

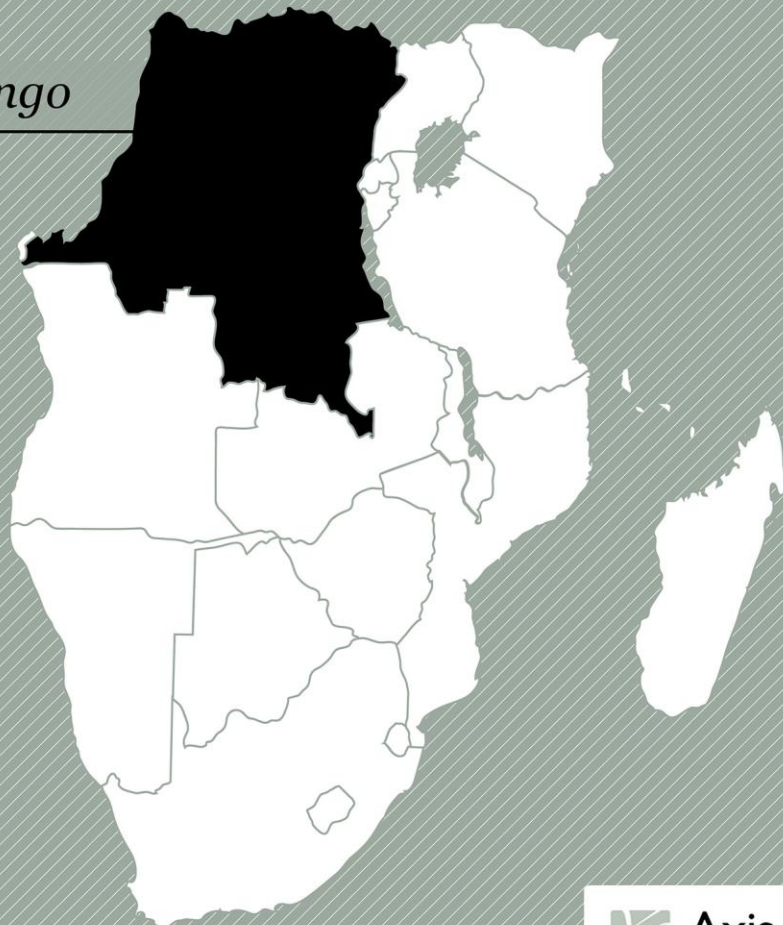
PPP Country Paper

DR Congo

Submitted to SADC-DFRC 3P
NETWORK Public-Private-Partnership
Working Group

LIMESSTRASSE 26, 61273 WEHRHEIM - 2013

DR Congo



Axis Consulting
The Cross Sector Advisory

Table of Contents

List of Figures	IV
List of Abbreviations	IV
1. Engagement Overview	6
2. Introduction	6
3. Methodology	7
4. Examination of the Term PPP	8
5. Application of SADC PPP Framework Road Map	8
5.1 PPP Policy in DRC.....	9
5.2 PPP Institutional Responsibilities in DRC.....	10
5.2.1 Role of PPP Unit in DRC	10
5.2.2 PPP Regulation, Approval and Implementation Roles in DRC	10
5.3 DRC Legal Framework.....	10
6. Recommendations	11



@ This publication includes information obtained or derived from a variety of publicly available and other sources. XS-Axis Consulting has not sought to establish the reliability of these sources or verified such information. XS-Axis Consulting does not give any representation or warranty of any kind (whether expressed or implied) as to the accuracy or completeness of the paper. The paper is for general guidance only and does not constitute investment or any other advice. Accordingly, it does not relieve any third party from conducting its own due diligence in order to verify its contents. The sole purpose of this Country Paper is to provide an overview of Public Private Partnership (PPP) Policy, Institutional Arrangement and Regulatory Framework as means of assisting the Client, Southern African Development Community-Development Finance Resource Center PPP Network (SADC3P), and its Member States to improve their Framework, and develop a common ground for aspiring potential harmonization of national PPP Policies.



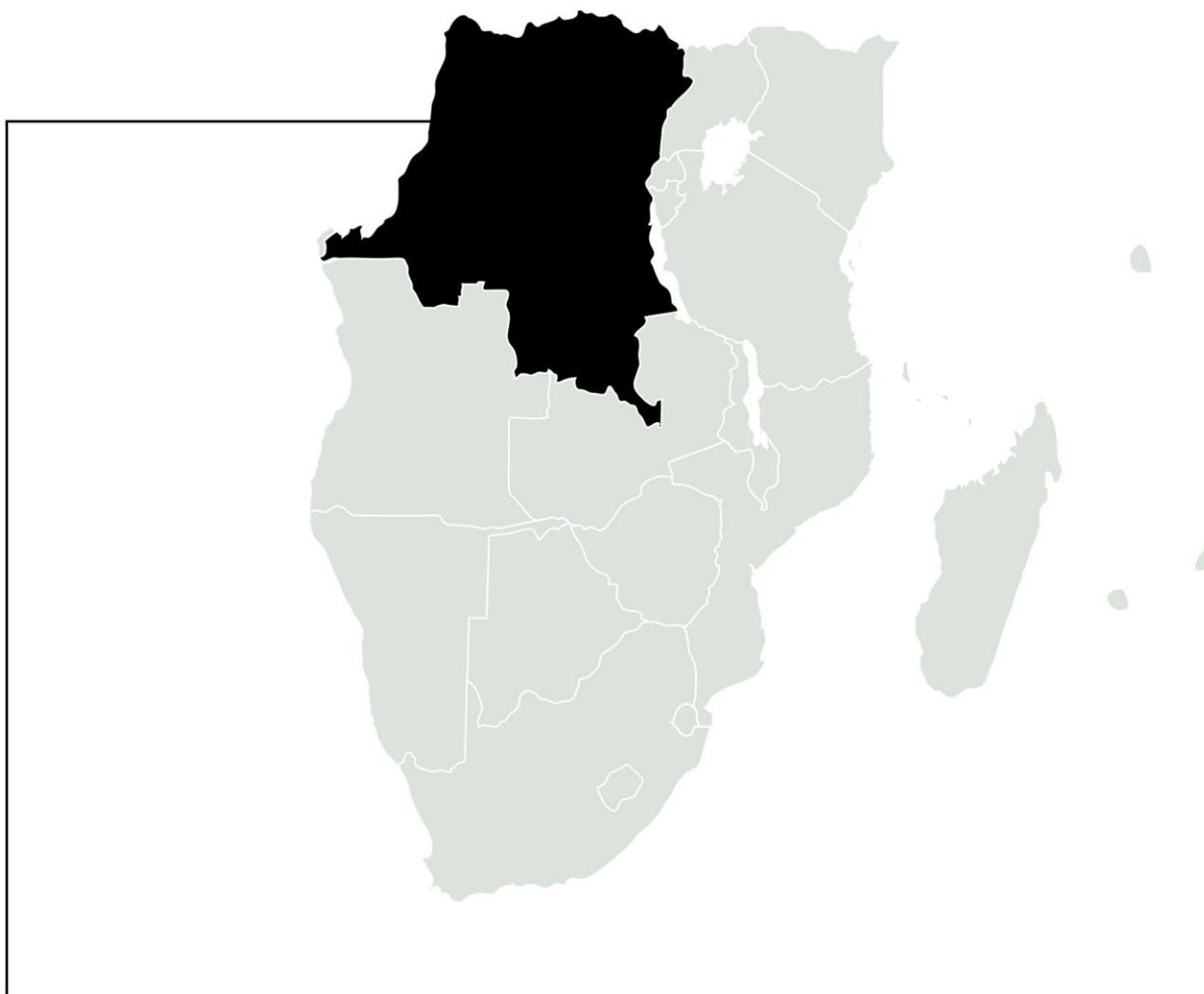
List of Figures

Chart 1: Overview SADC Road Map, Regional Strategy Paper, 2012

List of Abbreviations

AfDB	African Development Bank
DRC	Democratic Republic of Congo
GDP	Gross Domestic Product
ICT	Information and Communication Technology
PPP/s	Public Private Partnership/s
SADC	Southern African Development Community
SADC3P	Southern African Development Community- Development Finance Resource Centre PPP Network





KEY INDICATORS - 2012

DR Congo

Population (Mio.)

71

GDP per capita (US\$)

400 (2012 est.)

PPP Level of Maturity

Very Low

(Regional Strategy Paper, 2012)

1. Engagement Overview

XS-Axis Consulting, Wehrheim (The Cross Sector Advisory) has been engaged by the Client, Southern African Development Community-Development Finance Resource Center PPP Network (SADC3P) to prepare 14 country papers taking a look at current practice of PPPs with a specific focus on PPP Policy, Institutional Arrangements, and Legal Frameworks as a follow-up of the Draft Regional Strategy paper submitted to SADC3P in November, 2012. This paper focuses on Democratic Republic of Congo's (DRC) PPP Policy, Institutional Arrangements and Legal Framework as a Member State in SADC providing specific recommendations for the implementation or enhancement of private sector participation in the development of public infrastructure in the country. The main objective is to serve as a strategic paper for the Government of DRC and its Ministries in order to refine, develop and ultimately develop further its PPP Policy, Legal Framework, and Institutional Arrangements aimed at closing the 'infrastructure gap', and its negative impact on economic growth, job creation and social cohesion in DRC. Moreover, the country paper shall serve the SADC3P Network to identify areas of support to be offered by SADC3P Network towards identified Member States.

We render this report to the best of our knowledge and belief. Our results are based on the most recent verifiable information available at time of the report. Public sources were used where appropriate and fact based observations were made.

2. Introduction

The Democratic Republic of Congo (DRC) is the second largest country in Africa and has a population of 71 Million (Mio.) (African Development Bank: Democratic Republic of Congo, 2013-2017 Country Strategy Paper, 2013, p.1). Located at the crossroads of the continent, it shares common borders with nine other countries --its neighbouring countries include the Central African Republic, and South Sudan to the North; Uganda, Rwanda and Burundi to the East; Zambia and Angola to the South, the Republic of the Congo, and the Angolan exclave of Cabinda as well as the Atlantic Ocean to the West. Since November 2011, Joseph Kabila has been President of DRC which has significant natural resources and has some of the largest reserves in Sub-Saharan Africa. However, the country remains fragile although it is slowly recovering from over two decades of political and economic instability. DRC continues to face rebellions threatening to its institutions and the population's security. AfDB finds that the country's specificities provide it with unrivalled economic and social development opportunities, but these also bear enormous challenges in terms of security and peace, central government's capacity and authority, decentralization and political/economic governance.

DRC has the potential to be one of the richest African countries due to its richness in mining and agriculture; it could hence develop to a driver for African growth. According to the World Bank, DRC has shown a strong economic performance with Gross Domestic Product (GDP) growth rate of 7.2% in 2012, up from 6.9% in the previous year (World Bank, 2012, Web page). Despite its rapid economic growth in the past twenty years, and an expansionary policy with a budget deficit of 6.3% of GDP, the DRC has huge needs for reconstruction and boost of its economy. The country suffers especially from serious food problems reflecting its low agricultural productivity. The medium-term economic outlook still looks good even though the political, and security tensions remain fragile due to "lawlessness" in the Eastern provinces (AfDB, web page). Based on International Monetary Fund (IMF) forecasts, GDP growth should reach about 8.2% in 2013 and 6.4% in 2014, mainly as a result of the start-up of new mining projects and the revival of agriculture (AfDB, Democratic Republic of Congo: 2013-2017 Country Strategy Paper, 2013, p.3). The economy's continued expansion hinges, however, upon retaining political stability, improving security in the east and continuing structural reforms. Nevertheless, efforts to stabilise the macroeconomic framework continue in DRC thanks to a tight budget policy, the



gradual easing of monetary policy and a recovery in export earnings.

DRC has neither a Legal, Institutional or a Policy Framework established to promote PPPs in the country. The country has yet a history of PPPs in the water and power sectors dating back to colonial rule (Report of the Africa PPP Network (AP3N), Inaugural Meeting, 2012, p.3). The Ministry of Portfolio oversees current PPP efforts in the telecommunication sector, which has been highly successful. Projects in the pipeline include the Ingar Pam power venture that is capable of providing power to the whole of Africa, and plans for concessions in the mining sector. PPPs are considered as means to offer policy makers an opportunity to improve the delivery of services and management of facilities and help mobilize private capital which in turn speeds up the delivery of public infrastructure. PPPs are also deemed as an important instrument to promote universal access to telecommunication at this time of convergence in DRC. According to the World Bank, along with power and transportation infrastructures projects, telecommunication figures among the most growing areas in PPP projects in Africa. Many governments are turning to private sector to design, build, finance, and operate such infrastructure facilities hitherto provided by the public sector, and various PPP models are used to promote the development of national backbones. Nevertheless, fitting telecommunication projects into a PPP model can be quite challenging. Experts in the area suggest that issues specific to this sector play more important role and need to be considered carefully. Thus, the World Bank looked more in-depth into various structures and forms of PPPs that may be adopted in the Information and Communication Technology (ICT) sector for DRC (World Bank, Public-Private Partnership in Telecommunications Infrastructure Projects Case of the Republic of Congo 68702, 2011).

This paper is to be considered as a follow-up strategic document to the Framework paper which was submitted to SADC3P in November, 2012 recognizing that PPP Frameworks do not develop in isolation, but evolve over time along a PPP maturity curve that often responds to various challenges faced while actually implementing PPPs in specific cultural, legal and procedural and institutional settings. The Regional Strategy paper examined the current status of PPP frameworks across all Member States to classify SADC countries into four categories as far as their level of maturity of PPP Frameworks is concerned. The paper distilled DRC to belong to those few countries in SADC that have not adopted or established a Framework aimed at promotion of PPP schemes in the country. The next chapter will elaborate on DRC's specific PPP experience since 2012 -- its PPP Policy, Legal and Institutional Framework as a continuation of the above mentioned cross-country Regional Strategy aimed at providing an in-depth insight into the specific country strategy, and existing PPP policies per country across all SADC.

3. Methodology

Our approach in this country specific paper is to provide an overview of DRC's PPP Policy, Institutional Arrangements, and Legal Framework by taking into account the country-specific strategies, and drivers for resorting to PPPs considering the individual level of PPP development in the country. The ultimate idea is to draw lessons for DRC, and to come up with specific recommendations concerning potential areas of assistance needed. The Regional Strategy document distilled DRC in 2012 to belong to the nations in SADC with almost no experience concerning implementation of PPPs. This paper will touch upon this evaluation and move further to analyze the current progress made in DRC aimed at depicting those developments made since 2012 as far as the PPP Framework conditions are concerned.

Methodologically, we will first take a look at whether since 2012 the Government has made steps to introduce some kind of Framework either via a Policy, regulatory or other means. We will examine whether a common understanding of the term PPP has been developed in DRC since experience across countries shows that lack of a proper term and definition of what a PPP



typically encompasses does indeed result in poor implementation of PPP schemes. Next, we will evaluate DRC's approach towards developing a PPP Framework based on the recommendations provided to the Minister's of Finance and the road map developed for SADC countries aimed at establishing a typical good practice PPP Framework. This includes an examination of whether attempts have been made to adopt a PPP policy –examining whether its Policy contains its Government's formulation of its objective to use PPPs, the scope of the PPP program and the implementing principles. Then, we will consider whether DRC's operational Framework related to the implementation of PPP processes and the institutional responsibilities underpins its national PPP scheme. In addition, we will take a look at the legislature and entities participating in the PPP program as an integral part of any good Framework approach. Ultimately, we will evaluate as to whether the country's PPP programs are backed up by prudent laws and regulations enabling public sector to enforce and implement PPPs and set the boundaries within the contractual context. The ultimate idea is to distil proper recommendations from our work for SADC3P, and the Government of DRC as far as next steps is concerned.

4. Examination of the Term PPP

The DRC has so far not adopted any official definition of a PPP. The World Bank has conducted awareness raising workshops concerning PPPs, and also studied the application potentials of this procurement scheme to the ICT, water and also health sectors in the DRC. However, so far the Government of DRC has not moved on to officially consider private sector resources and knowhow as a potential or alternative source of procurement and financing as far as infrastructure service delivery and project implementation are concerned.

In 2012, at the Regional meeting of Africa PPP network, Mr. Emmanuel Gbaligaza, Conseiller Principal En Charge Des Questions Economiques Et Financieres /Cabinet Du Vicepremier Ministre, noted that DRC has a new policy in place to support PPP projects (Report of the Africa PPP Network (AP3N), Inaugural Meeting, 2012, p.17). However, there seemed to be a misunderstanding of what a PPP constitutes since the expert explained that the Head of State had created a new legislation aimed at conversion of public enterprises to private sector with a focus on efficiency, and good governance. In the same context, the expert laid out that a Pilot Committee had been created to effect the transitioning of public enterprises to private, and was in the process of being overseen by the World Bank. Thus, Government understands the term PPP in a broader sense and as of 2012, privatizations and simple restructurings are primarily considered as PPPs.

5. Application of SADC PPP Framework Road Map

The experience to date across comparators and SADC countries indicates that there is no unique formula for developing a sound PPP Framework. More specifically, the development of a common Framework for SADC needs to take into account the economic and political context of countries, their historically grown institutional and legal structures as well as the actual experiences with PPPs so far, with some countries having made considerable strides and others having made very little progress, and some none at all. Nevertheless, if PPPs are to work and render the expected results, we suggested in the Regional Strategy document a number of requirements for a proper PPP Framework with key features related to Policy, Institutional Structures and Legal setting (see next chart).

Thus, successful PPP schemes are characterized by clear policy statements, competent and enabled institutions that can appropriately identify, procure and manage PPPs, and efficient oversight procedures as well as proper legal frameworks. Nevertheless, it must be borne in mind that firm political commitment, stakeholder dialogue and a number of other factors such as a sound and strong PPP pipeline are important contributing factors for the promotion of PPPs in a



larger context. It is also important to be aware of the contribution of sector reforms and their role in developing and supporting PPP schemes. In a number of countries, sector institutions, for instance, power sector regulators have had an important role as far as the promotion of IPPs and investment in the power sector are concerned. It is in this context that Member States with a low level of PPP maturity should acknowledge the relevance of sector institutions in terms of their contribution towards developing PPPs over time and across various sectors --which are however best supported by setting up efficient and proper frameworks at the national level. In this section, we examine these various elements of a PPP Framework to see how far DRC has proceeded in terms of its PPP Policy implementation and practice as well as looking into its Institutional structures and Legal Framework more in-depth as well as the political commitment of the Government and its approach towards stakeholder integration into the PPP process.

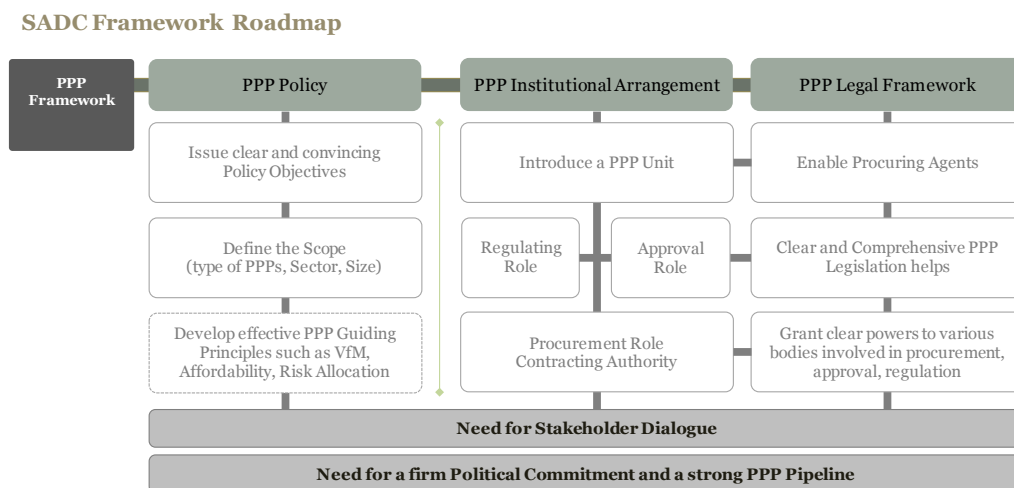


Chart 1: Overview SADC Road Map, Regional Strategy Paper, 2012

5.1 PPP Policy in DRC

The DRC has not launched and instituted a PPP Policy Framework for the country. Although there are efforts to consider PPPs in the water, ICT and health sectors, there is no record of efforts on behalf of the Government to consider PPPs as an alternative venue, and source of procurement next to Government and public sector provision. Thus, the country has still a long way to go as far as promotion and proper implementation of PPP projects and the development of a solid, clear and unambiguous Framework is concerned.

AfDB takes note in the 2013 Country Strategy Paper of DRC Government's purpose to promote private investment by focusing actions on the establishment of the necessary Framework for PPP development, and institution building as well as creating a PPP Unit (AfDB, Democratic Republic of Congo: 2013-2017 Country Strategy Paper, 2013, p.16). To leverage greater private sector contributions to economic development, AfDB commits to provide support towards creation of a PPP Unit, the passage of a PPP Law and its implementing texts as well as preparation of a PPP strategy and an action plan. In addition, at least four PPP projects shall be launched in conjunction with Pillar 1 operations and no fewer than 300 professionals shall be trained in PPP techniques (AfDB, Democratic Republic of Congo: 2013-2017 Country Strategy Paper, 2013, p.17). In terms of medium term output, AfDB expects that PPP projects with feasibility studies may be conducted, and enterprises operating in DRC may be better identified. In addition, AfDB expects a consultative Framework to be in place which will be operational between Government and private sector.

5.2 PPP Institutional Responsibilities in DRC

The Ministry of Finance takes charge of all project finance activities (Report of the Africa PPP Network (AP3N), Inaugural Meeting, 2012, p.17). In the telecommunication sector, 16% of the country's population has been covered by Vodacom with investment from South Africa and Airtel with investments from Sudan. There is a 200km road project also in view to be executed through PPP, and there are arrangements to finance transport and railway projects through the World Bank. References may be found concerning the famous Inga dams – a major partnership project and in collaboration with AfDB; there are plans to expand power sites to enhance power supply to all parts of the country and in the future, to a greater part of the African continent. The Government is currently not investing in mining and forestry; these activities have been handed to private sector investors through concessions.

5.2.1 Role of PPP Unit in DRC

In the absence of an adequate PPP Framework in DRC, there is no dedicated PPP Unit in the country. The Ministry of Finance is responsible for promotion of private sector activities. AfDB plan to assist DRC in establishing a proper Institutional Framework by introducing a PPP Unit.

5.2.2 PPP Regulation, Approval and Implementation Roles in DRC

There is no distinction between roles related to approval, regulation and implementation of PPPs in DRC since there is no proper Framework instituted yet for promotion and implementation of PPPs in the country. The key consideration for a PPP investment decision is whether the factors conducive for a significant investment create a “level playing field” in which:

- Investments can be made without unacceptable risk;
- Government will fail to honour its contracts;
- Interfere in the economy in ways that distort exchange rates; and
- Mobility of capital;
- Adopt policies in the future that are not friendly to business;
- Not provide timely and equitable resolution of disputes through its administrative and legal venues; as well as
- Fair, equitable, transparent and consistent regulator.

There has to be a clear separation of the regulatory role(s) and the role of government agencies undertaking PPP projects, e.g. a line ministry generally cannot be both party to a PPP deal and the regulator for that transaction. Therefore, as the DRC may develop a PPP Framework commencing PPP activities in the country, there will be a need to simultaneously establish independent regulators, preferably under a Multi-sector regulator to achieve economies of scale

5.3 DRC Legal Framework

Since 2006, the DRC has been a unitary republic based on the constitution approved by a referendum in 2005. The constitution established a semi-presidential republic, with a separation of powers between the executive, legislative and judiciary and a distribution of prerogatives between the central government and the provinces. As far as the Judicial Branch is concerned, it is composed of: Constitutional Court; Appeals Court or Cour de Cassation; Council of State; High



Military Court; plus civil and military courts and tribunals.

The DRC is a civil law country and as such the main provisions of its private law can be ultimately traced back to the 1804 Napoleonic Civil Code. More specifically, the Congolese legal system is primarily based on Belgian law. The general characteristics of the DRC legal system are similar to those of the Belgian legal system because the DRC received its law from the Belgian colonialists (Dunia Zongwe, Francois Butedi and Clement Phebe, NYU, The Legal System and Research of the Democratic Republic of Congo (DRC): An Overview 2007). Customary or tribal law is another basis of the legal system of the DRC, where the majority of people live in rural areas. The various local customary laws regulate both personal status laws (like marriage and divorce laws) and property rights, especially the inheritance and land tenure systems in the various traditional communities of the country.

The legal system may be divided in three branches, namely public law, private law and economic law. Public law regulates legal relationships involving the state or state authority; private law regulates relationships between private persons; and economic law regulates interactions in such areas as labour, trade, mining and investment. Overall, notwithstanding significant policies and legal reforms the Government has formulated and adopted factors such as lack of infrastructure, weak institutional capacity, and corruption undermining the effectiveness, stability and predictability of the legal system.

Having a strong and effective regulatory regime is a necessity to attract large-scale private sector investment. To date, the regulatory regime in DRC is insufficient to attract private capital and efficiency in key sectors. Current regulatory arrangements do not adhere to many of the criteria set down internationally for regulators. The international PPP investor has a choice of many different countries in which they can invest and regulation is one of the deciding factors. A country that can score well on the following factors might attract significant international private investment:

- A stable, free market driven economy;
- Open and active financial and capital markets;
- Minimal government interference in trade and investment;
- Efficient unbiased legal system and dispute resolution mechanism;
- Stable political environment with flexible pro-business policies; and
- a politically and financially independent predictable regulatory regime.

In order to attract private investment in the DRC, it is necessary to have contract dispute resolution procedures that are clear, transparent, unbiased, and not excessively time consuming. Formal court procedures can be slow and adversarial, leading to breakdown of relationships and above all costly in terms of trading losses and legal fees. The effectiveness of the legal system is a critical element for investors in the decision to enter a PPP arrangement. Therefore, in PPP it is best if there are alternative 'fast track' dispute resolution approaches that support the PPP principles, requiring sector regulatory disputes procedures, mediation services and international arbitration. These forms of dispute resolution are independent, objective and above all, have expert knowledge of the sector to resolve financial, technical and legal issues. They can be referenced or required in the PPP bidding documents and the PPP Unit can disseminate information about how they are utilized. Based on the above, we recommend introducing some sort of a PPP Legal Framework or regulations for promotion of PPPs in DRC.

6. Recommendations

DRC has not instituted a Legal or Institutional or Policy Framework for promotion of PPPs yet.



Managing the transition from private sector participation via schemes such as privatization to PPPs seems to be a delicate and complex task, but fortunately DRC is not alone in this mission. Many countries are going through the same process, and some have already gone through at least the initial stages of the transition, so there are some international models that can be used as guidelines. Most of the challenges relating to the transition are not in the area of Policy, which can evolve naturally and without any radical changes, but rather in the areas of institutional setup and enabling legislation. In DRC, and in many other countries, one could in theory launch a national PPP program very quickly by simply issuing some PPP standards and guidelines.

However, it is important to bear in mind that the selection of appropriate projects for development as PPPs requires an understanding of the features of, and environment required for a successful PPP project. This may be based on experience gained within a country, but also from wider experience in other countries. For DRC, PPPs pose new demands on public agents, as skills are needed to specify outputs, to understand complex financial structures and to allocate and manage risks in the most efficient manner. In order to further attract private sector in provision of PPPs in infrastructure, the DRC Government must better invest in building capacity to identify and develop PPPs and engage the private sector for investment purposes.

Concrete SADC3P Recommendations:

- Provide assistance to establish a proper Legal Framework;
- Assist in capacity building to Ministries and public agents to get a better understanding of the PPP concept
- Assist in identifying 1-2 PPP projects and provide advisory services to conduct a feasibility study.

DRC has a law in place to facilitate sector wise private sector activities, for instance in mining. The country also has a robust structure (protectionist law) to encourage private sector investment. However, there is yet a need for the DRC Government to open up more and allow private investment in desired sectors of the economy. The World Bank has been providing support towards this process and the transition process from public to private companies has commenced in earnest. In order to attract private investment in the DRC, there is an urgent need to have contract dispute resolution procedures that are clear, transparent, unbiased, and not excessively time consuming. Formal court procedures can be slow and adversarial, leading to breakdown of relationships and above all costly in terms of trading losses and legal fees. The effectiveness of the legal system is a critical element for investors in the decision to enter a PPP arrangement. If the Government aims at advancing the cause of PPPs, then it would be necessary to promulgate new PPP regulations at some level. It is quite important to select the appropriate law under which to issue the regulations. Most of the international models of highly successful PPP programs are countries in which the PPP program was launched by PPP regulations issued by the Ministry of Finance or the National Treasury. Examples include South Africa, the U.K., Ireland, and Australia. But in considering these models, one must take into account any differences in political culture that might exist between DRC and those countries. In all of those countries, there is a political culture that accepts vertical hierarchy and focus of decision-making at high levels of Central Government.

Finally, in order to promote PPP schemes in DRC, it will be essential to ensure that a proper PPP Framework is introduced in the country. AfDB has already committed to provide support to the Government to establish a proper Framework for promotion of private sector activities, especially also aimed at establishing a PPP Unit, etc.



Bibliography

African Development Bank, Democratic Republic of Congo: 2013-2017 Country Strategy Paper, 2013

Dunia Zongwe, Francois Butedi and Clement Phebe, NYU, The Legal System and Research of the Democratic Republic of Congo (DRC): An Overview 2007

Report of the Africa PPP Network (AP3N), Inaugural Meeting, 2012

World Bank, Public-Private Partnership in Telecommunications Infrastructure Projects Case of the Republic of Congo, TWICT 68702, 2011

World Bank, Congo Learns about Public-Private Partnership (PPP) Service Contracts in Water and Sanitation South-South Knowledge Exchange Hub, 22 October 2013

