

THE GAMUT OF NIGERIA'S LEGAL FRAMEWORK ON PUBLIC PRIVATE PARTNERSHIP (PPP)

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ABSTRACT

The paper identifies legislation, regulations and National plans applicable to the conceptualization, procurement and implementation of PPP projects in Nigeria. Many times, PPPs are prepared and implemented without due regard to salient legal requirements that touch on the validity, efficiency and effectiveness of private sector participation in public infrastructure. The National Policy, which guides the implementation of PPP in Nigeria, did not comprehensively identify all legal instruments and National plans impacting, one way or the other, on PPPs. The paper therefore conceptually reviews Nigerian laws and Executive decisions to discover three categories of legislation, namely, laws that enable PPP practice; laws that incentivize its participation; and sector specific laws that were used to consummate some of Nigeria's notable PPP projects. It also looked at extant National policy and plans that impact on Nigeria's PPPs. The identification of legislation and National policy and plans are important for the opportunity it gives stakeholders, including the academia, policy makers and prospective investors, to appreciate the scope and limitations of PPP practice in Nigeria. It also affords key players to mitigate project risks by standardizing, harmonizing and ensuring strict application of extant legal framework to any PPP project. It needs to be stated clearly that this paper did not appraise the performance or adequacy of any legal instruments, policy or plan. Hence, there could be a need for further studies on the success or otherwise of the legal framework. Notwithstanding, it is hoped that the overview of legal instruments, policy and plans herein could boost confidence in contracting parties to deliver successful and bankable PPP projects that rise above political and financial risks.

INTRODUCTION

The renewed interest of the Federal Government of Nigeria to procure public infrastructure on the basis of Public Private Partnership (PPP) has necessitated a good understanding of its legal framework by all stakeholders including academicians, policy makers and prospective investor. Such legal framework assist in understanding the scope of governmental powers, the extent of commitment that can be undertaken, and the types of infrastructure in respect of which PPP transactions could be entered into.

A legal framework is a broad system of rules and regulations that supports, governs and regulates PPP decision making, and as such it is rooted in legal, regulatory, institutional and financial legislation and policy documents,ⁱ which are either developed or have been in place to ensure effective and efficient implementation of the scheme.ⁱⁱ In fact, legal framework includes not only the core component of the legislation itself, but also the administrative, political, social and economic conditions or arrangements, which make the legislation available, accessible, enforceable and therefore effective.ⁱⁱⁱ

The paper would identify and give an overview of all legal instruments and National plans that, directly or indirectly, impose obligations on the development, planning, procurement, corporate structure, financing and repayments in respect of Public private Partnership (PPP) projects. However, discussions of the legislation and National plans are restricted to only those provisions that are relevant to PPPs. In the same vein, the paper is not a critique of the legislation and National plans. To ensure that the study comprehensively captures all relevant, necessary and desirable legal instruments and policies, the paper divided legal instruments into four categories in addition to National roadmaps and strategic plans.

Consequently, the paper is structured into six sections. The first section is Introduction, the second section captures the Enabling legal instruments including the National Policy on PPP, and the third section is on Compliance instruments, while the fourth section is on Incentivizing instruments. The fifth section is on cognate National strategic plans that not only provide and encourage, but also impact on the development and conceptualization of PPP projects. The last section is the Conclusion.

PPP Enabling Legal Instruments

The PPP enabling instruments are substantive laws and Executive orders that, directly or indirectly, authorize the practice of PPP in Nigeria. Mostly, these legislations relate to project conceptualizations, which determine whether or not a public authority could undertake a particular PPP project. While some are of general application like the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and the Infrastructure Concession Regulatory Commission Act (ICRCA), others are sector specific. Both however provide the foundation for PPP transactions in Nigeria. The Constitution takes a prime position because it provides the basis for coming into force of PPP legal and institutional frameworks as well as validates the actions of various players under main and sector-specific legislations.

Constitution of the Federal Republic of Nigeria, 1999

Like any other National constitution, the Constitution of the Federal Republic of Nigeria (CFRN),^{iv} is the embodiment of what the people desire as their guiding light in governance.^v It is the grundnorm, which governs all actions and structures of the government in Nigeria.^{vi} Restating the supremacy of the Constitution, the Supreme Court in *INEC v Balarabe Musa*^{vii} cited with approval its previous decisions in *Attorney General of Abia State v AGF*^{viii} and *AG of Ondo State v AGF*^{ix} that the constitution is supreme and that if any other law is inconsistent with its provisions, the constitution shall prevail and that other law shall, to the extent of its inconsistency, be valid.

The CFRN was promulgated in 1999 and its basic theme was to provide a structure of governance in Nigeria on the principles of freedom, equality, justice and unity.^x It extensively created and distributed powers to the various tiers^{xi} and arms^{xii} of government. It is axiomatic therefore that there would be provisions impacting the implementation of PPP in Nigeria. These provisions include powers of legislation; execution; adjudication; fiscal provisions; and tiers of government with their corresponding powers.

It is the responsibility of the legislature to promulgate PPP legislation,^{xiii} and it was in this regard that the National Assembly promulgated, for instance, the Infrastructure Concession Regulation Act in 2005 (ICRC Act 2005). In *Federal Republic of Nigeria v Anache & Ors.*,^{xiv} the Supreme Court held that such legislative powers included the power to make laws on any

matter incidental or supplementary thereto.^{xv} The responsibility of executing laws, regulations and policies of government is with the executive arm^{xvi} which, in this respect, had produced policies and established the Infrastructure Concession Regulatory Commission (ICRC) and other institutional structures of PPP. The Executive arm has also been shown to have the capacity to promulgate Executive Orders within the expansive powers vested in the president.^{xvii} For instance, the Federal Government issued Executive Order 007 on the funding of infrastructure refurbishment using tax credits.^{xviii}

On adjudication, the Constitution^{xix} vested powers of adjudication in the courts. These courts are the High Court, Federal High Court, Court of Appeal, the Supreme Court and any other courts established by the National Assembly such as the Industrial Court.^{xx} In view of the specific powers of the Federal High Court, it is possible that only the Federal High Court has jurisdiction in PPP matters of the Federal Government. This is in view of section 251(1)(r),^{xxi} which provided for exclusive jurisdiction in the Federal High Court in respect of any action or proceeding affecting the validity of any executive or administrative action by the Federal Government or any of its agencies. The State High Courts, which are courts of unlimited jurisdiction to the extent provided by the Constitution, could have jurisdiction in purely contract matters. Issues pertaining to labour disputes however, can only be taken before the Industrial Courts.^{xxii}

A constitutional provision that is also relevant to implementation of PPP is the fiscal provisions comprising of control by the legislature over public funds and the prescriptions on public revenues.^{xxiii} The Constitution established the Consolidated Revenue Fund of the Federal and State Governments as well as the Federation Account. While monies accruing to Federal and State Governments are respectively paid into the Consolidated Revenue Funds of the Federation^{xxiv} and the States,^{xxv} all revenues standing to the credit of the three tiers are paid in the Federation Account.^{xxvi} It is part of legislative oversight function under section 88(1),^{xxvii} that no expenditure^{xxviii} or debt^{xxix} could be incurred without express authorization by the legislature. In the same vein, the Constitution provided that any amount standing to the credit of the Federation Account shall be distributed among the Federal, State and Local Governments in such a manner that is prescribed by the legislature.^{xxx} It was in this respect that the courts held that the Federal Government is solely responsible for the funding of structures or things it has created from its share, and could not be accommodated under the Federation account.^{xxxi}

Noteworthy, is the definition of ‘Public Revenue’ under the Fiscal Responsibility Act, which includes all moneys received by a government in the federation.^{xxxii}

Another impactful provision to the implementation of PPP under the Constitution is the 3-tier structure of government, namely, the Federal, State and Local Governments.^{xxxiii} Each has its powers and arms of government clearly stipulated. In *AGF v AG, Abia State & 35 Ors.*,^{xxxiv} Belgore JSC stated that the powers and functions constitutionally entrusted to each arm cannot be encroached upon by the other.^{xxxv} Even the Local Governments are to be run based on a democratic system.^{xxxvi} Corollary to this division is the scope of authority of each tier of government. This has been stated under the Second Schedule.^{xxxvii} Part 1 of the Second Schedule is the Exclusive Legislative List (ELL) in which the Federal Government has exclusive powers, while Part II is the Concurrent Legislative List (CLL) in which both the Federal and State Governments have powers of legislation to the extent stated therein. In between the two and within the scope of state legislative powers are residual matters, i.e. all matters that are not listed in the ELL.^{xxxviii} As for the Local Governments, their functions are listed in the fourth schedule to the constitution.^{xxxix}

The dominant sectors^{xl} for PPP projects are transportation (roads, rail, aviation, and ports); financial (banks, insurance companies, mortgage firms, stock exchanges); energy (electricity generation, transmission and distribution) extractive (minerals, natural gas, petroleum and LNG (liquefied natural gas); communications (telephone, radio, satellite, and the Internet, both wired and wireless); and municipal infrastructures (water, sanitation, schools, and trash disposal). The scope of the Federal Government’s PPP programme was stated in its National policy to include power generation, transmission and distribution; roads bridges; ports; airports; railways; inland container depots and logistic hubs; gas and petroleum infrastructure; water supply, treatment and distribution systems; and solid waste management, educational facilities, urban transport, housing and healthcare facilities.^{xli} Looking at the 68 items on the ELL, it appears that the Federal Government has the power to enter into PPP transactions in sectors that include aviation including airports;^{xlii} banks;^{xliii} census and registration of births and deaths;^{xliv} commercial and industrial monopolies;^{xlv} construction and maintenance of Federal roads;^{xlvi} maritime shipping and navigation including Federal ports;^{xlvii} mines, minerals and oil fields;^{xlviii} prisons;^{xlix} railways;^l water whose source affects more than one state;^{li} and wireless broadcasting.^{lii}

The electricity infrastructure is particularly important and comes under items 13, 14 and 15 of the CLL. Both the Federal and State Governments have legislative powers to establish electric power stations as well as to generate, transmit and distribute electricity in Nigeria.^{liii} Similarly, both the Federal and State Governments can establish educational institutions except for primary education, which appeared to be exempted for the Federal Government.^{liv} It should be noted that if any law of the State Government is inconsistent with that of the Federal Government under these broad concurrent powers, the Federal Government's law and actions are to prevail.^{lv} It should also be noted that the Constitution reserved many popular PPP sectors for the Local Government. These include establishment of cemeteries, slaughterhouses, prescribed roads, sewage, refuse disposal, collection of tenement rates, outdoors advertising, etc.^{lvi}

These constitutional provisions are important to PPP implementation because they assist in understanding the scope of governmental powers, the extent of commitment that can be undertaken, and the types of infrastructure in respect of which PPP transactions could be entered into. Except for the omnibus and incidental matters in items 67 and 68 of ELL^{lvii} and in respect of the FCT, it is arguable whether the Federal Government could competently pursue PPP in healthcare, water supply, solid waste, primary education, urban transport, housing, logistic hubs and agriculture or whether the State Government could conceptualize PPPs in sewage, slaughterhouses, outdoor advertisement and collection of tenements.

Infrastructure Concession Regulatory Commission Act, 2005

In an effort by the Federal Government to deepen and standardize PPP practice in Nigeria, the National Assembly promulgated the Infrastructure Concession Regulatory Commission Act^{lviii} in 2005. The Act, to a large extent, established the legal and institutional frameworks of PPP, as its twin objective was to provide for the participation of private entity in the infrastructure projects of the Federal Government, and the creation of the Infrastructure Concession Regulatory Commission.^{lix} It has 37 sections and structured in two parts along its two objectives. Part one comprises of sections 1-13 and provided for the authority, conceptualization, procurement, implementation and supervision of PPP projects. Part two, on the other hand, comprises of sections 14 - 35 and provided for the establishment, functions and operations of the Infrastructure Concession Regulatory Commission (ICRC), which Board was

inaugurated on 27th November 2008. The remaining two sections are miscellaneous provisions – section 36 was on interpretation and section 37 was the short title.

Specifically, section 1 is very important to the public authority, which comprises of the ministries, departments and agencies (MDAs) of the Federal Government of Nigeria. It categorically authorizes the MDAs to enter into PPP contracts with the private entity that enables for participation in Federal Government infrastructure and service delivery. Though ICRC 2005 did not use the nomenclature ‘PPP’, it only referred to ‘concession’, which was defined to mean, ‘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 or services.’^{lx} It is also instructive that the National Policy on PPP, which was issued to clarify the implementation of the ICRC Act, made copious references to such nomenclatures as PPP, partnering, joint ventures and project finance.^{lxi}

Section 2 related to the conceptualization of projects, which it directed the public authority to prioritize, seek for the approval of the Federal Executive Council (FEC)^{lxii} and thereafter ensure that the private entity possesses relevant expertise and experience^{lxiii} to deliver such infrastructure or service. It is obvious that the preparations of projects are required not only to be thorough but also to be done in a transparent and accountable manner. In this respect, the ICRC was charged with the responsibility to publish the list of approved PPP projects.^{lxiv} In addition, the public authority cannot give any guarantee or letter of comfort or undertaking at this stage without the approval of FEC,^{lxv} ostensibly, to deepen the accountability of the process. This implies that the public authority is required to clearly state, in its project preparation document, whether or not the viability of its PPP project is dependent on viability gap funding or other mitigating mechanism, which the National Policy recognized, e.g. the partial risk guarantee of the World Bank.

The Act further stipulated the procurement stage, which was provided under sections 4 and 5.^{lxvi} It required that the selection of private entity should be through an open competitive bidding process,^{lxvii} with an evaluation criteria that recognized most technically and economically comprehensive bid as the winning bid.^{lxviii} The Act allowed for direct negotiation where there is inadequate response to the bid or to the prequalification.^{lxix} In the selection of a

private entity, the Act recognized that the private entity could be a single company or consortium. It underscored the notion that the public authority is dealing with the consortium and not an individual member such that all members are jointly and severally liable under the contract and that any change in the consortium membership could lead to the review or cancellation of the transaction.^{lxx}

The remaining sections under part 1 deal with the implementation of the programme including value for money consideration, protection and recovery of investment, and performance evaluation. The Act^{lxxi} provided for the insurance of the PPP project, obligation for facility maintenance and investor assurances that included recovery of investment, repayment through amortization, non-arbitrary termination^{lxxii} and right of easement in respect of any land to achieve proper project implementation.^{lxxiii} To ensure value for money consideration, project costs are to be authenticated for the purpose of repayment^{lxxiv} and the establishment of a special account for the payment of concession fees.^{lxxv} On performance evaluation, the Act requires public and regulatory authorities to supervise and inspect the concession transaction for effective performance.^{lxxvi}

Part II of the Act established the ICRC as a body corporate with power, *inter alia*, to sue, be sued, hold and dispose of movable and immovable property in its statutory name. The Act provided for the establishment of a governing board, tenure of their offices, their powers and functions, financial provisions and, importantly, their power to make regulations. Of particular interest is the function of the commission, which was stated under section 20 as to (a) take custody of every concession agreement and monitor compliance with the terms of such agreement; (b) ensure efficient execution of concession agreements entered into by the Government; and (c) ensure compliance with the provisions of the Act. In the execution of these functions, the Board has the power under section 19(a) to provide general policy guidelines.

The National Policy on PPP (NP4)

It was pursuant to this Board's power under section 19(a) of the ICRC Act that the Commission issued the National Policy on PPP (NP4),^{lxxvii} which evidently, was to provide clarity on the provisions of the Act and the process guidelines for all aspects of PPP development and

implementation from identification, evaluation, and selection to procurement, operation, maintenance and performance monitoring.

The NP4 was duly approved in April 2009 and published in July 2009. It was divided into two segments. The first segment contained the policy objectives of PPP, identification of various stakeholders and their respective roles in a PPP project development, characteristics of PPP, key principles of PPP and the PPP process.^{lxxviii} Other issues discussed under segment one were project funding and governance structure of legacy projects.^{lxxix} The second segment had four parts, comprising of four distinct supplementary notes, namely, PPP procurement process;^{lxxx} value for money in public procurement;^{lxxxi} project risks;^{lxxxii} and roles and responsibilities of stakeholders.^{lxxxiii} Without doubt, the combination of the ICRC Act and the NP4 together with its four supplementary notes has, to some extent, brought clarity, sanity and certainty in the implementation of PPP in Nigeria. This however is not an appraisal of its performance.

Public Enterprises (Privatization and Commercialization) Act, 1999

The role of Bureau of Public Enterprises (BPE) in the evolution of PPP in Nigeria cannot be underestimated. It was created under the Public Enterprises (Privatization and Commercialization) Act (PEPCA).^{lxxxiv} Section 12 of the Act, which created the Bureau, saddled it with the responsibility of implementing the privatization and commercialization, both full and partial, of Federal Government's enterprises listed in the first and second schedules respectively. However, looking at its enabling legislation and the role given to it under the National Policy on PPP, it is obvious that it was meant to play a marginal role in modern or traditional PPP in Nigeria.

The ICRC recognized that Bureau of Public Enterprises (BPE) had utilized, or in fact expanded, its powers to promote foreign direct investments under PEPCA in contracting private entities to operate some government enterprises, e.g. NPA terminals, by way of concessions. The National Policy provides that such skills and capacity developed in the BPE should be made available in implementing PPP and other concessions.^{lxxxv} Privatization under the Act is full or partial divestiture of government interests in public enterprises, while commercialization is preparing the management of such enterprises on sound commercial principles and prudent financial practices.^{lxxxvi} The BPE has however emerged as a central player in Nigeria's PPP policy following the circular issued by the Federal Government in 2020 that, henceforth, the

BPE shall be responsible for all concessions and PPPs of the Federal Government and its agencies.^{lxxxvii}

Electric Power Sector Reform Act, 2005

One of the few sector specific legislations that allowed for the participation of private entities in public infrastructure and services is the Electric Power Sector Reform Act (EPSRA).^{lxxxviii} In repealing the Electricity Act, the Act,^{lxxxix} *inter alia*, provides for the formation of limited liability companies to take over the National Electricity Power Authority (NEPA); development of a competitive electricity market; and the establishment of an electricity regulator, the Nigerian Electricity Regulatory Commission (NERC).^{xc} It is the main legislation that governs the Nigerian Electricity Supply Industry (NESI) and its value chain.

The most relevant section of the Act that underpins the implementation of PPP in Nigeria is section 32(2)(a), which charged NERC with the responsibility to promote competition and private sector participation in the sector.^{xci} In addition, NERC was empowered to license and regulate any person engaged in the generation, transmission, system operation, distribution, and trading of electricity.^{xcii} Considering that the definition of ‘person’ includes individual, company, partnership or any other association of individuals, whether incorporated or not,^{xciii} it appears that the sector was unbundled for private sector participation from the date the Act came into force.^{xciv}

The Act is also one of the rare legislations that provided for optimization of risks. It noted difficulties in land access pertaining to the generation, transmission and distribution of electricity, and therefore made provision for its mitigation.^{xcv} NERC has the power to declare any land identified by an investor as required, and upon such declaration, the President would issue a notice in a Gazette for its acquisition.

As the regulating agency, NERC issued many guidelines and regulations to encourage and regulate private sector participation in electricity value chain. Some notable regulations relevant to this study, which NERC issued, included the Application for Licenses (Generation, Transmission, System Operations, Distribution and Trading) Regulations 2010. This regulation laid out the procedure for private sector application and obtainment of licenses in generation, transmission, distribution and other service from the Nigerian Electricity Supply Industry (NESI). Noteworthy, is the criteria it stipulated for qualifications to participate or operate in

the sector.

There is also the Local Content Regulations for NESI 2013, which requires Nigerian operators to be given first consideration for all works and services in the industry. Another regulation is the Meter Asset Provider Regulations 2018, which sought to attract private sector in the provision of metering services. To a large extent, NERC had risen to its responsibility in deepening private sector participation in the electricity sector, and considering the capacity of both the Federal and State Governments under the Constitution to participate in electricity supply chain as players, more partnership with the private sector should be expected under EPSRA. It leaves to be seen whether the regulations, safeguards and incentives put in place by NERC are sufficient enough to achieve the reform objectives and bring the public and private sectors together.

Deep Offshore and Inland Basin Production Sharing Contract Act, 1999

The Deep Offshore and Inland Basin Production Sharing Contract Act^{xcvi} was promulgated on 23rd March 1999 to demonstrate the commitment of the Federal Government to specific contractual terms in its contract agreements with oil companies for exploration and production of oil in deep offshore and inland basins. Such arrangements are referred to as Production Sharing Contracts (PSCs).^{xcvii} The system of PSCs has been adopted by many developing countries,^{xcviii} including Nigeria, to leverage on the finances and expertise of the private sector while retaining sovereign rights in oil resources. In Nigeria, the first PSCs were executed on 12th June 1973 and, due to their lopsidedness,^{xcix} were amended in 1979 and 1986, and subsequently replaced in 1991 due to concerns of oil companies in the recovery of their investments. However, it was again replaced in 1999, but backdated^c to cover the PSCs executed as from 1991.

The Act codified the fiscal incentives granted to oil companies under the 1991 and 1993 PSCs, obviously, to foster certainty and encourage more investments in the oil and gas sector. In addition, it provided for the durations of such contracts,^{ci} tax incentives,^{cii} royalties payable and the mode of payments.^{ciii} Specifically, it provided for deduction of tax oil, royalty oil and cost oil, after which the balance, profit oil, will be shared as stipulated in the contract.^{civ} To further mitigate political risks, the Act provided for a review of the sharing ratio whenever the price

of oil exceeds \$20 in real terms.^{cv} Beyond the duration, tax incentives and the sharing ratio, the Act did not provide for other terms and conditions contained in the executed PSC agreements.

To a large extent, the Act brought certainty to investment in the oil industry until recently when there was agitation for the amendment of section 16 of the Act, which did not, *inter alia*, define the procedure and responsibility for review of royalty payable to Nigerian National Petroleum Corporation (NNPC).^{cvi} The Act was amended on 4th November 2019. The amendment introduced four issues, namely, a review of the royalty regime, deletion of section 16, a review of PSCs every eight years and a penalty for non-compliance with the obligation to review.

Road Infrastructure Development and Refurbishment Investment Tax Credit Executive Order, 2019

The Road Infrastructure Development and Refurbishment Investment Tax Credit Order^{cvii} was promulgated pursuant to the executive powers of the President under section 5 of the Constitution^{cviii} as well as section 23(2) of the Companies Income Tax Act (CITA),^{cix} which allowed Mr. President to exempt any company or class of companies from the payment of tax on all or any of its profits.

The idea of utilizing tax for public infrastructure is not novel. Prior to the promulgation of the Executive Order, there were various tax reliefs under CITA to encourage private participation in public infrastructure similar to the scheme, for instance, the infrastructure tax relief^{cx} and the rural investment allowance under section 34.^{cxii} Another effort at utilizing tax for infrastructure development prior to the promulgation of Executive Order 007 was the Road Trust Fund (RTF) scheme of 2017. Upon the expiry in April 2017 of the infrastructure tax relief allowed under CITA (Exemption of Profit) Order, 2012, the Federal Executive Council (FEC) approved the RTF in October 2017. The intendment of the RTF was to allow multiple private sector operators in the construction or refurbishment of public roads.^{cxiii} However, both schemes could not achieve their objectives to the satisfaction of the Federal Government, hence the new effort under Executive Order 007.

The new scheme, which was signed on 25th January 2018, deepened the strategies under the RTF. It entitles the private sector participant to utilize the project cost as a credit against its Income Tax payable, called 'Road Infrastructure Tax Credit',^{cxiii} allows for its tradability and,

to give comfort to prospective private sector participants, provides for an extended lifespan of 10 years.^{cxiv} It makes express provision on the scope and limits of the tax credit utilizable. The Income Tax swappable in an assessment year is limited to 50% only, though there is no such limit for road projects in areas designated as ‘economically disadvantaged’.^{cxv}

The scheme is a PPP intervention, which under section 1(2),^{cxvi} sought to achieve three major components of any PPP initiative, namely, leveraging on private sector funding, ensuring value for money, and guaranteeing full recovery of funds. The Executive Order was made up of 6 sections with two Schedules. It made provision for its institutional and regulatory framework as section 1(4)^{cxvii} provides for the establishment of a Committee under the chairmanship of the Minister of Finance to implement and administer the scheme. The Committee has membership strength of fourteen members, drawn from all relevant ministries and agencies of the Federal Government including the ICRC. The Permanent Secretary of Ministry of Finance is Secretary of the Committee.^{cxviii} Sections 2, 3 and 4 of Executive Order respectively dealt with eligibility to use tax credit under the scheme, issuance of tax credit certificate and the validity in its utilization. Section 5 was Interpretation section and section 6 was citation.

The First Schedule of the Executive Order laid down the regulations for the administration and operation of the Scheme. It has 5 sections, namely, establishment of the Committee, their functions, and information required for participation as well as the procedure for issuance and transferability of tax credit. The Second Schedule gave an outline of the MOU to be signed with participants. In understanding the Second Schedule, two notable sections are important, viz., members are to apply the principles and procedures laid down in their respective ministries and agencies,^{cxix} and secondly, section 2(3)(k) of the First Schedule, which stated that the scheme is subject to the terms and conditions in the MOU.^{cxx} These include conditions precedent, representations and warranties on specific issues, governing law and jurisdiction, which it stipulated as Nigerian Law.

FCT Land Swap Executive Order, 2014

The Federal Capital Territory Administration (FCTA) developed a policy framework^{cxxi} for the provision of district infrastructure by the private sector in exchange for allocation of land within the FCT, which is an entity established under section 297 of the Constitution. The Infrastructure for Land (Land Swap) Policy was contained in Federal Government Gazette No. 91 of 11th

April 2014. The policy was underpinned on the powers of the FCT Minister to grant land under section 5 of the LUA,^{cxxii} the discretion to make such grant subject to a special contract and to revoke such grant upon breach of the special contract.^{cxxiii}

Like the Tax Credit Scheme, the Land Swap policy framework contained basic terms of the relationship, which govern any transaction between the FCTA and participating private entities. The terms included, the joint project conceptualization, the duration for project delivery, the prioritization of infrastructure works to real property development, the release of title documents based on interim measured works, and the appointment of consultants to supervise project execution.

Lagos State Public Private Partnership Law, 2011

The Lagos State Public Private Partnership Law^{cxxiv} was promulgated in 2011 as an improvement of the 2007 PPP law to, specifically, provide for the PPP process, establish the PPP office and enhance Lagos State infrastructure. The most important provision is section 25,^{cxxv} which empowered Lagos State Government to enter into PPP agreements with private entities for infrastructure design, financing, construction and operation. The PPP law is unique as it created the PPP office both as a transaction partner^{cxxvi} and as a regulator.^{cxxvii}

The Law vested the PPP office with the powers of conceptualization, procurement and implementation of PPP projects in Lagos State.^{cxxviii} It is to develop PPP strategic master plan,^{cxxix} initiate and develop infrastructure projects,^{cxxx} implement the procurement process^{cxxxi} including prequalification, evaluation of bids and declaration of preferred bid. In this respect, it has power, *inter alia*, to form limited liability partnerships or companies as special purpose vehicles to facilitate infrastructure and service delivery.^{cxxxii} It also has the power to inspect and monitor the implementation of PPP projects to ensure compliance with the terms of the agreement.^{cxxxiii} The office also has power to regulate, approve and even provide for service charge, user fees and tolls.^{cxxxiv}

The law stipulated conditions for participation, *inter alia*, that a private party must be a registered company under CAMA,^{cxxxv} that a Ministry could not give any guarantee or undertaking other the normal indemnity clauses,^{cxxxvi} and that the transaction would not take effect unless ratified by the House of Assembly.^{cxxxvii} Another curious provision is section

31,^{cxviii} which created offences and penalties in respect of refusal to pay service charge, user fees and tolls.

PPP COMPLIANCE INSTRUMENTS

Compliance legislations are legislations that, even though did not specifically refer to PPP, contained general and mandatory guidelines, which might appear critical to specific PPP stages. They are general legislation, which are not specific to PPPs, but are required in the procurement and execution of every PPP project of the Federal Government. The breach of their provisions may invalidate a transaction, or could expose relevant officers to criminal sanctions or could stall effective implementation of a project. These legislations are not restricted to federal legislations, as there are State legislations that every authority, including the Federal Government, must comply with, e.g. planning laws of State Governments.^{cxix} Thus, legislations on procurement process, fiscal management, land acquisition and its development are hereunder discussed.

Public Procurement Act, 2007

Although the Infrastructure Concession Regulatory Commission Act (ICRC) did not make any reference to Public Procurement Act,^{cxl} the NP4 recognized that the Bureau for Public Procurement (BPP) plays an important role in ensuring due process in the procurement of public works and services.^{cxli} It further recognized that the BPP had set out principles of public procurement and issued a procurement manual, which the ICRC would make reference to in its PPP procurements.^{cxlii} It emphatically stated that a procuring authority should award PPP contracts, including concessions, unsolicited projects and disposal of public assets, through a competitive process under the PPA's principles and manuals except in the case of an emergency and with the prior approval of the Federal Executive Council.^{cxliii} In addition, the PPA is one of four legislations that the Government was to review under the NP4.^{cxliv} It is on these bases that the PPA becomes important to this study.

The PPA was promulgated in 2007 to, *inter alia*, provide for the establishment of the National Council for Public Procurement (NCP) and the BPP, to monitor and oversee public procurement, to harmonize existing legal frameworks and to set standard for public procurement in Nigeria.^{cxlv} The National Assembly amended three sections on 4th November

2019, viz. to review the mobilization fee for contractors, create an e-procurement and provide a timeframe for procurement purposes.^{cxlvi} The functions of the NCPP are spelt out under sections 2(a) while the objectives, powers and functions of BPP are stated in sections 4, 5 and 6 respectively.^{cxlvii} These are better appreciated considering the genesis of BPP, which arose from the Budget Monitoring and Price Intelligence Unit (BPMIU) that was established by the Federal Government in June 2003 to ensure that all MDAs comply fully with laid down guidelines and procedures in the procurement of their capital projects, goods and services.

Apart from the principles of procurement that the NP4 recognized, the important section that could affect the PPP procurement process and which, arguably, gave the BPP more courage to foray into PPP procurements is section 15 of the Act.^{cxlviii} The provision extended the application of the Act to all procurement of goods, works and services of the Federal Government and all procurement entities. The fundamental principles of procurement are contained in section 16,^{cxlix} which prescribed an open competitive bidding^{cl} that is subjected to prior review thresholds,^{cli} transparency, timeliness, equity,^{clii} competition, economic efficiency^{cliii} and value for money.^{cliv} In addition, it requires bidders to possess technical competence, financial capability and legal capacity as well as to fulfill outstanding tax obligations.^{clv}

Another relevant provision to PPP is on successful bids. Sections 24(3) and 33(1)^{clvi} provided that the successful bid should be the lowest cost bidder. This might pose a challenge to PPP process under the ICRC Act, which considered the successful bid as the most technically responsive bid. However, PPP procurement process may strenuously utilize section 33(2)^{clvii} that allowed for the bypassing of the lowest cost bidder if a procuring entity could show good grounds. Needless to observe, such good grounds must be derived from the PPA's principles and manual.^{clviii} The PPA has, over the years and to a large extent, proved to be effective in conventional procurements and whether it would serve the PPP regime efficiently remained to be seen.

Fiscal Responsibility Act, 2007

The Fiscal Responsibility Act (FRA)^{clix} is one of the four legislations that were specifically mentioned in NP4 as critical, and to be reviewed for effective PPP implementation in Nigeria.^{clx} The FRA was promulgated in 2007 to provide for a long-term macroeconomic stability of the

national economy in order to secure greater accountability and transparency in fiscal operations within the Medium Term Expenditure Framework (MTEF). Its central focus is to manage financial risks within the Government's overall financial and budgetary framework over the MTEF cycle, which was pegged at three years. In addition, it criminalizes infractions of its provisions.^{clxi} The FRA is important to this study on account of potential liabilities, fiscal risks and financial commitments in some PPP models. For instance, the issuance of guarantees, partial risk insurance or other financial instruments that are critical to viability of PPP projects could impact on MTEF framework.^{clxii}

The relevant provisions of the FRA that impinge on the practice of PPPs include those relating to preparation of National budgets, borrowings and issuance of guarantees. The Act stipulates that National budgets should be derived from MTEF^{clxiii} prepared and approved in accordance with section 11 of the Act^{clxiv} and that any contract must comply with procurement and due process regulations.^{clxv} One of the hallmarks of PPPs is the long-term funding and thus, cannot be divorced from debts and guarantees. The Act allows for borrowings for capital expenditure only,^{clxvi} including from the capital markets,^{clxvii} provided however that there is a prior authorization in the Appropriation Act^{clxviii} and they are based on concessional terms, with low interest rate and with a reasonably long amortization periods.^{clxix} Concessional term was defined to mean a loan whose interest rate does not exceed three percent.^{clxx} For guarantees, the Act centralized the power of grant in the Minister of Finance subject to the approval of FEC.^{clxxi} A very interesting provision that encourage transparency is section 51,^{clxxii} which allowed any person to enforce the provisions of the Act in a competent court without necessarily showing that he has a special interest.

Finance (Control and Management) Act, 2004

The main focus of the Finance (Control and Management) Act^{clxxiii} was to provide for the management and control of public moneys of the Federal Government. 'Public moneys' was defined in the interpretation section to include all monies held on behalf of the Government or its agent by any public officer, in his official capacity, whether subject to trust or not, and whether permanently or temporarily, and either alone or jointly with any person.^{clxxiv} This definition has far reaching implications on funds created towards the implementation of PPPs at its different stages such as escrow accounts or joint accounts. Section 4(1) of the Act

provided that any person responsible for such public moneys should obey all instructions of the Minister of Finance in respect of the control and handling of such moneys.

Loans Act and Loans (State Development) Act

The purposes of the Loans Act^{clxxv} and the Loans (State Development) Act^{clxxvi} are for the authorizations of external loans in connection with the economic and development programmes of the Federal Government^{clxxvii} and the States^{clxxviii} respectively. The Act authorized the Minister of Finance to raise loans outside Nigeria^{clxxix} for appropriation in respect of the economic programmes of the Federation as well as for lending to State Governments and statutory corporations.^{clxxx} The Act could provide viability gap funding in PPP projects. These are however timeous legislation, which have neither been repealed nor amended to conform to the realities of present day Nigeria.

Debt Management Office (Establishment, Etc.) Act, 2003

While the Loans Act and the Loans (State Development) Act authorize external borrowings, it is the Debt Management Office Act (DMOA) 2003^{clxxxi} that provides for the regulations of such borrowings. The DMOA was promulgated in 2003 and deemed to come into force as from August 2000. The main purpose of the Act was to establish the Debt Management Office (DMO) that manages public debts of the Federation. These debts include external, domestic and corporate debts. It has 34 sections and one schedule with extensive provisions on borrowings, guarantees, bank lendings to Governments, and grants and loans to foreign countries. Of particular interest are sections 27(4) and 27(5) of the Act, which provided that no loan agreement should come into operation without the approval of the National Assembly and that such approval should be deemed as granted if, after 30 days, the approval was not communicated to the Minister of Finance.

The DMO, established under section 4, has power to make regulations and policies.^{clxxxii} It had issued a comprehensive framework in 2013,^{clxxxiii} which provided for the interaction and synergy of Governments, institutions and policies for sustainable borrowing and repayment. The extant legal and institutional framework for debt management in the Federation is stated in its framework to include the Local Loans (Registered Stock and Securities) Act;^{clxxxiv} the Treasury Bills Act;^{clxxxv} the Treasury Certificate Act;^{clxxxvi} the Government Promissory Notes Act;^{clxxxvii} and Investment and Securities Act 2007.^{clxxxviii}

Land Use Act, 1978

The Land Use Act (LUA)^{clxxxix} was promulgated in 1978 to change the land tenure system in order to make land available for National development. Its purpose was to vest all lands within the territory of a State solely in the governor.^{cxc} To ensure the sustainability of the Act, it was listed as one of the existing laws under section 315(1) of the Constitution.^{cxc} In majority of cases, land is required for PPP projects, especially pertaining to creation of new assets, expropriation of mineral resources or installation of public facilities. The provisions of the Act relevant to PPP implementations are the scope of land interests, grant of lands and revocation of titles.

On the scope of land interests under the LUA, the Act provided that all lands in the territory of a state are vested in the Governor of that state to hold in trust and administer for the common benefit of all Nigerians^{cxcii} except lands belonging the Federal Government or its agencies, which would continue to vest in the Federal Government. In considering the implications of the interest of land that could be granted under the Act, the Supreme Court opined that no private individual could assert absolute right over land^{cxciii} and that the highest interest a person could have on land under the LUA is the right of occupancy.^{cxciv} Leasehold, rather than ownership, of land is therefore the appropriate terminology in Nigeria under the LUA.

The second provision relevant to PPPs is the power of grant under sections 5, 6 and 8 of the Act. It is instructive that there are four types of grant, namely, the all-encompassing power of grant by the Governor for all purposes;^{cxcv} the restricted power of grant by Local Government Chairman for rural lands for agricultural, residential and other purposes;^{cxcvi} a grant subject to a special contract,^{cxcvii} and the power of the Governor to grant licenses and permits.^{cxcviii} Another provision relevant to PPPs is the Governor's power to revoke any right of occupancy for overriding public interest,^{cxcix} which includes the requirement of the land by Government for public purposes,^{cc} mining, oil pipelines and for extraction of building materials.^{cc} In *Dantsoho v Mohammed*,^{ccii} the Court held that such overriding public purpose could not include a grant to a private individual or group for private use. Revocation can also be done for a breach of any term of a special contract.^{cciii} Corollary to the right of compulsory acquisition is the entitlement to compensation,^{cciv} which was protected both under LUA and the Constitution,^{ccv} but whose adequacy cannot be questioned in any court of law.^{ccvi}

Environmental Impact Assessment Act, 1992

The Environmental Impact Assessment Act^{ccvii} was promulgated in 1992 to set out the general principles and procedures for the consideration of environmental impacts in the execution of any public or private project. It emphatically stated that public and private sectors of the economy should not undertake or authorize any project without a prior consideration of their environmental effects.^{ccviii} It required written applications to be made by proponents of projects based on specific criteria and guidelines for approval of the agency before embarking on the projects.^{ccix} The Act listed cases where an EIA is required,^{ccx} and debarred public authorities from performing any duty with respect to any of the 19 projects listed in the mandatory list in the schedule before an environmental impact decision is made.^{ccxi} A cursory look of the schedule would reveal that the mandatory list comprised of sectors where PPP project procurements are very common, e.g. Airport, Housing, Infrastructure, ports, electricity, railways, transportation, waste disposal and water supply.

Nigerian Urban and Regional Planning Act, LFN 2004

Another legislation that had proven to play a significant role in PPPs is the Nigerian Urban and Regional Planning Act (NURPA).^{ccxii} Until 13th June 2003 when the Supreme Court held that it was a residual matter of the State and could only apply to FCT,^{ccxiii} the NURPA was aimed at realistic and purposeful planning of the entire country to avoid overcrowding and poor environmental conditions. The applicable planning legislations in the States are the respective urban and regional planning legislation of each state, for instance, the Kano State Urban Planning and Protection Authority Law 2011 and Lagos State Urban and Regional Planning and Development Law.^{ccxiv}

Both the NURPA and the various states urban planning legislations have similar requirements that approval of planning authorities is obtained before any project is commenced. For instance, the NURPA required a building plan to be prepared by a registered architect or town-planner^{ccxv} and that an application would be rejected if it could harm the environment or constitute a nuisance.^{ccxvi} Any breach of the regulations including disobedience to a stop work order^{ccxvii} is punishable under the Act. These are basic provisions in urban planning legislation at the States level. It is important to observe that, being a residual matter, the Federal Government is obliged to comply with State planning laws if it is to develop its lands within the territory of a State.^{ccxviii}

The importance or transaction risk of planning laws to PPPs can never be underestimated, as it could constitute a deal breaker like the Lagos Federal Secretariat Concession. The Lagos State Government refused to give approval for the conversion of Federal Secretariat into a residential estate, which was one of the principal objectives of the transaction between the Federal Government and the Concessionaire.

PPP INCENTIVIZING INSTRUMENTS

Incentivizing legislation assist investors to create structured and easily operated vehicles to deliver projects and guarantee the positivity on net present value (NPV) of investable projects. These legal instruments include legislations that provide necessary support and stability in the conceptualization and implementation of PPP projects. They also include those on organizational structures like the Companies and Allied Matters Act, on financial incentives provided in the Nation's tax regime, on protection of consumers under the Utilities Charges Commission Act, and on confidence-building measures to attract and retain private investments contained in the Nigerian Investment Promotion Commission Act. They are important to PPPs if Nigeria is to compete for global investments in the comity of nations and for private entities to negotiate effectively in establishing benchmarks for reasonable cost recovery.

Companies and Allied Matters Act, 1990

The Companies and Allied Matters Act^{ccxix} is the principal legislation that regulates the formation and operations of companies in Nigeria. The Act is important, as every PPP project must involve an organizational structure, a Special Purpose Company, as the private party. This company could comprise of only private stakeholders or could include the public authority in a joint venture relationship. It is the responsibility of the Corporate Affairs Commission (CAC) established under section 1(1) of the Act to incorporate that company as a limited liability company to enable the promoters operate and make profit. In the same respect, PPPs are programmes that attract foreign participation in view of foreigners' competitive technical expertise and their immense financial capacity. The only instrumentality for their participation is through a company incorporated by the CAC to enable parent foreign companies open bank

accounts, import capital and operate in Nigeria. In fact, until so incorporated, any action of the foreign company, including capacity commence legal action in courts,^{ccxx} is void.^{ccxxi}

The Act dealt with three fundamental organizational structures, namely companies under part A, business names under part B and incorporated trustees under part C. However, the focus of this study is companies under part A as PPP is a venture whose elements include profits and adequate return on investments or cost recovery. The Act provided for the incorporation,^{ccxxii} categorization^{ccxxiii} and capacity or powers^{ccxxiv} of companies. It also provided for documents required for incorporation,^{ccxxv} the duties and liabilities of promoters^{ccxxvi} as well as the rights and liabilities of members.^{ccxxvii} The Act further provided for the operations of companies including meetings,^{ccxxviii} appointment and conduct of directors,^{ccxxix} financial provisions^{ccxxx} and winding up of companies.^{ccxxxi} The Secretary, who includes legal practitioner under section 293 of the Act, is better placed to navigate the incorporation and operation of companies for PPP implementation.

Companies Income Tax Act, 1961

The Companies Income Tax Act (CITA)^{ccxxxii} is the primary tax legislation for companies in Nigeria. It made extensive provisions on the administration, enforcement and exemption of income tax on companies. Section 11 is particularly interesting to capital importation. It provides that a foreign loan should be exempted from taxation if it is repayable after ten years^{ccxxxiii} and should be charged half of the rate if it is repayable after five years but less than ten years.^{ccxxxiv} In addition, the President has the power to exempt any company or class of companies from all or any provision of the Act.^{ccxxxv} CITA is important to PPPs, as it allows for proper tax planning in PPP financial modelling, and is one of the mechanisms to ensure that a PPP project net present value (NPV) is positive.

Utilities Charges Commission Act, 1992

The Utilities Charges Commission Act (UCCA)^{ccxxxvi} is the legislation that has direct impact on charges, tariffs and rates by public utilities. It was promulgated in 1992 to establish a commission that would, *inter alia*, evaluate, advice, monitor and regulate tariffs as well as prevent undue exploitation of utility consumers. It was amended in 2016 to review the fines stipulated for offences under the Act. What made the Act relevant to PPPs is the provision that the approval of the Commission established under section 1(1) of the Act is required before a

public utility increases or varies its charges, tariffs or rates.^{ccxxxvii} These public utilities are listed in the second schedule of the Act.

Federal Competition and Consumer Protection Act, 2019

The Federal Competition and Consumer Protection Act (FCCPCA) 2019 was promulgated on 5th February 2019 to repeal the Consumer Protection Council Act 1992;^{ccxxxviii} establish the Federal Competition and Consumer Protection Commission; change the legal framework for merger transactions; and institute the Competition and Consumer Protection Tribunal. The purpose of the Act was to develop, promote and regulate fair and competitive market as well as protect the interest and welfare of consumers in the Nigerian economy. It was also to promote competition at all levels by eliminating monopolies, prohibiting the abuse of dominant market position, and penalizing other restrictive trade and business practices. The Act applies to all undertakings and commercial activities, and to all corporate bodies and agencies of Government engaged in commercial activities within, or having effect within, Nigeria.

The issue of competition and consumer protection is essential to PPP at both the inception and during the implementation stages. This is more so considering that part of the powers of the Commission was to prohibit performance of an Agreement if there are breaches. Though FCCPCA is the dominant legislation,^{ccxxxix} there are other sector-specific instruments that play key roles in regulating competition and protecting consumers. These include the Standard Organization Act 1971;^{ccxl} the Price Control Act 1977;^{ccxli} the Nigerian Communications Commission Act 2003;^{ccxlili} the Post and Telecoms Proceedings Act;^{ccxliii} the Quality of Service Regulations;^{ccxliv} the Consumer Code of Practice Regulations;^{ccxlv} the National Agency for Food, Drugs Administration and Control Act;^{ccxlvi} and the Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act.^{ccxlvii}

Nigerian Investment Promotion Commission Act, 1995

The Nigerian Investment Promotion Commission Act (NIPCA)^{ccxlviii} was promulgated in 1995 to establish a commission that would encourage and promote investments in Nigeria. The basic functions as stated in the Act was to, *inter alia*, coordinate and monitor investments; initiate and support measures to enhance the Nigeria's investment climate; provide support services to both new and existing investors; give necessary assistance and guidance for the establishment

and operations of enterprises; and invite investors to participate in identified enterprises and projects.^{cclxix}

Contrary to the provisions of its predecessors,^{ccl} which it had repealed, the NIPCA provided that non-Nigerians could participate in the operation of any enterprise in Nigeria^{ccli} if they are duly incorporated with CAC^{cclii} as well as registered with the Commission.^{ccliii} The only exceptions were enterprises in the negative list as defined under section 51 of the Act. The Act provided confidence-building measures^{ccliv} to attract foreign investments by negotiating incentive packages with relevant government agencies, guaranteeing unconditional transferability of capital, profits and dividends, ensuring sanctity of contracts and non-expropriation, and rendering other assistance that would ease doing business in Nigeria. Pursuant to its mandate, the Commission had published a journal^{cclv} in which it comprehensively listed incentives available to investors. These incentives include policies on investment protection, general tax incentives, sector-specific incentives, tariff-based incentives and incentives for enterprises within the Exclusive Economic Zones (EEZ).

Executive Order 001 on the Promotion of Transparency and Efficiency in the Business Environment, 2017

In deepening the ease of doing business under the NIPCA 1995, the Acting President, based on the recommendations of the Presidential Enabling Business Environment Council (PEBEC) and the need to upscale Nigeria's ranking in the World Bank's Ease of Doing Business Index from 169 out of 190 countries, promulgated Executive Order 001^{cclvi} on 18th May 2017. Its key objective was to create an enabling environment for businesses as well as entrench measures and strategies to promote transparency and efficiency. In this respect, it directed the conspicuous display of requirements for products and services^{cclvii} and gave timelines for communication of approvals, the failure of which shall be deemed as approved.^{cclviii} It fostered inter-agency collaborations,^{cclix} brought more transparency, and simplified the requirements for the issuance of entry visas into Nigeria.^{cclx} The Executive Order prohibited touting in the Nation's seaports and airports,^{cclxi} and directed for the immediate automation of companies' registration.^{cclxii}

PPP SECTOR-SPECIFIC INSTRUMENTS

While this category of legislation do not *strictu sensu* impact on general PPP policy and practice, they are however relevant in view of their efficacy in driving specific PPP projects in sea, air and road infrastructure sectors of the Nigerian economy.

Nigerian Ports Authority Act, 1964

The Nigerian Ports Authority Act^{cclxiii} was promulgated in 1964 to establish the Nigerian Ports Authority (NPA) whose basic functions^{cclxiv} and powers^{cclxv} included the provision, operation, maintenance and regulation of ports facilities and usages. Such facilities and usages include ports terminals, piers, wharves, warehousing and pilotage, berthage, towage, lighterage, and pollution control services. The Act did not contain any provision on PPP. However, section 9 is relevant to PPPs.^{cclxvi} It provided that NPA could perform its functions through its officers or agents or any other person authorized by it. NPA utilized this provision in the concession programme of its terminals.

Federal Airports Authority of Nigeria Act, 1996

The Federal Airports Authority of Nigeria (FAAN) Act^{cclxvii} was promulgated in 1996 to establish FAAN and to take over functions under the repealed Civil Aviation Authority Act.^{cclxviii} Its basic functions were to develop, provide and maintain all necessary services and facilities for air transport within the Nigerian airspace including accommodation and surface transport services.^{cclxix} The Act did not make any reference to PPP. However, it contained provisions allowing FAAN to pursue economic activities, either relevant or not relevant to air transport, by itself or by an agent or in partnership with any other person.^{cclxx} FAAN leveraged on these provisions to concession MMA2 Terminal in Lagos to Bi-Courtney consortium.

Federal Highways Act, 1956

The Federal Highways Act^{cclxxi} was promulgated in 1956 to vest the powers of management, direction and control of the federal highways in the Minister of Works and Housing.^{cclxxii} These are highways throughout the federation and specifically, those listed in the schedule to the Act. In this respect, the Minister was given the power to erect tollgates and prescribe toll fees on any federal highway as and when required.^{cclxxiii} Section 2(4) of the Act^{cclxxiv} provides that the Minister might authorize any officer or agent or person to exercise any of the powers conferred

on him on erection and tolling of federal highways. These were the provisions that saw to the tolling of federal highways in Nigeria up to 1999, when the arrangement was cancelled.

Federal Capital Territory Act, 1976

The Federal Capital Territory Act^{cclxxv} was promulgated in 1976 to establish a federal capital city for the federation. The Act created the Federal Capital Development Authority (FCDA)^{cclxxvi} to construct infrastructure^{cclxxvii} and provide municipal services^{cclxxviii} within the Federal Capital Territory (FCT). It allowed the FCDA to enter into contracts or partnerships with any person or company, whether corporate or unincorporated, in the discharge of its functions.^{cclxxix} However, it did not have the power to borrow money or dispose of its property except with the general or special approval of the President.^{cclxxx}

All federal laws and those specifically listed in the second schedule of the Act are applicable to the territory.^{cclxxxi} In addition, the Constitution provides that the FCT should be considered as a State.^{cclxxxii} Some of the implications of these provisions are to enable FCDA enter into PPP contracts and to allow the FCT Minister to assume powers of land grant and contracting under sections 5, 6 and 8 of the Land use Act.^{cclxxxiii} These provisions allowed for Katampe district development under a PPP arrangement as well as the FCTA Land Swap programme.

NATIONAL POLICIES AND ROADMAPS

A National policy is a strategic plan crafted and implemented as a short, medium or long-term plan for the stable and sustainable development of a country and the wellbeing of its citizens. Such strategic plan is central to National development and, hence critical to PPP. In Nigeria, the National Planning Commission established by the National Planning Commission Act,^{cclxxxiv} is the statutory agency primarily responsible for the formulation and preparation of National plans as well as monitoring planned implementation of Nigeria's public infrastructure projects.^{cclxxxv} The four extant National plans that command influence on Nigeria's PPP policy are discussed hereunder.

The Nigeria Vision 20: 2020

The Nigeria's Vision 20:2020 (NV20: 2020)^{cclxxxvi} was produced in December 2010 as a long term development goal that would propel Nigeria among the league of top 20 economies of the

world by the year 2020. Its broad objective was the efficient use of human and natural resources to achieve rapid economic growth for the benefit of all citizens. As part of aspirations to develop key sources of economic growth, and in particular the primary means of production and linkages, the NV20:2020 was to pursue a comprehensive policy towards industrial cluster development through PPPs;^{cclxxxvii} create an integrated and sustainable system of transport system through concessions;^{cclxxxviii} and grow electricity power generation capacity to 35,000MW through IPPs.^{cclxxxix}

The Vision recognized that previous plans did not translate into improved living standards for the citizenry, and concluded that for effective implementation, the objectives and outcomes of the Vision would have to translate into specific programmes and projects. Hence, the NPC produced the first National Implementation Plan (NIP) of the Vision for the period 2010 – 2013. NIP's detailed sectoral plans indicated current situations of the plans, the challenges to be addressed, the objectives to be achieved as well as the strategies to achieve desired results. The part that is of utmost interest to this study is part one,^{ccxc} which dealt with physical infrastructure comprising of five sectors, namely, power, transport, oil & gas, housing and water resources. It should be noted that transport sector included roads, railways, water transport and ports.

While the Government intended to invest ₦880.98 Billion on power generation, transmission, distribution and alternative energy,^{ccxci} the total estimated investment for the transport sector was ₦2.216 Trillion. Part of the objectives in the five sectors of the physical infrastructure was to create an enabling environment for private sector participation in power delivery, provision of transport infrastructure,^{ccxcii} concession of Lagos to Kano and Port Harcourt to Maiduguri rail lines,^{ccxciii} private inland waterway services on specific routes, concession of four international airports, rehabilitation or upgrade of ten major roads on PPP,^{ccxciv} and private sector led housing delivery. Though the private sector was required to complement the public sector in the required investment funds,^{ccxcv} the NIP was silent on the exact amount of money expected of the private sector. The only exception was on the housing sector, which it hoped to invest a total of ₦250.50 Billion, out of which the private sector was to contribute ₦104.73 Billion, representing 40%, for the delivery of 600,000 units of housing every year.

Nigeria's National Strategic Industrial Development Master Plan

Nigeria's National Industrial Development Master Plan (NIRMP)^{ccxcvi} was produced by the Federal Ministry of Commerce and Industry in November 2010 to articulate the industrial needs of the country formulated under NV20: 2020. It therefore contained detailed frameworks and strategies that would enable the manufacturing sector to achieve and exceed the parameters set by the Federal Government in NV20: 2020.

Part of the strategy to achieve efficiency and profitability of manufacturing establishments was to create model industrial clusters with shared facilities.^{ccxcvii} In this wise, the Industrial Plan recognized that the main responsibility of rapidly transforming the country into a main industrialized economy hinged critically on the private sector, which was expected to play a leading role in management, development and investment of industrial clusters.^{ccxcviii} Hence, it would facilitate the growth of SMEs through PPPs and, in particular, encourage formation of at least twelve private sector driven clusters across the six geopolitical zones of the Country based on state or resource leverages.^{ccxcix}

Nigeria's Integrated Infrastructure Master Plan 2014

Arguably the most ambitious plan in Nigeria's history, the Nigeria's Integrated Infrastructure Master Plan (NIIMP)^{ccc} was developed in 2014 to bridge the infrastructure investment gap observed in the NV 20:2020 and deepened the infrastructure development in line with Nigeria's growth aspirations. The objective of the NIIMP was to adopt a coordinated approach to infrastructure development, strengthen the linkages between infrastructure and national economy, harmonize the existing sub-sector master plans, and promote private sector participation in infrastructure delivery as well as to enhance the performance and efficiency of the national economy.^{ccci} It therefore concluded that Nigeria had to increase its infrastructure investment from 2-3% of Gross Domestic Product (GDP) to a minimum of 7% if it was to increase its infrastructure stock from 20-25% of GDP to 70%.^{cccii}

In line with this conclusion, the NIIMP was projected to require an investment of USD\$3 trillion to be implemented across the six geopolitical zones over a period of 30 years, i.e. 2019 - 2043. The NIIMP reviewed the economic growth and infrastructure stock of the nation,^{ccciiii} assessed the investment requirement in the six geopolitical zones, and identified the priority infrastructure assets that would be implemented in short, medium and long terms. It also

discussed the sources of financing the plan and the strategies required for its effective implementation.

Notably, the priority areas in the NIIMP were in the core infrastructure that included roads and electricity. These two sectors, which were considered as crucial enablers for all other sectors,^{ccciv} were expected to gulp 58% of the total investment under the plan. The private sector was expected to play a vital role in the implementation of the plan, as it would contribute 48% of the investments in the first five years of its implementation.^{cccv} Specifically, the bulk of the funding of the electricity and roads infrastructure under the NIIMP would come from the private sector. Because of the primacy role of the private sector under the plan, it provided the strategies that would increase the shares of PPPs in public infrastructure delivery. These included easier access to finance, mitigation of macroeconomic stability risks, strengthening of PPP frameworks and increasing human resource capacity.^{cccv}

Economic Recovery and Growth Plan 2017

The Economic Recovery and Growth Plan (EPRG)^{cccvi} was produced by the Federal Ministry of Finance and National Planning in February 2017 as a medium term plan to restore economic growth, invest in the citizenry and build a globally competitive, albeit diversified, economy.^{cccvi} It was projected for four years, starting from 2017 to terminate by 2020. The EPRG recognized previous sector plans, and in fact, was to specifically build on the strategies and successes of the National Industrial Revolution Master Plan and the Nigeria's Integrated Infrastructure Master Plan. The structure of EPRG was such that each of the three thematic areas was discussed under three broad heads, namely, the policy principles, the policy objectives and the strategies for their implementation. The thematic area that should interest this study is building a globally competitive economy, which was to be addressed through two ways, namely accelerating infrastructure investment and making it easier to do business in Nigeria.^{cccix}

One of the relevant policy principles was to leverage on private sector infrastructure investment while its policy objectives was to offer concessions on four major airports. The main strategy for the achievement of this objective was to invest massively in transport infrastructure, leveraging on private sector investments.^{cccix} It provided that the key activities that would be carried out by relevant Ministries, Departments and Agencies (MDAs) included the

establishment of a robust framework to increase PPP projects on roads, rail, seaports and airport infrastructure; review the ICRC Act to resolve conflicts with sister organizations; utilize existing funds to assess viability of projects; explore alternative mix of funding that would include project finance, infrastructure bonds, diaspora bonds and value capture financing; and approve tolling policy to allow for the concession of some major dual carriageway highways.^{cccxi}

The ERGP recognized that previous plans had not been successfully implemented. It identified factors that accounted for the failure, which included poor prioritization; inconsistent follow up; absence of consequence management; and insufficient funding.^{cccxi} It therefore formulated seven principles to ensure an effective delivery approach. These principles included focus on the sixty identified strategies, establishing clear accountability, setting targets and action plans, allocation of adequate resources, creating enabling policy and regulatory environment, monitoring and communicating the implementation of the plan.^{cccxi}

CONCLUSION

The instruments and National plans discussed in this paper laid the foundation for PPP practice in Nigeria. We have seen the linkages and interconnections among various applicable legal instruments whose interplay are necessary in ensuring the viability, validity and implementation of PPP projects. We have also seen the national plans of 2010 to 2020, which to a large extent, situated PPP projects and strategies within the contexts of their implementation. Interestingly, some of the National plans identified the weaknesses in extant PPP legal frameworks and went ahead to suggest specific reforms^{cccxi} The consideration of these legal instruments and National plans in this paper are conceptual, and hence, no effort was made to evaluate the success or otherwise of their enforcement and implementation or even the efficacy of suggested reforms. Although further study is required on contractual terms and structures normally found in average PPP agreements to understand the workings of these legislation and national policies, it is obvious that a comprehensive understanding and harmonization of the framework espoused in this paper could ensure the success and bankability of PPP projects that are devoid of political, financial and operational vulnerabilities.

ENDNOTES

- ⁱ European Investment Bank, *A Note on Legal Frameworks for PPPs* (2017), <<https://www.eib.org/epec/g2g/annex/2-legal-frameworks/>> accessed on 24 July 2019.
- ⁱⁱ Jeffrey Delmon, *Public-Private Partnership Projects in Infrastructure: An Essential Guide for Policy Makers* (1st edn., Cambridge University Press 2017); 31. The author observed that the legal framework is embedded in legal instruments that may be related to procurement, infrastructure sectors, government finance, or privatization.
- ⁱⁱⁱ DFID, *Regulatory Tools: Legal and Policy Framework*, (2021) 19-3 <<https://assets.publishing.service.gov.uk/media/57a08c44ed915d3cfd00129e/R8320-Sum19.pdf>> accessed 27 June 2021.
- ^{iv} Constitution of the Federal Republic of Nigeria 1999 (as amended) (CFRN) Cap. C23, LFN 2004.
- ^v Amah Emmanuel Ibiam, 'Federalism, Democracy and Constitutionalism: The Nigeria Experience' [2016] (53) (1) *Journal of Law, Policy and Globalization*, 6 <<https://core.ac.uk/download/pdf/234650754.pdf>> Accessed 7th March 2021. The author argued that although the 1999 Constitution is being severally criticized as not representative of the peoples' desire, it remains a legally binding document having being promulgated by Decree 24 of 5th May 1999 pursuant to the powers of the defunct Provisional Ruling Council under Decree No. 107 of 1993.
- ^{vi} *IGP & Ors. v ANPP & Ors.* (2007) 18 NWLR (Pt. 1068) 457 @ 485 (CA).
- ^{vii} [2003] Vol. 3 MJSC 1.
- ^{viii} (2002) 6 NWLR (Pt. 763) 264.
- ^{ix} (2002) 9 NWLR (Pt. 772) 383.
- ^x *Ibid* (n. 1), Preamble.
- ^{xi} *Ibid*, s 3.
- ^{xii} *Ibid*, chs. v, vi & vii.
- ^{xiii} *Ibid*, s 4.
- ^{xiv} [2004] 3 MJSC 1.
- ^{xv} *Ibid*, per Tobi JSC, 49, para. A.
- ^{xvi} CFRN 1999, s 5.
- ^{xvii} *Ibid*, s 7.
- ^{xviii} The Road Infrastructure Development and Refurbishment Investment Tax Credit Order, No. 007 of 2019.
- ^{xix} *Ibid*.
- ^{xx} The Industrial Court was established by the National Assembly in 2006, the bill was assented by the President on 14th June 2006 and it was gazetted in the Federal Government Gazette No. 38, vol. 93 of 16th June 2006.
- ^{xxi} *Ibid*.
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- ^{xxiii} *AG, Lagos State v AGF* [2005] 1 MJSC 1.
- ^{xxiv} CFRN 1999, s 80(1).
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- ^{xxvi} *Ibid*, s 162(1).
- ^{xxvii} CFRN 1999.
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- ^{xxix} The constitution vests in the National Assembly the exclusive powers to make laws for the regulation of domestic and external borrowings in the federation. See CFRN 1999, items 7 & 50, ELL, 2nd sch.
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clxi For instance, see FRA 2007, ss 39, 41(3) & 47(4).
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