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Public-Private Partnerships in Nigeria: The Journey so Far

Dr. George Nwangwu*

Abstract
The policy pronouncements of the Nigerian government over the last two decades clearly evidences the intention of the country to use Public-Private Partnerships (PPPs) for the delivery of much needed infrastructure. However, despite these policy pronouncements and taking steps through the enactment of the Infrastructure Concession Regulatory Commission (ICRC) Act to facilitate PPPs, only a few PPP projects have so far been consummated. The results therefore appear to be at odds with government's declared policy intention. This paper assesses why this is the case by taking stock of how PPPs have fared thus far in Nigeria. It discusses some of the problems bedevilling the use of PPPs for infrastructure delivery in Nigeria and proffers solutions.

Introduction
The state of Nigeria's infrastructure is appalling. Electric power is notoriously poor with an installed capacity of about 12,500 MW and a peak capacity of between 3,500MW to 5,000MW.[1] In fact, Nigeria's power sector operational efficiency and cost recovery has been amongst the worst in Africa, supplying only about half of what is required with subsequent social costs of about 3.7% of GDP.[2] In the water and sanitation sectors, there is very low and declining levels of piped water coverage.[3] The Roads are in very poor state, with only 27% of the federal road network in good condition.[4] Rail network is poor and freight network in constant decline.[5]In many urban areas, hospitals, water supply, sewerage and waste disposal infrastructure, to mention a few, are virtually non-existent.[6] Maintenance of the partially existing ones have also been poor. All these are being compounded by the twin problems of rapid population growth and urbanization. According to the World Bank, addressing Nigeria's infrastructure challenge will require sustained expenditure of almost $14.3 billion a year over the next decade or about 12 % of the country's GDP. [7] The National Integrated Infrastructure Master Plan (NIIMP) puts the required expenditure figure at about $3 trillion over 30 years to meet the country's aspirations.[8]

*Research Fellow, African Procurement Law Unit, Department of Mercantile Law, Stellenbosch University, South Africa and Honorary Senior Research Associate, The Bartlett School of Construction & Project Management, University College London, London, United Kingdom. gnwangwu@gmail.com

[1] Get Invest, 'Nigeria Energy Sector' (Get Invest)<https://www.get-invest.eu/market-information/nigeria/energy-sector/>Accessed June 3 2020.

[2] Foster V. and Pushak N. 'Nigeria's Infrastructure: A Continental Perspective' Policy Research Working Paper No. 5686, Pg. 1-56.

[3] *Ibid*.

[4] National Planning Commission, 'National Integrated Infrastructure Master Plan (NIIMP)' Nigeria 2015.

[5] PWC, 'Africa Gearing Up' (PWC, 2019)<https://www.pwc.com/gx/en/transportation-logistics/publications/africa-infrastructure-investment/assets/nigeria.pdf>Accessed June 3, 2020.

[6] *Ibid*.

[7] Foster V. and Pushak N. (n 2).

[8] National Planning Commission (n 4).

The fact that there is a positive correlation between investment in infrastructure and economic growth is well noted.[9] Infrastructure not only improves the quality of life of citizens but also has a multiplier effect on employment and productivity.[10] Thus Nigeria's limited investment in infrastructure has obviously adversely affected the country's growth. This also explains why various administrations in the country have made investment in infrastructure a priority. However, most administrations over the years have relied more on budgetary appropriations and excessive borrowing as opposed to private sector investment in providing infrastructure to the citizens. Nevertheless, the result is that despite the country's mounting debt levels, Nigeria has still not been able to narrow its availability infrastructure gap. The long-touted solution to Nigeria's infrastructure problem has been Public- Private Partnerships (PPPs) and successive administrations have voiced PPPs as their preferred policy direction, albeit with very minimal concrete traction in practice.

PPP as a concept is not new in Nigeria as mentioned above, it has been the policy choice of successive Nigerian governments. The deference to private sector finance for infrastructure has been a recurring theme in Nigeria's economic planning documents for years[11] and was finally made concrete with the passage of the Infrastructure Concession Regulatory Commission Act in 2005.[12] However, there have been very few PPP projects delivered over the years. The few transactions that have been consummated so far are mainly in the transport sector including a new domestic airport terminal in Lagos, a new toll road in the Lekki area of Lagos and a few brownfield concessions. Joint ventures and BOT arrangements appear to be the most common PPP delivery mechanism used in infrastructure projects in Nigeria.[13] However, concessions and Repair Operate Transfer (ROT) have also been prevalent.[14]

There are a number of other projects currently in the pipeline like the light rail project for the Federal Capital Territory and Lagos and the concession of major road networks around the country.[15] There is also the muted suggestion that the existing railway network will be concessioned in the future.[16] In other sectors like housing, the Federal Capital Administration in Abuja has concluded plans to concession the provision of infrastructure in certain areas of the

[9]Esfahani H.S and Ramirez M.T 'Institutions, Infrastructure and Economic Growth' Journal of Development Economics 70(2003) 443—477; Sanchez-Robles B., 'Infrastructure Investment and Growth: Some empirical evidence' (1998) 16 Contemporary Economic Policy 98-108; Easterly W and Levine R., 'Africa's Growth Tragedy: Policies and Economic Divisions' (1997) 112 (4) Quarterly Journal of Economics 1203-1250.

[10] Josh Bivens 'The Potential Macroeconomic Benefits from Increasing Infrastructure Investment' (2017) Economic Policy Institute.

[11] From the 4th National Development Plan onwards. See the Federal Ministry of National Planning, Fourth National Development Plan, 1981-1985, Federal Ministry of Planning, Lagos, Nigeria, 1981.

[12] Infrastructure Concession Regulatory Commission (Establishment etc.) Act Cap 125A LFN 2020

[13]Ibrahim A.D *et. al* (2006), 'The analysis and allocation of risks in public private partnerships in infrastructure projects in Nigeria' (2006) 11 3 Journal of Financial Management of Property and Construction.

[14] The Ports, power assets and the grain silos were all concessioned under ROT basis.

[15] These projects are listed on the ICRC Website but are not concrete yet.

[16] No procurement process has been commenced so far in this sector despite so many years of touting PPPs as a viable option.

capital city to some investors and there are also ongoing deals being negotiated in the power sector.[17]

Of the few projects that have been done, a number of them particularly in the transport sector like the Lekki toll road and the MMA 2 Airport in Lagos, have been delivered with minimal success, with both projects going through stress. The former has been cancelled and taken over by the state government while the latter is the subject of multiple litigations.[18] The unbundling and concession of the hitherto government owned power assets was supposed to be the landmark PPP transaction. However, these transactions are also undergoing serious issues and have not been able to improve power supply in the country. There have been minor concessions in the agriculture sector and a number of unsolicited proposals relating to very small projects.[19] Apart from these transactions mentioned above, nothing much has happened over the years. These results could not have been what was anticipated by successive governments which had made PPPs the cornerstone of their infrastructure finance policies.

It is based on the forgoing, that this paper looks at how PPPs have fared over the last two decades in Nigeria. The essence of this study is to understand the issues that have led to the delivery of only very few projects in the country. The paper also examines why the few projects that have been delivered thus far are undergoing stress. The paper then proffers solutions that will ensure that more projects be concluded through PPPs in Nigeria and that these new projects would also be of far better quality than what has so far been delivered. The subsequent sections of this paper looks at the definition and characteristics of PPPs, the history of PPPs, the critical successes factors required for PPPs to thrive in Nigeria, the issues with PPPs in Nigeria and finally a conclusion.

What are PPPs

It is important to define PPPs at least within the Nigerian context before venturing further into the main body of the paper. This is because there is generally no consensus on what amounts to PPPs as definitions and understanding of the concept differ from institution to institution and from country to country. There are wide and narrow definitions of PPPs. There are definitions of the concept that appear to include as PPPs, all transactions where there is some form of collaboration between the private and public sectors. Others have tended to be more restrictive, emphasising the need for greater sharing of responsibilities and rewards as a criterion for labelling a transaction as a PPP. For example, while some countries have very wide and encompassing definitions of the

[17] Most of the hitherto Government owned power assets are being completely divested through privatization. The only assets to be concessioned are the hydro power plants.

[18] See for example Bi-Courtney Limited v. Attorney General of the Federation (unreported) Suit No. FHC/ABJ/CS/50/2009; Ojemaie Investments Limited (claiming as Landlords to Arik Air) v. Bi-Courtney Limited (unreported) Suit No. CA/A/141/M/2009; SafiyanuDauda Mohammed and National Union of Air Transport Services, Air Transport Services Senior Staff Association of Nigeria (ATSSAN) v. Bi- Courtney Limited (This was an action filed by the workers union) (unreported) Suit No. CA/A/141/M/09 ; Arik Air v Bi-Courtney Limited; The Federal Airport Authority of Nigeria v. Bi-Courtney Limited & Anor. (2011) LPELR 19742 (CA) pg.1-57.

[19] A number of Agriculture Silos were recently concessioned by the Ministry of Agriculture and the Ministry of Interior has concessioned some aspects of their service delivery process.

concept including frameworks like privatisation and commercialisation as part of PPPs, a number of countries don't.[20]

The ICRC Act does not specifically define PPPs. Instead, the Act relates to the granting of concessions by public sector parties to private sector project proponents for "the financing, construction, operation or maintenance of infrastructure by whatever name called".[21] The scope of the Act appears to be very wide and the definition of "concession" under the Act further lays credence to this. Under the ICRC Act, concessions are defined 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 equipment and machinery for any infrastructure".[22] Following the Act, the National Policy on Public Private Partnerships (PPP) also embraces a wide characterisation of the concept. It provides that "PPPs includes a wide range of contractual arrangements between the public and private sectors."[23]

Despite the opaque definition of PPPs under official Nigerian legal and policy instruments, there are however a general understanding of the certain essential attributes that a PPP transaction should have in practice:

i. The relationship between the public and private sectors is based on a partnership, which means that risk is shared between both partners optimally as it is allocated to the party who is best able to manage it.

ii. The public sector procures specified outputs and outcomes of a service for the contract period whilst the private sector determines the required inputs to achieve the specified output and are given the freedom to introduce innovation into their design and development to reduce cost; There is thus an integration of design, construction, finance and maintenance and operation

iii. Payment for services is based on predetermined standards and performances

iv. PPP promotes a 'maintenance culture' where the private sector will be responsible for the long-term maintenance of the assets throughout the operational period agreed upon by the parties;

v. In some instances, there is an option for the transfer of the infrastructure asset back to the public sector at the end of the contract period.

[20] For example, a number of researchers from the United States make no distinction between PPPs and privatization. See for example, Dru Stevenson 'Privatization of State Administrative Services (2008) 68 4 Louisiana Law Review 1285.

[21] S.1 of the ICRC Act.

[22] S.36 of the ICRC Act.

[23] Infrastructure Concession Regulatory Commission, 'National Policy on Public- Private Partnership' The Presidency, Nigeria.

vi. PPP involves a Whole Life Cycle Costing ("WLCC") whereby PPP projects are usually awarded based on lowest total cost over the contract period compared to lowest construction cost under traditional procurement.[24]

Based on the following, a definition of PPPs may be offered for the purposes of this paper as "long term relationships between public sector agencies and private sector entities under which the responsibility for any or all of the combination of designing, financing, construction, management and operation of public infrastructure and utilities that were traditionally undertaken by the public sector are contractually shared and jointly undertaken by both the public and private sector, usually in proportion to the kind of risks each party can best carry".[25]

As in majority of countries, the main reason for the use of the PPPs for the delivery of infrastructure in Nigeria appears to be the need to attract alternative sources of finance to deliver public infrastructure.[26] There are however other benefits said to be inherent in the use of PPPs. For instance, the Netherlands has adopted PPP type structures primarily to promote an efficient procurement regime and reform its public sector.[27] Other reasons for adopting PPPs include claims that PPPs provide better value for money and reduces government's debt levels and better efficiency in providing and running infrastructure services. PPPs also allow the government to shed some risk and share them with the private sector. Politicians have also found PPPs to be more politically attractive forms than nationalization or privatization.[28]

While noting that not everyone agrees with the notion that PPPs have advantages over traditional procurement,[29] PPPs have continued to play an increased role in the provision of infrastructure across different sectors, becoming a global phenomenon. Sectors in which PPPs have been completed worldwide, include: Electric power generation and distribution, water and sanitation, refuse disposal, healthcare, education, airports facilities, prisons, transportation (railways, roads), technology systems, and housing to mention a few.

History of PPPs in Nigeria

Like mentioned above, the primary motivating factor for the drive to use PPPs in Nigeria appears to be paucity of funds. The Nigerian government simply realises that it would be unable to fund the country's infrastructure relying only on its own finances and therefore seeks other funding

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[24] Malaysian Public Private Guidelines (2009) PPP Unit, Prime Ministers Department Putrajaya (online) at http://www.ukas.gov.my/html/themes/miu/content/ppp_bi_131109.pdf Accessed on February 29, 2012.

[25] G. Nwangwu, 'The Legal Framework for Public-Private Partnerships (PPPs) In Nigeria: Untangling the Complex Web' (2012) 7 4 *European Procurement and Public Private Partnership Law Review* 268-277.

[26] Indeed, the first PPPs projects were done basically to bring private investments for public services. See Grimsey D and Lewis M.K., *Public Private Partnerships: The worldwide Revolution in Infrastructure Provision and Project Finance* (Edward Elgar, Cheltenham, 2004); Cheung, E. et al 'Reasons for implementing public Private Partnership Projects: Perspectives from Hong Kong, Australian and British practitioners,' (2009) 27 1 Journal *of Property Investment and Finance* 81-95.

[27] Harris S., 'Public Private Partnerships: Delivering Better Infrastructure Services,' (Working Paper) Inter-American Development Bank, Washington DC 3.

[28] For instance, Savas is of the opinion that privatisation and contracting out are expressions, which generate opposition quickly. See Savas E.S., *Privatization and Public- Private Partnerships* (New York: Chatham House 2000) 2.

[29] These claims have been vigorously challenged. See for instance Hall, D., *Public-Private Partnerships (PPPs) Summary Paper* (2008) A Report Commissioned by the European Federation of Public Service Unions (EPSU) 6. Can also be found (online) at http://www.epsu.org/IMG/pdf/PPPs-summary-011008.pdf Accessed February 21, 2012.

methods. It appears that other factors like improving efficiency in the delivery of public services or ensuring value for money in the financing of public infrastructure is secondary or even not considered. This conclusion is evident from the policy statements of various government officials and also from the manner in which PPP transactions are actually executed.[30]

Whilst the passage of the ICRC Act could be said to be the turning point in the history of PPPs in Nigeria, PPP like structures had long been deployed to deliver projects in Nigeria prior to the passage of the Act. Nigeria had gone through a privatization program spanning four decades.[31] This also included a reform program encompassing the liberalization and deregulation of the economy.[32] In essence, there was already a partially liberalized economic environment in place prior to the advent the ICRC Act. Therefore, PPP was seen as the natural progression from privatization. The transition was also made easier because PPPs did not carry "the ideological baggage" which burdened the privatization program. It was helpful that PPPs did not lead to the complete transfer of ownership of assets from the government to the private sector and so critics were naturally more comfortable with it.[33] A number of brownfield concessions had also been carried out under the privatisation programme.[34] The country also already had a growing crop of professionals within the public and private sectors who had a fair understanding of the mechanics of private sector finance for infrastructure. These professionals along with some expert advisers that were funded by multilateral institutions provided the much-needed local capacity for the delivery of PPP projects.[35]

Nigeria being a developing country, with very moderate capital budgets for infrastructure, an undeveloped capital market and not very robust private sector had anticipated that most of the investment in PPPs would come through foreign direct investment. This has not exactly been the case as majority of the investment in PPP projects were made by Nigerian companies and funded by Nigerian financial institutions. The problem however was that the Nigerian banks were not able to offer long tenure credit instruments and interest rates on loans were very high. These terms were not ideal for financing infrastructure which relies on very long-term finance and blended financial instruments. Some multilateral financial agencies also offered some support to some of the projects, funding feasibility studies and transaction advisory.[36]

Several of the country's economic policies have promoted the use of PPPs for the delivery of public infrastructure. The Vision 2020 Plan which is Nigeria's long-term plan designed to propel the country to the league of the top 20 economies of the world by 2020 promoted the use of PPPs as one of the instruments to achieve its target. According to the document: "one of the critical policy

[30] For instance, Government Ministers have only spoken about PPPs in the context of raising financing projects.

[31] The privatization programme of the Nigerian government is still ongoing, with various assets still listed for privatization under the Public Enterprises (Privatisation and Commercialisation) Act.

[32] This program was pursued through the Bureau of Private Partnership (BPE). Under this program over 200 transactions were concluded.

[33] This is consistent with the view that PPPs have sometimes been conceptualized as as a language game. See for example Hodge G. and Greve C. 'Public- Partnerships: Governance Scheme or Language Game?' Australian Journal of Public Administration, 69 (s1) S8-S22, April 2010.

[34] For example, the Ports were concessioned using the Landlord- Tenant Model; The Trade Fair Complex and the National Theatre were also concessioned.

[35] The World Bank and DFID particularly played a major role in the training of personnel.

[36] On March 17, 2011 the World Bank approved a loan of US$115m for the PPP initiative project aimed at helping increase private sector investment in PPP infrastructure in Nigeria.

priorities of government is the encouragement of private investments in infrastructure".[37] For the transport sector in particular, the Policy promoted the use of Build Operate Transfer (BOT) and Build Operate Own (BOO) as some of the models that can be used to finance the rail, road, water and air transport sectors.[38] The Yar'Adua administration's 7-Point Policy Agenda also hinged the success of the Policy on the use of PPPs.[39] Indeed, it was the same Yar'Adua administration that operationalised the ICRC Act, by constituting the governing board of the ICRC and thus ensuring the that the agency became operational.

The National Integrated Infrastructure Master Plan (NIIMP) produced under the Jonathan administration is Nigeria's blueprint for accelerated infrastructure development. The NIIMP took stock of the country's existing infrastructure and the volume of required investment to achieve the country's economic growth objectives. It pinpointed one of the critical enablers for achieving the country's aspirations as PPPs.[40] Under the NIIMP, PPPs are required to contribute between USD15-25 billion to financing the country's infrastructure to enable the country to meet its objectives. This will amount to approximately 6% of the country's total targeted infrastructure spend.[41] The NIIMP also realises that there are bottlenecks that limit attractiveness of private sector investment in Nigeria's infrastructure. Some of those bottlenecks listed by the document are (a) difficulty in accessing finance due to a lack of maturity in Nigeria's credit and venture capital market; (b) security concerns, corruption and other governance issues; (c) a lack of economic incentive in some sectors to encourage private sector investment; (d) inconsistency in enforcing policies and unpredictable regulatory regimes that limit investor ability to protect investments; (e) insufficient public sector capability to design and implement PPP projects.[42]

The NIIMP also recommends some measures to overcome these bottlenecks. These include:

a) The creation of an infrastructure project development facility to finance early project development activities so as to create a pipeline of bankable PPP projects.
b) Establish a dedicated, cash backed fund (Government Resource Fund) outside of the annual budgetary allocation process to finance governments contributions on infrastructure, involving the private sector.
c) Establish long term refinancing mechanisms aimed at refinancing short term infrastructure loans
d) Provide fiscal incentives such as exemptions from customs duties for equipment to be used for infrastructure development for selected infrastructure projects.[43]

Finally, the Buhari administration's Economic Recovery and Growth Plan (EPRG)also advocates for the use of PPPs. The EPRG acknowledges that economic recovery and transformative growth cannot be achieved by government alone. It therefore encourages that the government should

[37] National Planning Commission, Nigeria Vision 2020, The Presidency, December 2009
[38] National Planning Commission (n 37).
[39] See for example the Forward to the National Policy on Public-Private Partnership (n 23).
[40] National Planning Commission (n 4).
[41] National Planning Commission Plan (n 4).
[42] National Planning Commission (n 4).
[43] National Planning Commission (n 4).

harness the dynamism of businesses and the entrepreneurial nature of Nigerians.[44] The National Policy on Public Private Partnerships recognises that PPP is required to contribute to the massive investments required to remedy the significant infrastructure deficit which is holding back the country's development and economic growth.[45]

Critical Success Factors for Public- Private Partnerships in Nigeria.

This section looks at some of the critical success factors (CSFs) that have significant impact on PPP project success in Nigeria.[46] This is essential to diagnose the key drivers of the success of PPP projects. Also, an evaluation of how the PPP actors in Nigeria have managed these CFS would be a good indicator of where the problems lie with PPPs in Ni
geria. This brief survey of the literature on CSF will therefore help distil areas where the analysis in subsequent sections of this paper will focus.

Ogunsanmi identified the following CFS for PPPs in Nigeria: transparent and sound regulatory framework; comprehensive feasibility studies; appropriate risk allocation, commitment of public and private actors; strong private consortium and government guarantee.[47] An exploratory factor analysis employed by Sani identified seven CSFs: project feedback, leadership focus; risk allocation and economic policy; good governance; political support; short construction period; favourable socio-economic factors; developing much needed service.[48] Muhammad and Johar identified equitable risk allocation, stable political system, reputable developer as the CSFs for the delivery of public works in Nigeria.[49]Babatunde *et. al* identified nine CSFs: competitive procurement process, thorough and realistic assessment of costs and benefits, favourable framework, appropriate risk allocation, government involvement in providing guarantees, political support, stable macro-economic condition, sound economic policy, availability and suitable financial market.[50] According to Dada and Oladokun, the five main CSFs for PPPs in Nigeria are economic viability, appropriate risk allocation, sound financial package, favourable investment environment and reliable concessionaire with strong technical strength.[51]

From the analysis above, some of the recurring CSFs are: Legal and Institutional framework, reliable parties with strong technical strengths, risk management, good project governance, good project preparation, Finance and political support. The next section of this paper will evaluate how some of these factors have played out in practice in the use of PPPs for infrastructure development in Nigeria.

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[44] Ministry of Budget and National Planning, Economic Recovery and Growth Plan 2017.
[45] Infrastructure Concession Regulatory Commission (n 23)
[46]Tiong, R.L.K., Yeo, K.T., McCarthy S.C., 'Critical success factors in winning BOT contracts' (1992) 118 J. Constr. Eng. Manag 217–228.
[47]Ogunsanmi O.E., 'Critical Success Factors (CFS) Determining the Implementation of Public-Private Partnership Projects' (2013) 1 2 Covenant Journal of Research in the Built Environment 41-66.
[48] Sani A. O., 'Factors Determining the Success of Public-Partnership Projects in Nigeria' (2015) 16 2 Construction Economics and Building 42-55.
[49] Muhammad and Johar, 'Critical Success Factors of Public- Private Project: A Comparative Analysis of the Housing Sector Between Nigeria' (January, 2018) International Journal of Construction Management 1-13.
[50]Babatunde S.O, etal. 'Critical Success Factors in Public-Private Partnership (PPP) on Infrastructure Delivery in Nigeria' (2012) 10 3 Journal of Facilities management 212-225.
[51] Dada M. and Oladokun M., 'Critical Success Factors for Public Partnerships in Nigeria. A Perceptual Survey' Karter, C, Ogunlana, SO. and Kaka A. (Eds, pp.1-10), Transformation through Construction: Joint ER 2008.

Some of the Issues with PPPs in Nigeria

Based on the analysis of the CSFs carried out in the preceding section, this section takes a look at how some of the identified factors have operated in Nigeria. The following factors are considered: The legal and institutional framework for PPPs in Nigeria, Capacity building for PPPs; Risk management; Good project governance, political support and long-term finance for projects.

Legal and Institutional Framework

Nigeria operates a federal system of government where legislative powers are shared between the constituent units of government comprising the federal, the state and the local governments. The Constitution divides legislative power into 2 lists: the exclusive list and the concurrent list. Items on the exclusive list are preserved exclusively for the central government,[52] whilst both the federal and state governments may legislate on items listed in the concurrent list.[53] An inferred third, the residual list, is reserved exclusively for the state government.[54] The net effect of this distribution of power is that there are both federal and state legislations regulating PPPs in Nigeria and depending on the particular infrastructure which a private sector is involved in, it may deal with a particular state or both a state and the federal government and this may invariably determine which set of laws will regulate the transaction. For instance, certain types of infrastructure assets like roads and electric power on the concurrent list are owned and regulated either by the federal or state government.

Based on this distribution of legislative powers, the Federal Government and a number of states in the Federation have enacted specific laws regulating PPPs.[55] These laws operate along with other legislations that indirectly affect a potential PPP project within the country. Some of these laws are the different planning laws of the states of the federation, the multiple tax legislations and the general law of contract that is largely based on the received English law.[56] The Federal Government executes most of the large infrastructure projects in the country.

The legal framework at the federal level for PPPs in Nigeria comprises a confusing and conflicting web of regulations and policies.[57] Currently a potential PPP project may be regulated by either the Infrastructure Concession Regulatory Commission Act (the ICRC Act), the Public Enterprises (Privatisation and Commercialisation) Act or the Public Procurement Act.

The ICRC Act, which was enacted into law in 2005, provides the primary legal framework for private sector participation in infrastructure development in Nigeria and is the principal legislation for PPP in Nigeria. The Act vests government ministries, departments and other agencies (MDAs) of government with power to enter into contract with, or grant concessions, to the private sector

[52] S.4(2) of the 1999 Constitution of the Federal Republic of Nigeria.

[53] Note that if there is any conflict the federal government will override the state government.

[54] These are matters that are neither in the Exclusive nor concurrent legislative lists. See S. 4(7)(a) of the Constitution of the Federal Republic of Nigeria 1999.

[55] Some of the states with existing PPP legislations are Cross Rivers, Ekiti State, Lagos State and Rivers State.

[56] This consists of the Common law, doctrines of equity, together with statutes, and subsidiary legislations that were in force in England on the 1st of January 1900. See for instance the provisions of S.2 of the Law (Miscellaneous Provisions) Law, Laws of Lagos State Cap 65 1973.

[57] Nwangwu George (n 25).

for the financing, construction, operation and maintenance of any viable infrastructure.[58] The main function of the Infrastructure Concession Regulatory Commission (ICRC), created under this Act, is to take custody of every concession agreement or contract entered into by the MDAs and monitor compliance with the ICRC Act and the efficient execution of any such Concession Agreements.[59] However, despite the use of the word ”regulation” in the title of the ICRC Act, the law does not confer regulatory powers on the ICRC. Under the ICRC Act, the institution is for instance, not conferred with power to perform any form of economic or technical regulation.

The Privatisation Act provides the legal framework for the privatisation and commercialisation of various public assets in Nigeria. It also creates the National Council of Privatisation (NCP) as the apex body charged with the responsibility of setting and administering the Federal Government's policies and objectives on privatisation and approving transactions.[60] The Act also established the Bureau of Public Enterprises (BPE) to function as the secretariat of the NCP and carry out the actual day-to-day privatisation activities.[61] A number of concessions including concessions of the 26 seaports, the trade fair complex, Tafawa Balewa Square, the electric power plants and the National Theatre had been consummated under this law and by BPE. This is clearly in conflict with the express and exclusive powers conferred on the ICRC regarding concessions in Nigeria by the ICRC Act. This has led to a lot of confusion and bickering between the ICRC and the BPE.

The Procurement Act applies to procurement of goods and services carried out by the Federal Government of Nigeria and any public body engaged in procurement and all entities, which derive at least, 35% of the funds appropriated or proposed to be appropriated for any type of procurement from the Federation share of the Consolidated Revenue Fund.[62] The Procurement Act does not apply to procurements carried out by the constituent states of the Federation.[63]The Procurement Act does not expressly mention procurements done under PPPs like concessions and so the general assumption is that it only applies to traditional procurement and not to procurements done as PPPs.[64] It is based on this that the ICRC has stipulated some guidelines under the National PPP Policy for the PPP procurements.[65] This has led to some friction between the two institutions as the Procurement Act applies to procurement of goods and services for infrastructure projects.[66]

The Debt Management Act[67] and the Fiscal Responsibility Acts also apply to PPPs. The Debt Management Office, created under the Debt Management Act, is entrusted with the responsibility for preparing and implementing a plan for the efficient management of Nigeria's external and domestic debt obligations and set guidelines for managing the country's risk and currency exposure with respect to all loans.[68] PPP transactions will obviously require the Government of Nigeria to

[58] S.1 of the ICRC Act.
[59] SS. 14, 15, 16 and 17 of the ICRC Act.
[60] Public Enterprises (Privatisation and Commercialisation) Act 1999.
[61] See Part III of the Public Enterprises (Privatisation and Commercialisation) Act.
[62] S.15 of the Procurement Act, No.14 2007.
[63]*Ibid*.
[64] This assertion has been severely challenged by the Bureau of Public Procurement in relation to the Management Contract granted Manitoba Hydro of Canada to operate the transmission network by BPE.
[65] Part 1 of the Supplementary Notes to the National Policy on Public Private Partnership (PPP).

[66] It is however silent on the non-tender aspects of PPP transactions or handling of unsolicited bids.
[67] Debt Management Office (Establishment, etc.). Act No. 18 of 2003.
[68]*Ibid* S.4.

borrow both externally and internally as well as issue guarantees, However, the Debt Management Office does not adequately cater for PPPs and there is no policy on the management of fiscal liabilities that arise from PPPs. The Fiscal Responsibility Act promotes the prudent management of the country's resources by ensuring greater accountability and transparency in fiscal operations and also by imposing limits on the country's spending and borrowing. The Act establishes the Fiscal Responsibility Commission to ensure that the objectives of the Act are met. [69] This Act regulates the manner of fiscal support which PPPs may enjoy.

It is obvious from the forgoing that any investor wishing to invest in PPP projects in Nigeria will be wary of the great regulatory risks, which it is likely to face in the country. The major problem will arise from the responsibility given to the ICRC under the ICRC Act to monitor PPP contracts. There will arise manifest conflict between the BPE and ICRC over which of the two agencies should monitor and enforce particular PPP projects. Also, virtually all the other sector legislations like the Electric Power Sector Reform Act,[70]also confer regulatory powers to the different regulatory institutions that have been created under these laws. This situation has contributed to confusion in the regulation of PPP projects. There is a need to properly synchronize these different laws with one another and also with the other sector wide legislations.

Capacity Building

It is a fact that there is very limited capacity within MDAs to deliver PPP projects. This problem is not however peculiar to Nigeria. For instance, in a survey carried out by the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), it was identified that limited knowledge and capacity related to PPPs was a major obstacle to PPP development.[71] Also it is in recognition of the correlation between capacity building and the advancement of PPPs that the Addis Ababa Action Agenda on the Financing for Development put capacity building for PPPs at the core of its agenda.[72]

Therefore, the lack of capacity within the different MDAs has definitely contributed to the limited number of PPP projects that have so far been delivered in Nigeria. At the minimum MDAs should have in-house staff with requisite skills in financial, legal, technical, procurement and project management areas. Where necessary, the capacity should be complemented with external consultants to fill gaps. It is on record that the most effective method of knowledge transfer is through on-job learning. Therefore, where the government agencies hire external consultants to advice on PPP development and delivery, they must ensure that these consultants are contracted in a manner that will ensure eventual knowledge transfer to public sector staff.

One of the core responsibilities of ICRC is "providing advisory services, technical assistance, training and capacity development to MDAs in PPP project preparation and development".[73] However, the agency has only been able to carry out very minimal number of trainings so far and

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[69] *Ibid*S.6 .
[70] Electric Power Sector Reform Act Cap. E7 LFN 2004
[71] VerougstraeteMthieu, 'Building Capacity for Public-Private Partnerships' (World Bank, 2016) <https://blogs.worldbank.org/ppps/building-capacity-public-private-partnerships>Accessed June 3 2020.
[72] United Nations Department of Economic Affairs 'Addis Ababa Action Agenda of the Third International Conference on Financing for Development, United Nations 2015.
[73] See the Infrastructure Concession Regulatory Commission (n 23).

the gap still exists. Another factor responsible for the capacity gap constraints is the itinerant nature of civil servants in Nigeria. Civil servants keep getting transferred between Ministries and even between departments within ministries. Therefore, staff that are trained in PPPs more often than not leave the PPP units within the Ministries to other assignments. This leads to a sever loss of capacity within the PPP units in different PPP active MDAs.

In summary, the capacity building gap can further be bridged through organizing regular training programmes, the provision and circulation of resource materials- manuals, guidelines and technical notes. Public servants should also be involved in actual transactions and negotiations of PPP projects, as this is the quickest way to learn. As the government seeks help from multilateral institutions to assist in providing increased capacity building opportunities, it is also important that the government starts looking inwardly to develop its own structures, institutions and networks for providing PPP trainings and knowledge dissemination.

Risk Management

One of the arguments for the use of PPPs to finance infrastructure is that it allows for proper risk transfer from the public sector to the private sector. Therefore, it ensures that risks which would have ordinarily remained with the public sector under traditional procurement are now shared with the private sector. In sharing the risks, It is also commonly agreed that risk should be allocated to the party that is most able to manage it.[74] This basic rule has not always been adhered to in Nigeria. Consequently, it has contributed significantly to the stress being faced by a number of projects.[75] It would appear that instead of risk allocation being influenced by established guidelines they are persuaded more by economics, debt financiers' requirements and the bargaining strength of parties. It is crucial that projects are developed in accordance with certain risk management guidelines that result in delivering value for money for the user public. The management of risk is therefore crucial to the success of PPP projects. This involves:

a) risk identification: the process of identifying all the risks relevant to the project;

b) risk assessment: the determination of the degree of likelihood of the risk and the possible consequences if the risk occurs;

c) Risk allocation: assignment of the responsibility of the consequence of the risk to one or more of the contracting parties; and

d) Risk mitigation: the process of controlling the likelihood of occurrence of the risk and or the consequence of the risk.[76]

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[74] Partnership Victoria advocates that public interest consideration should also be taken into consideration in deciding whom risk should be allocated to. See Victoria State Government, 'Policy, Guidelines and Templates' (Victoria State Government, 2018) <https://www.dtf.vic.gov.au/public-private-partnerships/policy-guidelines-and-templates>Accessed June 3 2020.

[75] A preliminary profiling of the large PPP projects so far concluded in Nigeria such as the concession of the country's 26 port terminals, the MMA 2 Local airport terminal and the Lekki toll road in Lagos show that project risks have not always been properly managed. See Nwangwu George 'A Risk Based Approach to Enhancing PPPs in Nigeria' PhD Thesis University of Hull, United Kingdom, 2013.

[76] Department of economic Affairs (2006) National Public Private Partnership Handbook, Department of Economic Affairs, Ministry of Finance, Government of India pg. 1-246.

As mentioned above, in practice it is the case that risks are usually not properly managed. The first area where this problem arises is in the area of project preparation. Even though the outline business case and the full business case are mandated to contain provisions on how project risks are managed within the project, these documents usually do not convey a sense that a lot of rigour has gone into managing risks. The allocation of risks is usually poorly done and this is a fundamental problem that can be traced back to the country's foundational objectives for using PPPs. Typically, PPPs are sold to the public as being risk free and so the tendency is to seek to transfer the entire risk to the private sector. The private sector ends up managing these assumed and "unwanted risks" by requesting for guarantees and other revenue management devices. The constant default to the use of guarantees instead of proper risk management creates a problem of their own. Guarantees tend to have serious consequences when the events which they secure eventuate and they are triggered. When this happens, government seem always to be taken by surprise, suggesting that proper evaluation of the effects of the guarantees was not done before they were given. Two good examples are the MMA 2 airport concession and the Azura IPPP transaction. In the former the revenue protection clause in the agreement was not honoured by the government leading to several litigations.[77] While in the latter, government continue to reluctantly meet its obligations under the terms of the agreement.

Where the government decides to provide any form of guarantee to projects, such guarantee must be provided with care because of its absolute costs where it is called. Also indiscriminate use of guarantees may result in the public sector inadvertently creating a guarantee culture where the private sector seeks guarantees as an alternative to managing the risk itself.[78] The use of guarantees may mean that the risk previously assumed by the private sector reverts back to the public sector, thereby altering previously agreed risk allocation framework.[79] There is also the possibility that the cost and risk of such guarantees are neither transparent nor well understood by stakeholders.[80] It is also good practice to ensure that where these guarantees are used, provision should be made for the use of claw-back clauses. These clauses ensure that the private sector gets only the benefits they need to make the project work and ensures that excess benefits are creamed off and given back to the taxpayers. The reasoning behind this is simply the notion that if risks are to be shared, then benefits should also be shared.[81]

Proper risk management in PPPs is said to lead to better value for money (VFM). The principal method used in Nigeria for assessing whether projects provide VFM is the Public Sector Comparator (PSC). The use of the PSC has inherent challenges mainly as a result of the difficulties involved in obtaining data to make the necessary comparisons between publicly procured projects and the proposed PPP option. This is the reason why the Nigerian PPP Policy accepts that the government cannot rely on the PSC in calculating VFM at this early stage of its PPP development.

[77] See for example Bi-Courtney Limited v. Attorney General of the Federation (unreported) Suit No. FHC/ABJ/CS/50/2009; Ojemaie Investments Limited (claiming as Landlords to Arik Air) v. Bi-Courtney Limited (unreported) Suit No. CA/A/141/M/2009; SafiyanuDauda Mohammed and National Union of Air Transport Services, Air Transport Services Senior Staff Association of Nigeria (ATSSAN) v. Bi- Courtney Limited (This was an action filed by the workers union) (unreported) Suit No. CA/A/141/M/09 ; Arik Air v Bi-Courtney Limited;

[78] United Nations Guidebook Supra

[79] Alonso-Conde, A. B, *et al*, 'Public private partnerships: Incentives, risk transfer and real options', (2007) Vol. 16, Issue 4 *Review of Financial Economics* 335-349.

[80] *Ibid.*

[81] *Ibid.*

However, the Policy also concedes that it may do so over time when the country collates enough evidence of outturn costs to be able to rely on PSC effectively.[82]

The National Policy on PPP in Nigeria also considers VFM proposition as the most appropriate way of maximizing the overall benefit of a project.[83] The Policy concedes that there is no simple rule that can be used to satisfy a VFM test because of the difficulty in measuring quality and cost of the service as well as the unavailability of relevant data. It however states that the assessment of VFM should consider the whole life cost of the service requirement not just the initial cost and associated risks, which may have financial impact.[84]

A pertinent question is whether developing countries like Nigeria with little or no money to pursue infrastructure projects have any real alternatives, to PPPs even when VFM analysis show that it is more cost effective to do a project through public procurement. There seems to be just a single option available to countries like Nigeria, which is PPP. The whole comparative testing schemes involves the government merely going through the motions before deciding on the premeditated option to procure the projects through PPP.[85] This has the possibility of leading to the development of projects without VFM.

It is noted that it is not wise to jettison the PSC in Nigeria merely because of paucity of data. According to Grimsey and Lewis, the PSC performs the other roles apart from calculating VFM:

a) it promotes full costing at an early stage in project development
b) it provides a key management tool during the procurement process by focusing attention on the output specification, risk allocation and comprehensive costing.
c) It provides a means of testing value for money
d) It provides a consistent benchmark and evaluation tool
e) It encourages competition by generating confidence in the market that financial rigor and probity principles are applied.[86]

Therefore, it is conceded that some of the other benefits that are accruable through the use of the PSC may warrant its continued use in Nigeria. However, a more simplified and relevant approach to VFM testing may also be considered.

Promoting Good Project Governance Whilst Delivering Quicker Projects

Following due process when developing projects is not only essential for probity and integrity of the PPP process but also important for raising finance for project. There have been cases where projects have found it difficult to reach financial close due to the fact that project proponents have

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[82] Infrastructure Concession Regulatory Commission (n 23).

[83] National Policy on Public-Private Partnership (PPP), a document of the Infrastructure Concession Regulatory Commission.

[84] *Ibid*.

[85] It is however claimed that VFM also helps the public sector understand how the project risks can be allocated between the public and private sectors and also that the VFM tool also helps give the government confidence about the use of PPP and that scarce resources would be well spent. See for example Flores J.L. (2010) 'The Value of the "Value for Money" Approach When There's No Money' In IFC Advisory Services in Public-Private Partnerships: Smart Lessons from Infrastructure, health and education: International Finance Corporation, Pg.7.

[86] Grimsey, D., & Lewis, M. K. (n 26).

neglected to follow due process. Due process in this regard ranges from complying with the procurement laws to going through an acceptable environmental and resettlement process for instance. Also, PPPs must put people first and therefore it is essential that any PPP process must involve a process of ensuring that the public participates in the decision-making process leading up to the delivery of the project. This ensures that projects reflect the needs of the people. This involves a process of detailed stakeholder engagement: Including conducting education, other awareness and training programmes.

The National Policy on PPPs recognizes the need for public interest consideration in PPPs. It provides as follows:

1. Public authorities should ensure adequate consultation with end-users and other stakeholders prior to the initiation of an infrastructure project;
2. Private sector participants in a PPP project will contribute to strategies for communicating and consulting with the general public, customers, affected communities and corporate stakeholders, with a view of developing mutual acceptance and understanding of the objectives of the public and private parties;
3. Private sector contractors in the provision of vital services to the communities need to be mindful of the consequences of their actions for those communities and work together with the public authorities, to avoid and mitigate socially unacceptable outcomes.[87]

Despite these express provisions, in practice scant attention has been paid to stakeholder consultation when delivering PPP projects. The present practice is that MDAs merely pay lip service to stakeholder engagement. There is also no deliberate policy for stakeholder consultation when delivering PPPs in Nigeria. This was the major reason for the collapse of the Lekki toll road concession.

Sometimes it is assumed that following due process leads to unnecessary delays in project delivery. This not particularly true as the biggest contributing factor to the slow pace in the delivery of PPP projects in Nigeria is the unwieldy project approval process. For instance, ICRC rules require that a potential PPP project is presented several times before the Federal Executive Council before completion. This bureaucratic process is a contributing factor to the abysmal number of PPP projects that have so far been delivered in Nigeria. The project appraisal and approval processes need to be abridged. However, care must be taken to ensure that this does not compromise the quality of the project delivered. There also needs to be better coordination between the different institutions involved in PPP projects.

Lack of Long-Term Finance for Projects and Unavailability of Budget for Project Preparation

One of the major factors adduced for the low utilization of PPPs in Nigeria has been the unavailability of a developed capital market, making it difficult to raise much need finance for projects. Instead, the limited funds that have been used for the financing of PPP projects have been short term funds from local banks.[88] For this reason, the usual contention that PPPs are more

[87] Infrastructure Concession Regulatory Commission (n 23).

[88] For instance, majority of the funds that was used to finance the power sector privatization originated from local Nigerian banks.

expensive than traditional procurement due to the high cost of borrowing available to the private sector rings true in Nigeria. Other factors that have led to the increase in the cost of PPPs are exorbitant transaction fees, high administrative charges/fees for managing PPP transactions and over reliance on guarantees by private sector.

However, there is ample finance waiting to go to infrastructure. It is just the case that Nigeria appears to no longer be as viable a destination for foreign direct investment as was previously the case. [89] Whilst there are several factors that are responsible for this, the most obvious is that the enabling framework required for businesses to thrive in Nigeria has been eroded over the years.[90] However, the Nigerian private sector have always shown the desire to invest in PPPs within the country. For instance, the privatisation of power sector assets by BPE in 2013 was dominated mostly be Nigerian businesses and financed mostly by Nigerian banks. It therefore makes good sense that the country should look inward also to attract finance for the development of its infrastructure. There are available pension funds of over N9 trillion which the country has not been able to crowd in for the financing of infrastructure. Given the country's inglorious past with the management of pension assets, the hesitancy in risking these assets is understandable. However, the country needs to look for a way to attract these types of financing for infrastructure without impairing the assets. Perhaps in the first instance, the pension assets may be utilised only for financing projects with predictable cash flows and those that enjoy the benefit of government guarantees.

Government has not been able to fund early-stage project preparation. The result is that the country ends up with a very limited pipeline of viable projects. There have been a few projects that have enjoyed development grants from multilateral institutions, but this has not been enough. The Nigerian government needs to show sufficient commitment to project development by making funds available for this purpose. Also, significant technical and professional capacity gaps are holding back the effective preparation of PPP projects in Nigeria. This problem of lack of funding and significant capacity gaps are reflected in the lack of well-prepared technical studies and supporting market sensitized business cases and poorly configured project designs. Whilst it is widely acknowledged that investors will ultimately rely on their own due diligence for making investment decisions, the availability of well-prepared project information is a key indicator of government's commitment, and readiness to meaningfully engage in a sound PPP procurement process.

ICRC is also critically underfunded and has tried to find creative ways of raising internally generated revenue to augment its budgetary allocations. The combined reading of sections 24 and 25 of the ICRC Act 2005, show that the ICRC is statutorily allowed to raise internally generated revenue which it may deploy *inter alia* for defraying the cost of running of the affairs of the Commission.[91] In recognition of the need to raise funds to carry out the functions mentioned above, the Governing Board of ICRC in its meeting of the 14th of November 2013, approved that

[89] Ghana overtook Nigeria for attractiveness to FDI in 2018. With Nigeria recording a 36% decline in FDI within the same period. See: UNCTAD, 'Chapter II: Regional Trends' (UNCTAD, 2018) <https://unctad.org/en/PublicationChapters/WIR2019_CH2.pdf> Accessed June 3, 2020.

[90] These are a combination of fiscal, regulatory and social conditions necessary for projects to thrive.

[91] See Part V of the ICRC Act dealing with the Funds and Expenditure of the Commission.

the Commission should charge fees for carrying out some of its statutory responsibilities. Since then, ICRC has sought to charge the stated fees on a number of projects.

While there is a need for the Commission to raise internally generated revenues to augment whatever budgetary allocation the institution is presently getting, it may be that the fees are illegal and that the quantum and spread of the fees may actually hinder PPP transactions at the federal level. Firstly, there are doubts that the Commission has powers to impose the quantum of fees it is proposing. This is because even though the fees are presented as administrative charges, they are rather pass-through taxes to the user pubic that are ultimate users of the utilities and services. The natural reaction of the private sector investors to the charges would be to merely increase the amount of money, which it would charge as user fees, to cover the additional payments demanded by ICRC. Where the project is based on an availability payment model, the project sponsor will merely pass the cost to the government. Thus, ICRC may be indirectly collecting additional allocation from the budget through the back door.

Secondly, whilst conceding to the fact that ICRC is empowered by its enabling legislation to generate revenues, the law envisages the charging of administrative fees and not imposing taxes. As a general rule, administrative charges are typically indexed to particular services rendered, while taxes are not necessarily. Therefore, where there are no direct services rendered, like where the private sector is charged a yearly percentage fee of its revenues, it amounts to imposing a tax. Taxes can only be imposed by an Act of the National Assembly. Also, there is no statutory or contractual nexus between the ICRC and the private sector concessionaire and therefore no legal basis on which to charge the proposed fees. What ICRC has done is to require the project owning MDA to include the payment as part of the agreement between the MDAs and the private sector parties. Most times these fees are not mentioned in the Request for Proposal (RFP) document but are introduced after the bidders have submitted bids and during negotiations.

These fees are rather high and sometimes rise up to 10% of the revenues of the private sector concessionaire. Also, the decision to charge these fees have not been well thought out because it does not take into consideration the provisions of other laws that require fees from potential concessionaires and thereby makes PPP projects less attractive in Nigeria. For instance, a Concessionaire of a hydro power plant in Nigeria, will pay the Federal Government concession fees, pay the government 5% of its revenues as royalties, pay a percentage of its revenues as Hyperdec charges, pay statutory fees to NERC and then now pay a percentage of its revenue of up to 10% to ICRC. Note while all the other fees have statutory backing that of ICRC does not. It is also important to note that all these costs are finally transferred to the user public.

Political Support

PPPs require strong political support from the highest levels of government to succeed. The most obvious reason for this is that PPPs are often subject to some form of resistance or opposition from the public. This is because PPPs usually involves the transfer of management and sometimes temporary ownership of public assets to private entities. The fact that it remains a public asset means that citizens are interested in how they are divested and how it is being run. At certain times this can generate high levels of opposition from interest groups and would usually require a strong and steady leadership to engage and communicate effectively with citizens.

PPPs also require other types of government support to make it work. These supports may be in the form of government contribution of land, subsidies, grants and guarantees to the project. The success of a country's PPP programme would therefore require a political leadership that is prepared to provide these different categories of support for projects as at when required. The political support extended to the other government institutions that are responsible for the operational aspects of PPP projects is also crucial.

The second part of the ICRC Act creates a 12-member board to manage the affairs of the Commission.[92] The membership of the board includes 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 of the country.[93] Historically, the part-time chairman has tended to be persons of considerable influence. A former President of the country and a former president of the senate have held this position in the past. However, despite the deliberate design of the ICRC Board, it has not been able to wield sufficient political influence to push the mandate of the organization forward. When compared with the board of the BPE which is the National Council on Privatization (NCP), the board of BPE has fared a lot better. It may well be because the NCP is headed by a sitting vice president.

The Federal Executive Council (FEC), which is the highest decision-making organ of government, is involved in the PPP project approval process. The approval processes by this very high-ranking body confers legitimacy on the project. However, whilst the reason for the engagement with FEC at the beginning of the project preparation process and also at the point of final approval is to secure political buy-in of the government at the highest levels, it has also slowed down the PPP delivery process. The final approval process by FEC in particular poses a great risk for investors. For instance, where investors participate throughout the procurement process at great expense have their project cancelled at FEC, there is no provision in the PPP laws or policy for any form of compensation. This is not very reassuring and might be a problem for potential investors.

Conclusion

It is clear therefore from the forgoing that Nigeria has fully embraced PPPs as a policy to finance infrastructure. However, there have been very few projects that have been delivered as PPPs taking into consideration the immense potentials of the country, in terms of size and influence. The paper finds that the reason for this is because the crucial enablers for successful PPP transactions are not in place. This has been greatly hindered the country as investors (foreign and local) are wary of tying down their capital for long periods without sufficient guarantees that they would be able to recoup their investments and make some profit. Typically, prospective investors would like to see evidence or assurances that their investments will be safe. Whereas presently, Nigeria is unable to provide such guarantees, the country will naturally face difficulty in attracting the calibre of investors that will partner with the government to develop the country's infrastructure. In the limited cases where the country has been able to attract investments in PPPs, this paper has shown that the transactions have suffered significant setbacks. This is evidenced by the numerous cases

[92] S.15 of the ICRC Act
[93] S.15(2) of the ICRC Act

in courts between the government and the investors and in other cases where the user public have refused to pay for the use of the asset.

There are a number of institutional factors limiting the use of PPPs. For example, there is very limited capacity within the Ministries, Departments and Agencies of Government (MDAs) to deliver PPP projects. It is advised that MDAs should constantly maintain in-house staff with requisite skills in financial, legal, technical, procurement and project management areas to help deliver PPP projects. Where necessary, the existing capacities should be complemented with external consultants to fill gaps. Also, it was found that the number of PPP projects that have been concluded so far in Nigeria is quite abysmal. This is partly because of the present unwieldy project appraisal and approval processes put in place by ICRC. Government must look for ways to ensure that the different institutions involved the PPP delivery process reduce the timeframe for delivering projects. Care must however be taken to ensure that the quality of PPP projects is not compromised in the process. This can easily be achieved by ensuring that there is better coordination between the different institutions of government involved in PPP project delivery.

There are also significant issues with the legal and institutional framework for PPPs. The most problematic is the conflict between the ICRC Act and the Privatisation Act and the institutions created under both enabling legislations. A number of suggestions have been put forward to resolve these conflicts, one of which is that BPE should concentrate on brownfield concessions whilst the ICRC should be responsible for green field transactions. Whilst this solution is not supported by legislation, it might only help in resolving the confusion in the short term. In the long term however, it is suggested that these regulatory risks may only be eliminated through the passage a holistic PPP legislation.

Finally, the problem of attracting funds for early-stage project development needs to be resolved quickly through budgetary allocations. The decision by ICRC to impose additional fees on PPP transactions to help finance this process is not well thought out. These fees increase project costs significantly and therefore likely to further deter the private sector from investing in PPP projects. There is already a tendency for MDAs to avoid PPPs because of the seeming bureaucracies surrounding PPPs. These fees will only worsen the situation as MDAs will devise even more ingenious ways to sidestep the ICRC. It is therefore advised that ICRC merely charges a realistic administrative fee for some of the services it renders. These services include the review of Outline Business Cases (OBCs) and the Review of Full Business Cases (FBCs). In summary ICRC is not designed to be a revenue generating agency of Government, but an agency set up to enable the economic development of Nigeria by facilitating PPPs.