

**PUBLIC PRIVATE PARTNERSHIP AND SUSTAINABLE  
DEVELOPMENT IN BAHRAIN**

Dr

Camelia Salah El Din Abdulla Camal

College of Law - Aswan University

## **ABSTRACT:**

Public Private Partnership was recognized as a very important mechanism for achieving the Sustainable Development Goals (SDGs), and has even become one of its vital Goals, clearly stated in Goal 17: “strengthening the means of implementation and revitalizing the global partnership for Sustainable Development”<sup>1</sup>

A successful sustainable development agenda requires partnerships between governments, the private sector, and civil society, at global, regional, national, and local levels. Public Private Partnership is a successful way to promote the dynamics of Sustainable Development and ensure transparent competition; but it should not be designed to evade national laws and public interest constraints. The problematic of this research is to examine the extent to which Bahrain needs an independent legislation for Public Private Partnership.<sup>2</sup>

The aim of this research is to achieve a successful experience of Public Private Partnership in Bahrain, as a mechanism for meeting its Sustainable Development Agenda 2030. By using the analytical methodology, the concept of Public Private Partnership will be discussed and the differences it implies from the current forms of collaboration between public and private sectors will be specified using the Legislative Decree n° 36 of 2002, with respect to Regulating Government Tenders and Purchases. Secondly, the practical advantages and disadvantages of Public Private Partnership will be explored. Finally, the actual need of an independent legislation of Public Private Partnership in Bahrain will be analysed in light of the resolution n° 30 of 2022 concerning the Bahrain's Guide of Public-Private Partnerships issued by The

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\* The most important results of this research were presented at the International Conference on Sustainable Futures ICSF, in Manama- Kingdom of Bahrain, November 2017.

<sup>(1)</sup> UN Office for Partnerships, Partnering for the SDGs, Available on the website: <<https://2u.pw/fVPsUQ0>> (last accessed 1 December 2023 at 1:00 pm)

<sup>(2)</sup> United Nations, Revitalize the Global Partnership for Sustainable Development, UN Academic Impact. Available on the website: <<https://2u.pw/cYcJJI>> (last accessed 1 December 2023 at 3:00 pm)

Crown Prince, Prime Minister Salman bin Hamad Al Khalifa. The findings will be useful for Bahrain's Public Private Partnership, to be coherent with its political, legal, cultural and social environment.

Key words: Public Private Partnership, Sustainable Development, Administrative Contract, Sovereign Immunity.

## **1. Introduction**

In 2015, United Nations countries adopted the 2030 Agenda for Sustainable Development and its 17 Sustainable Development Goals and 169 targets. The new Agenda is people-centered, universal, transformative and integrated. It calls for action by all countries for all peoples over the next 15 years in five areas of critical importance: people, planet, prosperity, peace and partnership.<sup>3</sup>

The Kingdom of Bahrain has taken several steps to adopt the 2030 Sustainable Development Goals (SDGs) after building on its experience and expertise in achieving the Millennium Development Goals ahead of its schedule in 2015.<sup>4</sup>

A successful sustainable development agenda requires partnerships between governments, private sectors and civil societies. These inclusive partnerships, which are built upon principles and values, and shared vision and goals, that place people and the planet at the center, are needed at the global, regional, national and local level. That is why the kingdom of Bahrain has nominated Ministry of Foreign Affairs, Ministry of Finance, Telecommunications Regulatory Authority, Information and eGovernment Authority, and Ministry of

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<sup>(3)</sup> United Nations Sustainable Development, Summit Charts New Era of Sustainable Development, United Nations, New York, 2015. Available on the website: <<https://2u.pw/R2s7Qvi>> (last accessed 9 November 2023 at 3:00 pm)

<sup>(4)</sup> Kingdom of Bahrain - eGovernment Portal, Sustainable Development, Manama, 2017. Available on the website: <<https://2u.pw/VVLMfSi>> (last accessed 25 June 2017 at 1:00 pm)

Industry, Commerce & Tourism as responsible entities to achieve this goal and monitor its Achievement Levels.<sup>5</sup>

The United Nations has defined “strengthening the means of implementation and revitalizing the global partnership for sustainable development” as one of the Sustainable Development Goals (Goal 17) because Public Private Partnership (PPP) is an effective mechanism for achieving the SDGs; actually, it is the best instrument for providing social inclusive development which is one of the key elements of sustainable growth. PPP leads to promote effective public, public-private and civil society partnerships building on the experience and resourcing strategies of partnerships that mobilize and share knowledge, expertise, technology and financial resources to support the achievement of the sustainable development goals in all countries, particularly the developing countries.<sup>6</sup> Public Private Partnership particularity is based upon the principle of risk allocation which distinguishes PPP from other traditional forms of collaboration between public and private partners.

### **1.1 Research Problem**

The problem of this research is to examine the Bahraini's experience of Public Private Partnership in light of the resolution n<sup>o</sup> 30 of 2022 concerning the Bahrain's Guide of Public-Private Partnerships.

### **1.2 Research Objective**

This paper will focus on Public Private Partnership and Sustainable Development in Bahrain. Its problematic is to examine the extent to which Bahrain’s need an independent legislation for Public Private Partnership. The aim of this examination is to achieve a successful experience of Public Private

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<sup>(5)</sup> Kingdom of Bahrain - eGovernment Portal, Seventeenth Goal: Partnerships for the Goals, Manama, 2017. Available on the website: <<https://2u.pw/oynb8L>> (last accessed 25 June 2017 at 6:00 pm)

<sup>(6)</sup> United Nations Sustainable Development Goals, Goal 17: Revitalize the global partnership for sustainable development, United Nations, New York. Available on the website: < <https://2u.pw/oEDNJPu>>(last accessed 10 November 2023 at 1:00 pm)

Partnership in Bahrain, as a mechanism for meeting its Sustainable Development Agenda 2030.

### **1.3 Research Methodology**

By using the analytical methodology, the first part of this paper provides a general overview of PPP concept and outlines its definition and forms. The second part summarizes and analyzes the differences between PPP and the other forms of collaboration between public and private sectors according to Bahraini Legislative Decree n° 36 of 2002. The third part explores the practical advantages and disadvantages of PPP. The fourth part analyses the actual need of an independent legislation of Public Private Partnership in Bahrain.

### **1.4 Research Plan**

1. Introduction
2. The Concept of Public Private Partnership
  - 2.1 Definition of Public Private Partnership
  - 2.2 Types of Public Private Partnership
3. Advantages and disadvantages of Public Private Partnership
  - 3.1 The advantages and disadvantages of PPP for the Public Partner
  - 3.2 The advantages and disadvantages of PPP for the Private Partner
  - 3.3 The advantages and disadvantages of PPP for the Users
4. Public Private Partnership and Bahraini contracts according to the Legislative Decree n° (36) of 2002, with respect to Regulating Government Tenders and Purchases
5. Sustainable Development and the Problematic of Public Private Partnership Legislation in Bahrain
6. Conclusion

## **2. The Concept of Public Private Partnership**

Recent years have witnessed a remarkable increase in cooperation between public and private sectors for the development and operation of environmental

and various forms of infrastructure under the designation “Public Private Partnership” which describes a wide variety of arrangements between public and private sectors,<sup>7</sup> as an alternative and effective method to mobilize additional financial resources and benefits from private sector efficiencies to cover the financial shortages in the public sector.<sup>8</sup>

Therefore, it is necessary to find a definition for PPP and put our hands on its types in order to analyze its role in achieving the sustainable development in Bahrain as follows:

## **2.1 Definition of Public Private Partnership**

Public Private Partnership is a complex concept but it can be simply defined as a long-term global arrangement between public and private sectors based on the principle of risk allocation, to satisfy the public utilities mission.<sup>9</sup>

The principle of risk allocation between public and private sectors is indeed a decisive factor in the success of PPP. In this context, the principle of risk allocation is an attempt to guarantee the maximum possible degree of project security by specifying and allocating all project risks, whether foreseen or not anticipated by the risk matrix.<sup>10</sup>

Therefore, principle of risk allocation should be based on a clear determination of the potential risk; the following are some of the key risks which must be managed in PPP:

**Construction Risks** - potential risks related to construction may include:

- Exceeding the construction period and/or budget.
- Mismatch between the design assumptions and construction practice.

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<sup>(7)</sup> Cuthbert, N. & Choudhary, A., Middle East & Africa PPP Guide: The emergence of Public-Private Partnerships (PPPs) in the Middle East and Africa, Dentons, London, 2016. Available on the website: <<https://2u.pw/OHFTYsc>> (last accessed 10 November 2023 at 3:00 pm)

<sup>(8)</sup> Barnier M., Guidelines for Successful Public - Private Partnerships, European Commission -Directorate-General Regional Policy, Brussels, January 2003, p 13.

<sup>(9)</sup> Camelia S E. C., Le Partenariat Public Privé et le Mécanisme de l'équilibre Contractuel en Droit Interne et International, Thèse, Aix Marseille 3, France, 2010, p.179.

<sup>(10)</sup> Breton, TH. & Copé, J F., Les Contrats de Partenariat Principes et Méthodes, Ministère de l'Économie des Finance et de l'Industrie, Paris, 2004, p 28. Lewis, M. K., Risk Management in Public Private Partnerships, the Center for Globalization and Europeanization of the Economy Research Workshop, Georg-August-Universität, Göttingen, Germany, June 2001, p11.

- Abandonment of the project.

**Exploitation Risks** - Potential risks related to exploitation may include:

- Market Risks - are related to market demand or volume risk, and the cost increase of raw materials.
- Financial risks - are related to fluctuations in exchange rates, interest rate changes, and Cost overrun.

**Legal risks** - are related to change in the law, increase in taxes, and unilateral modification or termination of the contract.

**Political risks** - are related to war, revolution, terrorism, labor strikes, and extortion.

**Force majeure risk** - related to events beyond the control of both parties and which prevents either party from performing its obligations.

The principle of risk allocation is depending on risk matrix for transferring Risks between public and private parties to create a balanced risk sharing. Risk matrix is a table which lists the risks of the project for distributing them between public and private partners. Inside this matrix, there is an exclusive domain of the public partner, such as: risk of soil and risk of unilateral modification or termination of the contract; additionally, there is a shared domain between public and private partners, such as: force majeure risk.<sup>11</sup>

## 2.2 Types of Public Private Partnership

There is no standard model of a Public Private Partnership project. Therefore, it can essentially take whatever form that parties desire. Consequently, many forms of PPP exist and are continuously developing to suit project

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<sup>(11)</sup> Cuthbert, N. & Choudhary, A., op. cit., p 14:15. The World Bank, Identifying Risks, Public-Private Partnership Legal Resource Center PPPLEC, June 24, 2022. Available on the website :<<https://2u.pw/CX97qE4><(last accessed 11 November 2023 at 1:00 pm). Lewis, M. K., op. cit., p 13:14. Jefferies, M., McGeorge, D. and Chen S. E., Risk Management in Public-Private Partnerships: Emerging Issues in Social Infrastructure Projects, conference paper in Symposium: Building Across Borders Built Environment Procurement CIB WO92 Procurement Systems Proceedings, 23-26 September 2007, Hunter Valley, NSW, Newcastle University, Australia, p233-235. Camelia S E. C., op. cit., p181:196.

characteristics. However, PPP take a wide range of varying forms.<sup>12</sup> According to the World Bank, those forms are classified into:

**Management and Lease Contracts**, where a private sector partner takes over the management of a state-owned enterprise for a specified period. There are two subcategories of management contracts and lease contracts:

- Management contract: where the government pays a private operator to manage the project.
- Affermage or lease contract: where the government leases a public facility or land to a private operator for a fee.

**Concessions**, where a private partner provides full services in a specific area, including operation, maintenance, collection, management, construction and system rehabilitation. The public sector owns the project; therefore, it is responsible for setting performance standards and ensuring that the concessionaire meets them. The concessions can be classified into the following categories:

Build, Rehabilitate, Operate, and Transfer. (BROT)

Rehabilitate, Lease or rent, and Transfer. (RLT)

Rehabilitate, Operate, and Transfer. (ROT)

**Greenfield Projects**, where a private sector or public-private joint venture builds and operates a new project for the period stated in the contract, and at the end of the concession period, the project may return to the public sector.

**Joint Ventures**, which comprises cooperation between public and private sectors, by sharing the assets, finances and expertise of their projects. Joint ventures contain both of contractual arrangements and institutional forms, such as companies with one or more public and private partners.

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<sup>(12)</sup> Barnier M., op. cit., p 13:s.

**Divestitures**, where a private sector buys equity stake in a public enterprise through an asset sale, public offering, or mass privatization program. Divestitures include complete or partial divestitures.<sup>13</sup>

### **3. Advantages and disadvantages of Public Private Partnership**

The financial crisis of 2008 renewed the interest in public-private partnerships in both developed and developing countries to address constraints on public resources and budget deficits. Through recognizing the importance of investing in infrastructure to help their economies grow, state governments are increasingly turning to the private sector as an alternative additional source to fill the financing gap.<sup>14</sup> However, it should be born in mind that Public Private Partnership does not have the magic solution for countries problems, because practical experience has shown many disadvantages of PPP. Therefore, as with any project, a PPP has both advantages and disadvantages for public partner, private partner, project users, and public utilities as following:

#### **3.1 The advantages and disadvantages of PPP for the Public Partner**

##### **3.1.1 Advantages**

Public-Private partnerships offer several benefits, such as:

- Great efficiency to reduce budget deficits;
- Re-directing government funds to other important socio-economic areas;
- More competition on market and faster procurement;
- Access to an expertise not available in the public sector, and promote innovation;
- Minimizing development risk by Sharing risks and responsibilities;

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<sup>(13)</sup> Cuthbert, N. & Choudhary, A., op. cit., p 6:8. The World Bank, PPP Arrangements / Types of Public-Private Partnership Agreements, Public-Private-Partnership in Infrastructure Resource Center, Washington, D.C. Available on the website: < <https://2u.pw/N2NK5CH> > (last accessed 7 December 2023 at 9:00 pm). Izaguirre, A K, Hahn, S, Khuu, K, & Nellis, J, Private Participation in Infrastructure: Trends in Developing Countries in 1990-2001: Energy, Telecommunications, Transport Water, World Bank Publications, World Bank Publications, Washington, D.C., 2003, p25. Camelia S E. C., op. cit., p 27:140.

<sup>(14)</sup> The World Bank, Government Objectives: Benefits and Risks of PPPs, Public-Private-Partnership in Infrastructure Resource Center PPPLEC, Washington, D.C., June 21, 2022. Available on the website: < <https://2u.pw/bT3NHwq> > (last accessed 7 December 2023 at 11:00 pm).

- Better compliance with environmental regulations; and
- Improving operating efficiency, cost effectiveness and service performance.

### **3.1.2 Disadvantages**

Public Private Partnership has also some drawbacks, such as:

- Private funding is expensive;
- The bidding process is not perfect, and its costs are likely to be greater than those of traditional government procurement processes;
- Long-term commitment of the lease payment;
- Creation of a private monopoly;
- Accusation to favorite foreign companies;
- Resistance of final users (when Raising prices);
- Disputes can affect the reputation of the country;
- Government responsibility toward its citizens for quality of utility services will continue;
- Decrease of employment in the public sector and losing of technical staff and losing of the best managers of the public sector; and
- Limited influence of public authority over the investment.<sup>15</sup>

## **3.2 The advantages and disadvantages of PPP for the Private Partner**

### **3.2.1 Advantages**

Public Private Partnerships offer several benefits, such as:

- Enhancing private sector participation in government projects;
- Generate cash flows for a long-term period;
- Developing local private sector capabilities through joint ventures, and subcontracting opportunities with large international companies;
- More transparency in the economy;

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<sup>(15)</sup> Ibid. Pârvu, A. & Voicu-Olteanu, C., Advantages and limitations of the public private partnerships and the possibility of using them in Romania, *Transylvanian Review of Administrative Sciences*, n° 27 E, 2009. Available on the website: < <https://2u.pw/twHXetX> > (last accessed 1 December 2023 at 10:00 pm). Francoz, E., *Advantages & Limitations of the different Public Private Partnership Risks*, Public Private Partnership Workshop, Agence Française de Développement (AFD), Jordan, 2010. Available on the website: < <https://2u.pw/Uy2CrjM>> (last accessed 26 June 2017 at 6:00 pm)

- Government supports (subsidies, tax and guarantees) ;
- Creates the local standard and a captive market;
- Establishing a market for after-sales services and spare parts;
- Natural inflation hedge;
- Strong incentives for performance;
- Shared resources with other projects.

### **3.2.2 Disadvantages**

Public Private Partnership has also some drawbacks, such as:

- PPP procurement procedures are longer and more expensive than traditional public procurement;
- Introducing a fully risks appraisal early to determine project feasibility, leads to have unrealistic governmental expectations;
- Lack of skilled teams;
- Profits of the projects can vary depending on the risks assumed, complexity, competitive level and size of the project;
- Political and social challenges (like tariff increases , labor transfer, or land resettlement issues);
- Tendency to mistrust private sector;
- High margins of project debt;
- Resistance to high tariffs ( demonstrations against price increase);
- Conflict with local partners.<sup>16</sup>

## **3.3 The advantages and disadvantages of PPP for the Users**

### **3.3.1 Advantages**

Public-Private partnerships offer several benefits, such as:

- Creation of a new facilities with better maintenance;
- Social tariffs for low income;
- Lower price for a better quality;

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<sup>(16)</sup> Francoz, E., op. cit. Pârnu, A. & Voicu-Olteanu, C., op. cit., p 191:194. The World Bank, Government Objectives: Benefits and Risks of PPPs, op. cit.

- Less taxes due to less public debt;
- Better compliance with environmental regulation.

### **3.3.2 Disadvantages**

Public Private Partnership has also some drawbacks, such as:

- Creation of a private monopoly can affect the continuity of project;
- Raising prices charged for users of infrastructure;
- Disputes can affect the quality and the accessibility of service.<sup>17</sup>

## **3.4 The advantages and disadvantages of PPP for the Public Utilities**

### **3.4.1 Advantages**

Public-Private partnerships offer several benefits, such as:

- Enhance the necessary investments into public sector;
- Guarantee higher quality and timely provision of public Utilities;
- Benefit from the expertise and experience of the private sector in implementing PPP projects;
- Long-term service guarantee;
- Reducing political interference in the economy.

### **3.4.2 Disadvantages**

Public Private Partnership has also some drawbacks, such as:

- Delivered Infrastructure or services could be more expensive;
- Impossibility to anticipate and evaluate all possible events that could affect future activity;
- Poorer quality of the services, and Limited accessibility to services.<sup>18</sup>

## **4. Public Private Partnership and Bahraini contracts according to the Legislative Decree n° (36) of 2002, with respect to Regulating Government Tenders and Purchases**

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<sup>(17)</sup> Ibid. Francoz, E., op. cit. Pârvu, A. & Voicu-Olteanu, C., op. cit., p191:194.

<sup>(18)</sup> Ibid. Pârvu, A. & Voicu-Olteanu, C., op. cit., p191:194. The World Bank, Government Objectives: Benefits and Risks of PPPs, op. cit.

Bahraini contracts according to the Legislative Decree n° (36) of 2002, with respect to Regulating Government Tenders and Purchases classify as administrative contracts. While Government awards contract to private sector parties in both of the current forms of collaboration between public and private sectors (administrative contracts) and PPP projects, the differences between the two methods of collaboration appear as following:

- Government, in administrative contracts, pays private sector parties upon project completion or by its partial phases of achievement, while in PPP, the Private sector arranges financing the project upfront.
- Government is responsible for operation and maintenance in administrative contracts, while in PPP, the Private sector parties are responsible for construction, operation and maintenance for a fixed period.
- Private sector achieves its mission by project completion, while in PPP, private sector regroups costs and makes profit upfront.
- Government, in administrative contract, takes the majority of building and operations risk. While in PPP, Private sector parties are incentivized to achieve standards, otherwise penalized.<sup>19</sup>

Although there are differences between the two methods of collaboration, PPP contract may be classified as an administrative contract, as a result of satisfying the criteria of administrative contract “the public partner acts as a public authority with particular privileges and the contract relating to public utilities.”<sup>20</sup>

## **8. Sustainable Development and the Problematic of Public Private Partnership Legislation in Bahrain**

Despite the long successful history of collaboration between the public and private sectors to implement energy, infrastructure and other projects in the Gulf

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<sup>(19)</sup> Cuthbert, N. & Choudhary, A., op. cit., p 10:12.

<sup>(20)</sup> Delcours, X. & Wolf, D., *Le Contrat Administratif*, La Documentation Française, n° 2.11, Paris, 1977, p 17.

Cooperation Council (GCC) region, they have largely done so in the absence of PPP legal frameworks as known in more developed states.<sup>21</sup>

Recently, the fiscal deficits across the region due to the falling oil prices and the population's growth have forced the governments in the GCC to step away from their traditional reliance on oil revenues and sovereign reserves, and to search for new methods of financing projects in order to continue with their ambitious plans for development.<sup>22</sup>

PPP model was adopted across the GCC; horizontally it treats water and waste projects, power projects, road, rail and airport projects, healthcare projects and education projects, and the housing projects; while, vertically, it appears in various forms, such as: BOT<sup>23</sup>, DBFOT<sup>24</sup>, BOO,<sup>25</sup> Concession, and Joint Venture.<sup>26</sup>

In spite of the absence of PPP legislation **before 2022**, Bahrain has adopted PPP program in many projects, such as: Hidd Solar project, Askar Waste-to-Energy project, A-Dur 2 IWPP “The independent water and power” project, Light Rail PPP project and a Housing project.<sup>27</sup> Therefore, it was necessary to adopt a comprehensive law governing Bahrain's public-private partnership.

According to Del Nevo,<sup>28</sup> Bahrain needs to adopt a comprehensive legal and regulatory framework governing PPP because it would be beneficial for developing and implementing a streamlined process, while removing several legal uncertainties related to applicable laws and regulations, legal risks,

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<sup>(21)</sup> Cuthbert, N. & Choudhary, A., op. cit., p 16:17.

<sup>(22)</sup> Ibid., p 5.

<sup>(23)</sup> Build, Operate, Transfer.

<sup>(24)</sup> Design, Build, Finance, Operate, Transfer.

<sup>(25)</sup> Build, Own, Operate.

<sup>(26)</sup> Cuthbert, N. & Choudhary, A., op. cit., p 6:17.

<sup>(27)</sup> Burbury, T. & Smith, T., Middle East Vision 2030 PPP Legal Report 2017: An Overview of PPP Legislative Frameworks and Activities Throughout the Middle East, King & Spalding LLP: Middle East Offices, Abu Dhabi, June 2017, p 10. Available on the website: <<https://2u.pw/mppSuHp>> (last accessed 11 November 2023 at 10:00 pm).

<sup>(28)</sup> Del Nevo, S., The Case for a Comprehensive Legislation on PPP, bizbahrain - Bahrain's Business Magazine, Manama, August 2016. Available on the website: <<https://2u.pw/uWCDaOO>> (last accessed 27 June 2017 at 3:00 pm)

possibility to override contractual provisions by contracting authority, cancelling the contract totally, or suspending its execution on the ground for public interest; Also the right of contracting authority to modify the terms of the contract by referring to such agreements as administrative contracts; Finally, the sovereign immunity is forced in Bahrain by a statutory prohibition on court enforcement against public property or property owned by the Kingdom.

Del Nevo sees that the presence of a clear provision, which precisely controls the existence and consequences of any such rights (and ensuing indemnification for the investors), would enhance legal certainty of, perhaps, the most important item of concerns for private investors.<sup>29</sup>

**In 2022**, His Royal Highness Prince Salman bin Hamad Al Khalifa, the Crown Prince and Prime Minister, issued Resolution n° (30) of 2022, for Issuing a Guide Regulating Public-Private Partnerships in Bahrain, which came as a positive step toward developing integrated legislation for Public-Private Partnerships. The Guide of Public-Private Partnerships consists of five chapters dealing with: preliminary provisions, contracting procedures, provisions of the partnership contract, Supervising the project implementation and Settling Disputes, and miscellaneous provisions.

This guide shows the compatibility between the rules and provisions governing public-private partnerships and the administrative contracts rules, as following:

Firstly, In terms of the powers of the contracting administrative authority vis-à-vis the partnership project, we find that it exercises many powers such as: the power of direction and control the project execution in accordance with articles n° 3.1.9, 3.1.10, 3.1.11, 4.1, A.4.2.<sup>30</sup>,The power of unilateral modification in

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<sup>(29)</sup> Ibid.

<sup>(30)</sup> **The articles n° 3.1.9, 3.1.10, 3.1.11, 4.1, 4.2.a of the Public Private Partnership Guide: Article n° 3.1: " 3.1 Content of the Partnership Contract**

accordance with articles n° 3.1.9, 3.15<sup>31</sup> the power to “edict” sanctions in accordance with clause n° 4.2,<sup>32</sup> and the power of unilateral termination of the partnership contract in the case of its inability to implement its obligations for any reason such as: breach or insolvency, or for public interest considerations in accordance with article no 4.3.<sup>33</sup>

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The Partnership contract shall include the key terms that regulate the Partnership project, and the mutual obligations of the parties, particularly, the following: [...]

- 9) The right of the Contracting Administrative Entity or any other public authority to supervise the works that the Project Company intends to implement and the services to be provided, and the conditions under which the Contracting Administrative Entity may request amendments in relation to the works and terms of service, or take any reasonable measures it may deem appropriate to ensure proper operation of the Partnership project utility and provision of works and services in accordance with applicable legal and contractual requirements.
- 10) The extent to which the Project Company shall submit reports and information on its operations to the Contracting Administrative Entity or any other public entity.
- 11) The rights of the Contracting Administrative Entity to review and approve the contracts that the Project Company intends to conclude, specifically contracts with the shareholders of this Partnership or other concerned persons."

#### **Article 4: " 4 Supervising the Implementation of the Project and Dispute Settlement**

##### **4.1 Supervision of Project Implementation**

- a) The Contracting Administrative Entity is responsible for undertaking tasks related to the supervision the stages of project implementation, ensuring the achievement of the highest levels of performance required, evaluating the performance of the project company, and the continuous availability of the requirements, standards, arrangements, preparations and performance indicators stipulated in the Partnership contract.
- b) The Contracting Administrative Entity shall, in coordination with the Ministry, submit a periodic report to the Ministerial Committee on the results of supervision and evaluation of the Partnership project, together with its observations and recommendations, and the actions taken in this regard.
- c) The Contracting Administrative Entity may, after coordination with the Ministry, assign supervision and evaluation tasks to experts or entities that have the necessary technical capabilities to carry out these tasks.

##### **4.2 Breach of Obligations**

- a) The Contracting Administrative Entity shall, after coordination with the Ministry, notify the Project Company of any breach, error, or failure to fulfil the required quality and performance standards and required performance indicators, and to request remedial actions for such breaches within the period specified in the notice."

##### <sup>(31)</sup> **Article 3.15: " 3.15 Partnership Contract Amendment**

The Contracting Administrative Entity shall obtain the approval of the Ministerial Committee and Board prior to implementing any amendments to the Partnership contract or signing any addendums thereto."

##### <sup>(32)</sup> **Article 4.2: "4.2 Breach of Obligations**

- a) The Contracting Administrative Entity shall, after coordination with the Ministry, notify the Project Company of any breach, error, or failure to fulfill the required quality and performance standards and required performance indicators, and to request remedial actions for such breaches within the period specified in the notice.
- b) The Contracting Administrative Entity may, after coordinating with the Ministry, operate the utility on temporary basis by itself or with the support of another investor in the event that the Project Company is in material breach of its obligations under the contract, is in grave error, or is unable to achieve the required quality standards and performance indicators in accordance with the contract's terms and conditions.
- c) The provisions of this Article is without prejudice to any compensation or penalties prescribed for the Contracting Administrative Entity under the Partnership contract."

##### <sup>(33)</sup> **Article 4.3: " 4.3 Termination of the Partnership Contract**

- a) The Contracting Administrative Entity may, after consulting with the Ministerial Committee, terminate the Partnership contract in any of the following cases:

Secondly, the project company, In the partnership contract, is obliged to respect the principles governing the Public Utilities according to article 3.8<sup>34</sup> where the company is obliged to ensure the principle of continuity of public utilities, the principle of adaptability, and the principle of equality between beneficiaries of the public utility's services<sup>35</sup> that has been reaffirmed again by This principle by article 3.9.<sup>36</sup>

Thirdly, the financial and economic balance of the Public Private Partnership contract can be achieved easily due to its distinct mechanism which called risk allocation matrix for facing the previous risks relating to the public interest, and the contract execution, and the sovereign immunity. So, the previous risks should be allocated and shared between the public and private parties during the negotiation phase. In addition to this, the traditional theories of administrative contract balance play an important role in filling the gap which can occur to the principle of risk allocation during the contract execution because of the impossibility of specifying and evaluating all potential risks of the Partnership

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1) If the Project Company is unable to carry out its obligations or it appears that it is not ready to implement them due to insolvency, breach or other reasons.

2) considerations related to public interest, provided that the Project Company is compensated in accordance with the provisions of the Partnership contract.

b) The Partnership contract shall specify the method for calculating the compensation due to any of the two parties to the Partnership contract, if necessary, in the event of termination of the contract. Provided that the compensation is calculated such that to include the equitable value of the works completed under the contract and the costs or losses incurred by either party, including the expected profits."

Seif M. G., The Administrative Contract, Al Tamimi and Co., May 2011. Available on the website: <<https://2u.pw/SDLV18w>>(last accessed 15 November 2023 at 11:00 pm)

<sup>(34)</sup> **Article 3.8: " 3.8 Obligation to Provide the Service**

a) The Partnership contract shall specify, where necessary, the extent of the project company's obligations to ensure the following:

1) Modifying the service in line with meeting the actual demand for it.

2) Continuity of the service.

3) Providing the service on the same conditions to all beneficiaries.

4) Providing access for other service providers, without discrimination and, as appropriate, to any of the infrastructure networks operated by the project company.

b) The Project Company may, after obtaining the approval of the Contracting Administrative Entity or the competent administrative entity, issue rules regulating the use of the utility and the provision of the service."

<sup>(35)</sup> Cilibiu, O. M., Public Services and Public Utilities, Annals of the "Constantin Brâncuși", University of Târgu Jiu, Letter and Social Science Series, Academica Brâncuși Publisher, 3/2015, p 43. Available on the website: <<https://2u.pw/VOKSy3v>>(last accessed 15 November 2023 at 1:00 pm)

<sup>(36)</sup> **Article 3.9: " 3.9 Equality among Beneficiaries**

The Project Company shall abide by the principle of equality of the beneficiaries of the services provided by the Partnership project. As an exception, it may set out preferential terms for a certain category of beneficiaries, in accordance with the rules agreed upon with the contracting administrative entity."

contract in advance, as a result of the state of harmonization between the principle of risk allocation and the traditional theories of the administrative contract balance.<sup>37</sup> So, the Bahraini Public Private Partnership Guide sets out in its articles the cases of applying these theories as following: we find the theory of exceptional circumstances according to article 3.12<sup>38</sup> when the economic and financial circumstances of the contract change; also the theory of the Prince's actions apply according to articles 3.11<sup>39</sup> and 3.12 to recompense the injured party in the case of amending laws and regulations; and finally the theory of unforeseen material difficulties, which can be included in articles 3.1.12 and 3.1.14<sup>40</sup> because it is not explicitly stated between the Guide articles.

Finally, concerning the matter of sovereign immunity, and the prohibition on court enforcement against public property or property owned by the Kingdom. We can affirm that no one can deny the right of each state to have its own

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<sup>(37)</sup> Ruellan, A. & Hugé, A., *Le Partage des Risques et la Portée Matérielle des Théories de la Force Majeure, du Fait du Prince et de L'imprévision*, Actualité Juridique Droit Administratif, n° 29, 2006, pp. 1597-1602.

<sup>(38)</sup> **Article 3.12:** " **3.12 Compensation for the Increase of the Cost of Executing the Contract or the Decrease of the Financial Consideration**

- a) Without prejudice to the provisions of Article 3.13 of this Guide, the Partnership contract shall set out the provisions related to the project company's right to get compensation and the basis for its estimation in the event that the cost of executing the contract increased significantly or the value of what the company received from this implementation decreased significantly compared to the implementation costs and its expected value, as a result of the following:
- 1) Changes in economic or financial conditions.
  - 2) Amendments to laws and regulations that do not apply to the utility infrastructure or the service provided by the project company.
- b) The cases stipulated in paragraph (a) of Article 3.12 of this Guide, shall be subject to the following:
- 1) they have occurred after the conclusion of the contract.
  - 2) falling outside the control of the project company.
  - 3) It shall be of a nature that the Project Company could not expect upon the conclusion of the Partnership contract.
- c) The Partnership contract shall set the procedural rules related to amending its provisions after the occurrence of any of the cases stipulated in paragraph (a) of this Article."

<sup>(39)</sup> **Article 3.11:** " **3.11 Compensation for Amendments of Laws or Regulations**

The Partnership contract shall set out the provisions related to the right of the Project Company to compensation and the basis for its estimation as a result of any amendment in the laws or regulations in the Kingdom that apply to the utility infrastructure or the service provided in the event that such amendment led to a significant increase in the cost of implementing the contract or a significant decrease in the value of what the company received from this implementation compared to the implementation costs and its expected value."

<sup>(40)</sup> **articles 3.1.12 and 3.1.14:** " **3 Provisions of the Partnership Contract**

**3.1 Content of the Partnership Contract**

The Partnership contract shall include the key terms that regulate the Partnership project, and the mutual obligations of the parties, particularly, the following: [.....]

- 12) Performance bonds, and its recovery provisions and procedures. [.....]
- 14) The extent to which either party may be exempted from liability for failure to or delay in fulfilling any obligation under the Partnership contract due to circumstances beyond their reasonable control."

property. The state sovereign immunity over its public property should not be challenged, especially that national ownership is emphasized throughout the 2030 Agenda for Sustainable Development which confirms that SDGs are: "applicable to all, taking into account different national realities, capacities and levels of development and respecting national policies and priorities. These are universal goals and targets which involve the entire world, developed and developing countries alike."<sup>41</sup>

The Bahraini public private partnership guide has been consistent with its legal needs and its political, cultural and social environment especially that the World Bank affirms the ability of applying PPP through various legislations and regulatory frameworks such as: Concession Law or General Procurement Law without requiring a specific PPP law or framework.<sup>42</sup>

## **9. Conclusion**

Public Private Partnership is considered the cornerstone for achieving the goals of the 2030 Sustainable Development agenda. In the Kingdom of Bahrain, it has played an important role in many projects, until The Bahraini Prime Minister and the Crown Prince have has issued the Resolution n<sup>o</sup> (30) of 2022, for Issuing a Guide Regulating public private partnerships. At the conclusion of this research, the following results and recommendations can be drawn:

### **9.1. Research Results**

1. Although public-private partnerships are considered a cornerstone for achieving the 2030 Sustainable Development Goals agenda, as a result of their ability to provide project financing and realization, there are multiple

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<sup>(41)</sup> United Nations, Sustainable development knowledge platform, Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1, Division for Sustainable Development UNDESA, New York, 2015. Available on the website: <<https://2u.pw/cYRx7DT>> (last accessed 11 December 2023 at 10:00 pm)

<sup>(42)</sup> The World Bank, Benchmarking Public-Private Partnerships Procurement 2017: Assessing Government Capability to Prepare, Procure, and Manage PPPs, PPIAF Enabling Infrastructure Investment, Washington D.C., 2016. Available on the website: <<https://2u.pw/UPYsO8X>> (last accessed 11 December 2023 at 6:00 pm)

forms of public-private partnerships; Each type of public-private partnership has strengths and weaknesses. Therefore, each type should be selected according to the nature and needs of the project and the ability of the PPP type to offer clear advantages and benefits.

2. Bahrain is taking steady and deliberate steps towards the adoption of public private partnership by developing a partnership guide, as an initial step toward issuing a complete legislation for it if needed.
3. There is no contradiction between the roles of public private partnership and the general theory of the administrative contract.
4. Adopting public private partnership does not mean that the state gives up on exercising its sovereignty over its land and properties.

## **9.2. Research Recommendations**

1. The need of spreading legal awareness concerning Public Private Partnership projects is more important than issuing any legislation about it.
2. The necessity of creating a suitable environment for investment and ensuring the rights of the investor, the State, and the citizen.
3. The necessity of holding many courses, seminars and conferences on Public Private Partnership.
4. The necessity of emphasizing that Public Private Partnership should not prejudice the State's sovereignty and its national security.

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