



ISSN NO. 2320-5407

Journal homepage: <http://www.journalijar.com>

INTERNATIONAL JOURNAL  
OF ADVANCED RESEARCH

## RESEARCH ARTICLE

### The public-private partnership in the field of wind energy In Morocco

Pr. NADIR Bouchra<sup>1</sup>, ANOUAR Khadija<sup>2</sup>, LAMCHICHI Nadia<sup>3</sup>

1. Professor – Department of Private Law, Faculty of Law Sciences, University Mohammed V-Souissi, Rabat, Morocco.
2. PhD student – Department of Private Law, Center of Doctoral Studies, Faculty of Law Sciences, University Mohammed V-Souissi, Rabat, Morocco.
3. PhD student – Department of Private Law, Center of Doctoral Studies, Faculty of Law Sciences, University Mohammed V-Souissi, Rabat, Morocco.

#### Manuscript Info

##### Manuscript History:

Received: 15 August 2014  
Final Accepted: 29 September 2014  
Published Online: October 2014

##### Key words:

Public private partnerships, private partner, environment, wind energy, Morocco

##### \*Corresponding Author

Pr. NADIR Bouchra

#### Abstract

This paper seeks to conduct a sharing experience in developing the infrastructure through a public-private partnership. Thus, the government is willing to initiate its PPP by fostering wind energy. This is an interesting way to reach development through investment which objective is to deliver high quality performance and the best possible services to Moroccan citizens.

Copy Right, IJAR, 2014,. All rights reserved

#### Introduction

Public-private partnerships (PPP) are a phenomenon that is expanding significantly. They are traditionally a functioning asset between the public sector authority and a private party. Thus, the Interest is to balance the tools of public command with a new type of contract.

The PPP in the field of wind energy will lead to cooperation between the associations working in the field of the environment and the economic operators. Such cooperation aims to finance, renovate and exploit the infrastructure or the provision of a service. The PPP must impact transport, public health, education, safety, waste management and the distribution of water or energy

Civil society and the economic operators (private sector) play a key role in the sustainable development and the preservation of the environment. This is achieved thanks to investment in wind energy.

Morocco tends to consider the importance of private partners due to their significant contribution to the maintenance of sustainable development. Therefore, considerable priority is given to private partners so that they can assist in protecting and preserving the environment. This is clearly noticed in the new provisions provided by the constitution.

In Europe, many PPP have appeared. They are judged as a good example as they have contributed to open up new prospects. As in France, there have been healthy conventions concerning the development of wind energy and

the improvement of the energy efficiency of buildings. Another PPP was signed with the city of Dijon within 26 years, and it was related to the design, construction, maintenance and financing of all electrical equipment, control systems of the two future tram lines, and the management of energy supply.

The involvement of the private sector including the design and implementation of strategies concerning wind energy sector and their development is being recognized as a step forward by the public private partnership. In particular, this is seen in the prevention, training of human resources, investment and environmental review. Nevertheless, there is still confusion and lack of clarity as well as many unanswered questions such as:

- What is the legal basis of the public-private partnership in the wind energy sector in Morocco?
- Who is empowered to commit a public-private partnership?
- What should be the terms and conditions of implementation of a better and effective public-private partnership promoting the preservation and protection of our environment and natural heritage?
- Institutional Issues - how the countries are putting in place the strategic framework adequate for the PPP?
- Does the State have a specific legal solid framework, attractive conditions as well as a clear policy that identifies the PPP in the field of the environment? Does it have an important tool for the public control and the development of infrastructure?
- What entities are involved in the identification of projects? Is there a clear process for allocating the budget envelopes for the development of projects in PPP in the field of wind energy?
- Has the State taken to support the option of PPP through the creation of institutions and bodies of specialized councils with financial resources and sufficient human resources?
- Are there different levels of the State (local, national) associated to the control of public markets in PPP in the field of wind energy?
- Are the project proposals in PPP investigated in a comprehensive manner? Is their feasibility carefully evaluated before their launch on the market?
- How can the projects be implemented effectively and significantly monitored?

Hence, our job is to show the limits of the legal framework of partnership between the State and the private sector (the private operators). To do this, it is suggested to reflect the issue of a better public-private partnership in the field of wind energy.

## **I. THE LEGAL FRAMEWORK OF THE PUBLIC-- PRIVATE PARTNERSHIP IN THE WIND ENERGY SECTOR IN MOROCCO**

The public-private partnership in the field of wind energy in Morocco is governed by a set of quite different regulations. Such regulations hold back the growth of the partnership with the private partners. This is also due to the lack of an effective strategy to this effect.

### **A. Lack of proper specific framework to the public-private partnership in the field of wind energy**

The PPP in the field of wind energy contribute to cost savings and the protection of the environment to the extent that they include all phases of a project, from its conception to its exploitation.

Generally, the PPP in the field of wind energy also contributes to the services of general interest. Their growth is inscribed in the evolution of the role of the State, in the economic sphere and also with a view to sustainable development.

It is realized that the PPP, seeking environmental protection and sustainable development, is sometimes regarded as a secondary parameter by the government. This policy conceives in a closely economist manner while not considering the ecological concerns. It is necessary to ensure the infrastructure through PPP which ensures the balance between the protection of nature and the sustainable development.

In Morocco, the public private partnership takes the form of cooperation between the government and the world of businesses which aim to ensure the funding, construction, renovation, management and maintenance of an infrastructure or the provision of a service. These are the main features of the concessions. In addition, the State and local communities have generalized the contracts with companies for co-finance or infrastructure management, especially in water services. The form used is the delegation of public service, either in the form of leasing or in its concessive form<sup>1</sup>.

<sup>1</sup>Ameriane FERGUENE, local governance and territorial development, the case of the countries of the South, ed., the harmattan, 2003, Paris, p. 17

The difference between these two types of contracts is located in its mode of financing. First, the public sector retains control of the financing while, secondly, it is supported partially or totally by the private sector. But in all cases, the State retains control of work- or control<sup>2</sup>. Thus, the PPP can take different forms.

In Morocco, the delegated management represents a privileged form governed by the law No. 1-06-15 February 14, 2006 concerning the promulgation of the law No. 54-05 relating to the delegated management of public services which defines the contract as the following: "Contract by which a legal body governed by public law etc. delegate, etc. the management of a public service ... to a legal body of public or private law, while recognizing his right to receive a payment on the users ... "It is based on the principle of competitive tendering. : "for the choice of the delegate , the delegator is held, ... with competition bidding in order to ensure the equality of candidates, the objectivity of the selection criteria, transparency of operations and the impartiality of decisions".

Risk Management: "The delegator manages the delegated service at its own risks ... « It applies mainly to sectors such as the distribution of water and electricity, as well as sanitation and the collection of household waste.

Among these regulations, there is a regulating element, the Prime Minister's circular No.7/2003 dated 27/06/2003 related to mechanisms of establishing the partnership between the State and the associations.

The PPP contracts do not correspond, until very recent times, to no legal reality. At most, it was a phrase used to characterize the public contracts individually. In addition, there is the decree no.2-06-388 of the February 5, 2007 laying down the conditions and forms of procurement of the State as well as certain rules relating to management and their control.

Law No. 1-08-153 of the February 18, 2009 promulgating of Law No.17-08 amending and supplementing the Law No. 78-00 on communal charter as amended and completed. It states that the Commons must establish plans for development through partnership agreements.

It should be pointed out that there is a lack of clear and specific regulations regarding the partnership procedures that contribute to an uneven participation of actors. Besides, the precise concept of PPP does not exist in the Moroccan law. At the present time, there is a lack of a clear definition of this concept that stands as particular reference to the PPP in the industry for the environment protection.

In a broad sense, the PPP can be defined as all forms of collaboration between the government on the one hand, and the private companies on the other hand. This definition excludes the regulatory function of the State, the functions of production, and the usual marketing of businesses. This is particularly important regarding the respect of the environment and sustainable development, when the property and services are intended for private operators.

In a narrow sense, the DPI is regarded as the collaboration of the State or of its branches on one end and of private companies with common special projects on the other. By contrast, the cases in which the State supports and encourages enterprises are not taken into account in this definition. This type of partnerships is essentially implemented through instruments of a contractual nature.

### **B. Institutional and strategic shortcomings**

The Ministry of Energy, Mines, Water and the Environment and the commons aims to instill a real momentum in the development of public-private partnership (PPP) in the field of wind energy. This is to protect the environment that requires technological innovations, and the establishment of a real synergy between the two public and private sectors. Additionally, it aims to establish a new policy which the main objective is the institutionalization of sustainable partnerships with the private partners. It also focuses on stabilizing professionals in the private sector to ensure sustainable development.

In addition, it is worth noting that the main strategic documents on the environment in Morocco do not integrate and rarely promote the development of the partnership in the field of wind energy. Hence, it is required to ensure the protection of the environment and technological innovations linked to the most sophisticated wind energy used with the private partner. This is considered a necessary ingredient for achieving the main objectives in environmental conservation.

It should be noted that there is a lack of the strengthening of plans, programs and the State's long term vision. The Ministry of Energy, Mines, Water and Environment and the commons, are concerned here.

The existence of such a document will highlight the country's commitment to the protection of the environment. It is proved to be one of the important measures of environmental, economic, social and particularly sustainable development.

<sup>2</sup> Naoual ABHIR, law and practice of public-private partnership, memory of DESS, Mohamed V university, faculty of law , Rabat, Morocco, p. 48.

The lack of an action plan by such concerned ministry is clearly noticed. Thus, its establishment will define the main issues related to the contribution of the private sector in achieving the national objectives clearly reflected in sustainable development.

This is done thanks to the conviction of the values, programs and interests of the associations and communities that should be clear and easily compared to the objectives of the involved ministry.

The Ministry of Energy, Mines, Water and the Environment must strengthen its institutional capacity to fulfill its environmental leadership and to exercise an inter-sartorial leadership. This can appeal to the different actors of the system and to orient them to the task of fostering environmental development.

To strengthen the participation of professionals in the private sector in the implementation of wind energy projects, with respect to the environment as a crucial objective of course, a few steps will have to be included in an action plan. It is necessary for:

- The definition of priority areas with using the partnership, depending on the policy of the government in the area of wind energy, and the establishment of tools to strengthen the involvement of private partners in environmental actions.
- The establishment of a database on the partnership with the private partners;
- The constant monitoring and control of the action of professionals practicing in the private sector during the implementation of the project.

## **II. TOWARD A BETTER LEGAL FRAMEWORK IN THE FIELD OF PUBLIC- PRIVATE PARTNERSHIP**

There is a need to set up a specific system for the public-private partnership. A set of reflections on the development of convention of partnership projects respecting the environmental peculiarities will be introduced and accompanied by institutional and strategic measures.

### **A. The Need for establishing a legal framework specific to the Public- private partnership with due integration of ecological concerns**

The public-private partnerships are specific operations for which the current specific legal framework does not exist. Hence, legal provisions and adapted regulations must be taken to enable a harmonious development of these operations while respecting their specificities.

A specific legal framework for PPP is necessary in Morocco. It is due to the lack of legal clarity of the law, a situation which is limiting the growth of PPP.

A bill at this point in time is under discussion by the parliament. It discusses the best way to ensure the development of PPP in an effective competition context and legal clarity. It addresses the following topics:

- The framework of procedures for selection of the private partner;
- The establishment of private initiative PPP;
- The contractual framework and the possible changes in the course of PPP;
- The challenge of effective competition in the case of institutionalized PPP.

On the one hand, this bill is of great importance to the extent that it will lead, according to the note of representation, to better meet the expectations of the citizens for the sake of harmonious regional balance. On the other hand, to enhance the attractiveness of the investors, the competitiveness of the country and the business climate are to be improved.

Among the reasons for the appeal of the public-private partnership contract are seen in the concern to reconcile between the necessity to respond at the earliest opportunity to the expectations of increasingly growing efficient public services and the limitation of available budgetary resources. Such contracts are in line with the efforts of the State that has committed itself to lead major reforms for years.

In this respect, it is required to develop the use of public-private partnership to provide services and economic and social infrastructure while contributing to the dynamics of development of the state to take advantage of its capacity to achieve and to innovate the private sector.

Furthermore, this bill defines the partnership as a form of cooperation in which the State, the public institutions of the State and public enterprises in general and any independent legal body governed by public law outsource to private-law partners, called "private partner". This is usually done through a fixed-term administrative contract, called "public-private partnership contract". These private-partners take over the responsibility of global mission in charge of designing, financing, constructing, rehabilitating, maintaining and exploiting a work or a necessary infrastructure to provide a public service. In addition, the partnership approach enables to profit from the capabilities of innovation and financing of the private sector and to ensure an optimized risks sharing. This can be

successfully done by allocating the responsibilities to the best efficient party to remunerate for services rendered after their effectiveness and depending on their performance.

It is clear that it is necessary to define the profile and the legal form of the private partner as of private law and that is in order to guarantee the success of the public private partnership and avoid any problem of a financial and legal nature which may arise during the conclusion or application of the contract terms (recourse to external financing and their guarantees, the sale of shares or units of other investors following the purchase or the increase of the share capital, the repayment of the debts contracted, the payment of penalties and the assignment of the activity following a judicial liquidation etc.). To specify the status, the legal regime of the partner is to facilitate the public body to correctly identify its partner and its capacity to carry out a contract of private public partnership:

- **Moroccan or foreign Entities**
- **Companies (SARL, SA)**
- **Natural person**
- **Semi-public Establishment**
- **Economic interest group**
- **Non-profit associations**

It is therefore useful to add a legal provision which specifies the profile, the conditions and experiences of the candidate for a possible choice of a potential private partner, and the addition of an article which lays down the conditions that the candidate(s) must meet.

It should be noted that the private partner has the right in maintaining the balance of the contract, but it must be responsible to ensure and to take all necessary measures for the guarantee of this balance and to avoid the public body mobilizing additional funds related to its poor management or the occurrence of unpredictable internal or external hazards. The hazards are related to the private partner commitments and which have not been taken into account at the time of signing the contract.

It is also necessary that the specific regulations seek to override the encouragement of wind energy investments while protecting the environment. Therefore, the private sector will be obliged to manage the risks relating to the initial phase of investment, improve the security of the supply chain, and reduce trade disruptions coming from ecological risks.

It is important to integrate environmental concerns in the prior evaluation of PPP; thus, any procedure of prior evaluation of any PPP project should be put in place of a fundamental key to the success of any project. This procedure, which takes place ahead of the award procedure, must ensure the relevance of the chosen solution compared to the objective sought by the administration, here the preservation of the environment and nature is concerned.

This assessment must also determine precisely the needs to be met. The available means, good mastery and a prior knowledge of these elements could prevent further freezing of the procedure.

It is imperative that environmental considerations are introduced in the bill draft on the public-private partnership. Additionally; the Charter provisions of the national environment provides that the public policies should promote a sustainable development. To this effect, they reconcile the protection and enhancement of the environment and economic development as well as social progress.

It is particularly desirable that there is recognition of the ecological damage which is noted in a breach of the non-merchants environmental assets. It refers to all non-negligible violations of the natural environment without having an impact on a particular human interest but affecting legitimate collective interest. Therefore, the promotion of sustainable development should be part of the key objectives to be pursued by the public bodies when they engage in their purchases

Taking into account environmental objectives is in a variable geometry in the PPP. In the first place, an environmental assessment must be made after determining the needs of the public body.

There should be the insertion of a provision which lists certain aspects. They must be necessarily taken into account in the choice criteria in tender offering, it includes the performance in terms of sustainable development. In terms of performance, the PPP should prove to be more attractive than the public market, in that it allows linking the amount of payments to negotiated performance targets between the parties and measures by indicators.

#### **B. Put in place and implement the necessary accompanying institutional and strategic measures**

There is a real interest, on the ministry side, to include the private partner, through partnerships, in the improvement of the environment that is in line with the government's environmental policy. In addition, it is currently the government that is involved to set a real national action plan in favor of the development of PPP to



produce novel solutions to the thorny issues concerning climate change, biodiversity, chemicals, international waters, and land degradation.

It is urged to put in place coordination mechanisms in order to ensure a monitoring and evaluation of renewable energy partnerships as well as having inspections during all stages of project implementation. This is a particular concern to the environment protection

It is necessary to have the penalty provisions in the case of non-compliance to its obligations. The penalties must not be only limited to non-compliance to the performance objectives, but they must be inflicted during all phases of the fulfillment of the contract. Thus, it is desirable to provide an article which lays down the appointment terms of the new private partner at least in the same conditions and highlighting in particular the eligibility of the new private partner.

Strengthening decentralization by the decentralized mechanisms of delegations participation and regional directorates, during the whole cycle of the public private partnership in wind energy (of the proposal until the evaluation), constitutes a failure which limits the operationalization and the proper functioning of the partnerships as well as their efficiency and effectiveness.

The knowledge of the field as well as the proximity of the decentralized services of the ministry to the civil society will favor the strategic planning of health interventions in a territory under the coordination of these services.

It is emphasized that it is necessary to develop decentralization mechanisms of the establishment process of partnerships in the field of wind energy, essential measures to streamline procedures and for a better monitoring of the project.

The ministry should include, in its current organization, structures whose missions are part of the PPP perspective. It must build partnership that includes renewable energy projects. To achieve that, it developed significant tools such as the creation of an entity dedicated to public-private partnership and to ensure the management and the partnership agreement with the private partner.

The partnerships will generally be established on the basis of a framework agreement signed at the central level of the Ministry and carried out in collaboration with the concerned central directorates, the regional directions or provincial delegations of the Ministry.

The process of establishing partnerships must be coordinated by the Partnership Division, supported by a technical committee. This committee leads its work with review process and study of renewable energy studies with the private partners. All are supposed to be in compliance with a ministerial decision or other legal tool. This committee will be made up of permanent members and representatives of the directorates of the central administration of the ministry. The arrangement taken by the ministry and the screening criteria for selecting partners must be sufficient and precise.

This previously reported aspect is very important in the measure where we consider that the relationship of proximity between the devolved administrations of the Ministry of Energy, Mines, Water and the environment and private partners is an important factor to facilitate the access to the partnership and improve the process of monitoring and evaluation. Hence, it would be appropriate to create units at regional directorates. The units will be responsible for the analysis of the proposals of actions as well as the monitoring and evaluation of partnerships.

## CONCLUSION

Despite the willingness and the political commitment of the government, particularly since the adoption of the new Constitution which has opened the way towards the establishment of partnership and spaces for community participation conducive to the development of investment, the current situation of the partnership between the State and private partner presents obvious weaknesses and a little strong process.

However, the existence of an appropriate legal framework and of an emerging structure in the public administrations, promoting the development and the mentoring of partnerships, makes one optimistic and it is conducive to improve conditions of this existing process.

## REFERENCE

- [1] Ameriane FERGUENE (2003), local governance and territorial development, the case of the countries of the South, ed., harmattan, Paris.
- [2] Guy LOINGER (1997), build the dynamics of territories, Ed., harmattan, Paris.
- [3] Farida CHEBHAR (2003), role of public procurement in the orientation of the national economy, memory of DESA in public law, Mohamed V University, Faculty of law agdal, Rabat, Morocco, .

- [4] Mohamed NOUHI (2000), role of public markets for local development, memory of DESA in public law, Mohamed V University, Faculty of law, agdal, Rabat, Morocco.
- [5] Mohamed Bahi (2000), the contractualisation of public markets and conditions for their implementation, ed. , al-najah , Casablanca, Morocco.
- [6] Ahmed BENMASSOUD (2005), the protection of the environment between the State and the communities local, ph.d. thesis in public law, Mohamed V University, Faculty of law agdal, Rabat, Morocco.
- [7] Abdallah HEDDAD (1993), the markets, and the development local, Moroccan review of local administration and development, no5-4 july-December, p. 17.
- [8] El Hadi MEKDAD (2012), the law of the environment, 1st ed. , al-najah, Casablanca, Morocco.
- [9] Naoual ABHIR, law and practice of public-private partnership, memory of DESS, Mohamed V university faculty of law, Rabat. Morocco.
- [10] Amal EDDOUIB (2006), protection of the environment in Morocco, memory of Master, Mohamed V university faculty of law, Rabat, Morocco.