The Role of Law in the Successful Completion of Public-Private Partnership Projects in Nigeria: Lessons from South Africa

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DECLARATION

I, Augustine Edobor Arimoro, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the University to reproduce for the purpose of research either the whole or any portion of the contents in any manner whatsoever.

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ABSTRACT

Over the years, shortage of funds has resulted in a huge deficit in government budgets for infrastructure, especially in sub-Saharan Africa. Due to the huge costs involved in infrastructure procurement in relation to other competing demands on government spending, it is no longer feasible for governments to bear the entire burden of infrastructural development. This is especially the case in Nigeria, where annual infrastructure deficit is estimated at a massive $8 billion. Moreover, public officials have demonstrated incompetence in making public corporations profitable. Accordingly, Nigeria has adopted the public-private partnership model of infrastructure procurement to allow for the participation of the private sector in the design, funding, construction, management, and operation of public infrastructure. However, Nigeria's legal framework for managing public-private partnership is not clearly defined, leading to gaps in policy and overlapping laws that make implementation of PPP very difficult. Unsurprisingly, public-private partnership in Nigeria have, thus far, produced mixed results, thereby raising a need for clear policy guidelines on streamlining overlapping laws to attract, sustain and reward investor interest. In what ways do Nigeria's legal and policy framework for public-private partnership protect private investors' funds? This study examines the concept of PPP and its practice in Nigeria, arguing that the regulatory framework be designed or enhanced to protect investors' assets in public-private partnership projects and ensure they achieve proportional return on investments. Beyond the problem of overlapping laws, the study finds that political interference, weak institutional mechanisms and poor respect for the rule of law and sanctity of contract underlie the ineffectiveness of public-private partnership in Nigeria. Drawing from the public-private partnership experience in South Africa, it recommends holistic strategies for protecting investors' assets and unlocking the local financial market for sourcing project funding. These strategies are notably the provision of guarantees, making the process less cumbersome, provision of incentives for investors and project companies and ensuring that the host community for public-private partnership projects are involved in the process from inception to operation to get their support.

Key Words: **Public-Private Partnership, Investor, Procurement, Sanctity of Contract**

DEDICATION

In loving memory of Justice Auwal Ibrahim, PhD, my class adviser in year five of the LLB programme at the Faculty of Law, University of Maiduguri, with whom I shared my initial thoughts about this project. He passed on to the great beyond while I was writing up the thesis. Until his death, he was a judge of the National Industrial Court, Port Harcourt.

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Augustine E Arimoro
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LIST OF ABBREVIATIONS

AfDB	African Development Bank
AMCON	Asset Management Corporation of Nigeria
ANE	Mozambique Roads Agency
APC	All Progressive Congress
BCASL	Bi-Courtney Aviation Services Limited
BCHSL	Bi-Courtney Highway Services Limited
BEE	Black Economic Empowerment
BFO	Best and Final Offer
BIT	Bilateral Investment Treaty
BOOT	Build Own Operate Transfer
BOT	Build-Operate-Transfer
BPE	Bureau of Public Enterprises
BPP	Bureau for Public Procurement
BROT	Build Rent Operate Transfer
CEO	Chief Executive Officer
CPI	Consumer Price Index
CSFs	Critical Success Factors
DBFO	Design Build Finance operate
DCS	Department of Correctional Services
DFI	Development Finance Institutions
DFID	Department for International Development
DMO	Debt Management Office
DTI	Department of Trade and Industry
ECAs	Export Credit Agencies
EMDE	Emerging Markets and Developing Economies
EU	European Union
FAAN	Federal Airports Authority of Nigeria
FBC	Full Business Case
FDI	Foreign Direct Investment
FEC	Federal Executive Council
FGN	Federal Government of Nigeria

FMoF	Federal Ministry of Finance
FSHD	Free State Health Department
FTZ	Free Trade Zone
G20	Group of Twenty
GAT	General Aviation Terminal
ICG	Infrastructure Credit Guarantee
ICRC	Infrastructure Concession and Regulatory Commission
ICT	Information and Communication Technology
IDU	Infrastructure Development Unit
IMF	International Monetary Fund
LASG	Lagos State Government
LDM	Law and Development Movement
LDO	Lease Develop Operate
LSPPPL	Lagos State Public Private Partnership Law
MAs	Multilateral Agencies
MDA	Ministries Departments and Agencies
MMA	Murtala Mohammed Airport
NCP	National Council on privatisation
NGO	Non-Governmental Organisation
NIWA	National Inland Waterways Authority
NPC	National Planning Commission
OBC	Outline Business Case
PDP	Peoples' Democratic Party
PEBEC	Presidential Enabling Business Environment Council
PFA	Pension Fund Administrator
PFI	Private Finance initiative
PFP	Privately Financed Projects
PPI	Private Participation in Infrastructure
PPP	Public Private Partnership
PSP	Private Sector Participation
RFP	Request for Proposal
ROC	Registrations of Capability
RoI	Return on Investment

ROT	Rehabilitate Operate Transfer
RSA	Retirement Savings Account
SANRAL	South African National Roads Agency
SEC	Securities and Exchange Commission
SPV	Special Purpose Vehicle
SSA	Sub-Saharan Africa
TA	Transaction Adviser
TAP	Treasury Approval
TRAC	Trans African Concessions
UK	United Kingdom
US	United States
VfM	Value for Money
VGF	Viability Gap Fund
WBG	World Bank Group

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CHAPTER ONE

INTRODUCTION AND BACKGROUND TO THE STUDY

> …We also have a huge infrastructure deficit for which we require foreign capital and expertise to support whatever resources we can marshal at home. In essence, we seek public private partnerships in our quest for enhanced capital and expertise.[1]

1.1 **Background to the Study**

This study investigates the legal and institutional framework for the administration of public-private partnership (PPP) in Nigeria with a view to determining how the law protects investors' assets in PPP transactions. The framework in South Africa is also examined to provide comparative insight. Well-managed and effective regulation of PPP will not only ensure that PPP projects are successful but will also result in the provision of much-needed infrastructure, while making investment in infrastructure attractive to both local and foreign investors. The argument of this thesis is that the law and framework for PPP in Nigeria should be designed or enhanced to protect the assets of investors in PPP projects.

Traditionally, governments made use of state resources to provide for all the infrastructural needs of the public.[2] But in the modern era, the huge costs involved in infrastructure procurement as well as budgetary constraints make it impracticable for the public sector alone to meet all the infrastructure needs of any given jurisdiction.[3] This is the reason why governments around the world are seeking alternative means to fund and deliver infrastructure.[4] One such alternative is the adoption of the PPP model of infrastructure procurement.[5] The PPP model is, in brief, a collaboration between the public sector and the

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[1] Excerpts of speech of President Muhammadu Buhari on 23 August 2015. See *http://www.icrc.gov.ng/assets/uploads/2017/10/Presentation-by-Ag-DG-at-IOD-FF.pdf*

[2] Darrin Grimsey & Mervyn K Lewis *Public Private Partnerships: The Worldwide Revolution in Infrastructure Provision and Project Finance* (2004) at 1.

[3] The World Bank *Attracting Investors to African Public-Private Partnership: A Project Preparation Guide* (2009) at 2.

[4] Ibid.

[5] Jeffrey Delmon *Creating a Framework for Public-Private Partnership (PPP) Programs: A Practical Guide for Decision-makers* (2014) at 1.

private sector to design, fund, manage and operate a public facility.[6] While PPP is becoming popular in both developed and developing economies, in many developing countries whatever gains that the model can provide are often eroded by failures caused either by a weak framework or by a lack of political will on the part of public policy makers.[7]

This study asserts that the law has a key role to play in fashioning successful PPP relationships, especially in developing economies. Respect for these relationships and for the sanctity of contracts is a driver for PPP growth. Policy makers should therefore ensure that the law and the institutions that regulate PPP are open to reform to cope with changing times. Secondly, 'importing' a framework from a developed country without taking into cognisance local circumstances may be inviting failure at the outset. It is important that in their quest for a framework to suit the needs of their economy, policy makers consider jurisdictions with similar traits. For example, it will serve a developing country better to study a framework that has been successful in another developing country rather than in a developed one.

It is argued in this study that South Africa offers a good model for the design, administration, regulation, funding and operation of PPP facilities in the continent of Africa. This is not to say that the framework in South Africa is entirely flawless: indeed, the study makes some recommendations for its improvement.

1.2 Research Questions and Objectives

The research addressed the overarching question: In what ways do Nigeria's legal and policy framework for public-private partnership (PPP) protect investors' funds? This question stems from the need to address the concern of prospective investors regarding the safety of their investment. It is indeed trite that without private sector investments, there would be no PPP arrangements. Consequently, the research question is explored using four sub-questions as follows:

i. What measures are required to protect private funds invested in PPP projects?
ii. What legal and policy provisions and practices are offered for the development of PPP practice in Nigeria?
iii. How adequate are the current pieces of legislation, in terms of the protection of PPP investments in Nigeria?

[6] Ibid.

[7] E R Yescombe *Public-Private Partnerships in Sub-Saharan Africa: Case Studies for Policy Makers* (2017) at 3.

iv. What lessons can be learned from South African law, policy and practice on PPP?

To address the above questions, the study examines the concept of PPP and its practice in Nigeria and weighs the advantages and disadvantages of adopting PPP over other forms of procurement. Case studies of PPP projects are examined to highlight how the law is being followed and what changes need to be made to improve the performance of PPP transactions. Furthermore, an analysis of the framework in South Africa is undertaken to provide comparative insight to policy makers and PPP practitioners on the way forward for the development of PPP practice in Nigeria. The study similarly highlights areas where South Africa needs to implement change to improve on the current standard of practice.

Ultimately, this research aims to contribute to the development of an infrastructure investor-friendly legal and policy environment for PPP in Nigeria that emphasises the protection of investors' assets, so as to attract both local and foreign direct investments (FDI) into the country's infrastructure space. To achieve this aim, the study identifies the following five objectives:

i. Identify the process, challenges and critical success factors (CSFs) for PPPs;
ii. Analyse the effectiveness of PPPs in relation to other or traditional procurement methods;
iii. Study the framework of PPP in Nigeria to determine what measures should be enhanced or put in place to secure assets invested in PPP projects;
iv. Comparatively analyse the framework for PPP in South Africa, focusing on infrastructure financing and provisions for the protection of investments; and
v. Analyse the findings and make recommendations for future practice.

1.3 Meaning of Infrastructure

The term 'infrastructure' recurs in this study and it makes sense to provide a definition of the concept at the outset. Infrastructure consists of the essential facilities and services upon which the economic productivity of society depends.[8] The role infrastructure plays in economic development is significant, indeed, it is a determining factor in the growth of any given

[8] J P Morgan Asset Management 'Insights: Infrastructure investing: Key benefits and risk,' available at *https://www.jpmorgan.com/jpmpdf/1158630194855.pdf*, accessed 9 March 2018.

economy.[9] It follows that 'poor infrastructure impedes a nation's economic growth and international competitiveness.'[10]

A legal definition of the term can be found in Nigeria's Infrastructure Concession Regulatory Commission (Establishment Etc.) Act of 2005, as follows:

> 'infrastructure' includes development projects which, before the commencement of this Act, were financed, constructed, operated or maintained by the Government and which, after the commencement of the Act, may be wholly or partly implemented by the private sector under an agreement pursuant to this Act including power plants, highways, seaports, airports, canals, dams, hydroelectric power plants, water supply, irrigation, telecommunications, railways, interstate transport systems, land reclamation projects, environmental remediation and clean-up projects, industrial estates or township development, housing, government buildings, tourism development projects, trade fair complexes, warehouses, solid wastes management, satellite and ground receiving stations, information technology networks and database infrastructure, education and health facilities, sewerage, drainage, dredging, and other infrastructure and development projects as may be approved, from time to time, by the Federal Executive.[11]

The South African Infrastructure Development Act No. 23 of 2014 uses this abbreviated definition of the term:

> 'infrastructure' means installations, structures, facilities, systems, services or processes relating to the matters specified in Schedule 1 and which are part of the national infrastructure plan.[12]

Schedule 1 of the Act, however, bears the heading 'Public installations, structures, facilities, systems, services or processes in respect of which projects maybe designated as strategic integrated projects' and lists the following: national and international airports, communication and information technology installations, education institutions, electricity transmission and distribution, health care facilities, human settlements and related infrastructure facilities, economic facilities, mines, oil or gas pipelines, refineries or other installations, ports and harbours, power stations or installations for harnessing any source of energy, productive rural and agricultural infrastructure, public roads, public transport, railways, sewage works and

[9] Olufemi Soyeju 'Legal framework for public private partnership in Nigeria' (2013) *De Jure* at 814.

[10] Jeffrey Delmon *Public-Private Partnership Projects in Infrastructure: An Essential Guide for Policy Makers* (2011) at 1

[11] S 36 Infrastructure Concession and Regulatory Commission (Establishment Etc) Act of 2005.

[12] S 1 Infrastructure Development Act 23 of 2014.

sanitation, waste infrastructure, water works and water infrastructure. There seems thus to be considerable agreement as to what constitutes infrastructure as far as the law in Nigeria and South Africa is concerned.

1.3.1 The Need to Improve on Infrastructure Assets

Just as infrastructure investments need to be substantially increased in emerging markets and developing economies (EMDE) in order to meet social needs and support more rapid economic growth,[13] it is imperative that there be a corresponding legal and policy framework to ensure the protection of such investments and assets.[14] Otherwise, there will continue to be a significant number of 'infrastructure investment opportunities' with little or no interest from local or foreign investors.

Table 1: Examples of Infrastructure Assets

Transportation	**Energy & Utilities**	**Communications**	**Social Infrastructure**
Toll roads/tunnels/bridges	Oil & gas pipelines	Cable networks	Education facilities
Airports	Regulated electricity assets	Communication towers	Health care facilities
Ports	Transmission and distribution systems	Select satellite systems	
Rail and mass transit networks	Water treatment facilities and distribution facilities		
Municipal parking facilities			

Source: Morgan Stanley Investment Management.

[13] OECD, 'Fostering investment in infrastructure: Lessons learned from OECD investment policy reviews (2015), available at *http://www.oecd.org/daf/inv/investment-policy/Fostering-Investment-in-Infrastructure.pdf*, accessed 9 March 2018.

[14] It needs to be reiterated as well, that while good policies and reforms are key to ensuring the right kind of development, the law could play an expansive role not only in guiding the market environment but also assuming a new role in encouraging the right players to participate in the process. See Sam Amadi 'Improving electricity access through policy reform' in Yinka Omorogbe & Ada Ordor *Ending Africa's Energy Deficit* (2018) at 375-6.

In the light of the foregoing, several countries have entered into arrangements that allow the private sector to design, fund, build, maintain and provide infrastructure services. Public-private partnership (PPP) in infrastructure is described by Delmon as one of 'the tools in a policy maker's arsenal to help increase investment in infrastructure services and improve its efficiency.'[15] Thus, PPP creates a platform for both the public sector and a consortium of private sector interests to provide for the infrastructure needs of the public. It offers an opportunity for the public sector to tap private capital.[16] Although PPPs cannot solve all of a country's infrastructure problems, they offer a means to access significant financing where there are bankable projects.[17] Given the peculiar dearth of funding for infrastructure in sub-Saharan African countries, there is a huge need for countries to adopt the PPP model to accelerate infrastructure delivery and availability.[18]

Nigeria adopted the PPP model of public procurement with the passing into law of the Infrastructure Concession and Regulatory Commission (Establishment Etc.) Act (ICRC Act) 2005 and the subsequent establishment of the Infrastructure Concession Regulatory Commission (the ICRC) on 27 November 2008 to administer the PPPs in the country.[19] The ICRC is responsible for regulating PPP transactions that involve the federal government or any of its ministries, departments or agencies (MDAs),[20] in line with the 1999 Constitution of the Federal Republic of Nigeria (as amended).[21]

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[15] Jeffrey Delmon op cit note 10 at 2.

[16] Fida Rana & Chidi Izuwa 'Infrastructure and Africa's development: The PPP imperative,' available at *http://blogs.worldbank.org/ppps/infrastructure-africa-s-development-ppp-imperative*, accessed 10 March 2018.

[17] Ibid.

[18] Office of the Special Adviser on Africa, the United Nations 'Financing Africa's infrastructure development' (2015) *Policy Brief* at 1-2 available at *www.un.org/en/africa/osaa/pdf*, accessed 16 November 2018.

[19] Olufemi Soyeju op cit note 9 at 184.

[20] Some states including Lagos, Ekiti, Akwa Ibom, Rivers, Cross Rivers and Niger have enacted their own PPP Laws within their jurisdictions, to give PPP transactions the backing of law.

[21] The ICRC is a creation of an Act of the National Assembly, the country's federal legislative arm. Section 4(1) of the Constitution vests the National Assembly (which consists of the Senate and the House of Representatives) with powers to make laws for the peace, order and good governance of the federation as it relates to matters covered in the Exclusive Legislative list set out in Part I of the Second Schedule to the 1999 Constitution of the Federal Republic of Nigeria (as amended), while Section 4(3) empowers the various state Houses of Assembly to make laws for the peace, order and good governance of the various states constituting the federation with respect to matters in the Concurrent Legislative List set out in Part I of the Second Schedule to the 1999 Constitution of the Federal Republic of Nigeria (as amended).

Significantly, under the country's current PPP framework, some projects have been executed. Regrettably, however, the PPP process in the country continues to face tough challenges that have led to the outright cancellation or buy-back of hitherto well-defined and people-oriented PPP transactions/projects.[22] This situation is worrying, as PPP failures make both local and foreign investors question not only the possibility of commensurate return on investments (RoI) but also the safety of the assets invested.

Before Nigeria adopted PPP as an alternative to traditional public-sector procurement, the federal government of Nigeria (FGN) under the administration of President Olusegun Obasanjo[23] embarked on a privatisation programme that culminated in the divesture of government interests in some public sector-owned enterprises. The transactions were administered by the Bureau of Public Enterprises (BPE), authorised by the Public Enterprises (Privatisation and Commercialisation) Act 28 of 1999. The aim was to make the former public-sector establishments efficient and reliable, and to discontinue subsidising them, since they would now become profitable ventures. Unfortunately, however, President Olusegun Obasanjo's administration's privatisation programme was poorly executed and has been the object of severe criticism.[24] There were also allegations that government assets were being sold off to politicians and their cronies using pseudo companies.[25] The mishandling of the privatisation of the now moribund Nigeria Telecommunications Company (NITEL) and the experiments with the former Nigeria Electric Power Authority (NEPA) are indicators that the country's privatisation programme was poorly organised.[26] The shift to PPP has therefore been welcomed as a better option than the privatisation programme.

Yet the move towards PPP has not been without challenges. The problems associated with the Murtala Mohammed Airport Terminal 2 Concession, the Lagos-Ibadan Expressway

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[22] Oluwaseun Oluwasanmi & Odun Ogidi 'Public private partnership and Nigerian economic growth: Problems and prospects' (2014) 5 *International Journal of Business and Social Science* at 137.

[23] President Obasanjo was Nigeria's civilian president between May 29, 1999 and May 29, 2007, before handing over to the administration of the late President Umaru Musa Yar'Adua.

[24] D O Adeyemo & A Salami 'A review of privatisation and public enterprises reforms in Nigeria' (2008) *Contemporary Management Research* 412. See also E Okpanachi & P C Obutte 'Neoliberal reforms in an emerging democracy: The case of the privatisation of public enterprises in Nigeria, 1999-2014' (2015) 7.3 *Poverty & Public Policy* at 253–257.

[25] D E Arowolo & C S Ologunowa 'Privatisation in Nigeria: A critical analysis of the virtues and vices' (2012) 1.3 *International Journal of Development and Sustainability* at 792.

[26] Kabir Mohammed, David Chapolsa & Ashiru Bello 'The state of Nigerian economy in the 21st century: Privatisation and commercialisation programmes under Obasanjo/Atiku Regime' (2013) 9.19 *European Scientific Journal* at 92.

Concession and the recent buy-back of the Lekki-Epe Toll Road Concession,[27] threaten the future growth of PPP in the country and could result in investor apathy. This is because private sector investors are concerned about return on investment (RoI) and the safety of their invested assets. Such concern is heightened by the fact that a PPP investment is usually secured by the project itself and in the event of failure, lenders may be unable to recover credit advanced to debtors. This situation poses a lot of questions in the minds of investors. An example of this is the pulling out of the private sector consortium from the Rivers State Mono Rail PPP Project.[28]

To allay the fears of the private sector in relation to investing in infrastructure assets or investment vehicles in Nigeria, in the face of recurrent project failures and policy somersaults, this research investigates the protection offered to investors' funds under the country's PPP legal framework, in order to make recommendations for its strengthening or reform. Again, with plans in the pipeline to channel pension fund assets currently managed by various pension fund administrators (PFAs) into infrastructure financing, there is a heightened need to provide assurances of fund safety to both the PFAs and individual contributors.

1.4 Justification for the Research

Nigeria's former Coordinating Minister for the Economy during the tenure of President Goodluck Jonathan,[29] Dr Ngozi Okonjo-Iweala, asserted that the country requires about $14 billion annually to fund infrastructure in order to make up the country's infrastructure deficit but can only afford to spend $6 billion per annum.[30] The allocation for capital expenditure has typically been 25 per cent of the budget, with recurrent expenses taking up a gargantuan share

[27] The gubernatorial candidate of the Peoples' Democratic Party (PDP) in the build-up to the race for the Lagos State 2015 elections considered the stopping of toll collections on the Lekki-Epe Expressway a good campaign promise even before the Lagos State Government bought back the concession. The issue of PPP projects also came into focus during the Debates at the Business Sector, *https://www.youtube.com/watch?v=zdrdYot78T8*, accessed 15 February 2015.

[28] *Vanguard* 'No Rivers State fund was misappropriated by Amachi's govt – Ex-commissioners' 12 October 2015, available at *http://www.vanguardngr.com/2015/10/no-rivers-state-fund-was-misappropriated-by-amaechis-govt-ex-commissioners/*, accessed 7 February 2016. The private sector partner TSU Property and Investment Holdings Ltd pulled out of the project because of its inability to contribute its equity share of 80 per cent.

[29] President Goodluck Jonathan succeeded the late President Umaru Musa Yar'Adua upon the latter's demise in 2011. President Jonathan handed over to President Muhammadu Buhari on May 29, 2015.

[30] Dr Okonjo-Iweala made the assertion while she was addressing a PPP stakeholders' workshop organised by the African Development Bank in Abuja, Nigeria. This formed the editorial 'Nigeria's $8 billion infrastructure deficit' in the *Daily Independent* 12 November 2014.

of 75 per cent. The current administration of President Muhammadu Buhari raised the allocation for capital expenditure to 30 per cent in the 2016 Budget.[31]

Furthermore, being heavily reliant on oil revenue, Nigeria has been negatively affected by reduced oil prices, and renewed militancy in the Niger Delta area has in recent times resulted in lower production levels. With less funding thus available to the federal government under present realities, it has become increasingly challenging for the government to embark on infrastructure development without recourse to the private sector for funding support.

It is worthy of note that PPP project failures in Nigeria aggravate the problem of the unavailability of long-term financing. It does not augur well for the growth of PPPs if projects do not get beyond the pipeline stage or fail mid-way through execution. If there is any doubt that their assets enjoy a considerable degree of protection under the law, potential investors are likely to become apprehensive and turn to alternative investment options.

The Nigerian government considers PPP beneficial in the realisation of the country's Vision 20:2020 Objective.[32] Given that Nigeria occupies a leadership position in sub-Saharan Africa (SSA) as well as within the West African sub-region, the results of this study should be of benefit to other countries in SSA.

Although there is a body of literature about PPP in Nigeria, with a significant number of contributions from management analysts and experts within the built environment, there is a dearth of literature written from a legal perspective. Worthy of note are the contributions of George Anachebe Nwangwu, whose work essentially covers the allocation of risk in PPP transactions,[33] and that of Olufemi Olugbemiga Soyeju, whose work highlights the need to unlock access to finance for PPPs in the country.[34] While the latter study deals with infrastructure financing, there is a gap in the literature which leaves the question of the safety

[31] *The Guardian* 'Economists laud 2016 budget, raise concerns on 38 dollars oil benchmark' 22 December 2015, available at *http://www.ngrguardiannews.com/2015/12/economists-laud-2016-budget-raise-concerns-on-38-dollars-oil-benchmark/*, accessed 7 March 2018.

[32] Under the Country's Vision 20:2020 Objective as stated in the National PPP Policy Document, the goal is to make the country one of the 20 leading economies in the world by the year 2020. To achieve the objective, infrastructure development is considered vital.

[33] George Anachebe Nwangwu *A risk-based approach to enhance public-private partnership projects in Nigeria* (Unpublished PhD Law Thesis, The University of Hull, 2013).

[34] Olufemi Olugbemiga Soyeju *Public assets financing in Nigeria: The imperatives for legal reforms to unlock domestic financial resources and foreign capital for infrastructure development* (Unpublished LLD Thesis, University of Pretoria, 2012).

of funds invested in PPP projects unaddressed. This study attempts not only to fill this gap but also to indicate a way forward as far as infrastructure project finance in Nigeria is concerned.

But before focusing on the need to unlock finance for new PPPs, it is important to provide security for assets already invested, in the form of assurance that investments will be protected. In this sense, making a case for more funding as Soyeju has done without building on the foundation of asset protection is like putting the cart before the horse.

1.5 Research methodology

The methodology for this research is doctrinal. Legal research makes a distinction between primary and secondary sources. While primary sources are the official pronouncements of the governmental lawmakers, court decisions, legislation and regulations that form the basis of legal doctrine, secondary sources are works which are themselves not law, but which discuss and analyse legal doctrine.[35] This distinction is important given that in some disciplines, the terms 'primary' and 'secondary' source typically refer to, say, a letter or contemporary newspaper article, and a later scholarly analysis, respectively.[36] In carrying out the research, a large number of documents derived from primary and secondary sources were reviewed. The primary sources are made up of statutes and decided cases while the secondary sources include text books, journal articles, working papers, theses, newspaper articles and reports, magazines, government publications and other materials available via online sources.

The study begins with a background on the need to provide protection for PPP assets, followed by literature review covering the evolution of PPP, the legal framework for PPP and the PPP experience in Nigeria. Comparisons are drawn with PPP law and practice in South Africa, particularly with regard to the protection of PPP investments, procurement, regulation and administration. The rationale for choosing a comparative method to analyse the frameworks in Nigeria and South Africa is to highlight the structures in both systems as well as to show where and why the differences that exist may be appropriate.[37] Moreover, a comparativist does not just compare, he or she contrasts and provides some critical analysis.[38]

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[35] Kent C Olsen *Principles of Legal Research* (2009) at 7.

[36] Ibid at 7.

[37] J Paul Lomio, Henrik S Spang-Hassen & George D Wilson *Legal Research Methods in a Modern World: A Coursebook* (2011) at 61.

[38] Ibid.

Comparison also makes it feasible to identify best practices in one jurisdiction that may inform the development of a field in another jurisdiction and the position of Nigeria and South Africa as the two leading economies in Africa, a continent grappling with major infrastructure deficits, makes comparison compelling[39].

A case study approach is adopted in order to investigate the law in practice and the cause(s) of failure or success of PPP transactions in both Nigeria and South Africa. The overall aim is to make recommendations to ensure a healthy environment that will promote private sector participation in infrastructure procurement via the PPP model in Nigeria as well as for South Africa. The case study method, through reports of past investigations, enables the exploration and understanding of complex issues.[40] Through this method, an investigator can discern and explain both the process and outcome of a phenomenon through observation, reconstruction and analysis of the case(s) under investigation.[41] Hence, in chapters four and five of this study which deal with the practice of PPP in Nigeria and South Africa respectively, a review of empirical studies and reports was undertaken to investigate the law in practice.

Choice of South Africa for Comparative Insight

The Economist Intelligent Unit in collaboration with several banks, measured the readiness and capacity of 15 countries in Africa with regard to their legislative/regulatory/frameworks, institutional capacity, operational maturity, investment climate, financing facilities and subnational capacity, and found that apart from South Africa these countries had a low or very low ability to implement infrastructure PPPs.[42]

The choice of South Africa as a benchmark for comparison with Nigeria is motivated by at least five factors:

[39] Bamidele Seteolu & James Okuneye 'The struggle for hegemony in Africa: Nigeria and South Africa relations in perspectives' (2017) *African Journal of Political Science and International Relations* at 57

[40] Zaidah Zainal 'Case study as a research method' (2007) 9 *Jurnal Kemanusiaan* at 1.

[41] Ibid.

[42] Steven Shrybman & Scott Sinclair *A Standard Contract for PPPs the World Over: Recommended PPP Contractual Provisions Submitted to G20* (2016) at 7.

First, South Africa occupies the leading position in sub-Saharan Africa and the continent at large. Before 2014, South Africa was the largest economy in Africa,[43] a position that the country regained in the second quarter of 2016 as Nigeria slid into recession.

Secondly, South Africa has a good track record of PPP success, having developed a peculiar PPP programme that should be a model for developing countries.[44] Yescombe notes that PPPs started in South Africa in the mid-1990s and mentions the N4 toll road[45] and the R3 billion PPP for the upgrading and tolling of part of the N3 (between Pretoria/Johannesburg and Durban) as among the PPPs completed and operational in SA.

Thirdly, in comparison with South Africa's benchmark, i.e. other emerging middle-income and developing economies (EMDE), the country enjoys relatively good infrastructure.[46] In line with this, the number of partnerships between the public sector and the private sector has grown progressively with legislative framework developed at the national, provincial and municipal levels.[47]

Fourthly, South Africa is considered a country with strong public-sector institutions.[48] As weak public institutions can be a bane for a successful PPP regime, the South African model is a good one for other emerging economies.

Fifthly, there is continuing, sustained interest on the part of the private sector in PPP infrastructure and social services projects in South Africa. This has enabled an expansion of market presence as well as business volume.[49]

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[43] United Nations Economic Commission for Africa *Urbanisation and Industrialisation for Africa's Transformation* (2017) 52.

[44] E R Yescombe *Principles of Project Finance* (2007) at 47.

[45] This road connects South Africa with the port of Maputo in Mozambique.

[46] Zeljko Bogetic & Johannes W Fedderke 'International benchmarking of South Africa's infrastructure performance' (2006) *World Bank Policy Research Working Paper 3830.*

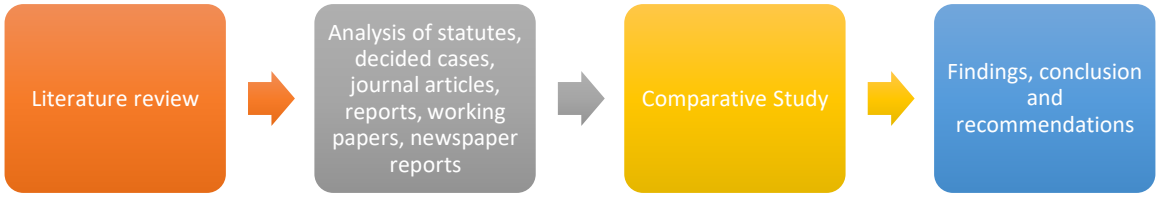
[47] Dominic Mitchell 'Partnerships between government and business in South Africa: A practical guide' (2007), available at *http://led.co.za/sites/default/files/cabinet/orgname-law/document/2012/gtz_partnerships_between_government_and_business_in_south_africa_2008.pdf*, accessed 19 September 2016.

[48] Vickram Cuttaree 'Successes and failures of PPP projects,' a World Bank Presentation delivered at Warsaw on June 17, 2008, slide 3, available at *http://webcache.googleusercontent.com/search?q=cache:dn1JCFJLnQgJ:siteresources.worldbank.org/INTECAREGTOPTRANSPORT/Resources/Day1_Pres2_SuccessesandFailuresPPPprojects15JUN08.ppt+&cd=3&hl=en&ct=clnk&gl=uk&client=firefox-b*, accessed 19 September 2016.

[49] Kaiser Associates 'Public private partnerships benchmarking study' (2005) 26, available at *http://www.thepresidency.gov.za/electronicreport/downloads/volume_4/business_case_viability/BC1_Research_Material/KZN_PPP_Bench.pdf*, accessed 19 September 2016.

The final stage of the investigation presents the findings, draws conclusions and makes both recommendations for practice and suggestions for further study.

Figure 1-2: Research methodology



1.6 Outline of the Thesis

This study is divided into seven chapters. The first chapter is the general introduction to the research. It describes the research problem, identifies the research questions, justifies the research, sets out the methodology, describes the structure of the research and introduces the literature.

In the second chapter, the study focuses on the theoretical foundations for the research. The rationale for the choice of concepts/theories as well as the theories themselves are discussed. The concepts/theories considered include the rule of law, law in development and the sanctity of contract.

Chapter Three analyses the PPP concept, traces its evolution and development in Nigeria, and examines its merits and demerits as a form of procurement in that country.

The fourth chapter deals with the law and practice of PPP in Nigeria. The legal and institutional frameworks for PPP are discussed, as well as some examples of completed PPP projects/transactions.

Chapter Five discusses the law and practice of PPP in South Africa. Case studies of selected PPP contracts arranged and executed in the country are reviewed.

Chapter Six offers a comparative analysis of the framework and practice of PPP in Nigeria and South Africa. The aim is to highlight areas where reforms are needed in both jurisdictions, especially where these concern the protection of assets invested in PPP transactions.

The seventh chapter presents a summary of the findings, observations, conclusions and recommendations for practice and further study.

Given that this research is multidisciplinary in scope, literature dealing with diverse areas of study such as law, economics, project finance, public administration and political economy make up the body of the literature reviewed. Again, because there is a limited number of works written from the legal point of view *per se*, with the majority of the research so far conducted by writers in fields other than law, this researcher deliberately undertakes a project informed by various perspectives but anchored in legal enquiry. The core of the study is directed at identifying ways of protecting the investments of private sector interests in the infrastructure market space in Nigeria, to stimulate the interest of both foreign and local investors. The thesis attempts to link the rule of law, sanctity of contract and the instrument of the law to the development of a holistic and efficient legal, institutional and regulatory framework to ensure that assets invested in PPP are safe.

1.7 Preliminary Literature Review

With a current estimated population of 183 million people,[50] Nigeria is the most populous African country. It is one of the world's fastest growing economies, an emerging major player in the global economy and, until the second quarter of 2016, Africa's largest economy.[51] In the last few years, falling oil prices have resulted in declining government revenue.

The country aims to be among the top 20 economies of the world by the year 2020, as represented in its Vision 20:2020 Objective of attaining a minimum GDP of $900 billion and a per capita income of no less than $4000 per annum.[52] It is imperative that the country fix its deplorable infrastructure as this is crucial to the battle against poverty and the realisation of the Sustainable Development Goals (SDGs).[53]

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[50] Worldometers 'Nigeria: Population,' available at *http://www.worldometers.info/world-population/nigeria-population/*, accessed 8 January 2016

[51] Jannie Rossouw 'South Africa just leapt over Nigeria to become Africa's largest economy again' *Quartz Africa* 16 August 2016, available at *http://qz.com/758947/south-africa-just-leapt-over-nigeria-to-become-africas-largest-economy-again/*, accessed 27 October 2016. See also BBC, 'South Africa regains Africa's biggest economy title from Nigeria,' available at *http://www.bbc.co.uk/news/world-africa-37045276*, accessed 12 February 2018.

[52] Solomon Thomas & Marcin Brycz 'Nigeria Vision 20:2020: Can dream become reality?' (2014) 7.3 *Journal of International Studies* at 162–70.

[53] See the United Nations 'About sustainable development goals' (2019) available at *www.un.org/sustainabledevelopment/sustainable-development-goals/*, accessed 11 February 2019. The Sustainable Development Goals have replaced the Millennium Development Goals discussed in Ochei Ailemen

The current state of Nigeria's infrastructure is shocking, considering that the country has experienced massive revenue generation from various oil boom periods. It is disheartening to note that little was done by successive governments to change the infrastructure fortunes of the country, other than making good plans that have seldom been followed through to fruition. Where upgrades are carried out on existing infrastructure, no clear maintenance plan is followed.

With a land mass of 9,110,000 square kilometres, the country has an estimated 197,000km road network, of which only a discouraging 18 percent is paved.[54] Over 70 per cent of federal roads, totalling 34,123km, are in bad shape.[55] The railways are currently not fully functional despite several attempts to resuscitate rail travel in the country by successive administrations. The plans of the current Buhari administration for the construction of additional rail lines to link different parts of the country are still only on paper. With respect to housing, Nigeria requires about 17 million housing units and about N60 trillion naira to meet these housing needs.[56]

1.7.1 Investing in Infrastructure in Nigeria

According to the Nigerian National PPP Policy Document, the federal government is committed to addressing the infrastructure deficit as well as improving the quality of public service to meet the Vision 20:2020 Objective.[57] The Policy Document provides for the federal government to contract the private sector to manage some public infrastructural services, and to design, build, finance and operate some infrastructure.[58] The federal government's key

Ikpefan 'Challenges of public-private partnership in infrastructural financing in Nigeria,' available at *http://eprints.covenantuniversity.edu.ng/1330/1/models%20of%20ppp.pdf*, accessed 9 January 2016.

[54] African Development Bank 'An infrastructure action plan for Nigeria: Closing the infrastructure gap and accelerating economic transformation,' available at *http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/An_Infrastructure_Action_Plan_for_Nigeria_Closing_the_Infrastructure_Gap_and_Accelerating_Economic_Transformation.pdf*, accessed 7 January 2016.

[55] Ibid.

[56] Ochei Ailemen Ikpefan op cit note 53.

[57] Infrastructure Concession Regulatory Commission 'National Policy on Public-Private Partnership (PPP)' (2013) at 1 Section 2.

[58] Ibid.

policy objectives for its infrastructure investment programme for PPP encompass three dimensions, economic, social and environmental. These have the following aims:[59]

i. Accelerate investment in new infrastructure and ensure that existing infrastructure is upgraded to a satisfactory standard that meets the needs and aspirations of the public;
ii. Ensure that all investments provide value for money;
iii. Improve the availability, quality and efficiency of power, water, transport and other public services;
iv. Provide investment opportunities for local and foreign investors in the provision of infrastructure;
v. Ensure balanced regional development;
vi. Encourage direct or indirect participation of small and medium sized enterprises in PPP projects;
vii. Protect and enhance the natural environment.

Following from the above, the federal government of Nigeria has set a 30-year infrastructure plan for the country beginning from 2014 until the year 2043 known as the National Integrated Infrastructure Master Plan.[60] The administration of President Goodluck Jonathan designed the key areas of focus to include energy, transport (which includes rail, roads and aviation), ICT, housing, water, mining and agriculture.[61] Table 2 lists the projections set in 2014:

Table 2: 30 Year Infrastructure Plan for Nigeria 2014-2043

Sectors	Amount Required (USD)
Roads	150 billion, 22 billion to be invested in the first five years.

[59] Ibid Section 3

[60] National Planning Commission 'Nigeria's National Integrated Infrastructure Master Plan' (2014) Final Draft Report at 15.

[61] Vanguard 'FG develops 30-year national integrated infrastructure master plan' *Vanguard* 24 June 2014 available at *www.vanguardngr.com/2014/06/fg-develops-30-year-national-integrated-infrastructure-master-plan/*, accessed 17 November 2018.

Rail	75 billion, 5 billion required in the first five years.
Aviation	50 billion, 5 billion to be spent in the first five years.
Maritime	50 billion.
Urban transport	250 billion
Power	600 billion
Oil and gas	400 billion
ICT	325 billion
Housing	350 billion
Education	30 billion
Healthcare	4 billion for the construction of 108 hospitals

Source: National Planning Commission

Importantly, the federal government commits to providing an appropriate enabling environment for PPP and allowing a fair return to private investors for the project risks that they will take.[62] Furthermore, the federal government commits to ensuring that its economic policies provide a stable and predictable environment for investors.[63]

According to a report published by the World Bank, 'poor infrastructure impedes a nation's economic growth and international competitiveness.'[64] Considering that countries around the world are challenged by budget constraints, the development of infrastructure projects with private sector funds has become an acceptable phenomenon in both developing and developed countries globally.[65] In essence, the PPP model of procurement is a collaboration between the public and private sectors to enable the design, funding, provision and maintenance of infrastructure for a given period of time, say between 20 and 30 years, after which the facility is transferred from the private sector back to the public sector. PPPs are also

[62] Ibid Section 3.

[63] Ibid Section 4.

[64] Jeffery Delmon op cit note 10 at 1.

[65] Hans-Withelm Alfen, Yu Chien Amberjan, Satyanarayana N Kaladindi & L Boeing Singh 'Introduction to PPP concept' in Bauhaus-Universitatwelmar (ed) *Public-Private Partnership in Infrastructure Development* (2009) at 1.

'considered to provide better value for money and thereby reduce government debt levels, and for this same reason, Nigeria has turned to PPPs to help finance infrastructure and provide public services.'[66]

Much has been written about the wide infrastructure gap currently experienced globally and particularly in Africa. The continent's largest deficit is found in energy and roads. According to the World Bank Group, 'the 48 countries of SSA (with a combined population of 800 million) generate roughly the same amount of power as Spain (with a population of 45 million)'; in the same vein, 'only one-third of Africans living in rural areas are within two kilometres of an all-season road, compared with two-thirds of the population in other developing regions.'[67] The African Development Bank (AfDB) Group estimated the financing requirement for Africa's infrastructure deficit in 2010 as $93 billion annually until the year 2020.[68] The AfDB Group also argue that investments in infrastructure in the continent have not kept pace with increasing demand, which further widens the deficit. Their findings show that less than 40 per cent of the African population have access to roads and only 5 per cent of agriculture is under irrigation. The implication is that Africa faces higher access costs to infrastructure compared to other developing nations around the world.[69] Nigeria's core stock of infrastructure has been estimated at between 20 to 25 per cent of the country's Gross Domestic Product (GDP). It has been noted that this is a poor result when compared with other emerging/middle income economies (the country's peers) that record an average of 70 per cent, leaving an estimated gap of about $300 billion.[70]

Government investment in infrastructure in Nigeria in the ten-year period between 1999 and 2009 did not achieve desired objectives. The Nigerian Technical Committee on Privatisation and Commercialisation estimated that $90 billion was invested in public sector-owned enterprises. Despite this colossal investment by the Nigerian government, not more than

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[66] George Nwangwu 'The legal framework for public-private partnerships (PPPs) in Nigeria: Untangling the complex web' (2012) 7 *European Procurement and Public Private Partnership Review* at 268.

[67] Bill Banks 'Addressing Africa's infrastructure deficit,' available at *http://www.ey.com/GL/en/Industries/Government---Public-Sector/Dynamics---collaborating-for-growth_Addressing-Africas-infrastructure-deficit*, accessed 15 September 2016.

[68] African Development Bank Group 'Infrastructure deficit and opportunities in Africa' (2010) 1.1 *Economic Brief*.

[69] Ibid at 2.

[70] Chinelo Anohu-Amazu 'Mend the gap: Fixing Nigeria's $300bn infrastructure deficit,' available at *http://blogs.ft.com/beyond-brics/2015/10/05/mend-the-gap-fixing-nigerias-300bn-infrastructure-deficit/*, accessed 16 September 2016.

2 per cent return on investment was achieved, resulting in Nigerians suffering from 'both a lack of availability and poor quality of infrastructure service delivery.'[71] An example is the inefficiency of the National Electric Power Authority (NEPA), which resulted in an estimated cost of $1 billion per annum, with only 12 per cent of Nigerians having access to metered electricity.[72]

Africa has been described as a continent of the future.[73] However, for the continent to realise its full potential, there is a need to reduce the huge infrastructure deficit to achieve both structural transformation and market integration.[74] This explains why several countries on the continent, including Nigeria, are looking towards alternative means of reducing their infrastructure deficit. This is because 'good infrastructure has always played a leading role in economic development, from the highways and aqueducts of ancient Rome to Britain's railway boom in the mid-19th century.'[75]

Considering that government funding for infrastructure globally is limited because of budget constraints and other demands, governments are turning to the private sector to finance, design, build, operate as well as manage infrastructure assets. This method of involving the private sector to supply infrastructure assets and services which have traditionally been provided by the government is commonly referred to as public private partnership.[76] According to the United Kingdom Her Majesty (UK HM) Treasury, the rationale for involving the private sector in the design, building, finance and operation of public infrastructure is the delivery of good quality and well maintained assets that provided value for money for the tax payer.[77] The United Nations also identifies, in addition to the constraints of limited traditional

[71] Cambridge Economic Policy Associates Ltd 'Mobilising finance for infrastructure: Nigeria country case Study' (2015), available at *https://assets.publishing.service.gov.uk/media/57a0897d40f0b649740000dc/61319-DfID_7_Private_financing_in_Nigeria.pdf*, accessed 1 September 2016.

[72] Ibid.

[73] Rabah Arezki & Amadou Sy 'Financing Africa's infrastructure deficit: from development banking to long-term investing' (2016) 2 *Global Views* at 1.

[74] Ibid.

[75] The World Bank *Why PPP? Toolkit for Public-Private Partnership in Road and Highways 1*, available at *https://www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/highwaystoolkit/6/pdf-version/1-11.pdf*, accessed 16 September 2016.

[76] The International Monetary Fund *Public-Private Partnership* (2014) at 3.

[77] HM Treasury *A New Approach to Public Private Partnerships* (2012) at 5.

funding for infrastructure, the lack of capacity of governments to implement many projects at the same time as a reason for engaging private sector interests in PPPs.[78]

1.7.2. Attracting Investors

There are several ways in which the public sector may engage the private sector in the provision and/or operation of public infrastructure assets. These include privatisation, deregulation, outsourcing, government downsizing, as well as the transfer of assets to the private sector which would in turn transfer back the assets to government at the end of a concession period.[79] It is this last type of public sector engagement with the private sector that forms the core of this study.

Whereas the infrastructure gap in Africa and in Nigeria in particular may appear to be a major challenge for government, the same gap could present itself as a huge investment opportunity for discerning private sector investors. For example, before the return to civil rule in Nigeria in the year 1999, telephony was the exclusive preserve of the upper class in society.[80] The lack of infrastructure in that area was massive. The subsequent growth of (especially) mobile telephony and the returns on investment recouped by investors so far, is an indication that where effectively and efficiently structured, private sector investment in infrastructure has the potential, first, to reduce the infrastructure deficit, secondly, to stimulate economic growth by creating jobs in the sector, and thirdly, to enhance business activities generally.[81]

The conceivable benefits of the private sector's involvement in infrastructure include helping fill the wide funding gap for projects, creating a competitive environment, providing technological expertise, maximising profits, and effecting a reduction in operational costs that is essential for financial viability. The rationale is that active private companies generally have a wealth of experience that can be applied to turn around non-performing government infrastructure projects.[82]

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[78] The United Nations *A Guidebook on Public-Private Partnership in Infrastructure* (2011) at 1.

[79] M Armstrong & D Sappington 'Regulation, competition and liberalisation' (2006) 44 *Journal of Economic Literature* at 325–66.

[80] There were only three telephone lines per 1000 people, which was considered at that time to be one of the lowest tele-densities in the world. See the World Bank *Implementation Completion and Results Report for the Privatisation Support Project* (2011).

[81] The World Bank op cit note 3 at 1.

[82] Dambudzo Muzenda *Increasing Private Investment in African Energy Infrastructure* 44, available at *https://www.oecd.org/investment/investmentfordevelopment/43966848.pdf*, accessed 16 September 2016.

The question that arises is, how does the private sector secure funding for infrastructure considering the volume of funds involved in the design and building of infrastructure projects? Yescombe notes that funding for PPP is closely linked to the financing technique for project finance, but he draws a distinction between project finance for pure public-sector projects and finance for a PPP project.[83] This is because the public sector may use a 'public-sector debt instrument' to source funds for infrastructure projects – for example, through the sale of Treasury Bills. The lenders in such a case are not considered partners in the provision of the infrastructure assets and are only purchasers of a government debt instrument. According to Delmon, PPP consortiums may raise funds by issuing bonds or shares or borrowing from commercial banks or the government. Importantly, he notes that these options are available to 'well-managed infrastructure firms in favourable investment climates.'[84] This latter qualification is a key concern for the present study: the fact that investors are usually not interested in committing to places where the investment climate is not favourable.

When funding is secured for PPP in Nigeria, it is sometimes accessed as foreign direct investment (FDI) or debt into the infrastructure market place. It is therefore imperative that government makes the legal and policy framework conducive to and convenient for foreign capital importation, as well as for the repatriation of invested funds and profits when due. In this regard, Ikpefan argues that government must make the local conditions clear to foreign investors to attract their interest.[85] A stable foreign currency exchange regime is also a very important factor, because project finance debt sourced from a foreign lender in a foreign currency would need to be repaid by revenues generated in the currency of the country where the project is located. In the event of a currency devaluation that is not properly worked out and taken into account *ab initio,* the cost of the debt can increase significantly.[86] For example, if the construction of an airport in Kano, Nigeria, is estimated to cost $50 million United States dollars and the funds were sourced and received at a time when the exchange rate is US$1/N200, the cost of the debt would soar if the naira is devalued and the exchange rate rises to US$1/N500. Thus, an erratic foreign exchange regime hampers FDI in infrastructure financing.

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[83] E R Yescombe *Principles of Project Finance* (2007) at 113.

[84] Jeffrey Delmon op cit note 10 at 62.

[85] Ochei A Ikpefan op cit note 53.

[86] The World Bank Group 'Risk allocation, bankability and mitigation in project financed transactions,' available at *http://ppp.worldbank.org/public-private-partnership/financing/risk-allocation-mitigation#currency*, accessed 16 September 2016.

Another factor that affects private sector involvement in infrastructure development is the ease with which one can engage in business in the country. This is a significant driver for both local and foreign investment. For instance, in the World Bank's Doing Business Report for 2016, it is reckoned that contract enforcement in Nigeria takes 509.80 days[87] and costs 57.70 per cent of the value of the claim. The results of this research place Nigeria 143 in a ranking of 189 economies on the ease of enforcing contracts.[88]

As far as the business environment is concerned, the World Bank Doing Business Report ranks Nigeria a woeful 169 out of 189 economies.[89] In comparison, South Africa is ranked 78. It is therefore mandatory that the regulatory environment for business in Nigeria in general and PPP in particular be addressed if the country is to become an investment hub for infrastructure in SSA.

A major challenge for infrastructure funding in Nigeria is the inability to access long-term finance from the commercial banks in the country. According to the Cambridge Economic Policy Associates Limited, local commercial banks are not able to offer long-term financing beyond seven years given the short-term nature of their liabilities.[90] This is compounded by the country's macroeconomic outlook. Inflation is currently in the double digits and the recession that has been experienced from early 2016 and which has continued into 2018 further raises questions about long-term financing in relation to the risk of doing business in the country.

The political economy risk is yet another factor to be considered. Private sector investors will usually be concerned about having long-term sustainable agreements with the public sector if the policy, legal and regulatory environment is weak. The failure of government to respect the terms of PPP agreements or, in some instances, obey pending court orders works against PPP development.[91] Specifically, concerns about political economy risk increase when policy inconsistencies arise from not only a change in government but also from changes in individual ministers or officials responsible for infrastructure regulation and administration. Again, because PPP is a recent phenomenon in Nigeria, there is a lack of policy framework in some sectors. For example, there is no clear-cut policy framework to help develop and

[87] Considerably more than one calendar year.

[88] The World Bank Group *Doing Business 2016: Economy Profile 2016 Nigeria* 13 ed 105, available at *http://www.doingbusiness.org/Reports/Subnational-reports/~/media/giawb/doing%20business/documents/profiles/country/NGA.pdf*, accessed 10 March 2016.

[89] Ibid at 8.

[90] Cambridge Economic Policy Associates Ltd op. cit. note 71 at 52.

[91] Ibid at 12.

implement projects in the transport sector, even though there is a policy for the use of toll roads to bring additional investment to the sector.[92] There have also been disputes between the federal and state governments, which reveal the relative inexperience of the regulator.[93]

The challenges notwithstanding, some successful PPP projects have been recorded. These include the Island Power Concession, a BOT concession between the Lagos State Government and Negris Group,[94] the Lagos Rapid Bus Transit Scheme, and the Murtala Mohammed Airport Terminal 2.[95] In this regard, Oluwaseun Oluwasanmi notes that in the context of Nigeria's vision to be among the top 20 economies in the globe by the year 2020, its large market is an obvious advantage that can help steer positive investor decisions towards the country.[96] However, he insists that sincerity of purpose on the part of government is required in order to earn the trust of investors.[97]

Investing in infrastructure assets provides a means of diversification for investors, especially given the volatility of equity investments.[98] It follows therefore that a system that makes comprehensive provision for the protection of invested assets, especially with regard to the infrastructure market space, would attract the attention of investors. Again, since infrastructure assets are less liquid than traditional assets, and given the long duration of the investment, investors need to be reassured that they can recoup their investments and make a profit. It is the inadequacy of the existing law to address this concern that informs the focus of this research, which seeks to investigate the role the law can play in not only improving the investment climate but also in providing investors with the confidence they need to commit their funds to long-term infrastructure financing in Nigeria.

Despite the opportunities that PPP offers, it has not been without significant challenges in the country. In the first place, PPPs are a measure to surmount the previous problems that

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[92] P A Oyadiran & A M Aregbesola 'Road transport policy and traffic management in Nigeria' (2008) 6 *Journal of Research in National Development* at 21.

[93] Ibid.

[94] Kazeem Ugbodaga, 'Gains from PPP: The Lagos example' *PM News* 19 December 2011.

[95] Despite the dispute involving the Bi-Courtney Aviation Services Limited and the Federal Airports Authority of Nigeria (FAAN) surrounding the terms for the management of the airport, the project is already operational and serving millions of passengers annually. It is also the best airport in Nigeria and in that sense can be described as a success.

[96] Oluwaseun Oluwasanmi 'Public private partnership and Nigerian economic growth: Problems and prospects' (2014) 5.11 *International Journal of Business and Social Science* at 139.

[97] Ibid.

[98] J P Morgan op cit note 8.

plagued public-sector establishments in the country, such as mismanagement and corruption. However, corrupt practices seem to bedevil PPPs as well. According to Sotola and Ayodele, in 2010, the Economic and Financial Crimes Commission (EFCC) was invited to probe PPP projects in the north central state of Niger.[99] The researcher is however of the belief that corruption is not a major issue with PPP execution in Nigeria as there have only been a few incidences of transactions being marred by corrupt practices.

The buy-back of the Lekki-Epe Concession Project by the Lagos State Government[100] exposes the teething troubles militating against a successful PPP regime in the country. While the intention for the launch of the Lekki-Epe Project was to ease the traffic congestion experienced at the Lagos Island axis and provide a system that would guarantee good road maintenance, the initiators of the project did not reckon with the need to carry the immediate community along.[101] The resistance to the project by members of the community and the fear that the All Progressive Congress (APC) could lose the 2015 gubernatorial elections in Lagos State worked against that PPP. Corder and Andzenge note, and rightly so, that 'one of the major challenges facing private sector investment sustainability is the allure of policy somersaults by government to pander to populist demands that are ill advised in the long-term. Electoral cycles tend to make elected governments take short-term decisions that affect long-term sunk investments.'[102] It is submitted that the policy change by the Lagos State government (LASG) was more of a political manoeuvre than one made in the public interest. The decision is bound to affect investor interest in future toll road concessions with the LASG. The current situation in Nigeria is akin to that in Canada when PPP was first introduced, described as "Problem, Problem and Problem."[103]

Soyeju identifies the financing problem as one of the hurdles in the path of successful PPPs in the country. He cites for reference purposes the concession for the new domestic terminal at the Murtala Mohammed Airport (MM2) that was awarded by the federal

[99] Olusegun Sotola and Thompson Ayodele, 'Public-private partnership: Will it fix Nigeria?' *Initiative for Public Policy Analysis* Policy Paper (2006) at 6.

[100] It is important to note that the Lekki-Epe Concession Project was a state government administered PPP. It however, was the flagship toll road project in the country and its success or failure has far-reaching implications for future projects, be they federal or state originated.

[101] Augustine Arimoro, 'Impact of community stakeholders on public-private partnerships: Lessons from the Lekki-Epe Concession toll road' (2015) 3.7 *International Journal of Law and Legal Studies* at 165–67.

[102] Hugh Corder & Terhemen Andzenge 'Regulation as a catalyst for the electrification of Africa' in Yinka Omorogbe & Ada Ordor (eds) *Ending Africa's Energy Deficit* (2018) at 79.

[103] Oluwaseun Oluwasanmi op cit note 96 at 136.

government to Bi-Courtney Limited, a limited liability company, 'to develop, finance, manage and operate the Lagos Airport Terminal 2 (and ancillary assets) under a Build-Operate-Transfer (BOT) arrangement.' Unfortunately that project and a sister project, the Lagos-Ibadan Expressway concession, experienced setbacks due to funding problems.[104] Soyeju therefore recommends *inter alia* the development of the capital market long-term debt instruments and the promotion of the involvement of the private sector to finance infrastructure.[105] In addition to these financial measures, this researcher is of the view that there needs to be a legal framework that provides assurance regarding funding security and some indication of potential RoI, rather than the creation of funding instruments for infrastructure financing. That is the heart of this research.

1.8 Definition of Key Terminology

Several technical terms are used in this research. Given that researchers tend not to have uniform definitions for certain words in academic research, it is imperative to define some key words or phrases in the context which they are used in the investigation. Operational definitions for these words or terms appear below:

'*Bidder*': This is a respondent to a request for Expressions of Interest or an invitation to submit a bid in response to a Project Brief. Typically, a bidder will be a consortium of parties with one lead party responsible for the provision of all contracted services on behalf of the consortium9
'*Business case*': This provides an overview of a partnership approach to how the project will be delivered, taking into account the impact of the project and market response.
'*Commercial banks*': These are private-sector banks which supply financing for PPP projects.
'*Concession*': A type of PPP in which the public pays service fees in the form of tolls, fares or other charges for using the facility.
'*Concessionaire*': The private sector partner in a PPP arrangement involving a concession.
'*Investment bank*': A bank that arranges PPP investment funds but does not on its own provide debt or funding.
'*Lead arranger*': This is the bank arranging and underwriting the Project Companies' debt.
'*Mezzanine debt*': This is a subordinated debt provided by a third party other than investors in the project.

[104] Olufemi Soyeju op cit note 34 at 27.

[105] Ibid at 368.

'*Naira*': The Nigerian currency. 100 kobo make one naira (₦1)

'*Private party*': The private sector entity with which the government contracts in a PPP. Traditionally the private party has been a special purpose vehicle created specifically for the purposes of the project.

'*Project company*': This is the special purpose vehicle which is the public authority's counter party under the PPP contract.

'*Public authority*': The public-sector counter party to the PPP contract.

'*Return on Investment*': Expected profits investors look forward to for committing their assets to the project.

'*Risk*': A situation involves risk if the randomness facing the economic entity can be expressed in terms of specific numerical probabilities (objective or subjective).

'*Risk allocation*': This is the allocation of responsibility for dealing with the consequences of each risk through a specified mechanism which may involve sharing the risk.

'*Sponsors*': The investors who bid for, develop and lead the project through their investment in the project company.

'*SPV*': Special purpose vehicle. Usually a legal entity with no other activity other than those connected with its borrowing.

'*Value-for-money*': This refers to the optimum combination of whole-of-lifecycle costs, risks, completion time and quality to meet public requirements.

'*Whole-of-lifecycle*': The cost associated with the ongoing repair and maintenance of a facility for the term of the facility's economic life.

1.9 Conclusion

In this chapter, a synopsis of the thesis has been provided. The background indicates that Nigeria is currently experiencing a huge infrastructure deficit occasioned by several years of poor funding for the sector as well as the poor management of existing facilities. Since infrastructure is vital for the economic growth of the country, it has been established that the public sector is obliged to seek for alternative funding for the procurement of public infrastructure. It is in this light that the PPP model of infrastructure procurement becomes an option to consider. Since the inception of a PPP framework in Nigeria, it has produced mixed results. The need to seek for ways to ensure that the practice is improved upon necessitates this study. Further, to get the participation of the private sector in infrastructure procurement

requires that the process for PPP is clear-cut, less cumbersome and one that promotes the protection of the assets of investors and lenders.

South Africa's success in PPP practice compared to other sub-Saharan African (SSA) countries provides a model that can be studied to improve on the performance of PPP in Nigeria. This study therefore, examines the legal framework for PPP in Nigeria in its socio-political and economic context with lessons from South Africa.

CHAPTER TWO

THEORETICAL FOUNDATION

> Much of what we call the developing world has stopped developing, while growth in other regions has slowed. As a result, billions of people remain trapped in poverty, despite decades of foreign aid and lending by multilateral institutions such as the World Bank. In the past, economists prescribed liberalisation and privatisation to governments seeking to improve their economic performance. But dissatisfaction with these remedies in many countries has left policy makers searching for new methods to jumpstart growth.[106]

2.1 Introduction

Having identified the research problem, research questions and the aim of the study in the previous chapter, this chapter seeks to explore the theories and concepts that provide an analytical framework to support the enquiry. Three main legal constructs have been selected to support the argument of the study: the rule of law, law in development and the sanctity of contracts. This chapter accordingly builds on three fundamental assumptions. The first is that respect for the rule of law by both the public sector and the private sector is key to sustaining commerce. Secondly, if any gains from a partnership between the public and private sectors are to be realised, the need for effective institutions cannot be over-emphasised. Thirdly, the development of a sound framework that underscores the protection of assets invested in a combined public sector/private sector initiative will promote the development of a sustainable market for private sector investment in infrastructure. Such a market will not only ensure good returns on investments but will also broaden access to both domestic and foreign capital.

The concept of the rule of law essentially advances the need for respect for the law on the part of those in authority and those whom they lead.[107] The theory of law in development is centred on the instrumentality of the law in bringing about socio-economic development.[108] In the context of this research, the law can be a tool to promote efficiency within government institutions in their dealings with the private sector, as well as provide an environment that protects the assets invested by the private sector to finance public infrastructure.[109] The doctrine

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[106] Kenneth Dam *The Law-Growth Nexus* (2006) at ix.

[107] Helen Yu & Alison Guernsey 'What is the rule of law?' available at *https://iuristebi.files.wordpress.com/2012/12/what-is-the-rule-of-law.pdf,* accessed 25 July 2018.

[108] YS Lee 'General theory of law and development' (2017) 50.3 *Cornell International Law Journal* at 415.

[109] Ibid.

of the sanctity of contract recognises that 'the moral basis of contract is that the promisor has by his promise created a reasonable expectation that it will be kept.'[110]

The theories selected for this study recognise the role of law in promoting development in society. The law is here regarded as a tool to help develop a market for private sector investment in infrastructure, and also to ensure that assets invested in the market are protected so as to sustain the growth of the market. Furthermore, since investment in infrastructure enables economic development, sustaining a flow of investments in infrastructure is fundamental to that development. The law is also necessary to give effect to government policy.

2.2. The Rule of Law

The concept of the rule of law is multi-dimensional. It has been studied by lawyers, political scientists and economists.[111] The rule of law encompasses a wide variety of subjects ranging from the security of person and property rights to checks on government and the control of corruption.[112] There are also writings linking the rule of law with economic development.[113] The famous words of the philosopher Thomas Hobbes insist on the need for the rule of law: outside of a social contract, he declared, human life is 'short, nasty and brutish.'[114]

2.2.1 The Rule of Law Defined

Whilst there is no consensus about how to define the concept of the rule of law, various definitions that have been advanced are of immense value for this study.

For every society, the rule of law is an essential subject.[115] The rule of law describes that aspect of the law which envisages a political system where life is organised according to laws that

[110] David Hughes Parry *The Sanctity of Contracts in English Law* (1986) at 2.

[111] Stephen Haggard & Lydia Tiede 'The rule of law and economic growth: Where are we?' *World Development* 39.5 (2011) at 673.

[112] Ibid.

[113] Nandini Ramanujam 'The rule of law and economic development,' available at *https://www.mcgill.ca/roled/files/roled/mcgill_roled_report_2012.pdf*, accessed 8 August 2016.

[114] T Hobbes *Of Man: Being the First Part of Leviathan* (2001) Vol. XXXIV.

[115] Elijah Okon John 'The rule of law in Nigeria: Myth or reality?' (2011) 4.1 *Journal of Politics and Law* at 211.

guarantee a good degree of objectivity in dispensing justice, defending freedom, promoting peace and prosperity, because law is a reasonable expression of integrity.[116]

To Tamanaha, the rule of law 'imposes legal limitations on and coordinates the behaviour of government officials and it imposes legal limitations on and coordinates the behaviour of citizens.'[117] He further states that the public sector is subject to two distinct limitations:[118]

i. The first limitation is that government officials must abide by valid laws in force at the time of any given government action; and
ii. Officials must remain within established legal bounds when exercising the power attached to their public positions.

Dam highlights the long history of the concept of the rule of law, from classical Greece to early England and up to the birth of the American republic.[119] He approvingly quotes Plato: 'the state in which the law is above the rulers, the rulers are inferior to the law, has salvation and every blessing which the gods can confer.'[120] In early England Bracton wrote that even the King was 'subject to God and the law.'[121] The Constitution of the United States in 1780 included the phrase 'Ours is a government of laws, not of men.'[122] This phrase was brought to bear in Chief Justice John Marshall's opinion on the power of judicial review in the US Supreme Court,[123] in the matter of *Marbury v Madison.*[124] The rule of law therefore establishes

[116] R C Onwuanibe 'The rule of law and the rule of man' in O C Eze (ed) *Society and the Rule of Law* (2009) 171–189.

[117] Brian Z Tamanaha 'A concise guide to the rule of law' in Gianluigi Palombella & Neil Walker (eds) *Relocating the Rule of Law* (2009) at 3.

[118] Brian Z Tamanaha 'The rule of law and legal pluralism in development' (2011) 3.1 *Hague Journal on the Rule of Law* at 4.

[119] Kenneth Dam op cit note 114 at 13.

[120] Plato (1952) at 682.

[121] Kenneth Dam op cit note 114 at 13.

[122] Massachusetts Constitution, Part the First, Article XXX. The Article in its entirety reads: *In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: to the end may be a government of laws and not of men.*

[123] It is vital to state here that US decisions as well as court decisions in common law countries are of persuasive authority in Nigeria.

[124] 5 U.S. 137, 163 (1803).

the position that the powers of state and government can be exercised only within the bounds of applicable laws.

The works of political theorists like Aristotle, Montesquieu and Locke also address the subject of the rule of law. These theorists proposed devising limits to the power of the government. Aristotle advocated that law rather than any single one of the citizens ruled, and thus the ideal society is one governed by reason and not by passion.[125] Montesquieu proposed a system of institutional restraints that could limit the government's exercise of power against its citizens and guarantee the individual's freedom from fear and the threat of violence.[126] In order to achieve this objective, the political system must be able to prevent the whims of the king or the discretion of the legislature from falling upon individuals. He proffered the solution of an independent judiciary to check the powers of the executive.[127] Locke's thesis promoted the preservation of individuals' property – the chief aim of men entering a political society was guaranteed by three conditions: first, established law agreed to by consent; secondly, an independent judge with power to decide controversies according to law; and third, a power to execute the sentence.[128]

A V Dicey is famous for his work on the subject. He defined the rule of law as follows:

> [It] means in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of government…. It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts… [and], lastly…that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of ordinary law of the land.[129]

As formulated by Dicey, the rule of law has three basic interpretations. First, no one is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner; secondly, no one is above the law; no matter his rank or condition, he is subject to the ordinary law of the realm and amenable to the jurisdiction

[125] Duncan Kennedy 'A critique of adjudication' in David M Trubek & Alvaro Santos (eds) *The New Law and Economic Development* (2006) at 13–14.

[126] C T Montesquieu & T Nugent *The Spirit of Laws* (2011).

[127] Ibid.

[128] John Locke *The Second Treatise of Government* ed. Peter Laslett (1988) 350–53.

[129] A V Dicey *Introduction to the Study of the Law of the Constitution* 10 ed (1961) at 42.

of ordinary tribunals; and thirdly, the rule of law may be used as a formula for expressing the fact that with us the laws of the constitution, the rules which in foreign countries naturally form part of a constitutional case, are not the source but the consequence of the rights of individuals as defined and enforced by the court.[130]

W Wade and C F Forsyth's theorisation of the rule of law identified the important attributes of the rule of law as:[131]

i. All acts must be in accordance with the law to be valid;
ii. Government activity must be conducted within a framework of defined rules and regulations;
iii. Disputes involving the legality of government actions must be decided by the courts independent of government;
iv. There should be no undue privileges and discrimination in the society; and
v. No one should suffer punishment outside the authority of law.

2.2.2 Key Schools of Thought on the Rule of Law

Discourses on the rule of law distinguish between an institutional and a substantive view, and between an instrumental and an intrinsic conception. These are discussed briefly below.

a. Institutional Conception of the Rule of Law

Proponents of this view place emphasis on the efficacy of a system of rules. According to Joseph Raz, a leading advocate of this view, the rule of law entails two fundamentals, namely, that government action should be authorised by law, and that laws should be capable of guiding people's conduct for them to plan their lives.[132] Thus, for people to be able to plan their lives, laid down rules should be prospective and stable.[133] The institutional view emphasises the characteristics of a legal system that ensures that laws are available and are capable of being

[130] Ibid. See also Mohammed Mustapha Akanbi 'The Rule of Law in Nigeria' (2012) 3 *Journal of Law, Policy and Globalisation* at 1.

[131] W Wade & CF Forsyth *Administrative Law* 10 ed (2009) at 30.

[132] Joseph Raz 'The Rule of Law and its Virtue' (1977) *Law Quarterly Review* 195.

[133] Ibid.

adhered to.[134] Such characteristics include generality, publicity, prospectiveness, clarity, non-contradictoriness, conformability, stability and congruence.[135] When laws reflect these traits, the addressees are able to 'know what they are commanded to do' and 'to do what is commanded of them.'[136] The main concern of the institutional view is to see to it that the qualities and mechanisms of a legal system are maintained. As such, the emphasis is not on the content of the law and the values it upholds but 'rather on whether the legal system has the formal characteristics that make it work.'[137]

b. Substantive Conception

This view of the rule of law is primarily concerned with the substance of the laws rather than the legal system. Thus, the public can 'foresee with certainty how the government would use its coercive power in given circumstances and thus plan accordingly.'[138] Individuals are able to determine what applies since government is bound by rules laid down in advance. In the words of Friedrich Hayek:

> Under the rule of law the government is prevented from stultifying individual efforts by *ad hoc* action. Within the known rules of the game the individual is free to pursue his personal ends and desires, certain that powers of government will not be used deliberately to frustrate his efforts.[139]

Alvaro argues that the judiciary 'must look not only at whether the executive has acted within its powers – whether the authority was legally entitled to act – but also whether the substance of administrative action fell within the government's powers or impinged upon the citizen's private property.'[140]

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[134] Margaret Jane Radin 'Reconsidering the rule of law' (1972) 64 *Boston University Law Review* at 720.

[135] Ibid at 786.

[136] Ibid.

[137] Alvaro Santos op cit note 133 at 258.

[138] Ibid.

[139] Friedrich Hayek *The Road to Serfdom* (1944) at 80–96.

[140] Alvaro Santos op cit note 133 at 265.

c. The Intrinsic Version

The leading proponent of the intrinsic view is A V Dicey. His work analysed 'rule, supremacy; or predominance of law' as one of the distinguishing characteristics of English institutions. To Dicey, due process, authority's submission to its own laws, and a constitution consisting of judicially declared rights for which there are enforceable remedies, are qualities to be exhibited in any community governed by the rule of law.[141]

d. The Instrumental View

This view is essentially concerned with how the rule of law can enhance economic development and thus strengthen commerce. The idea is that the rule of law presupposes that when individuals enter business relationships the outcome should be predictable and therefore lead to economic growth. Max Weber's work on the relationship between 'rational law' and economic development elucidates this view.[142]

Table 1: Rule of Law from Different Angles

Institutional view	Substantive view	Intrinsic view	Instrumental view
Emphasis is on the legal system.	Emphasis is on the laws in application.	Emphasis is on regard for the law.	Emphasis is on using the law as a tool for economic development

Source: Author

2.2.3 Common Rule of Law Assumptions

Kristen E Boon has identified three common assumptions regarding the rule of law.[143] First, that there is a relationship among law, peace and development; secondly, that institutions and legal systems can be reformed; and thirdly, that specific types of laws, such as secure property rights, will promote peace and development. These assumptions are described in summary.

[141] A V Dicey op cit note 121 at 202.

[142] Max Weber *Economy and the State* (1968).

[143] Kristen E Boon 'The rule of law in fragile and conflict-affected areas' (2009) *Seton Hall Law School Report* at 2.

a. Relationship among Law, Peace and Development

The application of law that is devoid of ambiguity and well enforced can assist in securing peace as well as promoting economic development. Where this is the case, there is always a sense of predictability. Should a dispute arise, it can be channelled to well-entrenched judicial institutions.

b. Reformation of Institutions and Legal Systems

Weak institutions constitute a drawback to developing economies as they result in poor application of the law and an inefficient judicial process. It appears that the problem is not as much with laws that are deficient as with the existence of good laws that are honoured in the breach.

c. Laws Promoting Development

Laws can be used as a tool to promote development and to implement policy decisions. In the case of Nigeria, the Infrastructure Concession Regulatory Commission Act 2005, which underscores the Federal Government of Nigeria's policy towards private sector participation in the provision of public infrastructure, illustrates how law can be channelled for developmental purposes.

Since the rule of law ensures predictability, investors often consider a country's regard for it when making business decisions, especially when these involve foreign direct investment (FDI). The Chief Justice of South Africa, the Hon. Mogoeng Mogoeng argued in favour of the rule of law as follows:

> Why do we not witness in France, Singapore and the UK problems that have become familiar in Africa? We have oil, gas, gold, diamonds, platinum, chrome, coal etc. in abundance, and breath-taking tourist attractions. The UK is the size of a game reserve in South Africa known as the Kruger National Park. South Korea is about the size of a province in South Africa known as KwaZulu-Natal – where Durban is – and Singapore was very poor and insignificant in 1965 but is now rightly counted among the big world economies although it has nothing but its people and a tiny piece of land. A closer examination of the operations of their judiciaries would, without ignoring the damage done by our painful history, be quite revealing.[144]

[144] Mogoeng Mogoeng 'The rule of law in South Africa: Measuring judicial performance and meeting standards,' available at *https://www.chathamhouse.org/sites/files/chathamhouse/public/Meetings/ Meeting%20Transcripts/ 250613Mogoeng.pdf*, accessed 10 August 2016.

Consequently, if Nigeria and other sub-Saharan African countries are desirous of attracting a positive response from prospective investors, they must take deliberate steps to improve on their rule of law record. Where there is flagrant disregard for court orders and rulings, mistrust and a lack of investor confidence is created.

2.3 Law and Development Theory

The major thrust of the law and development theory is that 'law is central to the development process,' or better still, that law is an 'instrument that could be used to reform society and that lawyers or judges could serve as social engineers.'[145] The law and development construct, embodies those theories that seek to connect law and development by formulating a framework that allows for the role of law in development to be understood by policy makers to enhance development.[146] Law and development is a branch of scholarship, that can be utilised to investigate the relationship between law and socio-economic growth.[147] This appears to be the distinction between law so-called and the field of law[148] and development.[149] Therefore, a development -driven approach to law denotes considering the law as a tool for development through the use of legal rules and the institutions in a legal framework to formulate, guide, implement and support development policies to ensure that objectives are achieved. In the sphere of law and development, institutions are a key driver to development.[150] It follows that having efficient institutions to support government policies will stimulate economic growth, hence it has become a focus for law and development theorists.[151]

Ordor identifies that law and development scholarship has opened several approaches to the study of the relationship between law and development.[152] What is important is that each

[145] John Merryman 'Comparative law and social change: On the origin, style, decline and revival of the Law and Development Movement' (1977) 25 *The American Journal of Comparative Law* 457–83.

[146] Ada Ordor 'Tracking the law and development continuum through multiple intersections' (2015) *Law and Development Review* at 1.

[147] YS Lee op cit note 116 at 416.

[148] Lee considers that the law has become a framework and vocabulary for debating development policies. See Ibid.

[149] Ibid.

[150] Ada Ordor op cit note 154 at 9.

[151] Michael J Trebilcock & Marina Mota Prado *Advanced Introduction to Law and Development* 2014 at 34.

[152] Ada Ordor op cit note 154 at 2.

country in the developing world should structure the law and development narrative to ensure that it meets the goals of that society.[153] First, for example, law and development should address issues concerning weak state institutions in Nigeria as well as the challenge of poor governance strategy which has stifled economic growth over the years. Secondly, the law is ineffective where the institutions that are responsible for enforcing it are absent.[154]

It follows that law should, be effectively used to promote good governance by giving effect to policy.[155] Thus, policy becomes law the implementation of which, is dependent on law's alignment with the needs and aspirations of the people.[156] However, policy or law, no matter how well couched, is not a magic wand. There must be the will to ensure that the law is observed not in the breach.[157]

The proponents of this theory believe that there is a gap between law in books and law in action in developing countries, and they therefore advocate professional legal education as a possible solution. More importantly, they posit that the law could lead social change, the law itself being an engine of change.[158]

The theory was developed by the Law and Development Movement (LDM) as a specialised area of academic interest in the US in the 1960s. The LDM centred their study on the relationship between legal systems and development in relation to social, economic and political changes that occur in developing countries.[159] Trubek notes that the law and development theorists sought to interest development agencies in the importance of reform and showed the relationship between law and development based on the intellectual agenda.[160]

It is noteworthy that the relationship between law and economic development has been at the core of modern social theory, building on the theses of Marx, Durkheim and Weber.[161] Tom Ginsburg argues that the law and development movement sought to export US models of law

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[153] Ibid at 18.

[154] See YS Lee op cit note 116 at 426.

[155] Theo Scheepers *A Practical Guide to Law and Development in South Africa: An Introduction to Law Applicable to Development and the Law and Development Process in South Africa* (2000) at 18.

[156] Ibid.

[157] Ibid.

[158] Ibid.

[159] David M Trubek, 'The "Rule of Law" in development assistance: Past, present, and future' (2005) in Y Matsuura (ed) *The Role of Law in Development, Past, Present and Future* at 4–5.

[160] Ibid at 1.

[161] Tom Ginsburg 'Review: Does law matter for economic development? Evidence from East Asia' (2000) 34.3 *Wiley-Blackwell Law and Society Review* at 829.

and legal education.[162] The same opinion is shared by Tor Krever, who notes that transplanting US institutions to the developing world would empower the state and facilitate the exercise of macroeconomic control.[163] Indeed, in the words of Trubek:

> The state had to undertake many key economic roles, from banking to manufacture and state corporations were a dominant form of activity…. [The] private sector in some countries was not oriented toward effective economic action so that the state had to try to transform key private actors through regulatory law. This orientation on the role of law led to an emphasis on public law and regulation as well as to sweeping legal reforms of traditional economic sectors.[164]

The law and development movement faded from prominence in the mid-1970s after highpoints between the 1960s and early 1970s.[165] It has recently resurfaced on a far larger scale and is at the 'forefront of development policy making, as government agencies, international organisations, and the non-profit sector advocate the rule of law in developing countries.'[166] Although legal institutions still occupy a central position in law and development theory, the field is now much broader than the question of reforming laws and legal systems in developing countries to mirror the developed world, having grown to include democracy indices and economic liberalisation.[167]

Law and development theory is made up of sub-theories that overlap and diverge in various respects. For the purposes of this study, the focus is on modernisation theory, dependency theory and economic growth theories.

2.3.1 Modernisation Theory

This theory is anchored on the hypothesis that developing countries' 'development prospects depend, for the most part, on convergence with the policies and institutions of developed Western societies, including assigning a prominent role to both liberal political values

[162] Ibid.

[163] Tor Krever 'The legal turn in late development theory: The rule of law and the World Bank's development model' (2011) 52.1 *Harvard International Law Journal* at 294.

[164] David M Trubek 'The political economy of the rule of law: The challenge of the new developmental state' (2009) *Hague Journal of the Rule of Law* 28, 29.

[165] Tor Krever op cit note 171 at 294.

[166] Tom Ginsburg op cit note 169 at 830.

[167] Amy L Chua 'Markets, democracy and ethnicity: Toward a new paradigm for law and development' (1988) 108 *Yale Law Journal* 1–107.

(democratic institutions and a welfare state) and liberal economic institutions, a prominent role for private markets.'[168]

Based on the foregoing, developing countries would be better off if they mirrored formal laws relating to property and commercial laws that obtain in the developed world, to ensure the predictability and security that are needed for fostering investment.[169]

2.3.2 Dependency Theory

Dependency theory developed as an offshoot from the work of Raul Prebisch.[170] Based on the work of Prebisch, the theory holds that increase in the wealth of developed countries was at the expense of poorer ones. In its extreme form, dependency theory draws inspiration from the Marxist perception that globalisation is merely the exploitation of the developing world and the spread of market capitalism in return for obsolete technologies supplied by the West.[171] Prebisch and his colleagues were troubled that economic growth in advanced nations did not necessarily result in growth in poorer countries. On the contrary, their studies aver that economic activity in richer countries often results in economic problems in poorer countries.[172]

Proponents of the theory advocate an 'inward looking' approach to development and 'an increased role for the state in terms of imposing barriers to trade, making inward investment difficult and promoting nationalisation of key industries.'[173] The inefficiencies associated with state involvement in the economy and the growth of corruption are seen in Zimbabwe's land

[168] Kevin Davis & Michael J Trebilcock 'What role do legal institutions play in development?' A paper delivered at the IMF's Conference on Second Generation Reforms November 8-9, 1999, available at *https://www.imf.org/external/pubs/ft/seminar/1999/reforms/trebil.pdf*, accessed 11 August 2016.

[169] Ibid at 4.

[170] Edgar J Dosman *Raúl Prebisch and the XXIst Century Development (1901-1986)*, available at *http://prebisch.cepal.org/sites/default/files/Prebisch%20por%20Dosman.pdf*, accessed 16 December 2016.

[171] Vincent Ferraro 'Dependency Theory: An introduction,' available at *http://marriottschool.net/emp/WPW/pdf/class/Class_6-The_Dependency_Perspective.pdf*, accessed 16 December 2016.

[172] Ibid at 1.

[173] Frank argues that modernity distorts the truth about the motive of developed countries and that the theory of modernisation fails to articulate the true relationship between the developing and the developed world. See Andre Gunder Frank *Crises in the Third World* (1987). In the view of Rodney, colonialism was a not only a tool for exploitation but also an instrument to underdevelop Africa by repatriating the profits made in Africa to Europe. See Walter Rodney, *How Europe Underdeveloped Africa* (1972).

reform policies as well as in Nigeria's nationalisation policy of the 1970s, which turned out to be anti-development.[174]

2.3.3 Economic Growth Theories

The economic theories briefly discussed here are Adam Smith's theory, the Keynesian theory and neo-classical economic theory.

a. Adam Smith's Comparative Advantage Theory

Adam Smith gained the reputation of being the founder of modern economics. His work titled *The Wealth of Nations* popularised his view on comparative advantage. He argued that unrestricted trade and free international competition are more beneficial to a nation than the mercantilist economic policy that existed in many parts of Europe in the 18th century.[175]

Smith advocated the division of labour as he claimed that it leads to the greatest improvement in the productive powers of labour:

> First […] the increase of dexterity in every particular workman; secondly, […] the saving of time which is commonly lost in passing from one species of work to another; lastly, […] the invention of a great number of machines which facilitate and abridge labour, and enable one man to do the work of many.[176]

b. Keynesian Theory

Keynesian economics gets its name and concepts from John Maynard Keynes, a British economist. He is regarded as the founder of modern macroeconomics. According to Keynes, inadequate overall demand could lead to prolonged periods of high unemployment. His theory rose to prominence against the backdrop of the Great Depression of the 1930s. He argued that government should provide an adequate public policy solution to spearhead production and

[174] On 30th July 1979, the military administration of General Olusegun Obasanjo 'increased its participation to 100 per cent in Shell-BP and BP (Nigeria).' See Ann Genova 'Nigeria's nationalisation of British Petroleum' (2010) 43.1 *International Journal of Historical Studies* (2010) at 115.

[175] Reinhard Schumacher 'Adam Smith's theory of absolute advantage and the use of doxography in the history of economics' (2012) 5.2 *Erasmus Journal for Philosophy and Economics* at 54.

[176] Adam Smith *The Wealth of Nations* IV. Ii.43. See Edwin Cannan (ed) *Adam Smith's Inquiry into the Nature and Causes of the Wealth of Nations* (1904).

employment.[177] Keynes's popular treatise, *The Genera Theory of Employment, Interest and Money* (1936) and his earlier work, *A Treatise on Money* (1930) analysed economics in terms of the flow of incomes and expenditures, thereby opening new vistas for further economic analysis.[178]

The central theme of this theory is that government intervention can stabilise the economy and that monetary policy and taxes can be used as tools to stabilise the economy. For example, reducing interest rates to encourage investments and using taxes to cool down rising inflation. This is the sub-field in economics known as macroeconomics. Keynesian economics therefore focuses on major aspects of the macro economy such as gross domestic product (GDP), national income and wealth, the money supply, unemployment, the consumer price index (CPI), as well as the growth pattern of the economy. This distinguishes Keynesian theory from neoclassical theory, which focuses on markets *per se*.[179] Money forms an important aspect of the theory. Although prices and incomes are expressed and determined in monetary terms, the role of money as a means of payment is distinguished from money as expressing prices or income.[180]

c. Neo-Classical Theory

This theory, in simple terms, maintains that private sector management in a competitive environment is intrinsically more efficient than the public sector, and consequently private sector participation in the procurement, management and maintenance of public infrastructure will result in better quality service delivery.

Neo-classicists maintain that 'capitalist societies are societies that establish and protect two key institutions. The first is private property: each citizen has the power to freely own, buy, or sell his or her resources and produced goods. The second is a system of fully competitive markets: no citizen has any power to control prices, and all buyers and sellers take market process as facts on which to base their decisions. When both institutions exist, a society possesses what is typically called a "private enterprise market economy."'[181] Neo-classical

[177] Sarwat Johan, Ahmed Saber Mahmud and Chris Papageorgiou 'What is Keynesian economics?' (2014) 51.3 *Finance and Development* at 53.

[178] Ibid at 53.

[179] Richard D Wolf & Stephen A Resnick *Contending Economic Theories: Neoclassical, Keynesian, and Marxian* (2012) at 61.

[180] Mark Hayes, *The Economics of Keynes: A New Guide to the General Theory* (2006) at 14.

[181] Richard D Wolf & Stephen A Resnick op cit note 151 at 40.

theorists support an economy that encourages private sector enterprise, with a major emphasis on a free market and free competition.

The proponents of neo-classical theory believe that human beings have inherent rational and productive abilities to produce the maximum wealth possible in society. Everyone is defined in terms of that person's consumption of goods and services and capitalism is the optimum society.[182]

In the context of development, the law is a tool that can be used to enforce government policy directions. As it relates to PPP, whatever directions or changes government intend to pursue, the law can serve to achieve that purpose. Where the law makes it mandatory that the local community is involved from the inception to the approval of PPP projects, this provides a solution to the problem of community stakeholder challenges to implementation of projects. This is similar to, for example, the enactment of a statute to remove custom tariffs of certain imported products to promote free trade following a trade agreement between two or more countries to reflect a change in government policy.[183] It remains to be stated that Law and Development theories could provide direction for the formulation of a PPP framework to suit the requirements of any given country or territory. Such theories can provide the foundation for policy decisions to be carried out by the public authority in support of a successful PPP regime.

2.4 Sanctity of Contract

In the first place, a contract is 'an agreement made between two or more parties which is legally binding on them.'[184] It is an agreement enforceable by the law, between two or more parties, to do or to abstain from doing some act or acts, their intention being to create legal relations and not merely to exchange mutual promises.[185] The law expects that the parties are competent to enter into a legally binding agreement.[186] According to Black's Law Dictionary, a contract is:

[182] Ibid at 52.

[183] YS Lee op cit note 116 at 436

[184] Lucy Jones *Introduction to Business Law* (2011) at 83.

[185] Agbonika John Alewo 'The principle and nature of law of contract in Nigeria: Formation of binding contract' (2012) 5.4 *Journal of Politics and Law* at 123.

[186] S Abiola *Introduction to Business Law in Nigeria* (2005) at 5.

> A deliberate engagement between competent parties, upon a legal consideration, to do, or abstain from doing some act…. It is an agreement creating obligation, in which there must be competent parties, subject-matter, legal consideration, mutuality of agreement, and mutuality of obligation, and agreement must not be so vague or uncertain that terms are not ascertainable.[187]

Such agreements are considered fundamental to business.[188] An agreement is not a contract unless there is an intention for the agreement to be legally binding between the parties.[189] It follows that if parties willingly enter into a contract, the terms of that contract are to prevail except if they are illegal or impossible to perform. Thus, it is not all promises that should be legally enforceable.[190] For example, an agreement between friends to meet at the cinema by 4.00 pm on Saturday must be assumed to be an agreement of a social nature and not meant to be binding on the parties. Generally, the setting in which the agreement is made can help to determine the intention of the parties. If the agreement was made in a social or domestic setting, the courts would view it as a social or domestic agreement. On the other hand, if the agreement was made in a *commercial setting*, it is to be assumed, unless proven otherwise, that there was an intention on the part of the parties to the agreement that legal obligations were created.[191] In *Amadi v Pool House Group Co*,[192] the plaintiff was a stacker who claimed to have won a lump sum. The defendant successfully denied any liability by relying on an honour clause that the contract was not intended to be binding.

It is a truism that the commercial and economic life of people in society is woven around agreements. It follows that commerce and trade would become chaotic if the law allowed a promisor to break his or her promises without, at least, placing him or her under the obligation to pay a compensation to their promisee for the loss caused by their default. This is because the law generally regards contracts as sacrosanct: the principle of sanctity of contract. Thus, where parties duly enter a contract, they must honour their obligations under the contract.

The law of contract is concerned with determining whether there is a legally binding agreement between the parties and ensuring that there is a remedy in a situation where a party fails to perform an obligation in accordance with the terms of the agreement. It becomes clearer

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[187] Henry Campbell Black *Black's Law Dictionary* 4 ed (1968) at 394.

[188] Lucy Jones op cit note 192 at 83.

[189] The parties to a contract may be natural or artificial persons.

[190] Brian Coote 'The essence of contract: Part II' (1988) 1 *JCL* 183 at 192.

[191] Lucy Jones op cit note 192 at 119.

[192] (1966) 2 All NLR

where there is some form of exchange between the parties based on their agreement.[193] The standard for determining whether the parties intended to create a legally binding agreement is that of a reasonable man. In common law, the question is, will a reasonable person, observing the words and the conduct of the parties objectively and considering the nature and context of the agreement, consider that there was an intention to create legal relations? If the answer is in the affirmative, then the court would order that the party in breach compensate the injured party.[194]

For an agreement to be considered a contract, there must be the communication of a promise to undertake or assume an obligation.[195] Adam Smith thought that contracts should be enforced because they induce reasonable expectations.[196] The law, therefore, should recognise a promise as a contract when a reasonable person in the promisee's position would expect performance or equivalent compensation.[197]

The principle of the sanctity of contract has, in the context addressed by this study, become more compelling due to the emergence of private sector participation in the provision of infrastructural services, with far-reaching effect.[198] The consequences of the failure of the government to adhere to the principle of sanctity of contract are severe, shaking the confidence of prospective investors in taking an investment decision.[199] Sanctity of contract entails that obligations in a contract must be honoured because the contract was entered into willingly.[200] Contracts freely entered into must be honoured and, where necessary, enforced by the courts.[201] The doctrine of sanctity of contract, also known as *pacta sunt servanda* came into question in the South African case of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*,[202] where the court invoked 'the age-old contractual doctrine that agreements solemnly made

[193] Ibid at 117.

[194] Ibid at 118.

[195] Stephen A Smith *Contract Theory* (2004) at 57.

[196] Brian Coote op cit note 198 at 195.

[197] Dena Valente *Enforcing promises: Consideration and intention in the law of contract* (unpublished thesis, University of Otago, 2010) at 4.

[198] Olatunde Ayeni 'The need for sanctity of contracts for the success of the power sector reform: An investor's experience' *The Lawyer* (2016), a *ThisDay* weekly Pull-out 24 April at 8-10.

[199] Ibid.

[200] Dale Hutchison, Chris-James Pretorius & J E du Plessis *The Law of Contract in South Africa* (2012) 21.

[201] Luanda Hawthorne *Contract Casebook* (1995) 173.

[202] 2012 (1) SA 256 (CC).

should be honoured and enforced (*pacta sunt servanda).*'[203] The decision of the Supreme Court of South Africa in *Mohammed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel (Pty) Ltd*[204] reinforces the need to ensure that contractual agreements are respected especially when the terms of the contract are not against public policy. Hence, the principle of *pacta sunt servanda* should be applied. The case before the Supreme Court was an appeal against the decision of the Gauteng Local Division of the High Court. The court of first instance had entered judgement in favour of the plaintiff (Southern Sun Hotels Interest (Pty) Ltd on grounds that an eviction of the plaintiff based on their breach of clause 20 of the lease agreement for failing to pay rent to the defendant on the due date is manifestly unreasonable, unfair and offend public policy. The Supreme Court held that 'it was a material term of the agreement that should the respondent fail to pay the rental on due date, then the appellant would be entitled to cancel the lease and retake possession.'[205] It therefore follows that in so far as enforcing a contract will not lead to an illegality or where doing so does not offend public policy, the parties must respect the terms of the agreement[206].

In South Africa, the principle of sanctity of contract is applied in line with the 1996 Constitution of the Republic of South Africa,[207] which promotes the principles of dignity, equality and justice.[208] In the case of *Brisley v Drotsky*,[209] Cameron JA used section 39(2) of the Constitution to connect the common law of contract with these constitutional values. Similarly, in *Brendenkamp & Ors v Standard Bank of SA Ltd,*[210] the court *inter alia* held that contractual promises should be kept and that the exercise of a contractual right, which does not involve public policy considerations or constitutional values, does not have to be fair to warrant being set aside when it is not in breach of the constitutional values of equality and justice.

The Supreme Court of Nigeria was firm in upholding the duty to honour binding agreements involving the public sector or governments in their sovereign might, as illustrated

[203] Supra para 70.

[204] (183/17) [2017] ZASCA 1

[205] Supra para 5.

[206] See also *Roazar CC v The Falls Supermarket CC* 2017 ZASCA at 166.

[207] *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC).

[208] Supra.

[209] 2002 (4) SA 1 (SCA) para 88–95.

[210] 2010 ZASCA at 75.

in *Attorney General Nassarawa State v Attorney General Plateau State.*[211] At the creation of Nassarawa State out of the former Plateau State, the Military Administrators had a meeting with General Abacha, the then Head of State, during which some areas of Plateau State were by agreement allocated to Nassarawa State. Later, the government of Plateau State failed to abide by the agreement and the Nassarawa State government instituted action to enforce the agreement. The Supreme Court noted:

> If mutual agreement entered by parties to it shall be treated lavishly and that any party shall be allowed to unilaterally resile from the commitment both parties have signed to bind themselves, then the essence of any agreement or mutual contract is woefully defeated.[212]

Further deprecating the attitude of the Plateau State government in seeking to unilaterally resile from its agreement with the Nassarawa State government, Peter-Odili JSC said:

> This attempt by the defendant is reckless with capacity to encourage lawlessness and disobedience to constituted authority and the Rule of Law which outcome would not rule out chaos. People or those in charge of institutions or government at every level should be cautious and wary of taking steps that are definitely not in keeping with the peace and order of this nation. The defendants are bound and stopped from going against that Agreement.[213]

It has been noted that for a prospective investor who wishes to enter a contract with the public sector in a developing economy, the following questions may arise: first, would such a contract in writing be respected? Secondly, can the investor enforce the terms in case of default? Thirdly, would an investor have a remedy? And where there is a remedy, would the Government honour the remedial measures? Fourthly, if there is a change in government would a previous administration's commitments be respected by the succeeding administration? Fifthly, would the government as a party honour its own obligations under the contract?[214]
The importance of respect for contracts by government came into question in the United States[215] in *Perry v United States,*[216] when the court per Chief Justice Hughes held as follows:

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[211] [2012] 10 NWLR (Pt 1309) 419.

[212] *Attorney General Nassarawa State v Attorney General Plateau State* supra 458C per Muhammad JSC.

[213] Supra 489.

[214] Olatunde Ayeni op cit note 206 at 9.

[215] This is of persuasive authority in Nigeria.

[216] 294 U.S. 330 (1934).

> The United States are as much bound by their contracts as are individuals…. When the United States, with constitutional authority, makes contracts, it has similar rights and incurs responsibilities similar to those of individuals who are parties to such instruments…. The [contrary] argument…is in substance that Government cannot by contract restrict the exercise of a sovereign power. But the right to make binding obligations is a competence attaching to sovereignty…. The binding quality of the promise of the United States is of the essence of the credit which is…pledged. The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legal and biding character of its contracts.[217]

It is pertinent to note that sanctity of contract is enshrined in the Constitution of the United States under Article I, Section 10. It provides, in the relevant part, that: "No state shall … pass any Bill of Attainder, ex post facto Law, or Law impairing the obligation of contracts. What this means is that the US government is prohibited by the Constitution from taking any action that may retroactively alter the terms of a contract."

When a private entity deals with government, certain questions arises. First, can the investor enforce the terms of the agreement where government defaults? Secondly, where the investor obtains remedy against the government, will such a remedy be honoured and thirdly, what happens if there is a change in government, will the new government honour the agreements of its predecessor in office? The answer to these questions is hinged on sanctity of contract and therefore investors consider whether a country's legal and regulatory environment favours cross-border projects.[218] In a contractual relationship between the state and a private sector entity, both parties are bound by their agreement. In *BFI Group Corporation v Bureau of Public Enterprises*,[219] the respondent advertised for expression of interest by interested bidders for the privatisation of the Aluminium Company of Nigeria. The appellant completed the request for proposals (RFP) issued by the National Council on Privatisation (NCP). The RFP contained the term that a bidder will be selected on the basis of and selection procedure approval by the NCP and contained in the RFP. The relevant clause in the RFP stipulated that bid proposals shall remain valid for 60 days after the submission date and that proposals shall be binding offers, acceptable by BPE to form binding contract between parties during the validity period. Undertakings and agreement signed by the appellants also contained a clause

[217] Ibid at 551–54. The case of the *Attorney General of Nassarawa State v the Attorney General Plateau State* cited Supra,

[218]Paul Obo Idornigie 'Towards adopting an appropriate dispute resolution mechanism to promote investments to enhance energy access in Africa' in Yinka Omorogbe & Ada Ordor (eds) *Ending Africa's Energy Deficit* (2018) at 164.

[219] (2012) All FWLR 676

that 10 per cent of the acceptable bid price shall be paid within 15 working days of the signing of the share purchase agreement, and that the outstanding 90 per cent shall be paid within 90 calendar days. The appellant was successful in his bid of $410 million for the 77.5 per cent shares of the Federal Government in ALSCON. By a letter dated 17 June 2006, the respondent in confirming the appellant's success, unilaterally introduced a term stipulating that 10 per cent of the bid price must be paid within 15 days of the appellant's receipt of the letter. The appellant fulfilled all conditions for the validation of its bid including the procurement of a bid bond. The respondent however repudiated the agreement on the basis that the 10 per cent of the bid price was not paid within 15 days of the receipt of its letter dated 17 June 2006. The appellant instituted a suit at the Federal High Court claiming various declaratory and injunctive reliefs. The trial court dismissed the claims. The appeal to the Court of Appeal was also dismissed. Aggrieved still, the appellant appealed to the Supreme Court. The Supreme Court, in a decision in favour of the respondents, held *inter alia* that the court must treat as sacrosanct the terms of an agreement freely entered by the parties.

As Parry notes, the doctrine of sanctity of contract was greatly influenced by the Ecclesiastical Courts in England as well as by the Court of Chancery. These courts sought to provide a remedy by filling the wide gap in law left under the common law. Thus, where a promisor had made a pledge and failed to perform his agreement, his failure constituted at that time an ecclesiastical offence for which he was answerable in church courts as a sinner in need of correction. This was because the King's courts only ratified or enforced contracts made under a pledge of faith and the Constitutions of Clarendon, 1164.[220]

2.4.1 Classical Approach to Sanctity of Contract

The doctrine of sanctity of contract had a primary role in classical law in securing a transactional framework. It prevented contractors from avoiding some or all of their obligations in a contract by raising excuses as to why they could not perform. However, contractors could be released from the terms of the contract through interpretation of the doctrines of frustration and mistake.[221]

[220] David Hughes Parry op cit note 118 at 4.

[221] Husam M S Botosh 'Striking the balance between the boundaries of certainty and fairness in the law governing letters of credit' (Unpublished Ph.D. Thesis, University of Sheffield, 2000) at 60.

2.4.2 Modern Approach to Sanctity of Contract

In modern times, the approach is more an interventionist one. This is quite different from the classical model as the core question in the modern approach centres on whether is it reasonable to hold a contractor to an apparent bargain.[222] The difference in the two views is illustrated in the English case of *L Schuler AG v Wickman Machine Tool Sales Ltd.*[223] In that case, 'L' and 'M' entered an agreement which stipulated as a condition that 'W' must visit the named manufacturers under Clause 7(b) of the agreement. The majority decision of the House of Lords was that Clause 7(b) was not a condition in the strict sense, i.e. 'L' had no right to withdraw when 'W' breached the term. However, it was the dissenting opinion that highlights the principle of the sanctity of contract. Per Lord Wilberforce:

> To call the clause arbitrary, capricious or fantastic, or to introduce as a test of its validity the ubiquitous reasonable man, is to assume, contrary to the evidence, that both parties to the contract adopted a standard of easy-going tolerance rather than one of aggressive, insistent punctuality and efficiency. This is not an assumption I am prepared to make, nor do I think myself entitled to impose the former standard upon the parties if their words indicate, as they plainly do, the latter.[224]

Following from the above, it can be deduced that Lord Wilberforce's judgment was that the agreement between the parties should be respected and that sanctity of contract be upheld. That view represents the classical view that a contract must be respected in its entirety. However, the modern approach to sanctity of contract is represented by the majority House of Lords judgment, which considered that the obligation to visit a named manufacturer does not go to the root of the contract and warrant its termination; rather, the parties should read the contract through the lens of reasonableness.

It remains to be stated by way of conclusion that the doctrine of sanctity of contract cannot be convincing without genuine freedom of contract. Even though in the modern era, courts tend to consider whether it is reasonable for the parties to perform the terms of a contract, it is sacrosanct that parties who of their own volition enter contractual obligations respect the terms of their agreement. As pointed out in *Perry v United States*, above, nation states who enter into contractual obligations with private parties must be held accountable like individuals.

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[222] J N Adams & Roger Brownsword *Key Issues in Contract* (1995) at 52.

[223] [1974] AC 235.

[224] [1974] AC 235 at 263.

2.5 What Makes a Good Public-Private Partnership Law

Having examined the theoretical constructs upon which the argument of this thesis is anchored, it remains to consider what a good PPP law should entail. It is imperative that PPP laws address key issues that relate *inter alia* to finance, changing attitudes to risk allocation, improved contract management, public investment management and regular reviews to ensure achievement of expected value for money.[225] In order to address some of the areas of concern regarding project failures, it is beneficial that the legal and regulatory framework for PPP cater to important aspects of the PPP process such as implementing the law and policy, assigning procedures and responsibilities for the identification, selection, preparation and approval of bankable projects and ensure efficient contract management and monitoring.[226]

2.6 Conclusion

This chapter examined three theories that lay the foundation upon which the research rests. First, the principle of the rule of law advocates that the public authority is not above the law, no more than any ordinary citizen or corporate entity. According to this principle, the public authority must be held accountable for the actions or inaction of those in authority. Secondly, the theory of law and development insists upon the role of law in bringing about economic and social change. The law should be actively used to help achieve societal goals. Thirdly, the principle of the sanctity of contract holds that the requirement that parties adhere to contractual agreements should equally apply to nation states. This is seen in the US Supreme Court case *Perry v United States*,[227] where it was held that when the United States, with constitutional authority, makes contracts, it has rights and incurs liabilities similar to those of individuals who are party to such instruments.

However, there are cases where the public authority may not be under obligation to honour a contract. These are exceptional circumstances. For example, under the doctrine of fettering discretionary powers, the courts should be reluctant to interfere with a decision taken

[225] Philip Kelly 'Preparing a public-private partnership law: Observations from the international experience' (2016) *ADB East Asia Working Paper Series* at 13 available at *www.adb.org/sites/default/files/publication/190132/eawap-04.pdf*, accessed 17 November 2018.

[226] Ibid 15.

[227] 294 U.S. 330 (1935) at 352.

by the public authority as a matter of public policy or in the public interest.[228] Another example of a case where the courts would not enforce a PPP contract is where the process is leading to the award of the contract is flawed on grounds of illegality.[229] This will also be the position of the law where fulfilling the obligations under a contract have become illegal, the contract cannot be enforced.[230]

In conclusion, it is imperative that the state and as well as individuals[231] are subject to the law. The law must also be in consonance with the times to support development and protect commerce. Similarly, all promises intended to have legal obligations must be honoured to the letter, except in cases where it is impossible to perform the obligations or where it is illegal to do so. This is important because every investor considers profit before investing capital. In the case of foreign investors, it is not enough for there to be the prospect of good returns on the investment: the law must also provide a guarantee for the repatriation of profits made from legitimate business concerns. Importantly also, it is not enough to make good laws to encourage investments: the institutions of state have a corresponding duty to ensure that the laws are implemented and respected. It is only in this way that the law can have a positive impact on the economy.

In the next chapter, the focus moves to analysis of the theory and practice of public-private partnership, its merits, demerits and contractual nature.

[228] MA Ikhariale 'The doctrine of legitimate expectations: Prospects and problems in constitutional litigation in South Africa' (2001) 45 *Journal of African Law* at 8.

[229] Lucy Jones op cit note 188 at 239.

[230] Ibid.

[231] Whether as natural or artificial persons.

CHAPTER THREE

PUBLIC PRIVATE PARTNERSHIP IN PRACTICE: UNDERSTANDING THE CONCEPT, ITS MERITS AND DEMERITS, AND CONTRACTUAL NATURE

3.1 Introduction

In contemporary times, private sector financing of the procurement of 'new or the rehabilitation of existing public infrastructure is increasingly becoming popular across many countries.'[232] The reason for this 'partnership' between the public sector and the private sector is due to the challenge of budget deficits and competing demands for state resources. Thus, governments can no longer afford to fund all state infrastructure projects as they previously did. This study is concerned with private-sector backed or financed infrastructure projects arranged as a PPP. It is important to state at the outset that not all private sector financing of infrastructure projects qualify as a PPP:[233] financing is only one element.[234] This is the reason why a discussion of PPP must begin with an appropriate definition of the term, to avoid confusing it with other similar forms of public procurement.

Although there is no agreement among scholars as to a universal definition for public-private partnership (PPP), many of the definitions highlight the fact that PPP entails a collaboration between the public sector and the private sector to provide a service that was traditionally exclusively provided by the public sector.

This chapter examines various definitions of public-private partnership and identifies elements internal to PPP arrangements as well as surrounding factors essential to the operation of PPPs. Establishing the nomenclature pertaining to PPP is essential to creating new legal provisions or applying existing ones to achieve the goals of parties agreeing to PPP arrangements/transactions.

3.2. Defining Public-Private Partnerships

In this section, definitions provided by institutions, scholars and statutes are discussed. The goal is thus to arrive at an appropriate working definition to avoid confusing PPP with other forms of procurement. It is submitted that several definitions of PPP that have been proposed

[232] E R Yescombe op cit note 44 at xv.

[233] Darring Grimsey and Mervyn K Lewis op. cit. note 2 at 6.

[234] Ibid at 6.

do not actually distinguish between PPP and, say, a service or management contract where the public sector hires a private sector contractor to provide a service – for example, the collection and disposal of refuse. While some authors have included this form of partnership within the purview of PPP, this writer is of the view that they have done so in error.

3.2.1 Institutional Definitions

Under this sub-section, the study examines definitions put forward by the World Bank, the International Monetary Fund (IMF), the European Union (EU) and the African Development Bank (AfDB).

The World Bank defines PPP as follows:

> Public-private partnerships (PPPs) are a mechanism for government to procure and implement public infrastructure and/or services using resources and expertise of the private sector. Where governments are facing ageing or lack of infrastructure and require more efficient services, a partnership with the private sector can help foster new solutions and bring finance.[235]

This definition appears to be too broad and does not provide any detail as to what makes a partnership between the private and public sectors a PPP. According to the World Bank's definition, service contracts would also be deemed PPPs since it is possible for the private sector to provide only a service at a public facility without providing any finance or being the owner of the facility during the period of the contract. For example, a private sector firm may be hired to provide cleaning services at a government-owned facility. This would appear to fit into the above definition, but for the purposes of this study, cannot be considered a PPP.

The International Monetary Fund (IMF) states that PPP refers to:

> Arrangements where the private sector supplies infrastructure assets and services that traditionally have been provided by the government.[236]

This definition does not distinguish PPP clearly from traditional procurement other than by the phrase 'services that traditionally have been provided by the government.' The definition raises doubt as to what PPP truly is. This is because even in traditional public procurement, the

[235] The World Bank 'About public-private partnerships,' available at *https://ppp.worldbank.org/public-private-partnership/about-public-private-partenrships*, accessed 22 November 2016.

[236] Fiscal Affairs Department, IMF, 'Public-private partnerships' (2004) at 4, available at *https://www.imf.org/external/np/fad/2004/pifp/eng/031204.pdf*, accessed 22 November 2017.

government often contracts out the building of facilities to the private sector. This is the case when, for instance, the public sector designs the facility, with the private sector only contracted to undertake its construction. The project is entirely funded by the government.

For its part, the European Union (EU) defines PPP as follows:

> PPPs describe a form of cooperation between the public authorities and economic operators. The primary aims of this cooperation are to fund, construct, renovate or operate an infrastructure or the provision of a service.[237]

It is submitted that although the EU's definition is more precise than those of the World Bank and the IMF, the EU definition is defective in that it makes no reference to the ownership of the facility during its construction and operational phases.

Rather curiously, the African Development Bank (AfDB) does not provide a definition of public-private partnership on the PPP section of its website, merely commenting on the emergence of PPP as follows:

> Public-Private Partnerships (PPPs) have emerged over the last decade as one of the best ways to foster development, fuelled by insufficient investment, growing pressures on government budgets and a general concern about service provision by state enterprises and agencies.[238]

3.2.2 Definitions under Statutes

This sub-section examines some definitions of PPP provided in statutes.

The Infrastructure Concession and Regulatory Commission (Establishment etc.) Act 2005 (ICRC Act 2005), which sets out a PPP framework at the national level in Nigeria, does not provide a definition of PPP. It does however offer a definition of the term 'Concession,' which is a PPP genre. This seems deliberate as the Act in Nigeria seemingly only recognises the concession type of PPP (as indeed the title of the Act appears to indicate). Section 36 of the ICRC Act 2005 defines a concession as:

> A contractual arrangement whereby the project proponent or contractor undertakes the construction, including financing of any infrastructure, facility and the operation and maintenance thereof and shall include the supply of any

[237] Europa 'Access to European Union Law,' available at *http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3AI122012*, accessed 22 November 2016.

[238] African Development Bank 'Public-Private partnerships,' available at *http://www.afdb.org/en/topics-and-sectors/private-sector/areas-of-focus/public-private-partnerships/*, accessed 22 November 2016.

> equipment and machinery for any infrastructure and the provision of any services.

This definition as provided in the ICRC Act 2005 does not accommodate the private finance initiative (PFI) type of PPP, which is the norm in countries like the United Kingdom and Australia. The major difference between the PFI model and the concession model is that in the case of the former, the government pays the private sector consortium for the use of the facility whereas in the case of the latter, the end-user (i.e. the ordinary member of the public) pays a toll or a charge for using the facility. Taking the above into consideration, where there is, for example, a need for the construction of a prison facility by the private sector, a concession type of PPP would not be suitable.

Interestingly, at the sub-national level, the Rivers State Government recognises that there may be occasions where the PFI model is preferable. This is provided for in the Rivers State PPP Law which is a verbatim repetition of Section 16(1) of the South African Public Finance Management Act No. 1 of 1999. It is noteworthy that both laws avoided the use of the word 'concession' in the title to avoid confusion. The Rivers State Public-Private Sector Participation in Infrastructure Development Law of 2009 defines PPP as:

> A commercial transaction between the public sector and a private party in terms of which the private party
> (a) Performs an institutional function on behalf of the government;
> (b) Acquires the use of state property for its commercial purposes;
> (c) Assumes substantial financial, technical and operational risks in connection with the performance of the functions of the government and/or use of state property; and
> (d) Receives a benefit for performing the institutional function or from utilising the state property either by way of:
> i. Consideration to be paid by the institution which derives a revenue fund or, government business enterprise from revenues of such institution; or
> ii. Charges or fees to be collected by the private party from users or customers of a service provided to them; or
> iii. A combination of such consideration and such charges or fees.[239]

Although the above definition provides for a PFI procurement if the need arises, it fails to clearly differentiate PPP from traditional public-sector procurement. It also fails to consider the element of ownership of the facility during the life span of the PPP agreement. It is

[239] S 77 Rivers State Public-Private Sector Participation in Infrastructure Development Law 2009.

submitted that this is a gap that needs to be addressed in future amendment of the Rivers State Law.

3.2.3 Definitions by Individual Authors

Several definitions of the term PPP have been offered by authors writing on the subject or on project finance more generally. Significantly, the definitions proffered have been influenced by the various writers' backgrounds.

To Delmon, a lawyer, 'PPP is used here in its most inclusive form, to mean any *contractual or legal relationship* between public and private entities aimed at improving and/or expanding infrastructure services but excluding public work contracts' (emphasis added). In his definition, Delmon seeks to distinguish between PPP and traditional procurement. With respect, his definition leaves out certain fundamental elements of a PPP.[240]

Yescombe, a lawyer and a management and project finance specialist, offers a description of PPP based on the following elements:

i. A long-term contract (a 'PPP Contract') between a public-sector party and a private-sector party;
ii. For the design, construction, financing, and operation of public infrastructure (the Facility) by a private-sector party;
iii. With payments over the life of the PPP contract to the private-sector party for the use of the Facility, made either by the public-sector or by the general public as users of the Facility; and
iv. *With the Facility remaining in public-sector ownership or reverting to public-sector ownership at the end of the PPP contract.*[241] (emphasis added.)

Akintoye, Beck and Hardcastle, experts in the built environment, define a PPP as 'a long-term contractual arrangement between a public-sector agency and a private sector concern *whereby resources and risks are shared for the purpose of developing a public facility*'.[242]

[240] Jeffrey Delmon *Creating a Framework for Public-Private Partnership (PPP) Programs: A Practical Guide for Decision-makers* (2014) at 6.

[241] E R Yescombe op cit note 44 at 3.

[242] A Akintoye, M Beck & C Hardcastle *Public-Private Partnerships: Managing Risk and Opportunities* (2003) at 2. (Emphasis added).

For the purposes of this research, and taking into consideration the definitions advanced above, in the opinion of this writer, a PPP can be defined as a long-term contractual relationship between a government or any of its agencies on the one hand, and a private sector consortium on the other, for the design, construction or rehabilitation and the management of a public facility, with risk transferred to the private sector entity for the duration of the contract, after which the facility is returned to the public authority.

The above definition does not include service contracts provided by the private sector which typically do not cover designing, building or rehabilitating and managing public facilities. It is only PPP contracts that fall within the ambit of this definition that constitute the focus of this research. This clarification is important in the sense that policy makers ought not to leave room for any ambiguity of purpose when they seek to partner with the private sector.[243]

Finally, the outlook for PPP in terms of how it is defined and presented in future laws or policy statements, should be reflect the importance of the protection of the assets of investors in PPP projects. Such an outlook for PPP in the Nigerian environment would help in creating as well as sustaining the interest of investors in PPP projects in the country.

3.3 Origins and Related Terminology

In this section of the study, the historical evolution of PPP is discussed. There is also brief discussion of some of the terminologies used in place of PPP in certain jurisdictions.

3.3.1 The Origin of PPP

The collaboration between the public and private sectors for the provision of infrastructure is not a new phenomenon. The modern-day adoption of public-private partnerships (PPP) is at best the revival of an old tradition:[244] it is the terminology that is recent in usage.

Toll roads are not new. The Salassi tribe was given a toll concession by the Roman Empire in return for maintaining the pass and providing guidance and porterage across the mountain range as far back as in 21AD.[245] In the middle ages, tolls were used to support the

[243] The World Bank op cit note 76 at 7.

[244]The World Bank 'Overview of PPP experience,' available at *https://ppiaf.org/sites/ppiaf.org/files/documents/toolkits/highwaystoolkit/6/pdf-version/1-21.pdf*, accessed 22 November 2016.

[245] Darring Grimsey & Mervyn K Lewis op cit note 2 at 42.

cost of the construction of bridges in the UK. This included London Bridge (1286) and the toll road from London to Philippe Litchfield.[246]

In France, PPP can be traced back to 1438 when the French nobleman Luis de Bernam was granted a river concession to charge fees for goods transported on the Rhine.[247] In 1792, a concession for water distribution was granted to the Perrier brothers in Paris.[248]

In the modern era, the PPP concept was rejuvenated in the UK in the early 1990s.[249] Because of the decline in infrastructure investment following the 1973 oil crisis and the International Monetary Fund (IMF) intervention three years later, successive governments in the UK imposed substantive cuts in public sector capital spending. Under the Labour administration in 1974/75, the net public sector investment was £28.8 billion.[250] This nosedived to more than half decades later, in both 1988/89 and 1998/99.[251] At about this time, the UK government was burdened by some unprecedented privatisation-related payments as well as North Sea Oil revenues.[252]

The administration of Mr John Major introduced PPP as a key policy tool in 1992 and a strategy to close the infrastructure gap in the UK.[253] The PPP model adopted by the UK was the private finance initiative (PFI).[254] Prior to the introduction of PFI, the use of private funds for public assets had been restricted by the Ryrie Rules.[255]

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[246] Ibid.

[247] Ibid at 42.

[248] Polish PPP Unit 'PPP – definition, origin and evolution,' available at *http://ppp4krakow.net/About_PPP/Definition_origin_and_evolution/*, accessed 22 November 2016.

[249] Ibid.

[250] Representing 5.5 percent of GDP.

[251] Representing 0.4 percent of GDP.

[252] Dexter Whitfield *Private Finance Initiative and Public Private Partnerships: What Future for Public Services?* (2001) 5.

[253] Bastina Heinecke 'Involvement of small and medium-sized enterprises in the private realisation of public buildings,' available at *https://www.econstor.eu/bitstream/10419/48371/1/352752939.pdf*, accessed 16 February 2017.

[254] Ibid.

[255] Ibid.

The relative success of the PFI in the UK made it attractive to other countries, and the strategy has since gained prominence in Canada, Australia, New Zealand, continental Europe and Latin America.[256]

South Africa adopted a PPP policy in April 1997, having approved the appointment of an inter-departmental task team to develop a package of policy, legislative and institutional reforms. The task team created an enabling environment for PPPs as well as set up pioneering projects for the N3 and N4 toll roads that same year.[257] Nigeria passed a PPP law in 2005 which was followed by a National Policy on PPP in November 2008. Since the passing of the Nigerian ICRC Act of 2005, several arrangements have been concluded.

3.3.2 Other Terms Used as Alternatives for PPP

The term PPP became widely used in 1997 under the Labour government in the UK, even though the new programme was structured along the lines of the PFI previously adopted by the Conservative government.[258] On the international scene, other terms are used in place of PPP even though the same aim – to get the private sector to fund, manage and operate public infrastructure – is intended.[259] The related terms include:[260]

i. *Private Participation in Infrastructure (PPI)*, which is commonly used by the World Bank and within the development-financing sector. The same term has been adopted by South Korea;
ii. *Private-Sector Participation (PSP)*, used in the development-banking sector;
iii. *P3*, used in North America;
iv. *Privately-Financed Projects (PFP)*, used in Australia;

[256] EYG Limited 'Public-private partnerships and the global infrastructure challenge,' available at *http://www.ey.com/Publication/vwLUAssets/EY-public-private-partnerships-and-the-global/%24FILE/EY-public-private-partnerships-and-the-global.pdf*, accessed 23 November 2016.

[257] National Treasury 'Public private partnership,' available at *http://www.ppp.gov.za/Pages/About.aspx*, accessed 23 November 2016.

[258] The World Bank Group 'Main types of PPP,' available at *https://ppiaf.org/sites/ppiaf.org/files/documents/toolkits/highwaystoolkit/6/pdf-version/1-13.pdf*, accessed 23 November 2016.

[259] E R Yescombe op cit note 44 at 4.

[260] Ibid.

v. *P-P Partnership* (to avoid confusing it with the term 'purchasing power parity,' a method used to compare currency exchange rates which is also referred to as PPP); and

vi. *Private Finance Initiative (PFI)*, a term with roots in the UK and now adopted in Japan and Malaysia.

3.3.3 Difference between PPP and Public-Sector Procurement

Following from the definitions discussed in Section 3.2, above, it is important for clarity's sake to distinguish between PPP and public-sector procurement. This is because the private sector may also be involved in public-sector procurement, especially when the project is not being executed by means of direct labour on the part of a government agency.

Where traditional public-sector procurement is used, the facility[261] is usually procured by funding sourced from tax revenues, other forms of government income or public borrowing. When there is need for a facility, the public authority sets out with the specifications and the design for the project. It then invites bids for the construction of the facility by a private contractor in what is commonly referred to as 'design-bid-build.' In this case, the public authority funds the full cost of construction as well as the cost overruns. Again, the private contractor has no business with the management of the facility after construction.[262] In the case of a PPP, however, the public authority lists its requirements for the facility but leaves out specific details regarding its design and construction. It is then up to the private sector consortium to design, finance, build and operate the facility in such a way as to meet the initial requirements set out by the public authority. As a consideration, the private sector consortium is authorised to receive 'tolls' or 'fees' over the life of the contract on a pre-agreed basis. Through this approach, risks are transferred to the private sector consortium during the subsistence of the contract.

3.3.4 Difference between Public-Private Partnership and Service Contracts

It is important also to distinguish between PPP and service contracts, because of the practice of private sector involvement in a public facility under a service contract. A private sector firm may be contracted by the public sector to provide a service only on a public facility. Service

[261] The term 'Facility' is used interchangeably in this study with the word 'Project.'

[262] E R Yescombe op cit note 44 at 4.

contracts are sometimes referred to as management contracts or outsourcing. Under a service contract, a cleaning company may be contracted to clean a facility within the period of the contract. In this case, although a private firm is involved, there is no PPP as the term is understood within this research. Again, if a private firm is hired to operate a public facility and there is no transfer of ownership of the facility from the public sector to that private firm during the duration of the contract, it cannot be said to be a PPP.[263]

3.3.5 Difference between Public-Private Partnership and Privatisation

Privatisation refers to the transfer of ownership and control of a government enterprise from the public to a private sector entity.[264] In countries where there are developed capital markets, this may be effected by the sale of shares to the public.[265] In countries with less developed capital markets, divesture may be by way of sale to a complete entity or a joint venture.[266]

The main difference between PPP and privatisation is that in the case of a PPP the ownership of the facility is transferred to the private sector consortium only for the period of the contract. Thereafter the ownership reverts to the public authority. In the case of privatisation, however, there is a complete and permanent divesture of a part of or, in some cases, all the interest of the public sector in the facility.

3.4 Categorisation of Public-Private Partnerships

For the purposes of this research, PPPs can broadly be categorised into concessions and private finance initiatives (PFI).[267] The categorisation is based upon who pays for the use of the facility, whether it is the end-user or the public authority.[268]

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[263] National Treasury 'What is the difference between "outsourcing," "privatisation" and PPP'?, available at *http://www.ppp.gov.za/Lists/Frequently%20Asked%20Questions/Flat.aspx?RootFolder=http%3a%2f%2fwww%2eppp%2egov%2eza%2fLists%2fFrequently%20Asked%20Questions%2fWhat%20is%20the%20difference%20between%20%27outsourcing%27%20%27privatisation%27%20and%20%27PPP%27&FolderCTID=0x012002006D200A7673B48E4E9E5071727D05195F*, accessed 24 November 2017.

[264] Alfred G Nhema 'Privatisation of public enterprises in developing countries: An overview' (2015) 5.9 *International Journal of Humanities and Social Science* at 247.

[265] Ibid.

[266] Ibid.

[267] United Nations Economic Commission for Europe *Guidebook on Promoting Good Governance in Public-Private Partnerships* (2008) at 1.

[268] Ibid.

3.4.1 Concessions

In a concession type of PPP, the end-users pay 'tolls' or 'fees' for using the facility.[269] The public authority grants a private investor the right to design, build, finance and operate a facility for the public sector. The contract is usually tenured to last for a fixed period of say, 25–30 years, after which the ownership of the asset is transferred from the private investor back to the public authority. During the period of the operation of the concession, the private investor recoups its investment, the operating and financing expenses and its return on investment (RoI), by collecting tolls or fees from members of the public who use the facility. A good example of this are toll roads or concession-built airports.[270]

3.4.2 Private Finance Initiative (PFI)

In a PFI, it is the public authority that pays the private consortium fees for the use of the facility by members of the public. In the words of Yescombe, the 'PFI introduced the concept of payment by the public authority.'[271] This type of PPP is more suitable for the kinds of projects that should be paid for by the government, for example, prisons and libraries. In this case, the demand or usage risk rests squarely with the public authority.

[269] PPIAF *Public-Private Partnerships: Reference Guide* (2014) at 19.

[270] The World Bank op cit note 270 at 9.

[271] E R Yescombe op cit note 44 at 9.

3.5. Models of Public-Private Partnership

Concessions or PFI-type PPPs may be operated in any of the following modes:

i. *Design-Build-Finance-Operate (DBFO):* Under this model, the private sector consortium designs the facility, builds it, funds it as well as operates it during the period of the PPP contract (which could be for a period of 20, 25 or 30 years).[272]

ii. *Build-Rent-Own-Transfer (BROT):* In a BROT, the private sector partner builds the PPP facility, rents it, owns it for a period and transfers it to the public sector at the end of the PPP contract.[273]

iii. *Rehabilitate-Operate-Transfer (ROT):* In a ROT, the contract specifies that the private sector consortium is to rehabilitate an existing government facility, operate it during the tenure of the contract, and transfer the facility back to the public authority upon the termination of the contract.[274]

iv. *Lease-Develop-Operate (LDO):* Under this arrangement, the private party leases an existing facility from the public authority, and invests its own capital to renovate, modernise, and/or expand the facility. At the end of the contract, the facility is transferred to the public authority.[275]

v. *Build-Operate-Transfer (BOT):* Here the private investor builds the facility, operates it and transfers it to the public authority at the end of the PPP contract.[276]

vi. *Build-Own-Operate-Transfer (BOOT):* The private investor builds, owns, operates and transfers the facility to the public authority at the termination of the PPP contract.[277]

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[272] S M Levy *Build Operate Transfer: Paving the Way for Tomorrow's Infrastructure* (1996).

[273] International Monetary Fund *Public-Private Partnerships, Government Guarantees and Fiscal Risk* (2006) 14.

[274] Oluwaseun Oluwasanmi & Odun Ogidi op cit note 22 at 136.

[275] The National Council for Public-Private Partnerships 'Types of partnerships,' available at *http://www.ncppp.org/ppp-basics/types-of-partnerships/*, accessed 17 February 2017.

[276] Ibid.

[277] Jeffery Delmon op cit note 10 at 8.

3.6 Merits of Public-Private Partnership

It has already been noted that in the light of budget constraints, the high cost of infrastructure procurement and other competing needs requiring state resources, PPP has become the alternative to traditional public procurement. Again, PPPs allow the government to concentrate on 'strategic planning, policies, processes and managing services while the partners undertake to deliver the services and implement projects.'[278] Besides these, there are several other advantages of PPP as a means of procuring public facilities. These are described below under the heads of financing, construction and operation.

3.6.1 Merits with regard to Finance

With regard to the funding of the facility, the advantages of adopting PPP include the following:[279]

i. Debt is on the private consortium and not on the public authority;
ii. Long-term finance is made available as against government having to make large allocations to the project in the same year;
iii. Risk is only on the equity contribution to the project company.

3.6.2 Merits with regard to Construction

The advantages of adopting PPP as far as construction is concerned are:[280]

i. The expertise of the private sector is brought to bear on the project;
ii. Creation of a market for after sales service and spare parts;
iii. Job opportunities are created.

[278] GTZ Partners *Partnerships Between Government and Business in South Africa: A Practical Guide* (2008) at 3.

[279] Ibid.

[280] Ibid.

3.6.3 Merits with regard to Operation

During the operational phase of the project, the advantages of adopting PPP include the following:[281]

i. The project benefits from the technical skill of the private sector;
ii. There is a reduction in the bureaucracy that often characterises public sector managed establishments;
iii. Less opportunity for embezzlement of funds accruing to the project;
iv. There is much more professionalism in management. This can be contrasted with the way government enterprises are managed.

3.7 Demerits of Public-Private Partnership

The above advantages notwithstanding, there are several disadvantages to the adoption of PPP. They are as follows:[282]

i. Public debt is cheaper to obtain than private debt. The public sector can easily offer bonds for sale to the public to raise funds at a cheaper cost than when the private sector seeks to borrow. Thus, the overall costs of the project can be affected since debt acquired by the private sector could have been obtained at a much higher cost;
ii. There is the possibility of resistance by the populace against the project where people are used to projects being traditionally provided in a way that results in no direct cost to them. It may be challenging to introduce a facility that requires the payment of tolls or fees, or there may be resistance to a rise in tariffs;
iii. Since PPP debts are largely secured by the project itself, where there is no high margin of PPP success, the likelihood of obtaining further funding by the private investor is slim;
iv. Again, since debt acquired by the investor may have been obtained in foreign currency, a slump in the value of the currency in which tolls are paid may negatively

[281] Ibid at 4.

[282] Ibid.

affect the investor, since the debt would now cost much more than it did when it was obtained.[283]

It is pertinent to point out that PPPs cannot solve all the infrastructure problems of a country. In fact, PPPs may exacerbate some problems with infrastructure procurement. For instance, while PPPs may appear to relieve funding problems, they may eventually lead to government accepting higher fiscal commitments.[284] It is submitted that having considered the demerits of PPPs, a decision by the public authority as to whether a project should be undertaken as a PPP requires that it be justified based on budget, certainty of outcome, value for money and sustainable development.

Following the distinctions discussed above between PPP and other forms of procurement, it remains to highlight the features that clearly identify a procurement arrangement between the public and private sectors as a PPP. These features are:[285]

i. PPP arrangements properly so called are usually long tenured contracts typically lasting between 10 and 30 years or more;
ii. Given the high capital outlay for PPP projects and the risk associated with them, the sponsors of the project usually set up a Special Purpose Vehicle (SPV) as an independent entity. The rationale for this is that a PPP project is unique in the sense that the risk is limited to the project. The SPV structure allows for the sponsors of the project to raise equity or debt specifically for the project;
iii. Risk allocation plays a pivotal role in PPP transactions. Essentially, risks associated with the design, construction and financial returns are borne by the private investor(s), while on the other hand, the public sector assumes those risks associated with macro-economic stability – for example, inflation and land acquisition from private or communal land owners.

Following from the above, the PPP unit of the South African National Treasury has identified three basic tests for PPPs: (i) can substantial risk can be transferred to the private sector? (ii) is

[283] Ibid at 5.

[284] The World Bank *Public-Private Partnerships* (2014) at 32.

[285] Nigerian Infrastructure Advisory Facility *PPP Manual for Lagos State* (2012) at 9.

the project affordable to the procuring institution? (iii) does the PPP procurement option show value for money?

3.8 Risk, Affordability and Value for Money

3.8.1 Risk

Risk is the chance that an event might occur to cause the actual project circumstances to differ from what was initially assumed or forecasted (regarding the benefits or costs of the project).[286] It is vital to note that risk cannot be eliminated. However, it can be allocated in a manner agreeable to by the parties. It is always better to transfer risk to the party who is a better manager of that kind of risk.[287]

It is common knowledge that over the years, experience has shown that the public sector is not a good manager of risk, especially in developing economies. If for example a public institution is building a facility, the construction may be completed later than expected and budgets may be overspent. This does not augur well for tax payers. On the other hand, if the private sector is responsible for the construction, the private investor(s) would not be paid by the procuring agency. As pointed out under item (iii) in 3.8, above, only those risks that the private sector can manage are transferred.

3.8.2 Affordability

It is important for the procuring MDA to have the capacity to afford the PPP project, taking into consideration available budgets where the public sector is expected to make an equity contribution to the proposed project.[288]The public sector must consider whether a PPP is feasible before engaging the private sector.[289] It is possible that institutions have no adequate budget for their infrastructure and service delivery needs and as such, a proposal to arrange for

[286] Amman Jordan 'Managing risk in PPP projects through legal documentation,' a presentation at the Expert Round Table on Private-Public Partnership sponsored by the MENA-OECD Investment Programme and the Executive Privatisation Commission of Jordan, available at *http://www.oecd.org/mena/competitiveness/39303648.pdf*, accessed 15 February 2018.

[287] Ibid.

[288] Ibid.

[289] European Commission *Guidelines for Successful Public-Private Partnerships* (2003) at 77.

the procurement of a project where the public sector cannot meet its commitment may likely result into a PPP failure from the start.

3.8.3 Value for Money (VfM)

Deciding whether to procure a facility by means of a PPP or via a traditional procurement route involves a fundamental test that must be carried out before a conclusion is reached.[290] If the comparison shows that the PPP option is cheaper in cost, the difference in cost between the two is referred to as value for money. Hence if traditional procurement is cheaper, the PPP option should be disregarded.[291] Value for money (VfM) assessment is therefore crucial to deciding on the suitability of PPP in general. The factors that determine VfM are reduced life cycle costs, better allocation of risk, faster implementation, improved service quality and general additional revenue.[292]

In addition to the features of PPP mentioned above, the Nigerian PPP National Policy Document also identifies 'Public Interest' as a vital factor for PPPs. To this end, in the consideration of public interest, it is required that:[293]

i. Public authorities should ensure adequate consultation with end-users and other stakeholders prior to the initiation of infrastructure projects;
ii. Private sector participants in a PPP project will contribute to strategies for communicating and consulting with the public, customers, affected communities, and corporate stakeholders, with a view to developing mutual acceptance and understanding of the objectives of the public and private parties;
iii. Private sector contractors in the provision of vital services to communities need to be mindful of the consequences of their actions for those communities and work together with the public authorities, to avoid or mitigate socially unacceptable outcomes.

[290] Infrastructure Concession and Regulatory Commission, *The National Policy on Public Private Partnership* (2009) 3.

[291] Ibid.

[292] European Commission, op. cit. note 301 at 55.

[293] Infrastructure Concession and Regulatory Commission op. cit. note 302 at 12.

3.9 Financing Public-Private Partnership

Traditionally, infrastructure finance was sourced mainly from the public budget (through taxing and borrowing).[294] But for a PPP, finance is sourced usually from a combination of equity and debt.[295] Equity contributions are the funds invested in the project by the SPV set up for the project or what may be termed the 'project company.' Debt contributions, on the other hand, are the borrowings made to fund the project. These are usually sourced from banks and bonds.[296] In recent times, as will be discussed in Chapter Six, the creation of specialised funds for infrastructure are being used to fund PPP projects.

3.10 The Public-Private Partnership Contract

The PPP contract is a complex form of contract. It consists of the concession/PFI (or main) contract together with other sub-contracts, including engineering, procurement and construction contracts, and contracts for supplies, operation/management services and repairs.[297] Designing a PPP contract to be signed by the government and a private sector consortium is a challenging undertaking that requires legal and technical expertise.[298] Again, it is pertinent to note that the term 'partnership' in PPP does not mean that the arrangement works like the usual business partnership, since the parties have different interests.[299] The interest of the public sector is to provide infrastructure for its citizens while that of the private sector consortium is make a profit. PPP contracts codify the business relationship by defining the roles and responsibilities of the partners, including risk sharing and rewards.[300]

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[294] Jeffrey Delmon op cit note 10 at 62.

[295] Ibid.

[296] Ibid.

[297] ER Yescombe op cit note 44 at 7.

[298] Rui Cunha Marques 'Public-private partnership contracts: A tale of two cities with different contractual arrangements' (2010), available at *http://bear.warrington.ufl.edu/centers/purc/docs/papers/0915_Marques_Public_Private_Partnership.pdf*, accessed 15 March 2018.

[299] G Noble 'The role of contracts in public private partnership' (2006) *University of Wollongong Research Online*, available at *http://ro.uow.edu.au/cgi/viewcontent.cgi?article=1599&context=commpapers*, accessed 18 March 2018.

[300] Ibid.

3.10.1 The Parties to a Public-Private Partnership Contract

The PPP arrangement involves two main parties, the public sector (government) and the private sector consortium. Other key actors in the arrangement include lenders, multilateral and bilateral agencies, export credit agencies, the construction contractor, the operator and the end-user(s).

The public sector or the government may be referred to as the grantor.[301] The grantor is the unit of the government that awards a PPP contract to a private sector consortium upon identifying the need for a project.[302] In most cases, the agency representing the government, sometimes referred to as a ministry, department or agency (MDA) is always a key actor in a PPP. The grantor maybe the national, state, regional or local government. The other key actor is the private sector consortium.

The private sector consortium is made up of the entities that come together for the sole purpose of bidding for the PPP contract. This is because of the capital-intensive nature of PPP infrastructure projects.[303] The specialised company set up for the contract is usually a special purpose vehicle (SPV). SPVs are used because the risk in the project is unique to that project alone and this in a way protects the main sponsors of the project, limiting their liability to what they invested in the project company.[304]

PPP projects are capital-intensive, often making raising additional funds a necessity. Hence, lenders play a leading role in PPP procurement. Again, the funding structure often requires the coming together of a team of commercial lenders with export credit agencies, bilateral and multilateral finance organisations.[305] Sometimes the lenders raise the funds required for the project through bonds or sovereign wealth funds. It is pertinent to note that lenders are not party to the construction or operation of the facility itself, since they would not like to bear risk that is not in line with their regular operations.[306]

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[301] The public-sector party to a PPP contract may be referred to by a variety of other terms depending on the choice of the writer. The other terms include: the public entity, the public authority, government institution, contracting authority or just the authority.

[302] D G Ecfin 'Public Private Partnerships in Member States' (2016), a presentation at the 10th meeting of public finance economists held in Brussels on 2nd March 2016, at 3.

[303] Lagos State PPP Manual at 9.

[304] Ibid.

[305] Jeffrey Delmon op cit note 10 at 20.

[306] Ibid. at 21.

Upon the closing of a PPP deal and the raising of the necessary funds, the project company appoints by way of a sub-contract, a construction contractor. It is the responsibility of the construction contractor to design, build, test, and commission the project. This is usually done by way of a 'turnkey.'[307]

With the project completed, an operator will be engaged to run the day-to-day service of the facility. The project operator operates with a mandate spelled out in the sub-contract for the operation of the PPP facility. This sub-contract is referred to as the operation and maintenance agreement.[308]

3.10.2 Other Key Actors in a Public-Private Partnership Arrangement

Apart from those discussed above, there are other parties who may not be directly involved in the arrangement but who are also key to the success of any PPP. These are the employees of the project,[309] the local community where the project is located, and the end-users.

The employees of the project benefit through their employment and the success of the project indicates job security. Consulting with members of the public, especially those who reside within the immediate locality of the project, is important. The cases of the Lekki-Epe Concession Toll Road in Nigeria discussed in Chapter Four and the Gautrain Rapid Link Rail in South Africa discussed in Chapter Five are relevant examples of the key role that consultation with the public plays in PPP success. There must always be a strategic plan to ensure that these key stakeholders are carried along from the point when the public authority conceives the project. It is also important that there be transparency in the entire process right from the start. Where there are doubts in the minds of members of the public, there is bound to be opposition. For example, even though the Asset and Resource Management Company Ltd (ARM) did a good job in the arrangement of the Lekki-Epe Toll Road Project, due to poor public relations skills on the part of the ownership of the company, the public was fed with rumours that the Governor of Lagos State at that time had a significant interest in the concession company. Finally, the managers of the project must consider the interest of the end-

[307] This is the design and construction of work to the point of completion when they are ready to produce cash flow. It is like 'turning a key' for a project to commence operation.

[308] Jeffrey Delmon op cit note 10 at 26.

[309] Esther Cheung *Developing a best practice framework for implementing public private partnership (PPP) in Hong Kong* (unpublished PhD thesis, Queensland University of Technology, 2009) at 46.

users of the project. Incessant, unexplained or unjustifiable price hikes often result in massive protests. This can turn an otherwise successful project into a failure.

3.10.3 Elements of the Public-Private Partnership Contract

Under the concession/PFI agreement, the grantor grants a series of rights to the project company to build and operate a unit or feature of government infrastructure for a determined tenure. The main issues to be addressed in a PPP contract are first, the completion date. Governments are often motivated by political interest associated with the completion of the project during the term of office of the government.

It is important that the concession/PFI contract itself makes provision for elements such as the obligations of each party, the tenure of the contract, the ownership of the land and facility, allocation of risks and consequences, construction, commissioning, operation and maintenance of the facility, performance requirements, payments and other financial matters, price review adjustments, amendment and variation of the agreement, monitoring and review, dispute resolution, termination of contract, end of term arrangements, service delivery management, contract compliance and management and renegotiation.[310]

Following a request from members of the Group of 20 countries (G20),[311] staff at the World Bank were mandated to prepare a report recommending a model language for PPP contracts.[312] The outcome of the exercise is a number of key 'Model Contract Terms' (MCTs), set out under eight headings: *Force Majeure, Material Adverse Government Action, Change in Law, Termination Payments, Refinancing, Lenders' Step-in Rights, Confidentiality and Transparency and Dispute Resolution.*[313] These new or 're-modelled' terms introduced in the report by Shrybman and Sinclair are discussed below.

Where there are circumstances which are beyond the control of the parties to the PPP contract making it impossible for the contract to be executed, or for the parties to fulfil their obligations under the PPP contract – for example, political events such as war, acts of terror, nuclear explosions and natural disasters (such as earthquakes, floods, landlines), strikes and

[310] Economic and Social Commission for Asia and the Pacific 'Main Contents of a Contract Agreement,' available at *http://www.unescap.org/ttdw/ppp/ppp_primer/711_main_contents_of_a_contract_agreement.html*, accessed 18 March 2018.

[311] A group consisting of 19 countries plus the European Union (EU). South Africa is a member of the group.

[312] Steven Shrybman & Scott Sinclair op cit note 42 at 7.

[313] Ibid at 10.

protests, a *force majeure* is said to occur. In the recommendation of the World Bank Group (WBG), general labour disturbances such as boycotts and strikes which are unique to the private sector partner or sub-contractors and occur outside the country do not constitute a *force majeure* but a default by the private partner.[314] The implication of this is that if there is a failure on the part of the private sector to fulfil its obligation(s) as a result of strike action outside the host country of the PPP project, the private partner bears the risk and will be considered in default of the contractual agreement. This is a departure from the conventional norm and ought not to be the case. Implementing such a proposal will stifle private sector interest in PPPs, especially in countries that do not have a significant market advantage.

The WBG's proposal identifies what is referred to as a *Material Adverse Government Action (MAGA)*.[315] A MAGA event is said to occur when there is an act or omission by the contracting authority or any relevant public authority, which occurs during the term of the contract and which renders the private partner incapable of complying with the terms of the agreement. When a MAGA event occurs, the private-sector partner shall be excused from the performance of the PPP contract to the extent that it is prevented, hindered or delayed in the performance of its obligations by reason of the material adverse government action, and shall be entitled to compensation under the PPP contract. This proposed new term is commendable, but the question of what should constitute adequate compensation needs to be carefully considered. It is better that the public authority refrains from committing any MAGA unless it is necessary and the interest of public policy. The reason is that one failed PPP project is a message to PPP investors and promoters that any future dealings with the public authority concerned is vulnerable to cancellation.

Based on the recommendations by the WBG, a *Change in Law* that can affect a PPP contract is said to occur where there is the enactment of any new applicable law; the repeal, modification or re-enactment of any existing applicable law; the imposition by any government entity of any material condition in connection with the issuance, renewal or modification, or the revocation or non-renewal (other than in accordance with the existing applicable law) of any approval; and/or the imposition or levying of any taxes, which was not foreseeable at the date on which the successful bidder submitted its bid and which has a material adverse effect on the ability of a party in a PPP contract to fulfil its obligations. The WBG recommends that the public sector should bear a *Change in Law* risk only when it is the author of discriminatory

[314] Ibid at 14.

[315] Report 2.2 (3).

reforms, in which case the private sector should be compensated to leave the latter in no better nor worse position than it would have been in had such a law not been made.

This recommendation is also flawed. It seems that the WBG has not taken into account the nature of developing and emerging economies before making this recommendation. The situation that the proposal enables may just afford the public authority the room to cleverly absolve itself of its obligations by passing a new law that affects the project, while claiming that it is not discriminatory.

With reference to *Termination Payments*, the WBG recommendation is in line with conventional norms. Thus, where there is a voluntary termination of the PPP contract by the public authority, for example, for reasons of public policy, the private sector party is to be compensated. Also, where the public authority by way of default, makes it impracticable for the private sector party to perform its obligation(s), the public authority is to pay the private party compensation to ensure that the latter is left in no better nor worse condition than it would have been had the early termination not occurred and the PPP continued until the last day of its term. While this insertion in the proposals is commendable and ensures the protection of the assets of the investors/lenders, it is important to state that a private sector investor will appreciate and derive more satisfaction from a completed project executed from a business point of view than from receiving compensation for default by the contracting authority. No matter the amount paid out as compensation, it cannot compare with successfully completing a project and receiving what is due.[316] Therefore the fact that compensation can be paid or that a buy-back can be structured should not constitute sufficient reason to cancel a project.

With regard to dispute resolution, the World Bank Group (WBG) proposes a reliance on the World Bank's Investor-State Dispute Settlement (ISDS) procedure.[317] The report proposes the following steps for the resolution of PPP disputes: first, a mutual commitment to try to resolve the disagreement promptly and amicably; secondly, an agreement that technical disputes be referred to an expert to recommend solution; and thirdly, that more intractable issues be brought before a dispute board comprised of representatives of both parties, which

[316] The buy-back of Lekki-Epe Toll Road Concession by the Lagos State Government, discussed in Chapter Four, is a good example.

[317] In accordance with the Proposed Dispute Settlement Provision. The ISDS system itself relies on the ratification of treaties. Many developing countries consider that the ISDS is biased in favour of investors, especially from developed countries, at the expense of public policy and democratic governance. This situation has led many developing countries to limit their exposure to ISDS. For example, Brazil has never ratified any treaty that included ISDS. South Africa also, intends to end the use of ISDS in its trade and investments treaties. See Steven Shrybman & Scott Sinclair op cit note 42 at 21.

may be empowered to reach a binding resolution through consensus. The proposal notes that, given 'the time and the cost of international arbitration, serious consideration should be given to the use of mandatory alternative dispute resolution mechanisms (such as the dispute boards).'[318] The report proposes further that, if the board fails to resolve the dispute within 30 days, the dispute shall be referred to and finally settled by international arbitration.[319] Unfortunately, this recommendation by the WBG clearly seeks to side-line the domestic courts of emerging and developing countries.[320] One of the first investor-state disputes that attracted global interest was that of *Aguas del Tunari v Bolivia.*[321] In that case, the government of Bolivia cancelled a water services concession on the grounds of price hikes that triggered public protests. The concessionaire subsequently sued under a Bolivia-Netherlands investment treaty.[322] In its defence, the Bolivian government argued that the concession agreement provided for disputes between public authorities and the concessionaire to be resolved 'in Bolivian courts in accordance with Bolivian laws.'[323] The tribunal rejected the defence of the Bolivian government and rather ruled that the 'forum selection' clause in the concession agreement was unclear and in its place, asserted that it had jurisdiction over the claim. Clearly, there needs to be a balance between the protection of investors' assets and the public policy of a state. Furthermore, if emerging and developing economies can improve on their rule of law index, investors will gain confidence that domestic courts can be objective and fair in their decisions.

[318]Proposed Dispute Settlement Provision S. 8.2, Article 23 at 52.

[319] Ibid.

[320] Steven Shrybman & Scott Sinclair op cit note 42 at 23.

[321] *Aguas del Tunari SA, Claimant/Investor v Republic of Bolivia* ICSID Case No ARB/02/3, available at *http://www.iiapp.org/media/uploads/aguas_del_tunari_v_bolivia.rev.pdf*, accessed 18 March 2018.

[322] It emerged during arbitration that, prior to bringing its claim as public opposition was developing, the foreign investor 'migrated' corporate ownership of the privatised assets from the Cayman Islands to the Netherlands to have access to the Netherlands-Bolivia BIT International Investment Arbitration and Public Policy. *Aguas del Tunari v Bolivia* supra. Case summary available at *http://www.iiapp.org/media/uploads/aguas_del_tunari_v_bolivia.rev.pdf*, accessed 18 March 2018.

[323] *Aguas del Tunari v Bolivia* supra. 'Decision on Respondent's Objections to Jurisdiction' at 21.

3.11 Conclusion

It is worthy of note that there are fundamental requirements for the establishment of an efficient PPP framework.[324] First, the government must articulate its intent to utilise PPP in the procurement of infrastructure in the form of a policy. Secondly, there is a need to set up a legal framework that enables the government to enter PPPs. The laws must also set out how PPP is to be undertaken. Thirdly, there must be in place an institutional framework for the administration and regulation of PPP. In most cases, a PPP unit must be created.[325]

In this chapter, the concept of public-private partnership (PPP) and its merits and demerits are introduced. In seeking a working definition for PPP, a deliberate attempt is made to distinguish PPP from other similar arrangements between the public sector and the private sector (for example, service or management contracts, privatisation and traditional procurement involving a private contractor).

The chapter traces the emergence of PPP from its origins in the 15th century to the revived PPP which was launched in the UK in the early 1990s and which has gained wide acceptance, but with variations, around the globe, including in Nigeria.

A distinction is made between concessions and private finance initiatives, based principally on who pays the private consortium for the use of the facility during the operational phase of the project.

It is noted that in addition to the features of PPP discussed, both South Africa and Nigeria have identified additional requirements to consider before adopting the PPP model of procurement for any given project. In the case of South Africa, there is a tripartite test to be carried out, while Nigeria considers public interest.

It is vital to ensure that the law is used as an instrument to effect the desired changes in the framework for regulating PPP. In the same vein, PPP contracts should be regarded as binding on the parties based on the principle of sanctity of contract. At all times, public institutions should be guided by the law and where decisions have been reached by the courts in the settlement of conflicts that may arise, all parties must respect the decision.

The next chapter discusses the practice, policy and framework for PPP in Nigeria.

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[324] The World Bank op cit note 270..

[325] Ibid.

CHAPTER FOUR

PUBLIC-PRIVATE PARTNERSHIP PRACTICE IN NIGERIA: LEGAL, POLICY AND INSTITUTIONAL FRAMEWORK

4.1 Introduction

Nigeria is a common-law country and operates a federal system with three tiers of government. The 1999 Constitution of the Federal Republic of Nigeria, which is the supreme law of the country, vests legislative powers in the federal government,[326] the 36 states[327] as well as the 774 local governments councils[328] that make up the federation.[329] Laws passed by the National Assembly are referred to as Acts, while those passed by the States and Local Councils are referred to as Laws and Bye-Laws, respectively. It is essential to note that each tier of government in Nigeria is by law required to operate separate legal frameworks for PPP practice.

This chapter examines the practice, policy, framework and regulation of PPP in Nigeria, from the project conception phase through to the operational phase of closed PPP arrangements. There will also be discussion of the institutions that regulate PPP, the funding structure and selected case studies. While the PPP framework in Nigeria is described in this chapter, a critical analysis of the framework, as well as a comparative study of the situation in South Africa, appear in Chapter Six of the study.

The passing into law of the Infrastructure Concession and Regulatory Commission (Establishment Etc.) Act 2005 and the adoption of a National Policy on Public-Private Partnership in November 2008 brought into being an administrative as well as a regulatory framework for PPP practice at the national level in Nigeria.[330] In addition, some states in the

[326] Section 4(1) 1999 Constitution.

[327] Section 4(2) 1999 Constitution.

[328] Section 7 1999 Constitution.

[329] Section 3 1999 Constitution.

[330] G Nwangwu *Public Private Partnerships in Nigeria* (2016) at 27.

country have enacted laws regulating PPP practice at the subnational level.[331] Several years later, mixed results have been witnessed in terms of project outcomes.[332]

Following the aggressive privatisation agenda shortly after the return to civil rule in 1999, the federal government of Nigeria has sought to provide a structure for private sector participation in the provision of public infrastructure.[333] A few concessions were arranged under the country's Privatisation Act even after the ICRC Act had been passed.[334] This indicates that there has not been a clear line of distinction between PPP and privatisation in the past, especially in the first few years of the passing of the ICRC Act 2005. Currently, however, the federal government of Nigeria is leaning towards PPP rather than privatisation.

4.2 Legal Framework for Public-Private Partnership in Nigeria

One of the critical success factors (CSFs) for PPP is 'a transparent and stable legal framework which should help make contracts and agreements bankable.'[335] The importance of a well thought-out policy, legal and regulatory framework for PPP cannot be overstressed, especially because PPPs are complex long-term transactions that are affected by many areas of law.[336] Investors also tend to consider whether the legal environment is conducive, since successful PPPs depend on the effectiveness of the national and subnational legislative and regulatory structures in any given jurisdiction.[337] The nature of the legal framework for PPP in any given country is largely dependent on whether it is a common law or civil law jurisdiction. This is because in civil law systems, government operations are basically prescribed in administrative

[331] In this study however, emphasis will be accorded to PPPs executed by the federal government or its agencies and to a few flagship projects that have been executed by certain states in the federation.

[332] C M U-Dominic, A C C Ezeabasilli, B U Okoro et al. 'A review of public private partnership on some development projects in Nigeria' (2015) 4 *International Journal of Application or Innovation in Engineering and Management* at 71.

[333] George Nwangwu op cit note 342 at 28.

[334] Ibid.

[335] Esther Cheung, Albert P C Chan, Patrick T I Lam et al. 'A comparative study of critical success factors for public private partnerships (PPP) between Mainland China and the Hong Kong Special Administrative Region' (2012) 30.13/14 *Facility Management Development* at 653.

[336] Ibid.

[337] Ibid.

law that establishes the legal rights and processes that apply to PPP contracts.[338] On the other hand, in common law jurisdictions, the system is much less prescriptive, with fewer provisions implied into a contract by law.[339] Thus, contracts in common law jurisdictions tend to be larger than in civil law jurisdictions.[340] The reason is that importance is given to specifying in the agreement the terms governing the relationship between the parties to the agreement, as gaps cannot be so easily remedied or resolved through the basic application of the law.[341] It is argued that PPP legal frameworks should reduce the level of uncertainty in PPP projects and their implementation, minimise the risk of legal challenge, increase investor confidence, promote and facilitate private involvement and the issuance of various licenses and permits.[342] It follows that laws should promote the ease of doing business and drive economic gains rather than foist cumbersome requirements and onerous tasks on private enterprise. It is submitted that since PPPs serve the end of closing the infrastructure gap in the economy, deliberate steps should be taken when passing laws to ease the setting up of special purpose vehicles (SPVs), work permits for expatriates, building permits, land allocation and the repatriation of the capital and profits of foreign investors. Furthermore, the PPP framework should be designed typically to facilitate complex long-term contractual arrangements as well as ensure a reduction in transaction costs. The UNCITRAL *Legislative Guide on Privately Financed Infrastructure Projects* insists that the existence 'of an appropriate legal framework' is a prerequisite for creating an environment that fosters private investment in infrastructure.[343] The document also stipulates the need to ensure that PPP laws remain 'sufficiently flexible and responsive to keep pace with the developments in various infrastructure sectors in the economy.'[344] Again, it is important that the legal framework be commercially oriented.[345] While it may not be feasible to have a single law regulating PPP in its entirety because of its complex nature, it is submitted

[338] The World Bank 'Laws and Regulations' *PPP Knowledge Lab*, available *at https://pppknowledgelab.org/ppp-cycle/laws-regulations*, accessed 23 January 2017.

[339] Ibid.

[340] Ibid.

[341] Ibid.

[342] ASM Abdul Quium 'Legal framework for PPPs, laws, contract and dispute resolution,' a presentation delivered at the Asia Public-Private Partnership Practitioners' Network (APN) Training, Seoul, Republic of Korea, 4-8 October 2010.

[343] *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects* UN 2001 A/CN.9/SER.B/B/4 at 23.

[344] Ibid.

[345] The United Nations, *Guidebook on Promoting Good Governance in Public-Private Partnerships* (2008) at 29.

that deliberate steps ought to be taken to simplify the PPP process so as to make the environment investor-friendly. It follows that 'a clear and stable legal environment for PPP projects, to reduce perception of risk, attract more competition for projects, attract more lending and therefore reduce project cost'[346] is sacrosanct for a healthy PPP regime. It is further submitted that the legal framework for PPP must essentially cover the legal system of the jurisdiction concerned as well as the procedure for procurement, execution, maintenance and operation of the project. As it relates to the legal system, the environment must be one in which the rule of law thrives. This is a primary concern, especially for foreign investors. In the case of Nigeria, breaches of the rule of law by the administration of President Muhammadu Buhari is a source of concern.[347] The reliability of the courts and the judiciary as well as the enforceability of international arbitration awards are of interest to investors.

However, it is worthy of note that in the United Kingdom and some other common law countries, 'PFI-Model PPPs are treated as a variety of government procurement, for which no special legal arrangements are needed.'[348] This approach is considered to be mainly contractual as it allows for flexibility to make changes in the PPP programme.[349] This is especially so as there is no formal legal framework for PPP in the UK. It is submitted that such an approach is best suited to a developed economy and is not appropriate for a developing economy like Nigeria that is saddled with the vexed problem of weak institutions. Besides, having a clear-cut legal framework ensures that the government can confirm its political commitment via explicit legislation, clearly set out investors' rights, allow for the provision of incentives such as tax treatment, create a procedure for the public authority to make changes to project specifications, and provide a method of compensation to the consortium if this leads to higher costs.[350] In the same vein, it is required that during the procurement process the law is clear, fair, open and transparent and must mandate the public authority to demonstrate the political

[346] Jeffrey Delmon *Creating a Framework for Public-Private Partnership (PPP) Programs: A Practical Guide for Decision Makers* (2014) at 5.

[347] A few examples include the summary execution of Shiites in Kaduna, illegal demolition of their houses and a crackdown on protesters, and wilful disobedience of court orders and the intimidation of judges. See Ebun Olu-Adegboruwa, 'Buhari and the law: One year, so far, so?' *The Vanguard* 2 June 2016, available at *http://www.vanguardngr.com/2016/06/buhari-law-one-year-far/,* accessed 5 February 2017.

[348] E R Yescombe op cit note 44 at 31.

[349] Ibid at 32.

[350] Ibid.

will to support the PPP process as well as ensure adequate monitoring of projects with the relevant PPP unit.[351]

The legal framework for PPP in Nigeria is made up of all the laws and regulations that control whether, and how, PPPs can be implemented. As such, it is expected that apart from providing the legal coverage for parties to enter into enforceable contracts, the legal framework should furnish the private sector with the necessary backing to finance, build, operate and collect revenues or service payments.[352]

The passing into law of the Nigerian Infrastructure Concession and Regulatory Commission (Establishment Etc.) Act 2005 and the setting up of the ICRC to administer federal PPP transactions across the country is meant to show the government's political will to adopt the PPP model of infrastructure procurement. Yet the legal framework for PPPs in Nigeria has been described, and rightly so, as comprising 'a tangled and confusing web of regulations and policies.'[353] This section will proceed to examine the body of laws and regulations through which PPPs are administered at the national level in the country. Where necessary reference will be made to applicable laws at the sub-national level.

Understandably, it may be inferred from the position of the federal government of Nigeria that the legal framework for PPP in the country aims to close the infrastructure gap, create job opportunities for citizens, stimulate foreign direct investment (FDI), facilitate economic growth, enable government to concentrate on policy making and social development programmes and, importantly, save scarce government resources. It is submitted that the absence of a clear-cut legal framework for PPP fosters uncertainty and hampers the development which PPPs are designed to promote. This writer believes that investors regard the process of relief in the event of a dispute or cancellation to be just as important as the possibility of doing business in the first place. No matter the business prospect or the return on investment, investors are bound to shy away from situations where the framework for doing business is not clearly defined.

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[351] Ibid.

[352] C Hardcastle & PJ Edwards, A Akintoye et al. 'Critical success factors for PPP/PFI projects in the UK construction industry: A factor analysis approach,' available at *http://www.civil.hku.hk/cicid/3_events/32/papers/13.pdf*, accessed 5 February 2017.

[353] George Nwangwu op cit note 342 at 27.

This chapter of the study examines the legislative framework for PPP in Nigeria, identifying and discussing the various laws that regulate the practice from inception to handover. The expectation is that the legal framework should support the institutions implementing PPP as well as regulate them. The approach adopted is to discuss the law regulating PPP first before an examination of the PPP policy in Nigeria.

4.2.1 The Constitution of the Federal Republic of Nigeria 1999

The 1999 Constitution of the Federal Republic of Nigeria is the supreme law of the country. It provides the structure upon which all laws in the country rest. The provisions of the Constitution have a binding force on authorities and persons throughout the Federal Republic of Nigeria.[354] Importantly, a law enacted by the National Assembly[355] or by a State House of Assembly that is inconsistent with the provisions of the Constitution shall be rendered void to the extent of that inconsistency.[356] The doctrine of the supremacy of the Constitution is well entrenched in the 1999 Constitution.[357] The question of the supremacy of the constitution was brought to bear in the recent case of *Dr Olubukola Abubakar Saraki v The Federal Republic of Nigeria.*[358] In that case, the Supreme Court of Nigeria held *per* Muhammad, JSC, as follows:

> The time-honoured principle of law is that wherever and whenever the Constitution speaks, any provision of an Act/Statute on the subject matter must remain silent. See *Independent National Electoral Commission v Musa* (2003) 3 NWLR (Pt 806) 72; *Attorney General Ogun State v Attorney General of Federation* (1982) 2 NCLR 166.

The court *per* Kekere-Ekun, JSC, also stated as follows:

> The Constitution is the supreme law of the land. It is the grundnorm i.e. it is the basic law from which all other laws of the society derive their validity. Section 1 (1) of the 1999 Constitution (as amended) provides: 1. (1) This Constitution is supreme, and its provisions shall have binding force on all authorities and persons throughout the federal republic of Nigeria. (3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the

[354] S. 1(1) 1999 Constitution.

[355] Made up of the Senate and the House of Representatives.

[356] S. 1(3) 1999 Constitution (as amended).

[357] S. 4 1999 Constitution.

[358] (2016) LPELR–40013 (SC) (at 64–65, paras E–A).

inconsistency be void. See *Abacha v Fawehinmi* (2000) 6 NWLR (Pt 660) 228: *P.D.P v C.P.C* (2011) 17 NWLR (Pt 1277) 485.

Under the provisions of the 1999 Constitution, there are powers exclusive to the federal government.[359] In other words, there are certain items listed in the Constitution that can only be legislated upon by the federal legislature. It follows therefore that state governments are precluded from making decisions on them. These items are listed in the Exclusive Legislative List.[360] They include accounts of the federal government or courts, arms, ammunition and explosives, aviation (including airports), awards of national titles, bankruptcy or insolvency, banks, banking, bills of exchange, borrowing of moneys within or outside Nigeria for the purposes of the federation or a state, census, naturalisation and aliens, commercial and industrial monopolies, combines and trusts, construction, alteration and maintenance of such roads as may be declared by the National Assembly to be federal trunk roads, control of capital issues, copyright, creation of states, currency, coinage and legal tender, customs and excise duties, defence, deportation of persons who are not citizens of Nigeria, designation of securities in which trust funds may be invested, diplomatic, consular and trade representation, drugs and poisons, elections to the offices of president, vice president, governors and their deputies, evidence, exchange control, export duties, external affairs, extradition, finger prints identification and criminal records, fishing and fisheries other than fishing and fisheries in rivers, lakes, waterways, ponds and other inland waters within Nigeria, immigration or emigration, implementation of treaties, incorporation of corporate bodies, maritime and shipping, meteorology, military, mines and minerals, national parks, nuclear energy, passports and visas, patents and trademarks, police, prisons, public holidays, quarantine and railways.

The above provision of the 1999 Constitution effectively limits the powers of states to negotiate or arrange PPP projects that involve any item on the list. It does not matter whether such a project is beneficial to that state, because the federal government can refuse to provide its benefits to the citizens of that state. An example is the deliberate abandonment of the East-West Road linking Imo State with Rivers State that was constructed by the administration of Mr Rotimi Amaechi, the then governor of Rivers State, with the expectation that the state would

[359] In the context of this research, these are areas that only the federal government or its agencies can enter or negotiate a PPP relationship with a private sector party.

[360] Contained in Part I of the Second Schedule of the Legislative Powers in the 1999 Constitution (as amended).

receive a refund from the federal government.[361] Even though the construction of the road was to the benefit of the citizens of the state, the road is a federal trunk road and as such, the construction of the road by the Rivers State Government was *ultra vires*. Federal trunk roads are outside the purview of state governments. If that road had been constructed under a PPP arrangement it would have been unlawful. A similar situation applies regarding the rehabilitation of federal roads in Ebonyi State in south east Nigeria.[362]

It also needs to be pointed out that the construction of airports by states in Nigeria is beyond their powers and therefore illegal. Aviation and airports are items within the Exclusive Legislative List. Notwithstanding this, a few states have gone ahead and built airports.[363] A PPP contract involving the construction of a state airport is an illegality as far as the 1999 Constitution is concerned. As such, one of the puzzles that a potential investor must resolve before engaging in a PPP in the country is to determine which of the tiers of government it should be dealing with.[364]

One of the cases dealing with the construction of infrastructure by a state government that involves an item on the Exclusive Legislative List brought before the Federal High Court in Lagos is that of *Olu Adegboruwa v AG Federation & Three Others.*[365] Mr Ebun-Olu Adegboruwa, a civil rights advocate, challenged the power of the Lagos State Government to collect tolls on the Lekki-Ikoyi Bridge. The defendants in the suit were the Attorney General of the Federation, the National Inland Waterways Authority, the Lagos State Government and the Attorney General of Lagos State. Mr Adegboruwa urged the court to declare that the imposition of tolls on users of the bridge amounted to violations of the rights of the users and

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[361] Anayo Onukwugha 'Nigeria: Rivers demand refund of N105 billion from FG' *Leadership* 16 February 2013, available at *http://allafrica.com/stories/201302181874.html*, accessed 5 February 2017.

[362] See *Daily Trust*, 'Ebonyi Govt. wants FG to refund its N35bn road intervention fund,' available at *http://www.dailytrust.com.ng/news/general/ebonyi-govt-wants-fg-to-refund-its-n35bn-road-intervention-fund/183879.html*, accessed 5 February 2017.

[363] See Kunle Olayeni 'FG decries proliferation of airports by states' *New Telegraph* available at *https://newtelegraphonline.com/news/fg-decries-proliferation-airports-states/*, accessed 5 February 2017.

[364] George Nwangwu 'The legal framework for public-private partnerships (PPPs) in Nigeria: Untangling the complex web' (2012) 4 *European Procurement and Public Private Partnership Law Review* 270.

[365] Unreported suit no. FHC/L/CS/1405/12. See Ben Ezeamalu, 'Lagos laws do not cover toll collection on Lekki-Ikoyi bridge, court rules' *Premium Times* 27 March 2014, available at *http://www.premiumtimesng.com/news/157525-lagos-laws-cover-toll-collection-lekki-ikoyi-bridge-court-rules.html*, accessed 8 March 2016. See also Kayode Oladipo and Chinedu Ihentu-Geoffrey, 'Bridging the infrastructure gap: The Lekki-Ikoyi tolling debate,' available at *http://www.kwm.com/en/uk/knowledge/insights/bridging-the-infrastructure-gap-the-lekki-ikoyi-tolling-debate-20140723*, accessed 8 March 2016.

residents of Lekki Scheme 1, Ikoyi, Ajah, Ibeju-Lekki and Epe communities, since the bridge was over an inland waterway which is clearly outside the powers of the Lagos State Government. Judgement was entered in favour of the plaintiff. However, the Lagos State Government has appealed the decision of the Federal High Court sitting in Lagos.[366]

The vexed question begging for answers remains: should state governments in the country refrain from embarking on developmental projects, even when they have the capacity to provide facilities, claiming they are precluded from doing so because the project comes within the scope of the exclusive legislative list? Again, when the federal government decides not to undertake projects in any of the states because of political difference between the central government and a state government, should the state not step in to execute such a project in the public interest?

Even though the 1999 Constitution does not specifically refer to PPP, it can be inferred from a reading of Section 16 under Chapter II of the Constitution, which deals with the Fundamental Objectives and Directive Principles of State Policy, wherein the 'Economic Objectives' of the Nigerian state indicate that private participation in promoting the national economy is supported. The Section provides:

> (1) The State shall, within the context of the ideals and objectives for which provisions are made in this Constitution –
> (a) Harness the resources of the nation and promote national prosperity and efficiency, a dynamic and self-reliant economy every citizen on the basis of social justice and equality of status and opportunity;
> (b) Control the national economy in such a manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity:
> (c) Without prejudice to the right to operate or participate in areas of the economy, other than the major sectors of the economy:
> (d) Without prejudice to the right of any person to participate in areas of the economy within the major sectors of the economy, protect the right of every citizen to engage in any economic activities outside the major sectors of the economy.

Sub-section (4) of the Constitution explains the term 'major sectors of the economy' as such activities that may, from time to time, be declared by a resolution of each House of the National Assembly to be managed and operated exclusively by the federal government, on the date preceding the day the section came into force. The implication is that the government may

[366] Suit No. FHC/L/CS/1240/2018 (unreported) See *The Post* 'Lagos challenges court ruling on Ikoyi-Lekki Bridge' 2 April 2014, available at *http://www.thepost-ng.com/lagos-challenges-court-ruling-on-ikoyi-lekki-bridge/*, accessed 5 February 2017.

involve the private sector in the management of the economic sector, including through PPPs. This right of the private sector to be involved in the management of the economic sector and business concerns that were previously government owned has been given judicial recognition in *Attorney General of Lagos State v Eko Hotels Limited*,[367] where the court held that the government should not be preoccupied with commercial activities but should allow the private sector to take over what rightly belongs to them. The government may, however, continue to hold shares (but not controlling shares) in a business concern, in line with changes in the global economy.

A potential PPP investor in Nigeria must determine what tier of government is being dealt with in order not to commit to an arrangement that is void *ab initio*.[368] This is because state governments are limited by the Constitution and lack the capacity to decide on any of the items on the exclusive legislative list.

4.2.2 The Infrastructure Concession and Regulatory Commission (Establishment etc.) Act 2005 (ICRC Act)

The ICRC Act 2005 is Nigeria's main legislation for PPP and provides the primary legal framework for private participation in infrastructure development in the country.[369] The Act empowers government ministries, departments and agencies (MDAs) to enter into contracts with the private sector for the financing, construction, operation and maintenance of public infrastructure.[370] It also established the Infrastructure Concession Regulatory Commission (the ICRC), which is managed by a 12-member board consisting of a part-time chairman, the Attorney General of the Federation, the Governor of the Central Bank and a person from each of the six geopolitical zones[371] in the country. It needs to be pointed out that the Act basically regulates PPPs that involve the federal government of Nigeria or any of its MDAs, as states which desire to adopt a PPP policy are required to provide their own regulatory framework.[372]

[367] (2006) 18 *NWLR* (Pt 1011) 378 at 493–440

[368] The third tier of government in Nigeria, i.e. the Local Government Councils, have been deliberately left out due to the huge financial commitments involved in structuring PPPs.

[369] George Nwangwu op cit note 376 at 270.

[370] S. 1 ICRC Act 2005.

[371] Nigeria maintains a principled federal character, which requires that each zone in the federation is represented on national boards or commissions.

[372] Some states like Lagos, Rivers, Cross Rivers, Niger and Ekiti have enacted local PPP laws to regulate PPPs in their jurisdiction.

The ICRC's role is to take custody of every concession agreement made under the Act, ensure efficient execution of concession agreements, and perform other functions as directed by the President from time to time.[373] The Act stipulates that for a private sector consortium to undertake a PPP concession with the federal government of Nigeria or any of its MDAs, the consortium must possess the financial capacity, together with relevant expertise and experience.[374] The fact that PPPs are a recent phenomenon in the country raises the question of whether local consortiums are disadvantaged by the provisions of the Act when bidding for projects, considering the greater experience that foreign consortiums may possess.

Notably, the Act provides that no agreement reached in respect of the Act shall be arbitrarily suspended, stopped, cancelled or changed, except in accordance with the provisions of the Act.[375] While this provision gives assurance to a prospective investor that PPP agreements will be respected, the Act fails to make provision for the funding[376] process for projects.[377] The Act does not provide detailed rules on how PPP contracts should be procured.[378] It is also noteworthy that the Act does not give clear directions on the approval process for PPP projects or on the method of dealing with unsolicited proposals, nor does it spell out provisions for dispute resolution in the event of disputes arising from a PPP arrangement.[379]

4.2.3 The Public Procurement Act 2007

As already noted in Chapter Three of this study, public procurement differs from PPP in the sense that in public procurement there is no transfer of the facility to the private sector, while in a PPP the facility is transferred to the private sector for the duration of the PPP transaction

[373] S. 14 and S. 20 of the ICRC Act 2005.

[374] S. 2(3) of the ICRC Act 2005.

[375] S. 11 of the ICRC Act 2005.

[376] This lacuna gave rise to the failure of the Lagos-Ibadan Expressway Concession awarded to Bi-Courtney Limited. That concession did not consider the funding of the project. While the Federal Government expected the concessionaire to provide the entire funding for the project, the Concessionaire felt that it was in the position of a middleman who is mandated to search for an investor. Details of that failed transaction are discussed later in the context of case studies of PPP projects under the current legal framework.

[377] Augustine Arimoro 'Funding of public-private partnership projects under the ICRC Act of 2005' (2015) 40 *Journal of Law and Globalisation*.

[378] George Nwangwu op cit note 376 at 270.

[379] Olufemi Soyeju op cit note 9 at 826.

(i.e. during construction, maintenance and operation). Notwithstanding this, there is currently an overlap of the Public Procurement Act in PPP administration in the country. The Act came into force in June 2007 and specifically stipulates that anybody engaged in the procurement of goods and services that derive at least 35 percent of the funding from the federal share of the budget must comply with the provisions of the Act.[380] Since the ICRC Act 2005 does not specifically exclude any other law regarding the procurement process for PPPs, and since the Public Procurement Act 2007 was passed later in time, the correct assumption is that the Public Procurement Act is applicable to PPPs as well. Furthermore, given that the Public Procurement Act 2007 does not take the ICRC Act 2005 into consideration, as it ought to have, the possibility of conflict is high because the Public Procurement Act itself deals with the procurement of goods and services for infrastructure projects.[381]

The Public Procurement Act 2007 established the National Council on Public Procurement (NCPP)[382] as well as the Bureau of Public Procurement (BPP).[383] These bodies regulate and monitor public procurement, harmonising the existing government policies as well as setting standards for developing the legal framework and professional capacity for public procurement in the country.[384] While the BPP performs regulatory and administrative functions, the NCPP exerts control over the administration of the BPP to ensure that the objectives of the Act are realised.

The Public Procurement Act 2007 identifies the main method of procurement as open competitive bidding, referred to as 'sealed bidding.'[385] Under this method, the procuring authority, based on a defined set of criteria, effects public procurements by offering every interested bidder equal, simultaneous information, and the opportunity to offer the goods and services needed.[386] The aim is to make public procurement transparent and keep corruption in check. However, it has been noted that the main challenge to the Act is the reluctance of the

[380] S. 15 of the Public Procurement Act 2007.

[381] George Nwangwu op cit note 376 at 271.

[382] S. 1 (1) of the Public Procurement Act 2007.

[383] S. 3 (1) of the Public Procurement Act 2007.

[384] See the Explanatory Memorandum and the Schedule to the Public Procurement Act 2007.

[385] S. 16 (1) of the Public Procurement Act 2007.

[386] O A Jacob 'Procurement law in Nigeria: Challenge for attainment of its objectives' *University of Botswana Law Journal* December (2010) at 139.

federal government of Nigeria to embrace the full implementation of the Act, since a public contract can be used to reward political loyalists.[387]

Some authors maintain that the Public Procurement Act 2007 may be applied to fill gaps left by the ICRC Act 2005 in terms of the procurement of goods and services required in PPP projects.[388] It is however the submission of this study that the Public Procurement Act does not adequately provide for PPPs, and that the existing PPP laws should be developed to cater to the needs of PPP arrangements. Most importantly, a clear distinction should be made between PPP and public procurement.

4.2.4 The Public Enterprises and Commercialisation Act 1999 (PECA)

Although this Act established the framework for the privatisation and commercialisation of public assets in Nigeria, being earlier in time than the ICRC Act it also initially served as a guide for concessions in the country.[389] Notably, 26 seaports, the Trade Fair Complex, the Tafawa Balewa Square, the National Theatre (all in Lagos) and the several hydroelectric power plants across the country were transferred to private ownership under the law by the Bureau of Public Enterprises (BPE), a creation of the Public Enterprises and Commercialisation Act 1999.[390] The Act also established the National Council on Privatisation (NCP).[391] While the NCP is charged with the responsibility of setting and administering the federal government's policies and objectives on privatisation and approving transactions, the BPE is responsible for actual day-to-day privatisation activities.

Even though privatisation is not the same as a PPP transaction, the absence of a PPP framework before the creation of the ICRC enabled the conclusion of concessions under the supervision of the BPE. Some transactions are still listed under the schedule to the Public Enterprises and Commercialisation Act, including airports and railway projects. This overlap could lead to conflict between the BPE and the ICRC.

[387] Ibid.

[388] George Nwangwu op cit note 376 at 271.

[389] Ibid.

[390] S. 12 PECA 1999.

[391] S. 9 of PECA 1999.

4.2.5 The Utilities Charges Commission Act 1992

This Act established the Utilities Charges Commission.[392] The Commission is responsible for evaluating on a continuous basis trends in tariffs charged by any of the public utilities listed in the second schedule to the Act; advising the federal government on guidelines within which increases in tariffs should be confined by scheduled utilities; designing and developing an adequate information system relating to the scheduled utilities; keeping charges and tariffs under constant surveillance and propose measures; regulating tariff charges and preventing the undue exploitation of consumers.[393]

As it relates to PPP arrangements, the Utilities Charges Commission is mandated to approve the tariffs or charges to be agreed by the Concessionaire and the public sector. The utilities specified by the Act include electricity, seaports, railways, postal services and airports.

4.2.6 The Environmental Impact Assessment Act No 86 of 1992

This Act was passed to ensure that an environmental impact assessment is carried out prior to the undertaking of any project that is likely to have a significant effect on the environment.[394] The Act stipulates that neither the public nor private sector of the economy shall embark on any project without first considering the environmental effects of the project. [395] Under the Act, the assessment shall include a description of the proposed activities;[396] a description of the potentially affected environment, including specific information necessary to identify and assess the environmental effects of the proposed activities;[397] a description of the practical activities, as appropriate;[398] an assessment of the likely or potential environmental impacts on the proposed activity and the alternatives, including the direct or indirect, cumulative, short-term and long-term effects;[399] an identification and description of measures available to mitigate adverse environmental impacts of the proposed activity and an assessment of those

[392] S. 1(1) Utilities Charges Commission Act 1992.

[393] S. 6 Utilities Charges Commission Act 1992.

[394] S. 1 Environmental Impact Assessment Act 1992.

[395] S. 2 Environmental Impact Assessment Act 1992.

[396] S. 4(a) Environmental Impact Assessment Act 1992.

[397] S. 4(b) Environmental Impact Assessment Act 1992.

[398] S. 4(c) the Environmental Impact Assessment Act 1992.

[399] S. 4(d) the Environmental Impact Assessment Act 1992.

measures;[400] an indication of gaps in knowledge and uncertainty which may be encountered in computing the required information;[401] an indication of whether the environment of any state, local government area or areas outside Nigeria is likely to be affected by the proposed activity or its alternatives;[402] and a brief and non-technical summary of the information provided under paragraphs (a) to (g) of Section 4 of the Act.[403]

The Act refers to the Nigerian Environmental Protection Agency, a creation of the Federal Environmental Protection Act,[404] as the agency to make decisions as to whether a proposed activity should be authorised.[405] The report is to be made available to any interested person or group.[406] However, the Act provides that an environmental impact assessment is not required when the President is of the opinion that the environmental impact of the project will be minimal, or the project is required to be carried out during a national emergency for which temporary measures have been undertaken by the Government, or if the project is to be carried out for the purposes of public health or safety.[407]

Since PPP projects involve construction and significant environmental impact, it is mandatory for all such projects to comply with the provisions of the Environmental Impact Assessment Act No. 86 of 1992.

4.2.7 The Debt Management Office Establishment (Etc.) Act 2003

This Act established a Debt Management Office (DMO).[408] Its relevance to PPP transactions is that the public authority may provide guarantees for projects or may seek financing for its contribution to any PPP project. The responsibilities of the DMO include *inter alia* maintaining a reliable database of all loans taken or guaranteed by the Federal or State Governments or any

[400] S. 4(e) the Environmental Impact Assessment Act 1992.

[401] S. 4(f) the Environmental Impact Assessment Act 1992.

[402] S. 4(g) the Environmental Impact Assessment Act 1992.

[403] S. 4(h) the Environmental Impact Assessment Act 1992.

[404] S. 63(1) the Environmental Impact Assessment Act 1992.

[405] S. 8 the Environmental Impact Assessment Act 1992.

[406] S. 9(2) the Environmental Impact Assessment Act 1992.

[407] S.15 the Environmental Impact Assessment Act 1992.

[408] S. 4 the Debt Management Office Establishment Act 2003.

of their agencies;[409] preparing and submitting to the Federal Government a forecast of loan service obligations for each financial year;[410] preparing and implementing a plan for the efficient management of Nigeria's external and domestic debt obligations at sustainable levels compatible with the national goals for growth and development, and participating in negotiations aimed attaining those goals;[411] verifying and servicing external debts taken by State Governments and any of their agencies (where such debts are guaranteed by the Federal Government);[412] setting guidelines for managing Federal Government financial risks and currency exposure with respect to all loans.[413]

PPP transactions may require the Federal government to borrow both externally or internally, as well as to issue guarantees in some cases. It is noteworthy that the ICRC Act does not countenance this. Potential PPP investors could be stranded if the DMO relying on the express powers granted to it under the Debt Management Office Establishment Act decides to veto a transaction midstream.[414]

[409] S. 6(a) the Debt Management Office Establishment Act 2003.

[410] S. 6(b) the Debt Management Office Establishment Act 2003.

[411] S. 6(c) the Debt Management Office Establishment Act 2003.

[412] S. 6(e) the Debt Management Office Establishment Act 2003.

[413] S. 6(f) the Debt Management Office Establishment Act 2003.

[414] George Nwangwu op. cit. note 321 at 272.

4.2.8 The National Inland Waterways Act 1997

This Act established the National Inland Waterway Authority (NIWA).[415] The objectives of the NIWA are to improve and develop inland waterways for navigation;[416] to provide an alternative mode of transportation for the evacuation of economic goods and persons;[417] and to execute the objectives of the national transport policy as they concern inland waterways.[418] It was pointed out above under sub-head 4.2.1 that inland waterways feature as an item on the exclusive legislative list. It therefore follows that any PPP project that deals with inland waterways must be arranged with the private sector by the Federal Government. The right body to deal with for a PPP transaction dealing with inland waterways is the NIWA.

The Act provides that all navigable waterways, inland waterways, river-ports and internal waters of Nigeria, excluding direct approaches to the ports listed in the Third Schedule to the Act and all other waters declared to be approached to ports under or pursuant to the Nigerian Ports Authority Act, up to 250 metres beyond the upstream edge of the quay of such ports, shall be under the exclusive management, direction and control of the Authority.[419]

Following from the foregoing, the effect of the provisions of the National Inland Waterways Act and the Second Schedule to the 1999 Constitution is that state governments are precluded from arranging PPP transactions that involve inland waterways.

4.2.9 The Federal Highways Act 1971

The Federal Highways Act 1971 empowers the Minister of Works and Housing to control federal highways.[420] It is the responsibility of the Minister to plan the construction and maintenance of federal highways as well as see to the regulation of traffic on them.[421] The Act however provides that this power may be delegated to the government of a state in respect of traffic on federal highways.[422] It must be emphasised that what may be delegated to state

[415] S. 1(1) National Inland Waterways Act 1997.

[416] S. 2(a) National Inland Waterways Act 1997.

[417] S. 2(b) National Inland Waterways Act 1997.

[418] S. 2(c) National Inland Waterways Act 1997.

[419] S. 1 National Inland Waterways Act 1997.

[420] S. 1 Federal Highways Act 1971.

[421] S. 2 Federal Highways Act 1971.

[422] S. 3 Federal Highways Act 1971.

governments is the control of traffic on federal highways and not the construction of such highways. The Act points out that the powers to be delegated refer to restriction on type or class of vehicle and vehicle inspection,[423] road diversion[424] or closure where necessary as a temporary measure and the prohibition of parking or waiting as the case may be on federal highways;[425] prohibition of the erection of hoardings and other forms of advertising within a distance of 300 feet from the middle line of any road formation in the vicinity of a federal highway or within the distance aforesaid from the middle line of the Federal highways;[426] and generally ensuring the uninterrupted flow of vehicular and pedestrian traffic.[427]

The power to erect, equip and maintain toll gates on any federal highway is vested in the Minister with the approval of the President.[428] It has been argued that when there is a concession in respect of any federal road in the country and there is a need for tolling, the authority to do so lies with the Minister in charge of roads in consonance with the Federal Highways Act 1971.[429] Regrettably, however, the ICRC Act 2005 does not make any reference to the Federal Highways Act 1971.

The Act also provides for compensation to be paid to land owners where land is acquired for the construction of federal highways in accordance with the Land Use Act 1978. There is confusion here regarding the question of who should be responsible for the payment of the compensation to land owners, since the Land Use Act provides that the Governor of the State concerned should pay such compensation[430] for lands acquired for overriding public interest, taking into cognisance that federal highways are strictly the concern of the federal government. The issue now is why should the state pay compensation for land acquired by the federal government for the construction of a federal highway, given that federal highways are on the exclusive legislative list? A serious problem could arise if the government of a state is

[423] S. 5(a) Federal Highways Act 1971.

[424] S. 5(b) Federal Highways Act 1971.

[425] S. 5(c) Federal Highways Act 1971.

[426] S. 5(d) Federal Highways Act 1971.

[427] S. 5(e) Federal Highways Act 1971.

[428] S. 2(1) Federal Highways Act 1971.

[429] Olufemi Soyeju op cit note 5 at 820.

[430] S. 29 Land Use Act 1978.

not disposed to pay compensation to land owners whose land is acquired for the construction of highways.[431]

4.2.10 The Fiscal Responsibility Act 2007

The Fiscal Responsibility Act (FRA) was passed in 2007 and amended in 2011 to provide for prudent management of the country's resources, to ensure the long-term macro-economic stability of the national economy, secure greater accountability and transparency in fiscal operations within the medium-term fiscal policy framework, and to establish the Fiscal Responsibility Commission (FRC) to ensure promotion and enforcement of the Nation's economic objectives.[432] The 2011 amendment of the Act empowers the FRC to enforce remittance or revenues of the Consolidated Revenue Fund of the Federation.

Basically, the Act is meant to impose limits on the country's spending and borrowing.[433] It follows that there ought to be synergy between the ICRC and the Fiscal Responsibility Commission whenever there is spending on the part of the government on PPP transactions. However, neither the ICRA Act 2005 nor the Fiscal Responsibility Act 2007 (and the later amendment of 2011) refers to cooperation between the ICRC and the FRC for the approval of PPP transactions involving government spending or borrowing. There is thus a gap in the law as to the extent of the cooperation between the Commissions to ensure the successful approval of PPP transactions in the country. This is particularly worrying because the FRC may withhold approval of government spending or borrowing in a project, which may lead to government not fulfilling its part in a PPP arrangement, a situation which could in turn lead to project abandonment and a loss to private investors.

[431] Mubarak Tijani Adekilekun *Legal and regulatory framework for public-private partnerships in infrastructure development: a case study of three African models and core international frameworks* (unpublished PhD thesis, University of Malaya, 2014) at 145.

[432] See the long title to the Fiscal Responsibility Act No. 31 of 2007.

[433] George Nwangwu op cit note 376 at 272.

4.2.11 The National Planning Commission Act 1993

This Act established the National Planning Commission (NPC). The role of the NPC as it relates to infrastructural development in the country include to formulate and prepare long-term, medium-term and short-term national development plans, to co-ordinate such plans at the Federal, State and Local Government levels;[434] and to monitor projects and progress relating to plan implementation.[435] It is noteworthy that the core objectives of the NPC include to promote national unity and integration;[436] ensure social justice and human welfare at all levels of Nigerian society;[437] focus on key national development issues and suggest ways for their efficient resolution;[438] determine how best the Fundamental Objectives and Directive Principles of State Policy contained in the Constitution of the Federal Republic of Nigeria 1999 can achieve the major objectives of optimal development, and suggest amendments that may be required from time to time, to achieve those objectives in the light of encountered realities.[439] As such, the focal point of the NPC is to see that there is an equal sharing of federal projects (including PPPs) across the country without much regard for the revenue the projects may generate, in recognition of the country's 'federal character' principle. It follows that if there is no clear cooperation between the NPC and the ICRC there is bound to be a conflict of interests.

4.2.12 Laws Regulating Foreign Direct Investments for Infrastructure

To attract foreign direct investment (FDI) into the Nigerian economy in general, the federal government has enacted laws to facilitate the importation of foreign capital. These laws also apply where there are foreign participants investing in the provision of infrastructure within the country.

The laws include the Nigerian Investment Promotion Commission Act 1998, which is the country's principal investment law and regulates the entry of FDI into Nigeria. It established the Nigerian Investment Promotion Commission, an agency set up to co-ordinate and monitor investment promotion activities dealing in foreign capital. The Foreign Exchange

[434] S. 4(d) National Planning Commission Act 1993.

[435] S. 4(e) National Planning Commission Act 1993.

[436] S. 2(a) National Planning Commission Act 1993.

[437] S. 2(b) National Planning Commission Act 1993.

[438] S. 2(c) National Planning Commission Act 1993.

[439] S. 2(d) National Planning Commission Act 1993.

(Monitoring and Miscellaneous) Provisions Act 1995 provides that no enterprise shall be nationalised or expropriated by any government of the federation unless it is in the national interest and adequate compensation is paid. The Act also provides for the smooth repatriation of funds in convertible currency where applicable.

It is crucial that the host country provide protection for foreign capital. Foreign investors usually require guarantees where or when there is a 'nationalisation or dispossession without recourse to judicial review and payment of appropriate compensation'[440] in line with the laws of the host nation and applicable rules of international law. However, in the light of recent shortages of foreign exchange in Nigeria occasioned by the fall in oil prices, it remains to be seen whether the government can provide guarantees that investors can access foreign exchange when they seek to repatriate funds.

4.3 Nigeria's National Policy on Public-Private Partnerships

It is common for policies to be drafted before legislation is introduced that affects any sector in the economy. This was not, however, the case with PPP in Nigeria. The main Act regulating PPPs, i.e. the ICRC Act 2005, was passed before the National Policy on Public-Private Partnerships was introduced in 2008. It has been suggested that the National Policy on PPP was designed to fill the many gaps and silences in the ICRC Act 2005.[441]

Nigeria's National Policy on PPP came into effect in November 2008 during the administration of the late President Umaru Musa Yar'Adua. The Policy is born out of the following:

> Many years of underinvestment and poor maintenance of infrastructure have left Nigeria with a significant infrastructure deficit which is holding back the country's development and economic growth. Nigeria needs to make massive investments, beyond the means available to government, in order to close its yawning infrastructure gap. The Federal Government ('the Government') believes that the private sector can play an important role in providing some of this new investment through Public Private Partnerships (PPPs).[442]

The objectives that the federal government of Nigeria seeks thereby to achieve are four-fold: economic, social, environmental and value for money.

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[440] UNCITRAL Legislative Guide at 190.

[441] George Nwangwu op cit note 376 at 272.

[442] The infrastructure Concession Regulatory Commission *the National Policy on Public Private Partnership* (2009) at 1.

In terms of the economic goals, the country aims to accelerate investment in new infrastructure and ensure that existing infrastructure is upgraded to a satisfactory standard that meets the needs and aspirations of the public; to ensure that all investment projects provide value for money and that the costs to government are affordable; to improve the availability, quality, and efficiency of power, water, transport and other public services to increase economic growth, productivity, competitiveness, and access to markets.[443] The latter would in turn ensure an increase in the capacity and diversity of the private sector by providing opportunities for Nigerian and international investors and contractors in the provision of public infrastructure, encouraging efficiency, innovation and flexibility. Other aims are to ensure that infrastructure projects are planned, prioritised and managed to maximise economic returns and are delivered in a timely, efficient, and cost-effective manner; to manage the fiscal risks created under PPP contracts within the Government's overall financial and budgetary framework; and to utilise federal and state assets efficiently for the benefit of all users of public services.[444]

Given the country's 'federal character principle,' which is defined as 'the distinctive desire of the peoples of Nigeria to promote national unity, foster national loyalty and give every citizen of Nigeria a sense of belonging to the nation as expressed in section 14(3) and (4) of this Constitution,'[445] it is no surprise that the National Policy on PPP lists ensuring balanced regional development under the social goals of PPP in the country.[446] Other social objectives of the Policy include the need to increase access to quality public services for all members of society; the need to ensure that user charges for new or improved public services are affordable and provide value for money; to respect employment rights and opportunities of existing employees and ensure that any redundancy or other social safety net issues are resolved before project approval; to enhance the health, safety and wellbeing of the public, as well as to encourage the direct or indirect participation of small and medium sized enterprises in PPP projects.[447]

[443] Ibid.

[444] Ibid at 1.

[445] S. 318 of the 1999 Constitution of the Federal Republic of Nigeria.

[446] The import of inserting the federal character principle into the country's PPP policy is that projects may not be executed solely according to the need for them and whether they are bankable but to ensure the national spread of projects.

[447] The Infrastructure Concession Regulatory Commission op cit note 454 at 2.

The environmental goals of the national PPP policy are to protect and enhance the natural environment as well as to minimise greenhouse gas emissions and other pollutants.[448]

As it relates to value for money, the Government will opt for the PPP model of procurement if it is likely to result in better value and more affordable services.[449]

An important inclusion in the national PPP Policy is the declared resolve of the government of Nigeria to create an appropriate enabling environment for PPP that allows a fair return to private investors for the project risk they are willing to take. The government therefore undertook to put in place a legal, financial and institutional framework that would promote and facilitate the implementation of privately financed projects by enhancing the transparency as well as the long-term sustainability of the projects.[450]

The Policy document lists the following sectors as the PPP focus for the country:[451] power generation plants and/or transmission/distribution of power; roads and bridges; water supply, treatment and distribution systems; ports; airports; railways; inland container depots and logistics hubs; gas and petroleum storage depots and distribution pipelines; solid waste management; educational facilities; urban transport system; housing and healthcare facilities.
It is the submission of this research that the government of Nigeria is obliged to follow through with the policy in line with the earmarking of the 13 sectors listed above, as most of the projects brokered thus far are in the transport sector. A holistic approach to bridging Nigeria's infrastructure gap taking these key 13 areas into account will go a long way towards improving the standard of living of the Nigerian people.

More importantly, the Policy envisaged that that between 2008 and 2015, the sum of $100 billion would be invested in four key sectors, namely, power ($18-20 billion), railways ($10 billion), roads ($14 billion) and oil and gas ($60 billion), to meet projected annual growth targets geared towards transforming the country into one of the 20 largest economies in the world by the year 2020.[452]

[448] Ibid at 2.

[449] Ibid.

[450] Ibid.

[451] Ibid at 60.

[452] Ibid at 61.

4.4 Institutional Framework for Public-Private Partnership in Nigeria

Institutional framework here refers to those organs or agencies of state structured or put in place by law to ensure that PPPs are successfully administered.[453] These agencies are either established as entities created by legislation or as units within government departments.[454] The institutional framework for PPP in Nigeria involves overlapping roles on the part of some government agencies, even though there is a primary body charged with responsibility for the administration and regulation of PPPs at the national level. The Infrastructure Concession Regulatory Commission (ICRC) is that body. It was established under the Infrastructure Concession Regulatory Commission (Establishment, etc.) Act 2005[455] but came into existence three years later. Yet because of previous policies including privatisation, commercialisation, deregulation and national development planning, other agencies of government may be included in a PPP process involving the federal government of Nigeria.

Specific roles and responsibilities have been assigned to various MDAs dealing with 'project identification, planning, approval, procurement, and implementation.'[456] The bodies charged with the responsibility for administering PPP at the national level are discussed below.

4.4.1 The Infrastructure Concession Regulatory Commission (ICRC)

The ICRC was established under s. 14(1) of the ICRC Act 2005. It is set up as a body corporate with perpetual succession and a common seal.[457] The functions of the ICRC are to: take custody of every concession agreement made under the ICRC Act and monitor compliance with the terms and conditions of such agreements,[458] ensure efficient execution of any concession agreement or contract entered into by the Government,[459] ensure compliance with the

[453] Tesborne Tafesse Beyene 'Policy, legal, and institutional frameworks for PPP implementation in development process: stakeholders' perspective' (2015) 14.3 *China-USA Business Review* at 155.

[454] The Institute for Public-Private Partnerships Inc. (IP3) *Development of Policy, Legal, and Institutional Framework for the Public-Private Partnership Program in Malawi* (2007) at 38.

[455] S. 14 (1) ICRC Act 2005.

[456] The Infrastructure Concession Regulatory Commission op cit note 454 at 8.

[457] S. 14 (2) ICRC Act.

[458] S. 20(a) ICRC Act 2005.

[459] S. 20(b) ICRC Act 2005.

provisions of the ICRC Act 2005,[460] and perform such duties as may be directed by the President, from time to time, and as are necessary or expedient to ensure the efficient performance of the functions of the Commission under the Act.[461]

The Contract Monitoring Unit within the ICRC is tasked with the responsibility of monitoring compliance with the terms of a PPP contract by the parties to the arrangement.[462] The ICRC also provides technical assistance to all ministries, departments and agencies in the development of PPP projects.

4.4.2 The Federal Ministry of Finance (FMoF)

The role of the FMoF in PPP at the national level is to ensure the effective public financial management of projects, especially as this relates to evaluating and managing fiscal risks that may result from the terms of the agreements. It is the duty of the FMoF to ensure that the forecast costs for the Government – including subsidies that may be necessary to make a project financially viable or to ease the transition for poor households to a full cost recovery tariff – are affordable over the life of the contract and within the medium-term expenditure framework.[463]

4.4.3 The Debt Management Office (DMO)

S. 4 of The Debt Management Office Establishment (Etc.) Act No. 18 of 2003 established the Debt Management Office to prepare and implement a plan for the efficient management of the country's external and domestic debt obligations, and set guidelines for managing the country's risk and currency exposure with respect to all loans. Since PPP arrangements will require the federal government of Nigeria to borrow both externally and locally and include the issue of guarantees, the DMO has a role to play in PPP procurement. It is the responsibility of the DMO to be satisfied that any contingent liabilities are manageable within the federal government's economic and fiscal forecast. It is also required that project teams consult the DMO in advance when an MDA considers involving multilateral agencies in providing

[460] S. 20(c) ICRC Act 2005.

[461] S. 20(d) ICRC Act 2005.

[462] Ibid.

[463] The Infrastructure Concession Regulatory Commission op cit note 454 at 9.

guarantees or other financial instruments.[464] It is pertinent to note, however, that the ICRC Act 2005 does not include a role for the DMO in the arrangement or procurement of PPP. It is therefore obvious that the National Policy on PPP has served to fill this gap in the law.

4.4.4 The Bureau of Public Procurement

The function of the Bureau of Public Procurement (BPP) is to ensure due process in the procurement of public works and services. It does so by using a benchmarking technique to ensure that the prices paid for goods and services are fair and reasonable.[465]

4.4.5 The Public-Private Partnership Resource Centre

The role of the Resource Centre involves capacity building in the private sector, 'through publicity, conferences and other meetings.'[466] It acts as a bridge between the public and the private sectors to ensure that the PPP programme across the federation has sufficient scale and ambition to encourage international players to participate, through teaming up with smaller and medium-sized local contractors. The Centre advises the federal government on the development of policy for PPP; it issues guidance, in conjunction with the National Planning Commission (NPC), on the identification of PPP projects and programmes within the Government's investment strategy, and it coordinates the PPP policies and programmes of the state and federal governments, working with similar units in the States or Ministries to ensure consistency of approach and a steady flow of projects in the market.[467]

[464] Ibid at 9.

[465] Ibid.

[466] Ibid at 66.

[467] Ibid.

4.4.6 The Contract Compliance Centre

The Centre takes custody of every concession agreement and monitors compliance with the terms and conditions of the agreement while maintaining a database on concessions and other PPP contracts entered into by the government.[468]

4.4.7 The Accountant General of the Federation

The office of the Accountant General of the Federation ensures that the funds for payment obligations incurred through Federal PPP contracts are safeguarded to ensure prompt payment, subject to appropriate authorisation.

4.4.8 The Securities and Exchange Commission (SEC)

The origin of Nigeria's Security and Exchange Commission (SEC) dates to 1962 when an *ad hoc* Capital Issues Committee was established under the aegis of the country's Central Bank. The Commission assumed its current form on 1 January 1980, but now derives its powers from the Investment and Securities Act 2007. Under that Act, the SEC is empowered to regulate investments in the country. As regards PPPs, the SEC has laid down a Rule for Infrastructure Funds in the country. The Rule sets out, *inter alia,* the conditions for establishing infrastructure funding, the issuance of units, permissible investments and the duties of the Fund Manager.[469]

4.4.9 The National Planning Commission (NPC)

The National Planning Commission (NPC) has the task of developing national development plans for all infrastructure services administered by the federation of Nigeria.[470] The MDAs in the country are required to work with the NPC in identifying their long-term infrastructure development goals, to determine whether the proposed projects can be funded through the

[468] Ibid at 66.

[469] See SEC Rules on Infrastructure Funds 2014.

[470] This is usually for a period of 15 years.

MDA's budget or be structured as a PPP. Thus, MDAs with prospective projects must maintain a synergy with the NPC.

Over the years, numbers of laws have been passed to promote the economic development of Nigeria across various sectors. Many of these have created agencies or government departments with a range of functions. Since PPPs involve infrastructural development, a key sector of the national economy, it is not surprising that by now too many agencies or departments are required to play a part either in the initial or development phases of PPP arrangements. The involvement of several agencies in the regulation of PPP projects may result in unnecessary bickering as well as interference by other government agencies in a task which is primarily the responsibility of the ICRC. The current situation renders the whole PPP process in the country somewhat complex, which can be dismaying for prospective foreign investors who are not conversant with the Nigerian legal and business environment.

4.5 Public-Private Partnership Laws at the Sub-National Level

Interestingly, following the adoption of a PPP framework at the national level, a few Nigerian states have enacted their own PPP laws and set up PPP units. Thus, potential PPP investors must take cognisance of which tier of government they should be dealing with. Apart from noting the items on the exclusive legislative list, a prospective investor must be guided to ensure that any state government being dealt with has in place a framework for PPP before agreeing to transact any business.[471]

The Lagos State Government led the way for the other states in the adoption of the PPP model of procurement. The state signed into law the Lagos State Public-Private Partnership Law (LSPPPL) in June 2011.[472] The law repealed the Lagos State Roads (Private Participation) Authority Law 2007 and established a PPP office in the State. Under the LSPPPL 2011, the State House of Assembly must ratify all concession agreements and must approve sums to be charged as tolls or user fees.

The Rivers State Government has made proactive commitment to a PPP regime by enacting the Public-Private Participation in Infrastructure Development Law in 2009. That law established the Bureau of Public-Private Partnership to administer PPP in the state. The Rivers

[471] At the federal level government may be represented by any of its MDAs while at the sub-national level a state government may also be represented by any of its MDAs.

[472] See *http://www.olaniwunajayi.net/clientalert/PPP%20Newsletter%20Final%2011%2008%202011.pdf* accessed 11 April 2016.

State law has clearly marked out "no-go-areas" for PPP in the State. These areas include defence, the security of the state, urgent public need or emergency, and items under closed bid as provided for in section 21(4) of the Rivers State Public Procurement Law No. 4 of 2008. Unlike the Lagos State PPP Law that merely mirrors the ICRC Act 2005, the Rivers State Law established an Infrastructure Development Unit (IDU) under the state's Ministry of Finance.[473] The main responsibility of the IDU is to ensure value for money for the state by applying commercial standards in evaluating risks and costs.[474] It is significant that the Rivers State Law provides for Infrastructure Credit Guarantee (ICG). Under the law, the Rivers State Government may upon the recommendation of the IDFU guarantee the credit of a private party which intends to obtain a loan from a financial institution for the execution of a PPP project, thereby stimulating private sector participation and encouraging the involvement of companies and businesses indigenous to Rivers State.[475] The Rivers State Law is an improvement on the ICRC Act 2005. However, a drawback of the Rivers State PPP Law is the limiting of PPPs to a 20-year term (Section 62 of the Law). There is a need to amend that section as PPPs are known to be long-tenured and could more appropriately extend to 30 years.

The Ekiti State Government enacted the Ekiti State Public Private Partnership Law on 26 July 2011. The Law established the Office of Public Private Partnership for the state.[476] The Law permits state MDAs to enter into PPP arrangements with qualified private project proponents. An important inclusion in the Ekiti Law is the provision for guarantees, letters of comfort or undertaking.[477] The import of this inclusion – which is lacking in the ICRC Act of 2005 – is the level of assurance that it provides for prospective investors.

The Cross River State Government enacted the Cross River Public Private Partnership Law in 2010.[478] In addition, the state has enacted the Cross River State Process and Process Intelligence Bureau for Public Procurement Law No. 15 2011, to ensure that due process is followed in PPP arrangements. [479]

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[473] S. 27 Public-Private Participation in Infrastructure Development Law 2009.

[474] S. 30(1) Public-Private Participation in Infrastructure Development Law 2009.

[475] S. 35 Public-Private Participation in Infrastructure Development Law 2009.

[476] S.1 Ekiti State Public Private Partnership Law 2011.

[477] S. 9 Ekiti State Public Private Partnership Law 2011.

[478] John Ighodaro 'C-River Govt Signs PPP Bill into Law' *Vanguard Newspapers* 4 August 2010.

[479] *African Gong* 'Cross River highway project; Buhari tasked for answers' available at *http://africangong.com/2015/11/08/cross-river-highway-project-citizen-demand-answers/* accessed 14 April 2016.

The other states that have set up a PPP framework for private sector participation in infrastructure delivery include Bayelsa, Delta, Akwa Ibom, Abia, Edo, Benue, Sokoto, Zamfara, Benue, Bauchi, Kaduna and Yobe.[480]

4.6 The Practice of Public-Private Partnership in Nigeria

With the passing of the ICRC Act 2005 and the adoption of a National PPP Policy in 2008, the country fulfilled its undertaking to engage the private sector in the procurement of public facilities. An important policy directive on the part of the federal government is the incorporation of the PPP Policy in the country's Vision 20:2020 Plan, since infrastructure is key to national economic development. PPPs can undoubtedly benefit the development of the economy, but the government needs to do more than just develop a framework for the practice of PPP: it needs to make a strong commitment to the success of PPP projects.

In this section, accounts are given of the life cycle of PPP projects, focusing on funding for projects and case studies of a few projects, in order to give the reader some insight into how PPPs are structured and conducted in Nigeria.

4.6.1 Public-Private Partnership Project Cycle in Nigeria

There are basically four different phases in the life cycle of a PPP project in Nigeria.[481] The first phase is the project development and appraisal phase. During this phase, the need for the project is identified. This is followed by a systematic appraisal of technical solutions to meet the need.[482] Thereafter, an economic, social and environmental cost benefit analysis is carried out (as well as an environmental impact assessment if required).[483] For the project to qualify as a PPP, a value for money assessment is done at this stage. After the assessment, a financial

[480] Martin O Dada & Olukayode S Oyediran 'The state of public private partnership in Nigeria' in Akintola Akintoye, Mathias Beck and Mohan Kumaraswamy (eds) *Public Private Partnerships: A Global Review* (2005) 5.

[481] Infrastructure Concession and Regulatory Commission 'National public private partnership policy document' (2009).

[482] Ibid at 13.

[483] Ibid.

analysis is prepared, a budget allocation is structured, and the project is approved as an Outline Business Case (OBC).[484]

The second phase in the life cycle of a PPP transaction in Nigeria is the project procurement phase.[485] This phase involves the creation of a project team and a management structure. This leads to the preparation of an Information Memorandum and Bid Documentation (IMBD).[486] If it is appropriate, market consultation is then carried out. Thereafter a competitive and transparent procurement process with a clear audit trail is followed to select bidders and to evaluate bids.[487] This is then followed by the approval of a Full Business Case (FBC) before a decision is reached to award a contract.[488]

The third phase is the implementation phase. This phase involves monitoring the design and construction of the project and the subsequent operation and maintenance of the facility to ensure that there is compliance with the required standards. This is in addition to the monitoring of payments against services delivered and any contingent liabilities.[489]

The fourth phase in the PPP transaction cycle in Nigeria is the maturity phase. During this phase, the facility is inspected and prepared for handover in accordance with the specified requirements.[490] If appropriate, an analysis of future service delivery options and further procurement is carried out. The contract is then closed, and lessons learnt are recorded for future purposes.[491]

All through the phases of the life cycle of a PPP transaction in Nigeria, the federal government through the ICRC provides guidance for and effective management of each phase of the project.[492]

Within the four stages adumbrated above, there are typically 12 steps to be adhered to in implementing PPPs. These steps constitute the National PPP process for the country.[493] The

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[484] Ibid.

[485] Ibid.

[486] Ibid.

[487] Ibid at 14.

[488] Ibid.

[489] Ibid.

[490] Ibid at 15.

[491] Ibid.

[492] Ibid.

[493] Infrastructure Concession and Regulatory Commission 'National PPP Process' see *http://www.icrc.gov.ng/ppp/* accessed 16 March 2017.

process for initiating a project usually begins with a ministry, department and/or agency (MDA) identifying the need for a project. This is followed by the MDA engaging the ICRC to ensure the bankability and viability of the proposed project. While doing so, the MDA is expected to consult the Federal Ministry of Finance to minimise the risk and contingent liabilities arising from such projects. Thereafter, a Transaction Adviser (TA) is engaged by the MDA through a competitive bidding process as required under the Public Procurement Act 2007. The function of the TA is to produce a report which is known as the Outline Business Case (OBC). Upon the completion of the OBC, the MDA forwards it to the ICRC for review. If the review from the ICRC is positive, the ICRC issues an OBC Certificate of Compliance to the MDA concerned; if not, the ICRC will decline to issue a certificate and will advise the MDA accordingly. If an MDA obtains an OBC Certificate, the MDA will thereafter submit the document to the Federal Executive Council through the line Minister for approval. Upon the approval of the Federal Executive Council, the MDA's TA will commence a procurement process leading to a competitive bidding stage, from which a preferred PPP Project Proponent (Investor) will emerge. Following this, negotiations will ensue, leading to the conclusion of a Full Business Case (FBC) for the review of the ICRC. The next step will be the MDA submitting the FBC alongside the Certificate of Compliance from the ICRC to the line Minister for approval by the Federal Executive Council. When this is approved by the Federal Executive Council, a contract is signed between the MDA and the preferred PPP Project Proponent (Investor). The ICRC then assumes custody of the contract.[494] But before the project can take off, the PPP Project Proponent (Investor) must achieve Financial Close, i.e. conclude funding arrangements for the project. While the project is ongoing, the MDA is required to supervise it diligently[495] as well as jointly inspect it with the ICRC until the end of the contract.[496]

[494] S. 20 ICRC Act 2005.

[495] S. 12 ICRC Act 2005.

[496] S. 10 ICRC Act 2005.

4.6.2 Funding of Public-Private Partnership Projects in Nigeria

One of the first steps a prospective bidder for a PPP project normally takes is to secure the finance required for the project as well as to engage a financial adviser.[497] A prospective investor is then required to consider two main sources of private finance for infrastructure projects, commercial banks and bond investors. The other sources of funding for PPP projects include equity contributions, capital market financing, mezzanine contributions[498] and inter-creditor finance.[499]

The usual approach for arranging a project-finance loan is to appoint a lead arranger who is expected to underwrite the debt and place it in the market. Considering the huge finance involved, a consortium of banks may be involved in raising the debt.[500] The sponsors may make their own equity contributions[501] to the project, in addition to any budgetary contributions from the government.

The framework for a secured lending regime is still developing and cannot in its present form be relied upon solely for the funding of PPP projects in the country. As has been observed, whereas Nigeria's legal and judicial system is relatively developed, the legal framework for the country's financial sector 'remains antiquated and unsophisticated.'[502] Nigeria's legal framework for the financial sector has not been updated for several years and does not provide an adequate foundation for a modern financial system. The key drawbacks are that the framework suffers from an absence of new laws for development, and from the non-consolidation of laws and overlaps.[503] It has already been noted under the sections dealing with

[497] E R Yescombe op cit note 44 at 124.

[498] Mezzanine contributions are subordinated loads and preference shares. These are loads that involve a lender agreeing not to be paid until more 'senior' lenders to the same borrower have been paid. They are usually compensated more for taking added risk.

[499] The World Bank 'Sources of financing and intercreditor agreement' available at *https://ppp.worldbank.org/public-private-partnership/financing/sources* accessed 17 March 2017.

[500] E R Yescombe op cit note 44 at 130.

[501] These are funds invested in the project company, which comprise its share capital and other shareholder funds. Equity holds the lowest priority in terms of contributions to any project. Thus, equity shareholders will only receive payment after debt contributors have been paid.

[502] The World Bank 'Making finance work for Nigeria' available at *http://siteresources.worldbank.org/INTAFRSUMAFTPS/Resources/Making_Finance_Work_for_Nigeria.pdf* accessed 17 March 2017 at 192.

[503] Ibid at 152.

laws applicable to PPP in the country that the legal framework for PPP consists of a complex regime of overlapping legislation and multiple institutions created by law.

It is noteworthy, however, that the financial sector in the country has witnessed significant changes in recent years. Apart from a major consolidation which reduced the number of banks from 89 to 20, there has been an increase in the capitalisation of the banks.[504] This has strengthened the capacity of banks to provide lending facilities,[505] although despite the declaration of profits in billions of naira, they still concentrate on short-term rather than long-term lending.[506] It is imperative that reforms are undertaken to provide opportunities for large-scale investors to raise the funds needed to finance PPP projects.[507] It is noteworthy that Nigerian banks have started participating in PPP financing, as will be discussed in the case studies on Nigerian PPP projects examined below. Yet there remains a need for improvement in the tenure of financing that the country's banks can provide. Again, the banks mostly concentrate on and lend to the oil and gas sector due to the short-term nature of the credit involved.[508] Since interest rates are high, the cost of obtaining credit in Nigeria is also very discouraging to a prospective borrower. This leaves the investor with the option of sourcing foreign loans, but these may turn out to be even costlier in the long-term in the absence of a stable foreign exchange regime.[509]

As it is, financing for PPP infrastructure in the country comes from project sponsors, commercial banks, international banks, local institutional investors, international investors and multilateral finance organisations.[510] The need to encourage low- to middle-income investor participation in infrastructure funding in the country is yet to be explored. However, the setting up of private equity firms like the African Capital Alliance, ARM Infrastructure Fund, Africa Finance Corporation and ACTIS West Africa is an indication that there is a potentially

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[504] *Making Finance Work for Africa* 'Nigeria: Financial sector profile' available at *http://www.mfw4a.org/nigeria/financial-sector-profile.html* accessed 17 March 2017.

[505] Ibid.

[506] A Adekunle Olusegun, O Salami Ganiyu & A Adedipe Oluseyi 'Impact of financial sector development on Nigerian economic growth' *American Journal of Business Management* 2.4 (2013) at 347.

[507] Ibid.

[508] The World Bank 'Making Finance Work for Nigeria' (2009) at 464.

[509] The value of the Naira has depreciated by more than 100 percent in the last two to three years. Since foreign loans are to be repaid in the currency for which they were obtained, this can result in serious problems for the investor since project revenue receipts are always in the home currency.

[510] Wale Shonibare 'Capital *Markets Financing for Infrastructure Projects'* (2013) at 11.

profitable infrastructure market in the country.[511] However, all the funds listed above have high entry thresholds for prospective investors. The result is that the public may view PPP as a means of making the rich richer and impoverishing the poor. It is the submission of this research that for a developing country like Nigeria, opportunities should be created for the participation of low- to middle-income earners in infrastructure funding, to make PPP more attractive to the public as well as to get them a return on their investment.

4.7 Case Studies of Public-Private Partnership Projects in Nigeria

In this section, some PPP projects that have been arranged under the current framework are briefly discussed and the factors that gave rise to their success or failure are analysed. The projects cut across the transport, health and tourism sectors. The projects selected are both national as well as state PPP projects.

4.7.1 The Lagos-Ibadan Expressway Project

This road links the commercial city of Lagos with the ancient city of Ibadan. The road was initially constructed by the federal military government between 1974 and 1978. While the first section of the expressway[512] was constructed by Julius Berger Nigeria, the second section[513] was constructed by Dumez (Nigeria) and the third section[514] by Strabag Nigeria.[515] Due to age, usage and poor maintenance, the state of the road had deteriorated considerably, and various sections of the road had become death traps for users.

In a bid to address the appalling state of the road, the Federal Ministry of Works awarded a 25-year concession[516] for the rehabilitation of the expressway to Bi-Courtney Highway Services Limited (BCHSL).[517] BCHSL engaged the services of local consultants to

[511] Ibid at 14.

[512] That is the section between Sagamu and Lagos.

[513] From Sagamu Interchange to Alapako.

[514] Between Alapako and Ojoo including the Ibadan Bypass.

[515] *The Punch Newspaper*, Editorial 27 April 2016.

[516] BCHSL was commissioned under a BOT arrangement to reconstruct the 105-kilometre Expressway with 100 percent funding from the concessionaire.

[517] The concession agreement entitled the concessionaire to revenue recoup rights through charging vendors on the road as well as collecting tolls.

commence the design for the rehabilitation of the expressway under the administration of President Umaru Musa Yar'Adua.[518] Furthermore, Project Management International was commissioned to manage a multi-disciplinary team made up of members of BCHSL, Group Five and Rand Merchant Bank while Vela/VKE of South Africa was to provide technical support.[519] Under the PPP arrangement, work on the expressway under consideration was to commence at the Ojota Interchange in Lagos and terminate at the Challenge Interchange in Ibadan, approximately 105 kilometres.

It has been argued that the federal government and the concessionaire failed to consider several factors that were necessary for the project to succeed and that resulted in the failure of the project to take off years after the concession agreement was signed. It has been pointed out that government officials did not have the requisite knowledge of PPP projects and failed to engage the services of experienced legal/transaction/technical consultants and advisers.[520]

In November 2012 the administration of President Goodluck Jonathan revoked the concession awarded to BCHSL in 2009, citing violation of the terms, in particular the failure on the part of BCHLS to secure the necessary funds for the project.[521] Following the revocation of the contract, BCHSL wrote to the Minister of Works on January 29, 2013 expressing a desire for arbitration, a request to which the government did not respond.[522] Subsequently, BHSL approached the Federal High Court for an order to restrain the federal government of Nigeria from re-awarding a concession of the Lagos-Ibadan expressway to any other construction company, arguing that this would amount to a breach of the contract between it and the Federal Ministry of Works.[523] The defendants in the suit were the Federal Minister of Works, the

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[518] Project Management International 'Lagos-Ibadan Expressway, Nigeria' available at *http://pmi-ltd.co.za/projects/66_BCHS-2011-Lagos_Ibadan_Expressway-Nigeria.pdf* accessed 12 August 2016.

[519] Ibid.

[520] Solomon Babatunde, Srinath Perera, Chika Udeaja and Lei Zhou, 'Challenges in implementing public private partnership strategy for infrastructure delivery in Nigeria,' available at *http://nrl.northumbria.ac.uk/17191/1/babatunde_et_al_ppp_conference_paper_(1).doc* accessed 20 August 2016.

[521] Ini Ekott 'At last, FG revokes Lagos-Ibadan Expressway Bi-Courtney concession' *Premium Times*, 19 November 2012 available at *http://www.premiumtimesng.com/news/107689-at-last-fg-revokes-lagos-ibadan-expressway-bi-courtney-concession.html* accessed 21 August 2016.

[522] *Vanguard Newspapers*, 'N167bN Lagos-Ibadan Expressway: How FG ignored arbitration offer by Bi-Courtney,' *The Vanguard* 26 January 2016.

[523] The suit by Bi-Courtney Highway Services Limited was instituted primarily to challenge the re-concession of the rehabilitation of the expressway to Motorways Asset Limited (an SPV set up by Infrastructure Bank Plc for the executors of the project – Julius Berger Nigeria Ltd and RCC Nigeria Ltd.).

Attorney General of the federation and three companies. In a ruling on 25 April 2016, the Federal High Court, whilst not agreeing with the defendants that the suit was an abuse of court process, nevertheless held that the matter was brought outside the time limited by the Public Officers' Protection Act[524] and therefore dismissed the action in its entirety. This is because once a suit against a public officer is commenced more than three months after the cause of action arose, such a case should be held to be statute-barred and the court should decline jurisdiction.[525] The court further set aside its earlier mandatory injunction setting aside the Concession Agreement entered between the FGN and Motorways Asset Ltd, which the same court had earlier made on 11 December 2015.[526]

The Lagos-Ibadan Expressway – Bi-Courtney Concession ended up a failure.[527] The reasons for this include: poor understanding of how PPPs work on the part of the government and the concessionaire; the lack of guarantees on the part of the government which resulted in the reluctance of financial partners to identify with the project; the failure of the concessionaire to source the needed funds for the project; arbitration not being given a proper place in the agreement leading to litigation and poor project development. It is submitted that the public authority must consider the lessons learnt from this project to avoid similar mistakes in the future.

[524] See S 2 (a) of the Public Officers' Protection Act which provides that 'where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Act or Law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, Law, duty or authority, the following provisions shall have effect –

Limitation of time

-the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within three months next after the act, neglect or default complained of, or in case of continuance of damage or injury, within three months next after the ceasing thereof:'

[525] *The Paradigm* 'Lagos-Ibadan Expressway: Bi-Courtney Highway Services Limited loses case against the Federal Government' available at *http://www.premiumtimesng.com/news/107689-at-last-fg-revokes-lagos-ibadan-expressway-bi-courtney-concession.html* accessed 21 August 2016.

[526] *Luminary Nigeria* 'Court dismisses Bi-Courtney's suit seeking termination of Lagos-Ibadan Expressway Concession' available at *http://www.luminaryng.com/court-dismisses-bi-courtneys-suit-seeking-termination-of-lagos-ibadan-expressway-concession/* accessed 21 August 2016.

[527] Aminu Dikko 'Infrastructure and national transformation: The PPP imperative' a presentation by the Director General, Infrastructure Regulatory Commission, Nigeria, in Price Waterhouse and Cooper, *the 4th National PPP Stakeholders Forum: Aligning Interests* July 2014.

4.7.2 The Lekki-Epe Concession Toll Road

Although this project was arranged at the state level, it serves as a good example of how to go about arranging and structuring a PPP project. The project was conceived as a PPP scheme under the BOT model. It was initially arranged to last for a 30-year period, following which the assets would be transferred to the Lagos State Government. As the flagship road concession project in the country and for the manner in which it was professionally structured, the project received international awards including that of the *Africa Investors' Magazine* for being the Transport Deal of the Year 2008; the Euromoney International 2007 Africa PPP of the Year; Reuters 2008 Africa Infrastructure Deal of the Year and the *IFC/Infrastructure Journal* Top 40 Emerging Market Award in 2013.[528]

The project was necessitated by the fact that Lagos experiences a continuous influx of people, putting significant pressure on the road infrastructure in the state. The congestion on the road linking mainland Lagos to the central business district on the Islands is extremely problematic. This is made worse by an inadequate public transport system. Thus, the project was driven mainly by the desire to decongest the roads in the central business districts of Victoria Island and Ikoyi to make the areas more 'business-friendly.'[529] The project was to comprise 'the upgrading of approximately 49.5 kilometres of the existing Epe Expressway linking Lekki to Epe on Victoria Island. Among others, street lighting would be provided, the four-lane dual carriageway would be expanded to six-lanes in some places, and toll plazas would be constructed, along with other administrative structures.'[530] The project was to last for about 30 months with the early phase (Falomo Bridge to Mobil House) planned to last for the first nine months.

Despite the accolades that the project received both locally and internationally, there were allegations that the process leading to the award of the concession (bidding and selection) was shady, with allegations of complicity between government officials and the ownership of the Lekki Concession Company.[531] Again, not involving community stakeholders in the period

[528] Augustine E Arimoro op cit note 389 at 165.

[529] Africa Development Bank 'Summary of environmental and social impact assessment for the Lekki Toll Road Project' (2007) available at *http://www.afdb.org/fileadmin/uploads/afdb/Documents/Environmental-and-Social-Assessments/ADB-BD-IF-2007-170-EN-NIGERIA-LEKKI-TOLL-ROAD-PROJECT-ESIA.PDF* accessed 21 August 2016.

[530] Ibid.

[531] T Ayodele & O Sotola op cit note 99 at 6.

leading up to the award of the concession proved costly.[532] To underscore the relevance of community stakeholder involvement in PPPs, Yescombe notes that due to their public service nature, it is inevitable that PPPs will be the subject of political debate. He insists on the need for 'political will on the public-sector side of the table, and the ability to communicate the case for pursuing PPP clearly and fairly.'[533]

The LCC set up three toll gates even before executing a substantial part of the project. That action had the negative effect of reducing property values around the corridor by about 30 percent.[534] There was agitation on the part of the residents along the corridor, who contended that paying N250, N150 and N120 on each of the three tolls on a single journey was absurd. The argument on their part was that tolling should only commence upon the completion of the entire 49km stretch of the road. On the other hand, the concessionaire argued that under the concession agreement, they were empowered to commence the collection of tolls even though less than 10 percent of the road had been completed.[535]

The question of whether an alternative road should be made available before tolls could be charged on the expressway was brought to bear by the Stakeholders' Forum on Lekki-Epe Expansion Project.[536] The group argued that there was a need for an alternative route in the first place for those who did not wish to ply the expressway and pay tolls.[537] However, in addressing the question on whether or not there was an obligation on either the concessionaire or the public authority to provide an alternative road for users who were unable or unwilling to pay tolls, it was posited that Nigerian law makes no provision for such a thing.[538]

In terms of project funding, it is worth mentioning that the Lekki-Epe toll road was the first PPP deal to achieve financial closure in the roads sub-sector in the country. In addition, apart from attracting the sum of $290m of private investment from local and foreign investors,

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[532] Augustine E Arimoro, op cit note 389 at 166.

[533] E R Yescombe op cit note 44.

[534] C Uroko 'Multiple tolls on Lekki-Epe Expressway bring down property value by 30 percent' *Business Day* 19 September 2013.

[535] Ibid.

[536] This is a group made up of residents of housing estates and owners of commercial interests in Lekki, opposed to aspects of the concession agreement between LCC and the Lagos State Government.

[537] Dominis Nwelih 'Why we want Lekki-Epe Expressway concession deal reviewed,' *Sahara Reporters* 1 September 2010 available at *http://saharareporters.com/2010/09/01/%E2%80%98%E2%80%99why-we-want-lekki-epe-expressway-concession-deal-reviewed%E2%80%99%E2%80%99* accessed 21 August 2016.

[538] See Detail Solicitors 'Nigeria PPP review' (2012) at 3, available at *http://www.detailsolicitors.com/media/archive2/articles/PPPreview.pdf* accessed 21 August 2016.

the project obtained a 12-year loan from a consortium of local commercial banks. Before this, infrastructure projects had only been able to obtain a loan over a maximum seven-year period.[539] Specifically, the finance source for the project included a mezzanine contribution of $42.5m from the Lagos State Government; a loan of $85m from the African Development Bank, and a loan[540] of $109.7m from a consortium of Nigerian commercial banks.[541] The equity contribution from the sponsors of the project was N6.93Bn, held by a consortium of Asset and Resource Management Company Limited, Africa Infrastructure Investment Fund, Laure Projects and Hi Tech Construction.[542]

Despite the accolades the project attained and the seamless way in which finance for the project was sourced, the project failed as a PPP first because the government did not involve members of the public resident in the Lekki-Epe corridor during the initiation phase of the project to get their buy-in. Secondly, the mystery surrounding the choice of the winner of the bid contributed to its failure. Thirdly, the fear that the People's Democratic Party would gain an advantage in the 2015 gubernatorial polls due to the citizens' outcry against the project led to buyback of the concession by the Lagos State Government.[543]

[539] Cambridge Economic Policy Associates Ltd op cit note 71 at 88.

[540] 12-year note issuance facility.

[541] Including Zenith Bank, First Inland Bank (now a part of FCMB), Diamond Bank, First Bank of Nigeria and United Bank for Africa.

[542] Cambridge Economic Policy Associates Ltd op cit note 71 at 88.

[543] Ibid.

4.7.3 The Murtala Mohammed Airport Terminal 2 Concession

This project was Nigeria's first PPP in the aviation sector. The federal government of Nigeria through its agency the Federal Airports Authority of Nigeria (FAAN) entered into three different agreements with Bi-Courtney Aviation Services Limited (BCASL) within a time frame of four years. The first BOT agreement was signed in April 2003 for a period of 12 years. A second agreement was signed in June 2004 to allow for an increase in the construction period from 18 to 33 months because of the slow pace of work being carried out by BCASL.[544] A third agreement extended the concession period from 12 to 36 years and was signed in February 2007.[545]

Funding for the project was sourced from a consortium of six local banks – Zenith Bank International Plc, Oceanic International Bank Plc,[546] Guaranty Trust Bank Plc, First City Monument Bank Plc, Access Bank Plc and First Bank Nigeria.[547] The construction work for the terminal was completed on 7 April 2007 and flight operations commenced a month later.[548] Although the project was successfully completed, it was not without challenges. First, securing long-term finance in the absence of a framework or a model for long-term finance in the country was a herculean task for the concessionaire. Secondly, the unwillingness of the FAAN to compel airlines to use the terminal in line with the PPP agreement meant that the concessionaire would receive less revenue than what was projected.[549] A third obstacle was the absence of a dispute resolution mechanism other than litigation, compounded by FAAN's several refusals to obey court orders, and a fourth, the weakness on the part of the ICRC to defend PPP projects and protect private investors.[550]

The court cases so far affecting the MMA2 terminal concession 'either directly question the legality of the concession, the duration of the concession or [concern an alleged] breach of the concession contract.'[551] Suits have been filed by the FAAN and the BCASL against each

[544] George Nwangwu op cit note 372 at 168.

[545] Ibid.

[546] Oceanic International Bank Plc has now been acquired by Ecobank Plc.

[547] Solomon O Babatunde, Srinath Perera, Chika Udeaja & Lei Zhou, op cit note 510.

[548] Ibid.

[549] Uwem Essia & Abubakar Yusuf 'Public-private-partnership and sustainable development of infrastructures in Nigeria' (2013) 3.6 *Advances in Management and Applied Economics* at 117.

[550] Ibid.

[551] George Nwangwu op cit note 372 at 278.

other as well as by airport users and the workers' union, the latter two groups bringing action against BCASL.[552] The public sector claimed that BCASL had not paid ground rent for the use of MMA 2[553] and that the concession was for 12 years and not 36 years, as claimed by the concessionaire.[554] On the other hand, the concessionaire claimed that the concession bars the FAAN from renovating or operating any other terminal within Lagos State and that this includes the General Aviation Terminal (GAT),[555] which is the second terminal located a few metres from the MMA2 terminal under concession.[556] On account of this, the concessionaire contends that the government owes it proceeds from the operation of the GAT.[557] Court judgements confirming the owner of GAT as Bi-Courtney include the 2009 ruling made by Justice J. Chikere of the Abuja Federal High Court in the case of *Federal Airports Authority of Nigeria v Bi-Courtney Aviation Services Limited*.[558] The same judgment was affirmed in a ruling on February 13, 2013 by Justice A R Mohammed of the same court, in a suit filed by FAAN and the Ministry of Aviation asking the court to declare that they were not bound by the ruling of Justice Chikere. Justice Mohammed in his ruling stated categorically that because it was aimed at the Attorney-General of the Federation, Bi-Courtney's suit was binding on all

[552] Ibid.

[553] The ground rent is set at 5% of the concessionaire's turnover, as stipulated in the concession agreement.

[554] The government's case is that the Addendum Agreement between FAAN and BCASL, which increased the duration of the concession from 12 to 36 years, was not approved by the Federal Executive Council (FEC) in line with the mandatory provisions of the Infrastructure Concession and Regulatory Commission (Establishment Etc) Act 2005.

[555] FAAN awarded the construction of GAT to rival MMA2 and contravened parts of the BASL/FAAN Agreement, especially the monopoly clause. See Wole Oyebade, 'How not to privatise Nigerian airports, by stakeholders,' *Daily Nigerian News* 29 July 2016, available at *http://www.dailynigerianews.com/2016/07/29/how-not-to-privatise-nigerian-airports-by-stakeholders/* accessed 25 August 2016.

[556] Under Article 2.2 of the Concession Agreement, the Grantor guarantees and assures that it will not build any new domestic terminal in Lagos State and that no existing domestic terminal will be materially improved throughout the Concession period that would compete with the concessionaire for the same passenger tariff. Provided that the concessionaire shall have the right of first refusal if the passenger traffic during the concession period necessitates an expansion of the terminal and the first consideration if the Grantor elects to build a new domestic terminal in Lagos State. The grantor further guarantees and assures that all scheduled flights in and out of FAAN's Airport in Lagos State shall during the concession period operate from the terminal. FAAN further assures and guarantees that it shall not during the concession period cause or authorise the erection or development of a shopping mall or any facility/ies within 200 metres from the perimeter of the site capable of impeding and or threatening the concessionaire's revenue generation.

[557] Arik Air, one of the country's leading airlines, currently operates from the old domestic local airport also referred to as the GAT.

[558] Suit No. FHC/ABJ/CJ/50/2009 (unreported).

agencies of the federal government.[559] It is noteworthy that FAAN's appeals against court rulings against it have all been dismissed, yet FAAN maintains an 'above-the-law' posture.[560]

The reasons for the failure of the Murtala Mohammed Airport Terminal 2 Concession include the absence of a clear-cut arbitration route to follow in the resolution of conflicts, a weak regulatory body (the ICRC does not seem to have the requisite powers to intervene and enforce decisions), the flagrant violation of the terms of the concession by FAAN, a government agency, and the refusal of FAAN to obey court rulings. It remains worth noting, however, that although marred by controversies the project was successfully completed in terms of construction and being ready for operations.

In the first place, a situation in which an agency of the government that is party to a concession violates the agreement and at the same time refuses to obey court rulings is inimical to the essence of PPP. Furthermore, considering that PPP is a new phenomenon in Nigeria, it is a given that both local and foreign investors will watch the performance of existing concessions before taking any decision on a future concession. Bearing in mind that PPPs are often long-term investments, a violation of the terms of such a contract after just a few years does not augur well for the government and ultimately for the citizens and end-users of the PPP.

4.7.4 Tinapa Concession Project

This project is a business and leisure resort located in Calabar, Cross Rivers State. It was conceived during the administration of Mr Donald Duke, who served as governor of the state between 1999 and 2007.[561] The agreement for the project between the Government of Cross River State (Grantor) and Tinapa Business Resort Limited (Concessionaire) has been regarded as successful in terms of the arrangement and construction of the project.[562] The first phase of the project gulped $350 million.[563]

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[559] Chinedu Eze 'Bi-Courtney claims Arik owes it N12.5bn' *This Day* 2 May 2016.

[560] The Nation 'FAAN, Bi-Courtney bicker over N1.2b debt' 1 April 2013 available at *http://thenationonlineng.net/faan-bi-courtney-bicker-over-n1-2b-debt/* accessed 25 August 2016.

[561] Murtalala S Sagagi 'Public-private dialogue as a panacea to poor governance and low public-private partnerships in Nigeria' in G Ramesh, V Nagadevara, G Naik and A B Suraj (eds.) *Public Private Partnerships* (2010) at 92.

[562] Ibid at 92.

[563] Ibid at 92.

The leisure resort was opened for business on April 2, 2007, barely a month before the expiration of the tenure of Mr Donald Duke. It is in Adiabo, by the River Calabar on the outskirts of the city of Calabar. The plan initially was to have four phases of development for the resort within the Calabar Free Trade Zone (FTZ). The resort occupies 80,000 square metres.[564] However, since the commission of the resort by the then President Olusegun Obasanjo in 2007, business activities have remained extremely low.[565] Nonetheless, the project's financial viability is driven by expectations of import, export and trading activities, as well as services to be offered by the leisure and tourism components of the resort.[566]

Funding for the project is sourced from the Cross River State Government (CRSG), a consortium of local banks and the Federal Government of Nigeria (through the provision of permits and guarantees for the financing of the project). The Standard Trust Bank (now UBA Plc) provided N5 billion as a bridging financial facility to ensure the steady progress of construction work at the site.[567]

Tinapa – which is modelled after similar resorts in Hong Kong, Singapore, Dubai and Bombay – has been granted FTZ status.[568] Unfortunately, however, under its initial management the project turned out to be unprofitable. This led to the CRSG reaching an understanding with the Asset Management Corporation of Nigeria (AMCON) for the takeover of management of the resort. The memorandum of understanding (MoU) stipulates that 'AMCON is to buy back Tinapa's debts totalling N18, 509,744.797.05 and provide the sum of N26 billion for the revitalisation and resuscitation of the resort to reposition it as a private sector driven enterprise.'[569]

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[564] To be included in the resort are wholesale and retail trade centres and four emporiums of 10,000 square metres each.

[565] Murtalala S Sagagi op cit note 573 at 92.

[566] Tinapa Calabar 'Investment opportunity in Tinapa' (2009), a presentation to investors, available at *http://tinapa.com.ng/downloads/TINAPA_PRESENTATION.pdf* accessed 3 September 2016.

[567] [567] Iby Jerry W Bird 'The Devil's Elbow at Obudu Ranch, Nigeria' *Africa Travel Magazine* available at *http://www.africa-ata.org/obudu_spd.htm* accessed 3 September 2016.

[568] The benefits of this include exemption from all federal, state and local government taxes, levies and rates, entitlement of approved enterprises to import, free of customs duty, any capital goods, consumer goods, raw materials, components and articles intended to be used with an approved activity.

[569] Eyo Charles 'AMCON buys over Tinapa debt burden' *Daily Trust* 16 October 2013 available at *http://www.dailytrust.com.ng/daily/business/7732-amcon-buys-over-tinapa-debt-burden* accessed 3 September 2016.

It is important to note that even though a project may be successful in terms of arrangement and construction, management of the project when it comes into the operation phase must be clearly thought out otherwise a project initially considered successful may also fail, raising the question of whether PPPs can be relied upon as an alternative to traditional procurement. Despite the expertise available at the conception of the Tinapa project, in the final analysis the choice of management for the project was wrong. The reason for this assertion is that despite the potential of the resort, the management did not make it profitable. There was no deliberate strategy, at least in the public eye, to catch the fancy of holiday-makers and tourists to consider Tinapa as an attraction. One cannot say that it is the absence of a market that has affected the project. The successful execution of a project is therefore not the only criterion to determine whether a PPP project is a success in its entirety. In this regard, this researcher does not consider the Tinapa project a success as the element of 'good management,' supposedly one of the advantages of PPP, has so far been lacking.[570] However, it is worth noting that in this case there was commitment on the part of the government, an encouraging financial arrangement, provision of a financial guarantee by the federal government of Nigeria, the presence of a highly experienced team of professionals, and an assurance that the project would outlive the administration that initiated it.[571]

4.7.5 Case Study 5: Nigeria Air Project

In fulfilment of its 2015 campaign promise, the President Muhammadu Buhari-led Federal Government of Nigeria (FGN) proposed a new airline to serve as the national carrier, to be structured as a PPP, and which was expected to commence operations in December 2018.[572] Before the current experiment, the FGN transited from one form of national carrier to the other without recording success and hence their liquidation.[573] The main reason for the project is to check the capital flight that the Nigerian economy has been grappling with because of the

[570] As discussed in Chapter Two of this study.

[571] This was a core value upon which the then Governor Donald Duke hinged the project.

[572] Okechukwu Nnodim & Maureen Ihua-Maduenyi 'FG unveils new national Carrier, Nigeria Air, targets 81 routes' available *at http://www.icrc.gov.ng/fg-unveils-new-national-carrier-nigeria-air-targets-81-routes/* accessed 10 August 2018.

[573] Ben EA Oghojafor & Gloria Chinyere Alaneme 'Nigeria Airways: The grace and grass experience (A case study)' (2014) 5.13 *International Journal of Business and Social Science* at 147.

absence of a national carrier, estimated to be around $2 billion as at January 2018.[574] The loss is occasioned by the dominance of foreign airlines and the fact that income generated by these airlines are repatriated to their countries of origin. Thus, a national carrier for Nigeria is desirable because it can serve as a catalyst for the growth of other sectors of the nation's economy.[575] Furthermore, the creation of the Nigeria Air Project will encourage the establishment of maintenance, repair and overhaul (MRO) facilities in the country which will in turn re-create jobs which were lost when MRO facilities disappeared with the country's erstwhile national carrier.[576] A national carrier for Nigeria can potentially enhance the tourism industry in the country as air access is a vital component for success in that sector.[577]

Consequent upon the foregoing, the FGN envisions that it can revitalise the aviation sector by having a new national carrier that would be financed, owned and managed by private partners.[578] The government considers this important given that Nigeria has the largest market in Africa and the fact that the country has signed bilateral air service agreements with over 70 countries but is disadvantaged because it cannot compete in the absence of a national carrier.[579] On 6 July 2018, the ICRC issued the Federal Ministry of Transportation (Aviation) (FMT) an Outline Business Case (OBC)[580] compliance certificate to confirm that the project conforms with the ICRC Act 2005 and the National Policy on Public Private Partnership. The conditions laid out in the OBC are that, first, the FGN demonstrate 'commitment to leverage private sector capital and expertise towards the establishment of the National Carrier through the provision of an upfront grant/Viability Gap Funding (VGF) to fund aircraft acquisition/start-up capital. The FGN also agrees to zero contribution to airline management decisions and zero management control by the government. Any attempt to impose government control over the

[574] Daniel Godson Olika 'Why Nigeria needs a national carrier' available at *www.forbesafrica.com/focus/2018/01/19/nigeria-needs-new-national-carrier/* accessed 10 August 2018

[575] Thisday 'Why Nigeria may need a national carrier' *Thisday* 20 October 2017 available at *www.thisdaylive.com/index.php/2017/10/20/why-nigeria-may-need-a-national-carrier/* accessed 10 August 2018.

[576] Ibid.

[577] News Agency of Nigeria 'Nigeria needs national carrier to develop tourism' *Vanguard* 9 March 2018 available at *www.vanguardngr.com/2018/03/nigeria-needs-national-carrier-develop-tourism-expert/*

[578] Nnodim & Ihua-Maduenyi op cit note 584.

[579] Reuben Abati 'Minister Hadi Sirika and the return of Nigeria Airways' *Today Nigeria* 17 July 2018 available at *www.today.ng/opinion/minister-hadi-sirika-return-nigeria-airways-133653* accessed 13 August 2018.

[580] See Appendix 28.

management of the Airline invalidates this certificate and the entire process.'[581] The OBC certificate issued by the ICRC to the FMT is valid for 12 months from the date of issue[582] 'to enable the ministry to commence international open competitive bidding process to procure a world-class strategic investor to manage, operate, maintain and invest in the National Carrier.'[583]

In furtherance of the FGN's objective to ensure that Nigeria's third attempt to have a national carrier becomes a success, the country participated at the Farnborough Air Show in London on 18 July 2018.[584] In the presentation delivered by the Minister for State for Aviation (FMT), the government estimates that the 'initial capital for the airline will range between $150 million and $300 million in the first few years of operation though the private sector partner has not been identified yet.'[585] The plan shows that the new carrier, Nigeria Air is to be financed through a combination of government budgetary provision, private debt arrangement and finance syndication from a consortium of banks.[586] Out of the estimated $300 million funding required for the airline start-up, the FGN is to contribute $55 million in form of a grant/viability gap funding (VGF).[587] The sum of $8 million is to be spent for the acquisition of offices, take-off operations, cash flow requirements, payment of commitment fees for aircraft to be leased for initial operations and deposit for new aircraft.[588] The financial model shows that the sum of $100 million would be required for 2019 operations and a further $145 million for 2020, with the remaining finance contribution coming from strategic equity partners.[589] After one year of operations, the government would be expected to divest its equity investment by issuing an initial public offer (IPO) for Nigerians to acquire shares in the airline with government only retaining 5 per cent equity.[590] The African Export-Import Bank, the African Development Bank

[581] Ibid.

[582] 6 July 2018.

[583] See Appendix 28

[584] Larry Madowo 'Will Nigeria Air Succeed Where Others Failed' *BBC News* 21 July 2018 available at *www.bbc.co.uk/news/world-africa-44888925, a*ccessed 13 August 2018

[585] Ibid.

[586] Ibrahim Apekhade Yusuf 'Funding Template for Nigeria Air' *The Nation* 12 August 2018 available at *http://thenationonlineng.net/funding-template-for-nigeria-air,/* accessed 13 August 2018.

[587] Ibid.

[588] Ibid.

[589] Ibid.

[590] Ibid.

(AfDB) and the Islamic Development Bank (ISDB) have shown interest in funding the initiative.[591]

Even though a PPP offers the opportunity for discerning private and institutional investors to fund projects and enjoy the reward of their investment in the form of return on investment, the arrangement for the Nigeria Air Project raises pertinent questions. One may ask, is the government thinking of a PPP or a privatisation? If indeed the arrangement is a PPP, the government appears to have gone a step too far by determining all the outcomes without any input from the would-be investors. Usually, in a PPP, the government spells out the need, undertakes the bidding process, select a preferred bidder who is then responsible for the design, financing, management and operations of the project. However, in the case of Nigeria Air, everything appears to have been laid out suggesting that all what is required from the private sector is finance and the running of the airline. Divesting of government shares from an enterprise is what privatisation is all about. In the case of Nigeria Air, it seems government is thinking of privatising a government enterprise that has not come into being in the first place. Furthermore, if the proposed project is a PPP, what sort of PPP is it? Will it be owned by a private company and later transferred to the public authority at the end of the concession? Or will it be perpetually private sector owned? It seems convenient to call the arrangement a PPP when in fact it has the colouration of a public enterprise with a plan to be privatised. The arrangement for Nigeria Air represents a case where the mere participation of the private sector in the running of a public infrastructure or service is termed a PPP.

Apart from the roadshow in London, there has not been, or any indication of a potential open competitive bidding for the project.[592] Furthermore, will prospective investors consider investing in Nigeria Air a good investment opportunity? A good place to begin with is to find out why previous attempts at having a national carrier resulted in failures. For example, Nigeria attempted to re-establish a national carrier by partnering with Sir Richard Branson's Virgin Atlantic that resulted in the creation of Virgin Nigeria.[593] The airline shut down in September 2012 after a struggle with institutionalised corruption. In the words of Sir Branson, 'We fought

[591] Ibid.

[592] Reuben Abati op cit note 591.

[593] Simon Calder 'Nigeria Air: will Investors Get a Level Playing Field' *Independent* 28 July 2018 available at *www.independent.co.uk/travel/news-and-advice/nigeria-air-investors-airline-failure-africa-richard-branson-virgin-a8467116.html* accessed 13 August 2018.

daily battles against government agents who wanted to make a fortune from us.'[594] These concerns need to be addressed to make any investment in the project viable.

4.9 Conclusion

This chapter has examined the legal, policy, regulatory and administrative framework for PPP in Nigeria, describing the practice of PPP under the current regime as well as some selected case studies. The discussion highlights the body of laws regulating the practice of PPP. Apart from the ICRC Act 2005 which is the primary PPP law for the country at the national level, a complex web of other laws exists, causing overlaps. Obvious gaps in the ICRC Act 2005 can be held accountable for the flaws that have cropped up in PPP practice so far. Obvious drawbacks include the failure to include provisions for the funding process for projects, or to empower the Infrastructure Concession Regulatory Commission to act with binding powers on parties to PPP projects rather than merely supervising the initiation of projects and taking contracts into their custody. The attempt to use the National Policy on Public Private Partnerships to fill gaps in the ICRC Act 2005 is less than desirable, as the National Policy does not carry the force of law.

It behoves prospective investors to be diligent enough to know what tier of Government is being dealt with in order not to enter into an agreement that is void *ab initio*. For example, aviation is an item under the Exclusive Legislative List in the Second Schedule to the 1999 Constitution. As such, state governments lack the power to negotiate PPP contracts dealing with airports. Another sector where states do not have authority to engage in a PPP is inland waterways. It has been pointed out that the current position of the law is counter-productive as it prevents states with the capacity to do so from addressing the huge infrastructure deficits in their communities, which are more easily identifiable by state governments than by the federal government.

From the analysis of selected PPP projects, it can be seen that reasons for the failure of projects so far stem from a lack of experience on the part of the public authority and other players, a lack of political commitment on the part of government, and the refusal of government agencies to obey court orders. On the other hand, successful cases are attributable to commitment on the part of government, adequate funding arrangements, assurance that the project will outlive the administration that instituted it, and the availability of a dispute

[594] Ibid.

resolution mechanism that is not costly to any of the parties. As Idornigie notes, the adoption of appropriate mechanisms can promote private investment in infrastructure.[595]

If government must transform to governance to meet with the aspirations of the people, it is imperative that the institutions of state, which are creations of the law, are not only efficient but also have regard for the law and for due process.The next chapter in this study examines the legal, policy, administrative, institutional and regulatory framework for PPP practice in South Africa.

[595] Paul Obo Idornigie op cit note 226 at 165.

CHAPTER FIVE

PUBLIC-PRIVATE PARTNERSHIP PRACTICE IN SOUTH AFRICA: LEGAL, POLICY AND INSTITUTIONAL FRAMEWORK

> "This is what PPPs are about. The public gets better, more cost-effective services; the private sector gets new business opportunities. Both are in the interest of the nation."
>
> *Finance Minister Trevor Manuel, August 2004*

5.1 Introduction

The Republic of South Africa operates a hybrid legal system.[596] The legal system in the country is a mix of a number of distinct legal traditions that include a civil law system inherited from the Dutch, the English Common Law and African Customary Law.[597] As a general rule however, South Africa follows the principles of the English Common Law in both criminal and civil procedure, company law, constitutional law as well as the law of evidence; while Roman-Dutch common law applies in the South African law of contract, tort and private law.[598] The sources of South African law include statutory law made by parliament, the common law (this includes the Roman-Dutch old authorities and judicial precedents derived from case law, African Customary Law and international law.[599] The Constitution of the Republic of South Africa is the supreme law of the Republic; any law or conduct inconsistent with it is invalid.[600] South Africa is the only African member of the Group of Twenty (G20) countries.[601] It is ranked fifth overall in the Mo Ibrahim Index 2014.[602] This index measures the quality of

[596] Christa Rautenbach 'Deep legal pluralism in South Africa: Judicial accommodation of non-state law' (2010) 60 *Journal of Legal Pluralism* 144-179.

[597] Ibid.

[598] Ibid.

[599] E Davies 'Foundations of law' (2016) Lecture Notes Rhodes University at 2 available at *www.ru.ac.za/media/rhodesuniversity/content/law/documents/courseoutlines2016/Foundations%20of%20Law%20Course%20Outline%202016.pdf*, accessed 17 November 2018.

[600] Section 2 Constitution of the Republic of South Africa No. 108 of 1996.

[601] The G20 is a forum for international co-operation that brings together leaders, finance ministers and central bank governors of 20 countries, including the United States, Canada, Brazil, Argentina, Spain, Germany, France, Italy, Saudi Arabia, Turkey, Russia, China, Australia, the United Kingdom, South Korea, India, Japan, Indonesia, South Africa and the European Union. See OECD 'G20 Members' available at *http://www.oecd.org/g20/g20-members.htm* accessed 17 February 2018.

[602] Department of Trade and Industry, 'South Africa: Investor's Handbook 2014/15' (2014) available at *https://www2.deloitte.com/content/dam/Deloitte/za/Documents/tax/ZA_DTI-InvestinginSA_2014-15.pdf* accessed 11 May 2017.

governance in African countries. Of note, Mauritius, Botswana, Cape Verde and Seychelles occupy the first four places out of 52, compared to Nigeria's 37th position.[603] The Republic of South Africa[604] is believed to have the most comprehensive experience of public-private partnerships (PPP) in the whole of Africa.[605] The country has developed a unique PPP programme that showcases how developing countries that have an enhanced investment and financial sector can achieve milestones with a PPP programme.[606] PPPs started in the country around the mid-1990s on an *ad hoc* basis. The National Roads Agency, which had already tolled parts of the major national roads, developed a framework for concessions to cope with budgetary constraints on the rehabilitation of parts of the network.[607] Due to its well-developed financial market, South Africa is well ahead of its benchmark peers because of the relative ease of access to private capital.[608]

The government of South Africa demonstrated its commitment to a PPP policy thrust in the delivery of quality infrastructure when the Cabinet commissioned the Minister of Finance to take steps to develop a comprehensive PPP framework for the country.[609] In April 1997, a team was set up to put together a legislative and institutional framework for PPP.[610] Several projects have since been completed, some of which will be reviewed later in this chapter.

South Africa's first PPP project was organised in 1996. It was the R2.6 billion N4 toll road that connects South Africa and the Port of Maputo in Mozambique. The debt on the transaction was guaranteed by the governments of South Africa and Mozambique.[611] This was followed by the rehabilitation and tolling of the N3 between Pretoria and Durban, for which

[603] Ibid.

[604] South Africa, a multiparty, constitutional democracy is situated on the southernmost tip of the African continent. It has a population of approximately 54 million people. It is considered a young and stable democracy.

[605] Peter Farlam *Working Together: Assessing Public-Private Partnerships in Africa* (2005) 1.

[606] E R Yescombe op cit note 44 at 47.

[607] Ibid at 63.

[608] Estian Calitz & Johan Fourie 'Infrastructure in South Africa: Who is to finance and who is to pay?' (2010) 27.2 *Development Southern Africa* at 186.

[609] National Treasury PPP Unit *Introducing Public Private Partnerships in South Africa* (2007) at 7.

[610] Ibid at 7.

[611] E R Yescombe op cit note 44 at 47.

the private-sector investors and lenders bore the full traffic risk.[612] Several other PPP projects have since followed, with many lessons learnt.

In this chapter the practice of PPP in South Africa is examined. The discussion focuses on the applicable legal framework, policy and institutional framework. Given that the country has a better record of managing PPPs than anywhere else in Africa, lessons learned from the management of PPP projects in South Africa will be highlighted with a view to developing better PPP practice in other African countries, especially Nigeria. It is pertinent to point out that, as was the case with the previous chapter on Nigeria, this chapter is descriptive and offers insight into the practice of PPP in South Africa. A critical analysis of the PPP framework, comparing it with the framework in Nigeria, is undertaken in Chapter Six of the study.

5.2 Legislative Framework for Public-Private Partnerships in South Africa

Following the mandate given to the Minister of Finance (noted in section 5.1, above), a holistic legislative and regulatory framework for PPP was put in place in the country at the national level. The Constitution of the Republic of South Africa also contains some important provisions with respect to the management and regulation of public contracts. These provisions have implications for PPP management as well.

The body of laws regulating PPP in South Africa include the Constitution, the Public Finance Management Act 1999, Treasury Regulation 16, the Municipal Finance Management Act 2003 and the Municipal Systems Act 2003.[613] These laws are examined in the sections that follow.

5.2.1 The Constitution of the Republic of South Africa

Although the Constitution of the Republic of South Africa does not specifically mention the term 'public-private partnership,' Section 217(1) of the Constitution stipulates that contracts involving the state of South Africa must be transparent. It provides as follows:

> When an organ of state contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

[612] Ibid at 47.

[613] National Treasury PPP Unit op cit note 621 at 8.

Since PPPs are a form of procurement contract involving the state, it follows that the provision of Section 217(1) will apply in all such arrangements in the country.

Given South Africa's long history of inequality, entrenched during the apartheid era,[614] the post-1994 government of South Africa sought to provide common ground for all and promote equality. This provision of the constitution represents one of the deliberate attempts to use the law to promote equality in the country.

The South African Constitution gives power to the South African Parliament to make laws on matters listed in Schedules 4 and 5 of the Constitution.[615] The items listed include airports, housing, public transport and public works. Similarly, the Constitution grants powers to provinces with respect to certain matters upon which they can legislate. These matters include, among others, provincial roads, provincial parks, and facilities for accommodation and public transportation.[616] It follows that there are limits on their powers to arrange PPPs, but where there are concurrent powers to legislate, both the national and provincial authorities may make PPP arrangements touching any item on the list.

It should be noted that the preamble to the South African Constitution emphasises that it is the responsibility of the state to improve the quality of life of all its citizens. The public authority is therefore mandated to seek avenues to provide access to amenities such as potable water, power, roads, ports and hospitals, to ensure the economic and social development of the people of South Africa.

5.2.2 The Public Finance Management Act 1999

The Public Finance Management Act 1999[617] is one of South Africa's main pieces of legislation governing PPP, the other being the Treasury Regulation 16. The Act was assented to on 2 March 1999 and came into operation on 1 April 2000.[618] It established the National Treasury, consisting of the Minister, as head of the Treasury, and the national department or

[614] During that period, it was not uncommon to see public procurement done in a manner that favoured the white minority to the detriment of others. There was discrimination against small and emerging firms. More details on this are provided in the section on South Africa's PPP policy.

[615] Section 44 Constitution of South Africa.

[616] Section 104 Constitution of South Africa.

[617] Act No. 1 of 1999.

[618] See Government Gazette 33059 of 1 April 2010.

departments responsible for financial and fiscal matters.[619] The focus of this piece of legislation is the improvement of financial management in the public sector.[620] The Act makes the heads of departments (the accounting officers) of national and provincial departments, and the Chief Executive Officers (CEOs) or boards of schedule 3 public entities (the accounting authorities), responsible for its implementation. These accounting officers or authorities are directly responsible to Parliament or the provincial legislature for the effective management of their budgets to achieve public mandates.

The National Treasury in South Africa may issue instructions to institutions to which the Public Finance Management Act applies to facilitate the application of the Act and the regulations made under it.[621] It is on this basis that the National Treasury under the powers derived from the Act promulgated Treasury Regulation 16 on Public-Private Partnerships in 2004.[622] The Public Finance Management Act is not in itself a PPP law, and while it provides for financial accountability in government spending that includes PPP transactions, it largely delegates the power to regulate and administer PPPs to the National Treasury. The key legislation that sets out the procedure for the approval and management of PPPs is therefore Treasury Regulation 16. In addition to this, the National Treasury has issued PPP Practice Notes relying on powers derived from the Act.[623] These and other PPP regulations are examined in the sections below.

5.2.3 Treasury Regulation 16 (2004) to the Public Finance Management Act (Act 1 of 1999)

Treasury Regulation 16 is the central legislation governing PPPs for national and provincial government.[624] It defines PPP and sets out the standards to be met for a project to be so described. Under the Regulation, a 'public-private partnership means a commercial transaction between an institution and a private party in terms of which a private party – (a) performs an

[619] Section 5(1) of the Public Finance Management Act 1999.

[620] National Treasury *Public Private Partnership Module 1,* 2.

[621] Section 76(4) (g) of the Public Finance Management Act 1999.

[622] H K Yong (ed.) *Public-Private Partnerships Policy and Practice: A Reference Guide* (2010) at 100.

[623] Ibid.

[624] PPPs for municipal government are governed by the Municipal Systems Act 2000, and the Municipal Finance Management Act, 2003. Municipalities are therefore not subject to the Public Finance Management Act or to Treasury Regulation 16.

institutional function on behalf of the institution; and/or (b) acquires the use of state property for its own commercial purposes; and (c) assumes substantial financial, technical and operational risks in connection with the performance of the institutional function and/or use of state property; and (d) receives a benefit for performing the institutional function or from utilising the state property.'[625] For the sake of clarity, the Regulation defines an institution as 'a department, constitutional institution, a public entity listed, or acquired to be listed in schedules 3A, 3B, 3C and 3D to the Act, or any subsidiary of any such public entity.'[626] Under the Regulation, a 'private party' in relation to a PPP agreement means 'a party to a PPP agreement other than (a) an institution to which the Act applies; (b) a municipality or an enterprise or other entity controlled by one or more municipalities; or (c) the accounting officer, accounting authority or other person or body acting on behalf of an institution, municipality, enterprise or entity referred to in paragraph (a) or (b).' It is submitted that this is a rather vague way to define a party to a PPP transaction.

The Treasury Regulation 16 provides precise and detailed instructions for PPPs and has been amended since it was first issued in May 2000.[627] The Regulation envisages two types of PPPs, namely where the private party performs an institutional function and where the private party acquires the use of state property for its own commercial purposes. There is also the possibility of a hybrid of these types.[628] By allowing for payments to involve a situation where the institution pays for the use of the facility or the private party collects tolls or fees from end-users for the use of the facility or a combination of these,[629] it can be inferred that both concessions and private finance initiative (PFI) PPP types can be contracted in South Africa, depending on the nature of the need for the project.

Under the Regulation, only an accounting officer or an accounting authority may enter into a PPP agreement on behalf of the institution.[630] Furthermore, the accounting officer may not proceed with the procurement of a PPP agreement without the prior written approval of either the National Treasury or – if it is a provincial institution and the National Treasury has, in terms of section 10(1) (b) of the Act, delegated the appropriate powers to the provincial

[625] National Treasury, *Public Private Partnership Manual* (2001).

[626] Ibid.

[627] Ibid.

[628] National Treasury *Introducing Public Private Partnerships in South Africa* (2007) at 8.

[629] Ibid.

[630] Treasury Regulation 16.2.1.

treasury[631] – the relevant provincial treasury. These provisions stress the value placed on financial prudence and accountability in PPP transactions in South Africa. Thus, the relevant treasury may only give such approval if satisfied that the proposed PPP will provide value for money, is affordable for the institution and will offer appropriate technical, operational and financial risk to the private party.[632] The above is considered the tripartite test for PPP in South Africa.[633]

Under the Regulations in South Africa, a PPP does not involve the outsourcing of functions where substantial financial, technical and operational risk is retained by the institution; it is not a donation by a private party for a public good; it is not the privatisation of state assets, and it does not constitute a borrowing by the state.[634]

5.2.4 The Municipal Finance Management Act (Act No. 56 of 2003)

This Act[635] was enacted to ensure financial accountability and elimination of waste at the municipal level. The Act seeks to secure sound and sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government, by establishing treasury norms and standards for the local sphere of government.[636] Like the Public Finance Management Act, this Act lays down a tripartite test for PPP comprising affordability, value for money and risk transfer. The Act provides that a municipal authority can enter into a PPP agreement if these requirements are met.[637]

It is worth noting that like the Public Finance Management Act, the Municipal Finance Act is not an Act dedicated to PPP but one which provides general regulations on government spending that constitute a core element in PPP arrangements.

[631] Treasury Regulation 16.3.1.

[632] Treasury Regulation 16.3.2.

[633] National Treasury op cit note 613 at 5.

[634] Ibid.

[635] Act No. 176 of 13 February 2004.

[636] See the Long Title to the Act.

[637] Section 120 Municipality Financial Management Act 2003.

5.2.5 Municipal Systems Act (Act 32 of 2003)

This Act applies when a municipality reviews the options and decides on an appropriate mechanism to provide a municipal service. The Act lists the criteria and procedure for deciding on municipal service provision, including cost-benefit analysis, a full assessment of the private party and the likely impact on municipal employment patterns.[638] The Act establishes clear guidelines on the involvement of the community in the procurement process.[639]

5.2.6 The Public-Private Partnership Manual and the Standardised Public-Private Partnership Provisions

Pursuant to powers derived from the Public Finance Management Act, the National Treasury has issued nine different modules which make up the country's PPP Manual.[640] These modules are regarded as practice notes and apply to departments, constitutional institutions and public entities as well as their subsidiaries.[641] The first module comprises the regulations for South African PPPs, the second module is the Code for Black Economic Empowerment (BEE) in PPPs, the third provides for PPP inception, the fourth highlights PPP feasibility study, the fifth discusses PPP procurement, the sixth is on managing PPP agreements, the seventh on auditing PPPs, the eighth regulates the accounting treatment of PPPs, while the ninth module is an introduction to project finance.

This Manual and the Standardised PPP Provisions developed after years of PPP practice in the country provide a standard structure for PPP in the country. Read together, the documents define a mechanism for the funding process for PPP transactions in the country.[642] Specifically, the Standardised PPP Provisions describe key issues that are likely to arise in PPP projects as regulated by the provisions of Treasury Regulation 16, and how these key issues must be dealt

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[638] Dominic Mitchell & Fakisandla Consulting *Capacity Development for Partnerships in South Africa: Increasing Service Delivery through Partnerships between Private and Public Sector* (2007) at 12.

[639] Ibid.

[640] Section 76(4) (g) of the Public Finance Management Act 1999.

[641] National Treasury *PPP Manual Module 1: South African Regulations for PPP* Number 2 of 2004.

[642] National Treasury *Introducing Public Private Partnerships in South Africa* (2007) at 9.

with in a PPP agreement so as to meet the requirements of 'substantial risk transfer,' 'value for money,' and 'affordability.'[643]

5.3 South Africa's Public-Private Partnership Policy

Generally, PPP policies serve to define PPPs as distinct from other forms of procurement. The policies describe the reasons and/or goals for choosing PPP schemes, while also providing general guidance for the implementation of PPP in any given jurisdiction. These policies may not carry the force of law but they clearly indicate the intentions of the government.[644] The South African government's strategy in respect of PPP is thus laid out in various documents.[645]

The adoption of PPP by the Government of South Africa is based on the cardinal premise that it can deliver better value for money than traditional procurement.[646] Other key factors include ensuring that project planning takes place within an enabling environment which includes political support and buy-in from key stakeholders. In South Africa, all PPPs governed under Treasury Regulation 16 are subjected to this strict three-point test:[647]

i. Is substantial technical, operational and financial risk transferred to the private party?
ii. Can the institution afford the envisaged fee?
iii. Is it a value-for-money solution?

Based on the foregoing, a private consortium bidding for a PPP project in the country must clearly demonstrate that it possesses the capacity, skills and capability to deliver the project, and to do so more efficiently than other parties. This is necessary to ensure that a project is not abandoned because a private sector consortium lacks the ability to continue with it. Secondly, the public entity sponsoring the project must have the budget required for that entity to fulfil its requirements under the agreement; and thirdly, it would not make any sense to adopt a PPP for a project if it would be cheaper to go the route of traditional procurement.

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[643] National Treasury *Standardised PPP Provisions* First Issue, 11 March 2004 at 1.

[644] European Investment Bank, *Study on PPP Legal and Financial Frameworks in the Mediterranean Partner Countries: Volume 1- A Regional Approach* (2002) 61 available at *http://www.eib.org/attachments/med/ppp-study-volume-1.pdf* accessed 1 May 2017.

[645] Axis Consulting, *PPP Country Paper: South Africa* (2013) 11 available at *http://www.sadcpppnetwork.org/wp-content/uploads/2015/02/south_africa_27012014.pdf* accessed 2 May 2017.

[646] National Treasury op cit note 655 at 10.

[647] Ibid at 13.

In South Africa, black economic empowerment (BEE) is a national policy objective and PPPs are regarded as a means of promoting it. This policy has been formalised in the Code of Good Practice for Black Economic Empowerment in Public-Private Partnerships, which was issued pursuant to the Public Finance Management Act.[648] The guiding purpose of the Code as stated in the Preamble is 'to redress the stifling economic effects of apartheid.'[649]

BEE is a key constituent of South African PPP projects, each of which is structured on a careful combination of financial, technical and BEE components to achieve value-for-money in the state's delivery of infrastructure.[650] Based on the Code, in the entire PPP process from the appointment of the transaction advisor to the final procurement of the private party, certain BEE targets must be met. A scorecard for BEE has been formulated with targets that a private sector consortium must meet for any PPP transaction.[651] These four targets are, first, that substantial direct ownership must be held by black people, black women and black enterprises. Secondly, black people must be involved in the management and employment of the private partner and its subcontractors. Thirdly, a significant proportion of the subcontracting to be done by the private party must involve black people, black women and black enterprises; and fourthly, the project must benefit the lives of the people within the area where the project is located, including small and medium enterprises, the disabled, the youth, and non-governmental organisations (NGOs) within the target area.[652]

It is worthy of note that because of the commitment to BEE in PPP procurement, the National Treasury of South Africa has worked with the Development Bank of Southern Africa (DBSA) to create a PPP BEE equity facility to fund BEE equity in PPP transactions.[653]

Furthermore, South Africa has taken a bold initiative to curb corrupt practices in PPP procurement by the adoption of a Public Service Anti-Corruption Strategy, launched to fight bribery, embezzlement, fraud, extortion, the abuse of power, conflict of interest, insider trading, favouritism and nepotism in the public service. This culminated in the passing of the

[648] Ibid at 15.

[649] See Preamble to the *Code of Good Practice for Black Economic Empowerment in Public Private Partnerships* issued in 2004 by the National Treasury.

[650] See Part 1: Policy on BEEE in PPPs of the Code of Good Practice for BEE.

[651] National Treasury op cit note 655 at 15.

[652] Ibid.

[653] Ibid at 17.

Combating of Corrupt Activities Act 2004.[654] The Act provides, among other things, for the establishment of a register of persons and companies convicted for corruption, thereby preventing them from taking part in public sector procurement. It follows therefore that any person or entity whose name is included in the registered list of corrupt persons is disqualified from engaging in any PPP activity.

5.4 Institutional Framework for Public-Private Partnership in South Africa

South Africa's institutional framework for PPP is made up of the agencies of the government that are tasked with the responsibility of monitoring and regulating the award of PPP projects in the country.[655] It is significant that there are only a few such institutions in the country, which means that a prospective PPP investor in South Africa is assured of having a minimum of bureaucracy to deal with. The institutions that regulate PPP in the country are discussed below.

5.4.1 The National Treasury's Public-Private Partnership Unit (PPP Unit)

Generally speaking, a PPP unit is responsible for policy-making, project identification, programme planning and general guidance, serving as a central repository of knowledge in any given jurisdiction. Based on these fundamentals, the National Treasury's PPP Unit was set up in the mid-2000s with technical assistance funding from USAID, the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), GmbH (GTZ) and the Department for International Development (DFID),[656] and was initially made up of five professional staff drawn from both public and private sectors.[657] It is the lead government agency for PPPs in South Africa. The main functions of the Unit are to ensure affordability, value-for-money and sufficient risk

[654] Act No. 12 of 2004, vide the Government Gazette 26311, 28 April 2004.

[655] The Institute for Public-Private Partnerships *Development of Policy, Legal, and Institutional Framework for the Public-Private Partnership Programme in Malawi: Final Report* (2007) 38.

[656] These foreign governmental agencies represent the United States (USAID), Germany (GTZ) and the United Kingdom (DFID). See Ryo Sasaki 'An in-depth international comparison of major donor agencies: How do they systematically conduct country program evaluation?' (2011) 8.18 *Journal of MultiDisciplinary Evaluation* 29–45.

[657] National Treasury, 'Public Private Partnership' available at *http://www.ppp.gov.za/Pages/About.aspx* accessed 30 April 2017.

transfer in line with international best practice.[658] In doing so, the PPP Unit is assumes responsibility for two broad tasks: providing technical assistance to government, departments, provinces and municipalities, and providing treasury approvals during the pre-contract phases.[659]

The National Treasury is required by law to ensure accountability, transparency and sound financial control in the management of public finances in the country.[660] The National Treasury is also mandated to make regulations for issues pertaining to the effective management and efficient use of public finance. It is pursuant to this that the National Treasury issued Treasury Regulation 16.[661]

In fulfilling its mandate through its PPP Unit, the National Treasury develops, formulates and promotes the country's PPP policy; develops systems and documentation to formalise and standardise the PPP process in the country; provides direct technical assistance to national and provincial departments and municipalities, in preparing and procuring value-for-money PPPs; provides quarterly PPP training for both public and private sectors; produces and distributes the PPP Quarterly and is the PPP knowledge management centre for the country; is in touch with international PPP bodies; ensures that international best practice for PPPs is followed in the South African context, and works with provincial treasuries to oversee provincial PPPs.[662] To promote an enabling environment for PPPs, the PPP unit seeks to facilitate certainty in the regulatory framework as well as driving black economic empowerment.[663]

The National Treasury PPP Unit supports the procurement process for PPP at the three Treasury Approval stages. The aims are to ensure that affordability is demonstrated, and to achieve financial closure.[664]

As at 30 April 2017, the National Treasury's PPP Unit in South Africa is made up of seventeen professionals who are allocated projects depending on individual sector expertise

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[658] Philippe Burger 'The Dedicated PPP Unit of the South African National Treasury' available at *https://www.oecd.org/mena/governance/37146964.pdf* accessed 30 April 2017.

[659] Ibid.

[660] Section 215 of the South African Constitution.

[661] Section 76 of the Public Finance Management Act.

[662] National Treasury Unit op cit note 559 at 20.

[663] National Treasury 'Public Private Partnership' available at *http://www.ppp.gov.za/Pages/About.aspx* accessed 30 April 2017.

[664] Axis Consulting op cit note 657 at 14.

and interest. The list of sectors[665] includes health, accommodation, energy, education, water, budget support, transport, contract management, information and communication technology (ICT), project development facilities, tourism, business development, waste, and international relations.[666]

5.4.2 Institutions of Government

Treasury Regulation 16 defines institution as 'a department, a constitutional institution, a public entity listed or required to be listed in Schedules 3A, 3B, 3C and 3D to the Act, or any subsidiary of any such public entity.'[667] It follows that all line departments, provincial entities, public sector-owned bodies and other government enterprises listed in Schedules 3A, 3B, 3C and 3D of the Public Finance Management Act form a part of the institutional framework for PPP in the country, having statutory powers to engage in PPP negotiations and arrangements.

Apart from government institutions, there are other role players involved in PPPs in South Africa. They include environmental organisations, trade unions and community-based organisations. It is usual to consult these stakeholders to provide input at various stages in the PPP cycle to promote transparency and community buy-in.[668]

5.5 Public Private Partnership Practice in South Africa

The National Treasury's PPP Unit has formulated a generic PPP project cycle for the country to ensure uniformity and consistency in PPP practice in South Africa.[669] Thus, by issuing the PPP manual and standardised process for PPP, the Unit has designed a comprehensive PPP programme for the country. But because of the complex nature of PPPs, the Unit makes provision for a reasonable degree of flexibility where appropriate.[670]

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[665] This reflects current government priorities, which may change from time to time. However, overarching considerations include BEE and the essential elements of a PPP: affordability, value-for-money and transfer of significant financial, design, technical and operational risks to the private sector. See *http://www.ppp.gov.za/Pages/About.aspx* accessed 30 April 2017.

[666] Ibid.

[667] Act in this definition refers to the Public Finance Management Act.

[668] National Treasury op cit note 657 at 21.

[669] Ibid at 18.

[670] Ibid.

The National Treasury's PPP manual methodically guides both public and private bodies through the various phases of the regulated PPP project cycle for national and provincial governments. The manual draws particularly on PPP experience in the country as well as international best practice to provide clarity.[671]

The initiative to identify and set up a PPP project rests with the relevant state or provincial institution and not with the PPP unit.[672] The PPP unit recommends a project it deems suitable, but only the National Treasury can grant approval. The initiative for and daily management of the PPP project remains with the relevant institutions, government departments and provinces.[673] The National Treasury's PPP manual describes the project preparation phase, during which Treasury Approvals I, IIA, IIB and III are granted. The manual indicates which module is relevant for each of these stages of approval.[674] Furthermore, the manual gives guidance on the management of PPP agreements, the audit and accounting treatment of PPPs, as well as project finance.[675] Thus, Treasury Approval I or (TA I), marks Treasury's approval of the feasibility study, preparing the way for the actual tendering/procurement process for private party consortia to deliver on the project. TA II A, TA II B and TA III, are the three further steps put in place to ensure that the project is properly designed, tendered and awarded. When TA III is granted by the Treasury, the project is considered 'closed.'[676]

The PPP project cycle[677] in South Africa consists of four phases: the inception phase; the feasibility study phase; the procurement phase; and the implementation phase.[678] These phases are discussed in detail below.

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[671] National Treasury Unit, *Public Private Partnership Manual* available at *https://www.gtac.gov.za/Publications/PPP%20Manual.pdf* accessed 1 May 2017.

[672] Treasury Regulation 16.

[673] Philip Burger *The Dedicated PPP Unit of South African National Treasury* (2006) 1.

[674] Axis Consulting, 'PPP Country Paper: South Africa' (2013) 16 available at *http://www.sadcpppnetwork.org/wp-content/uploads/2015/02/south_africa_27012014.pdf* accessed on 13 October 2017.

[675] Ibid at 16.

[676] Ibid.

[677] This refers to the processes, procedures, procurement methods and approvals that a PPP project must go through, commencing with the inception phase of the contract and continuing through to its termination phase.

[678] Treasury Regulation 16 in terms of the Public Finance Management Act 1999.

5.5.1 Inception Phase

All PPP projects in South Africa start off with an inception phase in accordance with the provisions of Regulation 16.3, pursuant to the Public Finance Management Act 1999. A project is registered with National Treasury PPP Unit when the accounting officer of the procuring institution applies for its approval. The Treasury Unit will then give approval if satisfied that the proposed PPP arrangement will provide value for money, is affordable and transfers appropriate technical, operational and financial risk to the private party. If the institution lacks the expertise to proceed with the procurement of a PPP agreement, the accounting officer of the institution is required by the Regulation to inform the relevant treasury and, where necessary, a specialist consultant will be appointed for the purpose.

5.5.2 Feasibility Studies

The second phase in the PPP cycle in South Africa is the Feasibility Studies Phase. During this phase, the procuring institution appoints private sector advisors to conduct a feasibility study on the most appropriate mechanism for procuring the project.[679] The purpose of the feasibility study is to determine whether a proposed PPP agreement is in the best interests of an institution.[680] Thus, first, the feasibility study must be undertaken to explain the strategic and operational benefits of the PPP agreement in terms of the institution's objectives and government policy. Secondly, the study must specify the nature of the institutional function concerned, the form of PPP agreement contemplated and the basis for the selection of that form. Thirdly, the study must show whether the agreement will provide value for money, is affordable for the institution and will transfer appropriate technical, operational and financial risk to the private party. Fourthly, the study must include any relevant information, figures and economic criteria used to justify the assessment. Finally, the study must explain the capacity of the institution to effectively enforce the agreement, including monitoring and regulating implementation and performance in terms of the agreement.

The feasibility study for a project is required to contain three parts in the following format:[681]

[679] National Treasury, op cit note 683 at 19.

[680] Treasury Regulation 16.4.

[681] Treasury Regulation 16.5.

a. Sector needs analysis;
b. Affordability, risk transfer and how value for money can be realised; and
c. Institutional arrangements for monitoring the implementation of the PPP agreement.

The Report of the study is to be submitted to the Treasury for approval in line with clause 16.3 of the Treasury Regulation.

5.5.3 The Procurement Phase

When a PPP option has been approved by the Treasury and a feasibility study shows that it is viable, the procuring institution invites the market to submit bids for the infrastructure and/or service provision project.[682] The procurement procedure must be open, transparent and competitive, and allow for the evaluation of the bids to determine which represents best value for money. It is submitted that the Regulation ought to indicate the importance of the experience and competence of the private consortia bidding. This is because the party offering the cheapest cost of procurement may not have the requisite competence or experience.

During procurement, there are five stages that must be complied with: pre-qualification; request for proposals; best and final offer, where appropriate; negotiations and final closure. The process begins with the preparation of bid documents and a draft PPP agreement in accordance with the provisions of the Public Finance Management Act. The accounting officer is responsible for designing and managing the procurement process to ensure that it conforms with Regulation 16.

The aim of *pre-qualification* is to reduce the total number of consortia in the PPP procurement process, by selecting a limited number of bidders who are qualified financially and technically, possessing the skills and commitment required to execute the project. As already noted, there is an obligation to meet the BEE policy of the South African government. Prequalification affords the bidders the opportunity to ascertain the rules in place for the procurement process, and at this stage, all vital information about the project cycle is made available. Finally, prequalification enables the PPP unit to gather information from the private consortia which can be used in the future.

After pre-qualification, successful bidders may enter the *Request for Proposal* (RFP) stage. The RFP must provide information about the project's background, expected outcome

[682] National Treasury op cit note 683 at 19.

and projected time frame. Other relevant information to be contained in the RFP includes the laws, rules and regulations governing the procurement of PPPs[683]as well as the procedure for securing approval from the National Treasury.

5.5.4 Implementation Phase

The project is deemed implemented once a suitable bidder has been chosen.[684] Upon submission, the bids are evaluated to select a preferred and reserve bidder. The evaluation procedure must comply with laid-down regulations that involve the appointment of an evaluation team as well as committees who must ensure that all declarations and codes are signed. It is instructive to note that the provisions of the Promotion of Administrative Justice Act and the BEE Code must be complied with to determine the *Best and Final Offer* (BFO).

Subsequently, with the preferred bidder and reserve bidder already chosen, *negotiation* commences. Negotiation helps to eliminate gaps and provide clarity for the contract. It affords the parties an opportunity to structure a sound and durable agreement. When negotiation is successful, the result is the award of a PPP contract. As noted in Chapter Three, since PPPs involve a main contract and several ancillary agreements, negotiation should also provide clarity about other contracts that will follow from the main PPP agreement.

In summary, during the inception phase, the procuring institution registers the project with the Treasury PPP Unit. A feasibility study is then carried out by the procuring institution to determine the appropriate mechanism for procuring the project. The next phase is to invite the market to submit bids for the project, and this is followed by implementation, i.e. when a suitable bidder is chosen to execute the project.

5.5.5 Dispute Resolution

South Africa's Arbitration Act No 42 of 1965, Module 6 of the National Treasury PPP Manual, and the Standardised Provisions for PPP, set out the procedure for dealing with disputes arising from PPP agreements.[685] A vital component of the PPP agreement is provision for dispute resolution during the tenure of the PPP contract. The first step is for all disputes to be referred

[683] The term 'procurement' here is used in a general sense and does not refer to traditional public procurement.

[684] National Treasury op cit note 683 at 19.

[685] Part 86 of the Standardised Provisions for PPP.

to the respective liaison or project officers to reach an amicable resolution. When this fails, the dispute should be referred to both the accounting officer of the institution and the chief executive officer of the private consortium. If the dispute is not resolved at this stage, an independent mediator is to be appointed by the parties.[686] Where the dispute is still not amicably resolved, it is then referred to the courts for settlement.

5.5.6 Funding of Public-Private Partnerships in South Africa

Compared to those of its peers[687] in sub-Saharan Africa, the financial market in South Africa is relatively well developed.[688] Most PPP funding comes from within the country and from institutional investors (banks, pension funds etc.).[689] It is important to note that when foreign money is involved, a hedge is generally used to protect the investors against currency fluctuations.[690] The financial market in South Africa contributes nearly 25 percent of private equity funds to the entire continent, second only to about 50 percent contribution from investors in the United States.[691] Furthermore, South Africa's private equity market compares favourably with those in developed economies.[692] The country also dominates the African equity market with a share of 80 percent of sub-Saharan African private capital compared with Nigeria's 10 percent.[693] It has been asserted that in the entire continent, 'only South Africa has domestic banks and a local capital market capable of consistently providing local currency financing for its infrastructure projects on suitable terms and in significant amounts.'[694] The other economies

[686] Section 11(1) of the Arbitration Act as amended by Act No. 49 of 1996.

[687] Other big emerging economies like Nigeria and Kenya.

[688] The World Bank *Establishing Public Private Partnerships: Lessons Learned from the Global South* (2015) 12 available at *https://openknowledge.worldbank.org/bitstream/handle/10986/21309/936290WP0Box380ion000for0disclosure.pdf?sequence=1&isAllowed=y* accessed 17 February 2018.

[689] Ibid.

[690] Ibid.

[691] Mihasonirina Andrianaivo and Charles Amo Yartey 'Understanding the growth of African financial markets' (2009) *IMF Working Paper* WP/09/182 9 available at *https://www.imf.org/external/pubs/ft/wp/2009/wp09182.pdf* accessed 6 May 2017.

[692] Ibid at 9.

[693] Ibid.

[694] Robert Sheppard, Stephen Von Klaudy & Geeta Kumar 'Financing infrastructure in Africa: How the region can attract more project finance' (2006) *Gridlines* Note 13 at 2 available at *https://openknowledge.worldbank.org/bitstream/handle/10986/10724/375490AFR0Grid1rastructure01PUBLIC1.pdf?sequence=1&isAllowed=y* accessed 6 May 2017.

in Africa have under-developed financial markets that oblige them to rely on short-term financial instruments. Given that foreign currency fluctuations (especially where there is devaluation) can negatively impact on debt funding, South Africa presents a good case study for other emerging economies on the continent on how an emerging economy can develop its market to suit its needs.

It is worthy of note that Treasury Regulation 16 is not prescriptive about the funding structure for PPPs in the country.[695] As a result, funding for any deal is dependent on the project and its sponsors. It is possible to have projects that do not involve any debt finance at all, as they can be funded directly and in their entirety by the sponsors through private equity and a contribution from the government's budget.[696] However, a generic project finance structure is in place.[697] Financing options available for PPP projects in South Africa are discussed next.

Bonds

Bond financing for PPP projects has been in use in private infrastructure financing in South Africa.[698] In a bond-financed deal, bond investors usually provide funds via an arrangement made by a bond arranger who is responsible for selling the bonds into the capital markets. The risk posed by the uncertainty of sufficient purchase of the bond is undertaken by a bond underwriter. In simple terms, bonds are loans made to large organisations which include corporations, cities and national governments. The size of these entities requires them to borrow the money from more than one source.[699] Bonds are usually interest-bearing loans that pay a coupon during the term of the loan and the principal at the maturity of the bond. The capital and interest payments on these bonds have been benchmarked by an inflation index, for

[695] National Treasury, *PPP Manual* at 5.

[696] Ibid.

[697] National Treasury PPP Unit 'South African Public Private Partnership Unit' (2009), a Presentation at the OECD Conference held in Paris 5 and 6 March 2009 available at *https://www.oecd.org/gov/budgeting/42344511.pdf* accessed 9 May 2017.

[698] Ibid.

[699] Kinberly Amadeo 'What are bonds, and how do they work?' (2016) available at *https://www.thebalance.com/what-are-bonds-and-how-do-they-work-3306235* accessed 6 May 2017.

example the Consumer Price Index (CPI).[700] CPI-linked bonds have been used in toll road financing in South Africa.[701]

Interestingly, despite a recent downgrading of South Africa's credit rating to a below-average rating by a major credit agency,[702] the bond market continues to thrive with foreign investors participating.[703] This may be attributed to the fact that the country's financial market is well developed, with investors continuing to evince confidence in the South African market. This writer believes that much more gain in terms of the performance of the market will be recorded following the swearing in of Mr Cyril Ramaphosa as president of South Africa in the wake of Mr Jacob Zuma's forced resignation from office.[704]

Equity

Equity refers to the funds contributed by the sponsors of the project and the other shareholders.[705] It represents the risk capital for the project and gives the shareholders of the special purpose vehicle rights, including the right to returns subject to the performance of the project.[706] This usually occurs after the debt funders have been paid. Investors are attracted by the upside potential of the investment in relation to the risk involved. This aspect of the funding of a PPP project is very important as it relates to the capacity of the initiators of the project. In South Africa, as pointed out in 5.5.3, above, one of the factors in determining the best bid is the capacity of the bidding consortium and its ability to raise sufficient capital in the form of equity.

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[700] Ibid.

[701] Helge Switala 'Project finance and obtaining sufficient funding for the successful completion of your project,' a Presentation by the Project Manager, Development Bank of South Africa, available at *http://www.dbsa.org/EN/About-Us/Publications/Documents/Project%20finance%20and%20obtaining%20sufficient%20funding%20for%20the%20successful%20completion%20of%20your%20project.pdf* accessed 9 May 2017.

[702] Fitch cut South Africa's foreign and local currency ratings to junk status.

[703] Nicholas Megaw 'Foreign investors pile into South African Bonds despite fears' (2017) *Financial Times* available at *https://www.ft.com/content/dc920b6e-064d-3bef-b374-352c52d29367* accessed 6 May 2017.

[704] The financial market is often influenced by political outcomes in the economy, especially when a new government is rated to outperform the previous one.

[705] Helge Switala op cit note 713 at 3.

[706] Ibid at 3.

Debt

A large share of the financing of PPP projects is usually raised through debt.[707] As will be discussed in the case studies of PPP projects in South Africa, debt holders are concerned about the cash flow of the project to ensure consistent debt service, i.e. the payment of the principal amount/capital sum and the interest accruing.[708] Project debts are usually sourced as loans from commercial banks,[709] multilateral agencies (MAs), development finance institutions (DFIs) and export credit agencies (ECAs).

5.5.7 Protecting Funds Invested in Public-Private Partnership Projects

A commitment to protecting investors' and lenders' funds is at the core of South Africa's PPP framework. A watertight project preparation process is therefore required to prove the merits of the project to potential funders.[710] Other critical components of the feasibility study under Module 4 of the PPP Manual include project due diligence, value assessment, economic valuation and a procurement plan. The procedure involves the engagement of advisors on behalf of the sponsors and the lenders to provide advice on technical, market, financial, legal and incidental matters.[711] This is fundamental to achieving financial closure[712] for the project. It should be noted that South Africa is globally ranked 10th out of 189 countries for good practice in protecting investors in business.[713]

The funding of specific projects in the South African currency offers protection against currency fluctuation risk. For example, the Sasol Natural Gas Project is an R8.6 billion project aimed at developing the gas fields and processing facility in Mozambique, and operating a gas

[707] The term debt is preferred to the use of the word 'credit.' The reason is because the investments in a PPP are treated as assets. What the SPV incurs for sourcing finance is a debt. Replacing the term debt with credit will mean the lender is an investor in the project, which is not usually the case.

[708] Helge Switala op cit note 713 at 3.

[709] Webber Wentzel 'Investing in South Africa: Charting the legal landscape with Webber Wentzel' (2015) available at *http://www.investinginsouthafrica.co.za/downloads/en/Webber_Wentzel_Investing_in_South_Africa_complete.pdf* accessed 11 May 2017.

[710] See National Treasury PPP Unit, 'PPP project cycle: Reflecting Treasury Regulation 16 to the Public Finance Management Act, 1999' *National Treasury PPP Manual: Module 1*.

[711] Helge Switala op cit note 713 at 3.

[712] Financial closure refers to the milestone in the project cycle that is reached when funds are secured.

[713] World Bank, *Doing Business Report* (2014).

pipeline from the processing plant to facilities in South Africa.[714] Even though the project will produce both rand and dollar revenues, the bulk of the debt is ZAR denominated.[715]

The Constitution of the Republic of South Africa 1996 states that when an organ of state in the national, provincial or local sphere of government or other institution identified in the national legislation contracts for goods or services, it must do so in accordance with a system that is fair, equitable, transparent and cost-effective.[716] It follows that South African law emphasises transparency and accountability, which are key to ensuring that funds are protected and not wasted. This philosophy is the driving force behind the Public Finance Management Act as well as the Municipal Finance Management Act.

Examples abound in South Africa of projects structured in such a way as to ensure that there are sufficient revenue streams accruing in the short to long-term. The aim is to optimise the performance of the PPP and encourage private participation. Two examples are worth mentioning here. The City of Johannesburg contracted with a consortium of international operators led by Suez. The project was structured in such a way that Johannesburg Water purchased some of biogas-fuelled generators and the contractor invested in other required capital infrastructure. The contract recovered its cost from the sale of bio-gas generated from the operations.[717] A second example is the City of Tshwane PPP with Magalies Water Board, ABSA Bank and Bigen Africa. The arrangement was structured to ensure sustainable revenue flows to the City of Tshwane as the City was the main beneficiary of the R500 million project.[718]

The protection of investments is vital to the sustainability of PPP arrangements in any economy. This is the spirit behind the passing into law of the Protection of Investment Act 22 of 2015.[719] The Act was passed to replace the bilateral investment treaties (BITs) with European countries and to make direct investment in the country attractive to foreign

[714] Helge Switala op cit note 713 at 3.

[715] Ibid at 3.

[716] Section 217(1).

[717] Cornelius Ruiters & Maselaganye P Matji 'Public private partnership conceptual framework and models for the funding and financing of water services infrastructure in municipalities from selected provinces in South Africa' (2016) 42.2 *Water SA.*

[718] Ibid.

[719] Gazette No. 39514 of 15 December 2015.

investors.[720] Historically, developing economies entered BITs to provide comfort to investors that their investments would be safe and protected. However, BITs have been criticised for creating unequal rights and obligations between developed and developing economies and for interfering with the developing countries' sovereignty.[721] Key provisions of the Protection of Investment Act are discussed below.

5.5.8 The Protection of Investment Act No. 22 of 2015

The Act defines an 'investor' to mean 'an enterprise making an investment in the Republic regardless of nationality.'[722] It follows that the protection afforded indigenous investors applies to foreign investors as well. The purpose of the Act is threefold: First, to protect investment in accordance with and subject to the Constitution; secondly, to affirm the Republic's sovereign right to regulate investments in the public interest; and thirdly, to confirm the Bill of Rights in the Constitution and the laws that apply to all investors and their investments in the Republic.[723] The Act applies to all investments in the Republic that are made in accordance with section 2 of the Act.[724]

The Act stipulates that foreign investors must not be discriminated against.[725] The Republic must accord foreign investors and their investments a level of physical security equivalent to that enjoyed by domestic investors, in accordance with minimum standards of

[720] In 2012, South Africa terminated its bilateral investment treaties (BITs) with European countries such as Denmark, Spain, Germany, Belgium, Luxembourg, Switzerland and Holland. It maintained the BITs with Russia and China.

[721] Dentons 'South Africa's Protection of Investment Act' (2017) available at *https://www.dentons.com/en/insights/newsletters/2017/january/26/south-africa-newsletter/south-africa-newsletter-january-edition/south-africas-protection-of-investment-act* accessed 9 May 2017.

[722] Section 1 Protection of Investment Act 2015.

[723]Section 4 Protection of Investment Act 2015.

[724]Section 5 Protection of Investment Act 2015. Section 2 of the Act defines 'investment' in the following terms: 'an enterprise may possess assets such as shares, stocks, debentures, securities as defined in the Financial Markets Act, 2012; a debt; loans to an enterprise; moveable or immovable property or other property rights such as mortgages, liens or pledges; claims to money or to any performance under contract having a financial value; copyrights, knowhow, goodwill, or intellectual property rights such as patents, trademarks, industrial designs and trade names to the extent that they are recognised under the law of South Africa; returns such as profits, dividends, royalties or income yielded by an investment; or rights or concessions conferred by law or under contract including licenses to cultivate, extract or exploit natural resources.'

[725]Section 8 Protection of Investment Act 2015.

customary international law.[726] Investors have the right to property in consonance with section 25 of the Constitution of South Africa.[727] Furthermore, the Act provides that a foreign investor may, in respect of an investment, repatriate funds subject to taxation and other applicable legislation.[728]

As regards disputes, when an investor has a dispute in respect of action taken by the government, the action having affected an investment of the investor, the investor may within six months of becoming aware of the dispute request the Department to facilitate its resolution by appointing a mediator.[729] A foreign investor is not precluded from approaching any competent court, independent tribunal or statutory body within South Africa for the resolution of the dispute.[730] When all domestic remedies have been exhausted and the dispute persists, the South African government may consent to international arbitration, with such arbitration conducted between South Africa and the home state of the foreign investor.[731] Thus an investor who feels wronged by an action of the South African government or any of its agencies is clearly empowered by the law to seek redress. It is submitted, however, that what the South African government is giving with the right hand, it seeks to take away with the left, through the provision that the state must only consent to arbitration when domestic remedies have been exhausted and international arbitration becomes the option.

On 30 December 2016, the South African Department of Trade and Industry (DTI) issued Draft Regulations on Mediation Rules which would apply to investment disputes between the government and investors.[732] Under the Rules, among others, an aggrieved investor must declare a dispute within six months of becoming aware of the dispute; the investor and the DTI must agree on the name of the mediator; and the rules of the DTI must be complied with in the mediation.[733] It is submitted that only a foreign investor with confidence

[726]Section 9 Protection of Investment Act 2015.

[727]Section 10 Protection of Investment Act 2015.

[728]Section 11 Protection of Investment Act 2015.

[729]Section 13 Protection of Investment Act 2015.

[730] Dentons op cit note 655.

[731] Ibid.

[732] Annet van Hooft 'South Africa: Draft regulations on mediation rules for investor-state disputes' (2017) available at *https://www.twobirds.com/en/news/articles/2017/global/africa-newsletter-feb/south-africa-draft-regulations-on-mediation-rules-for-investor-state-disputes* accessed 11 May 2017.

[733] Ibid.

in the South African market will be satisfied with the Rules as couched, especially as the remedies available to the investor are not clearly specified.

5.6 Case Studies of Public-Private Partnership Projects in South Africa

The choice of projects selected as case studies is motivated by their status as flagship projects in their respective sectors of the economy. Furthermore, given the long-term nature of PPP contracts, these projects remain relevant as they are currently in operation, and the lessons learned from them can serve as an eye opener for prospective investors in South African PPPs.

5.6.1 Case Study 1: The N4 from South Africa to Mozambique

The governments of South Africa and Mozambique in 1996 jointly signed a R3 billion[734] 30-year concession with a private consortium, Trans African Concessions, to build and operate the N4 Toll Road from Witbank (in South Africa) to Maputo (in Mozambique).[735] Even though the project was privately financed, the debt on the transaction was guaranteed by both the South African and Mozambican governments.[736] The concession was awarded to Trans African Concessions (TRAC) Consortium. TRAC became responsible for the financing, design, construction, rehabilitation, operation and maintenance of the toll road. The contract was signed with the South African National Roads Agency (SANRAL) and the Mozambique Roads Agency (ANE), and ends in 2027. The Concessionaire now manages 630km of toll road, most of which is in South Africa, with only about 50km in Mozambique.[737]

[734] Estimated as at 1996.

[735] Peter Farlam 'Working together: Assessing public-private partnerships in Africa' (2005) *Nepad Policy Focus Report No. 2* at 9.

[736] E R Yescombe op cit note 44 at 47.

[737] PPIAF, 'N4 toll road from South Africa to Mozambique' (2009) *Toolkit for Public-Private Partnerships in Roads and Highways* 92.

The N4 financing was structured according to a 20:80 ratio.[738] The three construction companies involved in the project[739] contributed R331 million worth of equity,[740] with the rest of the capital coming from the SA Infrastructure Fund, Rand Merchant Bank Asset Management and five other investors. The debt investors include a consortium of four South African banks – ABSA, Nedcor, Standard Bank and First National Bank. Other investors include the Development Bank of Southern Africa and the Mine Employees and Officials Pension Funds.

One of the challenges faced by the N4 project at inception was its demand risk, given the volume of finance required for the construction work. The main question posed to the sponsors of the project was whether there would be enough traffic using and paying for the road to generate sufficient income, given that there were other well-maintained free alternative routes?[741] Similarly, the project faced considerable payment risk along the Mozambican axis as the poor communities there were unable and unwilling to pay high toll fees. As a result, Trans African Concessions (TRAC) cross-subsidised the Mozambican portion of the road with higher revenues from the South African axis. There are currently eight toll points on the road with significant adjustments for the Maputo corridor.[742] Four types of vehicles were considered for toll purposes (light, medium heavy, large heavy and extra heavy). Tolls are collected at six main line toll plazas and at two ramp plazas. Only two toll plazas are in Mozambique.[743] The road is partly 4-lane separated carriageways and partly 2-lanes with widening to accommodate large hauling vehicles, with a one-stop border facility developed at Komatiport/Ressano Garcia to reduce cross-border bottlenecks between the countries.[744]

The significant lessons to be learned from the N4 Toll Road are first, that cross-subsidisation from more affluent South African users and substantial discounts for the regular Mozambican users helped to reduce the user payment risk.[745] Secondly, the road has shortened

[738] Financing of the project was split between 20% equity and 80% debt.

[739] Stocks and Stocks, Bouygues, and Basil Road.

[740] Which formed 20% of the financing of the project.

[741] Peter Farlam op cit note 747 at 10.

[742] See current toll fees at *http://www.tracn4.co.za/toll-fees.html* accessed 24 May 2017.

[743] PPIAF op cit note 749 at 92.

[744] Ibid at 92.

[745] Peter Farlam op cit note 747 at 11.

the travel time from Pretoria to Maputo by at least three hours,[746] which makes it attractive to road users. Thirdly, the road facilitated further private sector investment in Mozambique, resulting in raised traffic volumes.[747] Fourthly, the risk associated with the financing of the project was borne entirely by the TRAC consortium without government subsidies, although the governments of South Africa and Mozambique guaranteed the debt.[748]

The success of the N4 toll road is an indicator of the viability of PPPs in the road sector when users are willing to pay.[749] It is important to mention that initial traffic volumes were less than the financers of the project had envisaged. However, they regard the traffic growth as acceptable, at rates of between 5% and 7% annually.[750]

Despite the success of the N4 toll road, some of the problems encountered during its implementation include complaints by users and commuters that a road that was used free of charge had become a toll road; and higher-than-expected damage to the road caused by the overloading of trucks. These issues have been addressed by introducing much lower toll fees for commuters and locals, as well as implementing an efficient axle load control system along the corridor.[751]

5.6.2 Case Study 2: The Pelonomi and Universitas Hospital Co-Location, Bloemfontein

This project is structured as a co-location PPP. This type of PPP occurs when the public and private sectors operate a similar service and collaborate rather than compete, which results in the public sector receiving revenue while the private sector generates profits.[752]

The project was arranged in the year 2000 at the provincial level, with the aim of providing a better level of healthcare for South Africans, especially those living in the Free State. An agreement was eventually signed as a 16-and-a-half-year contract on 25 November

[746] TRAC, 'Toll Fees' *http://www.tracn4.co.za/* accessed 24 May 2017.

[747] Peter Farlam op cit note 747 at 11.

[748] PPIAF op cit note 749 at 94.

[749] Ibid.

[750] PPIAF op cit note 749 at 93.

[751] Ibid at 95.

[752] Shadrack Shuping & Sipho Kabane 'Public-Private Partnerships: A case study of the Pelonomi and Universitas hospital co-location project' available at *http://www.hst.org.za/uploads/files/chap10_07.pdf* accessed 24 May 2017.

2002.[753] The PPP for the hospital co-location project is made up of three partners. The public agency in the partnership is the Free State Health Department (FSHD).[754] The FSHD selected its partner after conducting a competitive tendering process: having obtained the requisite permission from the Treasury to proceed, it invited interested parties to submit Registrations of Capability (ROC) and held informational meetings with 30 private parties indicating interest.[755] After studying a blueprint from Australia, the FSHD accepted three of the ROC bids but only two responded to the Request for Proposals (RFP). A consortium of two healthcare companies was selected, the first a South African black empowerment company[756] and the other a healthcare company[757] with branches in South Africa and the United Kingdom.[758] The consortium held a 65 percent stake in the concession and the remaining 35 percent was offered to investors, doctors and, later, the State.[759]

Under the arrangement, the FSHD receives monthly concession fees from the private partner for the bed and operating theatre space that it uses in both hospitals. In addition, the private partner pays variable fees representing 2 percent of patient turn-over.[760] The inclusion of variable payments in the arrangement means that some operational risk is transferred to the FSHD because a portion of the revenue received is dependent on the success of the private partner.[761] However, the private partner retains the risk associated with construction as it is responsible for all construction, renovations and upgrades.[762]

[753] The United Nations Office for South-South Cooperation 'Hospital co-location, Bloemfontein, South Africa' available at *http://academy.ssc.undp.org/GSSDAcademy/SIE/VOL15.aspx* accessed 24 May 2017.

[754] The FSHD is the branch of the provincial government of the Free State in South Africa that oversees health-related issues and all the public health facilities, which include hospitals.

[755] The United Nations Office for South-South Cooperation op cit note 765.

[756] With a 40% stake in the consortium.

[757] With a 25% stake.

[758] The United Nations Office for South-South Cooperation op cit note 765.

[759] Ibid.

[760] According to the contract the private partners are expected to pay a fixed monthly rental fee of R40,000 per month for the use of the co-located facilities within the first five years and R60,000 per month subsequently. In addition, 1.32% of the annual turnover before profit is to be paid back to the public sector.

[761] The United Nations Office for South-South Cooperation op cit note 765.

[762] Ibid.

While the FSHD's role is to provide patient care in both hospitals, the private partner is responsible for all renovations and upgrades.[763] The upgrades at Pelonomi and Universitas Hospitals were completed on shared facilities and facilities for the use of the public hospital.[764] Apart from this, the private partner upgraded the facilities that were for its own private patients and in doing so, the private partner hired local construction companies. At one point, 26 Bloemfontein companies were subcontracted for a period of eight months. The result was an injection of over R10 million into the local economy.[765]

The PPP for Pelonomi and Universitas Hospitals is 'considered extremely successful.'[766] Both hospitals have facilities that are presently functional, with the healthcare needs of the population (whether insured or uninsured) being met daily. Running costs have been reduced and the quality of care has been increased because of the PPP arrangement. Furthermore, the PPP has ensured reduced costs for both the FSHD and the private partner, especially as there was no need to build a new hospital.[767] Again, commitment on the part of the stakeholders contributed immensely to the success of this PPP arrangement.[768]

5.6.3 Case Study 3: The Prison Contracts

Because of a significant shortage of prison space, the Departments of Correctional Services (DCS) and Public Works introduced a concept for the operation of private prisons in the country modelled after the UK private prisons.[769] The government of South Africa subsequently signed two 25-year PPP contracts for maximum security prisons in Bloemfontein

[763] Shadrack Shuping & Sipho Kabane op cit note 764.

[764] The United Nations Office for South-South Cooperation op cit note 765.

[765] Ibid.

[766] Ibid.

[767] It is significant that both hospitals can attend to all citizens without any form of discrimination based on race.

[768] National Treasury PPP Unit 'Case studies on the public private partnerships at Humansdorp District Hospital, Universitas and Pelonomi Hospitals and Inkosi Albert Luthuli Central Hospital: Overall findings and recommendations' (2007) available at *http://www.ppp.gov.za/Legal%20Aspects/Case%20Studies/Humansdorp%20Overall%20findings.pdf* accessed 29 May 2017.

[769] Peter Farlam op cit note 747 at 15.

and Louis Trichardt as part of its Department of Public Works' Asset Procurement and Operating Partnership Systems (APOPS) in the year 2000.[770]

Initially the DCS called for bids from the private sector for the design and construction of 11 maximum security prisons. This was later reduced to four, then again to two, after it was realised that costs had been vastly underestimated.[771] The two winning consortia, both of whom had more than 50 percent black shareholding and included foreign-based prison management companies among their shareholders, acquired responsibility for designing, building, financing, operating and transferring the prisons.[772] The facilities hold an estimated 3,000 inmates each and became fully operational in less than two years after the close of the contract in 2002, at a cost of about R1.7 billion for the Bloemfontein prison and R1.8 billion for the one in Louis Trichardt.[773]

A review undertaken jointly by the DCS, National Treasury and the Department of Public Works (DPW) found that the Bloemfontein and Louis Trichardt PPP Prisons achieved lofty goals, including but not limited to competitive first construction costs (R270m for Bloemfontein's 2,928 inmates, and R303m for Louis Trichardt's 3,024 inmates); secondly, construction completed on time and on budget; thirdly, fast track delivery: less than two years from contract close to full operating capacity accommodating some 6,000 maximum security prisoners; fourthly, operating costs per inmate per day were broadly comparable with the public sector's operating costs; fifthly, there were significantly higher quality facilities and levels of service than in public prisons; a sixth objective achieved was a high level of black equity in the contractors (60 percent Bloemfontein; 50 percent Louis Trichardt) and significant black sub-contracting in both construction and operation of both prisons; and finally, the appropriate assumption of financial, technical and operational risk by the parties.[774]

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[770] South African Institute of International Affairs 'Case study: Private prisons' (2005) available at *http://www.saiia.org.za/newsletters/case-study-private-prisons* accessed 29 May 2017.

[771] Linda Mti 'Review of public private partnership prison contracts,' a summary of a hearing before the Correctional Services Portfolio Committee, South African Parliament, 12 November 2002. Available at *https://pmg.org.za/committee-meeting/2259/* accessed 29 May 2017.

[772] Peter Farlam op cit note 747 at 15.

[773] Ibid.

[774] National Treasury PPP Unit 'PPP prisons are good deals' (2002) 9.2 *PPP Quarterly*.

The above notwithstanding, the review also identified some low points in both projects. These were:[775] first, the Department for Correctional Services' (DCS) design and operating specifications were too high, based on ideal prison conditions, though the prisons remain driven by high DCS input specs; secondly, suitable feasibility work by government should have established DCS' affordability limits prior to procurement; thirdly, the relatively high cost of debt due to high base interest rates prevailing at the time of the deals (14.58% Bloemfontein; 15% Louis Trichardt); fourthly, higher than normal margins charged by lenders, reflecting the perceived risk of early deals; fifthly, higher than normal returns on equities, again reflecting perceived risk of early deals; and finally, the inability to increase populations in the PPP prisons, despite severe overcrowding in the DCS system.

Farlam[776] argues that 'a thorough feasibility study would have clarified the affordability limits of the Department of Correctional Services at the start of the process.' He also notes that 'experienced private sector operators can provide a better-quality service at comparable rates to the public sector.'[777]

5.6.4 South Africa's Gautrain

This modern rapid train link was conceived to provide a solution to South Africa's infrastructure problems in the rail sector.[778] The rail links the nation's capital, commercial centre and main airport. It is considered central to South Africa's national transport strategy. Consequently, from the 1998 feasibility study to the year 2012 when it came into operation, it has offered a huge learning process to PPP stakeholders in South Africa.

The project was initiated in February 2000 by Mr Mghazima Shilowa, the premier of Gauteng Province, as one of the 10 Spatial Development Initiatives (SDIs) of the government of Gauteng to promote tourism, move towards integrated transport system and help alleviate congestion on the roads, particularly along the Pretoria to Johannesburg International Airport (JIA) corridor. The project was also intended to stimulate economic growth, development and job creation.

[775] Ibid at 17.

[776] Peter Farlam op cit note 747 at 17.

[777] Ibid at 17.

[778] Centre for Public Impact 'South Africa's Gautrain: Rail travel from Pretoria to Johannesburg' (2015) available at *https://www.centreforpublicimpact.org/case-study/gautrain-in-south-africa/* accessed 19 February 2018.

Notably, being a PPP, the Gautrain involved relations with the private investors involved in the funding and external stakeholders engaged in the construction.[779] The Bombela Concession Company (Pty) Ltd won the bid for the construction, operation and maintenance of the Gautrain until 2020.[780] Funding for the project was sourced from federal and provincial institutions, institutional investors (especially pension funds), the World Bank, the African Development Bank (AfDB); infrastructure funds; and banks via the capital markets and debt markets. The project is a classic example of a PPP in the sense that it showcases the use of various instruments available in the financial market for the funding of PPPs. Significantly, the project received strong political support from the national government, which committed as much as R7.1 billion to it.

Despite initial public scepticism about the project,[781] its clear policy objectives and strong management on the part of the concessionaire and other public-sector agencies were factors that made a strong contribution towards its success.

5.7 Challenges in the Implementation of Public-Private Partnerships in South Africa

Despite South Africa's leading position in the commissioning of PPP projects in Africa, the implementation of PPP policy in the country has not been without challenges and criticism. In 2007, the Office of the Presidency of South Africa and the Business Trust commissioned the Castalia Consortium[782] to identify challenges facing PPPs in infrastructure in South Africa.[783] After conducting a series of interviews, the Castalia Consortium in their report identified the following as potential bottlenecks in the successful implementation of PPP policy in the country:[784]

i. A lack of policy direction from the highest level of government, or at least a lack of clarity in the minds of implementing agencies and the private sector, on why

[779] Ibid.

[780] Ibid.

[781] Ibid.

[782] Comprising Castalia Ltd and Ukhamba Advisory Services.

[783] Castalia Strategic Advisors & Ukhamba Advisory Services 'Key challenges to public private partnerships in South Africa: Summary of interview findings' (2007) available at *http://www.castalia-advisors.com/files/12345.pdf* accessed 29 May 2017.

[784] Ibid at 35.

South Africa should enter PPPs, what PPPs are, and what is or should be the role of the PPP unit;

ii. Inconsistent commitment to PPPs in different parts of government and at different levels of government;

iii. A general mistrust among the implementing agencies of private sector involvement in the provision of infrastructure services;

iv. A lack of time, resources, know-how and authority among the staff of the agencies developing and implementing PPPs;

v. A policy bias toward traditional procurement and against PPPs;

vi. A lack of fiscal imperative to use PPPs;

vii. A completely different market and legal environment for PPPs in the municipalities, where all the above problems are much more severe and infrastructure needs are much greater.

In a recent study, poor stakeholder consultation has been identified as one of the issues that need to be addressed in South Africa.[785] On a similar note, Fombad[786] identifies accountability generally as a serious challenge for PPPs in South Africa and claims that accountability issues involve a lack of public consultation on the part of the public sector; a lack of transparency; corruption; a lack of competition; ineffective contract management and a failure to monitor performance. To my mind, where there is a lack of accountability, a project no matter how well designed and structured is doomed to fail from the start. The reason is that members of the public are very sceptical about PPP arrangements. If one considers that the procurement of infrastructure has been the sole responsibility of the public sector, a transaction with the private sector that lacks accountability will always be regarded as dubious.

Sanni and Hashim also note that inconsistency in the commitment of government agencies in South Africa affects PPP projects, and since PPP projects require a longer time for delivery, frequent changes in plans or policies may hamper the success of the projects.[787]

[785] E R Yescombe *Public-Private Partnerships in Sub-Saharan Africa* (2017) 96.

[786] Madeleine C Fombad 'Accountability challenges in public-private partnerships from a South African perspective' (2013) 7.1 *African Journal of Business Ethics* at 11–25.

[787] Afeez Olalekan Sanni & Maizon Hashim 'Building infrastructure through public private partnerships in Sub-Saharan Africa: Lessons from South Africa' (2014) 143 *Procedia: Social and Behavioural Sciences* at 133–38.

Seeletse has argued that the deployment of unqualified personnel to handle PPP transactions has been a drawback for PPP in South Africa.[788] Yet I do not agree with his submission that there is a need for the establishment of a regulatory body for PPP in South Africa, if what he means by that is a body separate from the PPP Unit.[789] My view is that multiple bodies regulating PPP will only end up causing confusion, and result in the unnecessary flexing of muscle by different government agencies.

5.8 Conclusion

In this chapter, the legal, policy, institutional and administrative framework for PPP in South Africa has been analysed. The practice of PPP in the country in relation to this framework has formed part of the discussion; and to examine the law and policy in action, a few brief case studies of projects have been presented.

It seems that despite the relatively slow development of PPPs in sub-Saharan Africa, when compared to other benchmark (middle-income) countries, South Africa has outperformed the others in using the PPP model for infrastructure procurement. Two reasons for this easily come to mind. The first is that compared to other sub-Saharan African countries like Nigeria, institutions in South Africa are better structured. Institutional actors in PPP regulation must be guided by the need to respect contractual agreements and to abide by the rule of law in the discharge of their responsibilities. Secondly, the local financial market in South Africa is arguably the only developed one in sub-Saharan Africa.

This is not to say that the framework and practice of PPP in South Africa is perfect. Indeed, as is the case with other strong PPP countries like the UK, Canada, Australia and Hong Kong, PPP is evolving in South Africa and there is always room for improvement.

The next chapter of the study compares the laws, policies and practice of PPP in Nigeria and South Africa. Aspects for reform in South Africa are discussed and suggestions offered. The chapter concludes with findings and suggestions for the future study and practice of PPP, especially in the Nigerian context.

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[788] Solly Matshonisa Seeletse 'Performance of South African public-private partnerships' (2016) 14.2 *Problems and Perspectives in Management* at 19.

[789] Ibid at 24.

CHAPTER SIX

A COMPARATIVE EXAMINATION OF THE REGULATORY ENVIRONMENT FOR PUBLIC-PRIVATE PARTNERSHIP FOR NIGERIA AND SOUTH AFRICA

6.1 Introduction

The frameworks for the regulation and administration of PPP in Nigeria and South Africa have been discussed in some detail in Chapters Four and Five, respectively. In those chapters, the writer provided a descriptive analysis of the law and practice of PPP. This chapter focuses on a comparative analysis of the regulatory and administrative framework for PPPs in the two countries. The approach here is analytical, critical and prescriptive.

In the preceding chapters it was established that the introduction of the PPP model of infrastructure delivery in Nigeria and South Africa has created an opportunity for the private sector to participate not just in the funding of projects but also in the design, building, rehabilitating, management and operation of public facilities. This is not unconnected to the recognition that utilising the PPP model as a means of delivering various types of asset-based public services and infrastructure has become a global public management reform trend.[790] For the sake of emphasis and as already noted in Chapter Three, even though the distinction appears to be marginal, service contracts entered into by the private sector and the government pre-dates PPP and must be clearly distinguished from the latter form of infrastructure procurement. PPP provides the option of the private sector taking charge and playing the lead role in a function that was traditionally undertaken by the government.

Since Nigeria and South Africa are two of the largest economies in sub-Saharan Africa,[791] a study of the impact of their introduction of the PPP model of infrastructure procurement is important, possible serving as a guide for other economies on the continent. The success and advantages of adopting PPP in both countries could be beneficial in structuring PPP programmes in other sub-Saharan African countries. This is not to say that there have not been challenges or even outright project failures in both countries. However, South Africa has achieved more success in PPP arrangement, execution and delivery than Nigeria. Apart from

[790] Ole Helby Petersen 'Public-private partnerships as converging or diverging trends in public management? A comparative analysis of PPP Policy and regulation in Denmark and Ireland' (2011) 12.2 *International Management Review* at 1.

[791] J Peter Pham 'Africa's economic prospects in 2017' *Atlantic Council* 9 January 2017 available at *http://www.atlanticcouncil.org/blogs/africasource/africa-s-economic-prospects-in-2017-ten-countries-to-watch* accessed on 5 October 2017.

having a better experience in the management of PPPs,[792] South Africa's financial market is much more developed than that of Nigeria. This means that promoters and investors in South Africa have a larger pool of funds that can be accessed for the funding of infrastructure than their counterparts in Nigeria. In that country the financial market is still at a developing stage, burdened by a lack of access to long-term funding, as the commercial banks and other lenders prefer tenures not exceeding 15 years at any given time.

In this chapter, indicators and drivers of success for PPP arrangement and execution are examined in both jurisdictions. These indicators are also referred to as Critical Success Factors (CSFs) for PPPs. Since these parameters determine whether PPPs will succeed, it is important to analyse the structures both in Nigeria and South Africa to determine how policy makers can best design a successful PPP regime. As a corollary, this chapter examines the two jurisdictions for areas of similarity and divergence.

6.2 The Establishment of an Adequate Legal Framework

According to the National Treasury PPP Unit in South Africa,[793] an independent, fair and efficient legal framework is a key factor for successful PPP project implementation. Due to the very complicated nature of PPP, it is important that the branch of the law that regulates it is clear to investors and practitioners.[794] Both Nigeria and South Africa operate with three different levels of governance, with different set of laws, in many cases, operating at the national and sub-national levels. It is therefore important to know which laws apply at each level.

In this section, the legal frameworks for the implementation of a PPP regime in Nigeria and South Africa are examined. Also highlighted are the similarities and differences between the two countries in relation to the establishment and administration of a PPP regime.

To begin with, this writer believes that the best way to implement a PPP regime in any jurisdiction is to take into consideration the administrative and legal traditions of that jurisdiction as well as the policy maker's objective(s). There is thus no single best way of

[792] Peter Farlam, op cit note 747 at 1.

[793] National Treasury PPP Unit of South Africa (2007), *Public Private Partnership Manual*, available at *http://www.ppp.gov.za/Legal%20Aspects/PPP%20Manual/Module%2001.pdf* accessed on 5 October 2017.

[794] Anthony Smith 'Policy, legal and regulatory frameworks for successful PPPs' (2012) available at *http://www.unescap.org/sites/default/files/4a-Policy-legal-regulatory-frameworks.pdf* accessed on 5 October 2017.

giving force to a PPP framework. This notwithstanding, countries with greater levels of PPP success can serve as examples for others. Conversely, even those with good results have lessons to be learned from their peers with less impressive records.

While it is clear that the enabling of fair and transparent PPP legislation is a fundamental requirement for PPP success, common law countries like the United Kingdom and Australia have established their PPP regimes through policy statements and administrative documents without enacting a PPP law.[795] Yet in other common law countries PPP laws have been passed, especially where these were required to override existing laws that would have restricted the implementation of PPP projects.[796] This writer agrees with the position that in developing or emerging common law economies like Nigeria, a PPP law is important to provide 'greater force, stability, transparency, and accountability.'[797]

6.2.1 Establishment of Nigeria's Public-Private Partnership Legal Framework

Before discussing the framework for PPP in Nigeria, it is important to describe its legislative structure. While the federal legislators make laws at the national level, state law makers exercise a similar function at the state level. The Federal Republic of Nigeria consists of a central federal government, a federal capital territory, 36 states and 768 local governments.[798] The Constitution of the Federal Republic of Nigeria 1999 (as amended) assigns responsibility (with certain restrictions) to each tier of government for infrastructural development within the territory over which it exercises control.[799] Following from this, there could be as many PPP laws and frameworks as there are different units of government. Indeed, some states – including Lagos, Rivers, Cross Rivers, Niger, Ekiti and Ogun – have established PPP frameworks with PPP units to oversee the administration of PPP projects in those states.

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[795] APMG International 'Establishing a PPP framework' available at *https://ppp-certification.com/ppp-certification-guide/152-legal-and-administrative-approaches-establishing-ppp-frameworks* accessed on 12 October 2017.

[796] Ibid.

[797] Ibid.

[798] It is important to note that under the Infrastructure Concession and Regulatory Commission (Establishment Etc.) Act 2005, any arm of the government with the exclusion of local government can initiate and manage PPPs. Each state exercises relative autonomy in the implementation of PPP projects and as such, each makes and enforces its own laws and regulations.

[799] Sections 4, 5 and 8 of the 1999 Constitution of the Federal Republic of Nigeria (as amended). Also, Schedules 2 and 4 of the Constitution.

The basis for the establishment of a PPP framework in Nigeria was the policy of the Nigerian government to shed some of its responsibility for infrastructure development by increasing private sector participation in critical sectors of the Nigerian economy. This was to be done through the privatisation and commercialisation of previously state-owned monopolies, especially in the telecommunications and power sectors.[800] Prior to the passing of the Infrastructure Concession and Regulatory Commission (Establishment Etc.) Act 2005, the federal government of Nigeria pursued a privatisation programme through which some state-owned enterprises were privatised. This process, which involved numerous transactions, including concessions, was conducted through the Bureau of Public Enterprises (BPE) under the Public Enterprises (Privatisation and Commercialisation) Act No. 28 of 1999. It is important to note that public enterprises were privatised by the Nigerian government in order to advance development and consumer access in those sectors: the mismanagement and under-utilisation that had characterised those establishments had resulted in a huge waste of material and human resources.[801] Regrettably, however, the privatisation programme in Nigeria left much to be desired. The programme was marred by a number of things, including the limited technical and financial capacity of some of the private companies, and allegations of corrupt practices.[802] Furthermore, some of the enterprises sold to the private sector have performed more poorly in the hands of the new managers than they did when they operated as government-owned enterprises.[803] For example, the Nigerian Telecommunications Ltd (NITEL) performed poorly under new management before it became moribund. Onuoha, Okoro and Mimiko observe that the late 1990s and beyond witnessed the federal government of Nigeria allocating some of its responsibilities for infrastructural development to the private sector,[804] but point out that in more recent years there has been a shift towards PPPs.[805] It is pertinent to note that a number of concessions were put in place under the Privatisation Act even after the ICRC Act had been passed.[806] Indeed, for a long time, it appeared as if the federal government of Nigeria

[800] Fred Onuobia, Okechukwu J Okoro & Bibitayo Mimiko 'Nigeria' in Bruno Werneck and Mário Saadi (eds.) *The Public-Private Partnership Law Review* (2017) at 157.

[801] D E Arowolo & C S Ologunowa op cit note 25 at 792.

[802] Ibid at 792.

[803] Ibid.

[804] Fred Onuoha, Okechukwu J Okoro & Bibitayo Mimiko op cit note 812 at 157.

[805] Ibid at 157.

[806] George Nwangwu, *Public Private Partnership in Nigeria: Managing Risk and Identifying Opportunities* (2016) at 28.

'could choose randomly between either of the two laws setting up PPP transactions as public authorities vacillated between either of the laws for different transactions.'[807]

With endemic budget deficits, the inefficient management of large infrastructure projects and services by the public sector, and the apparent failure of the privatisation programme, the Nigerian government's desire for a dynamic partnership with the private sector necessitated a policy shift towards a PPP regime for the procurement of infrastructure.[808] In sum, the establishment of a legal framework for the administration of PPP in Nigeria is first, not unconnected with the failure of the privatisation initiative. Secondly, it is driven by the need to make the process for PPP procurement uniform and clear; and thirdly, it is occasioned by the necessity of providing some form of assurance to private sector investors that PPP contracts are binding.

6.2.2 Establishment of South Africa's Public-Private Partnership Legal Framework

Unlike Nigeria, where the failure of the privatisation agenda of government was the harbinger of PPP, the involvement of the private sector in the procurement of public infrastructure in South Africa was based on the recognition that the private sector is better suited to provide effective services as well as the opportunity to introduce private capital and expertise into state enterprises.[809] The introduction of a PPP legal framework hinged on the need to create an environment in the country conducive to PPP success.

Having established the feasibility of the PPP model of procurement, in April 1997 the South African cabinet approved the appointment of an inter-departmental task team to advance both legislation and policy to facilitate the adoption of a PPP framework. Subsequently, a PPP Unit was set up under the National Treasury. Following from this, a strategic framework for PPPs was endorsed in December 1999, while the National Treasury issued regulations for PPPs in April 2000.[810]

Given South Africa's history and the importance of public procurement to the economic well-being of its citizens, all forms of procurement in the Republic, including PPP, are required

[807] Ibid at 28.

[808] Fred Onuoha, Okechukwu J Okoro & Bibitayo Mimiko op cit note 812 at 157.

[809] Axis Consulting, 'PPP country paper: South Africa' (2013) 11 available at *http://www.sadcpppnetwork.org/wp-content/uploads/2015/02/south_africa_27012014.pdf* accessed on 13 October 2017.

[810] Ibid.

to conform with accepted principles of fairness.[811] This principle of fairness is boldly encapsulated in the preamble to the 1996 Constitution of the Republic of South Africa. While there is undoubtedly a need to heal the injustices of the past, it is the respectful opinion of this writer that the procurement of infrastructure by the private sector should not be considered an area where there should be questions as to whether certain groups in the community are represented. Such considerations must only apply when they relate to traditional public procurement. The reason for this submission is that the requirement to be fair to all communities has the tendency to stifle private sector competition. Again, private sector consortia who feel obliged to meet such targets often resort to malpractices to conform to their burdensome requirements.

6.2.3 Similarities between the Legal Frameworks for Public-Private Partnership in Nigeria and South Africa

In this sub-section of the study, the focus is on similarities between the frameworks in Nigerian and South Africa. The key points for discussion are the tiers of government, the establishment of regulatory units for PPP, the standards required for PPP procurement, the emphasis on value for money as a key driver for PPP, as well as advancing PPP as a tool to ensure balanced regional development.

Similarly to the situation in Nigeria,[812] the government of the Republic of South Africa is constituted at national, provincial and local spheres, which are distinctive yet interdependent and interrelated.[813] While the Republic is made up of nine provinces,[814] the local sphere of government in South Africa is the municipal government.[815] Remarkably, there are distinct frameworks for the regulation of PPP at the national and sub-national level in both countries.

To ensure the efficient regulation and monitoring of PPP projects, the Nigerian Infrastructure Concession and Regulatory Commission (Establishment Etc.) Act 2005 set up the Infrastructure Regulatory Commission (ICRC) as the regulatory institution for federal PPP

[811] S. 217(1) of the Constitution of the Republic of South Africa states that 'When an organ of state contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.'

[812] As stated under Section 6.2.1, above, Nigeria is a federation consisting of 36 states.

[813] S. 40(1) 1996 Constitution of the Republic of South Africa (as amended).

[814] S. 103(1) 1996 Constitution of the Republic of South Africa (as amended). The provinces are Eastern Cape Free State, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga, Northern Cape, North West; and Western Cape.

[815] S. 151(1) 1996 Constitution of the Republic of South Africa (as amended).

in the country. In the Republic of South Africa, a PPP unit established in the year 2000 under the National Treasury is charged with this responsibility. Notably, both Nigeria's ICRC and South Africa's National Treasury PPP Unit play a vital role in the creation of PPPs. However, in both Nigeria and South Africa the initiative to start up a PPP project lies with the ministry, department or agency (MDA) of government that is responsible for the project. In both jurisdictions, it is safe to say that the rationale for having dedicated PPP units is based on the reasoning that the MDA may not fully appreciate the budgetary implications of PPPs due to their off-budget nature.[816]

Furthermore, while under section 20 of Nigeria's Infrastructure Concession and Regulatory Commission (Establishment Etc.) Act 2005, the ICRC takes custody of every concession agreement and monitors compliance, the function of the South African PPP unit is to ensure that all agreements comply with the legal requirements of affordability, value for money and risk transfer.[817] It needs to be observed that merely stating that the ICRC is to ensure compliance fails to specify what standards should be complied with. The function of ensuring compliance is clearly defined in South Africa but not in Nigeria, even though the ICRC maintains that it is driven by certain key principles.[818] Consequently, this writer argues that in future amendments of the 2005 Act in Nigeria, the parameters with which all contracts should comply must be clearly defined for the sake of uniformity and to make the job of the ICRC easier. Furthermore, the technicalities involved in a PPP arrangement require a specialist unit in government to oversee any such transaction. Again, while the World Bank rates the South African PPP environment as strong, with a solid track record in delivering major projects because of an active and efficient dedicated PPP unit,[819] Nigeria's equivalent, the ICRC, is still learning the ropes. Fundamentally, the ICRC appears to lack the powers of a regulator in the event of failure by ministries, department or agencies (MDAs) to adhere to contractual terms, as can be seen in some of the case studies in Chapter Four of this research. It is the submission

[816] Philippe Burger, 'The dedicated PPP Unit of the South African National Treasury' (2006), a presentation delivered at the Symposium on Agencies and Public-Private Partnerships, organised by the OECD and the Intervenciòn General de la Administration del Estado (IGAE), with the collaboration of the Secretary-General of Budget and Expenditure, held in Madrid, Spain, 5–7 July 2006.

[817] Ibid at 7.

[818] These principles are value for money, risk allocation, public interest, output requirements, transparency, competition and capacity to deliver. See National PPP Unit, *Introducing Public Private Partnerships in South Africa* (National Treasury PPP Unit, 2007) at 5.

[819] The World Bank, 'South Africa' available *at https://pppknowledgelab.org/countries/south-africa* accessed on 17 October 2017.

of this writer that the ICRC must not only claim to but must also be able to exercise the powers of a regulator, especially when the matter relates to public sector compliance.

The standards required for PPP procurement in both jurisdictions are quite similar. Both Nigeria[820] and South Africa, in line with international best practice, regard the best value for money outcome as a key consideration for PPP projects. In other words, for a project to be procured by way of a PPP, it must be evident that it is cheaper to do so that via the traditional public procurement procedure.[821] Other considerations include appropriate risk transfer, risk allocation and affordability. It is a fundamental requirement in both jurisdictions that risks should be transferred to the party who is better suited to manage them. Again, it makes no business sense to embark on a project that is not financially viable. Consequently, it is evident that both jurisdictions must allow for exceptions, especially for projects where the concession type of PPP may not be appropriate but for which partnership with the private sector may be beneficial. The building of new prisons or public libraries would fit into this category.

In South Africa, PPPs are considered a tool for Black Economic Empowerment (BEE),[822] requiring the formation of private consortia in the form of special purpose vehicles (SPVs) for PPPs. This is intended to facilitate long-term beneficial partnerships between new black-enterprises and experienced, resourced companies, both as equity partners and in project management, and both at the private party SPV and subcontracting levels.[823] Invoking a similar rationale, Nigeria considers PPP a tool to ensure balanced regional development.[824] Taking into consideration South Africa's history of apartheid and Nigeria's highly nuanced history of the ethnic and regional marginalisation of various sections of the country at different times, it is not surprising that government in both countries consider PPP as a 'political tool' to right societal wrongs. Thus, in South Africa, it is expected that the previously marginalised African population will be given opportunities in the procurement of PPP projects. In Nigeria, since an equitable distribution of government facilities across the geo-political zones in the country is deemed ideal, there is an assumption that in PPP procurement, as much as possible, all sections of the community must be catered to. It is submitted that for PPPs to be attractive to the private

[820] See the National Policy on Public-Private Partnership at 12.

[821] Axis Consulting, op cit note 821 at 12.

[822] See *Module 2: Code of Good Practice for BEEE in PPPs in South Africa.*

[823] National Treasury 'Public Private Partnership' available at *http://www.ppp.gov.za/Pages/whatisppp.aspx* accessed on 19 October 2017.

[824] See National Policy on Public-Private Partnership at 2.

sector, there must be a distinction between PPP and traditional procurement in terms of the equitable spread of public facilities. The reason is that while the public sector must be fair and willing to ensure equity in terms of the distribution of public facilities and the empowerment of its citizens, the private sector is ultimately driven by the prospect of making profits. For example, the equitable distribution of airports in Nigeria may require the construction of new airports in Lagos as well as in smaller towns. But while a new airport in Lagos may be attractive to investors, a similar project by way of a PPP in a small town with low business activity will likely hold no attraction for private investors. Similarly, a foreign investor with an interest in PPP in South Africa may be challenged by the BEE requirements in the country. The requirements add avoidable complexity to the ease of doing business in the country in so far as foreign direct investment is concerned.

6.2.4 Areas of Divergence in the Legal Framework for Nigeria and South Africa

In this sub-section the main areas of divergence between the frameworks are discussed. The areas with notable differences include the origin of the main legislation for PPP, the scope of application of the PPP laws in both jurisdictions, and the key stages in the PPP life cycle in Nigeria and South Africa.

While Nigeria has a principal law passed in 2005 to regulate PPP transactions, South Africa does not have one. Instead, the National Treasury issued Regulation 16 in 2004 pursuant to the Public Finance Management Act. It seems a paradox that the main law for PPP is a product of the legislature in Nigeria whereas the regulation for PPP in South Africa is the product of a public agency. But while an investor or anyone with an interest in PPP in Nigeria must consult a web of laws including the main PPP law to get a grasp of the regulatory environment for PPP, a similar exercise in South Africa is less cumbersome. It is therefore safe to say that, in the opinion of this writer, PPP is over-regulated in Nigeria.

Another point of divergence is that at the national and sub-national levels in Nigeria, different PPP laws apply. The Infrastructure Concession Regulatory Commission (Establishment Etc.) Act 2005, which is an Act of the National Assembly, is the applicable law for PPP where there is a partnership involving any federal ministries, departments or agencies (MDA) and the private sector. At the sub-national level, states that wish to introduce the PPP

model of procurement must establish their own local PPP framework.[825] The case in South Africa is quite different, as the same laws and regulations apply to both the national and provincial governments. Municipal authorities are an exception, since they are guided by the Municipal Finance Management Act No. 56 of 2003. It is submitted that the Nigerian structure best suits a federation since it affords each state the opportunity to tailor its PPP framework to its needs. A clear case is that the federal law for PPP in Nigeria does not allow for the private finance initiative (PFI) type of PPP, thus restricting PPPs at the national level to concessions. However, the PPP law in Rivers State does not restrict PPPs to the concession type only. The current South African framework, on the other hand, appears not to allow the various provinces to cater to their unique needs.

Furthermore, the framework in Nigeria requires that apart from the Infrastructure Concession and Regulatory Commission (ICRC), every state in the federation that sets up a local framework must also establish a local PPP unit for that state.[826] As suggested earlier, PPP units at state level should be more effective. However, in the short term, because of the technical nature of PPP transactions, there could be a dearth of available expertise at this stage of PPP development in the country. It might not be efficient to burden the federal PPP unit with PPP transactions and arrangements in all the federated units of the country, as this could require huge resources to achieve: officials would be expected to travel and be required to be conversant with the different frameworks in all the different states. If all 36 states in Nigeria were to have their own frameworks, it would be difficult for the ICRC to effectively manage and administer all transactions. Even though South Africa has only nine provinces and a national government, the single PPP unit confers a sense of uniformity, even though it does not allow for the development of PPP expertise at the second tier of government.

Finally, there is a key difference in the number of stages of the PPP project cycle. In Nigeria the ICRC, in consonance with international best practice, has identified four phases: project development and appraisal; project procurement; project implementation; and project maturity.[827] In practice, though, in the case of a solicited PPP procurement the process unfolds over 12 stages. It is submitted that the current arrangement is cumbersome and not good for

[825] For example, states like Lagos, Rivers, Cross Rivers, Niger and Ekiti have established their own PPP frameworks.

[826] This position has been emphasised in Chapter Four of this research.

[827] Infrastructure Concession Regulatory Commission, 'PPP Lifecycle' available at *http://www.icrc.gov.ng/ppp/* accessed on 20 October 2017.

business. Streamlining the process into six stages would be appropriate. The PPP project cycle – as provided for in Modules 3, 4, 5 and 6 of the Public Private Partnership Manual issued by the South African National Treasury PPP Unit in terms of the Public Finance Management Act – is more attractive to an investor as it merely restates the four phases in a PPP life cycle in clearer terms. Placed side by side, a prospective investor is more likely to choose to invest in a PPP project in South Africa than in Nigeria because of the clarity and straightforwardness of the PPP process in South Africa.

6.3 The Institutional Framework

Apart from entrenching a legal framework for the administration and regulation of PPP in any given jurisdiction, it is imperative that an institutional framework be in place to ensure that the processes of initiation, administration, control and accountability regarding PPP projects match international best practice. Thus, the better to implement PPPs, many countries have introduced PPP institutional frameworks to provide a description of the roles required of different public institutions that contribute to the development of PPP policy, while at the same time supporting project delivery.[828] The institutional arrangements in most countries include primarily the PPP unit and the MDAs that are relevant to the procurement and execution of the PPP project.

A strong and effective regulatory regime is a necessity in order to attract large-scale private sector investment.[829] When investors have the perception that the institutions charged with responsibility for initiating or superintending the project and its outcome are not strong enough or are inconsistent, the chances of the private sector participating in PPP execution and delivery are very slim. It is important that the criteria for appointing the heads or members of the MDAs directly responsible for PPP delivery should be based strictly upon expertise, experience and ability to deliver. This is a major challenge for a country like Nigeria, burdened by a 'federal character' principle which requires that:

> The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty and thereby ensuring that there shall be no predominance of persons from a

[828] European PPP Expertise Centre *PPP legal and institutional frameworks in the Western Balkans* (2014) at 19.

[829] The Institute for Public Private Partnerships *Development of Policy, Legal, and Institutional Framework for the Public-Private Partnership Programme in Malawi* (2007), a report submitted to the World Bank

> few states or from a few ethnic or other sectional groups in that government or any of its agencies.[830]

The implication of this federal character requirement is that some of those who are responsible for managing PPPs or making key decisions regarding them may lack expertise or experience, and are in their position by virtue of an employment quota. Their lack of expertise and experience renders them prone to error, and over time weakens the institutions concerned. It is submitted that, in order to spur economic growth, the federal character principle should be relaxed for key institutions in the country that are critical to the economy.

6.3.1 Nigeria's Institutional Framework for Public-Private Partnership

The National Policy on Public-Private Partnership states as follows:

> The Government will create an institutional framework that will reinforce the accountability of Ministries, Departments and Agencies (MDAs) of the Federal Government for the delivery of public services within their areas of responsibility, whilst ensuring that they have access to appropriate guidance, training, expertise and resources to plan, procure and manage investment projects and public services efficiently and effectively taking into account value for money and long-term affordability. It will issue guidance for the benefit of those states that propose to develop their own PPP policies and programmes, and will set up mechanisms to coordinate these and encourage the development of standardised documents where appropriate. It will coordinate communication between the public authorities across the Federation and private sector contractors.[831]

In the light of some of the cases studied in Chapter Four of this research, it does appear that the goals stated above have hardly been achieved. This is because of the lack of synergy between government agencies and the ICRC. It is the view of this writer that the ICRC as constituted has not shown itself to be a strong regulator when compared to other regulatory bodies in the country, like the Nigerian Broadcasting Commission (NBC) or the Nigerian Communications Commission (NCC), who are capable of imposing sanctions even on public establishments. While the NBC can take action against a public TV or radio station for an offensive broadcast, the ICRC is like the proverbial dog that does not bark, let alone bite. This weakness explains why the Federal Airports Authority of Nigeria (FAAN), for instance, is

[830] Section 14(3) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

[831] National Policy on Public Private Partnership (2008) at 5.

reneging on its contractual obligation to its PPP partner, Bi-Courtney Aviation Services Ltd, to enforce the use of the Murtala Mohammed Airport Terminal II by local flights landing in Lagos. As a regulator mandated to take PPP contracts into its custody and monitor performance, it is the duty of the ICRC to prevail on the FAAN to fulfil its obligation, to avoid the ugly situation in which Bi-Courtney Aviation Services Limited (the concessionaire) had to go to court to enforce that clause in the PPP contract.

As presently constituted, the institutional framework for PPP in Nigeria is, in the opinion of this writer, akin to having too many cooks preparing one pot of broth. Apart from the ICRC, the primary institution for the administration and control of PPP at the national level in the country, there are several other MDAs including the National Planning Commission (NPC), the MDA initiating the project, the Federal Ministry of Finance, the Debt Management Office (DMO), the office of the Accountant General of the Federation, the Bureau of Public Procurement (BPP) and the Bureau of Public Enterprises (BPE), all charged with different and sometimes overlapping functions. For example, while the Federal Ministry of Finance is responsible for evaluating and managing fiscal risk that may result from the terms of the agreements, the DMO is expected to be satisfied that any contingent liabilities are manageable within the Government's economic and fiscal forecast. This clearly introduces multiple bureaucratic bottlenecks. As earlier observed, PPP is not traditional public procurement that requires government borrowing directly for the procurement of infrastructure. The unique nature of PPP in most cases requires private investors to seek funds to execute a project that will in the long run be paid for through tolls or charges from users of the facility. It is therefore submitted that a role for the DMO in the regulation and administration of PPP in the country is unnecessary, especially when government borrowing is not part of the funds earmarked for the project. In such a case, the process must not involve the DMO.

Furthermore, how the institutions dealing with PPP in the country are to handle unsolicited proposals is not clearly defined. In line with international practice, a prospective investor may offer to partner with the public sector to execute and deliver a facility, even though such a project has not been initiated by the government or any of its agencies. The National Policy on Public-Private Partnership, merely states that some unsolicited proposals may be incorporated into an MDA's investment programme where:

i. The proposal concerns a sector with an established regulator and where there is an existing framework then the promoter may apply to the regulator for the relevant licences;

ii. Where the proposal confers rights, which could create a monopoly in the sector without an established regulator, the authority will consider the project in the context of its existing policies and project priorities and may adopt its investment programme; and

iii. The project proponent would be able to compete for the project in the normal way and may be able to benefit from its prior knowledge and analysis.[832]

Regrettably, the above is not a proper and clear-cut mechanism for receiving and examining unsolicited proposals from prospective private investors. It is submitted that the ICRC be empowered to receive unsolicited proposals, to examine and analyse them, and if they make good business sense, to present them to the MDA concerned to arrange for a competitive bidding process.

6.3.1 South Africa's Institutional Framework for Public-Private Partnership

Compared to Nigeria's, South Africa's institutional framework for PPP is much more compact. Consequently, the process for the approval and execution of PPP projects in South Africa is less complex than in Nigeria. The same National Treasury provides the various treasury approvals for both the national and provincial PPP projects.[833] Where there is a need to offer guarantees or indemnities, the Ministry of Finance is required to authorise any such transaction.[834] By implication, if there is no need for the issue of guarantee or indemnity by the public authority there is no need for any such approval by the Ministry of Finance. This arrangement helps to expedite projects, unlike the Nigerian case where all national PPP projects must at one point or another have the approval of the Federal Ministry of Finance.

A unique arrangement in South Africa is the location of the PPP Unit within the National Treasury. The same PPP Unit assists National Departments and Provincial Governments with PPPs. The unit is made up of seventeen professional staff who are allocated projects depending on individual sector expertise and interest. Even though the current structure is designed to enable efficiency and speed, the South African PPP Unit can be very easily overstretched and over-burdened. And while the institutional leanness is less cumbersome, the centralisation of the PPP unit in a large country like South Africa could stifle

[832] Nigerian National Policy on Public Private Partnership.

[833] Axis Consulting op cit note 821 at 14.

[834] S.66 Public Finance Management Act 1999.

the development of PPP expertise. It seems reasonable to conclude that the creation of provincial and municipal units for PPP across the country would provide room for the development of experts and help strengthen the PPP regime in South Africa.

6.4 Ease of Doing Business

A favourable economic environment is an important requirement for a successful PPP regime. Since PPPs involve the participation of the private sector, the ease with which business can be initiated and carried on in any given jurisdiction is often a key consideration for prospective foreign investors wanting to determine whether it makes business sense to embark on a venture, especially with the public sector. For about 15 years now, the World Bank has been publishing an annual report on the Ease of Doing Business in various countries of the world.[835] The World Bank Survey on the Ease of Doing Business covers 11 areas of business regulation – starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting minority investors, paying taxes, trading across borders, enforcing contracts, resolving insolvency and some aspects of the labour laws.[836] The Ease of Doing Business Report is a guide for investors and, as such, is one of the documents prospective PPP investors consider before making investments in any country.

There is no doubt that enhanced ease of doing business in any country creates the needed stimulus for economic recovery and sustainable growth. In the light of the economic recession in Nigeria and South Africa's current economic challenges, respectively, improving the ease of doing business in both countries is bound to be impactful. It follows therefore that governments in both countries should take a holistic approach to introducing reforms geared towards removing the barriers to trade.

6.4.1 Ease of Doing Business in Nigeria in relation to Public-Private Partnership

Nigeria is ranked by the World Bank as a lower-middle-income country and is positioned 169th of 189 countries in the Bank's ease of doing business report as at 2017, which is one spot above

[835] Africapedia 'Africa in the doing of business 2017 rankings: Getting a good score is serious 'do or die' state business' (2016) available at *http://www.africapedia.com/2016/11/02/doing-business-africa/* accessed on 23 October 2017.

[836] Ibid.

its previous position in 2016.[837] In Sub-Saharan Africa, Nigeria occupies the 36th position.[838] Considering that the country climbed to the top spot as the largest economy in Africa in 2014,[839] its ranking in the ease of doing business report is poor. It is worthy of note that the administration of President Muhammadu Buhari in July 2016 established the Presidential Enabling Business Environment Council (PEBEC), with a mandate to remove bureaucratic and regulatory constraints to doing business in Nigeria.[840] In the opinion of this writer, even though the PEBEC is chaired by the Vice President of the country, the chances are that it will remain business as usual without the commitment of public servants who are usually in charge of the day-to-day administration of the institutions with the mandate to ensure that specific targets are met. It appears that in their bid to improve Nigeria's ease of business ranking, policy makers believe that simplifying the regulatory frameworks would work automatically, but in fact more is needed. In addition to simplifying the regulatory framework, steps must be taken to introduce market-friendly policies and, importantly, a re-orientation of the civil service. Indeed, even a simplified regulatory framework with the same public servants would be akin to putting new wine in old wine bottles, as civil servants in Nigeria are known to have the knack of making simple processes complex.

It is further submitted that the incentives provided by the federal government of Nigeria in the agricultural,[841] energy[842] and power sectors,[843] as well as the incentives available for foreign capital contribution, are very useful and must be maintained. However, the federal government must make the repatriation of profits and capital by foreign investors easier, as this is one area that has been challenging for businesses with foreign participants in the country. The situation has not been helped by lower crude oil earnings that have led to a scarcity of

[837] The World Bank *Doing Business 2017: Economy Profile Nigeria* (2017) at 6. See also Tendai Dube 'How Nigeria is improving its ease of doing business' (2016) *CNBC Africa* available at *https://www.cnbcafrica.com/news/western-africa/2016/04/25/nigeria-improvement-of-ease-of-doing-business/* accessed on 26 October 2017.

[838] The World Bank, 'Economy rankings' available *at http://www.doingbusiness.org/rankings* accessed on 26 October 2017.

[839] Price Waterhouse Coopers *A Guide to Doing Business in Nigeria* (2015) at 2.

[840] 'Ease of doing business: FG moves to improve ranking' *The Vanguard* 24 August 2017.

[841] VAT exemption on tractors, zero restriction on capital allowance claimable for companies in the agro-allied business.

[842] Tax free period of three years which may be renewed for a further two years, or 35% investment allowance.

[843] Exemption from VAT on plant and equipment acquired to generate electricity; exemption from import duties on plant and equipment imported to generate electricity through the utilisation of Nigerian gas.

foreign exchange. For example, about USD$175 million accruing as ticket sales for foreign airlines operating the Nigerian route is still trapped in the coffers of the federal government of Nigeria.[844] Similarly, Nigeria's unstable foreign exchange regime must be addressed. Apart from the foreign exchange risk that must be considered by prospective PPP investors, foreign lenders find it very unattractive to lend money to a country with an unstable forex regime. This is especially so because repayment of the monies advanced is usually in the local currency of the debtor. For example, if a lender in the United Kingdom lent out the sum of £1 billion to a PPP consortium in Nigeria in September 2014 at an exchange rate of N264/£1, the principal amount as at December 2017 would have almost doubled to N470/£1. The repayment of such a facility would be difficult, as tolls or charges to be paid by users may not have increased by over a hundred percent within the same period to enable the consortium to meet loan repayment demands.

6.4.2 Ease of Doing Business in South Africa in relation to Public-Private Partnership

The World Bank ranks South Africa as an upper-middle-income country. It is an African economic powerhouse with rich cultural diversity. In the World Bank's Ease of Doing Business Report for 2017, the country moved two places downwards from its previous 72nd out of 189 countries to 74th position.[845] In Sub-Saharan Africa, South Africa is ranked number four. An analysis of the report for South Africa reveals that while the country is highly ranked for the protection of investors, for getting credit [846] and for the ease with which construction permits can be obtained, it needs to improve in the areas of registration of properties and accessibility to electricity. It takes about 226 days to get electricity in South Africa. It is worrisome that it may take Eskom, the public utility company, about 60 days to provide an estimate after an application has been received, and another 165 days to complete external connection works.[847]

The administration of President Zuma launched the 'One Stop Shop' to improve ease of doing business in South Africa, signalling the country's intention to improve its efforts to

[844] 'As foreign airlines contend with trapped funds' *This Day* 1 September 2017, available at *https://www.thisdaylive.com/index.php/2017/09/01/as-foreign-airlines-contend-with-trapped-funds/* accessed on 20 November 2017.

[845] World Bank, *Doing Business 2017: Economy Profile South Africa* (2017) 6.

[846] South Africa is ranked first in the world in terms of the ease of getting credit.

[847] The World Bank, op cit note 857 at 6.

attract more foreign direct investment and new business.[848] It is expected that this initiative will impact on South Africa's attractiveness to foreign investors, especially those with a bias toward investments in infrastructure as an alternative to traditional investment instruments.

It is worth pointing out that South Africa presents some challenges for the foreign investor. To the complex business culture in the country one must add the ripple effects of xenophobia. This could scare off expatriates since investors often have compatriots in communities where they have their investments. It is therefore submitted that the South African government must proactively seek a solution to the problem of xenophobia and address it. The delay in accessing electricity also needs to be addressed to help improve on the country's performance in terms of the ease of doing business.

6.5 Access to Credit for Public-Private Partnerships

Without finance, there cannot be a PPP in the first place. Infrastructure investment is usually characterised by large up-front capital outlay during the construction phase, with relatively smaller operational costs.[849] As a corollary, investors approach lenders to help finance PPP projects. Over time, PPPs have developed a distinctive form of credit financing referred to as project finance.[850] Credit risk is therefore a key element in PPP contracts, and indeed is significant in the structuring of PPP finance. This is in line with the basic investment tenet of a positive correlation between risk and the cost of finance, such that the more risk a lender is expected to take, the higher the required rate of return on the investment. In this regard, the public sector must ensure that a project is best tackled as a PPP before selecting that option. This is because a government may obtain funds more cheaply than a private sector concern because it is considered a low risk borrower.[851] Due to the huge capital outlay involved, funding

[848] CGTN Africa 'One stop shop to improve doing business launched in South Africa' available at *https://www.youtube.com/watch?v=VV1GJsI9cKU* accessed on 26 October 2017.

[849] Laura Turley & Abby Semple 'Financing sustainable public-private partnerships' (2013) *International Institute for Sustainable Development Briefing Note* 3.

[850] 'Project Finance' is defined as 'a method of funding in which the lender looks primarily to the money generated by a single project as security for the loan. This type of financing is usually used for large, complex and expensive single-purpose projects such as power plants, chemical processing plants, mines and toll roads.' See *Black's Law Dictionary* 9th ed at 663.

[851] Ibid.

for a PPP project is typically acquired from various sources, which may be a combination of equity and debt.[852]

The project sponsors are the investors in the project company or consortium. They provide the expertise and some of the services rendered by the project company such as construction or operations. The kind of funding that sponsors provide is usually referred to as equity. These are contributions in the form of shares. In practice, equity funding is the lowest in the order of priority of funding contributions to a project. Thus other contributors, especially lenders, have the right to project assets and revenues before equity contributors receive any return or, on termination or insolvency, any repayment. Hence, equity contributors are the highest risk takers.[853]

Debt for the project may be obtained from a diversity of sources, including commercial lenders, institutional investors, export credit agencies, bilateral or multilateral organisations, bondholders and sometimes the grantor. In contemporary times, some countries have also been exploring Shari'a financing for infrastructure. In Islamic financing, however, the Islamic financing institution must own the underlying assets, which would therefore not be available as security to other lenders.[854]

6.5.1 Access to Credit for Public-Private Partnership in Nigeria

Globally Nigeria stands at 44 in a ranking of 190 economies in terms of the ease of getting credit.[855] But since PPPs are long-term investments usually spanning 20 to 30 years, and because the financial market in Nigeria is still evolving, obtaining credit for PPP projects is extremely challenging for promoters. It is therefore important to highlight the options for financing PPP projects in Nigeria.

A primary channel of finance for PPP projects is equity. Promoters of the project – the consortium – usually set aside their equity for the project company. This type of funding is not difficult to raise within the country, given the experience described in case studies examined in Chapter Four. For example, the Bi-Courtney Aviation Services Ltd Murtala Mohammed

[852] The World Bank 'Source of financing and inter-creditor agreement' available at *https://ppp.worldbank.org/public-private-partnership/financing/sources* accessed on 26 October 2017.

[853] Ibid.

[854] Jason West 'Islamic finance and the resources sector: A natural fit for project finance' (2013) 9.2 *Journal of Islamic Economics, Banking and Finance* at 14.

[855] The World Bank op cit note 864 at 81.

Terminal 2 PPP Project and the Lekki Concession Project are good illustrations of a PPP arranged by the federal government in conjunction with a state government. These projects were successfully executed, and although subsequently marred by challenges, they evidence the fact that Nigerian promoters can arrange equity contributions to the project company with relative ease.

As a mono-economy, Nigeria is burdened by a weak financial sector, with lenders preferring the attractions of the oil industry. Even though the World Bank views Nigeria as one of the most promising pipelines for PPP projects in Africa, given the support for the use of PPP in the development of infrastructure in Nigeria's 2016 budget,[856] local financing from the country's commercial banks for long-term infrastructure is hard to come by.[857] The argument is that few projects in the country are bankable, and that the preparation process for PPP in the country is not yet sophisticated enough to address bankability issues, making it difficult to obtain credit.[858] However, this writer's view is that since PPP is a new phenomenon in the country, the waters are still being tested, with lenders preferring lending to sectors that have gained their trust over the years. Naturally, as success is achieved in the arrangement, execution and operation of PPP projects in the country, this trust will in due course be earned. Typically, the need for debt financing for infrastructure projects is substantially greater than equity. Debt financing in Nigeria is customarily provided by commercial banks with relatively short tenure.

A second funding option being explored for PPPs in Nigeria is tailor-made infrastructure funds. Infrastructure funds are considered alternative investment instruments to traditional investments in equities and the money market. A period of economic depression followed the global financial crisis, resulting in foreign investors recalling their investments in the Nigerian capital market in the late 2000s. Coupled with the volatile nature of the stock market, this crisis led investors to show more interest in alternative, less unpredictable investments like Infrastructure Funds. In recognition of the massive opportunities for Infrastructure Funds, the country's Securities and Exchange Commission (SEC) issued the Rules on Infrastructure Funds to provide guidance to fund managers and Infrastructure Capital

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[856] The World Bank 'PPP knowledge lab: Nigeria' available at *https://pppknowledgelab.org/countries/nigeria* accessed on 26 October 2017.

[857] Obinna Chima 'Nigeria: Adopting the public private partnership model' *This Day* 11 May 2016.

[858] Detail Solicitors 'Securing finance for infrastructure development (public private partnership) projects in Nigeria' (2009) available at *http://www.detailsolicitors.com/index.php?section=news&cmd=details&newsid=2&printview=1&pdfview=1* accessed on 27 October 2017.

Companies. The Rules define 'infrastructure fund' to be a specialised fund or scheme that invests primarily (minimum 90% of the scheme's net assets) in the securities or securitised debt instrument of a specified range of companies, namely: infrastructure companies, infrastructure capital companies, infrastructure projects, special purpose vehicles which are created for facilitating or promoting investment in infrastructure, and other permissible assets, including the revenue-generating projects of infrastructure companies or the projects of special purpose vehicles (SPVs).[859]

Under the Rules, an infrastructure fund may only be registered with the SEC when the fund manager has a minimum of two key personnel having experience in the infrastructure sector.[860] Clearly, merely having experience in the infrastructure sector is too wide a definition. The Rules should provide that the two personnel must be experienced in infrastructure finance in terms that define their level of experience.

The Fund may be an open or a close-ended scheme with a minimum tenure of seven years, or an interval scheme with a lock-in period of five years and an interval period not longer than one month, as may be specified in the scheme information document. Furthermore, the indicative portfolio of the fund must be disclosed to its potential investors stating the type of assets the fund would invest in.[861] It is pertinent to note that the introduction of infrastructure funds has helped to widen the scope of opportunities for investment in Nigeria. Regrettably, however, fund managers in Nigeria who offer investment in infrastructure funds target only high net-worth (HNI) clients. The entry threshold to subscribe to any of the funds makes it impracticable for most of the population, bearing in mind that Nigeria is a lower-middle-income country. Two prominent infrastructure funds are the Chapel Hill Nigeria Infrastructure Debt Fund denominated in Naira and managed by Chapel Hill Denham Management Ltd, and the ARM Harith Fund, which was incorporated in 2013 with total commitments of approximately US$91 million. The Fund is an investor in the US$876 million 450MW Azura-Edo independent power plant currently under construction in the country.[862] Infrastructure funds provide investment opportunities to investors as well as funding for PPP projects. In the view of this writer, the SEC should require fund managers to set an investment threshold that makes it feasible for low-middle income earners in the country to invest in infrastructure funds.

[859] Rule 1 SEC Rules on Infrastructure Funds.

[860] Rule 3 SEC Rules on Infrastructure Funds.

[861] Rule 4 SEC Rules on Infrastructure Funds.

[862] ARM-Harith 'Who we are' available at *http://armharith.com.ng/about/* accessed on 27 October 2017.

That is, the minimum threshold for infrastructure funds should be reduced so as to target the lower end of the market. In this way investors with modest means will also be able to benefit from the returns on investment in infrastructure, leading to a more broad-based economic growth pattern.

In 2017, the federal government of Nigeria introduced a third PPP financing option, the *sukuk* bond. The *sukuk* bond is an instrument in Islamic finance meant to fund large-scale infrastructure projects. Unlike conventional bonds, the proceeds of which can be used for a variety of purposes including recurrent expenditure, funds realised from the *sukuk* instrument can only be used for infrastructure assets. The investors in the *sukuk* receive income based on those assets rather than interest on conventional bonds.[863] Importantly, *sukuk* financing necessitates full disclosure of the project that the fund would invest in. The N100 billion *sukuk* bond will pay out a rental income of as much as 16.47% per annum every six months to investors in the bond.[864] This notwithstanding, the federal government needs to educate non-Muslims about the benefits of the *sukuk* bond. This is because Nigeria is a multi-religious country in which the different religious groups tend to be suspicious of one another. The introduction of the *sukuk* bond has already been the subject of criticism by the Christian Association of Nigeria (CAN), who have expressed the opinion that floating an Islamic bond is tantamount to Islamising the country.[865] It is therefore submitted that the obvious advantages of the *sukuk* – its being considered a liquid asset, the rental income being tax-exempt and its listing on the Nigerian Stock Exchange – should be effectively communicated to all interest groups in the country. Worthy of note is that despite the criticism of CAN, Nigeria's initial *sukuk* bond was over-subscribed.[866]

A fourth channel of finance for PPP projects consists of pension funds. Pension funds managed by Pension Fund Administrators (PFAs) may be deployed to raise finance for PPP projects in the country. Although the Pension Reform Act 2014 does not specifically name infrastructure as an area for the investment of pension funds, it is sufficiently broadly worded

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[863] Patience Oniha 'The case for Nigerian Sukuk' *This Day* 18 September 2017.

[864] The Islamic religion forbids the paying out of interest, and hence the income derived from the *Sukuk* is referred to as rental income.

[865] Adelani Adepegba 'Sukuk Bond part of strategies to Islamise Nigeria – CAN' *The Punch* 20 September 2017 available at *http://punchng.com/can-alleges-plot-to-islamise-nigeria-with-sukuk-bond/* accessed on 22 November 2017.

[866] Oladeinde Olawoyin 'Nigeria's N100 billion Sukuk Bond oversubscribed' *Premium Times* 27 September 2017 available at *https://www.premiumtimesng.com/business/business-news/244344-nigerias-n100-billion-sukuk-bond-oversubscribed.html* accessed on 22 November 2017.

to include infrastructure financing.[867] Further, the Guidelines for investing pension funds prescribed by the National Pension Commission (PENCOM) include specialist investment funds and other financial instruments as the Commission may from time to time approve. Based on the foregoing, it is accepted that pension assets may be invested in the provision of infrastructure. As at August 2017 about 0.08% of pension fund assets were invested in infrastructure funds in Nigeria.[868] This ratio of investment appears meagre. Considering that about N6 trillion ($16.6 billion) is held in pension assets, an increase in the ratio allocated to infrastructure would not only benefit the over 7 million retirement savings account (RSA) holders[869] in terms of return on investments, but would also boost the economy of the country in the long run. It is worthy of note that, according to Rule 2.1 of the Regulation of Investment of Pension Fund Assets 2017, PFAs shall invest pension fund assets with the objectives of ensuring safety and maintenance of fair returns. Under Rule 4.7 of the Guidelines, PFAs may invest pension assets in specialist investment funds whose underlying assets are tangible physical assets, including real estate investment trusts (REITs) registered by SEC; private equity funds registered with SEC; and infrastructure funds registered with SEC. The above express provision notwithstanding, there is a reluctance in the country to invest pension assets in infrastructure because of anxiety over asset preservation. Even though infrastructure funds offer the potential for pension fund members to reap higher and consistent returns on investment, the huge dearth of alternative asset products in the financial markets in Nigeria, liquidity risk, political risk in PPP projects, and the competitive yields offered by the risk-free federal government fixed income instruments, make infrastructure funds less attractive to PFAs.[870] It is submitted that a number of steps must be taken by policy makers to ensure a healthy environment for the investment of pension assets in infrastructure. First, the viability and bankability of a project must be established before a PPP option is chosen for that project.

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[867] S.86 of the Pension Reform Act expressly provides for investment to include (but not be limited to) federal government bonds, bills and other securities, state and local government bonds, bills and other securities, bank deposits and bank securities, and real estate developments.

[868] National Pension Commission, 'Summary of Pension Assets as at 31 August 2017,' available at *http://www.pencom.gov.ng/docs/1507109935_AUGUST%202017%20-%20PENSION%20ASSETS.pdf* accessed on 27 October 2017.

[869] National Pension Commission 'Quarterly RSA registrations' available at *http://www.pencom.gov.ng/docs/1487864723_update_on_registration_of_contributors.pdf* accessed on 27 October 2017.

[870] Ehimeme Ohioma 'Pension funds for economic development: Investing pension funds in infrastructure' (2016) a paper presented at the 2016 National Pension Commission Journalist Workshop held in Calabar.

This implies that PPP projects must not be pursued simply on the basis of the federal character principle. Secondly, a full repayment guarantee on the part of government will provide PFAs with the necessary confidence; and thirdly, the government must address the fears of pension fund contributors and the labour unions about the safety of pension fund assets invested in infrastructure funds.

6.5.2 Access to Credit for Public-Private Partnership in South Africa and Lessons for Nigeria

As noted above, South Africa's financial market is much more developed than Nigeria's. For example, Treasury Regulation 16 is not prescriptive about the financing of a PPP in South Africa.[871] Hence, the assumption is that the method of financing a project varies from project to project and sector to sector.[872] Furthermore, the South African market has a wider range of products and instruments available for investors interested in funding infrastructure.

The options available for funding infrastructure, such as equity provided by the promoters of the project, and debt financing such as bonds and credit from commercial banks, are similar to those in Nigeria, discussed above. In this section the focus rests rather upon South African pension funds and infrastructure funds in the provision of credit to PPP. This focus should be seen in the light of a template that might be followed by policy makers in Nigeria, since this is one area where the financial market is still evolving in that country.

Pension funds in South Africa[873] clearly demonstrate the huge potential of pension funds to drive economic growth. They serve as anchor investors for infrastructure and social development projects. [874] The Bright Africa report by consultancy firm RisCura indicates that at the end of 2014 out of the US$334 billion pension funds under management across 16 major African markets, South Africa accounted for US$258 billion.[875] In 2014, South Africa's Eskom Pension and Provident Fund (EPPF) invested $30 million in infrastructure projects through private-equity house Abraaj, based in Dubai, as well as in mobile phone infrastructure through

[871] National Treasury PPP Unit op cit note 835 at 9.

[872] Ibid at 9.

[873] South Africa has one of the largest pension systems in the world. See Nthabiseng Moleko 'SA's pension funds grow but national savings rate flounders' *Financial Mail* 25 July 2017.

[874] Tom Minney 'The power of pension funds for African infrastructure' *African Business Magazine* 25 January 2017.

[875] RisCura *Bright Africa* (2015) 21.

London's Helios.[876] The diversification of pension fund assets demonstrated in these South African investments should be explored by the pension industry in Nigeria. There must be a balance between being too cautious and not generating enough returns for pension fund members and taking moderate risk to generate greater returns, considering that returns are often proportionate to risk. The current cautious approach by PFAs, as dictated by Nigeria's PENCOM, is clearly influenced by the need to ensure the safety of RSA holders' funds but may not be ideal if fund growth is considered important. It is therefore submitted that a middle ground approach be adopted, with the right risk assessment measures put in place to ensure that pension fund members receive better returns on their investments. This will involve the use of funds and investment management experts with experience in producing competitive returns while ensuring fund safety.

Because of its well-developed financial market, compared to its peers in Africa South Africa has a wide range of infrastructure funds that investors may choose from. It seems worth analysing one such fund, the South Africa Infrastructure Fund (SAIF). The fund size is $1,855 million. The first 20-year infrastructure fund in South Africa, it matured in June 2016. The Fund invested in a number of projects within and beyond South Africa, as follows: the Bakwena Platinum Corridor Concession, with a 62% indirect interest in the 385km toll road; the N3 Toll Concession (38%); ICO Global Communications Holdings (1%); Ucingo Trust (38% in the 415km toll road); Trans African Concessions, South Africa and Mozambique (50% interest in 570km toll road); and the African Portland Holdings Mozambique and Namibia (34% interest in port and logistics terminals), among others.[877] Upon the maturation of the Fund, the managers, African Infrastructure Investment Managers (AIIM), announced the successful sale of investments in three privately-concessioned toll roads in South Africa. The transactions were successfully concluded on 4 July 2016. The sale is the largest private equity realisation for toll road infrastructure in Africa.[878] According to Jurie Swart, the CEO of AIIM, the sale transaction demonstrates the increasing development of the African infrastructure sector and addresses the concern investors may have around the ability to dispose of infrastructure assets.[879] The success of the liquidation of the SAIF fund is a lesson for Nigeria's

[876] Tom Minney op cit note 808.

[877] Africa Infrastructure Investment Managers, 'South Africa Infrastructure Fund' available at https://aiimafrica.com/funds/funds_saif/ accessed 27 October 2017.

[878] Southern African Venture Capital and Private Equity Association, 'Press Release: South Africa's First Dedicated Infrastructure Equity Fund Achieves Successful Sale of Toll Road Assets| AIIIM' 5 July 2016

[879] Ibid.

policy makers, fund managers as well as private and institutional investors, in the sense that it provides a workable template for similar funds in South Africa, Nigeria and elsewhere on the continent. With the involvement of experts and other fundamentals in place, infrastructure funds can help to grow the economy as well as ensure that funds are safely invested and paid back to investors at maturity. It is also submitted that more infrastructure funds should be established, considering that the infrastructure funding gap in Africa creates investment opportunities. Since Africa still requires at least US$93 billion in infrastructure investment per annum,[880] and given the shortage or even absence of such facilities in many countries in sub-Saharan Africa, there is room for the provision of more infrastructure funds like SAIF. It is also suggested that South African infrastructure funds consider investing in other countries, especially where the environment is healthy for such investments and the right risk assessment measures are in place.

The successes of high investment finance notwithstanding, there is still room for the involvement of prospective investors at the lower end of the market where the majority of the South African population is located. In this regard, this writer believes that South African infrastructure funds should create mirror funds specifically targeted at the lower end of the market in the country, in line with the recommendation made in the section on Nigeria, above.

6.6 Stable Political and Social Environment

A key obstacle to success for PPPs is the lack of political will to ensure that they indeed succeed. An unstable political and social environment is clearly detrimental to PPPs. Policy makers should also address the frequent changes in administration in ministries, departments and agencies (MDAs).[881] The private sector and other key players in PPP require strong support from the government and where this is lacking, the terrain becomes very difficult for private investors to navigate. It is essential that political issues beyond the remit of the private sector should be responsibly handled by the government. For example, it is the prerogative of the government to ensure that adequate compensation is paid for land taken over from private individuals or the community for any given PPP project. When this is not done, it is not

[880] Nazmeera Moola 'Africa Still Requires at Least US$93 Billion in Infrastructure Investment Per Annum' (2017) available at https://www.investecassetmanagement.com/south-africa/professional-investor/en-za/insight/investment-views/inperspective-winter-2017/infrastructure-funding-gap-creates-opportunities-in-africa/ accessed 27 October 2017.

[881] Albert P C Chan, Patrick T I Lam, Daniel W M Chan, et al. 'Critical success factors for PPPs in infrastructure developments: Chinese perspectives' (2010) *Journal of Construction Engineering and Management* at 491.

uncommon for members of the community to disrupt workers on site or vandalise equipment. It is incumbent on the public sector to provide a strong, mature and stable environment for PPPs to flourish. Because PPPs are vulnerable to political pressures, it is imperative that political office holders and public officials are committed to PPP success.

6.6.1 The Political Climate and Public-Private Partnership in Nigeria

Militating against the success of PPPs in Nigeria is political instability. There is a general inconsistency and lack of clarity with policies. For example, even though the administration of the immediate past President Goodluck Jonathan considered PPP a tool for the realisation of Nigeria's Goal 20:2020 objective,[882] that administration did not provide the necessary support that Bi-Courtney Highway Services Ltd critically needed to succeed in the Lagos-Ibadan Expressway Project (as discussed above). The government declined to provide the guarantees that the concessionaire required to secure funding for the project. Furthermore, the MDA responsible for the project refused to refer the dispute arising from the concession to arbitration. In the end, the contract was revoked and awarded to another concessionaire with government funding as a PPP. The concessionaire was blamed for failing to secure a facility for the project, but the refusal of the government to provide the needed assistance was what ultimately frustrated the project, thus adding to the number of failed projects in the country.[883] While the failure of the original concessionaire to fully comprehend the terms of the contract it signed is not justifiable, the attitude of government officials in the whole saga is a huge let down as far as attracting the interest of the private sector to PPP in Nigeria is concerned.

It is important that politicians refrain from playing politics with PPP projects. The case of the failed Lekki Concession Road Toll Project is a good example. Despite the accolades and awards received for the successful arrangement of that concession, the opposition political party in Lagos State on the lookout for votes made it seem as if it was wrong for the state government to partner with the private sector in the provision of infrastructure. To appeal to voters in the state, the gubernatorial candidate of the opposition party, ahead of the 2015 elections, campaigned against the Lekki PPP, asserting that the provision of roads was a traditional prerogative of the public sector and promising that his government would ensure that the citizens would not be burdened by the payment of tolls on public roads. Sensing that

[882] The goal is to make Nigeria one of the top 20 economies in the world by the year 2020.

[883] Discussed in Chapter 4 (Section 4.7.1) of the study.

this strategy would result in the loss of the gubernatorial seat in the state, the ruling party cancelled an already successfully arranged PPP project and bought back the concession. This was a bad signal to prospective investors.

Interference by government officials in the affairs of public institutions is also a minus as far as a healthy investment environment for PPP in Nigeria is concerned. It is submitted that public institutions must be strengthened and enabled to do their work. The minister of works under the President Jonathan administration meddled with the Lagos-Ibadan Expressway Concession Project, virtually usurping the role of the Infrastructure Concession and Regulatory Commission (ICRC).

Furthermore, a situation in which government is not perceived as a continuum is not healthy for PPP investments. It is common for succeeding governments in Nigeria to flout continuity and jettison the policies of the previous government, even when the new leadership is from the same political party as the government it has succeeded. There appears to be little interest in continuing with a project not initiated by the new administration. The perception is that if a new administration does not initiate its own projects, it has failed to fulfil its electoral promises. The result is that existing projects are abandoned and fresh ones are started. It is submitted that the completion of existing projects must become a yardstick for assessing the performance of political office holders. Furthermore, the abandonment of projects or policies that are geared towards the development of the economy by political office holders must be considered grave enough to attract legal and political consequences, including impeachment from office.

Disrespect for court orders when they are not in favour of the government must be severely penalised as it fundamentally undermines the rule of law. This writer submits that the National Assembly (as well as state houses of assembly) in Nigeria must, in the exercise of their powers to check the executive, develop sanctions for erring MDAs such as the Federal Airport Aviation Authority of Nigeria, which has persistently refused to abide by court orders in its case with Bi-Courtney Aviation Services Ltd.

6.6.2 The Political Climate and Public-Private Partnership in South Africa

There is no doubt that, comparatively speaking, the political environment in South Africa is committed to the success of PPPs. While it is true that there is room to achieve more via a greater level of commitment, results are often the best measure for determining whether PPPs are successful in any given jurisdiction. As far as setting up the structures for PPPs is

concerned, South Africa is one of the leading countries in the world.[884] A 2007 report on the performance of PPPs in South Africa found that, as of that date, there was poor communication of policies as well as a lack of policy direction.[885] It appears that this is no longer the case, however, given the PPP successes that have since been recorded in SA. It was inevitable that there would be a challenging teething phase in the country's PPP policy regime. The African Development Bank (AfDB) has identified key risks in South African PPP as including the inability of the government to address land acquisition issues, tariff setting and the need to further encourage PPP investments.[886] Moreover, the potential of PPP is not being utilised much at subnational levels. In this regard, this writer submits that there should be PPP units at the provincial and municipal levels to assist small-scale PPPs. Such units would be much closer to regional and community infrastructural needs and projects than the National Treasury PPP unit.

6.7 Judicial Review of Decisions of the Public Sector in Commercial Transactions

The need to check the arbitrary powers of governments when they deal with the private sector parties is vital to the argument in this thesis. This is because in a contract between a public authority and private sector parties, the former is always the dominant party. It goes without saying that since the public sector is in a position of authority, it could abuse its powers. Judicial review is therefore, an effective deterrent to cases of excesses and abuse of power by the public authority.[887] Put simply, it is '…the power of the court in appropriate proceedings before it to declare a governmental measure either contrary or in accordance with the Constitution or other governing law, with the effect of rendering the measure invalid or void or vindicating its validity..'[888] The vexed issue here is whether the public authority is exempt from the principles of private law i.e. *pacta sunt servanda* when it contracts with a private entity for the execution of a public contract.[889] To this end, Quinot states as follows:

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[884] Axis Consulting op cit note 821 at 19.

[885] SPAID 'Key challenges to public private partnerships in South Africa: Summary of interview findings' (2007) i.

[886] African Development Bank 'Republic of South Africa: Country strategy paper 2013-2017' 34.

[887] Chukwunweike A Ogbuabor 'Expanding the frontiers of judicial review in Nigeria: The gathering storm' (2011-12) 10 *Nigerian Juridical Review* 1.

[888] BO Nwabueze *Judicialism in Commonwealth Africa* (1977) at 229.

[889] EC Schlemmer 'The interaction between public policy and constitutional rights and public-private arbitration' (2016) 2 *Journal of South African Law* 500.

> If one accepts that state commercial activity may amount to administrative action judicial review should in principle be available…However, there are legitimate concerns about efficient and effective state administration, particularly in a resource-challenged country like South Africa, which supports limits to judicial review of commercial decisions.[890]

Where however, it is clear that the public authority has acted beyond its powers or has abused any such powers, for instance the unilateral cancellation of a PPP arrangement by a succeeding administration because the project is not considered as a priority for the new government, the need to resort to a judicial review of the action of the public authority becomes necessary.[891] In the sub-sections below, the attitude of the courts in relation to whether the public authority has abused its powers while dealing with the private sector in a commercial transaction in both Nigerian and South Africa are examined.

6.7.1 Judicial Review of Public Sector Actions in Commercial Transactions Nigeria

For commerce to thrive, people must abide by their agreements. In the same way, the public sector is duty bound to respect agreements entered into with the private sector. The courts have a role to play in this regard. In *Abdulkarim v In Car Nigeria Limited,*[892] the Supreme Court of Nigeria per Nnaemeka-Agu JSC (as he then was) described the functions of the court as far as judicial review is concerned. These include the need to ensure that every arm of government plays its role in the true spirit of the principle of the separation of powers; secondly that every public functionary performs his functions according to the law, including the Constitution; and thirdly, the Supreme Court reviews its own decisions to ensure that the country does not suffer under the same regime of obsolete or wrong decisions. It is settled law that the public authority must act within enabling instruments[893] and is subject to judicial review.[894]

As it relates to commercial transactions, Ezeike notes that commercial and economic life of people in society is woven around agreements and as such, where the public authority

[890] Geo Quinot 'Towards effective judicial review of state commercial activity' (2009) 9.3 *Tydskrif vir die Suid-Afrikaanse Reg* at 447.

[891] Ibid 328.

[892] (1992) 7 NWLR Pt. 251 at 1.

[893] *Hon. Muyiwa Inakoju & Ors v Hon . Abraham Adeleke & Ors* (2007) 4 NWLR (Pt 1025) 653,661,698.

[894] Akintunde Emiola, *Remedies in Administrative Law* (2nd Ed.) (2011) 35.

is a party to a commercial transaction, the obligation to respect contractual terms is sacrosanct.[895] Thus, even in their sovereign might, the public authority has a duty to honour binding agreements.[896] The courts in Nigeria have been firm on the need for the public authority to respect contractual decisions. For example, in *Golden Construction Company Ltd v Stateco Nigeria Ltd & Nasarawa State Government,*[897] the Court of Appeal, sitting in the Makurdi Division reiterated the need for governmental parties to at all levels to respect agreements. The Court, per Omoleye JCA held as follows:

> The parties to any contract and the court are bound by the terms or conditions in a contract, whether parol or written, between contracting parties…This has acquired the sobriquet and mantra of sanctity of contract which is expressed in the maxim, *pacta sunt servanda,* which means the non-fraudulent agreement of parties must be observed.[898]

The court further held that it is incumbent on governments at any level to keep faith with agreements freely made with non-governmental parties, particularly when it comes to payments for work duly executed by the latter.[899] This decision shows that when called upon, the courts in the country will rise to the occasion to enforce contractual agreements between the public sector and private entities. Similarly, in *Sino-Afric Agricultural & Ind. Co. Ltd & 2 Others v Ministry of Finance Inc & Attorney General, Kano State,*[900] the Court of Appeal, Kaduna Division determined *inter alia* whether the parties (in this case private entities and the public authority in Kano State) where bound to honour an arbitration agreement. The facts of the case are as follows: The Kano State Government entered into an agreement with the first appellant for the supply of 100,000 tones of Urea Fertilizer at the cost of N4 billion. The second appellant was surety for advancement and full performance of the whole contract. A dispute arose out of the contract between the first appellant and the Kano State Government. However, instead of referring the dispute to arbitration as stipulated in Clause 12 of the contract

[895] Edwin Obimma Ezike *Nigerian Law of Contract* (2015) 3.

[896] Ibid.

[897] [2014] 8 NWLR (Pt 1408) 171.

[898] Supra per Omoleye JCA para 5 at 176.

[899] Supra at 178.

[900] [2014] 10 NWLR (Pt 1416) 515

agreement, the respondents instituted an action against the appellants at the High Court in Kano State. The Court of Appeal held that the law is generally keen to uphold the validity of arbitration clauses even when they lack the formal language of associated with legal contracts. Having established that the courts would insist that the public authority honours contractual obligations with the private sector[901] and that arbitration clauses should be respected.[902] Furthermore, the courts in Nigeria should rise to prevent abuse of power by an administrative decision-maker. It may be the case that decision-maker maybe doing the right thing but influenced by ulterior motives or have failed to take relevant considerations into reckoning. In such a case, the courts should hold that the public authority has acted unreasonably and has abused its power. The challenge however, lies with the public authority respecting the decision of the courts and the hurdle that the private sector party may need to go through in getting enforcement of judgements against a public ministry, department or agency in Nigeria. Therefore, the government (at all levels) must show commitment not only in honouring contractual agreements but also in respecting court decisions. These two requirements are fundamental drivers for economic growth and are necessary to attract investors.

6.7.2 Judicial Review of Public Sector Action in Commercial Transactions South Africa

In South Africa, there is a clear Constitutional provision in favour of good governance in administration and this includes where the public authority enters into contractual agreements with the private sector. The Constitution of the Republic of South Africa provides as follows:

> When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.[903]

It follows that public sector contracts in South Africa falls within the ambits of constitutional law. In South African jurisprudence, it is considered that in a constitutional democracy under the rule of law, every sphere of activity falls within the purview of constitutional law and as such constitutional principles are applied without exception.[904] It is also imperative to note that

[901] *Golden Construction Company Ltd's case.*

[902] *Sino-Afric Agricultural & Ind. Co. Ltd's case.*

[903] Section 217(1) Constitution of the Republic of South Africa 1996.

[904] EC Schlemmer op cit (note 901) 501. See also *De Lange v Methodist Church* 2016 2 SA 1 (CC).

under South African law, when the public sector enters into a contract, the contract is not governed by the norms of contract law alone. The state is required to, and must comply with the principles of administrative law in order for a contract entered with a private partner not to be considered as invalid.[905] Thus, in South Africa, apart from the principles of contract applying in public sector contracts, it is fundamental that the state's capacity to contract is without doubt not exclusively founded on the common law rules of contract but also comply with constitutionally stipulated or other statutory requirements.[906]

Furthermore, the passing into law of the Promotion of Administrative Justice Act No. 3 of 2000 underscores the willingness of the South African Government to ensure that the actions of the executive branch are lawful, reasonable and procedurally fair. In section 3 of the Act, there is a requirement that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. Where a person's rights have been materially and adversely affected by administrative action and who has not been given reasons for the action, may request for the reasons from the administrator concerned.[907]

Importantly, the law provides for any person to institute proceedings in a court or a tribunal for the judicial review of administrative action.[908] There is thus, a backing by law for any citizen to seek a judicial review of administrative action in South Africa. This is in contradistinction with the position in Nigeria where the concept of *locus standi* (the legal capacity to institute proceedings in court or the right to sue) holds sway and where a plaintiff in Nigeria has no *locus standi*, the courts lack jurisdiction to entertain the action.[909]

As it relates to challenging the legality of a commercial transaction undertaken by the public authority in South Africa, Quinot argues as follows:

> Two types of challenges to state commercial activity should be distinguished in this context. Firstly, there are challenges on strict legality grounds, which may indicate that the particular public authority acted beyond its power or grossly abused its power in taking the commercial decision under scrutiny. In this type of case invalidity should in principle be a competent remedy, because here the function of judicial review as a constitutional control over the exercise of state power outweighs efficiency and certainty concerns. A party should

[905] Ibid 503.

[906] Cora Hoexter *Administrative Law in South Africa* (2012) 36.

[907] Section 5 Promotion of Administration of Justice Act 2000.

[908] Section 6(1) Promotion of Administration of Justice Act 2000.

[909] *Ajayi v Adebiyi* [2012] 11 NWLR (Pt 1310) at 176.

> thus be able to pursue judicial review to invalidate state commercial decisions in such cases. Secondly, there are challenges that may indicate that while the authority was objectively authorised to take the decision at issue it adopted as an irregular process. In this second type of case, however, review should not be able to result in invalidity. It is submitted that in these cases efficiency and certainty generally favour the continued factual validity of the commercial conduct. Such an approach will not offend against the basic rule of law justification for judicial review.[910]

From the foregoing, it is clear that judicial review is not limited to an aggrieved party seeking remedy for the failure of the public authority to perform its obligations, it also includes cases where the validity of such contracts are challenged.

The remedies available in proceedings for judicial review under the Act of 2000[911] in South Africa include directing the administrator to give reasons or act in the manner directed by the court; an order prohibiting the administrator from acting in a particular manner; setting aside of the administrative action;[912] a declaration that the rights of the parties in respect of any matter to which the administrative action relates; the granting of a temporary interdict or other temporary relief; or as to costs.

6.8 Principles of Fairness and Inclusivity

In order to address the concerns of the diverse groups in heterogenous societies, it is not uncommon for the government to introduce measures to ensure that the various people groups benefit from government plans and actions. In this sub-section, the thesis addresses how the Federal Character (FC) policy in Nigeria and the Black Economic Empowerment (BEE) policy can impact on PPP.

6.8.1 Nigeria's Federal Character Policy

The principle of Federal Character (FC) is well entrenched in the Nigerian Constitution. Section 3 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) upholds this principle and states that the conduct of the affairs of the nation would reflect FC in order to promote national unity. The origin of the FC policy in Nigeria can be traced to the agitation

[910] Geo Quinot op cit (note 902) at 328.

[911] See section 8.

[912] In exceptional cases, this may include substituting or varying the administrative action or correcting a defect resulting from the administrative action; or directing the administrator or any other party to the proceedings to pay compensation.

for even and fair distribution of the national resources. This also led to the passing into law of the Federal Character Act 1995. The Act established the Federal Character Commission and also divided the country into six geopolitical zones. This policy is reflected in the National Policy on Public Private Partnership 2009. Section 3 which deals with the Policy Objectives for PPP in Nigeria states *inter alia* that the Nigerian government aims to ensure balanced regional development. The import of this provision as it relates to PPP is that the government at all levels have a duty to ensure that there is even spread of public infrastructure facilities. However, it is the view of this writer that applying the FC principle to PPP especially as there is no provision for the PFI[913] type of PPP in Nigeria will be counterproductive. An investor may not want to consider a project in a region of the country where there is the risk of non-patronage of the facility is high. For example, an investor may be more interested in a new airport in the Lekki Free Trade Zone than a new airport in the North East Zone of the country. It is therefore difficult to see how PPP can be used as a tool for achieving the government's FC objective.

A similar policy, but one which is directly related to the oil sector is the Nigerian local content policy which is now reflected in the Local Content Act 2010. The Act specifies that Nigerian independent operators should be accorded first consideration in the award of oil and gas related contracts and services.[914] The Act provides for exclusive consideration to Nigerian indigenous service companies which demonstrate ownership of equipment, Nigerian personnel and capacity to execute work on land and swamp operating areas.[915] Again, for the local content to apply, and be beneficial to PPP, the project must relate to the oil sector. There is a great possibility of partnership between the private sector and the Nigerian government for the development of oil facilities. This should make a case for the ICRC Act 2005 to be amended to include the award of PFI contracts.

6.8.1 South Africa's Black Economic Empowerment (BEE) Policy

In South Africa, PPP is considered as a good vehicle for promoting and developing the BEE national policy objective. This policy has been formalised in the Code of Good Practice for

[913] In the Privately Financed Initiative type of PPP, government pays the project company for the use of the facility by citizens.

[914] Section 3(1) Nigerian Local Content Act 2010.

[915] Section 3(2) Nigerian Local Content Act 2010.

BEE in PPPs and was issued in 2004.[916] There is a scorecard with targets that must be met in order to comply with BEE provisions. Thus, for example, in each PPP project specific targets relating to equity, management and employment, subcontracting, local and socio-economic impact have to be met to ensure that the project is BEE compliant.[917]

The commitment to BEE through PPP in South Africa has led to the creation of a PPP BEE equity facility by the Development Bank of South Africa to fund BEE equity in PPP deals.[918] The aim is to empower black South Africans to acquire shareholding in PPP project companies. The impact of the BEE policy is that it opens up job opportunities for black South Africans, creates subcontracting opportunities for black small enterprises and has opened up opportunities for the local finance in the form of support by financial institutions to enable BEE partners participate in PPP. While the BEE policy benefits South Africans, the extra burden this would bring upon foreign investors should also be considered as well. This is because apart from the complex nature of PPP arrangements in the first place, a foreign investor in South Africa needs to be mindful of complying with BEE targets.

6.9 Conclusion

In this chapter, the regulatory and administrative environments for the success of PPP projects in Nigeria and South Africa have been discussed and compared. A key finding is that Nigeria is still going through a discovery phase as far as PPP is concerned, while the environment in South Africa is comparatively advanced. Drawing on the descriptive analysis of the frameworks for PPP in Nigeria and South Africa as presented in Chapters Four and Five of this research, and based on the parameters referred to as critical success factors (CSFs), the suitability of both jurisdictions for successful PPP regulation and administration was examined. Furthermore, judicial review of government actions with regards to commercial transactions in both Nigeria and South Africa was discussed. It is noted that South African law considers that public sector contracts not only as an aspect of common law but also a subject under constitutional law. In both Nigeria and South Africa, the measures adopted to address issues of inequality and how this relates to PPP was also addressed in the chapter.

[916] National Treasury PPP Unit op cit (note 621) 15.

[917] Ibid.

[918] Ibid.

The findings suggest that it is imperative that Nigeria further develops its financial market, strengthens its public institutions (especially the ICRC), and puts measures in place for enforcing public-sector compliance with contractual agreements and court orders. Ignoring court orders is contrary to the rule of law and portends a great danger to property rights in the country. Furthermore, Nigeria must address issues regarding the difficulty in the repatriation of profits by foreign firms and investors. The current situation where investors' funds are trapped in the country because of changing financial policies hinders foreign direct investment. Investors are unsure of being able to repatriate funds following the liquidation of their investments, due to a scarcity of foreign exchange. There is a need to provide directions for the future that will assure lenders, investors, the public sector and consumers of the stability and continuity of the economic environment. In the case of South Africa, the key finding is that there is a need to strengthen PPPs at the provincial and municipal level.

For both countries, transparency in the award of PPP contracts, adherence to contractual terms by both the public sector and private sector partners as well as efficient regulatory mechanism are essential ingredients for PPP success. The next Chapter of this thesis is the conclusion.

CHAPTER SEVEN

CONCLUSION

7.1 Introduction

This research examines the legal framework for public-private partnerships in Nigeria and South Africa. At the heart of the study is the question of the safety of assets invested in PPP, especially in Nigeria. The main question that the research addresses is: does the legal and policy framework for PPP in Nigeria protect private investors' funds? If yes, how might the framework be enhanced to stimulate more local and foreign interest? and if not, what measures must be put in place to protect funds and assure investors of their safety? Funds protection and investor confidence are key, considering that funds invested in PPPs are generally secured against the projects. The theoretical framework explores theories of law and development, the sanctity of contract and the rule of law, and relates them to the research question.

A clear point emerging from the literature is that the law is an instrument for economic development and can be made to strengthen government policies, particularly when those policies are geared towards specific goals, as is the case with Nigeria's long-term Vision 2020 objective. The law can thus be employed to define an effective role for PPPs in achieving that goal. Based on the sanctity of contract doctrine, governments are bound, as are individuals, to honour contractual obligations. Furthermore, the rule of law operates to hold government as well as private actors accountable under the law, and to ensure that the processes by which the laws are enacted, administered and enforced are accessible, fair and efficient.

In Chapter Three of the study, the theory and practice of PPP was examined, starting with an introduction to the PPP construct, followed by a discussion of PPP theories, and of the concept's advantages and disadvantages. Differences between PPP and other forms of procurement of infrastructure were described, and various models of practice for PPP were discussed.

Chapters Four and Five examine the framework for the regulation of PPP in Nigeria and South Africa, respectively. Both chapters discuss the laws regulating PPP, the institutional and administrative structures, the practice of PPP, and project finance, while illustrating these aspects with selected case studies.

In Chapter Six, the regulatory and administrative environment for PPP in both jurisdictions is analysed and compared. Based on the analysis in Chapters Four and Five,

Chapter Six offers both a critical and prescriptive anatomy of issues in the law and practice of PPP in Nigeria and South Africa.

This concluding chapter defines the contributions of this thesis to the existing body of knowledge and recommends some solutions to the myriad challenges encountered by practitioners in the field of PPP, especially in Nigeria but in sub-Saharan Africa as a whole.

7.2 Summary of Theories Discussed in the Study

7.2.1 The Rule of Law

The rule of law is essential to every society.[919] It envisages a society organised according to laws that guarantee a good degree of objectivity in the dispensing of justice while simultaneously promoting peace and prosperity.[920] The rule of law defines the legal limits of acceptable conduct, on the part of both public officials and private citizens. Based on this premise, Tamanaha states that government officials must abide by valid laws in force at the time of any given government action.[921] Furthermore, officials must remain within established legal bounds when exercising the power attached to their public positions.[922] Wade similarly argues that all acts must be in accordance with the law to be valid, and that government activity must be conducted within a framework of defined rules and regulations.[923]

Based on the foregoing as it relates to PPP, government officials must abide by the rules laid down to ensure that there is transparency and accountability. Following the rules will stem corrupt practices and ensure clarity. Court decisions will be respected. However, in the cases presented in Chapter Four of this study, disregard for the rule of law by public officials has resulted in protracted litigation and project failure. This clearly demonstrates that the rule of law is a cardinal requirement for economic growth, and if the government desires to improve the wellbeing of its citizens, having due regard for the rule of law must be a priority.

[919] Elijah Okon John op cit note 123 at 211.

[920] R C Onwuanibe op cit note 124 at 171.

[921] Brian Tamanaha op cit note 125 at 4.

[922] Ibid.

[923] W Wade & CF Forsyth op cit note 139 at 30.

7.2.1 Sanctity of Contract

Because of the emergence of the private sector in the provision of infrastructure, the notion of the sanctity of contract has become more compelling. Sanctity of contract is the principle of law that once parties enter into a contract, they must honour their obligations under that contract. The essence of doctrine of the sanctity of contract has been re-emphasised by Sagay in the following words:

> We must next consider why the law does enforce agreements at all. The commercial and economic life of modern society consists very largely of agreements. Trade and commerce would be chaotic, if not impossible, if the law permitted a promisor to break his promise without at least placing him under an obligation to pay compensation for the loss occasioned by his default.[924]

The position of the law was restated in *Arjay Limited & Ors v Airline Management Support Limited*[925] where the Supreme Court of Nigeria *per* Niki Tobi JSC stated as follows:

> It is an elementary law that where parties have entered into a contract or an agreement, they are bound by the provisions of the contract or agreement. Accordingly, a party cannot ordinarily resile from a contract or agreement just because he later found that the conditions of the contract or agreement are not favourable to him. This is the whole essence of the doctrine of the sanctity of contract or agreement. The court is bound to construe the terms of the contract or agreement and the terms only in the event of an action arising therefrom.[926]

Thus, a valid contract is binding on the parties to that contract and it may only be modified or terminated by consent of the parties or if provided by the law. The principle is the expression of the legal theory of 'good faith,' without which international contract law (including PPP contracts) would be a mere mockery. While the principle does not apply when it would result in unfair hardship or lead to illegality, the performance of a contractual obligation is sacrosanct to legitimate commercial activity.[927] The doctrine of sanctity of contract, *pacta sunt servanda* is established as one of the fundamental pillars of the modern law of contract.[928] The other pillars being freedom of contract and the good faith.[929] Moreover, the law protects the sanctity of contracts where third parties meddle or interfere unfairly. Such interference can warrant an

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[924] IE Sagay *Nigerian Law of Contract* (2nd ed) 2001 at 1.

[925] (2003) LPELR 555 (SC) at 67

[926] Supra at 67 paras A-E

[927] See BrendenKamp's case cited supra

[928] Dale Hutchison & Chris-James Pretorius (eds) *The Law of Contract in South Africa* 2nd ed 2012 at para 1.8.

[929] Ibid.

action for inducing a breach of contract.[930] As mentioned earlier, a government is bound by contractual promises no differently from any individual.

The poor regard for the sanctity of contract and the violation of property rights such as occurs in Nigeria presents a warning sign to both local and foreign investors, in spite of the potential of the huge population. The Nigerian government and their agents on all tiers are prone to show disrespect for contractual agreements. The case of Bi-Courtney Aviation Services Ltd and FAAN[931] is a good example of the attitude of public sector officials. If government is sincere about creating opportunities for the private sector to participate in the provision of infrastructure, it must demonstrate a commitment to respect contractual obligations. Given that foreign and local investors wish to be assured of the stability of any investment regime before committing their assets, the need to provide this assurance cannot be overemphasised. Apart from the assurance that investors require, other parties such as lenders and prospective sponsors of any project must be convinced that the project will not be encumbered or unilaterally cancelled by the government without good cause. For example, the cancelling of the Lekki Toll Road Concession and its subsequent buy-back by the Lagos State Government is a clear case of unilateral government action without good cause.

7.2.3 Law and Development

The theory of law and development is an interdisciplinary approach to the study of how law can be used to promote development. As discussed in Chapter Two of this research, law and development promotes the notion that the law can be used to drive development by giving force to government policies.[932] While this study does not seek to advance any new law and development theory, the context of the research suggests to the writer that the law should take into cognisance the peculiarity of the local environment.[933] While successes in other jurisdictions can serve as a guide, the wholesale importation of a highly successful framework

[930] Jeffrey S Klein 'How to protect the sanctity of contracts' (1990) *Los Angeles Times* available at *http://articles.latimes.com/1990-02-22/news/vw-1783_1_business-advantage* accessed 28 October 2017. See also Omoh Gabriel 'Sanctity of contract and well defined property rights drive foreign investment' *Vanguard* 31 October 2011.

[931] Discussed at length in Chapter Four (Section 4.7.3) of this study.

[932] Discussed in Chapter Two (Section 2.3

[933] Y S Lee op cit note 116 at 433. Lee refers to the need for the law to take into cognisance the local environment as adaptability to socio-economic conditions.

without adjusting it to the local situation courts failure from the start.[934] Having the political will to implement the law is therefore significant.[935] Certain lessons may be learned from how effective the law has been in giving efficacy to government policies in jurisdictions like Nigeria. The example of South Africa therefore suits the purpose of this study. In the same vein, Lee notes that several developing countries, including Vietnam, Cambodia, Myanmar and Bangladesh have expressed the desire to adopt certain Korea laws.[936]

Far from using the law as a tool to promote development, as far as PPP is concerned policy makers in Nigeria seem to have got it the other way around. While the law on PPP was passed in 2005, the policy for PPP was released in 2008. It is clear from the government's action that it sought to fill the void in the law with policy. It is suggested that the new law on PPP which is being contemplated consider both the various gaps in the law and instances where different laws overlap and create confusion. This is necessary since PPPs are recognised globally as an attractive development instrument that can be channelled to foster economic growth. The law therefore ought to reflect the government's desire to diversify the economy by stimulating local and foreign private sector investment, in order to sustain a pipeline of projects that the government cannot afford alone due to budget constraints.

7.3 Does the Current PPP Regulatory Framework in Nigeria Ensure the Protection of Investors' Assets?

The attraction of foreign direct investment (FDI) to any economy is dependent on the legal framework for investment as well as the availability of the appropriate mechanism to resolve disputes when they arise.[937] Certainty and clarity in legal frameworks are important for the purposes of attracting the levels of investment required.[938] As emerged from the discussion in Chapter Four of this research, there is not enough in the current PPP law and policy framework to ensure that investors' assets are protected. Given that investments in infrastructure are long term in nature, investors are circumspect and may not want to test the waters in a jurisdiction

[934] Ibid.

[935] Ibid at 454.

[936] Ibid at 444.

[937] Paul Idornigie op cit note 226 at 162..

[938] Yinka Omorogbe & Ada Ordor 'Achieving effective law and policy frameworks for access to sustainable energy in Africa – A multidimensional effort' in Yinka Omorogbe & Ada Ordor (eds) *Ending Africa's Energy Deficit* (2018) at 386.

where they are not assured of the safety of their assets. Similarly, lenders are wary of climates where transactions entered into between the private sector and government are almost sure to end up in dispute, or where the government unilaterally revokes agreements because of policy changes. A situation where government is not seen as a continuum as one administration succeeds another is not in the interests of a successful PPP regime. For instance, the private sector partner of the Rivers State Monorail Project[939] pulled out from the project because it was not sure that the succeeding administration would continue with the project. True to prediction, the present governor of Rivers State, Mr Nyesom Wike justified the cancellation of the project by announcing that 'Rivers people have told me not to touch the monorail project left behind by the other government.'[940] Concessionaires are aware of this negative tendency of government to disregard projects initiated by a past administration. The lack of political will to see through the policies of previous administrations in Nigeria needs to be addressed in future amendments of PPP laws.

The present framework is weak and without the right measures to protect concessionaires. The ICRC appears to be powerless in its interaction with other government institutions. Under the law, the ICRC does not have overriding powers like other regulatory bodies in the country, for example, the power to sanction state broadcast media houses as the National Broadcasting Commission (NBC) has. In the face of whether Bi-Courtney and the FAAN should refer their dispute to arbitration, the ICRC could not rise to the responsibility of a PPP regulator to direct the FAAN to seek an amicable solution to the conflict.

There is the possibility, as Amadi argues, that the law could fail in the drive to achieve government policy goals.[941] However, this writer considers this as a failure in the application of the law than as failure of law *per se.* Such failure is exemplified in the electricity power sector reform in Nigeria.[942] This shows that legal reform alone is not an end. Amadi considers as false hope, a belief that the mere creation of an independent regulatory body by legislation or the provision of immunity to private investors from political interference can on its own lead to success.[943] This is especially so, where the private sector partner lacks the experience or

[939] The project was initiated under the administration of Governor Rotimi Amaechi who, after eight years in office, was succeeded by Mr Nyesom Wike on May 29, 2015.

[940] Chukwudi Akasike, 'Rivers abandons monorail project' *The Punch* 29 March 2016 available at *http://punchng.com/rivers-abandons-monorail-project/* accessed 29 October 2017.

[941] Sam Amadi op cit note 14 at 344.

[942] Ibid at 372.

[943] Ibid.

capacity to deliver.[944] It is on this basis, that Amadi suggests, and rightly so, that the law should not only promote reform, but also promote the engagement process of only private sector partners who have the finance and technical competence to ensure that projects are delivered.[945]

Furthermore, the ICRC Act 2005 does not make any provision for such disputes as may arise from PPP contracts. This weakness has brought a situation where there is protracted litigation in court without either party shifting its ground. The result is low investor confidence and a private sector reluctant to do business with the public sector.

7.4 Conclusions on the Protection of Public-Private Partnership Assets

One of the ways to ensure that investors' assets in PPPs are protected is to ensure that good governance measures are adopted. Governance in this sense relates to exercising political, economic and administrative authority to properly guide a nation's socio-economy.[946] Good governance as it relates to PPP connotes the sustenance of a healthy relationship between the public-sector institutions and the private sector, and between public institutions *inter se* in the administration and regulation of PPP. To achieve this, certain drivers have been identified, such as accountability and transparency on the part of public officials, political stability, the competence and effectiveness of public officials, the quality of regulation provided by the regulatory bodies, respect for the rule of law and the sanctity of contract, and control of corruption.[947] Promoting good governance will therefore provide prospective investors with the assurance that their assets are protected.

The right risk allocation strategy is important for PPP success. Each risk must be properly allocated to the party that is best suited to take it on. This must be clear right from the contract negotiation phase. The case of the Bi-Courtney Highway Services Ltd-Lagos Ibadan Expressway Concession, another PPP project, exemplifies the lessons that can be learned from improper or lack of allocation of risk. It is important to note that risk that cannot be managed by the concessionaire, such as foreign exchange risk, must be held by the public sector.

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[944] Ibid at 375. This was the case in the Bi-Courtney Highway Services Ltd – Lagos Ibadan Expressway PPP Project where the private sector partner lacked the financial capacity and finance to deliver the project.

[945] Ibid.

[946] United Nations Economic Commission for Europe (UNECE), *Governance in Public Private Partnerships for Infrastructure Development* (2004) at 4.

[947] Ibid at 4.

The government must be willing to provide guarantees for projects to give lenders the confidence they need. Bi-Courtney was unable to convince any lender to fund the Lagos-Ibadan Expressway Concession in the absence of a guarantee from the federal government of Nigeria. The guarantee proved to be elusive, as public officials in a government that appeared to be promoting PPP frustrated all the efforts of the concessionaire to get actual government support. Determined to ensure that Bi-Courtney failed, government officials acted contrary to the aspirations of the very government that they represented. This may not be unconnected to the fact that public sector officials erroneously assume that private sector concessionaires are enemies who would deprive them of their jobs. It is important that government at all levels consider the fact that the attraction, promotion and protection of both foreign and local investments in infrastructure is a primary interest of the State, and as such, a strategy must be put in place and deliberate efforts made to protect facilities and, when necessary, provide guarantees to investors and lenders. Thus, individuals or corporations, whether local or foreign, who invest in infrastructure in the host country by lawful means must benefit from the protection of the government.

7.5 Lessons from South Africa

While there may be no perfect PPP framework anywhere in the world, some are better than others and South Africa's PPP structure and process can definitely serve as a template for other countries in sub-Saharan Africa. As one author observes, South Africa 'has the greatest cumulative experience of public-private partnerships in Africa....'[948] South Africa's practice of PPP dates to 1994, and with many successes in different sectors including toll roads, ports, prisons, water supply, hospitals and tourism, there is much that other African countries can learn from it, and not only in order to avoid pitfalls and establish successful PPP regimes. Although Burger argues that there is still a shortage of skilled personnel in government departments and provinces to match the pace at which the government of South Africa can roll out PPPs,[949] this writer is of the view that compared to other African countries, South Africa has a clear edge and is far ahead in terms of PPP specialists and technical know-how. Besides, some of the PPPs arranged in South Africa have been among the most successful in sub-

[948] Peter Farlam op cit note 747 at 1.

[949] Philippe Burger 'The dedicated PPP Unit of the South African National Treasury' available at *https://www.oecd.org/mena/governance/37147218.pdf* accessed 31 October 2017.

Saharan Africa.[950] South Africa's extensive PPP experience offers both positive and negative lessons for the rest of the continent.

7.5.1 Positive Lessons

First, South Africa's PPP Unit is made up of 17 professional staff who actively participate in policy formation and PPP training. They are allocated projects depending on their individual sector expertise, which includes health, energy, water, transport, ICT, tourism, waste, accommodation, education, budget support, contract management, project development, business development and international relations.[951] Compared to public service staffing size elsewhere in Africa, the staffing of the unit is moderate. Unlike the case of South Africa, where the number of staff in the PPP Unit is available on the website of the National Treasury PPP unit, Nigeria's ICRC website does not provide the number of professional staff on the Commission.

Secondly, the institutional framework for PPP in South Africa is clear-cut. A prospective investor or anyone interested in the framework for PPP in South Africa is not left confused about the number of agencies that are to be dealt with when negotiating or executing a PPP contract. These are simply the PPP unit and the institution or the province initiating the project. This is not the case with Nigeria, where the process is more complex.[952] The less complex a process is, the greater the interest of prospective investors, lenders and sponsors.

Thirdly, South Africa's well developed financial market is a plus for the development of a successful PPP regime. Despite an economy challenged by recession and damaging ratings downgrades, the stock exchange and indeed the financial markets in the country have maintained good fundamentals and performed consistently well.[953] The availability and ease of access to credit in South Africa places it ahead of its peers on the continent. Developing the financial market of any country is fundamental, not only to the growth of the economy but also for the development of new business opportunities. Furthermore, South Africa's infrastructure

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[950] Madeleine C Fombad, 'Accountability challenges in public-private partnerships from a South African perspective' (2013) 7.1 *African Journal of Business Ethics* (2013) at 11.

[951] National Treasury PPP Unit, 'About the PPP Unit,' available at *http://www.ppp.gov.za/Pages/About.aspx* accessed 31 October 2017.

[952] Discussed in detail in Chapter Four (Section 4.4) of the study.

[953] For example, see Ed Stoddard & T J Strydom 'South Africa's stock market defies recession, scales record highs' *Reuters Business News* 31 July 2017.

funds like the SAIF[954] can serve as a lifeline for projects requiring funding. The successful divestment of that fund is also a good lesson for other African countries, including Nigeria.

Finally, without the commitment of the government of South Africa, many PPP arrangements and projects could have failed, for example the N4 Toll Road and the Gautrain project. There are several projects that have outlived the administration that initiated them, an area of grave concern in Nigeria. It has been argued, and rightly so, that because of the huge investment it requires, any wasteful result in a PPP is a drawback for development.[955] South Africa's successes in the Hospital Co-Location project in Bloemfontein and the N4 Toll Road provide good examples of political commitment on the part of the government.[956] Clear political will and a determination on the part of government to ensure the success of PPPs increases the momentum of these projects and goes a long way towards ensuring that targets are duly met.

7.5.2 Negative Lessons

Despite South Africa's relative success with PPP, there have been errors and pitfalls that could have been or can be avoided. Other African countries studying the South African framework and wishing to borrow from it may have much to learn from these. Some of them are highlighted below.

South African PPP rules require that before a project is arranged as a PPP, at the inception stage, the institution[957] sponsoring the project must register the project with the relevant treasury, for a project officer and a transaction advisor to be appointed.[958] What the rules omit to state is that public consultation is fundamental. This omission in the rules could lead to avoidable challenges. For instance, J Stephen criticises the Gautrain Rapid Rail link Project for insufficient public consultation and legislative debate before the project was approved and put to tender.[959] It is pertinent to note that although the Gautrain Rapid Link Project is a success, the need to consult with stakeholders before embarking on PPP projects is

[954] Discussed in 6.5.1 above.

[955] Solly Matshonisa Seeletse 'Performance of South African public-private partnerships' (2016) 14.2 *Problems and Perspectives in Management* 19.

[956] Discussed in Chapter Five (Section 5.6.1 and 5.6.2) of the study.

[957] In this case the Ministry, Department or Province.

[958] See PPP Manual 2004.

[959] J Stephen 'Fears Gautrain will be a large, expensive white elephant' *The Star* 9 November 2005.

essential. Fombad has argued that a lack of transparency could negatively affect PPPs in South Africa, referring to superficial and inconsistent disclosure of PPP information online via the *PPP Quarterly*. [960] The argument here is that with little information being made available to the public, the principle of transparency is compromised. No matter how successful a project is, it often remains tainted where there are questions of ethical and procedural irregularity in concluding the contract and executing the project.

This writer is of the firm belief that insisting on a Black Economic Empowerment Code[961] for PPP, as is currently the case in South Africa, is an extreme burden at this emerging stage of PPP. PPP is a partnership between the public sector and the private sector. Putting a burden on the private sector to deal with domestic inequality issues could deter foreign interest or encourage corruption. Companies who have the experience and wherewithal to promote and execute flawless projects may find it difficult to meet the Black Economic Empowerment targets, and be ruled out of the reckoning in favour of less experienced sponsors who may just superficially appear to be BEE-compliant. It is important that the government deals with issues of inequality in such a way as not to deter legitimate private sector ventures, which must be allowed to manage their business as best they can. PPPs are very complex arrangements and anything that can make a PPP arrangement less complex should be welcomed.

[960] Madeleine C Fombad op cit note 930 at 15.

[961] See PPP Manual 2004.

7.6 Recommendations

PPP is no doubt challenging terrain. Even developed countries like the UK, Canada and Australia have had to grapple with issues that were never expected when the relevant model was adopted. At one point in Quebec, Canada, the acronym PPP was referred to as: 'Problem, Problem, Problem'! The important thing is that countries continue to seek ways to improve on their framework for PPP. The door to improving or simplifying the process for PPP arrangements and execution cannot and should not be closed. It is noted that even leading PPP jurisdictions like Canada and Australia 'employ a variety of arrangements, rather than having one national PPP model.'[962] It is therefore important that policy makers seek ways of improving on the structure and procedure for PPP contracts and projects. It is not enough to adopt a PPP policy and set it on auto-pilot mode. The ongoing need to review the process, to amend or repeal laws that hamper PPP progress, cannot be over emphasised. In this regard, the study makes a number of recommendations that are set out in the following sections.

7.6.1 Recommendations for Nigeria

First, the Infrastructure Concession and Regulatory Commissio (Establishment Etc.) Act 2005 is being reviewed for amendment by stakeholders in the country, and this is a step in the right direction. One can hardly believe that despite its flaws, it has been in operation for seventeen years without review. This writer believes that PPP must be clearly distinguished from traditional public procurement and other similar forms. As such, the silence in the PPP law, which allows for the application of the Public Procurement Act to PPP projects, must be addressed. Similarly, the funding dynamics of PPPs, a fundamental aspect of the concept, must be provided for in the law regulating the process. A situation in which policy is used to address gaps in the law is akin to putting the cart before the horse. It is important that the law gives effect to policy and not the other way around. The current situation suggests that the law was not well thought out before being passed.

Secondly, the process for the initiation and approval of PPP projects needs to be simplified. The current 12-stage process is unnecessarily complicated in the business context. A manageable reduction of the process into five or six stages is ideal and should make for simplicity and clarity.

[962] Anthony E Boardman, Carsten Greve & Graeme A Hodge 'Comparative analyses of infrastructure public-private partnerships' (2015) 17.5 *Journal of Comparative Policy Analysis* at 442.

Thirdly, even though the country seeks to attract foreign investment for infrastructure, it is important that the local financial market is strengthened and opportunities to raise funds are unlocked. The point is that despite the business that foreign funds can create, there is no point in exposing the country to a high foreign exchange risk. If the country continues to be largely dependent on oil revenues while at the same time remaining a mainly 'import' economy, there is little that can be done about foreign exchange stability. The best option is to develop the local market by encouraging a savings culture. If the funds held by Pension Fund Administrators (PFAs) as Retirement Savings Accounts (RSAs) are anything to go by (about N7 trillion or $19.4 billion as at July 2017),[963] there is a lot that can be achieved if other employee savings schemes are put in place, supported by legislation. The government needs to encourage such schemes as less than seven million out of a population of over 180 million Nigerians are pension fund contributors. Another option is to encourage fund managers to have replica infrastructure funds with lower entry thresholds that can cater to the investment needs of a population ranked by the World Bank as lower-middle income. Such funds would grow over time like pension funds, helping to provide the local funding needed for PPPs and curb the high foreign exchange risk that PPP projects in the country are exposed to.

Fourthly, there is a need for legal provisions requiring a new administration to continue with the policies of a preceding administration unless reasonable cause is shown, or face clearly defined consequences including impeachment proceedings in respect of elected officers. Even where reasonable cause is shown, there need to be rules around discharging a project in a way that prevents or minimises waste or loss to stakeholders. This writer believes that such legal provisions will serve as precautionary and punitive measures to ensure continuity in long-term government commitments. This will give local and foreign investors, sponsors and lenders the confidence that PPP projects will outlive the administration that initiated them.

A fifth recommendation is that apart from providing incentives to investors and promoters of PPP projects, the public sector must commit to jealously guarding and managing PPP projects to make sure they succeed. A case like that of the Bi-Courtney Highway Services Ltd Lagos-Ibadan Expressway Project, where it seemed that the public sector was more interested in the failure of the project than its success, must not be allowed to repeat itself: it

[963] This is over a 12-year period, given that the new pension system in Nigeria became fully operational in 2005. Even though some funds were transferred from the defunct NSITF to individual pension fund accounts, it is also noteworthy that the pension funds of members of the armed forces were liquidated and transferred back to pension funds managed by military authorities.

sends the wrong signals to prospective investors and sponsors, while leaving the country's infrastructure needs unaddressed.

In the sixth place, the government and its agencies must be willing to submit to arbitration in cases where conflicts arise. It is also important that both the private- and public-sector partners seek a balance in their approach to the settlement of disputes. The parties must always strive to achieve a win-win for all rather than a winner-takes-all approach, which often ends up in protracted disputes and wasteful litigation.

A seventh recommendation is that public officials should receive ongoing PPP information and updates so as fully to appreciate the role that they can play in ensuring PPP success. There should also be on-going trainings for the staff of the ICRC and other public officials involved in PPP transactions in the country. A similar process should be implemented at the sub-national level for state governments that have adopted the PPP model.

Finally, there is the need to ensure that PPPs are structured properly as PPPs and not in a hybrid form. The attempt in 2018, by the Federal Ministry of Transportation to revive a carrier for Nigeria in the form of a PPP seems to suggest a mix between a PPP and privatisation. The problem with this kind of arrangement is that it lacks the essentials to make a PPP what is. One of which is that at the end of the contract, the facility is returned to the government. It is therefore recommended that PPPs should be structured strictly as PPPs and not in a hybrid form to avoid confusion.

7.6.2 Recommendations for South Africa

Although it is reputed to be the PPP powerhouse in Africa, the South African framework for the regulation and monitoring of PPP projects can still be improved for better results. The South African PPP framework has received its fair share of criticism, e.g. for a lack of public consultation and for accountability issues.[964] Some of this criticism is out of place and seems to assume that PPP is some kind of magic wand that can solve all the infrastructure problems of a country overnight. Nevertheless, to improve on the current framework, the following steps might be considered.

First, it is important to decentralise PPP experience in the country so that more people become skilled in structuring PPP arrangements. Going forward, it cannot make sense to assign all responsibility for the guiding and monitoring of PPP in the country at the national,

[964] See Fombad op cit note 930 at 8.

provincial and municipal levels to only 17 professional staff' at the national treasury PPP unit. It would make sense to establish sub-PPP units in all the provinces to help ensure that the skills and experience available at the national level are transferred to others. This will enhance the development of PPP practice in the country. Decentralisation could also provide more opportunities for the skilling and involvement of a more diverse group of people, indirectly meeting BEE goals.

Secondly, policy makers need to expunge the requirements that PPP must follow the strict BEE targets that appear in the PPP Manual 2004. Let BEE remain a target for the public sector and let private partners focus on providing expertise and funding for PPP projects. Such a burden is unnecessary and is quite herculean for investors or project promoters who are new to South Africa.

South Africa needs to consider the issue of PPP transparency more critically. It is vital to ensure that there is adequate public consultation among the communities where projects are to be sited, experts and other stakeholders before final arrangements are made. A failure to do so could always clog the wheel of PPP success in the country.

7.7 Conclusion

Since the private sector is now playing a significant role in the development of infrastructure by way of PPP in many jurisdictions across the world, the need to arouse interest in such deals and gain the support of private sector promoters, financiers and lenders is paramount. Investors are constantly seeking avenues to grow their capital and generate returns over time, and since the shock collapse of equity prices across various stock markets around the world due to the financial crisis between 2008 and 2009,[965] there has been keen interest in alternative investment instruments, including infrastructure. Sustained interest in infrastructure as an alternative investment instrument can only be assured if investors are confident of the protection of their

[965] The financial crisis in the late 2000s which is also referred to as the US 'subprime' crisis that started in the summer of 2007 spread to several other advanced economies because of the combination of the direct exposure to subprime assets and the drying up of wholesale financial markets. This sparked a withdrawal of foreign assets from capital markets like that of Nigeria. The unexpected capital outflows led to price falls and panic sales which further propelled the market into a prolonged bearish run. Since many entrants into the market came during the early 2007 market boom, the crash affected investor confidence in equities and encouraged the search for alternative investment instruments. See for details Ouarda Merrouche & Erlend Nier, 'what caused the global financial crisis? – evidence on the drivers of financial imbalances 1999–2007' (2010) *IMF Working Paper* WP/10/265, 4.

assets because of the long-term nature of infrastructure investments, usually spanning between 20 and 30 years.

This research therefore advocates that measures be put in place by policy makers to protect funds and assets invested in PPPs in Nigeria. It has been suggested that as a matter of policy, there must be continuity in the administration of government projects. The policies of any one administration must not be jettisoned by a succeeding administration merely for the sake of wanting to fulfil the new administration's election promises. Government at all levels must be bound by promises made in contracts and must ensure that it respects the decisions reached at arbitration. Where, for any reason, a dispute is taken to the courts, the public sector must respect court decisions. It must no longer be business as usual for public servants who wilfully violate court orders and judgments. The judiciary should be approached to take decisive measures against public officials who hide under the cloak of office to disregard or violate court orders. This research highlights the areas in which the law can be used as a tool for development, to bring about change and attract both foreign and local participation in the provision of infrastructure in Nigeria.

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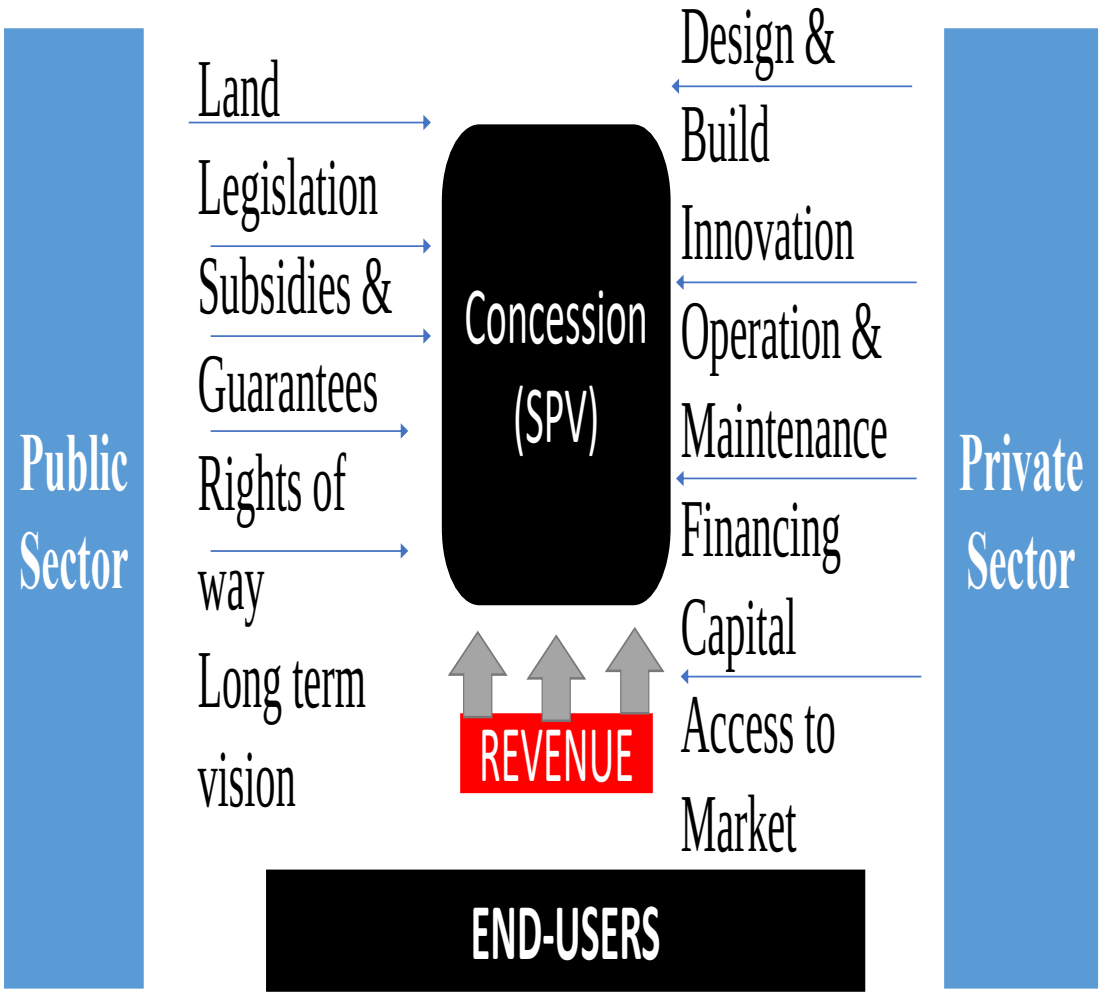
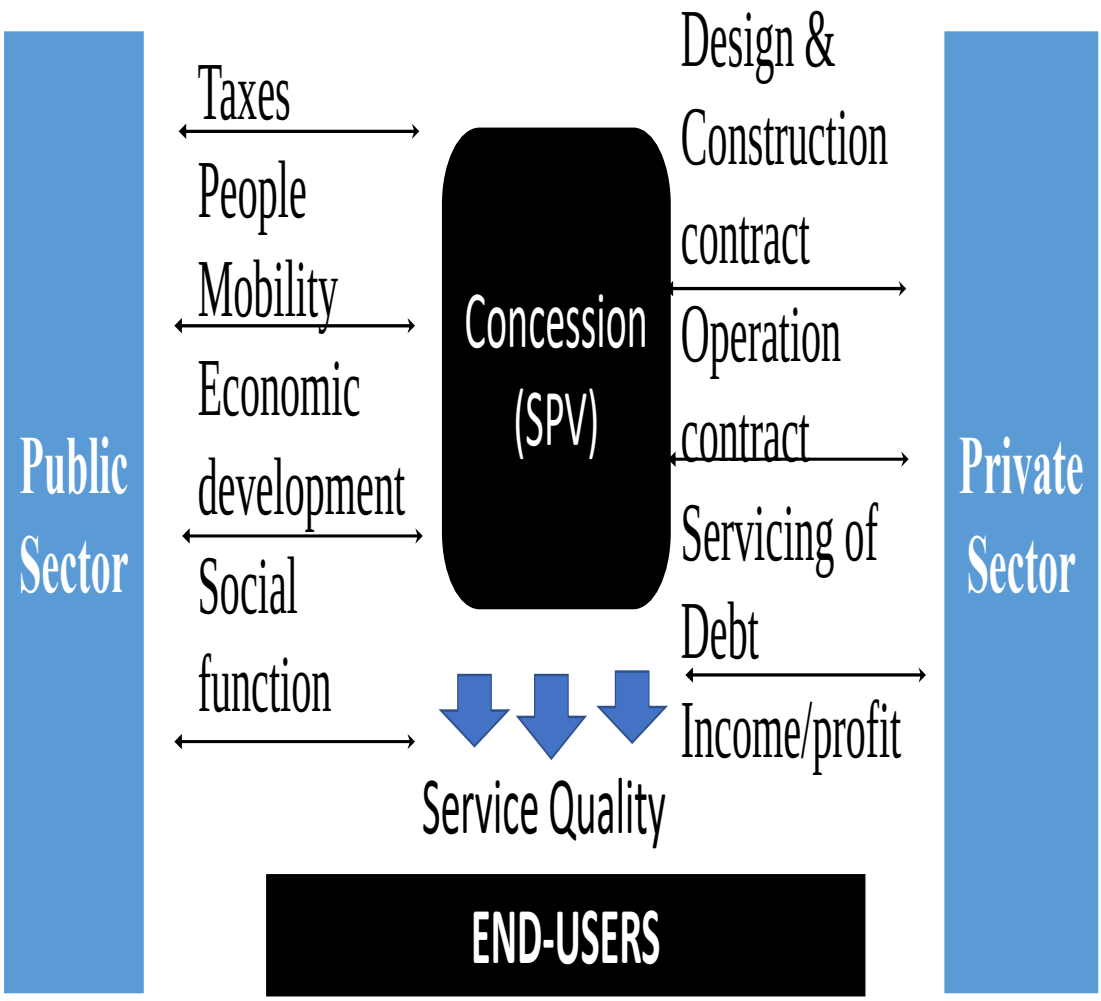
APPENDICES

Appendix 1: What Each Party Brings to a Public-Private Partnership



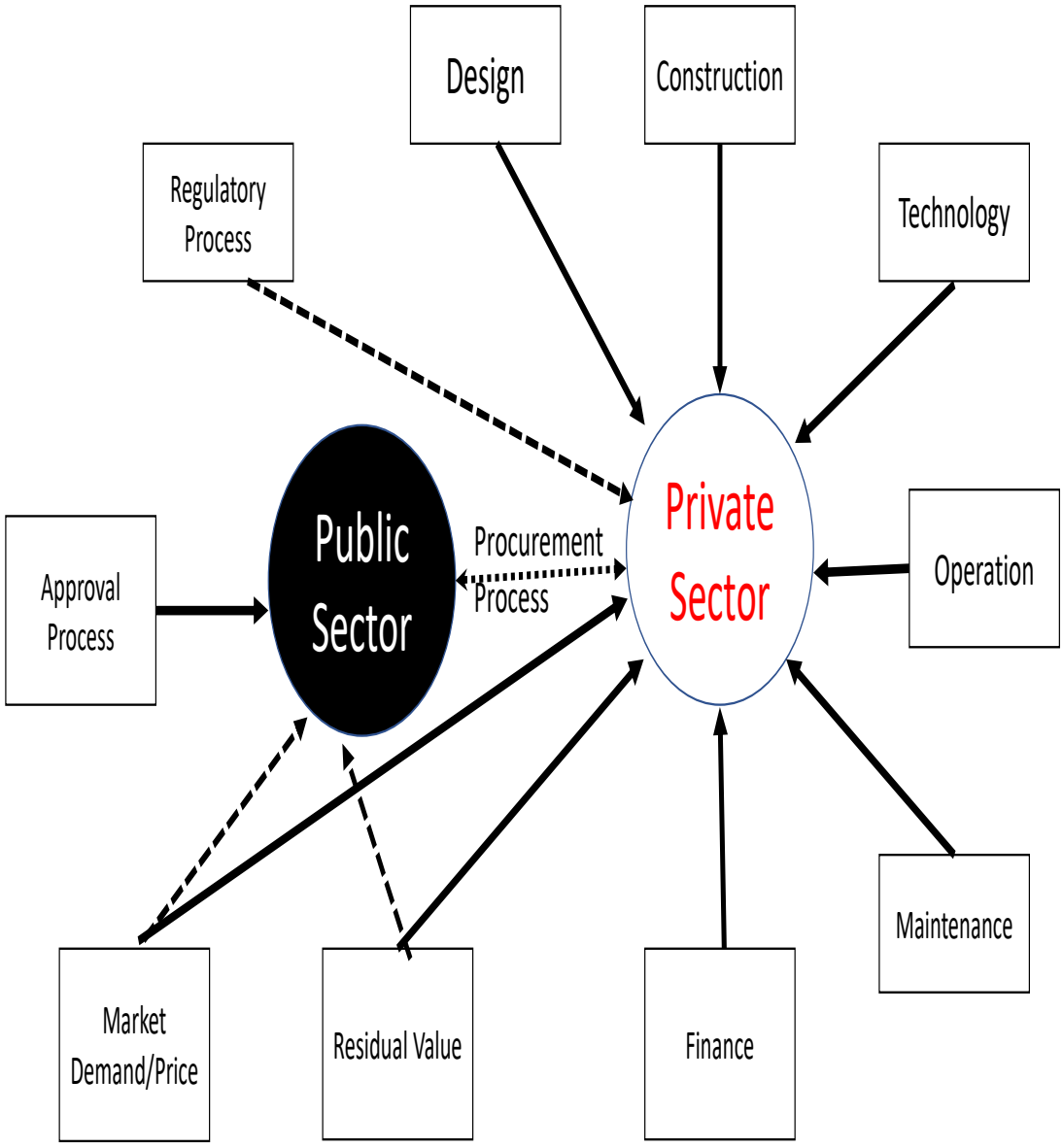
Source: Author

Appendix 2: What Each Party Gets from a Public Private Partnership



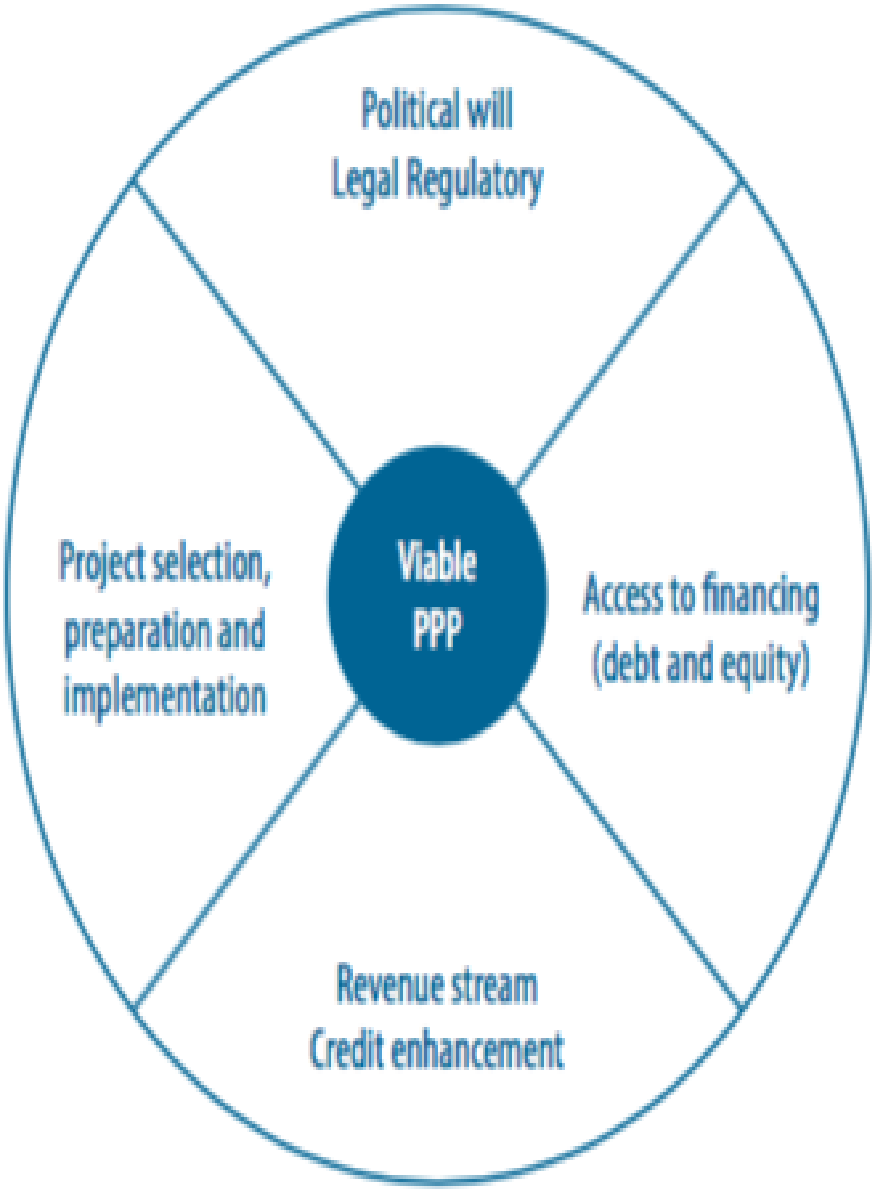
Source: Author

Appendix 3: Responsibilities in a Public-Private Partnership



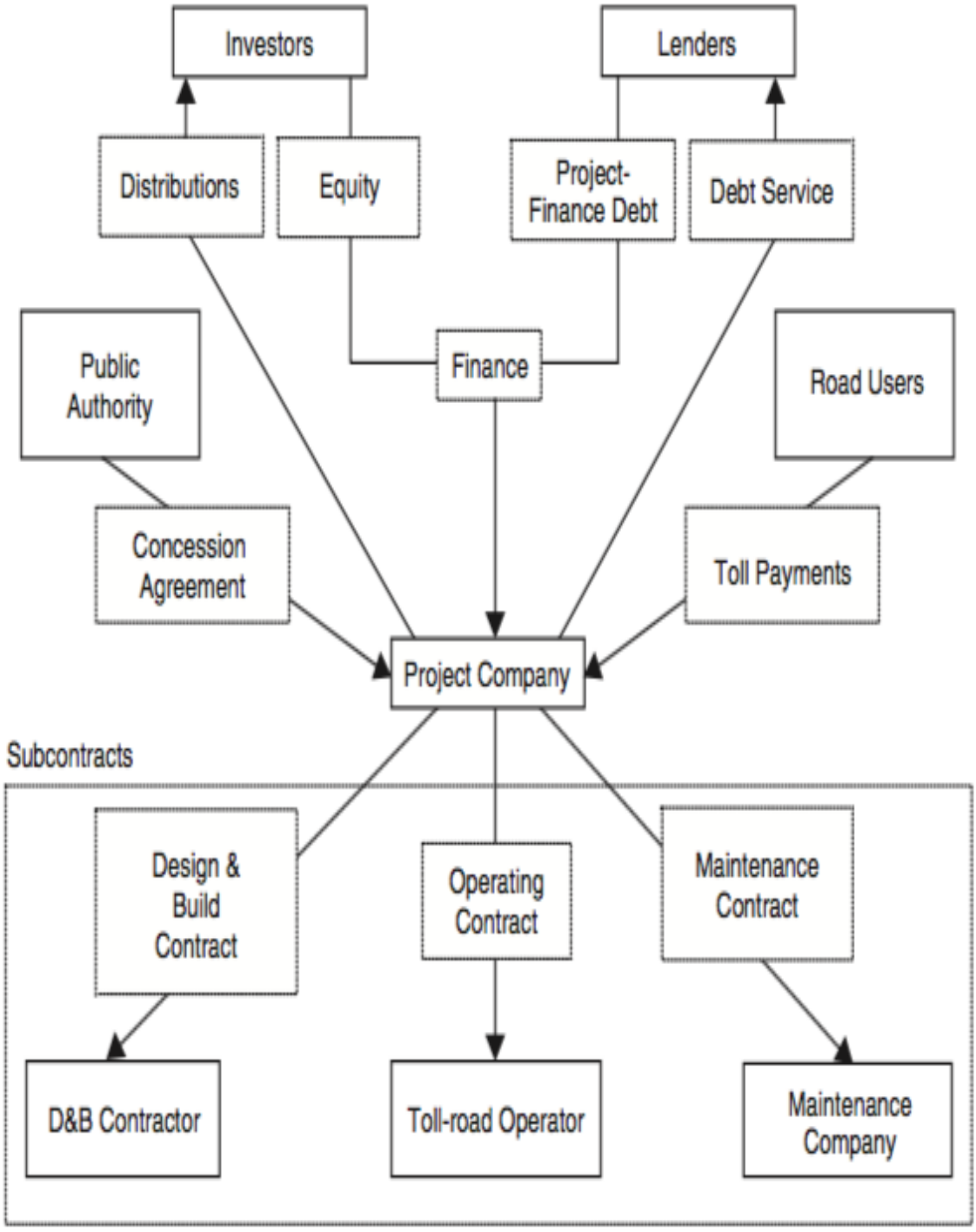
Source: Author

Appendix 4: Context of a Conducive PPP Framework



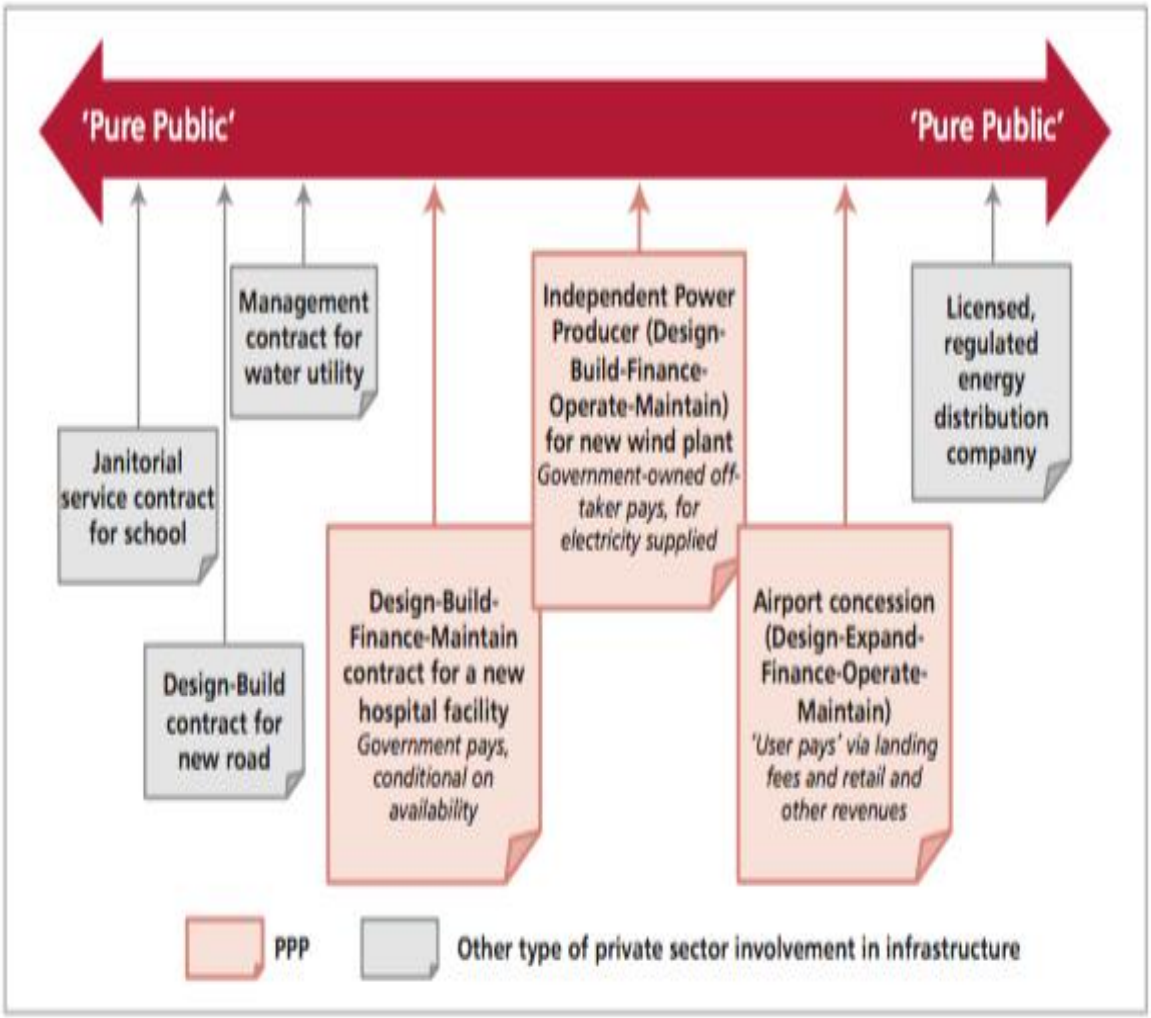
Source: Jeffrey Delmon

Appendix 5: Project Finance for a Road Concession



Source: Jeffrey Delmon

Appendix 6: PPP Differentiated from Similar Contracts



Source: Jeffrey Delmon

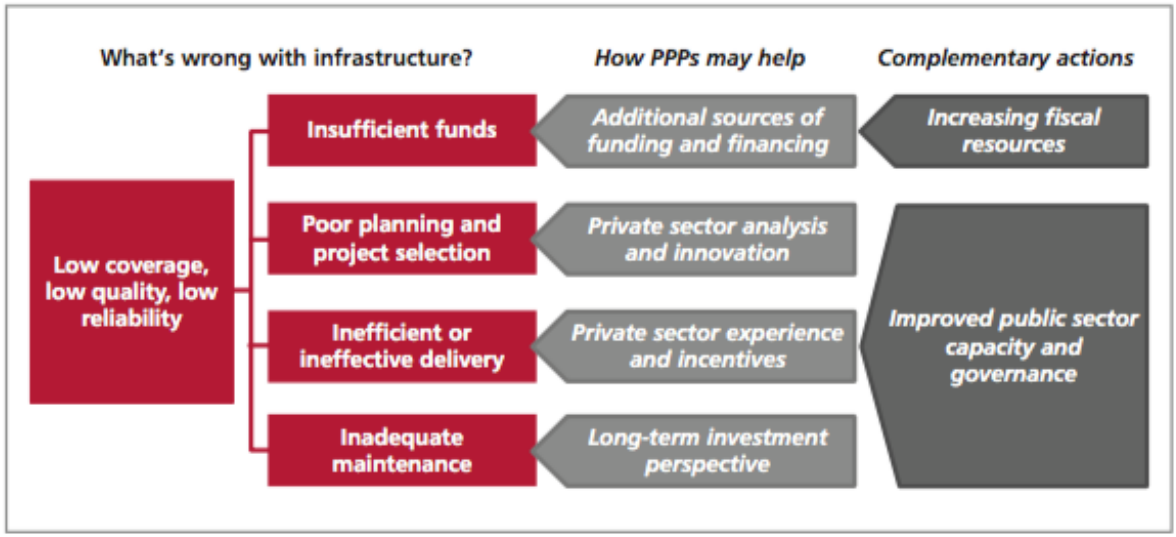
Appendix 7: Lekki-Epe Expressway Project

Fact Sheet

PROJECT NAME	Lekki Expressway
Country	Nigeria
Project summary	The first toll-road concession in West Africa. The 49-km road links the Lekki peninsula to the east of Lagos' central business district (Ikoyi).
Public authority	Lagos State Government ('LASG')
Project company	Lekki Concession Company Limited ('LCC'), advised by Rand Merchant Bank and Standard Bank
PPP contract type / term	Toll-road concession / 30 years
Project cost / funding	$382m, plus standby financing of $40m (₦50bn in total), funded by: • equity $91m (24%) • standby equity $10m • Lagos State mezzanine loan $43m (11%) • senior debt $248m (65%) • senior standby of $30m
Investors	Asset & Resource Management Company Ltd. ('ARM') 32% Larue Projects Ltd. 21% Africa Infrastructure Investment Fund ('AIIF') 46% (managed by African Infrastructure Investment Managers ('AIIM'), originally a joint venture between Old Mutual and Macquarie, from 2015 wholly-owned by Old Mutual) Export Credit Insurance Corporation of South Africa ('ECIC') provided AIIF with political-risk insurance for its investment. Hitech Construction Company Ltd. ('Hitech'), part of the Chagoury Group 1%
Lenders	International banks* $95m senior 15 years, 5 years' grace African Development Bank (AfDB) $85m senior 15 years, 5 years' grace Nigerian banks† $68m senior 12 years, 3 years' grace **Total bilateral DFI debt $248m** Nigerian banks† $30m senior standby Lagos State $43m mezz. 20 years, 10 years' grace * Arranged and underwritten by Standard Bank. † Co-arranged by First Bank of Nigeria & United Bank for Africa The international bank loan is at a fixed interest rate; other senior debt is on a floating (adjustable) interest-rate basis Standard Bank provided a currency hedge for AfDB, enabling its finance to be provided in ₦ rather than $
Design & build contractor	Hitech
Operation & maintenance / tolling contractor	Tolling services were originally provided by a South African company, Toll Infrastructure Services (Pty) Ltd, but O&M including tolling is now carried out by LCC.

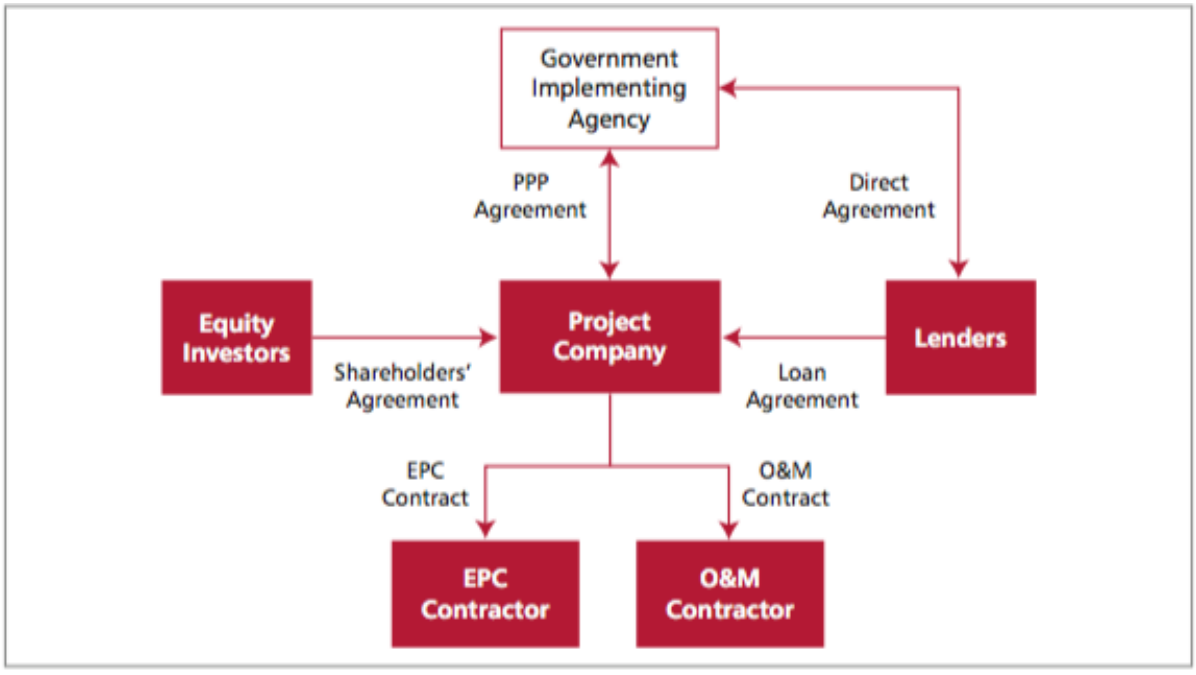
Source: Lagos State Government

Appendix 8: How PPPs Can Help Solve the Infrastructure Problem



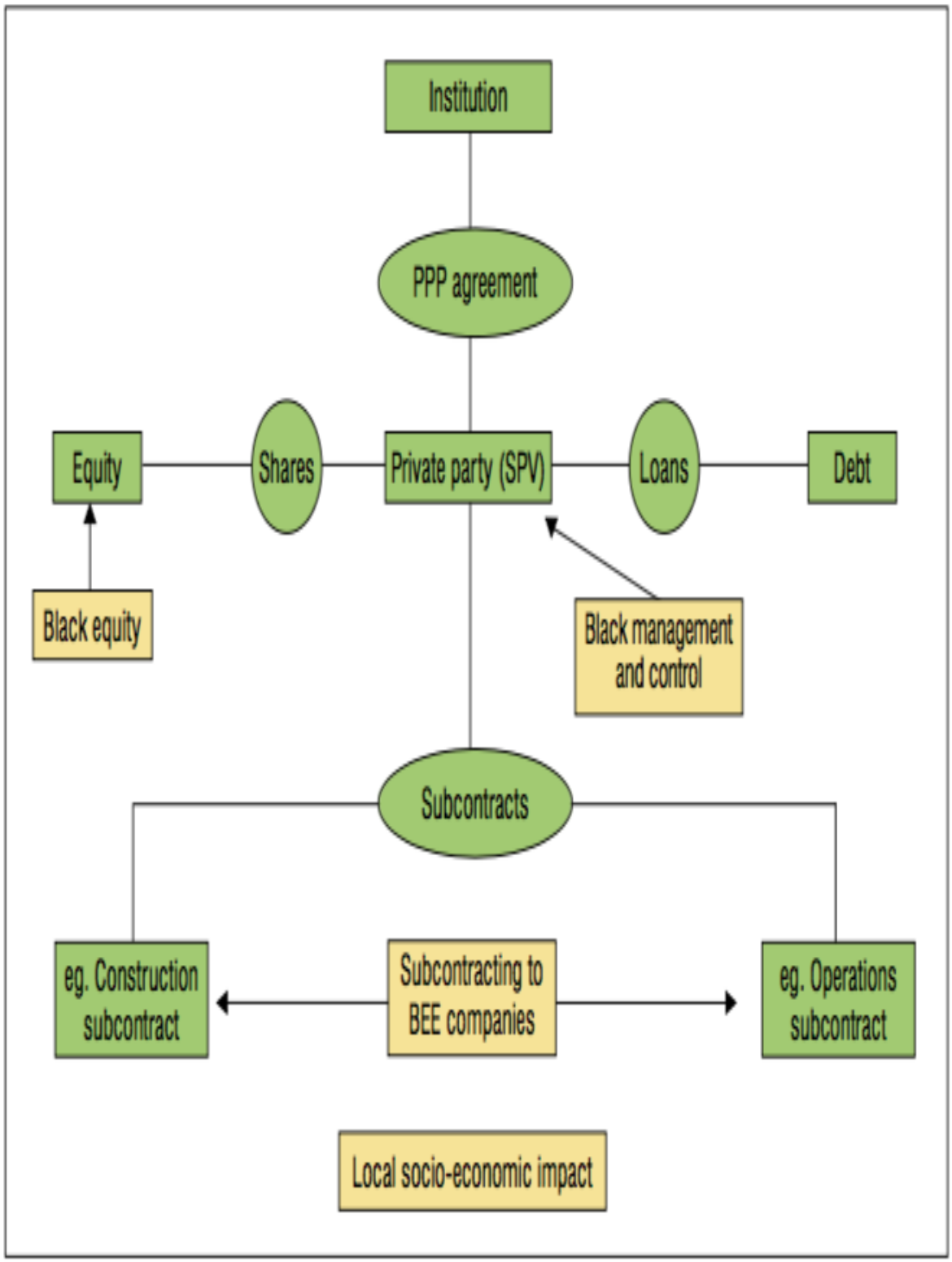
Source: Jeffrey Delmon

Appendix 9: Typical PPP Structure



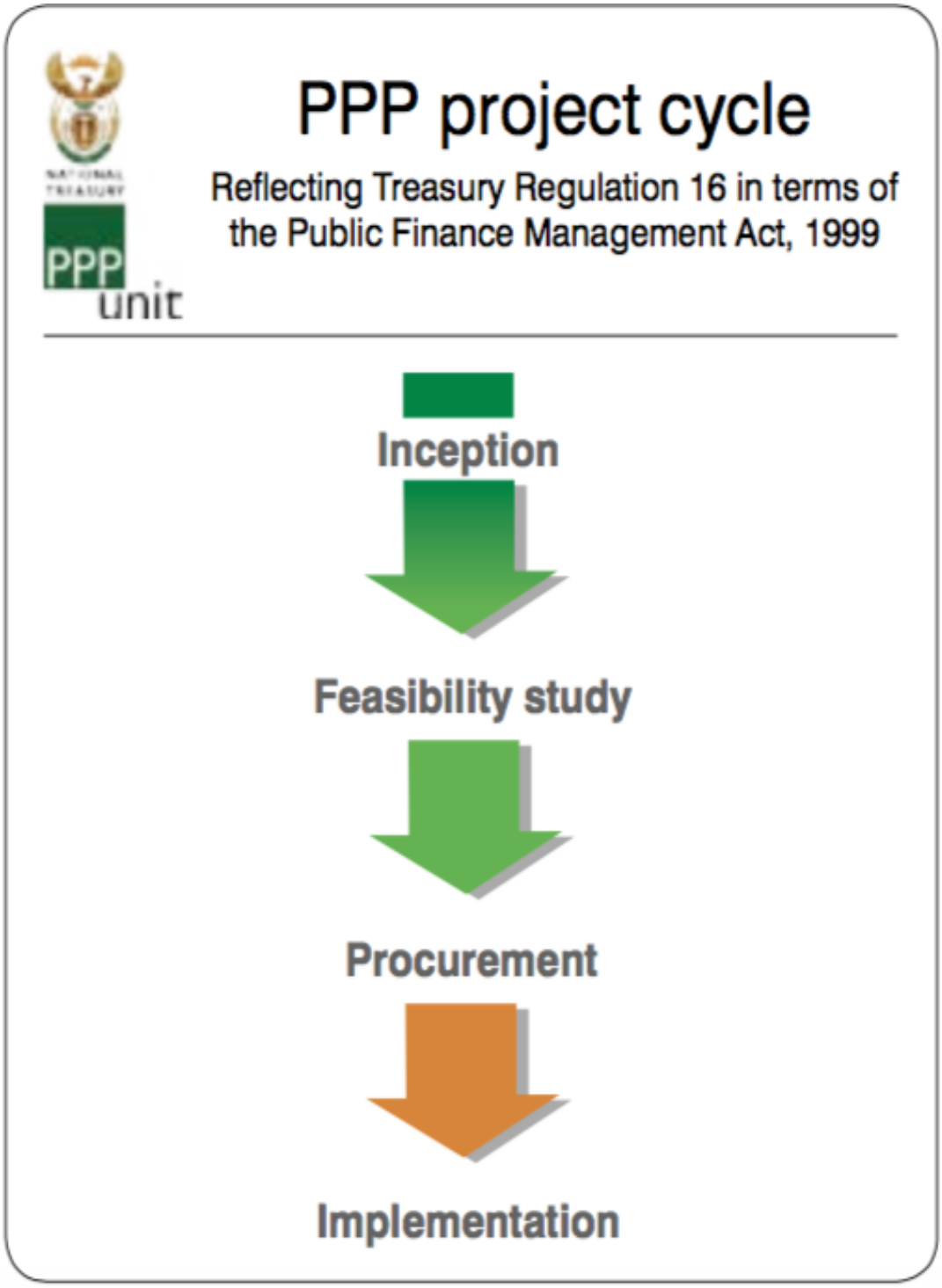
Source: Jeffrey Delmon

Appendix 10: BEE in South African PPPs



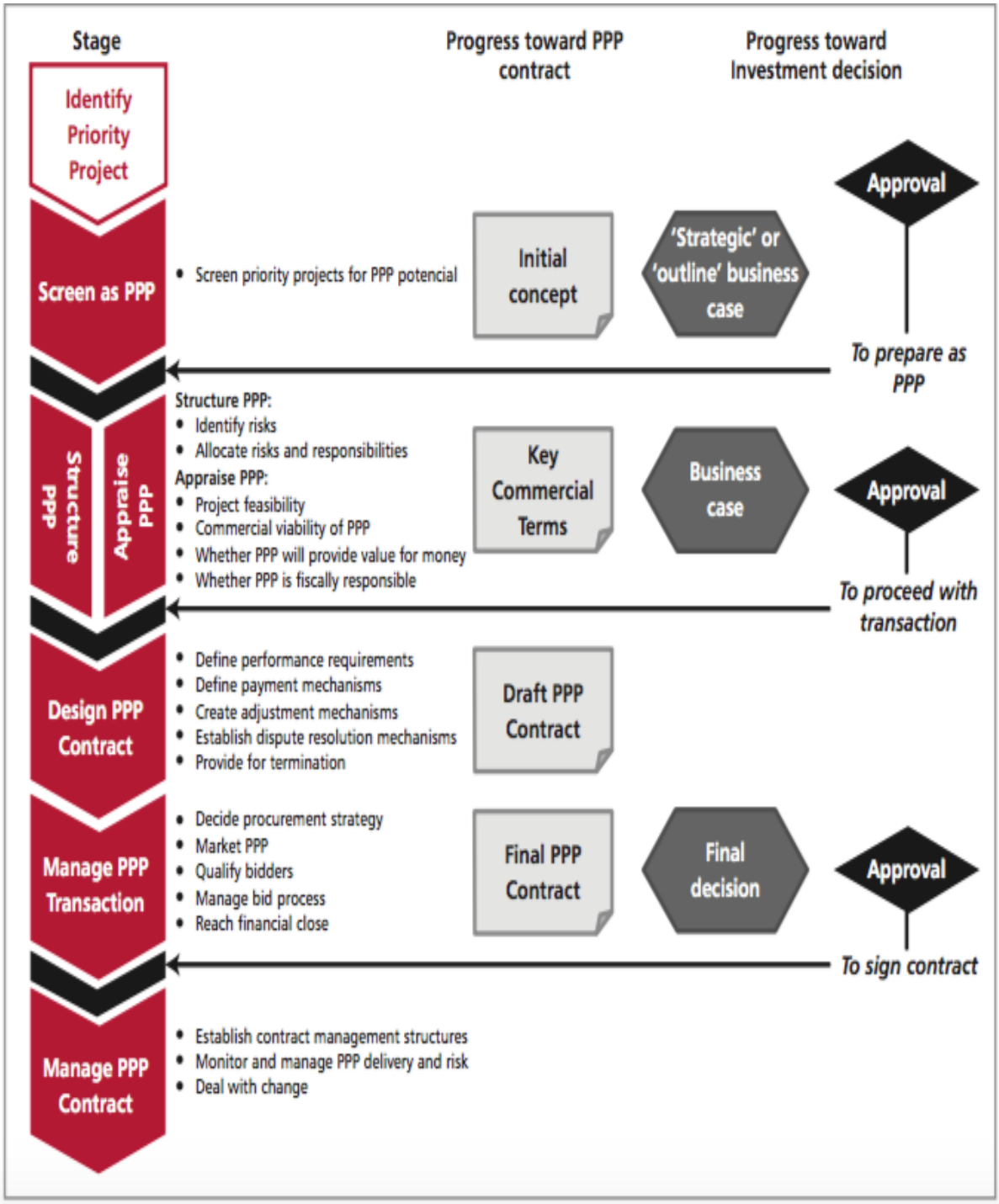
Source: National Treasury PPP Unit (South Africa)

Appendix 11: PPP Project Cycle in South Africa



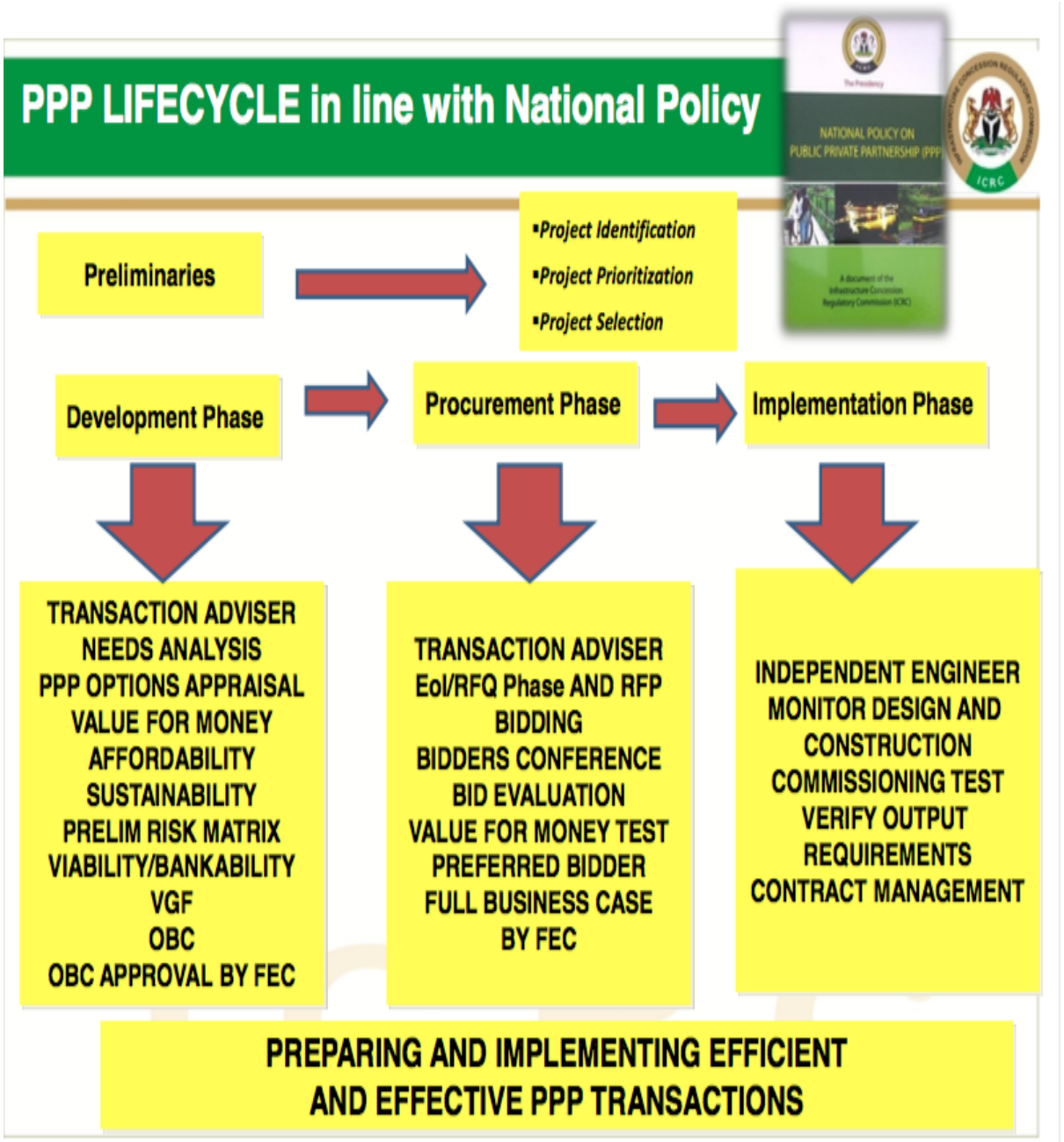
Source: National Treasury PPP Unit (South Africa)

Appendix 12: The Public-Private Partnership Process



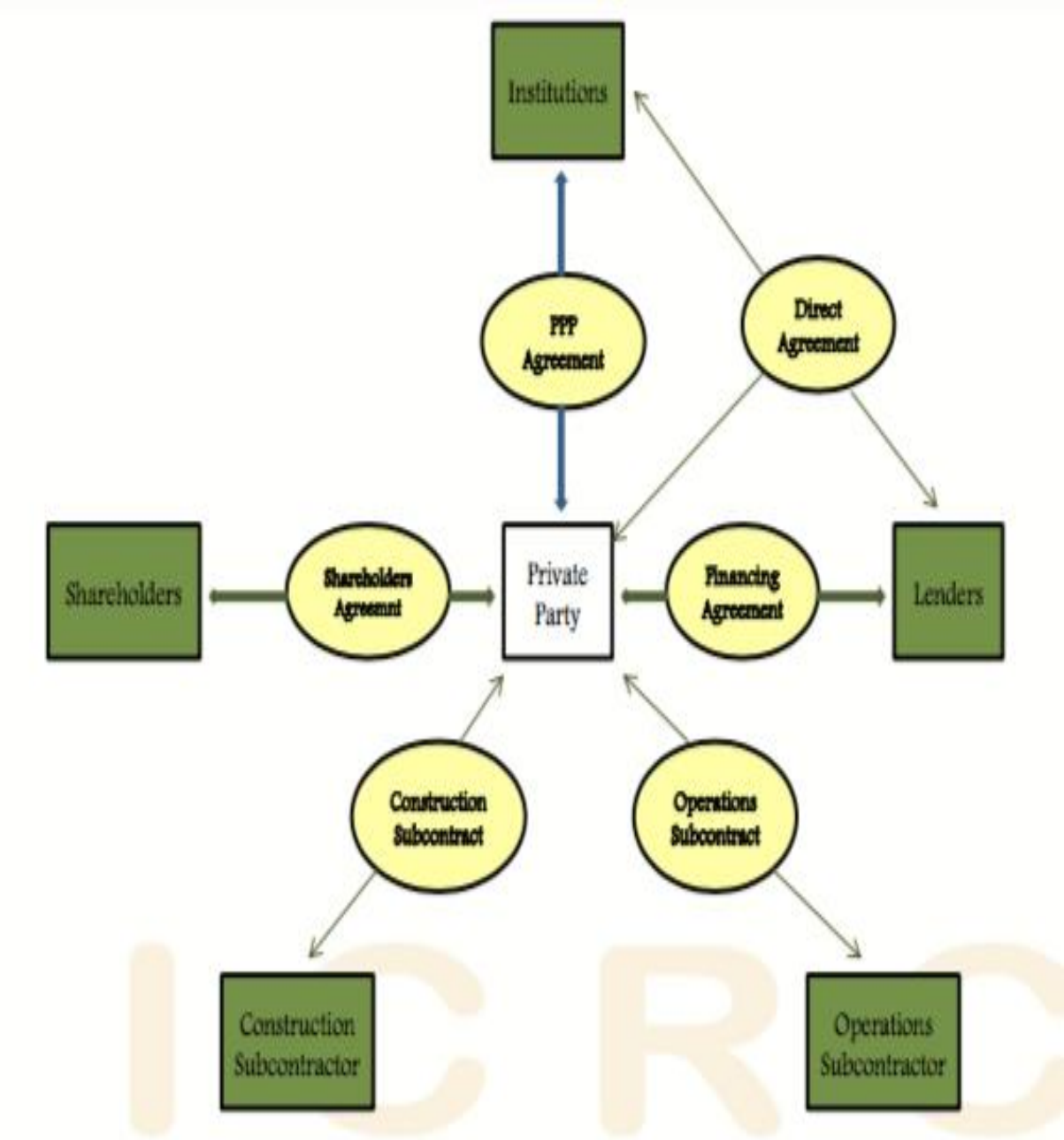
Source: The World Bank

Appendix 13: Life Cycle for Public-Private Partnership in Nigeria



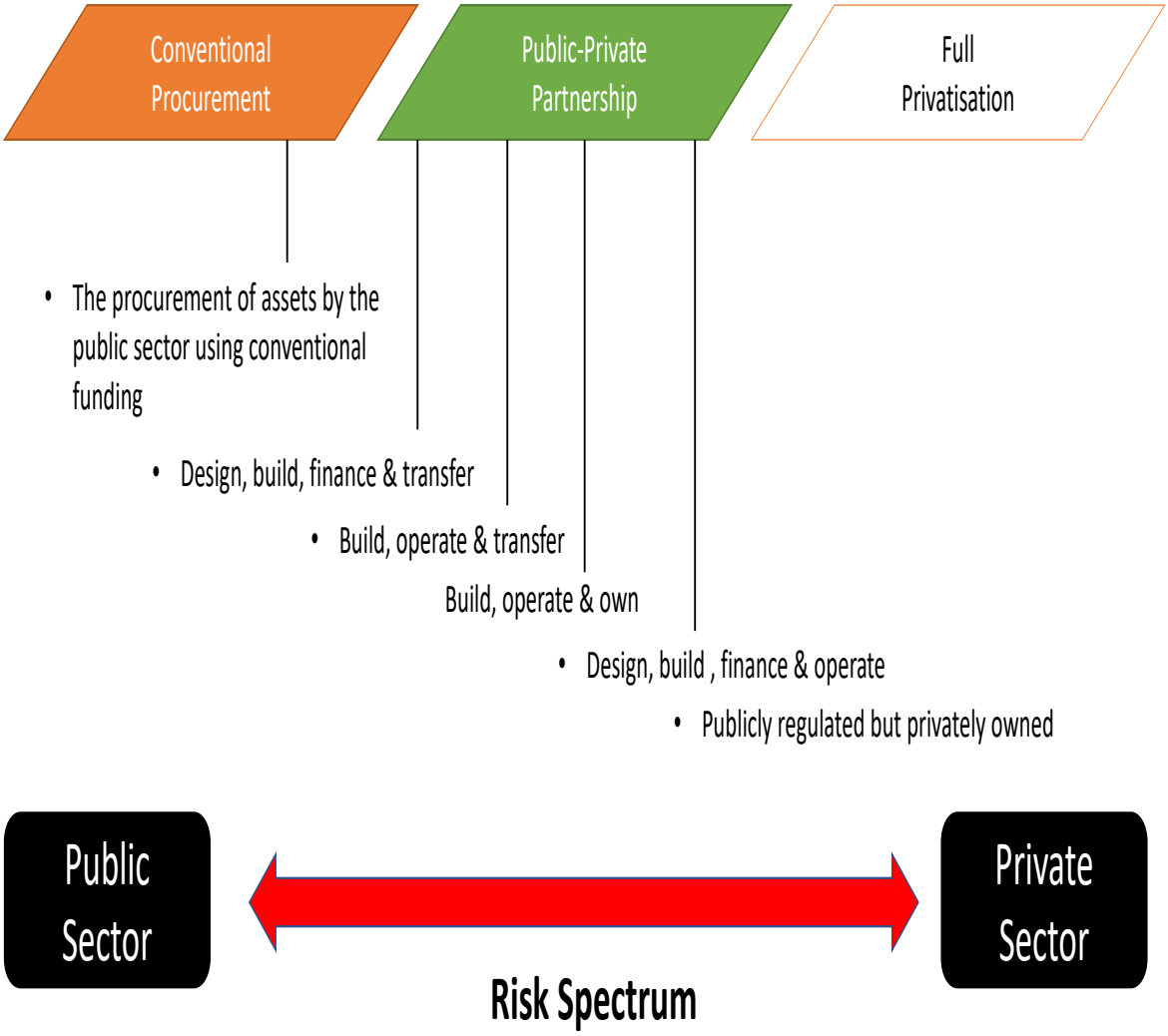
Source: ICRC Nigeria

Appendix 14: Contractual Structure of a Public-Private Partnership



Source: ICRC Nigeria

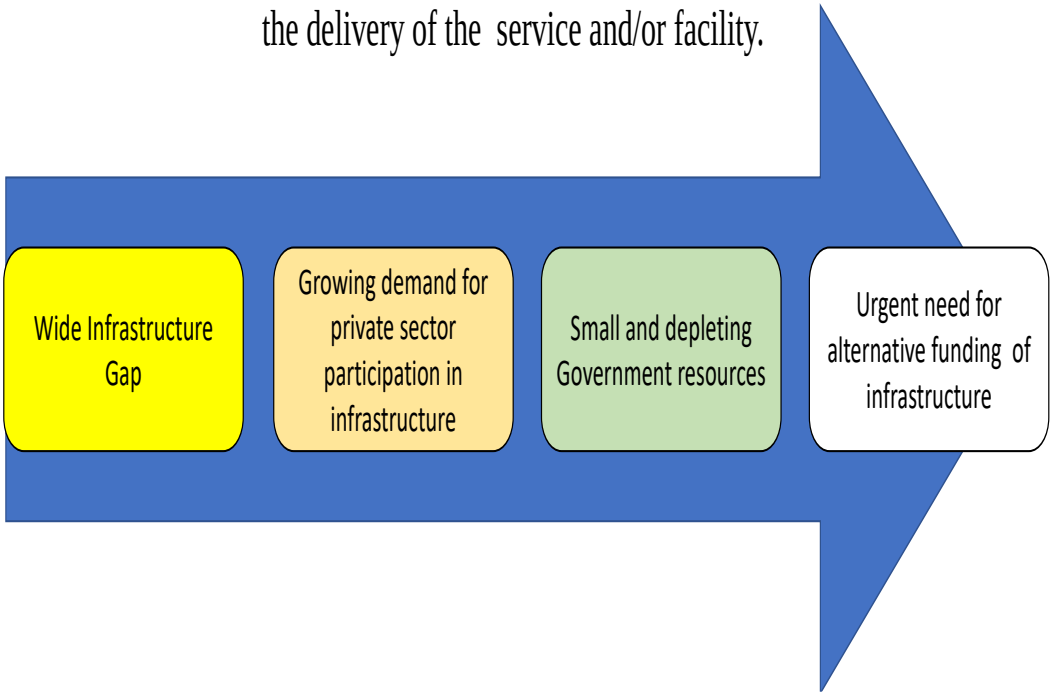
Appendix 15: Public-Private Partnership as a Balance Between State Ownership and Privatisation



Source: Author

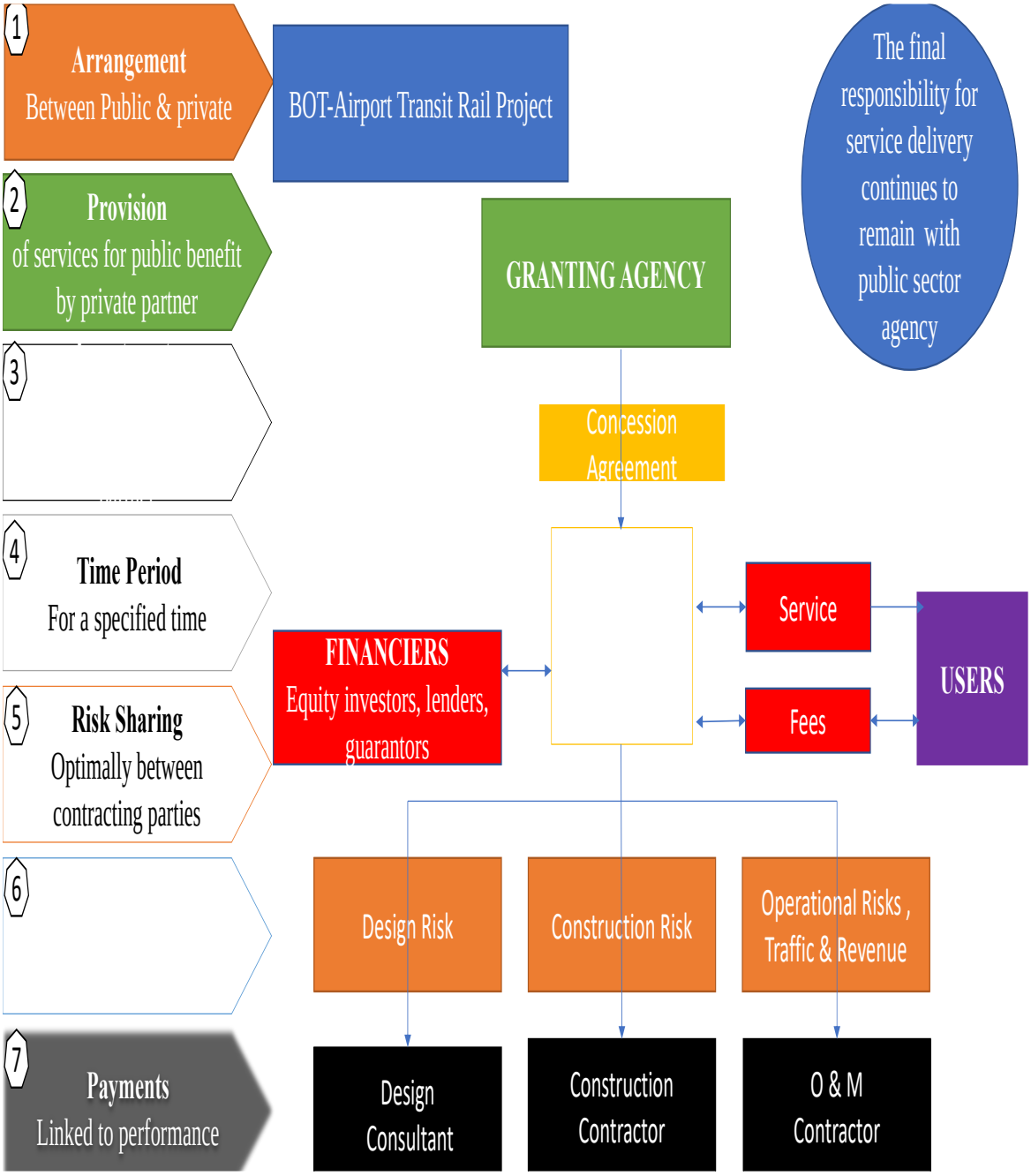
Appendix 16: Public-Private Partnership at a Glance

A Public-Private Partnership is a **contractual agreement** between a public agency (federal, state or local) and a **private sector entity**. Through this agreement, the **skills and assets** of each sector (public and private) **are shared** in delivering a service or facility for the use of the general public. In addition to the sharing of resources, **each party shares in the risks and rewards** potential in the delivery of the service and/or facility.



Source: Author

Appendix 17: Seven Essential Conditions that Define a Public-Private Partnership



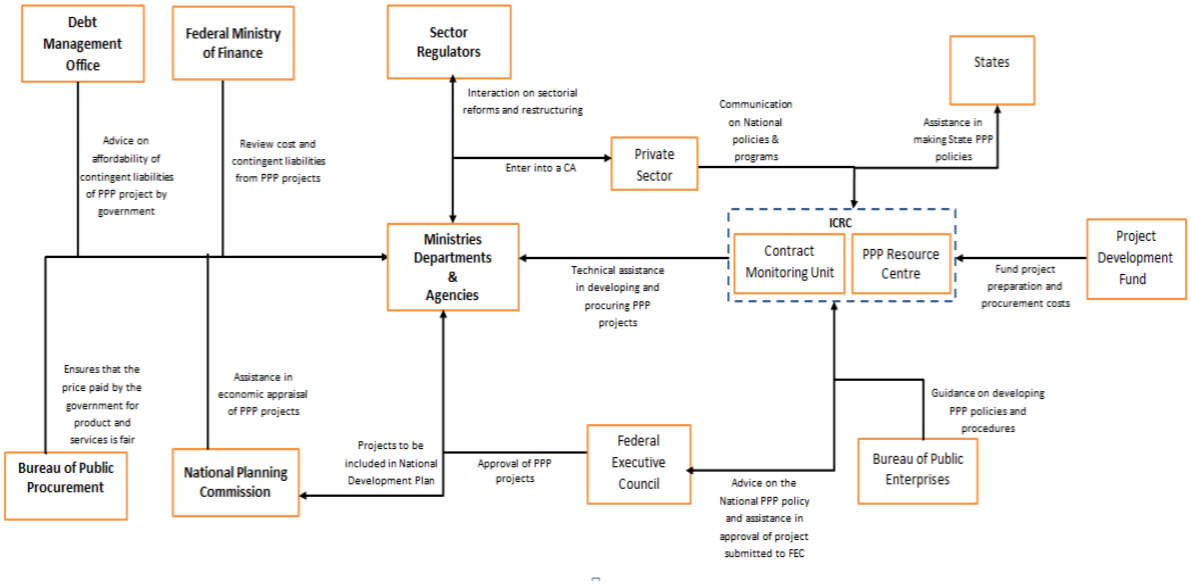
Source: ICRC Nigeria

Appendix 18: Public-Private Partnership Differentiated from Traditional Public Procurement

	Conventional public procurement	PPP/Concession contacts
Definitions	Supply, works, or service as defined by public authority.	Private concessionaire creates facility and service on the basis of a negotiated agreement between public private sectors
Main characteristics	Single objective Short term No link to operation No public project delegation • Public authority direct operation • No prior financing, co-financing or project financing • No entrepreneurial investment • No project design freedom • Contract does not deal with service (secondary contract) • Entrepreneur is not project manager • No management freedom • No long-term occupancy of public property	Multiple objectives Long term Linked to service management Public mission assignment • Operation directed by concessionaire • Financing, co-financing, mission financing by concessionaire • Investment by concessionaire • Project/service design freedom • Contract deals with service needed by public authority ("main contract") • Concessionaire is project manager • Concessionaire is free to manage contract • Generally long-term occupancy

Source: ICRC

Appendix 19: Nigerian Federal Institutional Framework for Public Private Partnership



Source: Jeffrey Delmon

Appendix 20: Steps for a Solicited PPP Project in Nigeria

INFRASTRUCTURE CONCESSION REGULATORY COMMISSION
Plot 1270 Ayangba Street Area 11 Garki Abuja, Nigeria; Tel: +234- 09-4604900.;
Email: info@icrc.gov.ng

A SOLICITED PPP Procurement over Federal Government Infrastructure would follow the following steps:

1. **PPP Project Identification Phase**

- Relevant Ministry, Department or Agency **(MDA)** will prioritize its projects and identify those to be developed through PPP. MDA would then prepare and submit a **Project Concept Note** to the Commission for assessment.
- If the Commission's assessment finds the project eligible for delivery through PPP, the Commission will advise MDA to begin Project Development. The MDA will constitute a Ministerial Project Steering Committee and a Project Delivery Team for the Project.
- The Commission will annually develop an eligible pipeline of PPP projects for **Approval** by the **Federal Executive Council** (FEC)

2. **PPP Project Development and Preparation Phase**

- Where MDA has no internal capacity to prepare an **Outline Business Case**[1] (OBC) for the project, the MDA shall engage a **Transaction Adviser** (TA) through a competitive bidding process as required under the Public Procurement Act of 2007, to produce the OBC. The TA will also guide the MDA through the entire transaction until an agreement is signed between parties.
- The MDA would thereafter forward the OBC to the Commission for **review**. The Commission would issue an **OBC Certificate of Compliance** to the MDA or decline issuance and advise the MDA with reasons.
- The Commission would consult the Federal Ministry of Finance **(FMoF)** in order to identify and appropriately handle any risk and contingent liabilities issues that may arise from the project.

3. **PPP Procurement Phase**

- If the project is approved by FEC, the MDA would commence a **procurement process** leading to the emergence of a preferred **PPP Project Proponent**.
- **Negotiations** would thereafter ensue, leading to the conclusion of a **Full Business Case** (FBC)[2] to be submitted to the Commission for **review**. The Commission would thereafter issue an FBC Certificate of Compliance to the MDA or decline issuance and advise the MDA with reasons.
- The MDA would submit the FBC along with the Commission's Certificate of Compliance to **FEC** for **Approval**. If FEC approves the FBC, the PPP contract between the MDA and the preferred **PPP Project Proponent** will be signed after which the Commission will thereafter **take custody** of the contract as required under the Section 20 of the Infrastructure Concession Regulatory Commission (Establishment Etc) Act 2005 (The Act).

4. **PPP Implementation Phase**

- Eventually, for the project to take off, the preferred **PPP Project Proponent** must achieve **Financial Close.**[3]
- The MDA is required under Section 12 of the Act to supervise the project diligently. On the other hand the Commission and the MDA are required, under Section 10 of the Act, to conduct regular joint **Inspections** of the Project until the end of the contract.

---

[1] Outline Business Case. A document that aims to establish the need for the project and to outline parameters and scope, including cost and bankability demonstration.
[2] Full Business Case: A document prepared by the MDA's TA prior to financial close and award of contract which provides all the information needed to support a decision to award a contract and commit actual funding, as well as provide a basis for the necessary project management, monitoring evaluation and benefits realization.
[3] Financial Close: The time when the financial documentation and covenants have been executed with lenders to the project, and condition precedent have been satisfied or waived . it is now permissible to draw money for project execution.

ICRC/PPP/Process June 2017

Source: ICRC

Appendix 21: 12-Step PPP Process in Nigeria

THE PRESIDENCY

INFRASTRUCTURE CONCESSION REGULATORY COMMISSION

Plot 1270 Ayangba Street Area 11 Garki Abuja, Nigeria; Tel: +234- 09-4604900.;
email: info@icrc.gov.ng

A PPP over Federal Government Infrastructure would **typically** follow the Phases and steps below:

PPP Project Identification Phase

1. Project identification by Ministries, Departments and Agencies **(MDA)**
2. MDA's should involve and engage with the Infrastructure Concession Regulatory Commission (ICRC) prior to commencing PPP to ensure viability and bankability of proposed projects.
3. MDA's should consult and engage with the Federal Ministry of Finance **(FMoF)** prior to commencing PPP projects, in order to minimize the risk and contingent liabilities arising from such projects.

PPP Project Development and Preparation Phase

4. A **Transaction Adviser** (TA) would be engaged by the MDA through competitive bidding process as required under the Public Procurement Act of 2007, to produce the report that would show the bankability of the project. This report is called an **Outline Business Case** (OBC)[1]
5. The MDA would thereafter forward the OBC to the ICRC for **review.** Subject to assessment, ICRC would issue an OBC Certificate of Compliance to the MDA or decline issuance and advise the MDA accordingly.
6. The MDA would then submit the OBC along with ICRC OBC Certificate of Compliance to the **Federal Executive Council** (FEC) through the line Minister for **Approval.**

PPP Procurement Phase

7. If the project is approved by FEC, the MDA's TA would commence a **procurement process** leading to a competitive bidding process from which a preferred **PPP Project Proponent (Investor)** will emerge.
8. **Negotiations** would thereafter ensue, leading to the conclusion of a **Full Business Case** (FBC)[2] document and submission of the FBC to ICRC for **review.** Subject to assessment, ICRC would issue an FBC Certificate of Compliance to the MDA or decline issuance and advise the MDA accordingly.
9. The MDA would again submit the FBC along with the ICRC Certificate of Compliance to **FEC** through the line Minister, for **Approval.**
10. If the FBC is approved by FEC, this would be followed by the signing of a contract between the MDA and the preferred **PPP Project Proponent (Investor).** ICRC will thereafter **take custody** of the contract as required under the Section 20 of the ICRC Act.

PPP Implementation Phase

11. Eventually, for the project to take off, the preferred **PPP Project Proponent (Investor)** must achieve **Financial Close**[3]
12. The MDA is required under Section 12 of the Act to supervise the project diligently. On the other hand the ICRC and the MDA are required, under Section 10 of the Act, to conduct regular joint **Inspections** of the Project until the end of the contract.

---

1. Outline Business Case: A document prepared by the MDA's TA that aims to establish the need for the project and its outline parameters and scope, including costs and bankability demonstration.
2. Full Business Case: A document prepared by the MDA's TA prior to financial closure and award of contract, which provides all the information needed to support a decision to award a contract and commit actual funding, as well as provide a basis for the necessary project management, monitoring evaluation and benefits realization.
3. Financial Close: The time when the financial documentation and covenants have been executed with lenders to the project, and conditions precedent have been satisfied or waived. It is now permissible to draw money for project execution.

ICRC/PPP/Process/December 2015

Source: ICRC

Appendix 22: Key PPP Drivers and Enablers Proposed by the European PPP Survey 2001 - D & P

Drivers	Enablers
• Financial need, e.g. budget deficit • Ageing or poor infrastructure • Growing demands or expectations on public sector services • Search for greater efficiency and creativity • Desire to introduce competition • Shortage of domestic experience or skills • Desire to educate national contractors and remain competitive • Bandwagon effect	• Political framework: stability, explicit political will or commitment, e.g. a dedicated unit, ability to push schemes through, creative and willing local government • Legal framework: no roadblocks, and documentation not excessively complicated • Public acceptance: acceptance of private sector involvement and specific impacts, e.g. environmental impact of new roads • Quality practitioners: good quality, experienced project sponsors and lenders • Readily available finance: Including EU and EIB funding in some cases; mature or sophisticate banking sector and capital markets culture

Appendix 23: Appendix 24: Constraints to Infrastructure Public-Private Partnerships as Identified by Young

Constraints	Implications
Lack of acceptability to PPPs	• Project unduly stalled • Difficulty to structure cost reflective tariffs; may involve subsidy elements
Lack of clear policy statement	• PPP programme do not get off the ground • Lack of understanding on the use of PPPs
Poor capacity of the public sector	• Difficulties and delays in PPP transactions • Inability to negotiate and communicate effectively with the private sector; difficulty in resolving conflicts
Inappropriate enabling environment	• Lack of private investor/developer confidence
High cost of project and development	• Private developers deterred from developing projects • Few bidders
Absence of long-term debt	• Lack of investment in infrastructure
Lack of affordability	• Requirement of government subsidies, which can have alternative uses as well.
Small size of economy/sector	• 'Unbankable' projects given size is below efficient size

Appendix 24: Summary of Contract Management Framework for Public-Private Partnership

PPP Life Cycle Phase	**Key Functions**		
	Service Management	Relationship Management	Contract Management
PPP Inception and feasibility	Identify and specify - Service delivery specifications - Affordability limit - PSC/PPP and VfM benchmark - Risk allocation framework	Undertake the following task - Appoint the project officer & Project team - Decide on project type & procurement method	Establish following systems and processes for -Document tracking & management -Financial management
PPP Procurement	Develop and prepare -Performance management plan -Payment mechanism -Risk management plan	Undertake the following task -Develop the relationship management plan -Identify and establish the PPP contract management team -Prepare the PPP contract management plan	Develop and prepare the PPP contract management plan
PPP Development	Establish, monitor and manage -Risk control procedures -Performance management systems -Progress of project towards completion	Establish and implement -Relationship management -Transition management plan -Change management measures	Establish procedures and systems -Financial administration -PPP contract maintenance -Variation management -Recording penalties -Updating the PPP contract management manual
PPP Delivery	Monitor and manage -Risk -Performance in relation to standard specified -variations	Undertake the following tasks -Review and revise partnerships -Commission independent reviews Review and revise PPP contract management plan	Review, monitor and update -Financial administration -PPP contract maintenance -Variation management -Recording penalties

			-PPP contract management manual
Exit	Review and assess -Deliverables -VfM -Quality of innovation Identify means of service delivery through -MDA -Contract extension -New PPP project Organise post implementation review	Undertake the following tasks -Manage change -Organise closure -Record the lessons of the PPP project	Implement and monitor -Handover procedures -Transition to new/alternative service delivery

Appendix 25: Preliminary Assessment Form for Public-Private Partnership in Nigeria

SN	Particulars	Details (To be filled in by the MDA)
1	Project name	Provide the name of the project
2	MDA name	Provide the name of the MDA acting as procuring entity
3	Brief description of the project	Provide a description of the project including location, capacity, size etc.
4	Project being implemented under which MDA	Provide the line ministry under which the project is implemented
5	Objective of the project and expected outcomes	The objectives for pursuing this project and the outcomes expected are to be provided here
6	Technical feasibility	The MDA's preliminary view on the technical feasibility of the project. Successful precedent of similar projects may be included here
7	Legal framework	The MDA's view on the legal framework on the implementation of the project
8	Project impact and suitability	The MDA's preliminary view on the likely impact of the project on the environment and community as well as social acceptability and public benefits of the project. Long-term impact of on the goals and position of the MDA. Please add more details as an annexure to this form
9	Brief description of social and community requirements	Please add more details as an annexure to this form
10	Estimated capital expenditure	This should be a preliminary estimate and need not be a detailed calculation.
11	Estimated O & M	This should be a preliminary estimate and need not be a detailed calculation. The projected O & M expenditure over the asset life should be discounted to arrive at the present value
12	Estimated investment	Summation of capital expenditure and present value of O & M expenditure
13	Revenue generating potential	State the various sources of revenues for this project. If available, also include the preliminary annual expected revenues
14	Proposed means of financing	State the various means of financing the project, indicative of proportions and amount

source	Proportion (%)	Amount (Naira Mn)
Private sector		
MDA		
Lagos State Government		
Any other (specify)		
Total		

SN	Particulars	Details (To be filled in by the MDA)

15	Estimated project IRR (Internal rate of return) where developed	If estimation of returns is very difficult at this stage then, do not include at this stage
16	Key risks envisaged	The key risks identified for this project should be provided under this section
17	Does the preliminary assessment show that the project is suitable for PPP	Reasons and necessity for involving private sector in the project and analysis of suitability of alternative models of project delivery. Roles of MDA and private sector
18	Estimated project development expenses (naira)	

Signature and seal
Name of the authorised signatory:
Designation of the authorised signatory:
Name of the MDA:

Date:

Appendix 26: Feasibility Checklist

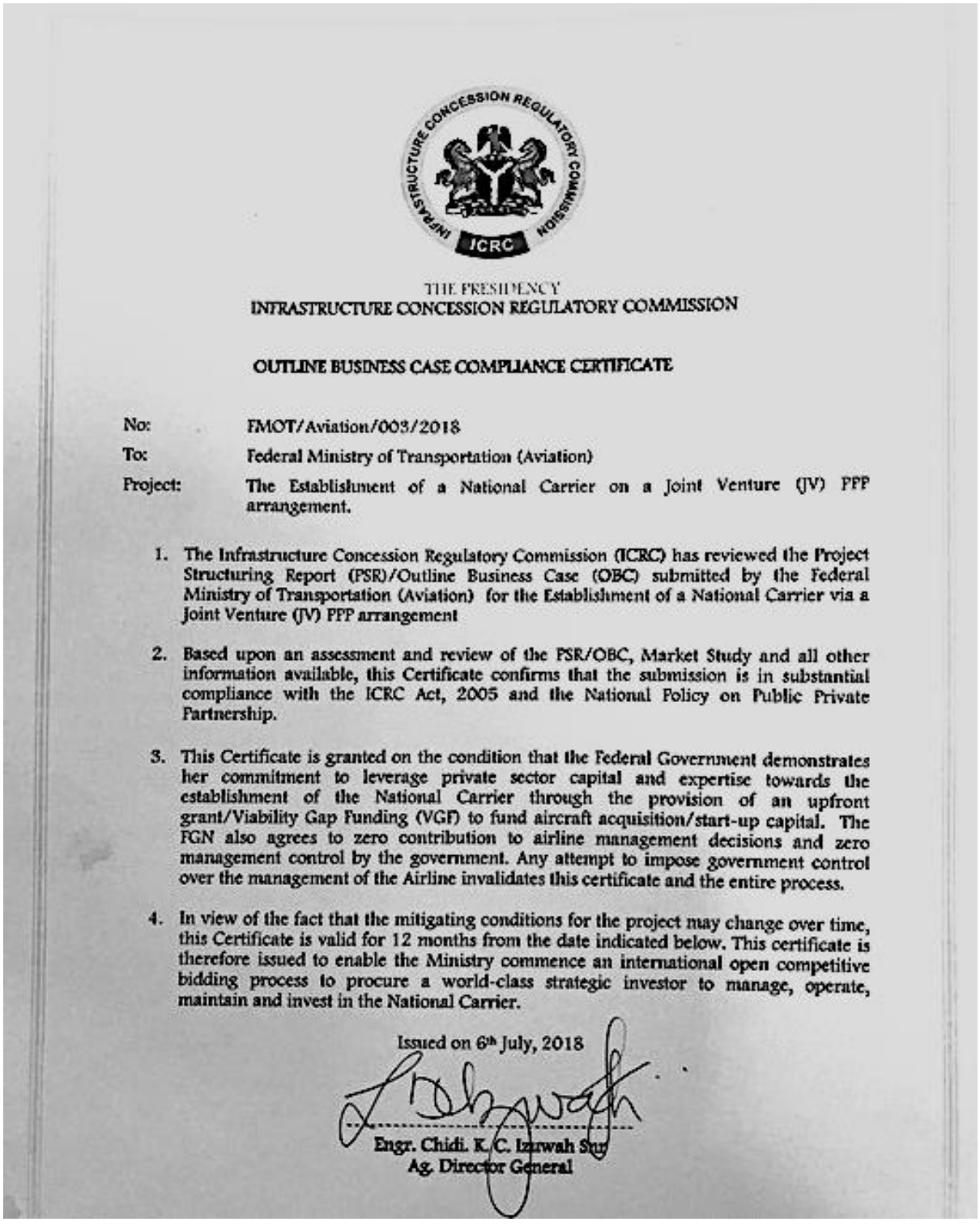
SN	(Tick "√" the applicable box)	Provided	Not Provided	Not Applicable
1	General			
1.1	Name of the project			
1.2	Type of PPP (BOT, BOOT etc.)			
1.3	Location (Province/District/Town)			
1.4	Responsible Ministry/Department			
2	Project Description			
2.1	Brief description of the project			
2.2	Justification for the project			
2.3	Possible alternatives, if any			
2.4	Estimated capital costs with break-up under major heads of expenditure also indicate the underlying assumptions			
2.5	Phasing of investment (if required)			
3	Financing Arrangements			
3.1	Sources of financing (equity, debt. Mezzanine capital etc.)			
3.2	Indicate the revenue streams of the project (annual flows over project life). Also indicate underlying assumptions			
3.3	Indicate the net present value (NPV) of revenue streams where appropriate			
3.4	Who will fix the tariff/user charges? Please specify in detail			
3.5	Have any financial institutions been approached? If yes, their response may be indicated			
4	IRR			
4.1	Economic IRR (if computed)			
4.2	Financial IRR (project and equity), indicating various assumptions			
5	Clearance			
5.1	Status of environmental clearances			
5.2	Clearance required from the MDA			
5.3	Other support required from MDA			
6	Federal and/or State Government Support			
6.1	Viability Gap Funding/capital grant or availability payment support if required			
6.2	Federal Government of Nigeria guarantees being sought, if any			
7	Concession Agreement			
7.1	Heads of terms of the proposed concession agreement			
8	Criteria for shortlisting RFQ stage			
8.1	Indicate the criteria or shortlisting			

Appendix 27: Summary of Pension Assets in Nigeria as at March 2018

SUMMARY OF PENSION FUND ASSETS AS AT 31 MARCH 2018						
ASSET CLASS	AES N' Million	CPFAs N' Million	RSA ACTIVE FUND N' Million	RSA RETIREE FUND N' Million	TOTAL PENSION FUND ASSETS N' Million	Weight %
Domestic Ordinary Shares	95,726.89	46,894.20	584,776.28	7,118.32	734,515.69	**9.25%**
Foreign Ordinary Shares	0.00	60,805.94	0.00	0.00	60,805.94	**0.77%**
FGN Securities:	**572,268.31**	**533,283.86**	**4,027,637.95**	**456,426.91**	**5,589,617.03**	**70.37%**
FGN Bonds	366,088.32	336,513.19	2,875,948.66	282,529.72	3,861,079.88	**48.61%**
Treasury Bills	206,180.00	196,373.18	1,084,887.44	171,718.88	1,659,159.50	**20.89%**
Agency Bonds (NMRC & FMBN)	0.00	285.19	5,122.32	388.49	5,796.00	**0.07%**
Sukuk Bonds	0.00	112.30	53,999.05	1,453.90	55,565.25	**0.70%**
Green Bonds	0.00	0.00	7,680.49	335.91	8,016.40	**0.10%**
State Govt. Securities	14,782.36	16,918.01	114,328.69	15,397.66	161,426.72	**2.03%**
Corporate Debt Securities	**32,181.64**	**150,583.33**	**170,488.34**	**37,590.75**	**390,844.06**	**4.92%**
Corporate Bonds	32,181.64	150,583.33	164,731.45	37,280.60	384,777.02	**4.84%**
Corporate Infrastructure Bonds	0.00	0.00	5,756.89	310.15	6,067.04	**0.08%**
Supra-National Bonds	0.00	687.28	4,047.28	2,633.83	7,368.39	**0.09%**
Local Money Market Securities:	**66,874.79**	**46,463.91**	**468,089.58**	**70,305.56**	**651,733.83**	**8.20%**
Banks	59,507.93	45,045.23	411,147.82	61,899.17	577,600.14	**7.27%**
Commercial Papers	7,366.86	1,418.69	56,941.76	8,406.39	74,133.69	**0.93%**
Foreign Money Market Securities	0.00	0.00	0.00	0.00	0.00	**0.00%**
Mutual Funds:	**2,192.67**	**2,465.88**	**14,565.68**	**0.00**	**19,224.23**	**0.24%**
Open/Close-End Funds	2,192.58	1,802.47	5,459.91	0.00	9,454.96	**0.12%**
Reits	0.09	663.41	9,105.77	0.00	9,769.27	**0.12%**
Real Estate Properties	93,533.32	125,708.93	0.00	0.00	219,242.25	**2.76%**
Private Equity Fund	0.00	13,261.31	14,324.77	0.00	27,586.08	**0.35%**
Infrastructure Fund	412.80	1,854.27	5,722.68	0.00	7,989.75	**0.10%**
Cash & Other Assets	3,738.14	62,000.39	2,454.74	4,960.60	73,153.86	**0.92%**
Total Pension Asset	**881,710.92**	**1,060,927.32**	**5,406,435.99**	**594,433.62**	**7,943,507.85**	**100%**

Source: National Pension Commission

Appendix 28: Outline Business Case Compliance for Nigeria Air



THE PRESIDENCY
INFRASTRUCTURE CONCESSION REGULATORY COMMISSION

OUTLINE BUSINESS CASE COMPLIANCE CERTIFICATE

No: FMOT/Aviation/003/2018

To: Federal Ministry of Transportation (Aviation)

Project: The Establishment of a National Carrier on a Joint Venture (JV) PPP arrangement.

1. The Infrastructure Concession Regulatory Commission (ICRC) has reviewed the Project Structuring Report (PSR)/Outline Business Case (OBC) submitted by the Federal Ministry of Transportation (Aviation) for the Establishment of a National Carrier via a Joint Venture (JV) PPP arrangement

2. Based upon an assessment and review of the PSR/OBC, Market Study and all other information available, this Certificate confirms that the submission is in substantial compliance with the ICRC Act, 2005 and the National Policy on Public Private Partnership.

3. This Certificate is granted on the condition that the Federal Government demonstrates her commitment to leverage private sector capital and expertise towards the establishment of the National Carrier through the provision of an upfront grant/Viability Gap Funding (VGF) to fund aircraft acquisition/start-up capital. The FGN also agrees to zero contribution to airline management decisions and zero management control by the government. Any attempt to impose government control over the management of the Airline invalidates this certificate and the entire process.

4. In view of the fact that the mitigating conditions for the project may change over time, this Certificate is valid for 12 months from the date indicated below. This certificate is therefore issued to enable the Ministry commence an international open competitive bidding process to procure a world-class strategic investor to manage, operate, maintain and invest in the National Carrier.

Issued on 6th July, 2018

Engr. Chidi. K. C. Izuwah Stu
Ag. Director General

Source: ICRC Nigeria