is the responsibility of the Government to define all the phases of the undertaking process as well as the acts and elements integrating each phase.

Article 9

Processing

1. When defining the processing of the PPP, LSP and BC undertaking proposals for the central, provincial, district and municipal levels, the Government shall ensure, among other matters, the following:
 - a) inter-institutional coordination and liaison;
 - b) confirmation, certification and monitoring of prevention and mitigation of risk and the sharing, with equity, of the benefits relating to each undertaking;
 - c) speed in decision-making, the preservation of commercial dynamics and the prevention of avoidable losses and damages for the contracting parties, the State and third parties.

2. For the purposes of the provision of clause b) of the preceding paragraph and without prejudice to protection of confidentiality of the undertaking's strategically commercial and competitive information, the entity implementing each PPP, LSP and BC undertaking shall organize and supply the information required by the responsible entities in the scope of the exercise of monitoring functions over the referred undertakings, under the terms of this Law.

Article 10

Guarantees and incentives to investment

1. Each PPP, LSP and BC is undertaking is eligible, under the terms of sector-specific legislation on the matter, to enjoy guarantees and incentives applicable to investments carried out in the Country.
3. The tax or other incentives of a financial nature granted under the terms of the applicable legislation are subject to registration by the entity in charge of financial oversight and reported in the State General Account of the corresponding fiscal year.

Article 11

Access to guarantees against non commercial risks

In addition to the contracting of guarantees and insurance for covering commercial risks, the PPP, LSP and BC undertaking may have access, at its own expense, to guarantee facilities for covering non-commercial risks, under the terms and conditions also approved by the Government.

CHAPTER III SPECIFIC PROVISIONS

Section 1 For Public-Private Partnerships

Article 12

Main Purpose

1. The main purpose of the PPP undertaking is to ensure the efficient, qualitative and quantitative provision of public goods and services to users and the economic appreciation of the property assets and other national resources integrated in that undertaking, including where applicable, the land resource assigned as the fundamental asset owned exclusively by the State to the referred undertaking via its respective DUAT (Title of Use and Enjoyment of Land).
2. In the pursuit, by the contracted party, of each PPP's purpose, in particular, the user-payer principle shall be observed, ensuring that the price paid by services provided, under the contractually agreed terms, counterbalances the costs incurred and provides a profit margin.

Article 13

Legal regime for contracting PPPs

1. The general legal regime for contracting PPP undertakings is the public tender, and the rules governing the public procurement shall apply on a subsidiary basis.
2. Considering the public interest and once the requirements legally provided are met, the contracting of a PPP may take the modality of tender with prior qualification or a two-stage tender.
3. In duly justified circumstances and as a last resort measure subject to prior express approval by the Government, the contracting of a PPP undertaking may exceptionally take the form of negotiation and direct award.
4. Proposals of PPP undertakings at private initiative are subject to public tender destined to determine or confirm the technical and quality terms, the price and further conditions offered by the proponent, which shall benefit from the right and preference margin of 15% (fifteen percent) in the assessment of the technical and financial proposals resulting from such tender and without any right to compensation for costs incurred in the preparation of the proposal.

5. In any of the modalities of contracting PPPs, the principles of legality, finality, reasonableness, proportionality, pursuit of the public interest, transparency, publicity, equality, competition, impartiality, good faith, stability, motivation, integrity and reliability, good economic-financial management, promptness and further applicable principles of public law shall be observed.
6. Every PPPs in the process of contracting as well as those already awarded in each financial year, shall be annually listed in an annex to the draft of the State General Accounts, with an indication of the respective regime and contracting modality followed in each case.

Article 14

(Maintenance of the State ownership)

The public domain property assets integrating the PPP undertaking, including where applicable, the land resource assigned to the undertaking, as the fundamental asset exclusively owned by the State, via its respective DUAT, remain the inalienable property of the State and cannot be given as security, without prejudice to the enjoyment of the right of use and usufruct contractually assigned to the contracted party.

Article 15

General principles on prevention and mitigation of risks

1. The prevention and mitigation of risks by the contracting parties constitutes their permanent obligation in the entire process of the PPP undertaking, through compliance with the following principles:
 - a) the risks inherent or arising from the professional, technical, technological, commercial or management capacity, which when occurring, have a negative impact on the accomplishment of the purposes, activities, goals or benefits contractually agreed, are the responsibility of the private partner and the contracted party, which is responsible for the prevention and mitigation and assumption of the consequences, damage and losses which may arise from the occurrence of such risks;

- b) the political and legislative risks and of conflicts of interest of institutional nature and of land concession and public planning which, when occurring, entail effective damages or losses for the undertaking are the responsibility of the State, which is responsible for their prevention and mitigation and for the assumption of consequences, damage and losses which may arise from the occurrence of such risks.
2. In any of the process phases of approval, implementation and management of the PPP undertaking and the respective contract, the occurrence of any type of risks referred to in articles 16 and 17 below shall be prohibited, [sic] and the contracting parties, the Government and further responsible entities, in their respective areas of operation and responsibility, shall avoid and prohibit their occurrence.

Article 16

Responsibility for the mitigation of risks by the Government and the contracting party

1. The Government and the contracting party shall ensure the prevention and the mitigation of occurrence of the following risks:
- a) political and legislative risks, arising from the unilateral adoption, by the Government or public institutions, of measures or the practice of acts with negative and adverse effects on the normal implementation, operation and management of the PPP undertaking or its competitiveness and economical-financial feasibility;
 - b) risks of conflict of interests of an institutional nature arising from the full or partial concentration or accumulation, in the same public entity, of the functions of regulatory authority and granting authority, as well as of quotaholder or shareholder of the contracted party; and
 - c) risks related to the granting of land and public planning.
2. The Government shall further ensure, as applicable, the implications arising from the granting or facilitation of access by the PPP undertakings to financial

guarantees or facilities allowed under the terms of articles 10, 11 and 20 of this Law.

Article 17

Responsibility for the mitigation of risks by the private partner and the contracted party

The private partner and the contracted party are responsible for ensuring, in the PPP undertaking, the prevention and the mitigation of the occurrence of any of the following risks:

- a) Risks of conflict of interests, in which one or both of them are or have been a party responsible or complicit in the occurrence of such risks, namely those arising from:
 - (i) conflict of business and political interests, arising from interference between the undertaking's interests or the private partner and the private interests of those vested with authority and political, governmental functions or other form of authority; and
 - (ii) conflict of interests of business nature, arising from interference between the undertaking's interests or the public partner and the interests, powers, functions or connections of quotaholders or shareholders or member of corporate bodies, management or business management.

- b) economical-financial risks, namely:
 - (i) financial risks inherent to the undertaking;
 - (iii) fiduciary risks, arising from improper use of financial resources made available for application in the undertaking;
 - (iii) risks of the unsustainability of the undertaking's debt;

- (iv) tax risks, arising from tax avoidance and evasion or the assumption and enjoyment of rights not provided in the applicable tax legislation in force.
- c) Risks of defective conception, design, engineering and construction, related to the undertaking;
- c) Commercial risks of the undertaking's management and performance;
- d) Risks of fall of the market demand or supply, excluding contractually agreed exceptional situations;
- e) Risks of squandering of the residual value of the undertaking's assets; and
- f) Environmental impact risks, arising from facts subsequent to assumption of control of the undertaking by the private partner or contracted party.

Article 18

Responsibility for mitigation of force majeure events

The effects arising from force majeure events shall be the object of mitigation under fair terms for both parties, the contracting party and the contracted party, as well as for third parties affected, according to the liability, obligations and rights contractually undertaken and applicable to each party.

Article 19

Financial guarantees of commitment and performance

1. The bidding entity and the contracted party in the PPP shall provide financial guarantees that ensure, respectively, the full compliance with the obligations undertaken, namely:
 - a) the good faith and seriousness of its participation in the tender, until the conclusion of the contract;
 - b) the correct and complete implementation of the undertaking; and

- c) the reversion of the undertaking, at the end or on expiration of the contract, in good condition of conservation and operation.
2. The financial guarantee shall be calculated taking into consideration the dimension of the undertaking and the complexity of its object and may, upon mutual agreement between the contracted parties and the express consent by the entity responsible for the financial oversight, be replaced by a surety or guarantee issued by a reputable and financially capable entity or by the parent company.
3. The provision of the preceding paragraph shall not apply to cases in respect of which sector-specific legislation provides for a similar guarantee requirement for the same purposes foreseen in this article.

Article 20

Financial guarantees grantable to undertakings

1. In the case of a strategic PPP undertaking or of special social-economic interest for the Country, and which is not financially feasible by itself and to which the State should contribute for its economical-financial feasibility, the entity responsible for the financial oversight may, upon express consent of the Government:
 - a) participate in its financing or provide a financial guarantee in favor of the undertaking for the purpose, on due consideration;
 - b) facilitate access to guarantees for financing requested from multilateral or government institutions; or
 - c) grant a subsidy or compensation for the provision of its services or sale of products at prices or tariffs administratively fixed below or close to the actual cost of such services or products.
2. The Government shall, when drafting the Medium Term Fiscal Scenario and in each annual State Budget proposal:

- a) record the budgetary allocation destined to ensure its co-participation in the investments of PPP undertakings in which the State's direct action is deemed indispensable, relevant or strategically appropriate; and
- b) anticipate and budget, in disaggregated and global amounts, the liabilities assumed for compensation or subsidy by the State or concession of access to financial guarantees or facilities for PPP undertakings clearly indentified, taking them into consideration in the analysis of the sustainability of the public debt.

Article 21

Contract

1. The award of the PPP undertaking takes the form of one of the following contractual modalities:
 - a) Concession contract;
 - b) Assignment of operation contract;
 - c) Management contract.
2. The concession contract may assume one of the following modalities or sub-modalities of concession:
 - a) Build, Operate and Transfer (BOT);
 - b) Design, Build, Operate and Transfer (DBOT);
 - c) Build, Own, Operate and Transfer (BOOT);
 - d) Design, Build, Own, Operate and Transfer (DBOOT);
 - e) Rehabilitate, Operate and Transfer (ROT); or
 - f) Rehabilitate, Own, Operate and Transfer (ROOT).
3. Without prejudice to compliance with other applicable legal provisions, it is the responsibility of the Government to define the essential and mandatory clauses that each main contract of the PPP undertaking should contain.

4. The amendment or revision of the main contract follows the processing observed for the approval and conclusion of the initial contract.
5. In addition to the main contract, provided for under the terms of paragraphs 3 and 4 of this article, the contracted party may conclude complementary contracts deemed required for the implementation, operation and maintenance of the undertaking.
6. The transfer of the contractual and statutory position of the private partner to a third party requires express consent, under the terms provided in the respective contract.

Article 22

Period of duration of the contract

1. The period of duration of the PPP undertaking contract is determined taking into consideration the economic-financial attractiveness and the time required for its implementation and the period of recovery of the capital invested, and shall, in no case, exceed the period of:
 - a) 30 years, for [a] greenfields concession contract;
 - b) 20 years, for [a] concession contract and assignment of operation contract for an existing undertaking, requiring rehabilitation or expansion; and
 - c) 10 years, for [a] management contract for an operational undertaking.
2. The duration provided in clause a) of the preceding paragraph may be extended up to 10 years in the case of large-scale greenfields projects and the longevity and technological and biological requirements of the process of its implementation or gestation so require.
3. The Government may, by means of an addendum to the contract, authorize the extension of the time limit set forth in paragraph 1 for the time required for compensation of:

- a) Additional investments carried out by express request by the Government and agreed upon in an addendum to the contract approved by the responsible entity;
 - b) Practice of price or tariff administratively determined by the Government below the cost price and the agreed profitability margin;
 - c) Mitigation of effects of force majeure events that occurred.
4. Once the term has ended, there shall always be a public tender for a new contract, and the entity previously contracted benefits from the right and 5% (five per cent) preference margin in case of equality in the assessment of technical and financial proposals, provided that it has shown good performance and results in the execution of the previous contract, but in no case shall the terms and conditions of the contract to be concluded be less favorable for the Country in comparison with those of the initial contract.

Article 23
Contract formalities

Without prejudice to protection of confidentiality of the undertaking's strategic commercial and competitive information, the major PPP contract concluded is subject to issuance of the prior review administrative ruling (*visto*) by the entity legally responsible for that purpose as well as to publication of:

- a) the principal contract terms, namely in the Official Gazette; and
- b) accounting balance sheet and reports related to the undertaking's activity.

Article 24
Right of redemption of the contract

1. The contracting entity enjoys the right of redemption of the contract, on the grounds of weighty reasons of public interest duly justified under the terms of the law and the contractual provisions agreed on the matter.
2. The redemption, for reasons of defense of public interest, health, order and security, the causes of which are not attributable to the private partner or the contracted party, entitles it to the right to indemnification calculated taking

into account the time remaining for the recovery of the investments carried out and the undertaking's level of profitability, if no other criteria for the calculation thereof were contractually agreed.

Article 25
Contractual Rescission

1. The contracting parties shall stipulate, in the contract, the causes for its rescission or termination and the respective mechanisms of indemnification, as applicable.
2. Without prejudice to the provision of the preceding paragraph, the following constitute causes for rescission of the contract related to the PPP undertaking:
 - a) serious non-compliance with the contract, which affects the objectives and purposes of the undertaking;
 - b) abandonment of the execution of the contract or the implementation of its object or its undue suspension;
 - c) transfer to a third party, by the contracted party, of its contractual position or the conclusion and operation of another business arrangement with the same objectives as those of the contract in force, whether temporarily or definitively, without the written approval or consent of the contracting party and the entities responsible for the sectoral and financial oversight;
 - d) lack of payment of fees or other consideration due under the terms of the contract; and
 - e) non-compliance with the provision of public goods or service, under the contractually agreed terms.

Section 2
For Large Scale Projects

Article 26
Main purpose of the LSPs

LSP undertakings have as their main purpose to develop, in the Country, the national capacity of efficient operation and use of resources and other national or imported goods and factors of production, with a view towards the provision of goods or services for the fulfillment of internal or external market need, enabling the generation or saving of financial and exchange foreign resources.

Article 27

Free initiative of business and LSPs' contractual modality

1. Potential investors and concessionaires enjoy the right to free private initiative in carrying out LSP undertakings, except in cases expressly reserved to the ownership or exclusive operation of the State or the investment initiative of the public sector and those in respect of which the law requires the conduct of a public tender.
2. The contractual modality of awarding an LSP undertaking which does not involve the assignment of operation of national resources embodies, under the term of specific legislation on investment, the form of the Investment Project Authorization, granted pursuant to the referred legislation.
3. All the LSPs in process of contracting as well as those already awarded in each financial year shall be recorded annually, in an annex to the draft of the State General Budget, with indication of the respective regime and contracting modality followed in each undertaking.

Section 3

For Business Concessions

Article 28

Main purpose of the BCs

The BC undertakings have as their main purpose to develop, in the Country, the national capacity of efficient operation and use of natural and labor resources and other national property assets, with a view towards the provision of goods or services to meet internal or external market needs and enabling the generation or saving of financial and foreign exchange resources for the Country.

Article 29
Legal regimes and modalities for contracting CEs

1. The contracting of BC undertakings is subject to compliance with the rules and contracting modalities provided in the sector-specific legislation as well as the general principles applicable to public contracts.
2. The contracting of a BC undertaking, which includes the LSP involving concession of the use of natural resources, takes one of the following contractual modalities:
 - a) *concession contract*, under one of the following sub-modalities of concession:
 - (i) Build, Operate and Transfer (BOT);
 - (ii) Design Build, Operate and Transfer (DBOT);
 - (iii) Build, Own and Operate (BOO);
 - (iv) Design, Build, Own and Operate (DBOO);
 - (v) Rehabilitate, Operate and Transfer (ROT); or
 - (vi) Rehabilitate, Operate and Own (ROO);
 - b) *assignment of operation contract*, in the modality of assignment of operation of rights and obligations which are the object of the contract;
 - c) *management contract* of the undertaking, infra-structure and property assets of the State or other public entity;
 - d) any other form of title of rights granted by the Government for prospecting, exploration and extraction or use of natural resources or other national property assets.
3. All the BCs in process of contracting as well as those already awarded in each financial year shall be annually recorded, in an annex of the draft of the State General Budget, with indication of the respective regime and contracting modality followed in each case.

Article 30
Formalities

Without prejudice to protection of confidentiality of the undertaking's strategic commercial and competitive information, the main BC contract concluded is subject to the prior review administrative ruling (*visto*) by the entity legally responsible for such purpose and to publication of the principal contract terms in the Official Gazette.

CHAPTER IV
SHARING OF BENEFITS

Article 31
Types and sharing of benefits

1. The benefits applicable, taking into account the particularities of each PPP, LSP and BC undertaking, comprise the *financial benefits and socio-economic benefits*.
2. The sharing, with equity, of financial and socio-economic benefits is conducted by assessment and establishment, in the relevant contract, of their dimension and distribution between the contracting parties, taking into due consideration the protection of the rights inherent to the funders, the State, the national economy and Mozambican society, in particular:
 - a) the quantity and quality of the resources available for each party and its respective opportunity cost;
 - b) the degree of responsibility of each party in enabling and implementing the various phases of the undertaking;
 - c) the degree of risks, objectively assessable, incurred by each party, associated to the guarantee of returns and profitability of the resources invested;

- d) the protection of the Country's economic competitiveness and of a business environment favorable to attract national and foreign investment; and
- e) the need to preserve benefits for current and future generations.

Article 32
Financial benefits

1. The financial benefits from each PPP, LSP and BC undertaking for the Country, shall be expressly referred to in the contract to be concluded between the contracting party and the contracted party, namely, the following:
 - A) the participation reserved for sale, via the stock market in favor of the economic inclusion on commercial market terms, preferably of Mozambican natural persons, in the share capital of the undertaking or in the joint venture equity, whether or not foreign investment is involved, guaranteed by:
 - (i) the State or other public entity appointed thereby, in a percentage not less than 5% nor greater than 20% of the referred capital; or
 - (ii) the entity implementing the undertaking, of the same level of participation, for unconditional sale, under the same terms and conditions provided in clause (i), above
 - [sic] the opportunity to participate of Mozambican public or private corporate persons in the share capital of the undertaking or the equity of the joint venture, under terms to be negotiated and agreed by the parties, without prejudice to the provisions of (i) and (ii) of the preceding clause A);
 - C) the generation of positive exchange effects on the balance of payments, whether by means of generation of exchange resources or savings for the Country;
 - D) the generation of tax revenues and positive contribution to the public treasury;

- E) the generation and distribution of profits or dividends, under the terms resolved by the corporate bodies of the undertaking's company; and
- F) the equitable sharing of the extraordinary direct benefits, thereby protecting the Country's economic competitiveness and under the contractually agreed terms and in any one or combination of the following forms:
- (i) carrying out of reinvestment in the national territory;
 - (ii) constitution of a reserve for the carrying out of additional investments or for covering extraordinary losses of the undertaking;
 - (iii) financial applications carried out and maintained in the Country; and [sic]
2. Additionally to the benefits provided in paragraph 1 of this article, every PPP or BC undertaking which includes the concession for use of national resources, shall also provide the following benefits:
- A) *Award fee or signature bonus*, if any, on whatsoever basis and under the terms provided in the respective tender, payable at the moment of signature of the contract and with a value of not less than 0.5% and not more than 5% of the fair value of the assets contractually assigned by the State or other public partner for the undertaking; and
- B) Payment of the *concession or assignment of operation fee* monthly, quarterly, semi-annually or annually, as agreed between the contracting parties divided in components of:
- I. the *fixed concession fee*, with a value of not less than 2% nor more than 5% of the fair value of the assets and rights contractually assigned to the undertaking; and
 - II. the *variable concession fee*, levied on the gross revenue net of indirect taxes related to the periodic monthly, quarterly, semi-annual or annual invoicing of the operation of the activity which is the object of the undertaking and which amount shall correspond to:
 - a) 2% to 5% of the referred revenue, in case of a founding PPP undertaking which is a producer and supplier of inputs to other

- undertakings in the Country, during the period of repayment of loans contracted for financing its implementation phase; and
- b) 5% to 10% of the referred revenue, in all other undertakings, as well as in those referred to in the preceding paragraph once the repayment of loans contracted for financing their implementation phase is concluded.
3. The provision of clause b) [sic] of the preceding paragraph does not apply to LSP and BC undertakings subject to Mining or Petroleum Royalties, under the terms of the applicable specific legislation.
 4. The 5% and 10% maximum limit for fixed and variable fees, respectively, provided in (i) and (ii) of clause b) of paragraph 2, does not apply in cases in which the best *concession fee or assignment of operation fee* constitutes the criterion to select the winning bidder for awarding the BC undertaking.

Article 33

Socio-economic benefits

The PPP, LSP and BC undertaking concession contract shall also contain clauses expressly specifying the socio-economic benefits to be provided for each undertaking, at its own expenses, for the national economy and Mozambican society, namely, the benefits related to:

- a) creation, rehabilitation or expansion of infra-structures for production or provision of services, in connection to or associated with the undertaking;
- b) offer of work posts and professional training programs for Mozambican employees;
- c) actions and programs of technical-professional training and transfer of technology and know-how to the Country;
- d) increase and maintenance of the production and export capacity and of the supply to the internal market needs;

- e) involvement or contribution for the development of Mozambican small and medium enterprises, via business and technological linkages between the undertaking and such enterprises; and
- f) carrying out of programs of activities or [social] responsibility projects, development and social sustainability projects with the local communities, for the undertaking's account.

CHAPTER V

IRREGULARITIES AND THEIR ADMINISTRATIVE TREATMENT

Article 34 *Irregularities*

The following constitute irregularities to the provisions [sic] of this Law, in PPP, LSP and BC undertakings:

- a) in the contractual period, the lack of definition, in an explicit manner, of the applicable benefits expected for the undertaking, under the terms provided in this Law and, also, in the particular case of PPPs, the lack of clauses related to prevention and mitigation of risks under the terms provided in Articles 15 to 18 of this Law;
- b) in the contractual period, any non-compliance with the provisions of this Law applicable to the undertaking, which occur in any of the phases of execution of the contract; and
- c) in the post-contractual period, any post-contractual fact or effect arising from an act or omission attributable to the undertaking, which causes or from which arise damage or losses to its former employees, the State and third parties, without prejudice to the prescription period provided under the terms of the law.

Article 35 *Administrative Treatment*

1. The irregularities foreseen in the preceding paragraph, which are not amicably resolved, shall have the following administrative treatment and effects:
 - a) in the pre-contractual period, the application of suspension or cancellation of the course of analysis, assessment or negotiation of the proposed undertaking or contract, in accordance with the phase in which the irregularity occurs;
 - b) in the contractual period, in the application of dispute resolution rules agreed in the respective contract in force; and
 - c) in the post-contractual period, the indemnification or compensation, by the party that committed the irregularity to the party or parties injured as a direct consequence of the fact or effect proven to have arisen from the act or omission, inherent to the undertaking, of an action indispensable to have avoided the occurrence of harmful or damaging effects to third parties.
2. The administrative treatment provided in the preceding paragraph does not release the party that committed the irregularity from civil or criminal liability due for both costs incurred and damages and losses caused to third parties, under the terms of the law.
3. The parties shall establish contractually the mechanisms of delimitation, material and temporal, of post-contractual liability, in conformity with the legal principles applicable in the matter.

CHAPTER VI TRANSITORY PROVISIONS

Article 36 *Undertakings awarded*

1. The validity and maintenance of the contracts of PPP, LSP and BC undertakings already awarded at the effective date of this Law are hereby recognized, under the terms they have been concluded.

2. Without prejudice to the protection of the equitable economic-financial balance contractually agreed in PPP, LSP or BC undertakings already awarded at the effective date of this Law and by means of mutual agreement between the contracting parties, the renegotiation of certain contractual clauses deemed relevant for such purpose and with a view towards the adjustment of the prevention of risks and mitigation of risks and the sharing, equitably, of benefits related to the undertaking, in conformity with the provisions of this Law, is permitted.
3. When the period of its validity is ended, and for the purpose of its eventual renovation, the PPP, PGD and CE undertaking contract already executed on the date this Law comes into effect that does not contemplate, in an express manner, the prevention and mitigation of risks and the equitable sharing of benefits foreseen in this Law and applicable to the undertaking, shall be the object of adjustment so as to conform to the relevant provisions of this Law.

Article 37
Applicable legislation

1. PPP, LSC and BC undertakings carried out in the territory of the Republic of Mozambique shall be governed by:
 - a) specific legislation of the sector in which the PPP, LSC or BC is located;
 - b) the applicable investment legislation;
 - c) further applicable Mozambican legislation; and by
 - d) international conventions or treaties signed and ratified under the terms of the law by the Republic of Mozambique.
2. In respect of the contracting regime, equitable sharing of benefits expected from each undertaking, and the respective inspection, monitoring and provision of information necessary and relevant for such purpose, as well as, for the PPPs, in respect of the prevention and mitigation of risks, the relevant provisions of this Law shall prevail; in all other matters, the provisions of the sector-specific legislation and further applicable legislation shall prevail.

Article 38
Dispute resolution

1. The resolution of disputes arising in any phase of the PPP, LSP and BC undertaking is processed under the terms contractually defined between the contracting parties, complying with the applicable legislation in force on the matter.
2. In order to enable greater speed in the resolution of disputes and preserve the dynamics of business economic life, especially to meet collective needs, the PPP, LSP and BC contract may prioritize the resolution of disputes arising therefrom via mediation and arbitration, under the terms of the law.

Article 39
Entry into force and Regulation

1. This Law becomes effective thirty days after the date of its publication.
2. It is the responsibility of the Government from the date of publication of this Law to approve:
 - a) the general regulation of this Law, within ninety days; and
 - b) the specific regulation, within one hundred and eighty days, for PPPs and BCs of provincial, district or municipal level, in respect of which the application of some provisions of this law may be adjusted, simplified or dispensed with, as deemed most appropriate.

Article 40
Repeal

Paragraphs 1 and 2 of Article 12 and paragraph 1 of Article 27 of Law no. 21/97, of 1 October (Electricity Law) are hereby repealed in all respects contrary to the provisions of this Law.

Approved by the Assembly of the Republic, on 2010

The Chairman of the Assembly of the Republic, *Verónica Macamo Dhlovo*

Enacted on 2011

Let it be published

The President of the Republic, *Armando Emílio Guebuza*

ANNEX TO THE COMPLEMENTAR LAW ON PPPs, LSPs AND BCs – GLOSSARY OF DEFINITIONS

For the purposes of this Law, [the following terms] shall mean [the following]:

1. *Economic activity*, the process of carrying out of investments and subsequent production and commercialization of goods or provision of services, whatsoever their nature, carried out, in the scope of a PPP, LSP or BC undertaking, in one or more sectors of the national economy with the main purpose of meeting the users' collective or individual needs and generating income and financial resources which, in general, cover and surpass the capital invested or applied in that undertaking.
2. *Social activity*, the process of carrying out of investments and subsequent operation of the activity of provision of services or goods to the users in the scope of a PPP, LSP and BC undertaking and on the basis of the user-pays principle to ensure recovery and remuneration of capital invested or applied in the respective undertaking.
3. *Public domain area* every area of natural resources or of economic activity ownership of which is reserved, exclusively, for the State, under the terms of the Constitution of the Republic, namely the natural resources areas existing in the soil, subsoil, internal waters, territorial sea, continental maritime shelf, exclusive economic zones as well as roads, bridges, railways, ports and airports, energy and hydraulic potential, airspace and the telecommunications spectrum and further assets classified as such by the law, in the territory of the Republic of Mozambique.
4. *Public service area*, the area of economic or social activity the provision of services or goods [in] which is the responsibility of the State to supply or ensure the provision thereof to the users.

5. *Municipality*, public legal person created by the State and comprised by the territory specially defined and its respective people, under the terms of the applicable specific legislation.
6. *Extraordinary direct benefits*, the unforeseen gains or profits, with recurring character occurring throughout a minimum of three successive financial years, arising from market factors external to the company and its management capacity and which annual average in each three year-period exceeds, in a contractually agreed percentage, the also agreed levels of return of the investment carried out;
7. *Assignment of operation*, the PPP or BC modality consisting of the legal regime of assignment (*by means of assignment of operation contract*) of rights to rehabilitate, use, operate, manage and fully maintain infrastructures and property assets of the State or other public entity that are the object of assignment of operation;
8. *Assignment of management*, the PPP or BC modality consisting of the legal regime of assignment (*by means of management contract*) of the rights of management and current maintenance of infrastructures and property assets of the State or other public entity that are the object of assignment of management;
9. *Contracted Party*, the natural or legal person with which the public partner concludes the contract related to the PPP, LSP or BC undertaking whereby the former acquires from the public partner, for the medium or long term and partially or totally in accordance with the contractual modality adopted, the rights of design, creation, rehabilitation, development, use, operation, management and maintenance, on a commercial basis, of infrastructures or other property assets or resources belonging to the State or any public entity;
10. *Contracting Party*, the State or a public entity which concludes with the private partner the contract related to the PPP, LSP or BC undertaking, by means of which it assigns to the private partner, for the medium or long term and partially or totally in accordance with the contractual modality adopted, the rights of design, creation, rehabilitation, development, use, operation,

management and maintenance, on a commercial basis, of infrastructures or other property assets or resources belonging to the State or any public entity;

11. *Contract*, the legal instrument by means of which the contracting party and the contracted party formalize the total or partial contractual assignment, according to the contractual modality adopted, the rights of design, creation, rehabilitation, development, use, operation, management and maintenance, on a commercial basis, of infrastructures and property assets belonging to the State or other public entity;
12. *DUAT*, the Title of concession of Rights to Use and Enjoy Land assigned as the fundamental asset exclusively owned by the State, issued by the responsible State entity, under the terms of the Land Law and its respective regulations, in the scope of the PPP undertaking.
13. *Undertaking*, the totality of every process or cycle of a PPP, LSP or BC and its respective economic or social activity aimed at production and provision or supply of goods and services to meet collective needs and which is the object of contracting, between the contracting party and the contracted party, in one of the contractual modalities provided in this Law.
14. *Implementing Entity or Undertaking Company*, the legally existing or specially created entity, responsible for the implementation and pursuit of the PPP, LSP or BC undertaking;
15. *State*, the State of the Republic of Mozambique;
16. *Funder*, entity which, in the capacity of lender, makes available part or all of the financial resources or the guarantees enabling access to obtain such resources, required for the carrying out of the investments and development of the activities of the PPP, LSP or BC undertaking;
17. *Government*, the Government of the Republic of Mozambique or the Council of Ministers, under the terms of Article 200 of the Constitution of the Republic;

18. *Investor*, the legal or natural person and quotaholder or shareholder in the concessionaire company and which applies its capital or other assets in the carrying out of an LSP, LSP or BC, observing the relevant provisions of this Law, sector-specific legislation and further applicable legislation in force.
19. *Fair value of assets assigned* the value of the market cost of the property assets, studies, maps and further documentation or material and findings of surveys, exploration and prospecting assigned to the undertaking or the contracted party, under the terms and conditions agreed in the relevant contract, including, if applicable, the DUAT that represent the land assigned to the PPP undertaking as a fundamental asset exclusively owned by the State.
20. *Private partner*, the legal or natural person being the economic agent of the private sector and contracted by the State or other public partner, taking responsibility for the guarantee of carrying out, operation, management and maintenance of the PPP or BC undertaking, under the terms and conditions of the respective contract;
21. *Public partner*, the State or other public entity or Municipality which is the contracting party, in the PPP undertaking contract;
22. *Contracting parties*, the contracting party and the contracted party;
23. *Extraordinary Losses*, the losses or damages of recurring nature occurring during a minimum of three successive financial years, arising from market factors external to the company and its management capacity and the annual average of which, in each three-year period reduces, in contractually agreed percentages, the also agreed levels of return of investment carried out.
24. *Risk*, the possibility of occurrence of one or more events with adverse or negative impact in the economic-financial projections scheduled and which results in financial and/or economic losses for the undertaking or for one or more contracting parties, involved or acting in that undertaking.
25. *Know-How*, the technical-professional or business capacity knowledge of the technical and ability to carry out, with efficiency and professionalism, acts or production operations of a certain good or the provision of a certain service.

26. *Concession award fee or bonus*, the remuneration paid by the contracted party to the contracting party as consideration for the assignment, by the latter to the former, of the property assets, studies, maps and further documentation or material and findings of surveys, exploration and prospecting already existing and assigned for its integration in the PPP or BC undertaking which is the object of the contract, under the terms and conditions agreed in the respective contract; and
27. *Concession fee or fee for assignment of operation*, the remuneration paid by the contracted party to the contracting party as consideration for the assignment, by the latter to the former, of the rights of operation of the economic activity of the respective undertaking, under the terms and conditions agreed in the relevant contract.