

The legal framework for PPP in China – current issues, challenges and future perspectives – with regard to the French experience

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Abstract

In recent years, the relationship between the private and public sectors has changed in response to the challenges posed by economic globalisation, with the PPP model guiding the two subjects from a relationship of subordination and employment to one of equality and partnership. Such a partnership model is complex but revolutionary in that the government no longer acts as a regulator alone, but also becomes a participant in the market. It is because of the involvement of public power that a well-developed PPP legal framework is particularly important to prevent the abuse of public power and the emergence of inequalities in the market. China has also introduced the PPP model to solve a range of problems arising from accelerated urbanization, to meet the massive demand for public services and infrastructure development, and to deal with the government's financial difficulties. This article analyses the main problems and challenges that China currently faces in the regulation of PPP, before looking at ways of improving the legal framework for PPP in China, following the example of French law in this area.

Keywords: PPP (public-private partnership), legal framework, legal challenges, Chinese Law, French Law.

JEL Classification: K23, K33

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1. Introduction

PPP, or Public-Private Partnership, emerged as a result of the urbanization process. Since the 1980s, with the acceleration of urbanization, PPP has been developing in many countries.³ Looking at the history of PPP development worldwide, we can observe a high level of consistency in the motivations of both developed and developing countries: the accelerated urbanization of a country will necessarily increase the population's demand for public infrastructure and services. When the public sector is unable to meet these growing demands with high quality, the utilization of public sector resources becomes necessary to fulfill these needs.⁴

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³ Li Kaimeng, *New connotations of government purchase of services under the PPP model*, China Investment, 10.2015.

⁴ Saša Marenjak, Danijel Kušljčić, *Legal framework of public-private partnerships*, Građevinar, Vol. 61 No. 02., 2009, pp. 137-145.

The government invites private capital to cooperate, forming a long-term partnership model, which is known as PPP. In simple terms, PPP involves private capital providing upfront funding for government public projects and services, and then receiving returns from the government, taxpayers, or users.

Globally, PPP is increasingly becoming one of the primary financing models for public infrastructure projects in several economies.⁵ According to statistics from the World Bank, between 1984 and 2020, the number of PPP projects worldwide has exceeded 6.4 million,⁶ with more than 134 developing countries implementing new PPP projects,⁷ particularly in the field of infrastructure. China has also become the country with the highest number of PPP projects and the largest investment among developing countries. According to information released by the PPP Center of the Ministry of Finance in China, as of the end of November 2022, there were a total of 14,081 projects in progress with a total investment amount of 21.1 trillion yuan.

1.1 The definition of PPP

Due to the widespread adoption of PPP models in many countries, and considering the varying levels of economic development and legal systems in each country, the legislation and practices related to PPP differ from one another, resulting in different definitions of PPP. However, there is a common understanding of PPP across countries, which highlight that PPP involves cooperation between the government and private sector with the aim of maximizing public benefits. “In general, both the public and private sectors play an important role and can be termed as ‘public-private partnership’”.⁸

Typically, private sector is responsible for the design, construction, operation and maintenance of most public infrastructure and services, while the government is responsible for regulating the price and quality of public infrastructure and services. Both parties form a cooperative relationship with shared interests and risks. Through PPP projects, on the one hand, private sector can take advantage of its professional skills, innovation capabilities and project management experience, thereby improving the efficiency of infrastructure projects

⁵ David Giauque, *The difficulties of managing public-private partnerships in Europe*, Journal of Public Administration, Vol. 2, No. 130., 2009, pp. 383 - 394; Huxham Chris et Vangen Siv, *What makes partnerships work? Public-Private Partnerships: theory and practice in international perspective*, London, Routledge, 2000, pp. 293-310; Koen Verhoest, Ole Helby Petersen, Walter Scherrer & Raden Murwantara Soeipto, *How Do Governments Support the Development of Public Private Partnerships? Measuring and Comparing PPP Governmental Support in 20 European Countries*, <https://www.tandfonline.com/doi/abs/10.1080/01441647.2014.993746> (last visited June 01, 2023); Pollitt Christopher & Bouckaert, Geert, *Public Management Reform: a comparative analysis*, Oxford University Press, 2004; Skelcher Chris, *Public-Private Partnerships and Hybridity*, The Oxford Handbook of Public Management, Oxford University Press, pp. 347-370.

⁶ Private Participation in Infrastructure Database, <https://ppi.worldbank.org/en/ppidata> (last visited June 01, 2023).

⁷ World Bank Group Support to Public-Private Partnerships, <https://openknowledge.worldbank.org/handle/10986/22908> (last visited June 01, 2023).

⁸ E. S. Savas, *Privatisation and Public-Private Partnerships*. Indian Journal of Industrial Relations, Vol. 38, No. 3 (Jan., 2003), pp. 381-385.

and the quality of public services. On the other hand, PPP effectively bridges the deficit in public expenditure and helps alleviate the fiscal crisis faced by the government during the urbanization process, while ensuring the healthy development of the socio-economic.

The World Bank has given a broad definition of PPP based on the above main characteristics: PPP is "A long-term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility and remuneration is linked to performance."⁹

In China, there is no unified definition of PPP as the National People's Congress has not formally introduced specific and unified national legislation on PPP. The latest definition of PPP appears in "The Explanation of Terms in the Outline of the 14th Five-Year Plan" released by the National Development and Reform Commission in December 2021: "Public-Private Partnership (PPP) refers to a long-term cooperation model established between the government and private sectors¹⁰ through franchise operation, equity cooperation, and other means, with the aim of enhancing the supply capacity and efficiency of public products and services. It involves the sharing of benefits, risk allocation, and long-term cooperation between the government and private sector."¹¹

1.2 The characteristics of PPP in China

Based on the above definition, PPP in China also adopts a broad concept¹².

⁹ <https://ppp.worldbank.org/public-private-partnership/what-ppp-defining-public-private-partnership> (last visited June 01, 2023).

¹⁰ In China, the private sector is also called "social capital", and state-owned enterprises (SOEs) are also part of the private sector of PPP.

¹¹ *The Explanation of Terms in the Outline of the 14th Five-Year Plan*, https://www.ndrc.gov.cn/fggz/fzzlgh/gjzgh/202112/t20211224_1309333.html?state=123 (last visited June 01, 2023).

¹² See about PPP in China: Chen Xiao, *The Legal Framework of PPP Model in China*, China University of Political Science and Law, 03.2010; Jihong Wang, *A general introduction to public-private partnerships in China*, <https://www.lexology.com/library/detail.aspx?g=55bbf186-d7b0-4726-9532-8289f4676719> (last visited June 01, 2023); Li Kaimeng, *New connotations of government purchase of services under the PPP model*, China Investment, 10.2015; Mohan Liu, *The Legislative Defects of Public-Private Partnership in China and Lessons Drawn*, https://www.researchgate.net/publication/369432349_The_Legislative_Defects_of_Public-Private_Partnership_in_China_and_Lessons_Drawn (last visited June 01, 2023); Tongle Si, *Opportunities and Challenges for Foreign Undertakings in China's PPPs Market*, <https://doi.org/10.21552/eppl/2022/1/7> (last visited June 01, 2023); Wang Hao, *The Definition and Classification of PPP*, Urban Rapid Transit, 10.2004; Xiaoxiao Zheng, Yisheng Liu, Ruijiao Sun, Jinzhao Tian, Qi Yu, *Understanding the Decisive Causes of PPP Project Disputes in China*, Buildings 2021, 11(12), 646, <https://doi.org/10.3390/buildings11120646> (last visited June 01, 2023); Yanlong Zhang, *The formation of public-private partnerships in China: an institutional perspective*, Journal of Public Policy Vol. 35, No. 2 (August 2015), pp. 329-354; Yongjian Ke, Shou Qing Wang, Albert P. C. Chan, *Public-Private Partnerships in China's Infrastructure Development: Lessons Learnt*, https://www.researchgate.net/publication/260267511_Public-Private_Partnerships_in_China's_Infrastructure_Development_Lessons_Learnt (last visited June 01, 2023); Yu An, *Basic Legal Issues of China's Implementation of PPP System*, Journal of National Prosecutors College, Vol. 25 No. 2, Mar.2017, pp. 84-94; Zhiyong Liu, Hiraku Yamamoto, *Public-Private Partnerships in China: Present Conditions, Trends, and Future Challenges*, <https://doi.org/10.4036/iis.2009.223> (last

According to the current legislations and the application of PPP in China, PPP can be divided into three main forms: outsourcing, concession, and privatization.¹³ No matter what form it takes, as long as it is a cooperation between the government and private sector for the purpose of providing public infrastructure and services, it can be classified as PPP.¹⁴ Its main characteristics include:

i. The parties of the contract are on an equal status.¹⁵ In a PPP project, the distribution of rights, the obligations and the sharing of risks are all based on equality. The government is no longer in a dominant position, but as a participant in the PPP, limiting its authority within the scope of the PPP contract.

ii. The risks of PPP projects are reasonably shared between the two parties. The "reasonable sharing" means that when risks are predicted or occurred, both parties use the complementary roles of their different resources to avoid risks and solve problems in order to reduce the negative impact on the PPP project, instead of simply letting both parties bear the negative consequences proportionally.¹⁶

iii. PPP provides a possibility to entrust an entire public project or public service all to a single private sector, instead of entrusting an entire project to several private sectors separately as it used to be, which not only facilitates the government, but also gives that public project or service a greater integrity and makes it easier to manage and carry out the project.

iv. The primary objective is the public interest. In PPP projects, the commercial profits obtained by private sector need to be predicated on achieving the public interest, so private sector cannot use some unreasonable methods to maximize its profit.

These characteristics of PPP bring numerous advantages. For instance, the government is not required to delegate certain public projects to private sectors, private financing can alleviate the burden on public finances, and both the government and private sector can leverage their respective strengths to compensate for each other's shortcomings. It is due to these advantages that the Chinese government has strongly supported the promotion of PPP since its introduction in China.

2. The development of the legal framework and current issues of PPP in China

2.1 The path of development of the legal framework

Since the adoption of PPP, the development of PPP in China can be

visited June 01, 2023); Ziwei Zhang, *Legal Remedies for Public Private Partnerships in China*, *European Procurement & Public Private Partnership Law Review*, Vol. 15, No. 3 (2020), pp. 216-224 (last visited June 01, 2023); Ke, Y., Jefferies, M., Shrestha, A. i Jin, X. (2014). *Public Private Partnership in China: Where to from Here*, <https://hrcak.srce.hr/135309> (last visited June 01, 2023).

¹³ *The classification of PPP models*, http://www.ccgp.gov.cn/specialtopic/pppzt/msjx/201411/t20141105_4700568.htm (last visited June 01, 2023).

¹⁴ Wang Shouqing, Ke Yongjian, *Concession Project Financing (BOT, PFI et PPP)*, Tsinghua University Press, 2008, p. 19.

¹⁵ Jia Kang, Sun Jie, *The Concept, Origin and Function of Private-Private Partnerships (PPP)*, *Chinese Government Procurement*, 2014, n° 6, pp. 12-21.

¹⁶ Zhang Shouwen, *The Publicity of PPP and its Economic Law Analysis*, 2015, no. 11, p. 24.

summarized in four stages, and accordingly its legal framework has undergone a process of continuous improvement.

The first stage began in the 1990s as the introduction period of PPP, starting with the construction of power stations using the build-operate-transfer (BOT) model, followed by investments in areas such as toll roads. There were no relevant laws and regulations at this stage, only some guiding policy documents were issued. For example, the State Planning Commission, the Ministry of Electricity and the Ministry of Transport jointly issued the *"Explanation on Issues Relating to the Approval and Management of Foreign Investment in Concession Projects"* in 1995. The Ministry of Foreign Trade and Economic Cooperation issued a *"Note on Issues Related to the Absorption of Foreign Investment in BOTs"* in 1995, and the Ministry of Construction issued a *"Notice on Accelerating the Commercialization of Municipal Public Utilities"* in 2002, among others. These normative documents are at a lower legal level, the contents of which are relatively vague and general, and therefore lack practical operation.

The second stage, starting in 2004, was the exploration phase of PPP. The Ministry of Construction issued *"the Management Measures for Municipal Service Concession Projects"* (No. 2004-126), formally introducing concession arrangements into the municipal service sector. Models such as BOT, Transfer-Operate-Transfer (TOT), and Build-Own-Operate (BOO) were officially implemented in areas such as roads, water supply facilities, sewage or waste treatment plants, and gas stations. During this stage, normative documents emerged that provided more specific regulations for PPP: they clarified the basic content of project contracts, strengthened project supervision, defined the responsibilities of project participants, and established penalties for violations.

The third stage is the fast-growing period of PPP. At the end of 2013, the Chinese government began promoting PPP in the fields of public products and public services. Since then, PPP has experienced explosive growth and has been widely applied in various sectors such as energy, transportation, water resources, environmental protection, agriculture, forestry, science and technology, healthcare, public health, elderly care, education, and culture. At this stage, PPP legislation was included in the five-year legislative plan of the Standing Committee of the 12th National People's Congress. The National Development and Reform Commission (NDRC) also drafted *"the General Guidelines for Government and Social Capital Cooperation Contracts"*, while the Ministry of Finance issued regulations such as *"the Regulation on Improving Government and Social Capital Cooperation Projects"* (No. 2015-57) and *"the Regulation on Operation Guidelines for Government and Social Capital Cooperation Models (Pilot)"* (No. 2014-113). These documents defined the standard process for PPP models. It is evident that legislative efforts and the issuance of normative documents increased during this stage, indicating the growing attention given to the standardized development of PPP by the country. However, in essence, all the relevant documents issued by various ministries and commissions still lack a unified basis and specification, and the contents of these legislations also seem to be duplicated

or conflicting.

The fourth stage is the regulation and rectification stage of PPP. After nearly five years of rapid development, various problems such as abuse of PPP, irregular financing and overdraft of the fiscal budget have gradually emerged, largely due to the lack of coherent et appropriate legislation. In order to rectify the various problems in reality and promote the sustainable development of PPP, in 2017 the State Council drafted *the Regulations on Government-Private Sector Cooperation in Infrastructure and Public Services (Draft for Comments)* and widely solicited opinions on PPP legislation from the whole society. The Ministry of Finance, the National Development and Reform Commission (NDRC), the State-owned Assets Supervision and Administration Commission (SASAC) and other departments have also issued a series of more detailed PPP regulatory documents and management requirements, and carried out rectification and management of PPP projects. Since 2017, PPP has all shown a moderate development in China, with PPP projects landing at a slower pace than before, but better regulated.

2.2 The current situation and characteristics of the PPP legal framework in China

It can be seen that PPP has gone through a process of promoting policies, developing regulations and launching legislative work in China. China has also accumulated experience with a large number of PPP projects. Nevertheless, the unified legislation for PPP is still missing, and the numerous and complex legislations that currently exist add to the difficulty of unified legislative work.

The main legislations and regulations that currently constitute the PPP legal framework are:

Category	Name	Release Date	Issuing Authority
Law	PPP Law (draft for comments)	June 2016	National People's Congress and its Standing Committee
	Government Procurement Law of the People's Republic of China	January 2006	
	Law of the People's Republic of China on Tenders and Bids	January 2000	
	Administrative Procedure Law	April 1989. first amended in November 2014, second amended in June 2017	
Administrative Regulation	Regulations on Public-Private Partnership in the Field of Infrastructure and Public Services (draft for comments)	July 2017	State Council
	Measures for the Management of Infrastructure and Public Utility	June 2015	

Category	Name	Release Date	Issuing Authority
	Concession		
	Regulations on the Implementation of the Government Procurement Law	January 2015	
	Guiding Opinion on Government Purchase of Services from Social Forces	September 2013	
	Implementing Rules of the Bidding Law	December 2011	
	Measures for the Administration of Concession for Infrastructure and Public Utilities	April 2015	National Development and Reform Commission and six other ministries
	Administrative Measures on Concession Arrangements for Municipal Public Utilities	March 2004	Former Ministry of Construction (The Ministry of Housing and Urban-Rural Development)
Normative Documents	Notice by the Ministry of Finance of Further Promoting the standardized development and transparent operation of Public-Private Partnerships.	November 2022	Ministry of Finance
	Operational Guidelines for Performance Management of PPP Projects	March 2020	
	Implementation Opinions on Promoting Regulated Development of Public Private Partnerships	March 2019	
	Measures for Administration of Information Disclosure for Public-Private Partnership Integrated Information Platform	January 2017	
	Measures for the Administration of Finance for Public-private Partnership Projects	September 2016	
	Guidelines for VFM Evaluations of PPP	December 2015	
	Guidelines for the Financial Affordability Assessment of the Public-private Partnership Projects	April 2015	
	Operational Guidelines for Public-	December 2014	

Category	Name	Release Date	Issuing Authority
	Private Partnership Model		
	Administrative Measures for Government Procurement under Public-private Partnership Projects	December 2014	
	Measures for the Administration of Competitive Negotiation Procurement Methods in Government Procurement	December 2014	
	Operational Guidelines for Public-Private Partnership Mode	November 2014	NDRC
	Guidelines For the Implementation of PPP Projects In the Field of Traditional Infrastructure	October 2016	
	Guidance of the National Development and Reform Commission on the Implementation of PPP	December 2014	
	Circular of the National Development and Reform Commission on Strengthening the Management of Investment and Construction of PPP Projects in accordance with Law and Regulations	June 2019	
Interpretations	Provisions on Several Issues Concerning the Trial of Administrative Agreements Cases	November 2019	Supreme People's Court
	Interpretation of the Supreme People's Court on the Application of the Administrative Litigation Law of the People's Republic of China	November 2017	
	Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Administrative Litigation Law of the People's Republic of China	April 2015	

Ps: Although some of the mentioned documents have expired, they are also commonly referred to and applied in practice as the National People's Congress and the State Council have not issued any new replaceable legislations.

The above table shows that the legal framework of PPP in China can be divided into four parts according to the order of legal status:

i. In the absence of specific laws, the relevant legislations formulated by the State Council (the country's supreme executive authority) are the most basic and core part of the PPP legal framework. For example, No. 2013-96 "Guiding

Opinions on the Purchase of Services by the Government from Social Sectors" provides the basic framework for the promotion and implementation of PPP in China.

ii. The legislations formulated by the Ministry of Finance (MoF) and the National Development and Reform Commission (NDRC) for PPP are more detailed and operative practical documents. However, the division of responsibilities between these two departments is not clear, and there are also conflicting provisions in the documents they have issued. In 2014, the Ministry of Finance established the Public-Private Partnership (PPP) Center, which is responsible for policy research, consulting and training, information statistics, international exchanges, and other work related to PPP, leading the development of PPP. Meanwhile, the NDRC has issued a series of legislations that indicate their intention to have a leading role in the development of PPP.

iii. Documents issued jointly by sectoral ministries (such as Ministry of Housing and Construction, Ministry of Environmental Protection, Ministry of Transport, Ministry of Water Resources, etc.) under the coordination of the Ministry of Finance and National Development and Reform Commission to guide PPP operations within their sectors.

iv. Local regulations issued by local governments are modeled on central legislations, combined with local characteristics, and used to regulate PPP projects within their jurisdictions. *Regulation on the Implementation Measures of PPP Financing Support Fund in Jiangsu Province* (No. 2015-19) issued by Jiangsu Province and *Regulation on the Establishment Plan of PPP Development Fund in Henan Province* (No. 2015-5) issued by Henan Province provide for institutional investment and financing mechanisms for PPP projects within their jurisdictions. *Regulation on the Management Measures of City Gas PPP Projects in Jilin Province* (No. 2015-50) issued by Jilin Province provides for the management of PPP in specific areas within its jurisdiction.

The development of the legal framework for PPP in China is closely linked to national PPP policies. As in other sectors, PPP legislation is developed gradually. The government departments concerned will first draw up a policy for various PPP projects on a pilot basis, before drafting national regulations while learning from the pilot experience.

At the same time, local governments may issue a specific regulation for a particular PPP project. This legal document does not have general application, but it can serve as a reference for other local governments in regulating PPP projects. Obviously, this legislative model is very much in line with China's national conditions and is conducive to the exploration and innovation of the PPP legal framework.

3. Current challenges

PPP has been developing in China for nearly 40 years, and its legal framework has been continuously improved. However, there are still deficiencies,

and establishing a complete PPP legal framework still faces some challenges.

3.1 Lack of specific and unified PPP legislation

It has to be said that compared to the rapid development of PPP in practice, the corresponding legislation has not kept pace with its progress.

Currently, the legislation related to PPP mainly consist of administrative regulations and some normative documents, with a weak legislative hierarchy and a lack of stability and authority. They cannot replace specific legislation and provide a solid legal foundation for PPP development. On the one hand, given that the texts are mainly drawn up by various government ministries within the framework of their respective competences, the framework for PPP is to some extent compartmentalized without there being an overall vision. In other words, each ministry acts in its own field without really worrying about whether or not the rules it draws up are consistent with those drawn up by other ministries.

On the other hand, in practice, these normative documents primarily serve as references for the development of PPP rather than effectively guiding and legally protecting PPP operations. Moreover, some normative documents present conflicting viewpoints, leading to uncertainty in choosing the applicable legislation during the implementation of PPP projects. Therefore, both in terms of legal effectiveness and practical application, the current legislations regarding PPP have not achieved the expected results. The lack of specialized and unified PPP legislation, coupled with the low-binding value of the normative documents, allows the government to exploit legal loopholes, while the lack of legal protection discourages the participation of private capital in PPP projects, thus causing the development of PPP to enter a vicious circle.

3.2 Conflicts between the Ministry of Finance and the National Development and Reform Commission

The problems mentioned above in relation to the regulation of PPP are particularly true with regard to the respective roles played by the MOF and NDRC. Actually, these two authorities are in a competition for the decision-making role of PPP.

Firstly, despite the fact that, in terms of scope of responsibility, the MOF is responsible for regulations in the public service sector and the NDRC is responsible for regulations in the infrastructure sector, in our view, it is virtually impossible to define a clear dividing line between the public service sector and the infrastructure sector. Both as the main promoters of PPP legislation have issued many regulatory and policy documents based on their sectors, but the content of these documents is often duplicative and even contradictory.

Secondly, in terms of law enforcement, the NDRC tends to apply the *Law of the People's Republic of China on Tenders and Bids* to select private capital for PPP projects, while the Ministry of Finance leans towards the *Government Procurement Law* for the same purpose. The two laws differ in terms of project

range, supervisory authority and bidding methods, which has caused confusion when bidding for PPP projects.

Thirdly, there is also no coordinated policy between the Ministry of Finance and the National Development and Reform Commission on the range of PPP projects. None of the relevant documents issued by the MOF specified clearly the scope of PPP projects. The NDRC, for its part, has limited the scope of concessions to infrastructure and public services such as transportation, water resources and environmental protection, but has also not clarified the scope of other PPP contracts apart from concessions.

Finally, in terms of the resolution of PPP contract conflicts, in the regulations published by the Ministry of Finance, it is specified that civil litigation or arbitration can be initiated in case of conflicts between partners of PPP projects. The NDRC, on the contrary, has determined that the conflict resolution of PPP contracts should be resolved by administrative procedures.

3.3 Uncertainty about the legal nature of PPP contracts

The PPP contract is the core of a PPP project, and determining the nature of the PPP contract is also one of the most important parts of building a stable and comprehensive legal framework for PPP. As PPP involves financing, construction, operation and management, if the legal nature of the PPP contract is disputed, there will be a great deal of ambiguity, resulting in the inability to apply legal standards to effectively solve problems in a timely manner. The problem is that none of the existing PPP normative documents provide a clear answer to the question of the nature of PPP contracts.

In 2019, the Supreme People's Court issued the *Provisions of the Supreme People's Court on Several Issues concerning the Trial of Administrative Contract Cases* (Judicial Interpretation [2019] No. 17), attempting to classify PPP contracts as administrative contracts. However, this judicial interpretation does not explicitly state that all PPP contracts are administrative contracts. Instead, it categorizes as administrative contracts the contracts that "*containing the rights and obligations under the administrative laws which an administrative agency concludes with a citizen, legal person, or any other organization by consultation, in order to achieve the goals of government administration or public services*"¹⁷. It does not provide

¹⁷ Articles 1 and 2 of the *Provisions of the Supreme People's Court on Several Issues concerning the Trial of Administrative Contract Cases* (Judicial Interpretation [2019] No. 17). Article 1. For the purpose of paragraph 1(11), Article 12 of the Administrative Litigation Law, "administrative agreement" means an agreement containing the rights and obligations under the administrative laws which an administrative agency concludes with a citizen, legal person, or any other organization by consultation, in order to achieve the goals of government administration or public services. Article 2. Where a citizen, legal person or any other organization files administrative agreements, the people's court shall grant acceptance according to the law: i. a government concession agreement; ii. a land, building, or other expropriation or requisition compensation agreement; iii. an agreement on the assignment of mineral rights or other rights to use state-owned natural resources; iv. a government-invested affordable housing lease, sale, or other agreement; v. a public private

corresponding provisions for PPP contracts that do not fall within this scope.

According to the legislation as well as the judicial decisions and academic doctrine, there are currently three different ways to define the nature of PPP contracts in China: administrative contracts, civil contracts or mixed contracts. It is obvious that administrative and civil contracts are two completely different types of contracts. The ways in which disputes are resolved are also very different. Legal clarification of the nature of PPP contracts is therefore essential in determining the dispute resolution mechanism to be used in the event of a dispute over a PPP contract. Furthermore, the existing ambiguity in the definition of the nature of the PPP contract constitutes a risk of legal uncertainty for the private partners.

3.4 Lack of legal protection for private sector for fair competition

There are currently no practical restrictions on the participation of state-owned enterprises in PPP projects in China, so it is clear that the government will prefer its own controlling state-owned enterprises to other private enterprises in the bidding process for PPP projects. Although various state departments have also issued a series of documents to encourage private enterprises to participate in PPP projects.¹⁸ However, in all the relevant normative documents, there are no detailed rules or regulations on the selection standards for PPP project applicants, which gives the government a great deal of decision-making power. In practice, some local governments may even set standards in PPP tenders that private capital simply cannot meet, in order to crowd out private capital from participating in PPP projects. Although China has *Anti-Unfair Competition Law*, but this law does not cover all issues,¹⁹ there are no rules related to PPP in it.

In summary, China has accumulated a wealth of experience in the practice of PPP projects, and on this basis, the legal framework for PPP has been continuously improved. However, as mentioned above, the legal framework for PPP needs to be reconsidered and still leave much to be desired.

4. Future perspectives

For China, PPP is an imported practice. The experience of other countries in this area will undoubtedly be of great benefit to the improvement of China's PPP

partnership agreement conforming to Article 1 of these Provisions; vi. any other administrative agreement.

¹⁸ For example, in November 2014, the State Council issued *Guiding Opinions on Innovative Investment and Financing Mechanisms in Key Areas* to encourage social investment, which proposed to encourage the active role of private sector, especially private capital, to be implemented. In 2010 and 2005, the State Council issued *The Opinions Encouraging and Guiding the Healthy Development of Private Investment* and *Several Opinions of State Council on Encouraging and Guiding Healthy Development of Private Investment*, respectively, which also proposed a number of opinions to encourage private capital to enter the public sector.

¹⁹ Mark Williams, *Competition Policy: One Theory, Three System*, China Perspectives 2004(1), <https://journals.openedition.org/china-perspectives/789> (last visited June 01, 2023).

legal framework. However, blindly copying the experience of other countries without considering China's own situation will only hinder the pace of progress. Since 2014, China has mainly followed the UK's PFI model to develop policies and legislation to encourage and regulate the development of PPP projects in the country. However, as China's basic conditions, legal system and economic and social environment are very different from those of the UK, following the UK model has led to various problems in the development of PPP in China. Looking around the world, we find that France, which is a civil law country like China, has a more practical reference value for China in terms of its PPP legal framework.

4.1 The French experience

France was one of the first countries to use the PPP model, and its PPP legal framework has been through a process of gradual maturation. Years of development and improvement have allowed the French PPP legal framework to meet both the requirements of the EU and the needs of the national situation.²⁰

A PPP system was introduced in France by an ordinance of 17 June 2004 in the form of a "partnership contract".²¹ Subsequently, in order to gradually address the State's increasing hidden liabilities, the drawbacks of long-term contracts and budgetary risks, France adopted a series of reforms to follow the *Directive 2014/24/Eu of the European Parliament and of the Council of 26 February 2014* on public procurement and repealing *Directive 2004/18/EC*. Then, France reshaped the PPP legal framework under Ordinance No. 2015-899, dated 23 July 2015,²² and to include PPP in the scope of public procurement. This reform has provided a better framework for PPP and made them more secure.

Firstly, the reform has made it possible to bring French law into line with European law, which is a requirement for guaranteeing the legal certainty of procedures. In addition, the reform has established the partnership contract as the

²⁰ See Maniatis, A. Vassilakou, *French Public - Private Partnerships (PPPs) law and culture*, <http://journal.uniwa.gr/index.php/economy/article/view/FrenchPublic>. (Last visited June 01, 2023); Bertrand du Marais, *PPP Contracts in France through the 2015-2016 "Big Bang Reform"*, *European Procurement & Public Private Partnership Law Review*, Vol. 13, No. 1 (2018), pp. 39-47; David Hartmann, *Public Private Partnerships in France – The Principles and the Legal and Policy Frameworks*, *European Public Private Partnership Law Review*, Vol. 1, No. 1 (2006), pp. 36-42 (last visited June 01, 2023); Jacques Demotes-Mainard, Emmanuel Canet & Lionel Segard, *Public-Private Partnership Models in France and in Europe*, <https://doi.org/10.2515/therapie:2006059> (last visited June 01, 2023); Jérôme Grand d'Esnon & Vianney Petetin, *Implementation of the Procurement and PPP Legislation in France*, <https://heinonline.org/HOL/LandingPage?handle=hein.journals/epppl2017&div=12&id=&page=> (last visited June 01, 2023); Sadran, Pierre, *Public-private partnership in France: a polymorphous and unacknowledged category of public policy*, *International Review of Administrative Sciences*, vol. 70 (2), 2004, pp. 233-251; Xu Lin, *Réflexions sur la législation chinoise relative à la fonction publique - Examen de l'expérience français*, *L'Administration et le Droit*, 2014-04-18, p. 88-92.

²¹ Ordinance n ° 2004-559 of June 17, 2004.

²² Diane Houriez, Francois-Guilhem Vaissier, Louis-Jérôme Laisney, Olivier Le Bars and Sacha Ruffié. *A general introduction to public-private partnerships in France*, <https://www.lexology.com/library/detail.aspx?g=e671cae9-b6cc-4029-b472-0e415c906c7f>. (last visited June 01, 2023).

only contractual instrument for PPP, which has also made it possible to reduce the legal risks associated with multi-contractual instruments. Thus, France has developed a public procurement system with two main parts: public contracts and concessions. The partnership contract is classified in the branch of public contracts. Finally, after the reform, partnership contracts are subject to a more stringent prior assessment procedure. Three conditions for using partnership contracts must be met: the budgetary sustainability study, the favourable balance sheet, and the threshold for recourse to the procedure²³, which has made it possible to reduce financial insecurity and improve the efficiency of the procedures²⁴. To support this assessment, an independent expert organisation - the Mission d'appui au Financement des Infrastructures (FIN INFRA) was set up in 2016 to replace the PPP expert organisation - Mission d'Appui à La Réalisation des Contrats de Partenariat Public-Privé (MAPP) ²⁵. In addition, this reform established a more favourable framework for small and medium-sized enterprises (SMEs) by requiring partnership contracts to include a mandatory share reserved for SMEs.²⁶

Faced with the various problems encountered in developing the PPP, France has gradually improved the PPP legal framework. In 2018, a decision was made to reshape and modernize the French PPP legal framework as legal rules governing this were scattered throughout about 30 different texts. The Public Procurement Code (Code de la Commande Publique) was finally enacted at the end of 2018 through Ordinance No. 2018-1074, dated 26 November 2018, Decree No. 2018-1075, dated 3 December 2018 and Decree No. 2018-1225, dated 24 December 2018, and entered into force on 1 April 2019. Since then, no major change has been brought to this legal framework.²⁷

Although PPP in France has not experienced the same explosive development as in China, the legislator has gradually formed a solid legal framework by issuing or modifying appropriate laws to regulate PPP at any point in its development. In the long run, this will certainly provide a solid legal basis for the sustainable development of PPP. From a practical point of view, there are a number of similarities between France and China in terms of the legal and administrative systems and the proportion of the public sector in the country's economy. Therefore, the study of France's legal framework for Public-Private Partnership may have an interesting reference value for enhancing the PPP legal

²³ According to article 151 of decree no. 2016-360 of 25 March 2016, public authorities may not award a partnership contract if the value of the contract is less than a certain amount.

²⁴ Hoepffner, Sourzat & Friedrich, *Public procurement reform, one year later: a positive report?* Journal du Droit Administratif (JDA), 2017, p. 217.

²⁵ Decree no. 2016-522 of 27 April 2016 repeals Decree no. 2004-1119 of 19 October 2004 on the public-private partnership support mission, and creates a body with expertise in the legal and financial structuring of investment projects, called the "mission d'appui au financement des infrastructures"(MAPP) and attached to the Director General of the Treasury, which retains the form of a department with national competence.

²⁶ Article 87 of Ordinance no. 2015-899 of 23 July 2015.

²⁷ Francois-Guilhem Vaissier, Alain Chan Hon, Sacha Ruffié and Lisa Gehin. *The Public-Private Partnership Law Review: France*. <https://thelawreviews.co.uk/title/the-public-private-partnership-law-review/france>. (last visited June 01, 2023).

framework in China.

4.2 Establishing a solid PPP legal framework in accordance with national conditions

As mentioned above, there are still many challenges to be met in order to put in place a legal framework for PPP in China that is adapted to the Chinese situation. To this end, a number of measures should be taken, of which the following three should be given priority.

4.2.1 Drawing up a Public-Private Partnership Law

In PPP projects, private sector participates in a large number of infrastructures, with large investment scales, long construction and operation cycles and relatively high investment risks. These complexities dictate that the PPP model must be disciplined by laws enacted by the legislature, rather than by regulations or sectoral policies. It is necessary for the country to have a unified and specific legislation on the implementation of PPP to clearly address the various uncertainties in the PPP contract process. A specific law maybe not solve all the contradictions and problems, but it can lay a solid foundation for improving the PPP legal framework.

In France, PPP is regulated early on in the form of specific legislation, such as Law No. 2005-809 of 20 July 2005 on development concessions, Law No. 2008-735 of 28 July 2008 on partnership contracts, etc. We note that the French legislator starts by drafting a simple and fundamental specific law on PPP with general application, establishing general rules on the main elements of the PPP model, such as the scope of application, the relationship between the rights and obligations of the parties, liability, procedures for PPP contracts and the dispute resolution mechanism. The relevant legislation is then amended and improved in line with the needs of practice and the development of PPP in France. France's legislative experience in this area is not uninteresting for China.

Thus, in our opinion, China needs to establish a general PPP law to lay down basic principles and rules governing PPP after reviewing all national and local laws and regulations.

As mentioned above, there are a large number of regulations and normative documents on PPP in China. However, these norms have a lower legal value than a law, and some of them have a lower legal value than administrative regulations and are only applicable in a limited administrative district. In our view, it is therefore essential to re-examine all the texts and standards governing PPP, in order to put in place a new legal framework for PPP based on the principles and rules of the law we are proposing to adopt, while modifying or repealing those rules that are no longer applicable or no longer adapted to today's situation.

4.2.2 Clarification of the legal nature of PPP contracts

In France, in order to provide a stable basis for mechanisms of conflict resolution, the lawmaker has clarified that a partnership contract is a public

contract under Article L1112-1 of the Public Procurement Code. This identification is based on three main considerations:

- i. One of the parties to the contract is a public authority.
- ii. The contract is for the performance of a public service.
- iii. The contract contains clauses that are exorbitant from ordinary law.²⁸

By combining these three conditions, it is clear that a PPP contract can be considered to be an administrative contract, so that there has been no dispute in France as to the administrative nature of PPP contracts. The French legislature has given PPP contracts an administrative character, mainly to keep them under the control of the State and to reduce the risk that they might compromise the public interest. In China, the nature of the PPP contract is still uncertain and remains debatable. In form it is rather a civil act, but it is not a purely civil act in the sense that this contractual relationship is supervised by the administrative authority. In fact, China currently has no clear provisions on the legal nature of PPP contracts, but according to a series of relevant legislation, PPP contracts are more likely to be identified as administrative contracts.

According to paragraph 11 of Article 12 of the Administrative Litigation Law²⁹ and paragraph 1 Article 11 of its judicial interpretation³⁰, the PPP contract is included in the scope of administrative litigation. Circular No. 2019-17 of 12 November 2019 issued by the Supreme People's Court even classifies a series of PPP contracts as administrative contracts. Although there is currently no explicit legislative definition of the administrative contract in China, we can nevertheless identify certain elements of qualification of an administrative contract in Chinese law through the interpretative texts issued by the Supreme People's Court:

- i. One of the parties to an administrative contract must be an administrative party with administrative power.
- ii. The aim of the administrative contract is to ensure a public facility or a public interest.
- iii. The administrator subject to the execution of the administrative contract has the authority to supervise the execution of the contract, the authority to modify

²⁸ *What are administrative contracts?* <https://www.vie-publique.fr/fiches/20260-les-contrats-administratifs-definition-et-criteres> (last visited June 01, 2023).

²⁹ Paragraph 11 of Article 12 of the Administrative Litigation Law: "Where is found that an administrative organ has not performed in accordance with law, has not performed as agreed, or has made unlawful modifications to or dissolved a government licensed management agreement, a land and housing acquisition compensation agreement, or other agreement."

³⁰ Paragraph 1 Article 11 of Judicial interpretation of the Administrative Litigation Law: "The agreement with contents concerning rights and duties specified in the administrative laws reached between an administrative authority within its legal scope of responsibilities with a citizen, legal person or other organization for the purpose of realizing public benefits or administrative management goals belongs to the administrative agreement specified in Item 11 in the first paragraph of Article 12 of the Administrative Procedure Law. Where a citizen, legal person or other organization lodges an administrative lawsuit against the following administrative agreements, the people's court shall accept it as is specified by laws: i. Government licensed operation agreement; ii. compensation agreement for land or house expropriation; iii. other administrative agreements."

and unilaterally terminate the contract.

We note that there is a certain similarity in the definition of the administrative contract between French and Chinese law. We believe that classifying PPP as administrative contracts in Chinese law would contribute to the development of administrative law in general and administrative contract law in particular.

In addition, as a cooperation model between the public and private sectors, PPP obviously has a complexity that traditional public procurement does not have, and PPP projects are usually large-scale and long-lasting, so if legal disputes in PPP projects cannot be properly resolved, they can cause a lot of problems for the contracting parties. The most fundamental problem in setting up a PPP dispute resolution mechanism is identifying the nature of the PPP contract. As a result, confirming by law the nature of the PPP contract is an important element in establishing an effective dispute resolution mechanism available to investors to provide them with greater legal certainty, which would undoubtedly help attract more private capital.

4.2.3 Protecting fair competition in PPP through legislation

One of the most important elements for private PPP partners is to have a legal guarantee that they can participate in the PPP project on a fair basis.

In France, article L.3 of the Public Procurement Code outlines the three main principles that must be respected: principles of free access to public procurement, equal treatment of candidates and transparency of procedures.³¹ These three principles constitute the basic rules governing the operation of the public procurement system, and form the basis of competition. Among these, the principle of equal treatment requires that all candidates receive the same treatment, receive the same information and compete according to the same rules; the principle of free access to public procurement requires that all candidates have the right to participate freely in PPP projects; the transparency of procedures, in particular, requires the public entity to comply with the obligation to advertise, thereby guaranteeing competition and fairness in the regulatory process.

A number of specific rules have been laid down to ensure that these three principles are respected: for example, technical specifications may not restrict competition and therefore must not be too precise or too narrowly focused; a requirement to determine geographical location, or imposing a minimum turnover or a particular language on bids is discriminatory, and must be prohibited; advertising must be sufficient to allow competition to develop among economic operators. Respecting and applying these principles creates favorable conditions for private capital to participate in PPP projects, so that the PPP has been able to

³¹ Article L. 3 of the Public Procurement Code: “Contracting authorities shall respect the principle of equal treatment of candidates for the award of a public procurement contract. They shall implement the principles of free access and transparent procedures, under the conditions defined by this Code. These principles ensure the effectiveness of public procurement and the proper use of public funds”.

maintain a positive development in France.

Another example is Council of State (Conseil D'Etat) decision no. 275531³², which states that public entities intending to take charge of an economic activity must respect the freedom of trade and industry and competition law, act within the limits of their powers and justify a public interest. This decision made an important contribution to competition between public and private entities, by imposing certain restrictions on the participation of public entities in economic activities, in particular that of "the lack of private initiative", meaning that priority was given to private entities. This decision also states that the intervention of public entities may not interfere with the freedom of trade because of its particular situation, "must not take advantage, in the prices it charges, of its status, its particular situation, its resources or the means allocated to it by virtue of its other public service missions; the price proposed must therefore reflect all the costs of the service".³³ Thus, the advantages of public entities are limited and cannot be used as a tool in the competition.

Compared with the situation in France, Chinese legislation in this area still leaves much to be desired. In fact, in China, the encouragement of private investors to participate in PPP projects is usually expressed through the publication of incentive policies by various ministries or local governments. However, the French experience shows us that the most important thing is to create a level playing field in law between public and private entities.

4.2.4 Taking account of environmental and social requirements

As PPP is currently the most effective model for infrastructure development and public services, it is extremely important to consider environmental and social needs in all aspects of PPP projects in order to better realise the sustainable development of PPP.

In 2004, the United Nations Global Compact summarised the ten principles of sustainable development into three criteria: environmental, social and governance (ESG),³⁴ which requires enterprises to focus on environmental protection, social responsibility, and improved governance of their own enterprises in their development.³⁵ It is an important standard for evaluating whether PPP projects meet sustainable development. Then the United Nations Environment

³² Council of State, Assembly, 31 May 2006, Order of barristers at the Paris Bar, No. 275531.

³³ Council of State, Litigation Division, 30 April 2003, No. 230804.

³⁴ The term ESG was popularly used first in a 2004 report titled "Who Cares Wins", which was a joint initiative of financial institutions at the invitation of UN. The Global Compact.

³⁵ The environmental criteria will analyse the company's waste management policy, the reduction of greenhouse gas emissions and the company's commitment to preventing all direct and indirect environmental risks in its activities. The social criteria will take into account the company's prevention of accidents and psychosocial risks, employee training, respect for employee rights, the organisation of the subcontracting chain and the quality of social dialogue. The governance criteria pay particular attention to the independence of the company's board of directors, the gender balance in the management team, the management structure and the presence of an audit committee.

Programme in 2018 also issued *Guiding Principles on People-First Public-Private Partnerships (PPPs) for the United Nations Sustainable Development Goals*. And the United Nations Economic Commission for Europe launched a new PPP evaluation methodology in 2022 - the "UNECE PPP and Infrastructure Evaluation and Rating System (PIERS)". All these progresses point out that the main evaluation criteria of PPP should progress from "value for money" to "value for people" and "value for the planet", so as to promote the public sector, the private sector and civil society to pay more attention to issues such as environmental protection, the rights of employees and gender equality in PPP projects.

Also in France, the public sector expects the private sector participating in PPP projects to act responsibly to meet the environmental and social challenges of today's society. So France not only follows the United Nations ESG standards, but also respects the requirements of the European Union, which demand that all enterprises should fulfil a particular duty: Corporate social responsibility (CSR). It requires enterprises to voluntarily integrate environmental and social requirements into their activities. In terms of its application to PPP projects, compared to ESG standards, which allow professional rating agencies to evaluate the environmental, social and governance sustainability efforts of a PPP project, CSR requires the private sector participating in a PPP project to make adjustments from within to meet environmental and social requirements.

Meanwhile, France has also improved its legislation to ensure the realisation of ESG and CSR in PPP projects. According to Article L. 2112-2 of *The Public Procurement Code*, in addition to their economic benefits, PPP projects may take into account the environment, innovation, social issues, employment or anti-discrimination-related aspects. And Article 213 of the *Law n° 2017- 86 of 27 January 2017 relating to Equality and Citizenship* also provides that the anti-discrimination policy pursued by the private sector may also be taken into account in the conditions for the performance of contracts.³⁶ In order to better "enforce" ESG and CSR on PPP participants, in 2019, France adopted a new law called *"Action Plan for Business Growth and Transformation" (Le Plan d'Action pour la Croissance et la Transformation)*, also known as the *Pacte Law (La Loi Pacte)*,³⁷ which requires PPP participants to incorporate the protection of the environment, human rights and gender equality into their objectives.

³⁶ Article 213: The first paragraph of I of Article 38 of Ordinance No. 2015-899 of 23 July 2015 on public contracts is supplemented by a sentence worded as follows: "They may also take into account the company's anti-discrimination policy".

³⁷ Article 169 of the PACTE Law introduces the following amendments into French law: Article 1833 of the French Civil Code now has a second paragraph stating that corporations must be managed in their own "corporate interests" by taking into consideration the "social and environmental issues" related to their operations; Article 1835 of the French Civil Code has been amended to allow corporations to specify in their bylaws a "purpose" for the corporate operations; this means that companies are encouraged to incorporate social objectives to their corporate purpose as part of their bylaws; Articles L. 225-35 and L. 225-64 of the French Commercial Code have been adjusted so that corporate and management boards take into consideration "social and environmental issues" as part of their respective managerial assignments.

Although China's PPP legal framework has been relatively late in responding to environmental and social requirements, some legislation and regulations have been issued in recent years. For example, in March 2020, MOF issued *the Operational Guidelines on Performance Management of Government and Social Capital Co-operation (PPP) Projects (Caijin [2020] No. 13)*, which for the first time proposed that the performance objectives of PPP should incorporate ESG standard. Later in December 2021, NDRC issued *the Opinions of the National Development and Reform Commission on Further Promoting the Reform of the Approval System for Investment Projects (NDRC Investment [2021] No. 1813)*, which also proposes that ESG should be integrated into the study of the PPP framework. It should be noted that *the Civil Code of the People's Republic of China*, which came into force on 1 January 2021, for the first time included the "Green Principle" in the Code and made basic rules for the relevant system corresponding to this principle. The so-called *Green Principle* requires that enterprises "should be conducive to the conservation of resources and the protection of the eco-environment in their activities."³⁸ This also means that at the legislative level, it is stipulated that participants in PPP projects should face up to the environmental requirements.

For the legal framework of PPP in China, the consideration of environmental and social requirements is still in the beginning stage, much remains to be done before China can put in place a legal framework for PPP that meets the requirements of our time. In this respect, the experiences of France and a number of other countries are worth studying.

5. Conclusion

China is now one of the countries with the best infrastructure in the world, which is essential and conducive to sustainable economic development for the country. Since their introduction in China, PPP has played an extremely important role in building and improving the country's infrastructure. Our study has shown that there is a growing need to improve the legal framework for PPP. We are convinced that the establishment of a new legal framework for PPP based on the main principles and rules generally adopted internationally, in particular in France, and adapted to the Chinese situation would undoubtedly contribute to better protection of the rights and interests of private investors, to the sound development of PPP, and ultimately to the general development of the law in China.

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³⁸ Article 9 of *the Civil Code of the People's Republic of China*.

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