

**LEGAL AND REGULATORY FRAMEWORK FOR PUBLIC-PRIVATE  
PARTNERSHIPS IN INFRASTRUCTURE DEVELOPMENT: A CASE  
STUDY OF THREE AFRICAN MODELS AND CORE INTERNATIONAL  
FRAMEWORKS**

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**FACULTY OF LAW  
UNIVERSITY OF MALAYA  
KUALA LUMPUR**

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**THESIS SUBMITTED IN FULFILMENT  
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**FACULTY OF LAW  
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KUALA LUMPUR**

**2014**

## DEDICATION

*In memory of my late mother, Alhaja Raihanat Bolarinwa Adekilekun, may  
Allah grant her soul an eternal rest*

## ORIGINAL LITERARY WORK DECLARATION

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Field of Study: **ADMINISTRATIVE LAW**

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## ABSTRACT

In most developing countries, the provision and supply of public infrastructures and services were, until recently, under the total control of the public authorities. However, because of inefficiencies, corruption, lack of skills and technical know-how that had plagued, and in fact still continue to plague, the provision and supply of public infrastructure through the traditional public procurement model, as well as the need to harness private capital and expertise, the governments of these countries began to divest themselves of their monopoly in the provision and supply of infrastructures. This paradigm shift from ‘government providing’ to ‘government enabling’ approach necessitates the smart synergy of Public-Private Partnerships (PPPs). Far more importantly, PPPs also serve as a catalyst for social-economic development for the country. In recognition of the vital role that PPPs could play in nation’s infrastructure development, governments, especially of the more progressive developing countries have put in place policies and have embarked on enacting legislations with the aim of regulating PPPs in their respective jurisdictions. These laws seek to ensure transparency, accountability and a level playing field between the government and the private sector partners. This thesis, therefore, examines the existing legislative framework in Ghana, Nigeria and South Africa as well as the core international frameworks with the aim of making specific recommendations for each of the jurisdictions examined as well as recommending a model regulatory framework for developing countries intending to adopt PPPs to mend their infrastructure deficits. This study adopted a qualitative method of legal research which involved both empirical and library-based study. The study demonstrates that generally speaking the current legislative framework of South Africa is by far more comprehensive than that of either Ghana or Nigeria

and, hence, can well serve as a national PPP framework for other developing countries subject to some changes and adjustments to suit the local conditions and circumstances. The study also concludes that there is an urgent need to review and revise the UNCITRAL Law on Privately Financed Infrastructure Projects so as to better serve as an international legislative model or instrument on PPPs.

## **ABSTRAK**

Dalam kebanyakan negara-negara membangun, penyediaan dan pembekalan infrastruktur dan perkhidmatan-perkhidmatan adalah, sehingga baru-baru ini, di bawah kawalan pihak-pihak berkuasa awam sepenuhnya. Walau bagaimanapun, kerana ketidakcekapan, rasuah, kekurangan kemahiran dan pengetahuan teknikal yang melanda, dan sebenarnya masih terus melanda, penyediaan dan pembekalan infrastruktur awam melalui model perolehan awam tradisional, serta keperluan untuk menikmati penanaman modal dan kepakaran pihak swasta, kerajaan-kerajaan negara-negara ini mulai melepaskan monopoli mereka dalam penyediaan dan pembekalan infrastruktur. Peralihan paradigma daripada pendekatan 'kerajaan menyediakan' kepada 'kerajaan membolehkan' memerlukan sinergi pintar Perkongsian Awam-Swasta (PAS). Jauh lebih penting lagi, PAS juga bertindak sebagai pemangkin kepada pembangunan sosio-ekonomi negara. Bagi mengiktirafkan peranan penting yang PAS boleh mainkan dalam pembangunan infrastruktur negara, kerajaan negara-negara membangun yang lebih progresif telah memulakan penggubalan undang-undang dengan tujuan untuk mengawal selia PAS dalam bidangkuasa mereka masing-masing setelah menyiapkan dasar-dasar sokongan yang berkenaan. Undang-undang ini bertujuan untuk memastikan ketelusan, kebertanggungjawaban dan tahap sama rata antara kerajaan dengan rakan-rakan kongsi sektor swasta. Tesis ini, oleh itu, bertujuan mengkaji semula rangka perundangan yang sedia ada di Ghana, Nigeria dan Afrika Selatan serta rangka-rangka antarabangsa teras yang berkaitan dengan tujuan membuat cadangan-cadangan khusus bagi setiap bidang kuasa yang dikaji serta mengesyorkan suatu rangka kawal seliaan sebagai model bagi negara-negara membangun yang bercadang untuk menerima pakai PAS untuk memperbaiki dan

mengatasi defisit infrastruktur mereka. Kajian ini mengguna pakai suatu kaedah penyelidikan undang-undang secara kualitatif yang melibatkan kedua-dua kajian empirikal dan kajian perpustakaan. Kajian ini menunjukkan bahawa secara amnya rangka perundangan semasa di Afrika Selatan adalah jauh lebih menyeluruh daripada apa yang sedia ada di Ghana atau Nigeria. Justru itu, ia juga boleh berfungsi sebagai rangka PAS kebangsaan bagi negara-negara membangun lain tertakluk kepada beberapa perubahan dan penyelarasan untuk disesuaikan dengan syarat-syarat dan keadaan-keadaan tempatan. Kajian ini juga menyimpulkan bahawa terdapat keperluan untuk menyemak semula Undang-undang UNCITRAL untuk Projek Infrastruktur Biayaan Swasta bagi tujuan penambahbaikan sebagai suatu model perundangan antarabangsa atau instrumen untuk PAS.



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Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others.

Brümmer v Minister for Social Development and Others [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC).

Cable & Wireless Plc V. IBM United Kingdom Ltd [2002] EWHC 2059 (Comm), [2003] B.L.R. 89.

Enyelike V. Ogoloma & Ors (2008) 14 NWLR (Pt. 1107) @ page 247.

Kano State Urban Development Board V. Fanz Construction Co. Ltd. (1990) 4 N.W.L.R. (Pt 142) 1.

Leon Joseph & others V. City of Johannesburg & others CCT 43/09.

Masetlha v. President of the Republic of South Africa 2008 (1) SA 566(CC), para78.

Minister of Health & another VS New Clicks South Africa (Pty) Ltd & Ors(2006) 2 SA 311 (CC) Para 95-96.

Pharmaceutical Manufacturers Association of SA In Re: Ex parte Application of President of SA 2000 3 BCLR 241 (CC) para 85.

President of the Republic of South Africa & Ors V. M &G Media Limited [2009] ZACC 21; 2009 (6) SA 323 (CC).

## **LIST OF STATUTES**

### **GHANA**

Arbitration and Conciliation Act 2010

Business Name Act No 151 of 1962

Companies Code Act No 179 of 1963

Constitution of the Republic of Ghana

Financial Administration Act 2003

Financial Administration Regulations 2004

Ghana Investment Promotion Act 1992

Ghana Investment Promotion Centre Act 1994

Partnership Act No 152 of 1962

Public Procurement Act No 663 of 2003

### **NIGERIA**

Arbitration and Conciliation Act Cap 268 LFN 2010.

Companies and Allied matters Act cap 59 LFN 2010.

Constitution of the Federal Republic of Nigeria 1999

Federal Airport Authority Act LFN 2010

Federal Capital Development Authority Act LFN 2010

Federal Highways Act LFN 2010

Fiscal Responsibility Act 2010

Freedom of Information Act 2011

Immigration Act Cap 171 LFN 2010.

Industrial Inspectorate Act 180 LFN 2010

Infrastructure Concession and Regulatory Commission Establishment Act, 2005

Investment and Securities Act No. 45 2010.

Land Use Act LFN 2010

National Office of Technology Acquisition and Promotion Act

National Policy on Public-Private Partnerships

Nigerian Investment Promotion Commission Act

Privatisation and Commercialisation Act 2010

Provisions) Decree No. 17 of 1995

Public Procurement Act LFN 2010

The Foreign Exchange (Monitoring and Miscellaneous

## **SOUTH AFRICA**

Arbitration Act No 42 of 1965

Black Economic Empowerment Act

Companies Act No 71 of 2008

Competition Act 1998

Constitution of the Republic of South Africa 1996

Municipal Finance Management Act

Municipal Systems Act

Preferential Procurement Policy Framework Act 2000

Prevention and Combating of Corrupt Activities Act 2004

Promotion of Access to Information Act 2000

Promotion of Administrative Justice Act 2000

Public Finance Management Act 1999

Public-Private Partnership Manual

Standardized Public Private Partnership Provision 2004

Treasury Regulation 16

## **REGIONAL AND INTERNATIONAL LEGISLATIVE FRAMEWORKS**

European Bank for Reconstruction and Development (EBRD's) "Core Principles on Modern Concession Law" 2006; and

European Commission Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions, 2004

European Commission's Directives on the Award of Concessions

European Union Procurement Directives 2004/18/EC

OECD "BASIC Elements of Law on Concession Agreements" 2000;

Treaty on the Functioning of the European Union

UNCITRAL Model Law on Public Procurement

UNCITRAL Privately Financed Infrastructure Projects (PFIPs) Instruments;

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award (New York Convention 1958),

United Nations Industrial Development Organisation (UNIDO's) Guidelines for Infrastructure Development through Build, Operate and Transfer (BOT) 1996;

## LIST OF ABBREVIATIONS

ADR:	Alternative Dispute Resolution
AU:	African Union
BC:	Before Christ
BCAL:	Bi Courtney Aviation Limited
BMPIU:	Budget and Price Intelligence Unit
BOO:	Build, Own, Operate
BOOT:	Build, Own Operate and Transfer
BOT:	Build, Operate and Transfer
CAC:	Corporate Affairs Commission
CASA:	Chinese Association of South Africa
CCTV:	Close Circuit Television
CEDR:	Centre for Effective Dispute Resolution
DBOM:	Design, Build, Operate and Transfer
DFBOT:	Design, Finance, Build, Operate and Transfer
EBRD:	European Bank for Reconstruction and Development
ECOWAS:	Economic Community of West African States
EU:	European Union
FAAN:	Federal Airport Authority of Nigeria
FCDA:	Federal Capital Development Authority
FIFA:	Federation of International Football Association
GAT:	General Aviation Terminal
GDP:	Gross Domestic Product
GDR:	Global Depository Receipts
GIPC:	Ghana Investment Promotion Centre
GLO:	Global Telecommunications
GWCL:	Ghana Water Company Limited
ICB:	International Competitive Bidding
ICRC:	Infrastructure Concession Commission
IMF:	International Monetary Funds
UNCITRAL:	United Nations Commission on International Trade Law
ISE:	Istanbul Stock Exchange
ITU:	International Telecommunications Union
KIA:	Kotoka International Airport, Ghana
LCC:	Lekki Concession Company

MCL:	Model Concession Law
MDAs:	Ministries Departments and Agencies
MDGs:	Millennium Development Goals
MMA:	Murtala Muhammed International Airport
MOFEP:	Ministry of Finance and Economic Planning
MTN:	Mobile Telecommunications Network
NCA:	National Communications Authority, Accra
NCB:	National Competitive Bidding
NDP:	National Development Plan
NDPC:	National Development Planning Commission
NIP:	National Infrastructure Plan
NIPC:	Nigerian Investment Promotion Commission
NITEL:	Nigerian Telecommunications
NPC:	National Planning Commission
O & M:	Operation and Management
OECD:	Organisation for Economic Cooperation and Development
OUTA:	Opposition to Urban Tolling Alliance
PFI:	Privately Financed Infrastructure
PHCN:	Power Holding Company of Nigeria
PID:	Public Investment Division
PMI:	Project Management International
PMU:	Project Monitoring Unit
PPA:	Public Procurement Authority, Ghana
PPIAF:	Public Private Infrastructure Advisory Services
PPP:	Public-Private Partnership
RFP:	Request for Proposal
RMB:	Rand Merchant Bank
SAIDP:	South Africa Infrastructure Development Plan
SANRA:	South African National Road Agency
SAP:	Structural Adjustment Programme
SEC:	Securities and Exchange Commission
SPV:	Special Purpose Vehicle
SSNIT:	Social Security and National Insurance Trust
STDs:	Standard Tender Documents
TA:	Treasury Approval



TCPC:	Technical Committee on Privatisation and Commercialisation
TFEU:	Treaty of the Functioning of the European Union
TFR:	Transnet Freight Rail
UN:	United Nations
US:	United States
USD:	United States Dollars
VFM:	Value for Money
WAPP:	West African Power Pool

## CHAPTER ONE

### 1.0 INTRODUCTION

Investment in infrastructure is the key to economic growth, quality of life, poverty reduction and, access to education and healthcare, and helps in achieving many of the goals of a robust economy.<sup>1</sup> The recent trend from public to private provision of infrastructure has been underpinned by a marked change in thinking and practice, reinforced by technological changes and institutional innovations.<sup>2</sup> In recent time, a worldwide movement has taken place towards Public Private Partnerships<sup>3</sup> and deregulation,<sup>4</sup> signaling an intellectual revival in free markets.

Governments all over the world have sought for the participation of private sector in the delivery of public services which were traditionally within the domain of public authorities. The levels of involvements vary and have taken different forms ranging from Privatization of erstwhile public enterprises to contracting out of services and of recent, the use of Public-Private Partnerships in the provision of social and economic infrastructures necessary for the development of a nation.<sup>5</sup> Privatisation is the most common of these initiatives and it has been adopted by several countries especially in Europe, Asia and Latin America.<sup>6</sup> Contracting out of government services has also been widespread. Recently, Public Private Partnerships in infrastructure development have increasingly been of special interest to most developing countries as an alternative to traditional public procurement system.

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<sup>1</sup> Jefferey Delmon, *Public Private Partnership Projects in Infrastructure: An Essential Guide for Policy Makers*, (Cambridge, Cambridge University Press 2011). 1

<sup>2</sup>Darrin Grimsey and M. K. Lewis, *Public Private Partnerships: The Worldwide Revolution in Infrastructure Provision and Project Finance* (Edward Elger Publishing Limited,2007) Page 30.

<sup>3</sup>PPP is used here in its most inclusive form, to mean any contractual or legal relationship between any public and private bodies aimed at improving and/ or expanding infrastructural services, but excluding public works contract.

<sup>4</sup> This means the reduction or elimination of government power in a particular industry, usually enacted to create more competition within the industry.

<sup>5</sup> Bing Li and Akintola Akingboye, " An Overview of Public Private Partnership", In Akintola Akintoye, Mathias Beck, and Cliff Hardcastle (eds) *Public Private Partnerships: Managing Risks and Opportunities* (Blackwell Publishing Company: Oxford, 2008) Page 29.

<sup>6</sup> There are several Countries that have adopted this politico-economic policy. Prominent among them are China, Brazil, India, Russia, Poland, Argentina, Thailand, Indonesia and Malaysia.

The idea of Government in Nigeria divesting itself of its interest in commercial enterprises started in the early 80s.<sup>7</sup> Because of the government monopoly in businesses, the experience of Government in Nigeria had been very similar to that of the United Kingdom. Almost all the businesses in the country became virtually unsuccessful. The magnitude of the failure of these businesses became very apparent when the government realized that it had failed even though it had no competitors.

By the late 1980s, the Nigerian government began to open up to a more private sector-led economy. The government started to engage the private sector in dialogue on economic policy making.<sup>8</sup> However, due to the long military rule in the country which gave no active role to the private sector in development, the private sector had become weakened and lacked the capacity to constructively prioritize and implement reforms. The resumption of military rule in the early 1990s forestalled the limited economic progress made, but with the return to democracy in 1999, economic policy again shifted in favor of a more open, private sector-led economy. At this time, effective representation by the private sector became critical to national economic policy deliberations.

In the same vein, Ghana's experience is similar to that of Nigeria. The long military rule which the country went through had weakened the private sector. However, since the return of democracy in 1992, the country has equally laid a solid foundation for the private sector participation in development. The 1992 constitution expressly gives the private sector the right to participate in economic activities in order to increase its investment in infrastructure and other economic

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<sup>7</sup>This was the Privatisation and Commercialization Decree No. 25 of 1988; later redesigned "Act".

<sup>8</sup> M. I. Agboli and J. J. Emery, "Encouraging Effective Dialogue and Advocacy in Nigeria: The Public-Private Dialogue". Retrieved from [www.publicprivatedialogue.org/.../The%20Better%20Business%20Inj](http://www.publicprivatedialogue.org/.../The%20Better%20Business%20Inj). Accessed on 04.03.12.

activities.<sup>9</sup> Investment in Public-service delivery has not matched the population growth. The World Bank estimates that Ghana needs over US\$1 Billion annually to address its infrastructure challenges.<sup>10</sup>

South Africa has the greatest cumulative experience in the practice of Public-Private cooperation. The Public-Private Partnership programme has over 50 projects executed at both the National and Provincial levels and over 300 projects executed at the municipal level since 1994.<sup>11</sup> The South African National Treasury which is the ministry that is responsible for the approvals of these deals, has built on almost a decade of PPPs, and has developed a PPP Manual and Standardized PPP Provisions to guide all projects of this nature.<sup>12</sup>

South African Public-Private Partnerships programme has been a success story. The rate of the development of infrastructure is rather unimaginable; electricity, rail, roads, airports, ports and water are all expanding rapidly.<sup>13</sup> Clear Public-Private Partnership laws, processes and standard terms; independent judiciary; strong political commitment; strong financial market and competitive private sector and sound monitoring measures are part of the success factors in the Public-Private Partnerships programme.<sup>14</sup>

It is on the above premise that this research will examine the existing legal and regulatory framework for Public Private Partnerships in Ghana and Nigeria and to draw lessons from South Africa and other regional and international legislative

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<sup>9</sup> See S.36 (2) of the Ghanaian 1992 Constitution.

<sup>10</sup> See Threading a Public Private Partnership Path that Works”, Retrieved from <http://www.ghanabizmedia.com/ghanabizmedia/july-2011-policy/364-treading-a-public-private-partnership-path-that-works.html>. Accessed on 17.05.12.

<sup>11</sup> Peter Farlam ‘Putting Partnerships Together’. <[www.oecd.org/dataoecd/44/4/34867724.pdf](http://www.oecd.org/dataoecd/44/4/34867724.pdf)>. Accessed on 01.05.12.

<sup>12</sup> Ibid.

<sup>13</sup> Sikhumbuzo Gqoli, *Public-Private Partnerships in South Africa*. Retrieved from <http://www.oecd.org/dataoecd/59/10/35624345.pdf>. Accessed on 19.04.12.

<sup>14</sup> Ibid.

frameworks. Hence, the research will look at the practical application of the legal and regulatory framework especially in the selected countries such that where the application of these legal and regulatory frameworks are inadequate, proposal will be made to the appropriate authorities to legislate laws that will complement the already existing ones.

## **1.1 Statement of Problem**

Nigeria and Ghana suffer from a huge deficit in terms of key infrastructures.<sup>15</sup> The available infrastructures are not also being operated or maintained satisfactorily. In Nigeria, the existing network of highways in the country is not only inadequate but also largely in a deplorable state. A vast section of the country remains unconnected to the national grid and the areas connected suffer from epileptic power supply most of the time.<sup>16</sup> The same unsatisfactory state of affairs applies to other infrastructures with the possible exception of telecommunication which has enjoyed very significant private sector investments in recent times.<sup>17</sup>

The state of infrastructure in Ghana and Nigeria currently does not meet the requirement for economic development. Recent reports suggest that Nigeria requires USD100 Billion (about 15 Trillion Naira) for the next Ten Years in order to meet her infrastructural requirements.<sup>18</sup> The World Bank recommends that 7-9 %

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<sup>15</sup> Section 36 of the Infrastructural Concession Regulatory Commission (Establishment, e.t.c) Act 2005 defines "Infrastructure" to include development projects which, before the commencement of the Act, were financed, constructed, operated or maintained by the government and which, after the commencement of the Act may be wholly or partly implemented by the private sector under an agreement pursuant to the Act including but not limited to power plants, highways, seaport, airports, canals, dams, hydroelectric power projects, water supply, irrigation, telecommunications, railways, interstate transport systems, land reclamation projects, environmental remediation and clean-up projects, industrial estates or township development, housing, government buildings, tourism development projects, trade fair complexes, warehouses, solid wastes management, satellite and ground receiving stations, information technology networks and database infrastructure, education and health facilities, sewerage, drainage, dredging, and other infrastructure and development projects as may be approved, from time to time, by the Federal Executive Council.

<sup>16</sup>B. O. Babalakin, *Public Private Partnership: Infrastructure Development as a vehicle for Economic Development*. Being a Paper Presented at the 2<sup>nd</sup> Mustapha Akanbi Public Lecture Organised by the faculty of Law University of Ilorin, July, 2009.

<sup>17</sup> The Federal Government of Nigeria granted the first license to Mobile Telecommunications Network (MTN) in August 2001.

<sup>18</sup>See the statement made by the Central Bank Governor of Nigeria, Sanusi Lamido Sanusi <http://www.thisdaylive.com/articles/cbn-advocates-creation-of-nigeria-infrastructure-fund/87067/> accessed on 04.03.12.

of the Gross Domestic Product [GDP]<sup>19</sup> of the developing countries like Ghana, Nigeria and other developing countries should be invested in infrastructure.<sup>20</sup>

Today, Ghana's infrastructure development is relatively poor, both in qualitative and quantitative terms, in spite of its growing economic wealth.<sup>21</sup> Investment in public infrastructure in recent times has not matched the increasing need of the population. The nation's railway network had suffered serious neglect before it is currently being given government attention. Underinvestment in road transportation, electricity, housing, water and sanitation has posed a serious challenge to the government in its quest for rapid development. The World Bank has estimated that for Ghana to fill its infrastructure gaps, the country needs over US\$1.5 billion annually for the next ten years in various sectors of the economy.<sup>22</sup> The investment required exceeds government total revenues available in the short term. These infrastructures and related investments are critical in helping these countries to achieve 13% Annual Growth government target and to be in one of the world's 20 largest economies by the year 2020.<sup>23</sup>

It is therefore apparent from these facts that the government alone, at the best of times lacks the capacity to provide the infrastructure requirements of the nation. This clearly underscores the need for the active participation of the private sector through the Public-Private Partnership (PPP) schemes to supplement the efforts of government in the provision of critical infrastructures.

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<sup>19</sup>This is the total monetary value of all goods and services produced domestically by a country.

<sup>20</sup> See: Can Infrastructure Investment Generate Growth? Available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTINFRA/0,,contentMDK:23154473~pagePK:64168445~piPK:64168309~theSitePK:8430730,00.html>, accessed on 15.06.12. It has also been said that improved infrastructure quality accounted for about 30% of growth attributed to infrastructure in developing countries.

<sup>21</sup> Treading a public private partnership path that works. Available at <<http://www.ghanabizmedia.com/ghanabizmedia/july-2011-policy/364-treading-a-public-private-partnership-path-that-works.html>>. Accessed on 09.11.13.

<sup>22</sup> See Ghana-PPP Projects. Available at <<http://www.worldbank.org/projects/P125595/ghana-ppp-project?lang=en>>. Accessed on 13.11.13.

<sup>23</sup>See the statement made by Chief Earnest Shoneka, Chairman Nigerian Infrastructural Concession and Regulatory Commission. <http://allafrica.com/stories/201004200328.html> Accessed on 04.03.12.

The government of Ghana and Nigeria are moving from the role of infrastructure developers and operators to facilitators. The governments believe that PPPs will optimize achievement of their goal of adequate infrastructure services that support the full mobilization and realisation of all economic growth and will help resolve problems related to traditional procurement such as inefficiency, unreliability and poor fiscal management.<sup>24</sup>

Public-Private Partnership (PPP) is a formal collaboration between a public body such as the Federal Government or a sub-national authority, and one or more private companies generally, with the objective of procuring private capital, management, technology and other resources as a means of enhancing infrastructure service delivery. PPPs, through which private companies work with public sector to manage complex infrastructure programmes and develop public services, are increasingly being used throughout the world as a solution to major public projects.

It is as a result of these and other reasons that the National Assembly of Nigeria enacted the Infrastructure Concession Regulatory Commission (Establishment, etc.) Act of 2005 (hereinafter called ICRC Act) to allow the Federal Government Ministry, agency, corporation or body involved in the financing, construction, operation, or maintenance of infrastructure to enter into contract with or grant concession to any pre-qualified project proponent in the private sector for the financing, construction, operation or maintenance of any infrastructure in Nigeria.<sup>25</sup>

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<sup>24</sup> See the Project Appraisal Report of the African Development Fund accessed from [http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/NIGERIA%20-%20PAR%20-%20-%20CB4PPP%20\(2\).pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/NIGERIA%20-%20PAR%20-%20-%20CB4PPP%20(2).pdf) on 06.03.12.

<sup>25</sup> See Section 1 of the Infrastructure Concession and Regulatory Establishment Act 2005.

However, despite the enactment of this Act, the PPP scheme has not made any appreciable impact at closing the infrastructure gap for which the Act was established due to lack of comprehensive legal and regulatory framework and lack of access to long-term financing. These have constituted serious impediments to the successful delivery of infrastructures through the Public-Private Partnerships arrangement in Nigeria.

Before the enactment of the ICRC Act in Nigeria, traditional procurement legislations and regulations have been adopted which usually include stipulations that the government can unilaterally terminate the agreement and forfeit the performance bond. The position of government has been that they can unilaterally terminate contracts as long as the termination is bona-fide and for the purposes of public interest. This concept clashes with the fundamental principle of party autonomy not only in infrastructure agreements but also in various international business transactions where states are involved.<sup>26</sup>

It is as a result of the above stated problems that the researcher has raised some questions which this research will address in order to suggest solutions and recommend reforms.

## **1.2 Research Objectives**

The objectives of this research are:

1. To examine and evaluate the legal and regulatory framework for Public-Private Partnerships in infrastructure development in Ghana, Nigeria and South Africa and other core international legislative framework;

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<sup>26</sup> Mohamed A.M.Ismail, International Infrastructure Agreements and PPP in Developing Countries: Substantive Principles, (2011) EPPPL Journal, Vol. 3.



2. To analyse the roles and responsibilities of the regulatory agencies under the relevant regulations, laws and conventions;
3. To identify the issues and challenges facing the implementation of PPP in Ghana, Nigeria and South Africa after their adoption; and
4. To propose reforms and recommendations in order to close the gaps in the existing legislative framework for PPPs in these countries as well as the international agencies.

### **1.3 Research Questions**

The researcher therefore raises some questions which the study seeks to address.

These are:

1. What are the relevant laws governing the private sector participation in the provision and development of infrastructure through PPP in Ghana, Nigeria and South Africa?
2. Whether the present legal and regulatory framework for Public-Private Partnerships in the three selected countries is adequate?
3. What are the challenges facing the Ghanaian, Nigerian and South African Authorities in the implementation of PPP laws in their respective jurisdictions?
4. Whether the UNCITRAL Model Law on Privately Financed Infrastructure Projects and Other International Legislative Framework on PPPs could effectively assist in the making of an ideal national PPP Model law?

#### **1.4 Research Methodology**

The researcher adopts a qualitative method of legal research. The qualitative legal research encompasses both doctrinal and non-doctrinal approaches. The methodology involves both empirical and library-based study involving the analysis of primary and secondary literature. In order to complete the first objective of this research work, namely; to examine and evaluate the legal and regulatory framework for Public Private Partnerships in infrastructure development in Ghana, Nigeria and South Africa as well as other international legislative frameworks, this research work looked at the primary sources which are the PPP legislations and other internal rules made by the regulatory bodies of the selected countries. These include:

1. The 1992 Ghanaian Constitution, National Policy on Public Private Partnerships, Public Procurement Act 2003, Financial Administration Act 2003 and Financial Administration Regulations 2004 and other relevant laws on PPPs in Ghana;
2. The 1999 Constitution of Nigeria, Infrastructure Concession and Regulatory Commission (Establishment) Act of 2005, Public Procurement Act of 2007, Fiscal Responsibility Act of 2007 and other relevant laws in Nigeria;
3. The South African Constitution of 1996, Public Finance Management Act (PFMA), Municipal Finance Management Act (MFMA) 2003 Preferential Procurement Policy Framework Act, The Black Economic Empowerment Act 2003, Treasury Regulation 16 and other relevant laws; and
4. Other regional and international legislative frameworks such as the UNCITRAL Model Law on Privately Financed Infrastructure Projects (PFIPs), United Nations Industrial Development Organisation (UNIDO's) Guidelines for Infrastructure Development through Build, Operate and Transfer (BOT),

The OECD “BASIC Elements of Law on Concession Agreements” 2000; European Bank for Reconstruction and Development (EBRD’s) “Core Principles on Modern Concession Law” (2006) and the European Commission’s Directives on the Award of Concessions.

The secondary sources that were used in this research work are: text books, journal articles, internet, newspaper reports, international documents, reports and other relevant materials. The use and analysis of the secondary materials at this point was considered quite interesting. This is because, it has helped the researcher to understand the practical constraints facing the legal and regulatory framework that could not be easily identified by the analysis of only the primary materials.

The non-doctrinal method adopted in this research includes the interviews of relevant stakeholders in the field of PPPs in the three selected countries. Semi-formal interviews were conducted with relevant stakeholders in the field of PPPs in the three selected countries (Ghana, Nigeria and South Africa), such as academics, Concessioners, attorneys, Staff of the relevant PPP regulatory agencies, educated persons and other members of the public. The names of the interviewees and the questionnaire are contained in Appendix A of this thesis.

Specifically, interviews were conducted in Nigeria at the following offices; Legal Department of the Infrastructure Concession Commission in Abuja which is the main regulator of Public-Private Partnership Projects in the Nigeria; a PPP Practitioner of Bi-Courtney Nigeria Limited was also interviewed in Lagos. The office is one of the major players and advisors on infrastructure development in Nigeria; two academic from the Institute of Advanced Legal Studies, Abuja and

University of Ilorin (both in Nigeria) respectively were also interviewed. In Ghana, interviews were conducted at the Public Investment Division (PID) of the Ministry of Finance and Economic Planning (MOFEP) in Accra. The PID is the main regulator of PPPs in Ghana. The dean, faculty of law University of Cape-Coast was also interviewed. To further understand the prospects and challenges facing PPPs in South Africa, the researcher beamed his searchlight to the PPP Unit of the National Treasury in Pretoria where he interviewed an official in the Unit. The Head of Chambers of Ledwaba Mazwai Attorneys, a leading firm in the provision of legal services relating to procurement, drafting, and implementation of delivery of infrastructure project in South Africa was also interviewed. The Head of the Department of International Law and Development of the University of Pretoria was also interviewed among others.

A less structured interview technique was adopted. In the process, interviewees were encouraged to talk freely about the adequacy and practical constraints experienced in the application and enforcement of the rules governing PPPs in their respective jurisdictions. Those interactions have greatly contributed to a better understanding of the practical context in which the laws and regulations are applied. Moreover, the discussions have also greatly contributed to the other objectives of this thesis by helping to identify and understand the prospects and challenges facing the implementation of the laws and regulations of PPPs in these countries.

Documentary research for the review of the current legislations was mainly carried out through library research at both the Tan Sri Professor Ahmad Ibrahim Law Library and the University of Malaya Main Library. Internet Materials, using the

University of Malaya Database and other search engines have really been very useful for this research.

### **1.5 Significance of the Study**

There is little comprehensive research on the regulatory framework for Public-Private Partnerships in infrastructure development, and generally no empirical research on the use of PPPs to procure public infrastructure especially in Nigeria and Ghana. The study therefore hopes to contribute to both theoretical and empirical literature by examining the regulatory framework of the three selected countries together with international best practices with the aim of recommending a model legal and regulatory framework for Public-Private Partnerships which can guide all developing countries with common law origin in particular that have adopted or may want to adopt PPPs as a solution to their infrastructure deficits.

Secondly, a close observation of the Public Private Partnership programme especially in Nigeria and Ghana will reveal that it has been a mixed grill. There have been remarkable progress, but there are also challenges. The challenges facing private participation in operation and maintenance of public infrastructures in Ghana and Nigeria are beyond cultural, funding, political and even economic factors. The lack of a clear cut policy on it and an inchoate nature of the legal framework are largely responsible for these challenges. This therefore necessitates a thorough examination of the Public-Private Partnership programme by looking at its legal and the regulatory framework. The study will therefore make appropriate recommendations to close the gap in the existing regulatory regime.

Thirdly, as at the time of writing this research, the African Union (AU) does not have any legislative framework to govern Public-Private Partnerships in Infrastructure Development and thus, may be interested to draw lessons from this research while drafting the regulations on PPP for the Union.<sup>27</sup> This will greatly help the nations of the union and other developing countries to consolidate and harmonise the laws for the development of the continent.

An effective, credible and sustainable legal and regulatory framework is crucial and essential for the promotion and fostering of successful PPP projects. It is the sincere hope of the researcher that this study will increase understanding of how best to use PPPs in developing countries and it will thus interest all stakeholders in PPP contract awards such as private firms, governmental agencies and lawyers. It is further hoped that the study will be of great interest to policy makers in PPPs and Public Procurement.

During all stages of PPPs, there must be a clear and transparent legal and regulatory framework that both parties can trust. Clarity in the regulatory framework will also help to minimise the risk of corruption and prevent unethical behaviour. No country can grow without the right guiding principles and laws regulating economic development. In essence, the right kind of legal and regulatory framework must be well established so as to achieve the desirable goals. A formidable legal system is therefore indispensable to the realization of a developing economy.

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<sup>27</sup> Also the ASEAN Region could also draw from the recommendations to develop a legal and regulatory framework for PPPs and Public Procurement.

It is hoped that the ultimate outcomes of this research project will be of great relevance and significance to other developing countries whose legal and regulatory framework on the same are still struggling to come to grips with the actual operating mechanics governing the same.<sup>28</sup>

## **1.6 Choice of Jurisdictions**

There are three countries selected for this study. These countries are all developing countries in Africa and they are the most developed in terms of common law and regulations within the African continent.

South Africa has developed a very comprehensive PPP Procurement regulation which makes it an ideal candidate for this study. The country has adopted a highly regulated and formal approach to public procurement and Public-Private Partnerships by entrenching Constitutional provisions as well as binding legislation and regulations to achieve the procurement objectives. The Administrative Law in South Africa has developed at an unprecedented manner making the country to be one of the best in the world in terms of administrative laws and regulations.<sup>29</sup>

In addition, there is available research that South Africa has incorporated various anti-corruption measures into its procurement regulations generally, and the effects of such mechanisms on the machinery of government will be great.<sup>30</sup> The study will therefore examine the manner in which the PPPs in South Africa are structured and applied, and lessons gathered from this jurisdiction will be recommended to other developing countries particularly those with common law background.

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<sup>28</sup> There are many countries that have PPPs but with no clear legal framework. Examples are Malaysia, Thailand among others.

<sup>29</sup> The South African Constitution provides for Just Administrative Actions and the parliament has enacted the Administrative Justice Act to ensure that official conducts of all officials are just, fair and reasonable.

<sup>30</sup> Sope Williams-Elegbe, *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification Measures*. Thesis submitted to the University of Nottingham for the Degree of Doctor of Philosophy. December, 2011.

Nigeria is a developing nation with huge human and material resources. The country has an estimated population of about 170 million people, it is the 13<sup>th</sup> largest producer of oil and gas and the 10<sup>th</sup> largest in oil reserves.<sup>31</sup> Like many developing countries, the country has a huge infrastructure deficit. It also has a very high potential for high returns on infrastructure investment. There exists huge opportunities within its infrastructure landscape which should make it a preferable choice for private investment in infrastructure.<sup>32</sup> The country has since 2005 adopted the PPP initiative as a solution to its huge infrastructure gap. Despite this, there have been serious challenges facing the operation of the PPP initiative. This study will therefore examine the existing legal and regulatory regime with a view to making recommendations from lessons learnt from other jurisdictions.

Ghana's wealth of resources, dynamic economy as well as stable political system makes it one of Africa's leading lights. Peaceful political transition and firm commitments to democracy and the rule of law are really helping the country to gain the world confidence in recent times. The country is attracting well-known international businesses that are currently investing in various sectors of the economy. The country is therefore committed to improving her infrastructure through the Public-Private Partnership initiative. The parliament in Ghana is in the gradual process of coming up with a legislative framework for PPPs for the country. This research work will therefore speculate on the possible outcome of the Ghanaian PPP legislation. The writer's guess is that Ghana will come up with a practical legislation considering its commitments to good governance.

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<sup>31</sup> See: Nigeria's facts and figures. Available at [http://www.opec.org/opec\\_web/en/about\\_us/167.htm](http://www.opec.org/opec_web/en/about_us/167.htm). Last accessed 19.01.14.

<sup>32</sup> Ahmed M, PPP for Infrastructure Development: The Nigerian Experience (2011). Infrastructure Concession Commission Publication, Page 1.



## **1.7 Scope and Limitation of the Research**

Generally, in a research like this, where a discourse on infrastructure is involved, it is mainly expected to be interdisciplinary in the sense that most of the texts are written by non-lawyers and were viewed not from the legal perspective. However, this research work is inherently limited to the legal aspects of Public-Private Partnerships in infrastructure development. The study focuses on developing countries with a case study of Ghana, Nigeria and South Africa.

## **1.8 Definition of Terms**

In this study, the term “public sector”, “government” and “public authority” are interchangeably used. Also, the term “Public-Private Partnership” and “concession” are also used interchangeably because in most PPPs, what the government does is to grant concession to the private sector to develop the infrastructure project. In addition, most of the international legislative framework refers to it as concession.

## **1.9 Structure of the Study**

The thesis broadly discusses the legal and regulatory framework for Public-Private Partnerships in Infrastructure Development with specific focus on Ghana, Nigeria and South Africa. The thesis is broadly divided into Seven Chapters to ease the discussion and appreciation of the issues therein.

Chapter One (1) is the general introduction to the study which includes the background of the research, methodology, Objective of the Study, Significance of the study, Choice of Jurisdiction and the Literature Review. Chapter Two (2) discusses the meaning and concept of Public-Private Partnerships, its typology and other necessary agreements which are ancillary to the main PPP agreement. Chapter Three (3) examined the legal,

regulations and agencies responsible for the implementation of PPP laws and policies in Ghana and further identified the challenges facing PPPs in that country. Chapter Four (4) examined and analysed legal regime of PPPs in Nigeria and identified the challenges. Chapter Five (5) focused on the legal regime of PPPs in South Africa. Chapter Six (6) examined the regional and international legislative frameworks like UNCITRAL Model Law on Privately Financed Infrastructure Projects (PFIPs), United Nations Industrial Development Organisation (UNIDO's) Guidelines for Infrastructure Development through Build, Operate and Transfer (BOT), The OECD "BASIC Elements of Law on Concession Agreements" 2000; European Bank for Reconstruction and Development (EBRD's) "Core Principles on Modern Concession Law" (2006) and the European Commission's Directives on the Award of Concessions while Chapter Seven is a concluding chapter which deals with conclusion, findings and recommendations.

### **1.10 Literature Review**

Reputable legal literature on Public-Private Partnerships were reviewed and relied upon to assess the merit of the previous studies carried out in this area of study and to assess the international best practices on the practice of Public-Private Partnerships in the selected countries. As highlighted in this chapter, the dearth of research specifically on the legal and regulatory framework for Public Private Partnerships in Infrastructure Development in the selected countries justifies the selection of this research. Among the literature were:

N. Avery<sup>33</sup> posited that governments of all political colours, at least in the capitalist world have considered the opportunities provided by the private sector in the modernisation and improvement of their ageing infrastructure. The writer gave a

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<sup>33</sup>Nicholas Avery, *Public-Private Partnerships: A Practical Analysis*, (London: Globe Publishing Ltd, 2006).

vivid description of the nature and kinds of PPP transactions. The book analysed PPP in relation to socio-economic infrastructures like Roads, Railways, Prisons, Health, Education and defence. However, the writer did not consider the legal and regulatory framework for PPPs in Ghana, Nigeria and South Africa.

E.R Yescombe<sup>34</sup> defines infrastructure and the various types to include economic and social infrastructure. The book further examined policy issues which normally arise for the public sector in considering whether to adopt the PPPs procurement route, and the specific application of this policy approach in PPP contracts. The writer also focused on the systematic and integrated approach to financing PPPs within this public-policy framework. The writer however did not make any mention of the legal and regulatory frameworks of PPPs in the three selected countries.

D. Grimsey and M. K. Lewis<sup>35</sup> examined the nature and types of Infrastructures to be covered by PPPs and the advantages and disadvantages of adopting PPPs as an alternative to infrastructure provision. The book further examined the typologies of PPP which can be adopted depending on the type of project. Finally, the structures of PPPs partnership agreements and also the concept of Risk Sharing and Value for Money were also examined. The writer also did not focus on the legal and regulatory framework for PPPs in Ghana, Nigeria and South Africa.

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<sup>34</sup>E.R. Yescombe, *Public-Private Partnerships Principles of Policy and Finance*, (Oxford: Elsevier Publishing Ltd, 2007).

<sup>35</sup> D. Grimsey and M. K. Lewis, *Public Private Partnerships: The Worldwide Revolution in Infrastructure Provision and Project Finance*.(United Kingdom, Edward Elger Publishing Limited, 2007).

Jefferey Delmon<sup>36</sup> focuses on specific infrastructure sector, with a focus on the strategic and policy issues essential for successful development of infrastructure through PPPs. He explained the practical guide to PPPs for policy makers and strategists, showing how governments can enable and encourage PPPs, providing a step by step analysis of the development of PPP projects. He explained what contractual structures look like and how PPP risk allocation works in practice. Though, the writer gave a brief account of the regulatory framework of PPPs, the writer did not examine it with specific reference to the legislations applicable to the selected countries being examined in this work.

S. Arrowsmith,<sup>37</sup> defines Public Procurement especially under the EU framework and explains the terminologies adopted by other systems such as the World Trade Centre and the United States. The work further distinguished between Public Procurement and other in-house provisions such as contracting-out or outsourcing. The study posited that for almost two decades now, governments have started moving towards contracting out of their services to an outside entity. The study further highlights the basic objectives of Public Procurement systems as including Value for Money, accountability, integrity, equal opportunities and treatments of all bidders, opening of public market to international trade and efficiency in the procurement process. The writer further examines the key principles that are important in ensuring the proper implementation of procurement objectives. These principles, according to the writer are transparency, equal treatment and competition.

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<sup>36</sup> J. Delmon, *Public Private Partnership Project in Infrastructure: An Essential Guide for Policy Makers* . (Cambridge University Press, 2011).

<sup>37</sup> S. Arrowsmith, *Public Procurement: Basic Concepts and the Coverage of Procurement Rules in Public Procurement Regulations: An Introduction*, Sue Arrowsmith (ed), (2010). Available at <http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf>. Accessed on 28.05.12.

P. Urio,<sup>38</sup> examines how the government and the private sectors can deliver efficient, sustainable, peaceful and equitable development through adequate collaboration and cooperation. The writer further examines the usefulness of the theory and practice of Public-Private Partnerships experience in Western countries to the transition and developing countries. He stated that the greatest obstacles to the ability of the government to create jobs are mainly due to a lack of effective basic infrastructure and services, poverty and insecurity. He further stressed that such situations will definitely limit the development of small and medium scale enterprises or investments by the multinational corporation. However, the writer did not address the legal and regulatory frameworks for Public-Private Partnerships.

J.L. Guash,<sup>39</sup> discusses the concession procedure, the regulatory framework and their outcomes in order to determine the continued usefulness of the process for the governments, investors and other end users. The book further examines the high incidence of contract renegotiation and its implication for infrastructure performance in the long run. However, the writer did not examine the legal and regulatory frameworks of Public-Private Partnerships in the three selected countries.

S. Karangizi,<sup>40</sup> analysed the extent to which some countries in the African Union have introduced and implemented the framework arrangement in public procurement processes. In doing this, the writer examined the existing procurement legislations of some of these African countries which were based on the

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<sup>38</sup>Paulo Urio, *Public-Private Partnerships: Success and Failure Factors for In Transition Countries*, (Washington, University Press of America, 2010).

<sup>39</sup>J.L. Guash, *Granting and Renegotiating Infrastructure Concessions: Avoiding the Pitfalls*, (Washington D.C, The World Bank, 2004).

<sup>40</sup> S. Karangizi, *Framework Agreements in Public Procurement: A Perspective from Africa*, in *Reform of the UNCITRAL Model Law on Procurement: Procurement Regulation for the 21<sup>st</sup> Century* Sue Arrowsmith (ed), ( Danvers, USA, Thompson Reuters, 2009). Pages 243-263.

UNCITRAL Model Law on the Procurement of Goods, Construction and services. The writer specifically examined the conditions for using the framework agreements; procurement planning and budgeting; publication of awards; financial thresholds and right of administrative review. The writer concluded that for African countries to enhance their procurement system, they need to enact specific legislations to provide for clear and unambiguous laws on procurement.

A. Akintoye, M. Beck and C. Hardcastle in the book titled *Public-Private Partnerships: Managing Risks and Opportunities*<sup>41</sup> present an overview of the involvement of the private sector in the delivery of public services. The writer considered the situation in both developed and developing countries and posited that in developed countries, PPPs are mainly used for services and maintenance issues like health services, education and management of public buildings. Whereas, in less developed countries like the countries of Sub-Saharan Africa, PPPs are used mainly to develop critical projects like roads, bridges, dams, water and sanitation among others. The book further examines and identifies the risks that are associated with specific projects. These include availability, construction, cost, credit, design, environment, land, finance, legislative changes, legal performance, operations, planning permissions, specification, time and technological risks among others. The authors therefore call for prudent risk management in order to ensure that before embarking on a PPP Project, risks are identified, assessed and or mitigated.

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<sup>41</sup> A. Akintoye, M. Beck and C. Hardcastle, Eds, *Public-Private Partnerships: Managing Risks and Opportunities* (Oxford , Black Science Publishing Company, 2003).

M. Bult-Spiering and G. Dewulf<sup>42</sup> provide a theoretical foundation for analysing the functioning of PPPs. The book illustrated this by drawing examples especially from the United States of America and the United Kingdom. The book further provides an insight on the various forms of PPPs and concludes that in order to ensure more strategic decisions on PPP issues, then stakeholders must understand the rationale behind PPPs.

E.B. Yehoue, M.R.Hammani and Jean-Francois<sup>43</sup> analysed the determinant factors for effective Public-Private Partnerships scheme in infrastructure projects using the World Bank Data Base on projects for developing countries. The book categorized the determinants of PPPs into Seven broad factors, taking into account the different incentives and challenges facing both the private and public sectors. The factors according to the writers are; the political environment of the nation where the PPP programme is being implemented, the institutional quality, the legal system, government constraints, market conditions and past experience with the PPP scheme. The writer however did not also specifically examine the legal and regulatory frameworks for Public-Private Partnerships in Ghana, Nigeria and South Africa.

K. Sarkodie,<sup>44</sup> analyses the provisions of the Ghana Arbitration Act of 2010, stressing the importance of a sound and an efficient dispute resolution mechanism in PPP contracts to a country like Ghana that intends to attract both local and foreign investors. The article further considers the extent to which the provisions of

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<sup>42</sup> M. Bult-Spiering and G. Dewulf, *Strategic Issues in Public Private Partnerships: An International Perspective*, (Oxford, Blackswell Publishing Ltd, 2006).

<sup>43</sup> E.B. Yehoue, M.R.Hammani and Jean-Francois, *International Monetary Fund Working Papers: Determinants of Public-Private Partnerships in Infrastructure*, (Washington D.C., I.M.F., 2006).

<sup>44</sup> Kwadwo Sarkodie *Arbitration in Ghana – The Alternative Dispute Resolution Act 2010*, (2011). *International Construction Law Review*, Page 3. Also available at [http://www.mayerbrown.com/files/Publication/See12231-1295-4559-8167-89d93cdf2a06/Presentation/PublicationAttachment/91e048fe-67d4-4e3f-9d10-8bbf9861e753/ArbitrationGhana\\_Sarkodie.pdf](http://www.mayerbrown.com/files/Publication/See12231-1295-4559-8167-89d93cdf2a06/Presentation/PublicationAttachment/91e048fe-67d4-4e3f-9d10-8bbf9861e753/ArbitrationGhana_Sarkodie.pdf).

the new Act are likely to succeed in facilitating and supporting arbitration as an effective tool for resolving conflicts especially in the construction industry.

M.T Adekilekun, O.A.Olatunji, C.C. Gan and M.M. Akanbi<sup>45</sup> examined the dispute resolution mechanism in PPP contract with a specific focus on Nigeria, South Africa and few countries in Asia. The article states that since PPP disputes are commercial in nature, the best way to resolve those disputes is through other alternatives apart from litigation. The article further sets out the types of dispute that may arise from PPP transactions and considered the advantages and disadvantages of using the alternative to dispute resolution mechanisms. The article concludes that arbitration is the best procedure because the decision of the arbitration panel is binding and enforceable in law courts.

T.O. Akenroye, A.S. Oyegoke and Ama Bassey Eyo, 'Development of a Framework for the implementation of Green Procurement in Nigeria'<sup>46</sup> emphasises the need to incorporate environmental and sustainable issues (otherwise known as Green Procurement) in procurements generally. The writers posited that in developed countries, green public procurement is often considered as part of the procurement process, whereas in developing countries, green public procurement are emerging. The writers stated that the awareness of green issues in public procurement has been on the increase since the international conference on environment and development which was held in Rio de Janeiro in 1992. The article concluded that developing countries need to consider incorporating Green Public Procurement in developing a framework for procurement generally.

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<sup>45</sup> M.T Adekilekun, O.A.Olatunji, C.C. Gan and M.M. Akanbi Public-Private Partnership Initiatives in Nigeria and Its Dispute Resolution Mechanism: An Appraisal (2013) JMCL Vol 40 67-86.

<sup>46</sup> T.O. Akenroye, A.S. Oyegoke and Ama Bassey Eyo, 'Development of a Framework for the implementation of Green Procurement in Nigeria (2013) Int. Journal of Procurement Management Vol 6 No.1 1-23.



Peter Zunlik<sup>47</sup> discussed the procurement of green energy within the countries of the European Communities especially considering the effect of the Treaty of Lisbon on the energy and environmental policies of the community. The work further considered the implications of environmental principles for public procurement. The writer considered the provision relating to this policy in the 5<sup>th</sup> and 6<sup>th</sup> development programme. He concluded that the 6<sup>th</sup> action programme contained provisions on economic incentives for environmentally friendly products which can help in developing an objective basis for green public procurement. He suggested that government of both developed and developing countries must act as leaders in the management and implementation of green public procurement.

A.B Adjei,<sup>48</sup> examined the existing legislative and institutional framework for public procurement in Ghana. He posited that before the enactment of the Public Procurement Act of 2003, the procurement regulations and institutions were uncoordinated. The writer specifically examined the procedure for Administrative Review for complaints emanating from the public procurement. This was examined under administrative review proceedings or review by procurement entity. The writer later identified the challenges while seeking to enforce the provisions of the Public Procurement Act in relation to administrative review.

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<sup>47</sup> Peter Zunlik, 'The Procurement of 'Green' Energy' in *Social and Environmental Policies in EC Procurement Law, new Directives and New Dimensions* Sue Arrowsmith and Peter Zunlik (eds), (Cambridge University Press, 2009), 369.

<sup>48</sup> A.B. Adjei, *Challenges in the handling of Procurement Complaints: Ghana's Experience* (2011) 38 JMCL.

M.M. Akanbi and O.A Olatunji<sup>49</sup> examined the different housing policies which successive governments had developed to tackle housing problems in Nigeria. The paper further examined the legal framework put in place to regulate the various housing regimes in Nigeria. The paper found that there is still a wide deficit in housing delivery despite the diverse regulations introduced by successive governments to address the problem. The paper therefore considered adopting PPP initiative as an alternative solution to providing sustainable housing delivery in Nigeria. The paper concluded that although PPPs may be an option, but asked government to be wary of it because it may turn out to be exploitative at the long run.

M. M. Akanbi<sup>50</sup> examined the prospects and challenges that are inherent in the Privatisation and Commercialisation programme especially to developing countries in Africa. The paper shows how some African Countries are attracting investors thereby becoming emerging economies. The paper further traces the history and legal regime of Privatisation and Commercialisation in Nigeria since the policy was introduced in 1986. The paper concluded that although, the programme can be a window of opportunity for growth and development for most African nations, they are however not without challenges which should be addressed in order to make the programme a success.

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<sup>49</sup> Muhammad M. Akanbi & Olugbenga A.Olatunji, "Sustainable Development and Housing Delivery in Nigeria: An Examination of the Legal Perspective of the Public-Private Partnership Initiative", (2012) in *Law and Sustainable Development in Africa*, edited by Bondzi-Simpson P.E, Egbewole W.O, Etudaiye M.A, Olatunji AO. (Surrey: Grosvenor House Publishing Limited).

<sup>50</sup>M.M. Akanbi, "Privatisation and Commercialisation of Investments: How Beneficial are they to Developing Economies in Africa?" (2010) 11 *J. World Investment & Trade*. Available at <http://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/jworldit11&id=421&print=section&section=27&ext=.pdf>. Last accessed 04.12.13.

M.T. Adekilekun<sup>51</sup> examined the background to the emergence of the concepts and workings of Public-Private Partnerships in Nigeria Political-cum-economic climate; a climate where infrastructure projects were funded solely by the public sector. The article further examined the nature of the partnership existing between the parties and showed the correlation between Public-Private Partnerships and nation's development. Also, the nature and the legal framework for PPPs in Nigeria were also examined. He concluded that PPPs will go a long way in helping both the Federal and State governments in Nigeria in addressing the infrastructure deficit in the nation.

S. Williams-Elegbe,<sup>52</sup> defines corruption in its various forms and examines its effect on Public Procurement. The thesis compares and contrasts the legal, institutional and practical approaches to the implementation of the disqualification measures in procurement practices in the European Union, the United Kingdom, United States, the World Bank and South Africa. The study further highlighted the problems that may be created by the use of disqualification measures especially in determining how much discretion should be exercised by the disqualifying authority. The writer concluded that the provisions in the South African and United States Corruption legislations are quite detailed and they cover several of the difficult issues.

P. Braun<sup>53</sup> distinguishes between PFIs and Public Procurement. The thesis examined the Three (3) socio-economic circumstances for adopting PFIs, which are significant cash constraints, procurement failures of the past and the urgent need of infrastructure investment that are necessary to stimulate national

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<sup>51</sup> M.T. Adekilekun, "Public-Private Partnerships and Sustainable Development in Nigeria,"(2012) in *Law and Sustainable Development in Africa*, edited by Bondzi-Simpson P.E, Egbewole W.O, Etudaiye M.A, Olatunji AO. (Surrey: Grosvenor House Publishing Limited, 2012).

<sup>52</sup> S. Williams Elegbe, *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification Measures*, (UK, Hart Publishing, 2012).

<sup>53</sup> P. Braun, *The Practical Impact of E.U Procurement on PFI Procurement Practice in the United Kingdom*. Thesis Submitted to the University of Nottingham for the Degree of Doctor of Philosophy.

development. The thesis posited that the significant backlog of infrastructure investment, poor management of public projects and effective service delivery mechanism as well as the requirement of value for money and sufficient risk transfer were part of the reasons why PFI was adopted in the UK.

E. Farquharson, C. Torres de Mastle, E.R. Yescombe and J. Encinas<sup>54</sup> discussed some of the key aspects to successful and sustainable Public Private Partnerships, such as the various financing mechanisms and the diversity of PPP contractual arrangements in countries with different legal systems. The writers also discussed emerging PPP markets in Africa and discussed the nuances that emerged in the recommended paths when taking into account this diversity. The writers also examined the different activities involved in transforming a desirable project in a government's eyes to an attractive investment opportunity for private partner, and also into a PPP project that would ultimately benefit all parties. However, the writers did not focus on the legal and regulatory aspects of Public Private Partnerships in Nigeria.

Organisation for Economic Cooperation and Development<sup>55</sup> examined how to improve the use of resources in PPPs. The book also shows the extent to which countries are now using PPPs in service delivery. Other issues which the writer focused on include the roles that affordability and value for money plays in the success of PPP, the importance of sufficient competition in ensuring an effective transfer of risk. The book further discussed the regulatory questions such as transparency, compliance, enforcement issues and the need for legal framework in

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<sup>54</sup> E. Farquharson, C. Torres de Mastle, E.R. Yescombe and J. Encinas, *How to Engage with the Private Sector in Public Private Partnerships in Emerging Markets*, (World Bank: Washington DC), 2011.

<sup>55</sup>OECD, *Public Private Partnerships: In Pursuit of Risk Sharing and Value for Money*,( OECD publishers, 2008).

PPPs. However, the writers did not beam their searchlight on the legal and regulatory issues affecting Public Private Partnerships in Nigeria.

M. Burnett<sup>56</sup> explains the need for further legislative initiative and greater legal certainty in the award of concessions and the need to promote value for money in PPP and concession contracts in the European Union. The writer posits that in the absence of legislative initiatives, the rules on the definition and award of concessions will emerge from decisions of courts, leaving legal uncertainty to persist and its attendant price litigation. Though brilliant as the writer has posited, the paper does not consider legal and regulatory issues surrounding Public Private Partnerships in Ghana, Nigeria and South Africa.

J. Nyagwachi and J. Smallwood<sup>57</sup> pointed out that though, PPPs are still new in South Africa, and they have a long history dating back to the Nineteenth Century in financing infrastructure. The writers examined cases of some specific projects earlier carried out under PPPs such as the Suez Canal, which was a financial success until nationalized in the mid-1950s, the toll roads in the United States which were operated between 1789 and 1900 and the Motorway Programme embarked upon by the Spanish government in the mid-1960s. The writers examined some operational PPP projects in South Africa, representing various sectors in different stages and which were investigated with regard to their operational performance in relation to risks, affordability, project management and legal and regulatory framework.

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<sup>56</sup>M. Burnett, "A new EU Directive on Concessions- the Right approach for PPP?"(2008), (EPPL Journal) Volume 4 Page 185(Berlin, Lexxion mbh).

<sup>57</sup>J. Nyagwachi and J. Smallwood, "South African Public Private Partnership (PPP) Projects", (2008) *Journal of Construction, Vol 1 No 2*, (Cape Town, Crown Publication Plc).

P. Burger<sup>58</sup> gave a brief history of PPP and the PPP Unit in South Africa. He traced the history since 1997 when the government first appointed an interdepartmental task team to develop policy, law and institution reforms till 2009. The article further examines the rationale for establishing a dedicated PPP Unit within the South African National Treasury. He stated that there would be a great danger if the concerned department does not fully appreciate the budgetary implications of PPPs. In addition, he posited that a dedicated PPP Unit may be established in order to create a center of knowledge and expertise that can provide technical assistance to the relevant department that wants to carry-out a PPP project.

A.S. Raquel & A. Andrade<sup>59</sup> explained good governance in PPP as putting in place the enabling institutions, procedures and processes associated with PPPs. The writers also examined the concept of corporate governance which is said to be important in achieving success in PPPs. The writers however did not write on the legal aspect of the public Private Partnerships.

J.R.A Aryee, in his book titled *Saints, Wizards, Demons and Systems: Explaining the Success or Failure of Public Policies and Programmes*,<sup>60</sup> examines why policies and programmes fail and how they can become more successful not only in Ghana, but in other African countries. He suggested that the right combination of committed politicians and bureaucrats (saints); appropriate policy analysts and available reliable information (wizards); management of hostile and apathetic groups (demons); and insulation of the policy environment from the vagaries of implementation (systems).

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<sup>58</sup> Philippe Burger, “ The Dedicated PPP Unit of the South African Treasury” (2011). Available at <<http://www.oecd.org/mena/governance/37147218.pdf>> Accessed on 06.12.13.

<sup>59</sup> A. S. Raquel and A. Andrade, “Corporate Governance in Public Private Partnerships” (2010), EPPPL Journal, Volume 4 Page 209, (Lexxon mbh: Berlin)

<sup>60</sup> J.R.A. Aryee, “Saints, wizards, demons and systems: Explaining the Success or Failure of Public Policies and Programs (2010) (Accra, Ghana University Press, 2000).

M. Burnett<sup>61</sup> examined the effective ways of implementing competitive dialogue from the perspective of obtaining value for money for the public sector. The writer also posited that there are clear benefits to standardizing the approach to the application of competitive dialogue and clear pointers to aid the development of an optimal methodology for promoting value for money.

Andrew Chew and Geoff Wood<sup>62</sup> explained the marked increase in cooperation between governments and the private sectors for the development, financing and operation of infrastructure in Australia. The writers posited that the nature and size of the country presents both opportunities and challenges considering the huge amount of resources needed. The article specifically examines the DBOM contracts in Australia and its advantages and disadvantages.

R. H. Garcia<sup>63</sup> examines International and Regional Procurement, acknowledging the different aims of procurement systems in the national and international context and the likely difficult interplay between domestic policy goals and international trade. He further considers the experiences in individual countries from all region, exploring the varied routes to the same basic objectives and recognizing discernable trends in procurement regulation and reforms.

B. D. Oloworaran<sup>64</sup> examines the institutional and regulatory framework for Public Procurement in Nigeria. The writer emphasises the importance of Public Procurement to a nation's development especially a country like Nigeria. He elaborates on procurement surveillance and review of public procurement award

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<sup>61</sup>M. Burnett, "Conducting Competitive dialogue for PPP Projects- Towards an Optimal Approach"(2009),*EPPPL Journal, Volume 4*.(Lexxion mbh: Berlin).

<sup>62</sup> Andrew Chew and Geoff (2011), *DBOM Contracts in Australia. International Construction Law Review, Vol 28, Page 275*.

<sup>63</sup>R. H. Garcia, *International Public Procurement: A guide to Best Practice*, (London: Globe Business Publishing Limited) 2009.

<sup>64</sup>Benson Dele Oloworaran, *The Law and Practice of Public Procurement in Nigeria*,(Porthacourt: Benuch Legal Consult, 2011).

and also on privatization and disposal of public property by public entities. The writer however only focused on Legal framework on Public Procurement in Nigeria.

G. Oyebode & O. Makinde<sup>65</sup> examined the relevant authorities and legislations applicable to Public Private Partnerships in Nigeria. The writers focused solely on the Lagos State Public Private Partnerships Law of 2005. The writers also examined the types and arrangements suitable for public Private Partnerships in Nigeria. However, the writers did not consider or mention the Infrastructural Concession and Regulatory Establishment Commission Act of 2005 which the major legislation on PPP in Nigeria.

Apart from the texts highlighted above, several conference papers, reports, articles, international conventions and regulations generally on the legal and regulatory frameworks for Public-Private Partnerships were examined. A cursory look at all the literature listed above, shows that none has specifically examined the legal and regulatory framework for Public-Private Partnerships specifically in Ghana, Nigeria and South Africa. Their discussions on Public-Private Partnerships in Infrastructure Development are largely theoretical without reference being made to Ghana, Nigeria and South Africa. In fact, this does not give them the opportunity to make a distinction in the practice of PPPs among the selected countries. All these are the gaps created by the writers which this thesis will attempt to fill.

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<sup>65</sup>Gbenga Oyebode and Ogbobo Makinde, *The International Comparative Legal Guide to PFI/PPP Projects*. (Lagos, Global Legal Group Publishing, 2007).



This thesis is based on the existing legal and regulatory framework on Public-Private Partnerships in Ghana, Nigeria and South Africa as at 31<sup>st</sup> day of January, 2014.

## CHAPTER TWO

### PUBLIC PRIVATE PARTNERSHIPS: MEANING, NATURE AND TYPOLOGIES

#### 2.0 INTRODUCTION

This chapter focuses on the various definitions of Public Private Partnership as defined by various texts and the nature and types of PPPs. It also discusses the distinctions between PPPs and other types of procurement methods like privatization and public procurement. The chapter later discusses the different kinds of agreements that are necessary in order to ensure efficiency, transparency and revenue driven PPPs projects.

#### 2.1 Meaning of Public Private Partnership

There is no universally accepted definition for the term “Public Private Partnerships”.<sup>66</sup> It can be used to describe different arrangements involving the public and private sectors coming together to provide goods and services. In general term, it means an arrangement or agreement involving a public sector authority and one or more private partners whereby the private partners perform or help in the provision of goods and services which were traditionally within the domain of the public sector authority.

Public-Private Partnerships has been defined as arrangements between the public sector and private parties whereby private parties participate in, or help in the provision of public-infrastructure based services.<sup>67</sup> Also, according to the Oxford

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<sup>66</sup>It should be noted here that there are number of alternative names given to PPPs. In the United States of America, the term P3 is used; In Australia, it is called Privately-Financed Project(PFP); In England and Japan, it is called Private Finance Initiative(PFI); In Malaysia and Nigeria, it is called Public Private Partnerships(PPP) ; In Indonesia and Egypt, it is called Private Sector Participation(PSP); It is referred to as Commercially Viable Utilities in India; In South Africa, it is called Partnerships while the World Bank prefers to use Privately Provided Infrastructure.

<sup>67</sup>Darin Grimsey and L.K. Lewis, Public Private Partnerships: The Worldwide Revolution in Infrastructure Provision and Project Finance (United Kingdom: Edward Elgar Publishing Limited, 2007) Page 2.

Dictionary of Politics, the term has been defined as an agreement between government and the private sector whereby the latter helps in the provision of public services or infrastructure.<sup>68</sup> It helps in bringing together social priorities with the managerial skills of the private sector, by relieving governments of the enormous burden of providing large capital expenditure and thereby transferring the risk of cost overruns to the private sector.

The term has also been defined<sup>69</sup> as a legally binding agreement between the government and private sector for the provision of infrastructure assets and efficient delivery of services that allocates responsibilities and business risks among the various partners. During this process, government is actively involved throughout the project's life cycle. The private sector is responsible for ensuring the efficient functioning of the entire project, ranging from project design, construction, finance, maintenance and operations.

According to the World Bank,<sup>70</sup> there is no consensus on the definition of the term Public Private partnerships. However, it is referred to as arrangements, ranging from medium to long term, between the public and private sectors whereby part of the services or works that fall under the domain of the public sector are provided by the private partners, with a detailed agreement for the delivery of public infrastructure and/ or public services. The term has been defined to exclude service contracts or turnkey contract, which are categorized as public procurement and it also excludes privatization of utilities wherein there is a limited role for the public authority to perform.

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<sup>68</sup>Oxford Dictionary of Politics. Available at < <http://www.answers.com/topic/public-private-partnership>>. Accessed on 08.03.12.

<sup>69</sup>*An Introduction to Public- Private Partnerships* . Available at <<http://www.partnershipsbc.ca/pdf/An%20Introduction%20to%20P3%20-June03.pdf>>. Accessed on 08.03.12.

<sup>70</sup>World Bank definition of Public-Private Partnerships<<http://ppp.worldbank.org/public-private-partnership/overview/what-are-public-private-partnerships>>. Accessed on 08.03.12.

The European Union Procurement Law does not clearly define the term PPP.<sup>71</sup> The term in the EU procurement context is used to show the distinctions with the traditional procurement system. Under a traditional approach, the public authority identifies and finances a project or service in its entirety through its own efforts and resources, while under the PPP arrangement, the private sector assumes greater roles and sees to the operation of the project over a long time.

The Organisation for Economic Cooperation and Development OECD<sup>72</sup> defines the term as an agreement between the government and one or more private partners (which may include the operators and the financiers) whereby private partners deliver the service in such a manner that the objective of the public authority are aligned with the profit objectives of the private partners and where the effectiveness of the alignment depends on a sufficient transfer of risk to the private partners.

However, a more clearer definition was given by E.R. Yescombe as a long term contract between the government and a private sector party in which the private sector is saddled with the responsibility of designing, financing, constructing and operating a public infrastructure with payment over the life of the PPP contract to the private sector party for the use of the facility, made either by the government or the general public as users of the infrastructure provided, and with the facility

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<sup>71</sup>Jaya Sharma, Public Private Partnership Projects in The United States, Roberto Hernandez Garcia,( ed), International Public Procurement: A Guide (London : Globe Business Publishing, 2009)Page 401.

<sup>72</sup>OECD, Public Private Partnerships: In Pursuit of Risk Sharing and Value for Money. (OECD Publishing: 2008). Page 17.The OECD is a unique forum where the governments of 30 democracies work together to address the economic, social and environmental challenges of globalisation. The OECD member countries are: Australia, Austria, Belgium, Canada, The Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.

remaining in public-sector ownership, or reverting to public-sector ownership at the end of the contract term.<sup>73</sup>

It is important to state here that due to the elusiveness of its definition, the term PPPs as used in this research work designates a variety of partnerships between the public authority and one or more private sectors for the designing, financing, construction, operation and maintenance infrastructure that belong to the government with a view to recoup such investment from the direct users over a specified period of time.

The public authorities or public sector parties to a PPP contract are known by different terms such as Federal, Central and Regional, State, Municipal, Local, Governmental Institution, Public Agency or any other entity which is under the public-sector control. While the private sector party is normally a Special-Purpose Company which includes investors, lenders, and companies providing construction and operational services. According to Yescombe, the relationship between the parties is not really a partnership in the legal sense, but its contractual, being based on the terms of the PPP Contract.<sup>74</sup> PPPs have been successfully used in the provision of such public services such as Transportation (Rail, Road, Water and Air), Power, Health, Water and Sanitation, Prisons, Education; Defense Canals, and Telecommunications. PPPs are the latest in a wave of changes brought about by the Neo-liberal revolution of the 1980s.<sup>75</sup> This partnership arrangements share

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<sup>73</sup> E.R. Yescombe, *Public-Private Partnerships: Principles of Policy and Finance*, (Oxford: Elsevier Publishing Ltd, 2007). Page 3.

<sup>74</sup> *Ibid.*

<sup>75</sup> In the early 80s, the new government of Margret Thatcher in Britain advocated and initiated Neo-liberalism as political and economic policy of the new Labour Government. Thatcher led the Neo-liberal revolution by demanding for more efficiency and competition regarding economic, political and social policies of government. This policy has greatly reshaped the face of the global economy. According to this policy, privatization is supposedly the answer to all problems. Privatisation started first in the Great Britain before being adopted by the United States of America under the government of Ronald Reagan, who served from 1981-1989. To the neo-liberalists, anything that has not undergone privatization is capable of being plagued with inefficiency and lack of competition.

many characteristics with deregulation, privatization, commercialization and quasi-markets.

## 2.2 History of Public-Private Partnerships

Public-Private Partnerships have been used as concession to finance infrastructure projects in the nineteenth century.<sup>76</sup> One of the earliest and best known water projects was the Suez Canal which was managed by the private sector until it was nationalized in the 1950s.<sup>77</sup> Tolling commenced in the United States between 1789 and 1900.<sup>78</sup> Over 2,000 private companies operated turnpikes in Ohio, New York, Michigan and Albany as a result of inadequate highways that existed at that time.<sup>79</sup> In the 1960s, Spain embarked on its motorways programme which was financed by the private sector because of the inadequacy of the national budget to meet the infrastructure demands of the country at that time.

The energy crises of the 1970s led to the collapse of most of these private companies which necessitated the nationalization of some of these enterprises. Also at that time, the Labour Government in Britain was of the view that the market economy was very unfair and imperfect. Leaving the means of production, distribution and exchange to market forces was considered inequitable and that this would lead to the marginalization and impoverishment of the people.<sup>80</sup>

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<sup>76</sup> Nyagwachi, Josiah & Smallwood, John, South African Public Private Partnerships (PPP) Projects. *Journal of Construction Vol. 1, No 2.*

<sup>77</sup> Ibid.

<sup>78</sup> The private companies that built these roads were stage companies, miners, and ranchers who built the roads, at least in part, to attract business for their primary investments. See further [http://en.wikipedia.org/wiki/Toll\\_roads\\_in\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Toll_roads_in_the_United_States). Accessed on 22.05.13.

<sup>79</sup> Ibid.

<sup>80</sup> See The Legal Dynamics of Privatisation in Nigeria, Retrieved from [www.babalakinandco.com](http://www.babalakinandco.com). Accessed on 15<sup>th</sup> February, 2011.

However, changed economic condition saw the process being reversed in the 1980s when it became clear that governments as entrepreneurs had not succeeded.<sup>81</sup> Most of their investments in commerce had been a colossal waste of government revenue. Interestingly, the philosophical position in the United Kingdom had begun to shift. Then, the Conservative Government of Margaret Thatcher had defeated the Labour government of Sir Harold Wilson.<sup>82</sup> Both Margaret Thatcher and Ronald Reagan of the United States were of the firm view that Government had no business in commerce.<sup>83</sup> The only role of Government was to provide a conducive and an enabling environment for entrepreneurs to flourish.<sup>84</sup>

Also in the 1980s, China under the visionary leadership of Deng Xiaoping radically pursued a policy of private enterprise which changed his country's policy of overdependence on failed state enterprises.<sup>85</sup> This paradigm shift ushered in a new era of positive economic outcomes that continue till today. His famous Chinese saying was "*don't care what colour a cat is as long as it catches mice*" which has unraveled china's economic miracles.

In recent times, a worldwide movement has taken place in respect of Public-Private Partnerships.<sup>86</sup> The main aim of this innovation is to introduce the effective functioning principles of the private sector into the public administration.<sup>87</sup> This move was necessitated by the need to reduce inefficiencies, wastages in public

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<sup>81</sup> Ibid.

<sup>82</sup> In May 1979, Labour Party lost the general election to the Conservatives and Margaret Thatcher became Britain's first female prime minister.

<sup>83</sup> Both the late Margaret Thatcher and Ronald Reagan championed the concept of Neo-liberalism in the 1980s.

<sup>84</sup> The government can provide good investment laws that will protect the interest of both foreign and local investors.

<sup>85</sup> He abandoned many orthodox communist doctrines and attempted to incorporate elements of the free-enterprise system into the China economy.

<sup>86</sup> Darin Grimsey and Mervyn KL, *Public private partnerships: the worldwide revolution in infrastructure provision and project finance*, (Massachusetts: Edward Elger Publishing Limited, 2007). Page 3.

<sup>87</sup> Mona Hammami, Jean-Francois Ruhashyankiko and EB Yehoue, Determinants of public private partnerships in infrastructure, (*Washington DC*: International Monetary Fund, 2006) Page 5.

spending, lack of managerial skills and to attract private capital in the provision of public infrastructure.

### **2.3 Fundamentals of Public-Private Partnerships**

In Public Private Partnerships, there must be a public authority or participant. This authority can come in many forms. This as earlier said may mean the Federal, Central, National or even Regional, States or Local Governments. Also, there are the bodies which are quasi-public authorities like agencies and commissions of the Federal or National Government which are creatures of statutes or other relevant enabling laws<sup>88</sup> and are technically independent from the Central or National Government although, they are still reliant on the central government for funding and supervision.<sup>89</sup> There is also the private sector party which is normally a Special-Purpose Vehicle (SPV) registered to carry on business. This is usually set up by the private sector parties in exchange for shares which represent their ownership in the SPV. The Special Purpose Vehicle is established as a legal entity in order to protect the interest of the shareholder and it cannot venture into any other business apart from that specific project.<sup>90</sup> This may include investors, lenders, and companies providing construction and operational services. The rationale for the formation of an SPV is because in PPPs, a project may be too complex and complicated for a single investor to undertake considering the enormity of the investment, the size of the management, the risks involved and the skills required.

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<sup>88</sup>S. 1 of the Infrastructure Concession and Regulatory Establishment Commission Act of 2005. The Act mentions Federal Government Ministries, Agencies and other Federal government bodies which are quasi authorities that can enter into a concession contract with a private partner.

<sup>89</sup>Nicholas Avery, *Public Private Partnerships: A critical Analysis* (London: Globe Publishing Ltd, 2006). Page 6.

<sup>90</sup> See *A Guidebook on Public-Private Partnership in Infrastructure*. A Publication of the United Nations Economic and Social Commission for Asia and the Pacific, (Bangkok, UNESCAP, 2011) Page 10.



It is important for the parties who want to engage in transactions with these public entities to pay a closer attention to the powers and contractual limits and also the likely outcome of the federal or central government to intervene if and when they fail financially. In most cases on the private sector side, a Special Purpose Vehicle (SPV) which is totally a consortium of financial institutions and private companies will be responsible for all the activities of PPPs including the coordination of the financing and service delivery.

Most times, this will be a consortium which will have at least two shareholders. The SPV enters into an agreement with the public authority for the building of a new infrastructure or the management of existing infrastructures. The public authority specifies its requirements in terms of 'output', which sets out the public services which the facility is intended to provide. By this, rather than providing the SPV with a detailed blueprint on how the project is to be carried out, it is for the private sector who, through innovation and design, to meet this specification.

A classical schematic diagram as illustrated in figure 1.1 below:

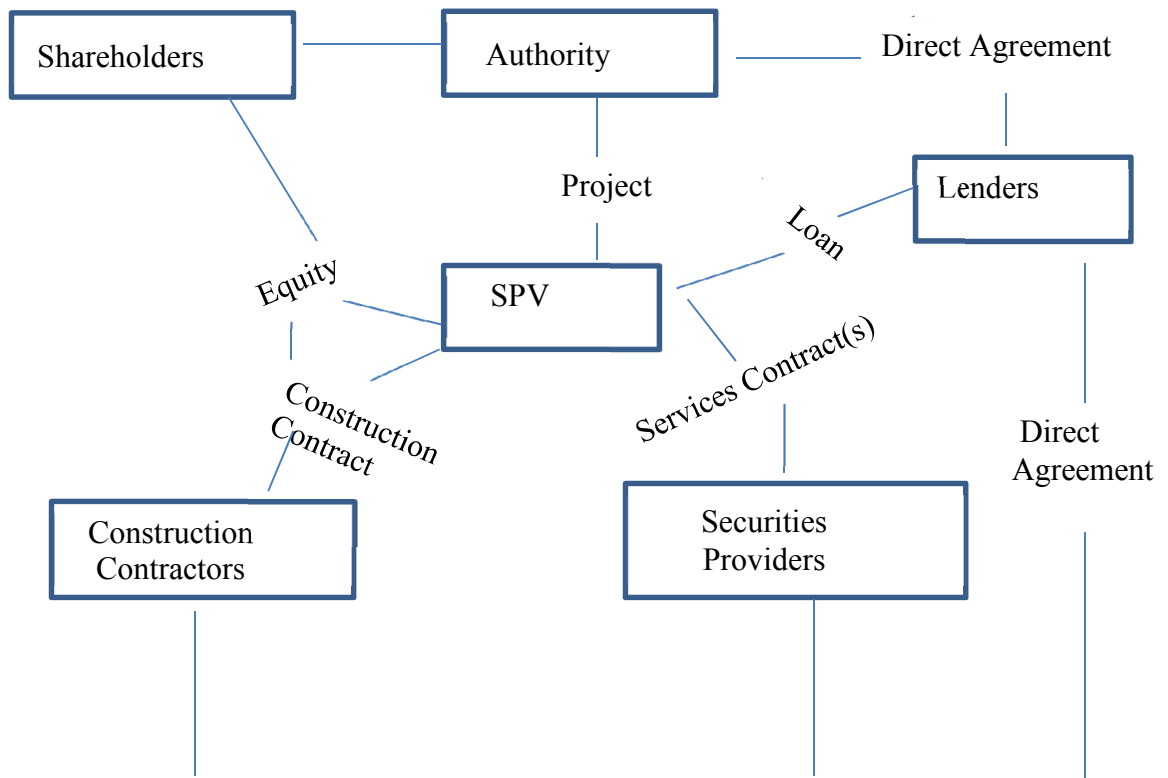


Fig 1.1: Schematic Diagram of an SPV Agreement

In setting its output target, the authority will normally set a time limit within which it requires the output to be delivered. It is crucial therefore that the construction contractor delivers the infrastructure within that timeframe. This is because the nature of PPPs is such that an incomplete project will be of limited value.<sup>91</sup> In addition, in order to ensure the long-term stable cash flows, it is equally crucial that construction costs do not overrun.<sup>92</sup>

<sup>91</sup>Ibid at Page 8.

<sup>92</sup>This means the possibility that during the design and construction phase, the actual Project costs will exceed projected Project costs.

The way in which the infrastructure transactions in PPPs are structured necessitate payment of long term service fees usually over the life of the contract( 20-35 years on the average) which is usually on a pre-agreed basis with the intention of repaying the cost expended in financing the project and to also give return to the investors .<sup>93</sup>

PPP allows public authority to retain ownership while engaging the private sector to perform functions such as financing, designing, constructing, maintaining and operating infrastructure like roads or providing basic services like water and electricity. Both parties stand to benefit from the contractual agreement. Government earns the confidence and good image of performing its social responsibilities. It also earns revenue by leasing state-owned assets or alternatively pays the private sector for improved infrastructure and better service delivery. The private sector can do the job more efficiently, which is capable of reducing the prices and improving rollout. The private sector also gets reimbursed either by government or consumers for doing its work, at a profit.

There must also be the partnership agreement which shall clearly state the rights, obligations and liabilities of all the stakeholders. Considering the complex nature of PPPs, it is necessary that the partnership agreement is comprehensive enough so as to take care of all foreseeable contingencies. The rights and obligations shall be made enforceable. It is also advisable that all regulations, codes of ethics, guidelines and other documentations relating to the PPP project shall be freely made available to the public and private sectors.

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<sup>93</sup> Chris Brown and Norton Rose, Financing Public-Private Partnerships: The Changing Market in Public Private Partnerships: A Practical Analysis, Nicholas Avery (ed), (London, Globe Business Publishing Limited, 2006) Page 187.

## **2.4 Basic Principles in Public-Private Partnerships**

There are three benchmarks for determining PPP viability.<sup>94</sup> These are Affordability, Value for Money (VFM) and Risk Transfer. Whenever any government must decide which of the procurement model to choose between PPPs and Public Procurement, then, the very important question to ask is which of these will be more affordable and deliver the highest value for money between the two?

### **2.4.1 Affordability, Value for Money and Risk Transfer**

A PPP project is said to be affordable if its expenditure and other mode of delivery can be accommodated within the budget constraints of the public authority and it should also be assumed that such can be sustained in the future. Affordability does not only apply to PPPs, but also to the traditional Public Procurement. The government should first of all determine whether the proposed PPP Project can be conveniently accommodated within the current level of its expenditure and revenue. If the outcome is in the affirmative, then such PPP project passes the test of affordability.

Value for money (VMF) has been defined as ‘the optimum combination of whole life cost and quality (or fitness for purpose) to meet the requirements of the users’<sup>95</sup> In PPPs, Value for Money (VFM) must be the most primary objective of the project. A PPP project is said to be affordable if it increases VFM. Any PPP Project should be able to demonstrate that users will get value in return for the money they are parting with and that the cost to be paid by the users of the PPP project will be lower than the one paid for the services provided by the public sector.

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<sup>94</sup> See OECD, Public-Private Partnerships: In Pursuit of Risk Sharing and Value For Money. Page 37.

<sup>95</sup> See Darrin Grimsey and Mervyn K. Lewis at Page 135.

There are Six major determinants of value for money namely; competition; risk transfer; performance measurement; the long term nature of the contract; private sector skills and incentives. In order to achieve value for money in PPPs, the following are important;

1. PPP projects should be awarded in a competitive environment:
2. There should be fair and realistic comparisons between the publicly and privately financed options;
3. Standard economic appraisal techniques including proper allocation and appreciation of risks between the public and the private sector should be rigorously applied.

Risk plays a very fundamental role in the success of PPP projects. Risk bearing is one of the main determinants of whether the project is one under public procurement or Public-Private Partnerships. Whereas in the former, the government solely bears the risk while in the latter there is transfer of the risks to the private sector. The ability of both the public and private sectors to identify, analyse and allocate risks will help in a great deal to achieve value for money. The rationale for the transfer of risks in PPPs is that risks should be transferred to the party who will be best able to manage the risks. Allocation of the risks to the party that will be best able to manage it may not necessarily mean that the maximum risks are on the private party. The word ‘to best able to manage the risks’ connotes ‘to manage the risks at the least cost and thereby reduce the long-term cost of the project.’<sup>96</sup>

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<sup>96</sup> See See OECD, Public-Private Partnerships: In Pursuit of Risk Sharing and Value for Money.

Therefore, if the cost of preventing the occurrence of a devastating event is far less than the cost of dealing with the consequences of such an adverse event, then risks should be transferred to the party who will be in the position to best manage it. In most cases, it is the private sector that is most appropriate in the circumstances.

## **2.5 Public-Private Partnership and the Private Sector**

As stated earlier that PPP is an arrangement between the government and the private sector in order to provide basic infrastructures or to modernize the ageing ones. Therefore, the private sector has a key role to play in public private partnerships. There is no doubt that in order for the governments (especially of the developing countries) to meet the challenges posed by infrastructure, there is the need to mobilise private sectors to contribute in the development of infrastructure. If this arrangement is structured correctly, the government may be able to mobilize previously untapped resources from the private sectors that are looking for investment opportunities. The major aim of the private sector in the contract is to make profit from its capacity and experience in managing businesses (utilities in particular). Experience has shown that engaging the private sector in the development of infrastructure often brings stronger managerial capacity, efficiency, and access to new technology as well as specialized skills.<sup>97</sup>

As stated earlier, the private sector performs its functions through a company which is specifically established for the purpose of providing and maintaining infrastructure. This company called the Special Purpose Vehicle (SPV) will have at least two or more shareholders who will together have common interest in carrying out the functions under the agreement. The shareholders will carry-out their

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<sup>97</sup>Lecture delivered on "Designing a world-class Public-Private Partnerships Infrastructure and Framework for Malaysia", by Tan Sri Nor Mohamed Yakcop at Marriot Hotel Putrajaya on 2<sup>nd</sup> March, 2010. Available at <[http://www.epu.gov.my/c/document\\_library/get\\_file?uuid=a6e97d78-1fe0-40a3-96d5-157afb28d996&groupId=34492](http://www.epu.gov.my/c/document_library/get_file?uuid=a6e97d78-1fe0-40a3-96d5-157afb28d996&groupId=34492)>. Accessed on 13.03.12.

functions as subcontractors of the Special Purpose Vehicle. It is this umbrella body (SPV) that enters into a contract with the public authority.

The private sector will perform greater role in providing infrastructure by introducing the discipline of the private capital markets in improving the quality and efficiency in construction and operations, particularly in order to ensure that PPP projects are completed without any delay.<sup>98</sup>By involving the private sector in the construction, financing and operation of the infrastructure, this will certainly lead to greater efficiency in the use of resources.

### **2.5.1 Reasons for the Involvement of the Private Sector in the Development of Infrastructure**

There are many reasons why the government may need to collaborate with the private sector in the delivery of public goods and services. It is not in doubt as stated earlier in this work that budgetary constraints and inefficiencies on the part of government are among the reasons. Afeikhena Jerome, listed some of the reasons why government corporations have failed to provide adequate services to the people. He put the reasons succinctly as:<sup>99</sup>

*“Underpricing; low productivity; poor service quality; long queues and large portions of the population without access to basic services; lack of transparency; and damaging political interference in the operations of these infrastructure entities.”*

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<sup>98</sup>Darrin Grimsey and M. K.Lewis, Public Private Partnerships: The Worldwide Revolution in Infrastructure Provision and Project Finance. ( Cheltenham, UK: Edward Elgar Publishing Limited, 2007).Page 5.

<sup>99</sup> Jerome A, ‘Infrastructure privatisation and liberalisation in Africa: The quest for the holy grail or coup de grace?’, September 2004, Johannesburg: National Institute for Economic Policy; paper presented at ‘4<sup>th</sup> Mediterranean Seminar on International Development, University of the Balearic Islands, Palma de Mallorca, Spain.’

These reasons have been grouped and discussed under five major sub-headings.

They are:

### **2.5.1.1 Attracting Private Capital Investment**

Governments are attracted by the benefits of mobilizing private capital. The estimated demand for public infrastructure is huge and sometimes above the entire budget projection of a nation. The government alone cannot provide these basic infrastructure because of non-availability of funds. So, harnessing private capital can help governments to speed up the delivery of public infrastructure without delay. The banking and finance markets have moved to accommodate the needs of PPP transactions. We have seen extraordinary change in the length of time for which financial institutions are willing to lend.<sup>100</sup>

Loan maturities of 10 to 12 years were unusual in the 1980s and 1990s; now we see repayment periods of 30 to 35 years (and beyond). In the case of PPPs, there are repayment periods of 25-35 Years and even beyond. This is because the way the infrastructure transactions are structured guarantees a high degree of certainty of stable cash flow in the project. Also, Pension Funds Administrators are also becoming interested in long term fixed-income investment which PPPs provide. In Nigeria for example, the National Assembly established the Pension Reforms Act which provides for the establishment of Pension Fund Administrators.<sup>101</sup> There have been allegations of financial scandals concerning the fund. If this type of fund is applied to the provision of infrastructure, it will surely help both the government and the private sectors and it may also result into profit for the pensioners.

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<sup>100</sup>Nicholas Avery at Page 1.

<sup>101</sup>See S.1 of the Pensions Reform Act 2004.



### **2.5.1.2 It Increases Efficiency and the use of Resources**

Scarce public resources are not being used efficiently by the government. Also, because of the poor incentives for efficiency, the public sector is not rightly positioned to efficiently build and operate infrastructure. Combining such incentives in the operation and management of the public infrastructure through the private sector is therefore necessary. Typically, private sector operators enter into such transactions with the intention of maximizing profits which are geared majorly by increased efficiency in investment and operations. If the PPPs are designed in such a manner as to allow the operator realise this goal, the efficiency of the infrastructure services will be achieved.

Philippe Burger<sup>102</sup> stated that one major reason why it is better to adopt PPP instead of privatization is where effectiveness, rather than efficiency, is also an aim of the government. A policy becomes effective where the aim of government with respect to which it was conceived is achieved, irrespective of whether the aim is carried out in an efficient manner or not. Achieving the result is the aim, and such aim is carried out effectively. There is no doubt that the governments have access to more funding than the private sector, the efficiency gains from the private sector participation may in the long run overweigh the extra financial cost expended.<sup>103</sup>

The greater efficiency of the private sector can be linked to the following factors:-

(a) The private sector's commercial approaches to problem solving with serious focus on cost-effectiveness which leads to the rationalization of cost of labour and materials;

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<sup>102</sup> See the Dedicated PPP Unit of the Southern African National Treasury.

<sup>103</sup> OECD. Principles for Private Sector Participation in Infrastructure. Available at <http://www.oecd.org/daf/inv/investment-policy/38309896.pdf>. Accessed on 13.06.13.

(b) By allowing less politically oriented decision making will surely lead to better governance and it will improve accountability; and

© Improving competition and transparency will greatly reduce the opportunity for corrupt practices and it will reveal those costs that were hitherto hidden.<sup>104</sup>

### **2.5.1.3 Reformation of the Sectors through a Reallocation of Roles, Incentives, and Accountability**

Once risks, roles and responsibilities are reallocated, there is the tendency that efficiency and accountability will be assured. Also, corruption which is common in conventional procurement will be greatly reduced thereby enhancing greater output.

### **2.5.1.4 Technology, Innovation and Know-how**

By involving the private sector, access to new technologies and experienced management not currently available through the public monopoly is the result. This will include access to skills and those technologies and know-how which were otherwise not known to the public sector. These technologies may even be developed for the project specifically which would not have been developed under the traditional procurement system.

### **2.5.1.5 Transparency and Anti-corruption**

Openness and good governance will lead to equality in the treatment of the investors and it will promote competition. Lack of transparency and good governance therefore increases the likelihood of bribery and corruption, reduces competition, increases costs and reduces quality of the output. PPPs therefore

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<sup>104</sup> Jeffrey Delmon, Page 14.

provide opportunity to implement good governance in the process of implementation.

These are some of the factors that guarantee good governance in procurement systems;-

1. Improved public access to information concerning the procurement process.

Once the public have access to the information, people will have trust and confidence in the process. This can be done by opening a website with relevant and up-to-date information about the contract award;

2. Enhanced project procurement approach in order to increase transparency, competition and control;

3. Using financial and fiduciary management (an approach to asset management which involves an asset owner appointing a third party to manage the total assets of the asset owner on an integrated basis through a combination of advisory and delegated investment services, with a view to achieving the asset owner's overall investment objectives) like providing subsidies from the government.<sup>105</sup>

## **2.5.2 The Key Private Actors in Public-Private Partnerships**

Due to the complex nature of PPPs, it is imperative to examine the roles and functions of the key private actors in the PPP contract. The most prominent ones among them are:

### **2.5.2.1 The Project Company**

This is a legal entity usually a limited Liability company created to fulfill certain specified objectives. This is also called the Special Purpose Vehicle (SPV). The construction of the new infrastructure is usually entrusted to a specialist construction company or a joint venture formed by a number of specialists

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<sup>105</sup> Ibid at Page 16.

construction companies. It is this company that will directly enter into a contract with the public authority. The SPV is usually a consortium of both local and foreign companies. Where the company does not include any local investors, the government may require that local investors be included in order to improve transfer of technology and this will also enhance job provisions and training of local personnel.

#### **2.5.2.2 Lenders**

These are referred to as ‘the glamour boys’ of the transaction. It is the lenders who will be providing the bulk of the funds and it is they who take the highest risks. Funding is sometimes provided through project bonds or by sovereign wealth funds and other financial intermediaries. Lenders are likely to be involved in most of the important phases of the project to oversee how the fund is being applied on the project. However, because they will not be involved in the operation and construction of the project, they will therefore want to avoid all the risks which they are not familiar with. In a standard PPP transaction, there should be a direct agreement between the lenders and the government which would provide that for the purpose of the security’s enforcement, the lenders will be granted the right to step in.

#### **2.5.2.3 Bilateral and Multilateral Agencies**

These may be referred to as development financial institutions that are mandated to provide support in form of debt or equity investment. Examples of bilateral agencies are the kind of agency funded by only one nation aimed at helping the other nation in the execution of infrastructure projects. Example of bilateral agency

is the PROPARCO of France.<sup>106</sup> Multilateral agencies like World Bank,<sup>107</sup> Organisation for Economic Cooperation and Development (OECD) and the Public Private Infrastructure Advisory Facility (PPIAF)<sup>108</sup> are common examples. Their functions include advisory services, providing guarantees or insurance and also provision of loans.

#### **2.5.2.4 Operator**

On completion of the project, the company may need to transfer the operation and maintenance of the project to the operator for efficiency and service delivery. The company may want to tie the operator's payment to the performance of the project. Where the standard of performance is high, it will guarantee a high rate of return and it will in turn ensure regular and adequate payment to the operator. However, where the standard of performance is low, surely, the operator will be adversely affected. In some cases, the operators may want to avoid the risks associated with tying their revenues to the standard of performance; they may therefore request to be paid fee for the service provided irrespective of the rate of returns.

#### **2.5.2.5 Construction Contractor**

This is engaged by the company to carry out the construction work. The construction contractor is saddled with the responsibility of designing, building, testing and commissioning the infrastructure project. Completion and performance risks are always placed on the construction contractor. Both the company and the

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<sup>106</sup>This is a French Developmental Agency which was established to help in financing the private sector especially in developing countries. The company is committed to promoting private investment in developing and emerging economies for growth and development. In 2009 alone, the company granted over One Billion Pounds which covered over Eighty projects in more than Thirty Countries. (Proparco: Shaping Sustainable Features. Retrieved from <http://www.afd.fr/lang/en/home/pays/mediterranee-et-moyen-orient/geo/egypte/Proparco-Egypte>. Accessed on 01.04.12.

<sup>107</sup> One of the major responsibilities of the World Bank is to ensure that developing countries have the infrastructure necessary for their economic growth and development. The World Bank is open to supporting public and private partners coming together to provide critical infrastructure.

<sup>108</sup>This was established in the year 1999 to help in increasing private sector participation in infrastructure development in developing countries. It helps the government in developing economies by providing technical assistance to support the creation of sound enabling environment for the provision of key infrastructure.

lenders will always have the right to oversee the construction works being carried out in order to ensure standard and prompt delivery. The contractor must execute the construction plan to the latter. In addition to the implementation of the plan, the building contractor is also responsible for hiring, supervising and, (where possible) firing the employees for gross negligence or non-performance. In addition, the contractor will also be responsible for the payment of the employees and he may engage someone to perform this function on his behalf.

## **2.6 Public-Private Partnership and Infrastructure**

Infrastructure is very critical to the socio-economic advancement of any nation. In fact, they are the wheels through which nations' economies are run. Infrastructure creates the basic services and facilities that are needed for the economic advancement of any nation. Poor infrastructure on the other hand hinders economic growth and international competitiveness.<sup>109</sup> A nation's level of infrastructure has a direct bearing on the competitiveness of such a nation and its attraction to investors.

Roads and highways were considered to be the earliest human demand for infrastructure. The first world's known paved roads were laid in Egypt between 2600 and 2200 BC.<sup>110</sup> Indeed, it could not have been possible to build the pyramids without the roads on which the heavy limestone blocks were dragged. Also, stone paved roads were found in the city of Ur in the modern day Iraq since 4000 BC.<sup>111</sup> No doubt, civilization advanced or declined around the qualities of their road networks. The ancient Roman, Persian, Chinese and Indian civilizations built road

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<sup>109</sup> Jeffrey Delmon, Page 1.

<sup>110</sup> John Noble Wildord "*World's Oldest Paved Road Found in Egypt!*". Retrieved from <http://www.nytimes.com/1994/05/08/world/world-s-oldest-paved-road-found-in-egypt.html>. Accessed on 27.04.13.

<sup>111</sup> Roads and Highways, Encyclopedia Britannica, Encyclopedia Britannica online, [www.britannica.com/EBchecked/topic/505109/road/71891/Ancient-roads-of-South-and-East-Asia](http://www.britannica.com/EBchecked/topic/505109/road/71891/Ancient-roads-of-South-and-East-Asia). Accessed on 20.05.13.

networks that encouraged and advanced trade and commerce among those empires and also assisted them in the transportation of military equipment.<sup>112</sup> The technological advancement in the world today could not have been possible without the invention of electricity and its applications in the eighteenth century by the great scientists like Benjamin Franklin, Alessandro Volta, Michael Faraday and many others.<sup>113</sup>

According to the Online Etymology Dictionary<sup>114</sup> the word infrastructure has commonly been used since around the year 1927, as meaning "The installations that form the basis for any operation or system". The word infrastructure has its source from French, which literally means sub-grade, which means the native material underneath a constructed pavement or railway. The term Public Infrastructure can be referred to those facilities which are very crucial to the functioning of the economy and the society.

It helps in supporting a nation's economy and social activities and they also include facilities which are ancillary to these functions such as government offices.<sup>115</sup> Traditionally, infrastructure refers to only the following sectors; Telecommunications (fixed lined and mobile telephony), Energy (oil, gas, petrochemicals, and electricity generation, distribution and transmission, water, transportation and Sanitation.<sup>116</sup>

Infrastructure has been categorized into two broad categories. These are economic and social infrastructure. These are as follows:

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<sup>112</sup> Sawant, R J. Infrastructure investing: managing risks & rewards for pensions, insurance companies & endowments (New Jersey: John Wiley & Sons Publishers, 2010). Page 1.

<sup>113</sup>William Gilbert, History of Electricity. Retrieved from <http://inventors.about.com/cs/inventorsalphabet/a/electricity.htm>. Accessed on 20.05.13.

<sup>114</sup> See the online Etymology Dictionary Retrieved from <http://dictionary.reference.com/browse/infrastructure>. Accessed on 02.04.12.

<sup>115</sup>E.R. Yescombe 1.

<sup>116</sup>Rajeev J Sawant, Infrastructure Investing: Managing Risks& Rewards for Pensions, Insurance Companies and Endowment. Page1.

### **2.6.1 Economic Infrastructures**

These are infrastructures that are so crucial and essential for the daily economic activities of a nation. They provide key intermediate services to business and industry generally. They also help in enhancing productivities and innovations.<sup>117</sup>

Economic infrastructure can further be classified into two. These are hard economic infrastructure and soft economic infrastructure. Examples of hard economic infrastructures are; highways, energy, ports, dams, bridges, telecommunication and many others.

### **2.6.2 Social Infrastructure**

These consist of those infrastructures that help in providing basic services to the people. Social infrastructures help in improving the quality of lives and welfare of the people. Social infrastructure can be further sub-divided into hard and soft social infrastructure. Examples of hard social infrastructures are prisons, education and hospital buildings, sewage, child care and aged care institutions.

Soft Social Infrastructures are those that are very essential for communities to have because they are socially desirable. Examples are a range of community services, environmental protection institutions and social security system among others. Security systems infrastructure can be referred to as a network of electronic security systems and devices that is configured, operated, maintained and enhanced to provide security functions and services (such as operational and emergency communications and notification, physical access control, intrusion detection, video surveillance, officer patrol tour management and security administration) to

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<sup>117</sup> See Darrin Grimsey and Mervyn K. Lewis at page 21.



achieve specific risk mitigation objectives.<sup>118</sup> This would also include the Close Circuit Television (CCTV) and Satellites to monitor the activities of terrorists and criminals in the nation.

According to OECD, hard infrastructures such as rail networks, roads, dams, bridges, energy, airports, telecommunications and others are the ‘core’ physical infrastructure as compared with others like health and education that involve intangible investments.

## **2.7 Distinctions between PPPs and other Procurement Methods**

The ability of any government to effectively and efficiently acquire the resources for its social, economic and developmental goals is crucial and fundamental to its sustenance and development. An effective management and co-ordination of public procurement may therefore signal a factual test for government’s efficacy.<sup>119</sup> A good public procurement regime enhances steady development of the economy and also gives room for a systematic accomplishment of public development efforts.

Public procurement and Privatisation are prominent procurement methods which have been adopted by governments over the years before PPPs. Attempts would therefore be made here to show the distinctions between PPPs and these other models.

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<sup>118</sup> Ray Bernard, What is Security Infrastructure? Available at <http://www.securityinfowatch.com/article/10538077/what-is-a-security-infrastructure>. Accessed on 04.12.13.

<sup>119</sup>B. D. Oloworaran, The Law and Practice of Procurement in Nigeria, (Porthacourt: Benuch Legal Consult, 2010) Page 1.

### **2.7.1 Public Procurement and Public-Private Partnership**

The term Public Procurement refers to the entire process of government acquisitions.<sup>120</sup> Public procurement connotes the purchase of goods and services by authorities in the market place from another legal entity, generally by contractual agreement.<sup>121</sup> According to Arrowsmith, there are three phases involved in the procurement processes. These are deciding what goods and services are to be purchased and when it will be purchased (Procurement Planning); choosing the contracting partner together with the terms and conditions on which the goods or services are to be provided and lastly, the process of administering the contract in order to ensure effective performance of the contract.

Public-Private Partnerships occupy a middle position between Privatisation and traditional Public Procurement. PPP is thus an alternative to the traditional procurement system by providing the needed facilities to the public sector using funding generated by the private sector. In PPPs, the government usually sets a target as to the quality and quantity it requires. The designing, financing, building and the operation of the project is left to the innovation of the private sector. This is because if the government carries out the design itself, it would also have to carry the risk resulting from faulty design.<sup>122</sup>

Thus, the risk and the possible efficiency gains are better left to the private partner. In this method, the government does not buy the capital assets from the private sector directly rather, it buys the services which the private sector generates through the assets. In PPPs, risks relating to the cost of design and construction,

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<sup>120</sup> Sue Arrowsmith, John Linarelli and Don Wallace, Jr, *Regulating Public Procurement: National and International Perspectives*, (The Hague, Kluwer Law International, 2000) Page 2.

<sup>121</sup> Peter Braun, *The Practical Impact of E.U. Procurement Law on PFI Procurement Practice in the United Kingdom*. Thesis Submitted to the University of Nottingham for the Degree of Doctor of Philosophy. Page 2.

<sup>122</sup>OECD, Page 20.

usage of the facility, services provided by the facility and the operation and maintenance cost are all transferred from the public authority to the private sector.<sup>123</sup>

Furthermore, compliance with the quality and quantity specifications at the price agreed by the parties should yield the value for money that the government intends to achieve through PPPs. Also, in PPPs, the private partner receives payment (Service Fees) over the duration of the PPP contract (normally between 25-30 years) on the pre-agreed basis with the intention of giving a return to the investors.

While in the public procurement method, both parties (government and the private partners) negotiate a price usually through the tender process. The public authority funds the full cost of the project, and the operation and maintenance of the project are handed over to the public authority. The project contractor takes no responsibility for the effective long term performance after the construction-warranty period has expired.<sup>124</sup>

It is trite that public procurement already has many challenges both nationally and internationally.<sup>125</sup> There are generally three socio-economic reasons why governments prefer to adopt the PPP model in the procurement of infrastructure. The first is because of the urgent need of infrastructure facilities. Secondly, there are serious cash constraints on the part of the governments and the third reason is because of the procurement failures of the past. Among the challenges that face the traditional procurement methods are lack of competition, lack of transparency, and inequality of the treatment of the bidders. Also, bribery and corruption, dealing

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<sup>123</sup>E.R. Yescombe 4.

<sup>124</sup>Ibid.

<sup>125</sup>Roberto Hernandez-Gracia, "The Global Challenges of International Public Procurement", In Roberto Hernandez-Gracia, (ed), *International Public Procurement: A guide to Best Practices* (London: Globe Business Publishing Limited, 2009). 7

with cartel, environmental protection issues and non-availability of up to date technology also constitute hurdles to the public procurement process.

PPPs ensure transparency, fairness and selection of the best qualified bidder. Procurement rules and regulations are in place in order to ensure probity and transparency in the selection of the private partners. The main objective is the creation of a level playing ground for all project proponents. This is important because it enables non-discrimination in the selection and award of contracts and therefore would lead to the emergence and selection of the most qualified bidder with the most economically viable proposal. Due to the fact that in PPPs unlike the public procurement system, there is greater transparency in the selection and award of contract, there is then the tendency that there would be greater investor confidence in the procurement process.

It should be mentioned here that the United Nations Commission on International Trade Law (UNCITRAL) recognizes both PPPs and Public Procurement by adopting different legislative frameworks for the two. For PPPs, there is the UNCITRAL Model Law on Privately Financed Infrastructure Projects (PFIPs) 2003 and for public procurement, the Model Law on procurement of Good, Construction and Services was adopted in 1994. The United Nations General Assembly explained the rationale for its provisions thus:<sup>126</sup>

*“The decision by UNCITRAL to formulate model legislation on procurement was taken in response to the fact that in a number of countries, the existing legislation governing procurement is inadequate or outdated. This results in inefficiency and ineffectiveness in the procurement process, patterns of abuse and the failure of the public purchaser to obtain adequate value in return for the*

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<sup>126</sup>See the official Records of the General Assembly, 49<sup>th</sup> Session adopted on 17<sup>th</sup> February, 1995, Supplement NO 17 and Corrigendum (A/49/17 and Corr1). The full texts of the provision are available at [www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure/1994Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model.html).

*expenditure of public funds. While sound laws and practices for public procurement are necessary in all countries, this need is particularly felt in many developing countries, as well as in countries whose economies are in transition”.*<sup>127</sup>

Thus the Model Law is available to national governments seeking to reform their public procurement process. However, it should be mentioned here that the provisions will become binding only if it is ratified by the national legislators.<sup>128</sup>

### **2.7.2 Public-Private Partnership and Privatisation**

Privatisation connotes the act of reducing governmental roles and increasing the roles of the private sectors in satisfying people’s needs. It means relying more on the private sector and less on government.<sup>129</sup> It also connotes transferring a government facility to the private partner, usually with ownership, for it to be managed and operated in accordance with some set objectives.

Privatisation and Public-Private Partnerships reflect market principles and the two of them constitute a strategy for improving public management. PPPs are sometimes confused with privatization. Privatisation connotes the permanent transfer of the public ownership of an asset to the private sector while in PPPs; there is a continuing role to be performed by the public sector as partner in the ongoing relationship with the private sector.<sup>130</sup>

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<sup>127</sup>Guide to the enactment of the UNCITRAL Model procurement Law on the Procurement of Goods, Construction and services.

<sup>128</sup>See S.12 of The 1999 Constitution of the Federal Republic of Nigeria that provides that no treaty between the Federation of Nigeria and any other nation shall have the force of law except to the extent to which such treaty was enacted by the National Assembly. This was the holding of the Supreme Court of Nigeria in *General Sanni Abacha & 3 Ors v. Chief Gani Fawehinmi* (2000) 4.S.C. (Pt 11) 1, 20-22. Conventions and other international legislations also fall within this term.

<sup>129</sup>E.A.Savas, *Privatisation and Public-Private Partnerships*. Retrieved from [http://www.cesmadrid.es/documentos/sem200601\\_md02\\_in.pdf](http://www.cesmadrid.es/documentos/sem200601_md02_in.pdf). Accessed on 17thMarch, 2012.

<sup>130</sup>Edward Farquharson, Clencia Torres de Mastle, E.R. Yescombe and Javier Encinas, Page 9.

Under the PPPs, accountability for the provision of the service is clearly a responsibility of the public sector that is in a continuing relationship with the private sector, while in Privatisation, accountability for providing services will immediately be transferred to the private sector although, citizens would still have the right to complain to the government. For Instance, if a privatized telecommunication company is closed, people will complain directly to the private sector, whereas, if a road built through PPPs is closed, people will complain directly to the government.

Also, Privatisation involves no strict alignment of objectives.<sup>131</sup> This is because the government is not really involved in the output specification of the privatized entity, while also giving room for the private sector to maximize profit.<sup>132</sup> Under a PPPs scheme, the government usually specifies the standard and quality of service delivery expected from the private sector. The two parties also need to agree on the price before the contract is concluded and the private sector is then at liberty to maximize its profit based on the agreed price.<sup>133</sup>

Under Privatisation, the ownership of the privatised entity is wholly transferred to the private sector entity, while under PPPs, the control and management of the entity is only with the private sector for some years usually between 25-30 years. Also in PPP contract, substantial risk is transferred to the private sector partner, whereas under privatization almost all the risks are transferred to the private sector.

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<sup>131</sup> See E.A Savas, Op Cit.

<sup>132</sup>Exception exists in a situation where the government continues to regulate the price and quality of outputs of a public monopoly that becomes a private monopoly after privatization.

<sup>133</sup> OECD, Page 19.

## **2.8 Public-Private partnership Models**

Several agencies have attempted to show the various models of PPPs along a continuum<sup>134</sup> that ranges from public sector ownership of infrastructure acquired through the traditional or conventional procurement system to private sector ownership of infrastructure through privatization.<sup>135</sup> The typology of the PPPs examined here is based on the functional approach and attention will be focused on the functions performed and risks undertaken.

### **2.8.1 Build, Operate and Transfer (BOT)**

These are contracts in which the private sector is responsible for the financing, designing, building and operation of the project. Ownership and control of the project will then be transferred back to the government after the period agreed under the contract. This type of arrangement is used in complex and long-term projects like in power plants and water treatment facilities. In some arrangements, the government does not assume ownership of the project. In those cases, the company continues running the facility and the government act as both the consumer and regulator.<sup>136</sup>

#### **2.8.1.1 Main Features of BOT**

- (a) In BOT projects, the government gives the private sector the right to develop and operate a facility or system for a certain period (the "Concession Period").  
The facility granted must be a public facility/infrastructure.
- (b) This type of arrangement usually involves building of a new project with little or no risks associated with an existing project. Unlike concession which may

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<sup>134</sup> The OECD terms of reference follows a financial/legal approach and suggests a typology which focuses attention on the funding source and the nature of contractual undertaken. The U.K in its private Finance Initiative uses a vocabulary based on a functional approach and which focuses attention on the functions performed.

<sup>135</sup> Lecture note delivered at the Institute of Public-Private Partnerships(IP3) U.S.A.

<sup>136</sup> See Build Operate and Transfer Contract. <http://www.investopedia.com/terms/b/botcontract.asp#axzz1pQvK3o40>. Accessed on 02.04.12.

involve rehabilitation of an existing infrastructure, there may be some unknown risks associated with that existing infrastructure.

- © The facility will then revert back to the government after the private operator had funded constructed and operated it commercially for the entire period of the concession.
- (d) In BOT, lenders will be seriously willing to ensure that projects concerned are ring-fenced within the operating project company and will also want to make sure that all risks in the project are transferred on to the appropriate actor.
- (e) The company gets funds for the project, and thereafter undertakes the design and construction of the works and then operates the facility for the concession period.
- (f) There is the Special Purpose vehicle (SPV) which comprises of shareholders with appropriate PPP Procurement/ Financial skills who are highly experienced in the management of projects.
- (g) The project company (SPV) will coordinate the construction and operation of the project strictly according to the concession agreement. The off-taker will want to know the identity of the construction sub-contractor and the operator.
- (h) The money generated from the operation of the facility are intended to cover operating costs, maintenance, repayment of debt (which represents a significant portion of development and construction costs), financing costs (including interest and fees), and a return for the shareholders of the special purpose company.
- (i) The project company (SPV) assumes a lot of risks. It is common for a project company to require some form of guarantees from the government (particularly in gigantic projects like power projects), and commitments from the



government which would be incorporated into an Implementation Agreement.<sup>137</sup>

- (j) Existing (public) Utility simply buys a key input (electricity, treated water, waste treatment, etc.) instead of providing it internally. Retail consumers still interface with the existing (public) utility.

Examples of the BOT arrangement are the Sydney Harbour Tunnel and the City Link Project in Melbourne in Australia; the Third Dartford Crossing of the River Thames linking two stretches of the M25 Motorway Circling in London and the Murtala Muhammed Airport II (MMII) in Lagos, Nigeria to mention but a few.

### **2.8.2 Build, Own, Operate and Transfer (BOOT)**

This is an arrangement whereby the project is designed, financed, operated, and maintained by the private sector for the agreed period of the contract. Under this arrangement, legal ownership of the project is vested in the private partner. During the lifespan of the contract, the developer charges customers who use the infrastructure in order to realize the profit. At the end of the period, the private-sector partner transfers ownership to the public authority, either freely or for an amount stipulated in the original contract.<sup>138</sup>

### **2.8.3 Design, Build, Operate and Maintain (DBOM)**

The design-build-operate (maintain) DBOM model is a type of arrangement in which the private sector combines the responsibility of designing, constructing, operating and maintenance of the infrastructure. This project delivery approach is practiced by several governments around the world and is known by a number of different names, including "turnkey" procurement and in some countries, it is

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<sup>137</sup>See Concessions, Build-Operate-Transfer (BOT) AND Design- Build-Operate-Transfer Projects. Retrieved from <http://ppp.worldbank.org/public-private-partnership/agreements/concessions-bots-dbos>. Accessed on 02.04.12.

<sup>138</sup> Definition of Build, Own, Operate and Transfer. Retrieved from <http://searchcio.techtarget.in/definition/BOOT-build-own-operate-and-transfer>. Accessed on 01.04.12.

called build-operate-transfer (BOT). The arrangement has a great advantage because it confers responsibilities on the private sector to design, construct, and maintain - under a single entity. This allows the private partners to take advantage of a number of efficiencies. The project design can be tailored to the construction equipment and materials that will be used. In addition, the DBOM team is also required to establish a long-term maintenance program up front, together with estimates of the associated costs.

An example of this is the Inkosi Albert Luthuli Central Hospital in Durban, South Africa, which was contracted to the private sector for 15 years under the Design, Finance, Build, Operate and transfer (DFBOT).<sup>139</sup> Under the arrangement, the Impilo Consortium will upgrade and manage the facilities and information technology of an 846-bed state-of-the heart referral hospital. The capital value of this project is put at US\$746 million. This hospital is well equipped and provides services to the people of KwaZulu Natal and the Eastern Cape Province. The general opinion has been that PPP through which this hospital was built has delivered a quality service which could not have been achieved by the government alone.<sup>140</sup>

#### **2.8.4 Build, Own, Operate (BOO)**

In this type of arrangement, there is no provision for the transfer of ownership of the project to the government after the concession period. The private sector is saddled with the responsibility of funding, designing, constructing, operating and maintaining the project. However, the agreement may be renegotiated giving the option to the government to purchase from the private sector developer. One

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<sup>139</sup> See PPP Quarterly, A publication of the PPP Unit, National Treasury South Africa. Number 28 of February, 2009.

<sup>140</sup> See M.T Adekilekun & C.C.Gan, "Public Private Partnership in Infrastructure Development in Africa: A Magic Wand to Socio-Economic Development". Being a paper delivered at the 2013 Symposium on Finding Solutions to Africa's Development, held at the University of South Africa (UNISA) between 23-24 August, 2013.

important feature of this type of arrangement is that the private sector assumes the ownership of the project out rightly, but this may later be purchased by the government. Both the risks and the revenues are totally for the private partner developer. This type of arrangement is mostly common in power projects.

### **2.8.5 Concession**

This involves a consortium of private firms forming a new project company usually called Special Purpose Vehicle (SPV) with the responsibility to finance, build, expand, and improve public sector services. Usually, the private sector borrows a long-term loan from the commercial lenders. The private sector gets its profit from the revenue accruable from the users of the facilities directly for the duration of the concession.

Franchise is a subset of concession.<sup>141</sup> In Franchise, the private partner takes over an existing infrastructure often with a mandate to maintain it within a stipulated period of time. In this arrangement, the private party will pay a sum of money to the government in order to take over the infrastructure.<sup>142</sup> There are no clear distinctions between concession and franchise. While concession involves a high level of initial investment in new or upgraded project, Franchise involves a limited amount as initial investment in the project.

The following are part of the characteristic features of concession contract:-

1. The private sector provides a monopoly service. In concession, the concessioner is the only provider of the utility service;

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<sup>141</sup>Attracting Investors to African Public-Private Partnerships: A project Preparation Guide. (World Bank: Herndon, USA, 2008) Page 9.

<sup>142</sup> Ibid.

2. The consumers will have the direct access to interface with the concessioner;
3. The risk of collection of money like tolls for the utility provided is usually very high since it is the sole duty of the private sector to do this;
4. Concessions sometimes involve the private sector taking over a poorly managed infrastructure, there may be a high risk associated with the unknown condition of the infrastructure;
5. The right to provide a public service is usually exclusively ceded to the concessioner through the concession agreement;
6. The concession period is usually between 20-35 years for the investors to recoup their profits;<sup>143</sup> and
7. There is a need for regulatory bodies to protect the interests of all parties involved, i.e. Government, consumers and the investors.

For example, in Manila, Philippines, as a result of lack of access to drinkable water, the government engaged the private sector by granting concession in order to provide and improve access to water in the Eastern Zone of Metro Manila. The contract has a capital value of US\$17 million. Since the water project was completed, the company has met all its obligations regarding water supply. In fact, the water project currently serves more than 5.1 million people and the company has increased its coverage of 24hours water supply to about 98 percent of the area.<sup>144</sup>

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<sup>143</sup> J.L. Guasch, *Granting and Renegotiating Infrastructure Concessions: Doing it Right*. (World Bank Publication: Washington D.C, 2004) Page 50.

<sup>144</sup> Ferguharson Edward, Torres de Mastle Clemencia, Yescombe E.R. and Encinas Javier. 2010. *How to engage with the Private Sector in Public Private Partnerships*, (Washington DC: The World Bank, 2011). Page 73.

In Gabon, PPPs have been used to provide water and electricity to the two main cities of Port-Gentil and Libreville. In 1997, the government signed a 20 year concession contract with SEEG, with a capital value of US\$135 million.<sup>145</sup> This concession contract has been a success and it was the first real output driven water project in Africa. Through PPP in water project, more than half of the Gabonese population now has access to safe water.

## **2.9 The Nature and Length of Concession Agreement**

The discussion here centers on the nature and length of concession agreements. This is particularly important to note especially when drafting concession agreements.

### **2.9.1 The Nature of Concession Agreement**

Public-Private Partnerships is a legally binding agreement between the public and private sectors, which involves new investments by the private sector (the private sector concerned should possess the following: technology, money, experience in management, reputation, etc.) and in which risks (funding, designing, building and operation etc.) are transferred to the private sector in which payments are made in exchange for performance, for the services delivered by the private sector.

There is a general consensus that PPPs provide the government with a more flexible approach to the regulation, control, ownership and maintenance of the project while offering the private sector the opportunity to provide efficient services and to maximize profit. The government takes the glory for the project provided because ordinarily, the project should be provided by the government.

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<sup>145</sup> Ibid at Page28.

A good PPPs contract serves to protect the interest of the private investors from unnecessary political interference from the government. It also protects the users from the abuse of the monopolistic nature of the private sectors. Because of the huge amount of money invested into the project, the government too may be tempted to behave opportunistically.<sup>146</sup> The need for safeguards arises because investment in infrastructure requires very huge amount of money which cannot be easily recouped. As a result of these, safeguards to protect the interests of all parties involved are usually built into the concession agreement and the framework regulating the partnerships.

Ideally, a PPP contract should be complete, i.e., it should take care of all the foreseeable contingent events. The rights and duties of all the parties thereto must be specified clearly, so also is the risks and revenues. A typical public sector obligation in the contract should include:

1. Maintaining an efficient legal and regulatory framework necessary for the efficient service delivery, including toll rates;
2. Financial assistance, such as tax breaks and minimum revenue guarantees for the private sector;
3. Construction assistance in the form of resolution of issues relating to land like the right of way and services and other issues ancillary thereto;
4. Assistance relating to currency and banking issues e.g., currency conversion and securing banking permits;
5. Ensuring the payment of damages in case of breach by the government or any of its agencies; and
6. Providing where necessary the law enforcement agencies to ensure compliance on the part of the citizen. In all kinds of PPP contracts, the

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<sup>146</sup> J.L Guash, Page 12.

financing, construction, and operation of the projects are the responsibilities of the private sector.

The private sector should bear the risks of financing, designing, constructing, operation and management of the project. The Public sector bears the regulatory and political risks (This include the followings: delay in project approvals, land acquisition, change in laws and policies affecting revenue), and force majeure (Like Acts of God, Natural Disasters and War). Both the Public and the Private sectors also have certain risks which they share together. These include Project default risk, project bankruptcy and loss of revenue.

### **2.9.2 The Length of Concession Agreement**

The length of concession means the period in which the private sector is contractually bound to operate the asset. However, before discussing the length of concession contracts, it is important to first state the length of the gestation of the project, i.e. the length of the period for the completion of the project. This usually depends on the complex nature of the project concerned. However, it is better for the completion period to be between a maximum periods of between 6-8 Years.

Majority of the writers are of the view that concession contracts should be between 20-30 years, by which time; the investors would have recouped the money invested in the project.<sup>147</sup> An unreasonably long period of time is likely to be suboptimal for tax payers. Concession period usually reflects the number of years required to recover the investment. For long duration concessions, fixing a particular time period for full amortization<sup>148</sup> is usually not feasible as infrastructure services require continuous investments that cannot be predicted well in advance;

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<sup>147</sup> See for example, the position of E.R Yescombe and Chris Brown, Financing Public-Private Partnerships: The Changing Market.

<sup>148</sup> Amortisation is the reduction of the value of an asset by prorating its cost over a given period of time. It may also mean the writing off of an amount of money within a specific number of time.

investments almost always must be made toward the end of the contract and cannot be amortized before its expiration.

Also, other factors to be considered in fixing the length of contract are:

1. **The cost of construction:** - It is important to fix a period in which the parties to the concession agreement reasonably think that all things being equal, the investor would have gained the profit of his investment.
2. **The benefits of competition:**-In concessions, an exclusive right to operate the facility is usually granted to the private operator. This sometimes would lead to monopoly and lack of competition. In considering the length of the contract, a shorter concession period which would allow the private sector to recover the money invested is better because it would provide room for competition. The government may have to make the facility available for auction to the other interested operators.
3. It is more appropriate for the parties to terminate the rights and obligations only arising from the contract and not the contract entirely. This is because, it is better for the project company to still be held responsible for warranties even after the asset has been transferred to the government. However, where the entire contract is terminated, it will be difficult for the government to still transfer the responsibility regarding warranties to the private sector.
4. The parties may also need to provide that certain clauses may still be operative even after the termination of the concession agreement. Clauses relating to confidentiality<sup>149</sup> would most fit into this category. It should be categorically stated that from the foregoing, that whatever the length of

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<sup>149</sup> Confidentiality clause is a clause that restricts parties to the contract from divulging information about the activities of the contract to a third party or the public.



time to be agreed upon, it should be one that will allow the private investors to recover their investment. A longer period of concession will likely overburden the direct users or toll payers (in case of roads), and this may likely trigger both political and economic unrest.

## **2.10 Other Vital Agreements in Public-Private Partnerships**

Apart from the main agreement that bind all parties together under the PPP contract, there are also some other agreements that will further help in defining and understanding the roles of the parties. These include; shareholding agreement, lending agreement, insurance agreement, Operation and Maintenance agreement, Offtake Purchase agreement and input supply agreement. All the above stated agreements will be examined one after the other.

### **2.10.1 Shareholding Agreement**

Since there will be shareholders coming together to execute the PPPs project, it is necessary to have a company incorporated under the relevant laws of the country concerned.<sup>150</sup> It is necessary to have a clear agreement regulating the relationships between or among the shareholders within the company. A shareholders' agreement is therefore an agreement which stipulates the rights and obligations of the shareholders in relation to the company. This agreement defines the way and manner in which the project company is managed, how the revenues accruable will be allocated and how intervening events will be dealt with.<sup>151</sup>

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<sup>150</sup> Where there are foreign companies among the companies that will form the SPV, it is incumbent on those companies to first register in that country where the project will be executed. Where licences and permits are to be obtained. Such licences must be sought and obtained for the smooth operation of the company in that country.

<sup>151</sup> Jeffrey Delmon, Shareholders Agreements, In Jeffrey Delmon (ed) in Project Finance, BOT Projects and Risks (Kluwer Law International) 2005 Page 181.

This agreement is like the constitutional document of the company. This may be in form of Articles of Association or incorporation. This agreement will include the names of the parties thereto, and it will cover areas such as the scope of business of the development company, their rights, powers and limitations, loans, issuing and transfer of shares, meetings, and allocation of project costs and the management of the project company.

This would necessarily also include non-competition clauses, decision making processes, voting rights and means of resolving disputes which is usually through arbitration. It is worthy of note here that it is always better for the document to have greater flexibility. This is because, this kind of business requires regular changes to suit the prevailing circumstances, and therefore, its flexibility will allow the parties to take a prompt action which is necessary in the circumstance.

### **2.10.2 Lending Agreement**

A huge amount of money is normally advanced by the lenders (mostly banks, shareholders and pension fund administrators) for the construction of the project. The lenders will advance funds gradually during the construction phase. The lenders will want to insist on an unequivocal method of debt servicing. This may involve requiring shareholders and guarantors to cover the risks of any probable delay which have not been transferred to the construction company. The debt will be serviced by the revenue accruable from the completed project.

The lender's main aim of entering into the agreement can be summarized as follows:

1. It is most appropriate for the lender to set out the conditions under which it will be obligated to disburse funds under the agreement.

2. The arrangement will enable the lender to monitor the financial position of the borrower as this will enable the lender to take necessary action in case the borrower is in a financial hardship.
3. It will also provide the lender with legally binding claims in case of default of the borrower. A detailed lending agreement which will protect the interest of the lender is desirable. Some of the provisions to be included in the lending agreement include;-
  - a. The right of the lenders over warranties from contractors, liquidated damages resulting from delay, and other mechanisms aimed at reducing the risks associated with the project.
  - b. The lenders should also have the right to halt the disbursements to the shareholders where the funds are not being applied appropriately.
  - c. The lender may also have the right to fund and control the Reserve Account. A Reserve Account is where the company keeps the money to take care of contingencies. Also, maintenance expenses, payment of taxes and servicing of revenue short fall would also be taken care of by this reserve account. This account will usually be domiciled with the lender.

### **2.10.3 Operation and Maintenance (O&M) Agreement**

On completion of the project, the private sector will be saddled with the responsibilities of operating and maintaining the project for the duration of the concession period. This contract is important because while the concessionaire is responsible for O&M throughout the project life, government does monitor these activities to ensure quality of service. O&M is also important because the asset at the end of the project needs to be given back to government in the same condition as it was at the time of commencing the operation or even in an improved

form.<sup>152</sup>It therefore follows that it is better for the parties to provide a concrete agreement for the operation and maintenance of the project. The agreement will include the way and manner of operation of the project, replacement of ageing equipment, developing the relationship between off-take purchasers.

It is possible that the project company may want to enter into an agreement for the provision of skilled labour, or it may want an agreement whereby the operation and maintenance obligations will be divided among the contractors. Whatever the structure of contractual arrangement, they will still be regarded as Operation and Maintenance agreement.<sup>153</sup>

For efficiency and risk allocation purposes, it is better for the company to engage the services of an operation and maintenance contractor (operator). Efficient operation should lead to standard needed to fulfill its intended purpose. Maintenance activities would involve engaging in physical inspection and caring for equipment. When performed systematically, operation and Maintenance tasks enhance reliability; they reduce equipment degradation, and lead to energy efficiency.

For an effective operation, the parties would need to understand the laws regulating the operation of such project like the environmental impacts on the community,<sup>154</sup> knowing about the local market, having a good relationship with the local authority and understanding the labour market. The operation should be consistent with the obligations set out in the concession agreement and those others required in

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<sup>152</sup>See Infrastructure Concession Contracts: An Introduction. Available at <http://www.cuts-international.org/pdf/Viewpointpaper-InfrastrConcessContract-intro.pdf>. Accessed on 10.04.12.

<sup>153</sup> Jeffrey Delmon, Project Finance, Bot Projects and Risks.(Kluwer Law Law International:2005) Page 242.

<sup>154</sup>It is very essential for the operator to study what environmental impact the operation and maintainance of such project will have on the community at large.

ensuring efficient service delivery. The most important terms which the Operation and Maintenance Agreement should include are:

- 1. Provisions relating to performance standards;** - The agreement will spell out the required standard expected from the operator. Part of the guiding provisions relating to the standard must have been set out in the concession agreement, off-take purchaser agreement, and the maintenance manual (if any).<sup>155</sup> The liability to be imposed for failure should be high considering the huge investment in the project and the probable loss of confidence by the public.
- 2. Method of Operation:** - Due to the fact that the operator is providing public service to the people, there is likely going to be disagreements and face-off with the users. It is therefore necessary to take care of the operator's relationship with its employees and the local community in the agreement.
- 3. Cost of Operation:** - It is also necessary for the agreement to spell out the means of charging the cost of operation; whether it is fixed, variables and the need to consider the prevailing market values in determining the cost of operation.

#### **2.10.4 Insurance Agreements**

The importance of insurance in modern day businesses has been globally recognized. It is practically a necessity for the protection of public infrastructure. It is a means by which a disaster is shared by many, thereby lessening the burden to repair. In PPP projects, it is generally better for the project company to ensure that

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<sup>155</sup> Maintenance Manual should contain supplementary instructions and guide on the ways and manners the project should be maintained.

there is a provision for a comprehensive insurance for the project. Although, other project participants might have made their own individual insurance for the project, the comprehensive insurance made by the company will subsume all the relevant provisions so as to avoid overlapping. The provision in the insurance will include; insurance of materials, operational damage, third party liability insurance, consequential loss insurance, automobile liability insurance, workers' compensation/employers liability insurance, and professional indemnity insurance for design faults or for such other professional services rendered.

#### **2.10.5 Offtake-Purchase Agreement**

This is an agreement between the grantor/government or any of its agencies and the company whereby the grantor agrees to purchase the output of the infrastructure at an agreed price. This is done in order to divert the market risks away from the project company and the lenders. This agreement will require the offtake purchaser to pay for a minimum amount of the project output or for all fixed costs no matter the volume of the output. An example would be a government agency agreeing to purchase the power supplied by a power company.

This agreement will define not only the amount of revenue accruable but also when those revenue streams can be modified, interrupted or terminated.<sup>156</sup> Theoretically, this kind of agreement is merely intended to allocate the market risks involved in the distribution of the project output to the general public/end users.

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<sup>156</sup> Mark Twain, "Offtake Purchase Agreements." In Jeffrey Delmon (ed) Project Finance, Bot Projects and Risks.(Kluwer Law Law International:2005) Page 257.

The agreement may provide for the imposition of sanctions if the company defaults in delivering the expected output as promised or if the project is not performing up to the expected standard. The consequences of a failure to meet the standard may be in form of liquidated damages and/or the right to call an event of default. Offtake Purchase Agreements are mostly appropriate to certain types of BOT projects e.g. Power Purchase agreements where it involves power projects and Water Purchase Agreements where the project is a water project. This agreement will not be necessary for some projects, such as hospitals, tunnels, roadways and bridges, where no physical off take is produced.

#### **2.10.6 Input Supply Agreement**

The project company may need certain input necessary for the operation of the facility. This can be fuel which will be used to power the electricity needed for smooth operation. The project company may not want to bear the risk of supplying these necessary inputs. It may therefore enter into a contract with an input supplier to provide the needed input from time to time. It is important to state that the Input Supply Agreement will only be required where some supply of input is necessary for the operation of the facility.<sup>157</sup> The important issues to mention in the input supply agreement include:

1. **Quality and Quantity of the input required;** the quality and quantity required will be agreed upon and should be delivered as at when due. The input supplier will bear the risk and responsibilities associated with late or insufficient input delivery.
2. **Price:** - The price of the input will include the cost price of the commodity and transportation. Where the input is to be imported from another country,

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<sup>157</sup>B.S. Shapiro, P3 Concession Agreements-Risks and Rewards. Available at <http://www.shk.ca/docs/P3ConcessionAgreements.pdf>. Accessed on 11.04.12.

the input supplier will be responsible for obtaining the necessary licenses and permits for importing such input into the host country. Any failure on the part of the supplier as to the input supplied will result in the payment of liquidated damages or a decrease in the price paid for the commodity.

3. **Testing and Inspection:** - In order to ensure optimal standard, there is the need to inspect and test the input supplied. This will help in determining the quantity and quality supplied. It is therefore necessary to have this included in the input supply agreement.
4. **Duration:** - This involves the length of the period in which the input supplier will supply the input. The length may be determined by the risks associated with the input or the availability of another sources of input. There will also be provision for renegotiation incase the need arises.

## **2.11 Sustainability Issues in PPPs and Public Procurement**

### **2.11.1 Environmental and Developmental Issues**

Sustainable Procurement connotes a process whereby the government engages in buying and selling or provisions of goods and services to meet the needs and aspirations of the people whilst still minimising damage to the environment.<sup>158</sup>

Sustainable involves incorporating a policy that the government provision of goods and services (especially infrastructure, mining and other related matters) will be done in such a way that environmental factors of such project will be considered and taken care of before the project is implemented. This may entail policy of carbon reduction and energy/water conservation among others.

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<sup>158</sup> Cau Fuguo, Yan Yuying & Zhou Fen, Towards Sustainable Public Procurement in China: Policy and Regulatory Framework, Current Developments and the Case for a Consolidated Green Public Procurement Code. Available at <http://www.ippa.org/IPPC4/Proceedings/07GreenProcurement/Paper7-7.pdf>. Accessed on 13.08.14.



Since the resolution of countries at the International conference on Environment and Development which took place at Rio de Janeiro in Brazil in 1992, the awareness of environmental and developmental issues (otherwise known as Green Procurement) has been on the increase.<sup>159</sup> Significantly since then, many member countries of OECD adopted a recommendation on green procurement in 2002. In addition, other countries especially of developed economies such as United States of America, South Korea, Australia and other developing countries in the Asia region such as China, Philippines and Thailand have also adopted Green Public Procurement into their public and private procurement.

In China for example, sustainable procurement is not enshrined in the law as a legal concept under the public procurement laws, however, there has been both legal and political justification for sustainable procurement leading to sustainable development. Remarkable developments for sustainable procurement laws are also on going in china.<sup>160</sup>

In the European Community for example, since the coming into force of the Treaty of Lisbon,<sup>161</sup> the European Community has adopted a resolution proposing specific treaty for energy policy. The EC has developed successive environmental policies, however, the 5<sup>th</sup> policy programme<sup>162</sup> (Towards Sustainability) emphasized of the common responsibilities of both the public and the private participants to ensure environmental protection and states further that government purchase could make

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<sup>159</sup> T.O. Akenroye, A.S. Oyegoke & Ama Bassey Eyo, 'Development of a Framework for the implementation of Green Procurement in Nigeria (2013) Int. Journal of Procurement Management Vol 6 No.1 at Page 3.

<sup>160</sup> See Cao Fuguo, Supra note 158 at Page 2.

<sup>161</sup> This treaty amended the European Union and establishing the European Community was signed at Lisbon on 13<sup>th</sup> day of December, 2007. Article 176A states that ' in the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between members to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks.'

<sup>162</sup> (1992-1997) See the European Community programme of policy and action in relation to the environment and sustainable development OJ, 1993 No. C138/1.

have a great impact on the environment considering the size of the public acquisition so that environmental factors should be incorporated into procurement decisions.<sup>163</sup>

The 6<sup>th</sup> Policy programme tagged ‘Environment 2010: Our Choice’<sup>164</sup> entrenches this aim further. The 6<sup>th</sup> plan establishes ‘Integrated Product Policy’ which is aimed at addressing ways to improve environmental performance of products throughout their life cycle. The policy is stated to incorporate action on economic incentives aimed at developing an objective basis for green public procurement and also to encourage more environmentally friendly designs.

It is cardinal to state here that public authorities are advised to develop environmentally friendly regulations and policies in their procurement programmes. Sustainability is therefore one of the key issues to be considered in the Public private procurement especially as it relates to infrastructure projects.

### **2.11.2 Corporate Social Responsibility and its impact on Development**

To successfully achieve the global goal of sustainable development, poverty alleviation and infrastructure development, private businesses must play a key role.<sup>165</sup> After all, these industries extract raw materials from the natural resources base of their host communities and in turn cause degradation and pollution of the environment.

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<sup>163</sup> Peter Zunzlik, ‘The Procurement of ‘Green’ Energy’ in *Social and Environmental Policies in EC Procurement Law, new Directives and New Dimensions*’ Sue Arrowsmith and Peter Zunzlik (eds), (Cambridge University Press, 2009), 369.

<sup>164</sup> European Commission, *Green Paper on Integrated Product Policy*, COM (2001) 68 final.

<sup>165</sup> See Agenda 21, *Strengthening The Role of the Business and Industry*, Ch 30, 1999 and also Johannesburg Declaration on Sustainable Development, Paras 27 and 29 of 2002.

In November 2004, trade unions and NGOs within the European Union have made a call to the EU to propose a new Corporate Social Responsibility agenda in order to demonstrate CSR's credibility globally especially in the context of the developing countries.<sup>166</sup> This call clearly indicates that in respect of CSR, poverty alleviation and development are now intertwined. The World Bank has described the Corporate Social Responsibility of the private sector as *'the commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their quality of life, in ways that are both good for business and good for development'*.<sup>167</sup>

The modern trend now is not only to ask how CSR affects company behaviour in developing nations, but also to ask if and in what manner are businesses affecting development within their domains.<sup>168</sup> This presupposes that while a company is making its profit from the people and resources in a community, it should also imbibe the conscience and responsibility of giving back to the community what is due to it. This is the only way the company can contribute its quota towards the development of the community. CSR should at least prioritise the protection of labour, human rights and environmental standards. These should be made an integral part of corporate business strategy.

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<sup>166</sup> NGO and trade union statement at the European Conference on Corporate Social Responsibility, Maastricht, 7–9 Nov. 2004.

<sup>167</sup> [www.worldbank.org/privatesector/whatwedo.htm](http://www.worldbank.org/privatesector/whatwedo.htm), accessed 24 March 2004.

<sup>168</sup> Micheal Blowfield, Corporate Social Responsibility: reinventing the meaning of development? Retrieved from [http://www.chathamhouse.org/sites/default/files/public/International%20Affairs/Blanket%20File%20Import/inta\\_466.pdf](http://www.chathamhouse.org/sites/default/files/public/International%20Affairs/Blanket%20File%20Import/inta_466.pdf). Accessed on June 12, 2013.

Thus, corporate social responsibility initiative should be understood as a veritable vehicle for development especially to all developing nations. It is vital that private companies realise their obligation to this important commitment for growth and development of the community in which they operate. This will go a long way in helping many developing nations with the provision of necessary infrastructure that will make life easier and better for the citizenry. It must be pointed out and realised that sooner or later CSR will be made obligatory. The sooner modern businesses get to adopt this culture of responsibility, the better it would be for everyone. Companies can no longer afford to ignore CSR anymore.

## **2.12 Conclusion**

In this chapter, attempts have been made to define Public Private Partnerships as given by different writers in their various texts. Also, other basic concepts and principles such as Infrastructure, Affordability, Value for Money (VFM) and risk transfer have also been examined among others. It is equally important for stakeholders in the PPP procurement to know the difference between PPP and other procurement models such as privatisation and public procurement. Lastly, there are other important agreements that are ancillary to the main agreement under the SPV, these agreements are also very vital for a successful PPP transaction. All these have been examined in detail in this chapter.

**CHAPTER THREE**  
**AN EXAMINATION OF THE LEGAL AND REGULATORY**  
**FRAMEWORK FOR PUBLIC PRIVATE PARTNERSHIPS (PPPs) IN**  
**GHANA**

**3.1 INTRODUCTION**

Since Ghana attained independence in 1957, the responsibility of providing both social and economic infrastructure for the citizens has been mainly that of the government.<sup>169</sup> Government became the main financier of the entire public infrastructure. In the early 1980's, the country faced a serious challenge to fund its public infrastructure as a result of dwindling revenues, which led the country to adopt the International Monetary Fund (IMF) and the World Bank Structural Adjustment Programme.<sup>170</sup>

Today, Ghana's infrastructure development is relatively poor, both in qualitative and quantitative terms, in spite of its growing economic wealth.<sup>171</sup> Investment in public infrastructure in recent times, has not matched the increasing need of the population. The nation's railway network, had suffered serious neglect before it is currently being given government attention. Underinvestment in road transportation, electricity, housing, water and sanitation has posed a serious challenge to the government in its quest for development.

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<sup>169</sup> See the Ghana Constitutions of 1957, 1960, 1969 and 1979.

<sup>170</sup> See Public-Private Partnership: A new strategy of infrastructure financing in Ghana. Retrieved from <http://www.ghanabizmedia.com/ghanabizmedia/august-2012-policy/755-public-private-partnership-a-new-strategy-of-infrastructure-financing-in-ghana.html>. Accessed on 13.11.13.

<sup>171</sup> Treading a public private partnership path that works. Retrieved from <http://www.ghanabizmedia.com/ghanabizmedia/july-2011-policy/364-treading-a-public-private-partnership-path-that-works.html>. Accessed on 09.11.13.

As part of the World Bank's commitment to developing Ghanaian infrastructure, the Bank approved an interest free credit of US\$30 million for Ghana to revolutionise infrastructure Development through the new Public-Private Partnership (PPP) initiative.<sup>172</sup> This support from the World Bank is aimed at closing the funding gap and leveraging private sector investment from 2012-2016.<sup>173</sup>

In order to give effect to the provisions of Article 36 (2) (b) of the 1992 Ghanaian Constitution,<sup>174</sup> which gives private individuals the right to participate in economic activities, the government, after a wider consultation established the Public Investment Division (PID) within the Ministry of Finance and Economic Planning to regulate private sector participation in public infrastructure delivery.<sup>175</sup> This was part of the government support to bolster private sector participation in infrastructure development through the PPP initiative.

Attempts at formalising the Public Private Partnerships process in Ghana and establishing a solid framework started with the then Ministry for Private Sector Development in 2003.<sup>176</sup> As a result of a series of consultations with the stakeholders, a policy document titled "Policy Guidelines for the Implementation of Public-Private Partnerships in Ghana" was approved by the cabinet in 2004.<sup>177</sup>

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<sup>172</sup> See New Partnership Project to Mobilize Private Investment for Ghana's Infrastructure. Retrieved from <http://www.modernghana.com/news/386267/1/new-partnership-project-to-mobilize-private-invest.html>. Accessed on 11.11.13.

<sup>173</sup> Ibid.

<sup>174</sup> See [www.parliament.gh](http://www.parliament.gh) for the full text of the constitution.

<sup>175</sup> See <http://www.mofep.gov.gh/about/objectives>. Accessed on 18.11.13.

<sup>176</sup> Since early 2000, under the administration of President Kufuor, a whole ministry was established for private sector development with the aim of facilitating public private cooperation in national development.

<sup>177</sup> In the 2004 PPP policy guidelines, it attempted to officially integrate and position both the public and private sectors in development process. In fact, the private sector was positioned as Ghana's "engine of growth" to indicate its importance.

Unfortunately however, the guidelines were not fully operational, thereby denying the private sector the impetus of participating in national development. In the Late President John Atta-Mill's administration, the initiative was resurrected, culminating in the launch of another national policy document for PPPs.<sup>178</sup> On 3rd June 2011, the government adopted the National Policy framework for PPPs in Ghana to provide a guide in the meantime for PPPs. A minister of State in charge of PPP was also appointed at the Presidency.

The Public-Private Partnership Bill is currently before the country's legislature and when passed, it is intended to serve as detailed legal framework for Public Private Partnership programme in the former Gold Coast.<sup>179</sup> While in Ghana and several other countries, the strategy of government has shifted from direct government procurement of infrastructure and services to privatisation and various other arrangements, PPP is considered as a viable alternative of infrastructure financing.<sup>180</sup>

At the opening ceremony of the 2013 Annual Bar Conference held in Ho, Ghana, the Honourable Chief Justice of Ghana, Mrs Justice Georgina Wood reiterated the importance of having a standard legal framework for PPPs in Ghana.<sup>181</sup> At the conference with the theme titled '*The Role of the Legal Profession in Developing Public Private Partnership Regulatory Framework for National Development,*' the Chief Justice posited as follows:

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<sup>178</sup>See Public Private Partnership (PPP) in Ghana. Retrieved from <http://www.ghanaweb.com/GhanaHomePage/features/artikel.php?ID=269857>. Last accessed on 18.11.13.

<sup>179</sup> See Ghana Public Private Partnership Bill. Retrieved from <http://www.mofep.gov.gh/?q=news/060713>. Last accessed on 18.11.13.

<sup>180</sup> See Treading a public private partnership path that works <http://www.ghanabizmedia.com/ghanabizmedia/july-2011-policy/364-treading-a-public-private-partnership-path-that-works.html>.

<sup>181</sup> See CJ calls for legal framework for public-private partnerships. Retrieved from <http://www.modernghana.com/news/490314/1/cj-calls-for-legal-framework-for-public-private-pa.html>. Accessed on 23 November, 2013.

*“There are a plethora of laws with PPP impact in Ghana, though most are uncoordinated. The uncertainty of the legal regime for PPPs in Ghana results not only in inconsistent approaches to the participation of the private sector in the delivery of PPPs, but it also constitutes a potential risk that may adversely affect the appetite of private sector partners to participate in PPP projects in Ghana.”*

She further urged lawyers to forge a radical change in their traditional focus and that for lawyers to play their active roles in the nation’s development, they should understand the interplay between finance, economics, project financing and execution, as well as the prevailing needs of the society. She stated thus:

*“Consequently, legal instruction must not continue to focus solely or purely on the traditional law subjects, legal rules, statutes and decided cases only, but rather begin to bring to the fore, the economic, political, financial and social underpinnings that make the legal rules and principles more relevant to society. It is only then that lawyers will begin to be at ease with specialised legal documents including PPP Concession Agreements that they might be tempted to consider far too technical for their comprehension. In this regard, there is the need for lawyers to again acquaint themselves with the rules, customs and practices of international trade and finance.”*

She said that because of the complex nature of PPP arrangements, effective drafting of a sound comprehensive legal framework will require highly accomplished legal expertise with adequate understanding of both general and sector-specific laws governing PPPs.

It must be stated that PPP is not a recent phenomenon in Ghana, for example in 2006; the Ghana Water Company Limited (GWCL) signed a 5-year management contract with Aqua Vitens Rand. There are other Projects being undertaken under



the PPPs that are still in the pipeline.<sup>182</sup> However, results were mixed and negotiations between the parties to the PPP transaction have proved somehow difficult because of the lack of a clear legal and regulatory framework that will govern these types of often complex and transactions.

### **3.2 Sector Level Analysis of Infrastructure Development in Ghana**

Attempt is made here to briefly examine the level of infrastructure development in Ghana in various sectors of the economy.

#### **3.2.1 Transportation Sector**

##### **3.2.1.1 Road**

Ghana has a total road network of 66,200 km, out of which 12,400 km are urban roads, 42,192 km are feeder roads, while 11,628 km are for trunk roads.<sup>183</sup> Although, transportation in the country is still relatively underdeveloped, the country however shows a great potential and a strong environment for foreign investment.<sup>184</sup> The network of roads is considered adequate to meet the minimal requirements for sub-regional integration.<sup>185</sup> Nevertheless the roads in major cities are mostly congested as a result of heavy traffic. Only 41% of the entire road is considered to be in good condition.<sup>186</sup> Some critical roads linking the capital city to the rest of the country are still under construction for more than Six years and are yet to be completed due to resources constraint.<sup>187</sup> However, transport projects are expected to increase because of oil discovery in the country. No doubt, in order for

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<sup>182</sup> For example, the Sunon Asogli Power Plant, a typical PPP project which is expected to produce fifteen per cent of the total electricity generated in the country (200 megawatts of power).

<sup>183</sup> See Ghana Infrastructure Plans. Retrieved from [http://www.mofep.gov.gh/CG2012/userfiles/file/ghana\\_infrastructure.pdf](http://www.mofep.gov.gh/CG2012/userfiles/file/ghana_infrastructure.pdf). Last accessed on 19.11.13.

<sup>184</sup> See Ghana Infrastructure Report Q1 2013. Retrieved from <http://www.marketresearch.com/Business-Monitor-International-v304/Ghana-Infrastructure-Q1-7259384/>. Last accessed on 18.11.13.

<sup>185</sup> Ibid.

<sup>186</sup> See Ghana Infrastructure Plans supra.

<sup>187</sup> See Updating our road infrastructure. Retrieved from <http://graphic.com.gh/editorials/3032-updating-our-road-infrastructure.html>. Accessed on 19.11.13.

Ghana to meet the requirements for economic growth, Urban, Highways and feeder roads in the country must receive urgent attention.

### **3.2.1.2 Rail Transportation**

Ghana's total railways network spans about 1,300km. The rail network links the Capital city of Accra-Kumasi-Takoradi and has really helped in the transportation of commodities for export.<sup>188</sup> As the largest producer of cocoa in the world, the railroad is considered to have a strong effect in cocoa production and distribution.<sup>189</sup> Currently, Ghana's rail system is partially operational because of lots of old tracks that need to be rehabilitated and upgraded. This portends negative effects on the development of the mining sector and will certainly not support the development of the country's emerging oil sector.<sup>190</sup> In order to fully open up the country for economic development, the government has considered rehabilitating and modernising the road networks in the Western region. In 2010, a contract worth US\$6-billion was signed with the Chinese National Machinery Import and Export Corporation (CMC) for the construction and upgrading of railroads in the country.<sup>191</sup> When completed, the rail network is expected to link central business districts with other parts of the country and also to provide easy transportation of containers and petroleum products from the oil and mining regions to the ports of Tema and Takoradi.<sup>192</sup>

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<sup>188</sup> The country is rich in Cocoa, bauxite, timber and manganese.

<sup>189</sup> Transportation Infrastructure and Development in Ghana. Retrieved from <http://ideas.repec.org/p/hal/psewpa/halshs-00607207.html>. Last accessed on 19.11.13.

<sup>190</sup> Oil was discovered in commercial quantity in Ghana in 2007.

<sup>191</sup> See Ghana signs railway contract with Chinese firm. Retrieved from <http://www.modernghana.com/news/306377/1/ghana-signs-railway-contract-with-chinese-firm.html>. Last accessed 19.11.13.

<sup>192</sup> See Infrastructure – Transportation in Ghana. Retrieved from <http://www.gipcghana.com/invest-in-ghana/why-ghana/infrastructure/transportation-infrastructure.html>. Last Accessed on 19.11.13.

### **3.2.1.3 Maritime and Inland Water Transportation**

Ghana's busiest seaports located at Tema and Takoradi are recently equipped and upgraded to provide services to both the local and international traders. Recently, the volumes of activity have been on a sharp increase to the extent that there have been serious congestions and capacity constraint which are gradually becoming impediments to further development in that sector.<sup>193</sup> There are usually long queues of vessels waiting to berth due to limited facilities available to decongest the ports. This may expose the vessels to potential attacks by the pirates. The Volta Lake is also an important means of transportation in Ghana. Over the years, it has been a major source of transporting petroleum and agricultural products as well as passengers. However, the lake suffers from volatile ecological conditions and obsolete equipment.<sup>194</sup> The government is carrying out expansion and the development of a multimodal transportation system on the Volta Lake.

As a result of increasing demand, ports in Ghana are now being congested. For example, the Port of Tema has a container handling capacity of around 375,000 annually. However, as a result of increasing demand; the port has been handling about 420,000 containers. The congestion problem needs to be addressed in order to increase efficiency in its operations.<sup>195</sup>

### **3.2.1.4 Aviation Sector**

Ghana's international airport (Kotoka International Airport) is a host to most international airlines that fly regularly into the country.<sup>196</sup> The airport connects Ghana to Africa and the rest of the world. KIA is one of the leading airports in sub-Saharan with high international safety standards. In 1996, the country embarked on

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<sup>193</sup> See Ghana Infrastructure Plans.

<sup>194</sup> Ibid.

<sup>195</sup> Ghana's Infrastructure: A Continental Perspective.

<sup>196</sup> See Infrastructure – Transportation in Ghana.

rehabilitation and expansion programme which has brought about refurbishment of the facilities at both the international and the domestic terminals. This has greatly increased the capacity of the airport to attend to both travellers and cargoes with dispatch. However, for Ghana to be able to cope with the global economic trend there is still the need to expand and build more airports in the light of the oil discovery in the country.

### **3.2.1.5 Water and Sanitation**

Ghana is one of the few countries in African that has already met the MDG target for water supply. Access to safe and drinking water rose from 69 percent in 2003 to 84 percent in 2008 thereby exceeding the MDG target of 76 percent.<sup>197</sup> Despite the water utility's improvements in recent times, cost recovery and revenue collection, distribution losses remain high at around 50 percent with adverse impacts on service quality. There are two explanations for Ghana's poor performance in this respect. The first is the country's ageing water distribution infrastructure, which is full of leaks.<sup>198</sup> The second reason is because of the large scale commercial theft from the networks. As a result of these huge losses, water supply is now being rationalised as there are intermittent supply. The very poor quality of water output is now impacting negatively on the country's achievement of the Millennium Development Goal in the area of water provision, because although there is good connection of water pipes to most houses, water supply is not adequate. The government will have to carry out reforms aimed at addressing these challenges.

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<sup>197</sup> Vivien Foster and Nataliya Pushak. Policy Research Working Paper on Ghana's Infrastructure: A Continental Perspective. TheWorld Bank 2011 at Page 16.

<sup>198</sup> Ibid.

While it can be said that Ghana is on track to meet the Millennium Development Goal in the area of water supply, the situation on sanitation is different. Evidence has shown that although, access to improved sanitation facilities has increased in recent times, this still falls below the expected standard required by the MDG. As at 2013, it was estimated that about 16 million people do not have access to sanitised latrines while close to 1.8 million people do not even have access to latrines at all.<sup>199</sup>

In a keynote address delivered by the Deputy Minister for Local Government and Rural Development at the commemoration of the World Toilet day on 19<sup>th</sup> November 2013, the deputy minister lamented that Ghana may not likely meet the 2015 Millennium Development Goals target on sanitation.<sup>200</sup> He however stated that his Ministry is willing to support collaborations with development partners and other key stakeholders because the government has put in place the necessary policy, institutional, and legal/investments framework to address this developmental setback.

### **3.2.1.6 Electricity Infrastructure**

If Ghana's economy will continue to grow, the country will have to seriously address the challenges of power supply. The country has been witnessing social, political and economic stability over the past decade. Since the year 2010, the nation's economy has been growing at a very fast rate. For instance in 2011, due to the commencement of oil production, the annual GDP growth was put at 14.4

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<sup>199</sup> See Ghana: World Toilet Day Commemorated in Accra. Retrieved from <http://allafrica.com/stories/201311201258.html>. Last accessed on 21.11.13.

<sup>200</sup> Ibid.

percent compared to 8.0 in 2010 and 7.1 percent in 2012.<sup>201</sup> The growth performance was low in 2012 due to lower production of cocoa and oil. The country's medium-term outlook remains healthy, with projected GDP growth of 8.0% (6.5% non-oil) in 2013 and 8.7% (8.9% non-oil) in 2014, which is an improvement over and above the average annual growth rate of 6.5% for the period since 2000.<sup>202</sup> Investments in public infrastructure like power supply; commercial agriculture and oil and gas are expected to drive this growth.

Currently, the country's power generation stands at about 2,200 MW and by 2017, the government plans to increase the generation capacity to more than 4,000 MW.<sup>203</sup> For this to be achievable by 2017, then transmission and distribution networks will have to be rehabilitated and expanded. The major causes of the challenge facing the power sector are as a result of lack of maintenance of the electricity equipment and the refusal to change the obsolete ones.

The government is therefore carrying out both Structural and regulatory reforms aimed at encouraging private investment in the development of the power industry.<sup>204</sup> In doing this, the government has already commenced the reformation of the energy sector to bring it in line with the international standards. The government also plans to increase the generation capacity and enhance inter country connections by expanding the West African Power Pool (WAPP) to boost electricity supply within the West Africa Sub-region.<sup>205</sup>

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<sup>201</sup> See Ghana's power challenges and national productivity. Retrieved from <http://www.ghanabizmedia.com/ghanabizmedia/december-2012-cover-story/867-ghanas-power-challenges-and-national-productivity.html>. Accessed on 21.10.13.

<sup>202</sup> See Ghana Economic Outlook. Retrieved from <http://www.afdb.org/en/countries/west-africa/ghana/ghana-economic-outlook/>. Accessed on 21.11.13.

<sup>203</sup> See Ghana Infrastructure Plans. Op cit.

<sup>204</sup> See Electrical Power in Ghana – Overview. Retrieved from <http://www.mbendi.com/indy/powr/af/gh/p0005.htm>. Accessed on 21.11.13.

<sup>205</sup> Founded in the year 2000, the West African Power Pool (WAPP) is an institution established by the mandate of the Economic Community of West African States (ECOWAS), to among others, develop a sustainable regional electricity

### 3.2.1.7 Telecommunication Infrastructure

Before 1996, telecommunication sector in Ghana was under the direct control of the government. This monopoly led to inefficiency and corruption. However, with the enactment of the National Communications Authority Act, 1996,<sup>206</sup> the monopoly of the former Telecommunication Corporation was abolished thereby giving way to the National Communications Authority (NCA) as the new national telecommunication regulator.<sup>207</sup> In 2009, the NCA announced that it was prepared to give licenses to private investors to install telecom infrastructure in the country to boost capacity in that sector.<sup>208</sup> The Commission stated this through its Director of Regulatory and Administration, Mr Joshua Peprah at a day's workshop with stakeholders in the communication industry.<sup>209</sup> The commission reiterated the importance of having a good telecommunication bandwidth as follows:

*“When we have adequate, clean and reliable international bandwidth, we will carve a niche for ourselves in the international outsourcing market and that way enterprises will not hesitate to establish anywhere in the country outside of the capital. “But we need the citizenry to come along with us on this because without the telecom masts, we can't extend the benefits of the bandwidths to the rest of the country.”*

There are currently six (6) network operators in the country. These are: Vodafone Ghana Limited, Scancom Ghana Limited (MTN), Airtel Communication, Millicom Ghana Limited (Tigo), Globacom Ghana Limited (Glo) and Expresso. The market for telecom operators stood at 26,616,427 with Scancom Ghana Limited (MTN)

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supply system in order to promote the economic growth of the ECOWAS sub region. To achieve this objective, there is the need for WAPP develop and implementation of key infrastructure so that all ECOWAS member states are given access to economic energy resources.

<sup>206</sup> Act No 524 of 1996.

<sup>207</sup> See Infrastructure Telephony in Ghana. Retrieved from <http://www.gipcghana.com/invest-in-ghana/why-ghana/infrastructure/ict-infrastructure.html>. Accessed on 21.11.13.

<sup>208</sup> See more at: <http://www.ghanabusinessnews.com/2009/04/24/ghana-to-license-third-parties-to-provide-telecom-infrastructure-for-co-location/#sthash.pGffHtFX.dpuf>. Last accessed on 21.11.13.

<sup>209</sup> The Workshop was held in Accra on 24 April, 2009.

leading with about 46 percent of the market share, followed by Vodafone with 21 percent.<sup>210</sup>

With these improvements in the telecommunication sector, it has been said that a great deal needs to be done to improve and sustain higher quality of service in the country.<sup>211</sup> Appropriate laws which would provide an enabling environment to the private sector will be of utmost importance.

### **3.3 Legal Framework for Public Private Partnerships (PPPs) in Ghana**

The legal frameworks for PPPs in Ghana are as follows:

#### **3.3.1 The Constitution**

The 1992 Constitution of the Republic of Ghana makes provisions for the national development imperative for the country through the Directive Principles of State Policy which requires that all governments must pursue sound policies that would ultimately ensure the “*establishment of a just and free society*”, where every Ghanaian would have the opportunity to live long, productive, and meaningful lives.<sup>212</sup>

To complement the efforts of government in the realisation of these objectives, and in recognition of the positive impacts the private sector could play in economic development, the right of the private sector to participate in economic development has therefore been enshrined in the constitution. S.36 of the Constitution provides;

*“(2) The State shall, in particular, take all necessary steps to establish a sound and healthy economy whose underlying principles shall include -*

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<sup>210</sup> Ibid.

<sup>211</sup> See Francis K. A. Allotey and Felix K. Akorli, Telecommunications in Ghana. Retrieved from <http://www.vii.org/papers/ghana.htm>. Last accessed 21.10.13.

<sup>212</sup> See S.34(1) of the 1992 Constitution of Ghana.



*(a) The guarantee of a fair and realistic remuneration for production and productivity in order to encourage continued production and higher productivity;*

*(b) Affording ample opportunity for individual initiative and creativity in economic activities and fostering an enabling environment for a pronounced role of the private sector in the economy;”<sup>213</sup>*

The above quoted provision of the constitution especially subsection 2(b) succinctly shows that the government is committed to give room to the private sector to participate in nation’s development by creating an enabling environment for the businesses to thrive. Although, the constitution does not contain detailed provisions for the PPP framework in Ghana, it however sets the ball rolling for private sector participation in development through the Public Private Partnerships.

### **3.3.2 National Policy on Public Private Partnerships (PPPs)**

In June 2011, the Ministry of Finance and Economic Planning developed a National Policy on Public Private Partnerships in Ghana. This was made to provide some degree of consistency in the way and manner PPP projects are to be carried out in the country. The policy covers areas such as project identification, selection, appraisal, procurement, operation, maintenance, performance monitoring and evaluation. The policy applies to all ministries, agencies and levels of government and shall be pursued in accordance with the basic principles of affordability, value for money and sufficient risk transfer. <sup>214</sup>

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<sup>213</sup> S.36(2) of the 1992 Constitution of Ghana.

<sup>214</sup> See the National Policy on Public Private Partnerships in Ghana. Retrieved from [http://www.mofep.gov.gh/sites/default/files/docs/pid/ppp\\_policy.pdf](http://www.mofep.gov.gh/sites/default/files/docs/pid/ppp_policy.pdf). Accessed on 23.08.13.

In drafting the policy framework, extensive consultations were made with relevant stakeholders such as financial institutions, professional associations, industry representatives, ministries, departments of government, metropolitan and district associations. The views and opinion gathered were codified and reflected in this policy. The policy covers basic principles governing procurement processes. These include accountability, transparency and competition as well as predictability and environmental safeguards among others. It further provides that all projects shall be structured in such a way as to encourage local contents and technology transfer. The key objectives of the PPP programme as contained in the national policy are summarized hereunder as follows;

- a. *“To leverage public assets and funds with private sector resources from local and international markets to accelerate needed investments in infrastructure and services;*
- b. *To encourage and facilitate investment by the private sector by creating an enabling environment for PPPs where value for money for government can be clearly demonstrated;*
- c. *To increase availability of public infrastructure and services and improve service quality and efficiency of projects;*
- d. *To ensure the attainment of required and acceptable local and international social and environmental standards;*
- e. *To protect the interests of all stakeholders including end users, affected people, government and private sector;*
- f. *To set up efficient and transparent institutional arrangements for the identification, structuring and competitive tendering of PPP projects;*
- g. *To provide a framework for developing efficient risk sharing mechanism;*  
*and*
- h. *To encourage and promote indigenous Ghanaian private sector participation in the delivery of public infrastructure and services.”*

The policy however does not purport to provide a comprehensive legal and regulatory framework for PPPs in Ghana. This is because the policy itself states that until a detailed PPP law is enacted by the parliament, the policy shall continue to provide legal and regulatory framework to guide parties involved in the PPP project in the country. Therefore, until the Ghanaian Parliament enacts the PPP Act, this policy shall guide all PPP transactions.

### **3.3.3 Public Procurement Act, 2003**

In an attempt to stem the tide of corruption in Public Procurement in Ghana, the Parliament enacted the Public Procurement Act<sup>215</sup> which was substantially fashioned after the UNCITRAL Model Law on Public Procurement.<sup>216</sup> The Act contains provisions that can ensure transparency and accountability in procurement processes. It sets out the methods, structures and tendering procedures for procurement and the procedures for reviews/approval and other miscellaneous matters connected therewith.

Before the enactment of the Public Procurement Act of 2003 in Ghana, procurement regulations and institutions were fragmented and uncoordinated. However, since the enactment of the procurement Act, the procurement regulations have become harmonised and an independent regulatory body called the Public Procurement Authority was also established as a central body responsible for policy formulation and regulation of procurement in Ghana.<sup>217</sup> The Authority is empowered to supervise all procurement activities by all government Ministries, Agencies and Departments at all levels of government. To ensure an effective supervision, the authority carries out a periodic assessment of activities to uncover

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<sup>215</sup> Act No 663 of 2003.

<sup>216</sup> See Act 663- Antidotes to Corruption in Procurement . Public Procurement Authority Bulletin. Retrieved from <http://ppaghana.org/documents/Bulletins/PPAE-BulletinJulAug2013Final.pdf>. Accessed on 24.11.13.

<sup>217</sup> A.B. Adjei, Challenges in the handling of Procurement Complaints: Ghana's Experience (2011) 38 JMCL Page 1.

all probable lapses and therefore initiate appropriate measures to remedy them. The Act complements the provisions in the Financial Administration Act and the Regulations made thereunder.

### **3.3.4 Financial Administration Act 2003 and Financial Administration Regulations 2004**

This Act<sup>218</sup> was passed into law on 28<sup>th</sup> day of October 2003. It was passed to promote public sector accountability and combat corruption. The preamble to the Act states the main purport of the Act succinctly thus:

*“AN ACT to regulate the financial management of the public sector; prescribe the responsibilities of persons entrusted with financial management in the government; ensure the effective and efficient management of state revenue, expenditure, assets, liabilities, resources of the government, the Consolidated Fund and other public funds and to provide for matters related to these.”*

Section 1 of the Act empowers the Minister of Finance to ensure that transparent systems for all government procurement are maintained and that the minister must cause the full account of all public moneys and resources to be laid before the parliament. The Minister shall also ensure the exercise of regularity and propriety in handling all government expenditures.<sup>219</sup>

Section 2 of the Act further empowers the Minister of Finance to make regulations or give further directions that are in compliance with the provisions of this Act where they are considered necessary and expedient for the proper implementation

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<sup>218</sup> Act No 654 of 2003.

<sup>219</sup> See S.1 (3) (c) of the Act.

of this Act and for the safety, economy and advantage of public revenue and property.<sup>220</sup>

Pursuant to the Provisions of Sections 2 and 73 of the Financial Administration Act 2003 which empowered the Minister to make regulations for the conduct of financial businesses on behalf of the government, the Minister made the Financial Administration Regulations which came into effect on 8<sup>th</sup> day of April, 2004. Both the Act and the Regulations provide detailed directions and control for overall sound financial administration for the country.<sup>221</sup>

### **3.4 The Institutional Landscape**

These are the government establishments or agencies that are responsible for the proper implementation of PPP Programme in the Country. The PPP Policy provides that such institutions shall support the following broad functions. These are:

1. Advising on PPP Policy development, monitoring, dissemination and enforcement;
2. Advising and supporting individual project in the areas of preparation, designing and execution;
3. Giving advice, support and promoting PPP Projects;
4. Giving project approval where necessary ;and
5. Ensuring proper financial management.

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<sup>220</sup> See S.2 (2) of the Act.

<sup>221</sup> See Main Legislation and Policy Documents Regarding Decentralization and Local Governments in Ghana. Retrieved from [http://books.google.com.my/books?id=BoLxNCD29CkC&pg=PA98&lpg=PA98&dq=overview+of+the+Ghana+Financial+administration+act+2003.&source=bl&ots=b7TJKsMpPV&sig=pkcuQOn9w\\_S22VtVcjQeE6IKjow&hl=en&sa=X&ei=5IORUpa1AYjZrQfx0YHIAw&ved=0CHMQ6AEwCQ#v=onepage&q=overview%20of%20the%20Ghana%20Financial%20administration%20act%202003.&f=false](http://books.google.com.my/books?id=BoLxNCD29CkC&pg=PA98&lpg=PA98&dq=overview+of+the+Ghana+Financial+administration+act+2003.&source=bl&ots=b7TJKsMpPV&sig=pkcuQOn9w_S22VtVcjQeE6IKjow&hl=en&sa=X&ei=5IORUpa1AYjZrQfx0YHIAw&ved=0CHMQ6AEwCQ#v=onepage&q=overview%20of%20the%20Ghana%20Financial%20administration%20act%202003.&f=false). Accessed on 24.09.13.

The following are the relevant institutions that are responsible for Implementing PPP Programmes in Ghana:

1. The Ministry of Finance and Economic Planning;
2. The Public Investment Division;
3. Contracting Agencies or MDA's; and
4. National Development Planning Commission.

Their responsibilities shall be examined one after the other.

### **3.4.1 Ministry of Finance and Economic Planning (MOFEP)**

The Ministry of Finance and Economic Planning is the ministry that is responsible for developing the legal, regulatory and institutional framework for PPPs programme in Ghana. The ministry is also responsible for issuing standardized PPP Provisions and Manuals in order to ensure sound financial management of the PPP Programme. The minister in charge of this ministry performs central roles in the development of the PPP Programme. The minister is empowered under the law to make regulations to support the existing legislations on PPPs in the country. These are the Financial Administration Act of 2003, The Public Procurement Act and the PPP National Policy.

### **3.4.2 The Public Investment Division (PID)**

This is a department under the Ministry of Finance and Economic Planning (MOFEP) that ensures efficiency in management and delivery of public investments for sustainable growth and development.<sup>222</sup> According to Mr Ekow Coleman,<sup>223</sup> this unit is the most important unit that performs a key role in the management and implementation of PPP Programme in Ghana. It provides

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<sup>222</sup> See Public Investment Division. Retrieved from <http://www.mofep.gov.gh/?q=divisions/pid>. Accessed on 24.11.13.

<sup>223</sup> Being an interview with Mr Ekow Coleman of the PPP Advisory Unit of the Public Investment Division in Accra on Wednesday 9.01.13.

advisory services and support to all ministries, Departments and Agencies that intends to engage in PPP Programme. He stated further that the Division shall also promote a flow of bankable, sustainable and viable PPP deals. The Division is to carry out these objectives through a procedure that is transparent and commands public confidence. The division has some units within it that assist in carrying out these objectives. These are; the PPP Advisory Unit; Project and Financial Analysis Unit; Public Entities and Strategic Projects Units.

### **3.4.3 Government Contracting Entities**

These are Ministries, Departments and Agencies of government both at the Central and Municipal levels. It is the MDA's that have the power to identify a project that is suitable and grant concessions in respect thereof. The MDA's are encouraged to develop capabilities within themselves in order to assist in project identification, contract management, project monitoring, reporting and evaluation. This will be done by setting up Project Management Units within each of the Ministries, Departments and Agencies of the government concerned.

An important point to mention here is that Ghana operates a Unitary System of Government whereby there is only the Central government and districts.<sup>224</sup> The laws made by the parliament are binding on all authorities and persons in Ghana.<sup>225</sup> Since the parliament makes law for the country, it also presupposes that the decisions of the Public Investment Division will be binding on both the central and the district units. Therefore, the likelihood of conflicts between the national laws and the state or regional laws as applicable in a federal system will be reduced.<sup>226</sup>

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<sup>224</sup> See S.4 (1) of the Ghanaian Constitution. The country has 6 Metropolitan, 49 Municipal and 161 Districts making 216 MMDs.

<sup>225</sup> See S.93 (2) for the powers of the parliament to make laws for the whole country.

<sup>226</sup> Conflict of laws between the states and Federal Government usually occurs in a Federal System of Government. A typical example is Nigeria. This is further discussed in Chapter 4 of this Thesis.

Therefore, it will be more convenient for the relevant implementing agency like the Public Investment Division to ensure a uniform compliance of the law within the country.

#### **3.4.4 National Development Planning Commission (NDPC)**

The Ghana National Development Planning Commission has the mandate to prepare the National Infrastructure Plan (NIP) in conjunction with the relevant contracting authorities before embarking on the project. The National Infrastructure Plan identifies those projects that will be carried out within a specific period of time. Therefore, before any PPP Project can be initiated by any agency, it must emanate from the National Infrastructure Plan (NIP) otherwise, the relevant agency must seek the approval of the commission before embarking on such new project.

#### **3.5 The Private Sector Proponent**

The National Policy is silent on the qualification inherent in a Private Sector before participating in the procurement process. However, since the general procurement law applies to procurement of goods and services including PPP procurement especially in the areas where the National Policy is silent, then recourse would have to be made to its provisions with respect to the qualification of tenders. Section 21 (1) of the Public Procurement Act provides that;

- “(a) A tenderer in all public procurement shall possess the necessary;-*
- (i) Professional and technical qualifications and competence;*
  - (ii) Financial resources to execute the project;*
  - (iii) Equipment and other physical facilities for the execution of the project;*
  - (iv) Managerial capability, reliability, experience in the procurement object and reputation; and*



- (v) Personnel to perform the procurement contract;*
- (b) Shall have the legal capacity to enter the contract;*
- (c) Shall be solvent, not be in receivership, bankrupt or in the process of being wound up, not have its business activities suspended and not be the subject of legal proceedings;*
- (d) Shall have fulfilled its obligations to pay taxes and social security contributions and any paid compensation due for damage caused to property by pollution;*
- (e) Shall have directors or officers who have not in any country been*
  - (i) Convicted of any criminal offence relating to their professional conduct or to making false statements or misrepresentations as to their qualifications to enter into a procurement contract, within a period of ten years preceding the commencement of the procurement proceedings; or*
  - (ii) Disqualified pursuant to administrative suspension or disbarment proceedings.*
- (f) Shall meet such other criteria as the procurement entity considers appropriate.”*

All the above requirements are conjunctive and must be satisfied in addition to any other specification(s) that may be included in the tender documents or other documents for invitation to bid.

### **3.6 Key Principles in PPP Procurement**

There are core principles which are very cardinal to any PPP transaction. These include transparency, accountability, openness and fairness of the process. These will determine whether the procurement process in the country is in line with the best practices.

### **3.6.1 Transparency, Accountability and Competition**

Transparency and accountability are very important principles that ensure integrity in any procurement process. The National Policy provides that these core principles shall guide all PPP Projects. On the requirement of transparency in the PPP Procurement Process, the policy states as follows:

1. That the process of procurement must be well defined and instructions to bidders must be clear and unambiguous so as to prevent manipulations and abuse of the procurement process;
2. That the conditions set out for bidding and evaluation must be made available to all prospective bidders and must ensure the attainment of value for money and efficiency of the process.
3. That where a decision is taken to consider an unsolicited bid, clear and objective reasons must be given to support of such decision which should be in conformity with the provisions of the National Policy.
4. That access to information about the project shall be guaranteed except where national security will be prejudiced.

On the need to enthrone accountability in the PPP procurement process, the policy has set out some basic principles regarding this. All implementing agencies shall ensure that all PPP transactions are in accordance with these basic principles.

These are;

1. That every PPP Procurement process shall be in accordance with the laid down rules and regulations.
  2. That decisions must be objective and in accordance with law and policy;
- and

3. That all public sector authorities must adhere to the prescribed processes laid down for taking decisions within their respective organisations.

Furthermore, the policy provides that in order to get value for money in all PPP Projects, the project should be subjected to a competitive bidding. This is the only way through which the bidder with the most economically viable bid will emerge. All procurement processes must be subjected to these three basic principles. The provisions of the Financial Administration Act 2003 and Financial Administration Regulations 2004 will also help in ensuring transparency and accountability. These provisions will further complement the national policy in this regard. Since all procurements are subject to the Financial Administration Act and its regulations, this will in no doubt go a long way in enthroning accountability.

Currently, Ghana does not have competition law, although, the bill is still pending before the parliament.<sup>227</sup> This bill when passed into law will ensure efficiency in the production of goods and services in the country. The Competition Law will complement the scanty provisions in the PPP National Policy to ensure competition in PPP Procurement. An authority with the full powers to implement the provisions of the law and raise awareness on the importance of competition in procurement process should also be established.<sup>228</sup>

Recently, the country has started reviewing and re-designing public procurement procedures in order to make it in line with international best practices and to achieve value for money. To achieve this, the Public Procurement Authority (PPA)

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<sup>227</sup> See Ghana Will Soon Have A National Competition Law. Retrieved from <http://ghanaconsumerwatch.wordpress.com/2009/06/16/ghana-will-soon-have-a-national-competition-law-issuer/>. Accessed on 25.11.13.

<sup>228</sup> See Karen Ellis, Rohit Singh, Peter Quartey & Elvis Agyare-Boakye. Assessing the Economic Impact of Competition: Findings from Ghana. UKaid, London, 2010. Page V.

met with other stakeholders in September 2013 to officially launch the reviewed Standard Tender Documents (STDs) for the procurement of goods, works and services.<sup>229</sup> Mr Samuel Sallas-Mensah, who was the Chief Executive Officer of PPA, stated that this was informed as a result of the fact that the world of procurement had moved on and many changes had occurred in the way tender documents were formed, including changes in specifying requirements of how goods, works and services are procured.

The PPA boss said further that the review of the documents had become imperative at a time the public was demanding greater accountability and transparency in the conduct of procurement with public funds. He said the Public Procurement Act, 2003 (ACT 663), was being amended to reflect current developments. He posited that *“It is therefore necessary to align our procurement documents and processes with such developments.”* He said the review and re-design of the PPAs STDs formed part of a 2.7 million dollars support from the Swiss Government to assist Ghana to initiate a project that would introduce sustainability criteria into her public procurement regime.

### **3.6.2 Openness and Confidentiality**

The National Policy includes the principle of openness as one of the most basic principles guiding PPP Projects in Ghana. The general rule is that all information relating to the PPP transactions shall be made known to the public. However, such information that is commercially sensitive is permitted to be kept from the public domain and should therefore be held confidential. The Policy further provides that all PPP transactions shall be made open and citizens shall have the right of access

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<sup>229</sup> See Ghana begins review of procurement processes. Retrived from <http://www.ghanabusinessnews.com/2013/09/12/ghana-begins-review-of-procurement-processes/>. Accessed on 25.11.13.

to information about the project, except where national security will be prejudiced. Therefore commercial sensitivity and national security are the two main issues that can make a PPP transaction to be held in secrecy.

It must be stated here that currently, Ghana does not have a law that guarantees the right to information. The Bill remains in the legislative pipeline since it was initiated in year 2010. The Right to Information Bill when passed into law will provide for the implementation of the constitutional right to information held by a government agency.<sup>230</sup> The law will afford the general public the right to know what is taking place in public offices and the ability to monitor the implementation of policies and procurement procedures.

The following are the potential benefits of the Freedom of Information Law:

3.6.2.1 The law will afford Ghanaians to know the activities of the government, agencies and the officials with respect to the allocation of public resources. This is a potent power to fight corruption. It is trite that corrupt practices flourish in darkness and secrecy, so any attempt that is aimed at opening governments and their agencies to public scrutiny is very likely to advance anti-corruption efforts.<sup>231</sup>

3.6.2.2 The law when passed will further promote transparency in government and this will lead directly to the reduction of corruption in government. To buttress this point further, it is necessary to show the corruption

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<sup>230</sup> See Ghana's cabinet approves Right to Information Bill. <http://www.globaltimes.cn/content/787808.shtml#UpRSlsRmxBw>. Accessed on 26.11.13.

<sup>231</sup> Freedom of Information Act: A Powerful Weapon Against Corruption; ...*So Why Has Its Passage Continued To Remain Elusive To The Ghanaian Parliament?* Retrieved from <http://www.modernghana.com/news/454616/1/freedom-of-information-act-a-powerful-weapon-again.html>. Accessed on 24.11.13.

equation thus; **Corruption = Discretionary Powers + Monopoly – Transparency.**

It is instructive to note that the above equation basically states that the potential of corruption is based on three factors. These are;

- (a) If the decision making process in the state is subject to the discretionary powers or based on the whims and caprices of the leader or the decision is highly subjective;
- (b) If the state has firmly established a system of monopoly over the sources and use of resources in the state and in such a way that it leaves no room or very little room for competition. If there are too many licenses, permits, subsidies concessions among others; and
- (c) Lastly, if there is lack of transparency in the decision making process, then such government will have a very high potential of being corrupt. Therefore, increased transparency will certainly help in reducing corrupt practices.

3.6.2.3 Thirdly, information in a democracy is like oxygen in a human body.

Where the acts of government officials are shrouded in secrecy, the people of Ghana will not be able to know the happenings within the government and this will in effect limit their access to participate in democratic processes.

3.6.2.4 Lastly, a bad government needs secrets to survive. Keeping governmental actions in secrecy will ensure continuous wastes, ineffectiveness, inefficiencies and gross abuse of power to survive.

There is a certain impunity that enables non-performing governments; public and even private institutions to continue to hold sway over the people because citizens are basically kept in darkness and ignorance. The Freedom of Information act is a powerful weapon against this culture of impunity.

In his article titled “Public Private Partnership (PPP) in Ghana”<sup>232</sup> William Dowokpor lamented on the lack of information regarding PPP projects in Ghana. He stated that connected to the concepts of inclusiveness and openness is accountability. He wondered why the concept of confidentiality will override openness and accountability in the country. He posited thus;

*“When the confidentiality practice in corporate governance meets with the proverbial inefficiencies of the public sector in a PPP, it results in a total mess! In the ragging 15 million cedi guinea fowl project for example, I hear arguments for confidentiality as a corporate governance principle. But I will counter that with good corporate governance practices which include openness and accountability. I think it is premature for a society with weak regulatory institutions to put confidentiality above openness and accountability in a PPP financed with public money. The controversies surrounding otherwise useful projects SADA projects can be avoided if adequate information showing how monies spent, are made available to oversight institutions such as parliament and the general public. That is why we have public affairs departments attached to such projects. Like the PPP itself, the relevance of the guinea fowl project remain unquestionable. What is fuelling the suspicion is the lack of adequate information at the right time. A word to the wise is enough!”*

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<sup>232</sup> William Dowokpor, “Public Private Partnership (PPP) in Ghana”(2013). Retrieved from <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=269857>. Accessed on 30.11.13.

It follows from the foregoing therefore that access to information is a veritable tool to minimize corruption in the PPP and other procurement processes. This right of access will increase transparency, accountability, inclusiveness and integrity in government.

### **3.7 The PPP Processes**

Since there are different players representing various interests in PPP Projects, thus, the partnership need to be formalized and there is also the need to follow the process laid down in a transparent manner. There is also the need to prepare detailed documentation at all the phases of the project. In order to improve credibility and transparency in the PPP process, the National Policy states that at all phases of the project development, the input of both parties to the PPP project shall be assessed so as to ensure compliance with the provisions of the regulations and the PPP processes especially regarding the bidding processes, the composition of the Special Purpose Vehicle (SPV), and the local contents requirement.<sup>233</sup>

All the stakeholders involved in the PPP process shall go through the following steps in order to ensure strict compliance with the laid down regulations:<sup>234</sup>

#### **3.7.1 Project Inception**

This is the first phase of any PPP project. Once an MDA has identified a project that may be developed through PPPs, then such an MDA must prepare a project brief and thereafter follow the procedures states below;

1. Register such project with the Public Investment Division (PID) of the Ministry of Finance and Economic Planning (MOFEP);

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<sup>233</sup> See Paragraph 39 of the Ghanaian PPP National Policy.

<sup>234</sup> See Paragraph 40 of the National Policy.



2. Inform the PID of the MOFEP of any available expertise (if any) within that institution to go ahead with the project planning;
3. Appoint a project officer within or outside such institution; and
4. Appoint a Transaction Advisor where such is requested by MOFEP.

### **3.7.2 Pre-Feasibility Studies- Approval Stage 1**

In order to ensure that the proposed project will be in the best interest of the nation, then the contracting authority, with the support of the MOFEP-PID shall undertake a Pre-Feasibility Study so as to ensure that the project;-

3.7.2.1 Makes a business sense in terms of ;

- a. Explanation about the strategic and operational benefits to the contracting authority in line with the authority's objectives;
- b. Demonstrate that the proposed project is in alignment with the National Infrastructure Plan (NIP) and government Policy objectives.

3.7.2.2 Describe in clear and specific terms ;

- a. The nature of the functions of the contracting authority and the extent to which such institutional function can be carried out by the private sector. This applies to a situation where the private sector will be involved in building a new infrastructure.
- b. While in the case of using PPPs to manage government properties, then a vivid description of such property, the uses of the property concerned (if any) for which such building was registered at inception and the full description of the purpose for which the private sector intends to use the property.

3.7.2.3 Provide a broad estimate of the total cost of the project, the location of such project and give an initial indication whether the project may be viable and affordable or not.

3.7.2.4 All concerned government Ministries, Departments and Agencies shall have the responsibility to review and approve the report of the Pre-feasibility study.

3.7.2.5 Then the approval referred to above shall be the first approval in the procurement process and shall be referred to as **Approval 1**.

3.7.2.6 No contracting authority shall have the power to proceed to the full stage of feasibility study without a prior written approval of their respective Project Management Unit (PMU) and also must have been subjected to a review by the MOFEP-PID.

### **3.7.3 Feasibility Study- Approval II**

In compliance with the provisions of Paragraph 49 of the policy, all contracting authorities shall:

1. Submit a full report of the feasibility study and approval thereon to the MOFEP-PID. The report of the feasibility study shall;
  - a. Demonstrate affordability to the institution in respect of a project where the contracting authority will ordinarily incur expenses;
  - b. Set out the proposed allocation of technical, operational and financial risks between the contracting authority and the private party;
  - c. Demonstrate the anticipated Value for Money to be achieved from the project;
  - d. Give a detail estimate of the viability gap and the need for incentives (if any);

- e. Give a detailed explanation as to the capacity of the institution to procure, manage, implement, monitor, enforce and reports on PPP projects.
2. Where the contracting authority will require funding to carry out the feasibility study for the project, it may in consultation with the MOFEP-PID include such expenses in its procurement process and pass the cost to the private sector.
3. A contracting authority will only be allowed to proceed to the procurement phase only after a written approval of the approval committee has been sought and obtained. All approval shall be communicated to the cabinet on quarterly basis.
4. The approval referred to above shall be referred to as **Approval II**.

#### **3.7.4 Procurement Phase- Approval IIIA & IIIB**

This is the Procurement stage of the PPP process. Here, Paragraph 54 of the National Policy requires that before any procurement documentation is issued to any prospective bidder, such contracting authority must have obtained approval from the MOFEP-PID. The draft PPP agreement must also be approved at this stage. The approval referred to in Paragraph 54 shall be referred to as **Approval IIIA**.

The Policy regulation further requires that the procurement process must;

1. Be in accordance with a system that is fair, competitive, transparent and cost effective;
2. Ensure that such PPP activities that are within the scope of Public Procurement shall be governed by the Public Procurement Act; and

3. Be such that promotes and encourage the use of local content and technology transfer.

After the bid evaluation, but before the selection of the winning bidder, the contracting authorities are required to submit an evaluation report through the MOFEP-PID to the respective approving authority concerned for the approval of the winning bidder. The approval referred to in Paragraph 57 shall be referred to as **Approval IIIB.**

#### **3.7.5 Contracting Phase- Approval-IV**

After the conclusion of the procurement process, but before the contracting authority concludes the concession agreement, the contracting authority must obtain approval from the respective approving authorities. Such approval presupposes that the agreement satisfies the requirements of Affordability, Value for Money and risk transfer. It also shows that the satisfactory due diligence has been complied with in the contracting process. The approval obtained in accordance with Paragraph 59 shall be the final approval and shall be referred to as **Approval IV.**

### **3.8 Unsolicited Proposals**

The National Policy allows any private sector to submit an unsolicited proposal for PPP Project. The main aim of this policy is to stimulate innovation and give room for new opportunities and novel ideas from the private sector. However, an unsolicited proposal shall only be considered if it is in accordance with the National Infrastructure Plan (NIP). All such proposals shall be given a case-by-case consideration and shall be limited to those projects that are not already in the list of the contracting agency and such must demonstrate innovation and shall be in

accordance with public policy. In addition, all unsolicited proposals shall be in conformity with both the National Development Agenda and the long term strategic plan of the relevant contracting agency.

In considering such proposals, the provisions of the Standardized PPP Provisions and Manual shall be complied with. All such proposals shall also pass the test of Affordability, Value for Money and Risk Transfer. Whatever the case may be, the viability of the project shall be assessed by transaction advisor(s) appointed for the project.

### **3.9 Amendment/ Variation of PPP/Concession Contracts**

Generally, amendment or variation is seldom allowed in PPP agreements. However, the Policy provides that a material amendment will only be allowed where such amendment or variation will continue to ensure;

- 1 Affordability;
- 2 Value for Money; and
- 3 Sufficient Risk Transfer to the private party.

For an amendment to be granted, a prior written approval of the MOFEP-PID must be sought and obtained. Such approval is a must where what is sought is a material amendment/ variation/ waiver. It must be stated that such must however have been contemplated in the PPP/ concession agreement. If such is not contemplated, then such amendment or variation will not be allowed.<sup>235</sup>

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<sup>235</sup> See the Provisions of Paragraph 57 And 58 Of The National Policy.

### **3.10 Participation by Foreign Companies**

A foreign investor may team up with a Ghanaian entrepreneur or company for a joint venture, usually in the form of a partnership or a limited company. The law allows any foreigner who intends to invest in Ghana to team up with a Ghanaian entrepreneur or a firm for a joint venture in order to form a company or partnership. Such person or companies must comply with the provisions of these legal instruments; - The Companies Code, 1963 (Act 179); the Business Name Act, 1962 (Act 151) and the Partnership Act, 1962 (Act 152).

In addition, such foreign investor must satisfy the provisions of the Ghana Investment Promotion Act 1994 as well as the specific legislations made for each sector of the economy. Under the Ghana Investment Promotion Centre Act, 1994 (Act 478), a foreign investor is required to have a minimum equity capital of US\$10,000 before participating in any joint venture partnership with a Ghanaian. The Ghana Investment Promotion Centre (GIPC) Act, 1994 (Act 478), governs investment in all sectors of the economy except minerals and mining, oil and gas, and the Free Zones. In addition, there are sector-specific legislations to regulate energy, telecommunication, banking, insurance, securities, mining, and real estate among others.<sup>236</sup>

The Government of Ghana has no overall economic or industrial strategy that discriminates against foreign-owned businesses. In some cases a foreign investment may enjoy additional incentives if the project is deemed critical to the country's development.<sup>237</sup> Foreign companies are permitted to take part in government-financed and/or research and development programs on a national

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<sup>236</sup> See 2013 Investment Climate Statement Issued By The Bureau of Economic and Business Affairs, Ghana. Retrieved From <http://www.state.gov/e/eb/rls/othr/lcs/2013/204648.htm>. Accessed On 27.11.13.

<sup>237</sup> Being an Interview with Mr. Ekow of the Public Investment Division of the Ministry of Finance in Accra, Ghana on 11<sup>th</sup> day of January, 2013.

treatment basis.<sup>238</sup>In July 2013, Ghana's Parliament adopted the Ghana Investment Promotion Bill 2013. If this Bill is signed into law, it will introduce positive changes in country's investment landscape.<sup>239</sup> In the 2013 Bill, the right of Ghanaians to invest has been extended to petroleum and mining sectors. This is an improvement over the provision of the 1994 Investment Act.

All companies that intend to do business in Ghana must first register with the regulations and procedures of the following government agencies;

- a. Ghana Investment Promotion Commission;
- b. Registrar General Department,
- c. Ghana Revenue Authority;
- d. Ghana Immigration Service; and
- e. Social Security and National Insurance Trust (SSNIT).

According to The World Bank's Doing Business 2013 report issued in 2012, the report stated that there has been significant improvement in the average time to start business in Ghana. From about 129 days in 2003, 33 days in 2010 and now to 12 days in 2013.<sup>240</sup>

### **3.11 Dispute Resolution in PPPs in Ghana**

There is no doubt that mechanism for handling PPP disputes contribute to transparency and accountability by ensuring that the provisions of the law and other requirements are strictly adhered to. In addition, an effective dispute

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<sup>238</sup> Example is the Public Private Partnership Programme.

<sup>239</sup> Ghana: Parliament Passes Revised Law Governing Investments. Retrieved from [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_l205403648\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403648_text). Accessed on 29.11.13.

<sup>240</sup> Doing Business 2013: Smarter Regulations for Small and Medium-Size Enterprises. Retrieved from [http://publications.worldbank.org/index.php?main\\_page=product\\_info&cPath=1&products\\_id=24391](http://publications.worldbank.org/index.php?main_page=product_info&cPath=1&products_id=24391). Accessed on 29.11.13.

settlement mechanism ensures that all parties in the transaction are given a fair and equitable opportunity in the procurement process.<sup>241</sup>

The National PPP Policy on PPPs is silent on how to resolve disputes arising from PPP contracts in Ghana. However, since the intendment of the provision of the Arbitration and Conciliation Act of 2010 is to apply to all matters including commercial disputes, then its provisions will be applicable to all PPP disputes in Ghana.

In order to promote alternatives to the courts in Ghana for the resolution of disputes, in 2010, the parliament amended the Arbitration Act of 1961 which undoubtedly preceded many statutes that were enacted on businesses and investment. It also pre-dated Ghana's accession of the United Nations Conventions on the Recognition and Enforcement of Foreign Arbitration Award popularly called the New York Convention of 1958.<sup>242</sup>

The new Arbitration Act replaces the 1961 Act. The Act governs all arbitral proceedings as well as the enforcement of both foreign and domestic arbitral awards within Ghana. The provisions of the Act are substantially in conformity with the UNCITRAL Model Law. Section 1 of the Act provides that subject to the provision of the Act, it shall apply to all matters. The Act upholds and respect party autonomy by giving the parties the right to go to arbitration and to determine how such arbitration will be conducted.<sup>243</sup>

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<sup>241</sup> A.B. Adjei, Challenges in the handling of Procurement Complaints: Ghana's Experience (2011) 38 JMCL Page 1.

<sup>242</sup> Ghana acceded to the UNCITRAL Model Law on the Recognition and Enforcement of Foreign Arbitration Awards in 1968.

<sup>243</sup> Kwadwo Sarkodie Arbitration in Ghana – The Alternative Dispute Resolution Act 2010, (2011). International Construction Law Review, Page 3. Also available at [http://www.mayerbrown.com/files/Publication/See12231-1295-4559-8167-89d93cdf2a06/Presentation/PublicationAttachment/91e048fe-67d4-4e3f-9d10-8bbf9861e753/ArbitrationGhana\\_Sarkodie.pdf](http://www.mayerbrown.com/files/Publication/See12231-1295-4559-8167-89d93cdf2a06/Presentation/PublicationAttachment/91e048fe-67d4-4e3f-9d10-8bbf9861e753/ArbitrationGhana_Sarkodie.pdf).



Section 5(1) gives the parties the right to go to arbitration in the settlement of their disputes while S.5 (2) provides that except as otherwise provided, the procedure to be adopted in the arbitral proceeding shall be as the parties and arbitrators determine. Accordingly parties to the proceedings may agree on a set of arbitration rules to govern the arbitration. In this way the Act recognises and upholds the right of contracting parties to agree to arbitrate.

The Act also governs the enforcement of foreign arbitral awards in Ghana. Specifically, S. 59 of the Act provides that the High Court of Ghana shall have the powers to enforce the provisions of the act in accordance with the New York Convention. However, such an award must not be a subject of appeal at the higher courts. The Act does not limit the arbitral awards which may thus be enforced to those made in the territory of a state which is party to the New York Convention.<sup>244</sup>

### **3.12 Challenges Facing PPPs in Ghana**

Although, PPP is still new in Ghana, it however has some challenges which need to be addressed. These are:

#### **3.12.1 Lack of Comprehensive Legal Framework**

The PPP National Policy, which was made by the Ministry of Finance, is still the applicable regulation governing PPPs in Ghana. Ghana does not have a legislative framework governing PPPs. According to Professor Bondzi-Simpson,<sup>245</sup> he stated that the National Policy is not comprehensive and cannot enjoy the same legal status with an Act of parliament. He stated further that in the absence of a sound legislative initiative, the rules and meanings of concessions will have to emerge

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<sup>244</sup> Kwadwo Sarkodie Arbitration in Ghana – The Alternative Dispute Resolution Act 2010.

<sup>245</sup> The researcher interviewed Professor Bondzi-Simpson in January 2013. He is the Dean of the Faculty of Law, University of Cape Coast, Ghana.

from the decisions of the court of law. There are major areas such as termination of concession agreement, dispute resolution mechanisms and many others that the policy does not cover. The Public Private Partnership Bill is still pending before the parliament as at the time of this research. If the country intends to attract investors both within and outside the country, then it must ensure that there is comprehensive and adequate legal framework that will guarantee future investment returns.

### **3.12.2 Openness and Transparency**

Although, there are few legislations to combat corruption in procurement processes in the country, there is need to further ensure openness and transparency through the enactment of vital laws that will complement the PPP Policy. The country needs the Freedom of Information Law as well as Competition Law. These laws will give the citizens the right to know what is going on in relation to PPP procurement processes. Secrecy in PPP procurement promotes the likelihood of corruption. These laws will further help to strengthen and enhance integrity in the procurement processes.

### **3.12.3 Inadequacy of PPP Experts**

There are very few experts in the field of PPP Procurement in Ghana. According to Mr. Ekow of the Public Investment Division of the Ministry of Finance, he stated that this is due to the fact that the initiative is still very new in the country. The few experts are the ones that are managing and implementing PPP projects in the whole country. Currently, the country has Six (6) Metropolitan, Fourty Nine (49) Municipal and One Hundred and Sixty One (161) Districts making a total of Two Hundred and Sixteen (216). There is no doubt that all these Metropolitan,

Municipals and Districts need to build capacity within each level of authority. Therefore, inadequacy of PPP experts is still a major challenge to the PPP programme in Ghana.

#### **3.12.4 Corruption**

Although, Ghana has ratified the United Nations Convention against Corruption as well as the African Union Convention on the Prevention and Combating of Corruption among others, corruption still poses a great challenge to the implementation of projects in the country. This implementation gap is evident in the scorecard of the Global Integrity Report for the year 2010.<sup>246</sup> The report scored the country high in terms of the quality of its anti-corruption legislations but low in terms of enforcement. Since PPP is part of the methods for procuring infrastructure, it is therefore not insulated from corruption.

Although, the government of Ghana has reiterated its commitment to ensure the speedy passage of the Fiscal Responsibility Act in 2014, with the aim of strengthening the mechanisms for fiscal discipline and enthrone fiscal stability.<sup>247</sup> This Act, if passed, will no doubt complement the provisions of the Financial Administration Act of 2003, in reducing corruption in PPPs and other procurements in Ghana.

#### **3.13 Conclusion**

With the current stable democratic and economic transitions in Ghana, the country needs to seriously step up its drive towards achieving good socio-economic infrastructure through the Public Private Partnership initiative. There is the need to

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<sup>246</sup> See Overview of Corruption and Anti Corruption in Ghana. Retrieved from <http://www.u4.no/publications/overview-of-corruption-and-anti-corruption-in-ghana/>. Accessed on 30.11.13.

<sup>247</sup> See: The Ghana Action Plan, available at <http://www.ghanaopengov.org/wiki/ghana-action-plan>. Accessed on 27.11.13.

enact and strengthen the laws that will encourage private sector participation in infrastructure development if the country intends to achieve its Vision 20-20 objectives. Legal certainty and regulatory stability are key component that attract private sector investment in infrastructure development.

Aryee JRA,<sup>248</sup> while delivering his inaugural address titled “*Saints, Wizards, Demons and Systems*” at the University of Ghana explained the reasons why most government policies and programmes failed and how they can become more successful not only in Ghana, but in other developing countries of the world. He suggested that the right combination of committed politicians and bureaucrats (*saints*); appropriate policy analysts and available reliable information (*wizards*); management of hostile and apathetic groups (*demons*); and insulation of the policy environment from the vagaries of implementation (*systems*) are sine qua non to the successful implementation of government programmes generally.

As the Ghana Minister of State for Public Private Partnership<sup>249</sup> pointed out that Public Private Partnerships should not be seen as ending all developmental challenges, it can however greatly help the country in building and modernising critical socio-economic infrastructure that can serve as the wheel for nation’s development. Thus, in achieving this, the country needs to show more commitments in order to allow the partnership work and build capacities by training more experts especially in the areas of finance, public governance, compliance and transparency, human resources and legal among others.

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<sup>248</sup> Aryee JRA. “Saints, wizards, demons and systems: Explaining the Success or Failure of Public Policies and Programs (2010) (Accra, Ghana University Press, 2000).

<sup>249</sup> Being the Statement of the Minister of State for (PPP) in Presidency at a reception organized by the United Kingdom Trade and Investment Unit of the High Commission for the Global Training Consulting Limited (GTC) in Accra, Ghana on 15<sup>th</sup> July, 2013. Retrieved from <http://www.modernghana.com/news/475667/1/public-private-partnerships-not-solution-to-proble.html>. Accessed on 29.11.13.

## CHAPTER FOUR

### AN EXAMINATION OF THE LEGAL AND REGULATORY FRAMEWORKS FOR PUBLIC PRIVATE PARTNERSHIPS IN NIGERIA

#### 4.0 INTRODUCTION

The dominant economic policy objective of the Federal Government of Nigeria at independence was to expand its roles through direct intervention and ownership in the economy of the nation. With the international donor agencies' supports, the government was able to gain the commanding heights and dominated economic activity in the country.<sup>250</sup>

With an unprecedented increase in the oil revenues in the country in the 1970s,<sup>251</sup> this further strengthened government's dominance and thwarted the growth of the emerging private sector. During this period, governments in Nigeria<sup>252</sup> were able to invest in agricultural, infrastructure and industrial production. The oil boom also caused a major shift in the activities of the private sector away from agricultural and industrial production to government contracting and trade. The increased dominance of the public sector during this period led to a huge gap between the public and private sectors and created an atmosphere characterised with lack of trust.

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<sup>250</sup>Mary I. Agboli and James J. Emery, Encouraging Effective Dialogue and Advocacy in Nigeria: The Better Business Initiative. Retrieved from [www.publicprivatedialogue.org/case\\_studies/The%20Better%20Business%20Initiative.doc](http://www.publicprivatedialogue.org/case_studies/The%20Better%20Business%20Initiative.doc) on 15.06.12.

<sup>251</sup> Oil was discovered in large quantities in Nigeria in the early 1970s. Nigeria generated a lot of revenues especially during the period of the oil boom.

<sup>252</sup>Nigeria is a federation which has Three Tiers of Government viz The Federal, State and Local Governments.

The idea of Government in Nigeria divesting itself of its interest in commercial enterprises commenced in the early 80's with the Promulgation of the Privatization and Commercialization Decree.<sup>253</sup> The experience of Government in Nigeria had been very similar to that of the United Kingdom. Interestingly, the philosophical position in the United Kingdom had begun to shift. The Labour Government of Sir Harold Wilson had been defeated in the polls by the Conservative Government of Margaret Thatcher.<sup>254</sup> The Conservatives were of the firm view that Government had no business in commerce. The only role of government was to provide a conducive and an enabling environment for entrepreneurs to flourish.<sup>255</sup> The source of revenue for Government was not in participating in these enterprises but in collecting taxes from these successful businesses. Almost all the businesses had become unsuccessful. The magnitude of the failure of these businesses became very apparent when it was realized that they failed even though they had no competitors as they were virtual monopolies.

By the late 1980s, the Nigerian government began to open up to a more private sector-led economy. There was then the need to engage the private sector in dialogue on economic policy making.<sup>256</sup> However, the private sector had been weakened and lacked the capacity to constructively prioritize and implement reforms. In July 1986, the Ibrahim Badamosi Babangida administration embarked upon the Structural Adjustment Programme (SAP). Part of the major objectives of SAP were to pursue deregulation and Privatisation leading to removal of subsidies, reduction in wage bills and the retrenchment of the Public Sector ostensibly to trim

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<sup>253</sup>This was the Privatisation and Commercialization Decree No. 25 of 1988; later redesigned "Act". This Act established the Technical Committee on Privatization and Commercialization and their functions.

<sup>254</sup> In May 1979, Labour Party lost the general election to the Conservatives and Margaret Thatcher became Britain's first female prime minister.

<sup>255</sup> The government can provide good investment laws that will protect the interest of both foreign and local investors.

<sup>256</sup> M. I. Agboli and J. J. Emery, *Encouraging Effective Dialogue and Advocacy in Nigeria: The Public-Private Dialogue*. Available at < [www.publicprivatedialogue.org/.../The%20Better%20Business%20Ini](http://www.publicprivatedialogue.org/.../The%20Better%20Business%20Ini)>. Accessed on 04.03.12.

the State down to size.<sup>257</sup> To actualize this objective, The Federal Government in July 1987, set up a Technical Committee on Privatisation and Commercialisation (TCPC) which was backed up by the Privatisation and Commercialisation Decree.<sup>258</sup>

The resumption of military rule forestalled the limited economic progress made in the early 1990's<sup>259</sup> but with the return to democracy in 1999, economic policy again shifted in favour of a more open, private sector led economy. At this time, effective representation by the private sector became critical to national economic policy deliberations. Given the huge amount needed and the drive necessary for economic development, the Nigerian government lacked the requisite capability to achieve this on its own and has thus among other options embarked upon the use of Public Private Partnerships (PPPs) for infrastructure development to address the challenges hindering the growth of the Nigerian economy.

Between 1999 and 2005, projects with arrangements similar to those under PPPs came under the control of the Budget Monitoring and Price Intelligence Unit (BMPIU)<sup>260</sup> which was set up to ensure full compliance with the laid down guidelines and procedures for the procurement of capital projects. Although BMPIU did not directly control PPPs, it could be said to be the pioneer unit set up

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<sup>257</sup>See Ehi Oshio and N.F Stewart ' The Legal and Institutional Frameworks of Privatisation in Nigeria: A Discourse.

Available at

<http://nigerianlawguru.com/articles/company%20law/THE%20LEGAL%20AND%20INSTITUTIONAL%20FRAMEWORK%20OF%20PRIVATISATION%20IN%20NIGERIA.%20A%20DISCOURSE.pdf> on 23.03.11.

<sup>258</sup>Decree No 25 of 1988 now redesigned Act.

<sup>259</sup> Although, few of the military administrations in Nigeria contributed massively to the development in infrastructure in the country. Mention must be made especially to both General Gowon and General Muhammad Murtala's administrations.

<sup>260</sup> M.M.Akanbi and O.O.Olatunji, Sustainable Development and Housing Delivery in Nigeria: An Examination of the Legal Perspective of the Public Private Partnership Initiatives in Law and Sustainable Development in Africa P.E. Bondzi-Simpson, W.O Egbewole, Muhtar Adeiza Etudaiye and Olugbenga Ajani Olatunji (eds). (Grosevenor Publishing Ltd, Surrey 2012.) Pg 198.

to oversee PPPs transactions at the Federal level with regards to contracts that come within its jurisdiction.

As a result of the greater use of PPPs in Nigeria, the Federal Government considered setting up a separate legal and regulatory framework for regulating and controlling PPPs in Nigeria. Following this realisation, the National Assembly enacted the Infrastructure Concession and Regulatory Establishment Act in 2005 pursuant to which the Infrastructure Regulatory Commission was established in 2008 to develop policies and provide regulatory and institutional framework for an effective PPP programme in Nigeria.<sup>261</sup>

Since the enactment of the ICRC Act in 2005, some projects have been awarded to the private sector for concession through the Build, Operate and Transfer (BOT) and other methods that are most suitable for the particular project.<sup>262</sup> The Murtala Muhammed Airport (MMA2) in Lagos and the Lagos Port were the first sets of projects concessioned under the ICRC Act.

Some of the states in Nigeria have also adopted the PPP initiative as a means of developing their infrastructure. Lagos, Rivers and Osun States have been in the frontline. Each of these states is responsible for developing its own investment framework and will also create an enabling environment for investors. In December 2008, the Lagos State government established the public Private Partnership office.<sup>263</sup> The Office is expected to draw from best practices in project

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<sup>261</sup> The commission was inaugurated by late President Umaru Musa Yar'adua on 27<sup>th</sup> November, 2008. The commission has the mandate to provide the MDA's the requisite regulatory and institutional frameworks for their effective participation in PPPs.

<sup>262</sup> This can be Design, Build, Operate and Maintain (DBOM), Design, Build, Operate (DBO) and many others.

<sup>263</sup> See Lagos State Public-Private Partnership Office. Available at <<http://www.lagosstateppp.gov.ng/home.asp>>. Accessed on 13.05.13.



management and delivery to ensure that residents of Lagos State get value for money in Public-Private Partnership programmes.

In Lagos Nigeria, in an attempt to eliminate the severe traffic jam along Lekki-Epe Expressway, the Lagos State Government granted a concession contract to the Lekki Concession Company (LCC) to design, construct, finance, and operate the toll road project. The Upgrade and expansion of the 49.36 km road will be maintained by the LCC for a period of 30 years.<sup>264</sup> The capital value is estimated to be US\$450 million. This project has since been fully operational since 2012.

#### **4.1 Sector Level Analysis of the State of Infrastructure in Nigeria**

In Nigeria, despite its abundant deposit of natural resources, acute shortage of both social and economic infrastructures in still poses a great challenge to both the government and the governed. There are several cases of infrastructure inadequacies such as irregular power supply, bad roads, and unreliable healthcare services, lack of safe and drinkable water among others. The combination of poor management, poor policies and state monopolies, absence of effective maintenance and lack of re-investment had led to deterioration of infrastructure and had occasioned massive losses. Since the last three decades, infrastructure in Nigeria has now become a hindrance rather than a facilitator to nation's development. It is, therefore, important at this juncture to briefly analyze the current situation of infrastructure in Nigeria.

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<sup>264</sup> See Lagos Infrastructure Project (LIP) Concession. Available at [http://www.lagosstateppp.gov.ng/projects/project\\_portfolio/project\\_in\\_construction.asp](http://www.lagosstateppp.gov.ng/projects/project_portfolio/project_in_construction.asp). Last accessed on 21.12.13.

#### 4.1.1 Electricity Infrastructure

Power blackout is a regular phenomenon in most Nigerian cities, towns and villages with negative impacts on the quality of lives and economic development. Most of the electricity equipment that were erected in the 1950s and 1960s are ageing and operating at a sub optimal level due to lack of maintenance.<sup>265</sup> The country is still plagued with serious electricity crisis due to unreliable supplies, insufficient generating capacity and high tariffs being paid by the consumers. Power outages in the country remain unabated. Power generation today stands at about 4,000 Megawatts. It is estimated that the country's current electricity demand is well above 15,000 Megawatts which on a per capita basis is still less than one tenth of that of South Africa and two and half times less than Egypt.<sup>266</sup> About \$US50 Billion Dollars was disbursed on electricity within Fourteen years<sup>267</sup> leading to generation of only about 1,000 Megawatts<sup>268</sup> from 3000 Megawatts in 1999 to 4000 Megawatts in 2013. Mismanagement and underinvestment in this sector are not unconnected to the fact that since the country's independence in 1960, electricity generation and distribution has been an exclusive preserve of the Federal Government. Unreliable and epileptic power supply has been a perennial problem of these Sub-Saharan African countries for decades.<sup>269</sup>

However, in an attempt to find a solution to the perennial electricity problem, the federal government has embarked on privatization of the power sector in Nigeria. On 30<sup>th</sup> September 2013, President Goodluck Jonathan formally handed over the licenses and Share certificates to 14 new core owners of the Power

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<sup>265</sup> Africa's Energy Situation. Retrieved from [www.desertec-africa.org/index.php?option=com\\_content&view](http://www.desertec-africa.org/index.php?option=com_content&view). Last accessed on 04.05.13.

<sup>266</sup> Nigeria's Power Situation: Where are The IPPS?

[Http://www.Ayakaonline.Com/Politics/Nigerias-Power-Situation-Where-Are-The-Ipps/](http://www.Ayakaonline.Com/Politics/Nigerias-Power-Situation-Where-Are-The-Ipps/)

<sup>267</sup> This covers a period between 1999-2013.

<sup>268</sup> State of Electricity Supply in Nigeria. <http://thenationonline.net/new/columnists/state-of-electricity-supply-in-nigeria/>

<sup>269</sup> Enabling Private Sector Participation in Electricity Generation. Retrieved from <http://www.gsb.uct.ac.za/files/Kenya.pdf>. Accessed on 23.05.13.

Holding Company of Nigeria (PHCN) successor companies. During the official handing over, the president assured Nigerians thus “We can all look forward to a better time very soon as we have seen in telecommunication and banking sectors. I am confident that the power sector will promise no less, knowing the calibre of those who are taking over.”<sup>270</sup>

It is hoped that with the reform in the Nigerian electricity sector, the nation will witness a positive change in terms of stable electricity which will definitely have great positive impacts on the Nigerian economy and the standard of living.

#### **4.1.2 Road and Transportation Infrastructure**

The condition of roads in Nigeria ranges from fair to poor. There are relatively very few roads in good condition. The existing network of highways in the country is not only inadequate but also largely in a deplorable state. Bad drainage system, deadly potholes, fallen bridges and lack of maintenance are part of the reasons for its deplorable state.<sup>271</sup> In 2012 alone, 4,620 people died as a result of road accidents while 20,757 people sustained various degrees of injuries.<sup>272</sup> The situation in most Sub-Saharan countries is not so different. Rural Africa has only 34% of access roads compared to about 90% in the developed world.<sup>273</sup> About 80% of the cargo loads in Nigeria are taken through the roads. Good national and regional

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<sup>270</sup> The Power Sector Privatisation: The Journey So Far. Available at <http://www.thisdaylive.com/articles/the-power-sector-privatisation-the-journey-so-far/163271/>. Accessed on 21.12.13.

<sup>271</sup> Akeem Ayofe Akinwale, the Menace of Inadequate Infrastructure in Nigeria (2010) African Journal of Science, Technology and Innovation, Vol.2 No 3. Available at <http://www.ajstid.com/Sample%20Research%20Note.pdf>. Accessed on 15.12.2013.

<sup>272</sup> Nigeria: 4,260 Deaths Recorded in Road Accidents in 2012, Says FRSC. Available at <http://allafrica.com/stories/201310040412.html>. Accessed on 13.10.13.

<sup>273</sup> African Development Bank, 2010.

transportation links are very vital to the governmental policies of reducing poverty and hunger.<sup>274</sup>

The nation's railway has become moribund for close to 2 decades before it is now being attended to. Most of the rail tracks are already dilapidated because the larger part of it was laid before independence in 1960. The Nigeria Airways, which is the national carrier, has collapsed. Incessant plane crashes have been recorded as a result of the poor management and inefficiency of the nation's aviation system. Recently, in order to save the nation's ports from its deplorable state, the nation's ports have been concessioned to the private operators since 2005 in order to improve the quality of its services.<sup>275</sup>

The exercise which commenced in 2006 has put the concessionaires to be in charge of the day-to-day running of the ports, especially cargo handling while the management of the Nigerian Ports Authorities still remains the landlord.<sup>276</sup> The performance of the ports especially after the concession has made the Nigerian ports to be more competitive and innovative because the terminal operators has have really modernise its operations to an international standard. Port Concession is one of the major areas where the PPP arrangements have brought great reforms to Nigeria and Nigerians. It has led to more efficiency, innovation and greater revenue.

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<sup>274</sup> Roads funded by EU left to fall apart in sub-Saharan Africa. <http://www.guardian.co.uk/global-development/2013/jan/18/roads-funded-eu-sub-saharan-africa>. Accessed on 25.05.13.

<sup>275</sup> See Akeem Ayofe Akinwale, the Menace of Inadequate Infrastructure in Nigeria at page 218.

<sup>276</sup> See [www.thisdaylive.com/articles/Nigerian-ports-and-the-effect-of-repositioning](http://www.thisdaylive.com/articles/Nigerian-ports-and-the-effect-of-repositioning). Accessed on 23.09.12.

### **4.1.3 Water and Sanitation**

According to the United Nations Environmental report, it is estimated that in Africa, over 300 million people lack access to clean and safe drinking water.<sup>277</sup> In Nigeria, like most of the countries of Sub-Saharan Africa, safe and drinkable water supply has posed a great challenge. Currently, almost about half of its population has no access to safe and drinkable water despite the fact that the country is abundantly blessed with water resources.<sup>278</sup> Access to water in the country is low and does not meet the 75% target of the Millennium Development Goals (MDGs). This is so despite the fact that the country has series of policy on water supply.<sup>279</sup>

The effects of lack of access to water and sanitation have a macroeconomic impact on the continent and the benefits of improving access to water and sanitation are very enormous. Achieving the water and sanitation Millennium Development Goals would increase the yearly economic benefits of the nation. This is because, it is estimated that every \$1dollar judiciously spent on this sector will bring a return of about \$8 dollars in saved time, and it will help in reducing health costs and thereby increasing productivity. If the MDG targets on water and sanitation are met by 2015, national governments in sub-Saharan Africa could save about 12% of annual public health expenditures.<sup>280</sup>

### **4.1.4 Telecommunication and ICT infrastructure**

The telecommunication sector has witnessed significant development since privatization in the sector began in 2001.<sup>281</sup> Before the advent of the Global System for Mobile Telecommunication (GSM) in Nigeria in that same year, the Nigerian

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<sup>277</sup> See the United Nations Report on Water in Africa. Available at <http://www.unep.org/>. Accessed on 08.08.13.

<sup>278</sup> O.B Akpor and M. Muchie, The Challenges in Meeting the MDGs: The Nigerian Drinking Water Supply and Distribution Sector (2011), Journal of Environmental Science and Technology.

<sup>279</sup> See the National Policy on Water Supply which was approved in 2000. Some states also have similar provisions.

<sup>280</sup> See the United Nations Report on Water in Africa.

<sup>281</sup> The first service provider in this sector commenced service in August 2001.

Telecommunications (NITEL) which was a public company was only able to roll out about Four Hundred Thousand (400,000) telephone lines for about three decades of its existence. In September 2013, the total number of active lines in Nigeria stood at One Hundred and Twenty One Million (121,000,000).<sup>282</sup> In fact, the International Telecommunication Union (ITU) rated Nigerian Telecommunication sector as the fastest in Africa<sup>283</sup> with teledensity of 86.62.<sup>284</sup>

Nigeria, with 48 million internet users has the highest number of internet users in Africa followed by Egypt, Morocco, Kenya and South Africa in that order.<sup>285</sup> Although in recent times, the performance of Africa's mobile networks has radically improved, the telecommunications industries all over the world have also evolved. Internet broadband is now considered as central to a long term economic development strategies of a nation. Attempts at upgrading the Nigerian telecommunication infrastructure have remained futile. The first communication satellite that was launched by the government failed in the orbit in November 2008. The failure was due to lack of maintenance and technical itches and another agreement was made in 2009. The replacement was launched in December 19, 2011 called NigComSat-1R. The new satellite is expected to last for 15 years and it will provide an ideal telecommunication infrastructure for Nigeria.

#### **4.2 The Legal Framework for Public-Private Partnerships in Nigeria**

Basically, the statutes and laws regulating Public-Private Partnerships in Nigeria are as follows:

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<sup>282</sup> See the Nigerian Communications Commission (NCC) Monthly Subscribers Data, July 2013-September, 2013. Available at <<http://www.ncc.gov.ng>>. Accessed on 18.12.13.

<sup>283</sup> See ITU Telecoms World 2013. Available at <<http://www.itu.int/en/itu/telecom/Pages/world2013.aspx>>. Accessed on 12.12.13.

<sup>284</sup> See Nigerian Communication Commission Subscribers' Data.

<sup>285</sup> See <http://www.internetworldstats.com/stats1.htm>. Accessed on 15.11.13.

#### **4.2.1 Privatisation and Commercialization Act**

As part of the structural Adjustment Programme (SAP) embarked upon by the then Federal Military Government of Nigeria in 1986, the then military government promulgated the Privatization and Commercialization Decree (Now Act)<sup>286</sup> in 1988. The main purpose of this Act was to ensure wider ownership of government enterprises in Nigeria and the desire to extend the frontiers and the depth of the Nigerian Capital Market.<sup>287</sup>

The Privatisation and Commercialization Act has Six (VI) major parts. The first part (Sections 1-8) deals with Privatization and Commercialization of public enterprises, The second part (Sections 9-11) contains provisions that deal with the National Council on Privatisation, while the Third part (Sections 12-22) deals with the establishment and functions of the Bureau of Public Enterprises. The remaining three parts i.e. parts 4, 5 and 6 contain provisions relating to legal proceedings, constitution and functions of the arbitration panel and miscellaneous respectively.

Section 1 of the Act listed those public enterprises that were for partial and full privatization. Sections 6 provides for those public enterprises that will be partially or fully privatised as contained in the Second schedule to the Act. Section provides for the establishment of the National Council on privatisation whose power is mainly to approve policies and guidelines on privatisation. Section 12 contains provisions on the establishment of the Bureau of Public Enterprises and whose function is mainly to implement the Council's policy on privatisation.

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<sup>286</sup> No. 25 of 1988 which later became an Act of Parliament and Cap 369, Laws of the Federation of Nigeria, 1990 (hereinafter referred to as "the Privatization and Commercialization Act").

<sup>287</sup> Paul Obo Idornigie, "Privatization and Commercialization of Public Enterprises in Nigeria". Available at <http://paulidornigie.org/Resources/privatization%20and%20commercialization%20of%20Public%20Enterprises%20in%20Nigeria.pdf>. Accessed on 02.12.13.

#### **4.2.2 Infrastructure Concession Regulatory Commission (Establishment) Act 2005<sup>288</sup>**

The National Assembly enacted the Infrastructure Concession Regulatory Commission (Establishment, Etc.) Act in 2005, with the aim of giving room to the private sector to partner with the government in the provision critical infrastructure in order to fill the infrastructure gap. Also, in line with the provision of the Act, the Infrastructure concession regulatory commission was also established to monitor and implement the provisions of the Act. The Act lays down broad principles on which concessions are to be granted and also gives certain guarantees to potential concessionaires in case such is needed.

Section 1 of the Act allows any of the MDA's to grant concession to any duly pre-qualified project proponent in the private sector in order to finance, construct, operate and maintain any infrastructure that is financially viable or any development facility of the Federal Government in accordance with the provision of the Act. The scopes of arrangements that can come under the PPP opportunities in Nigeria exist in virtually every sector of the economy. These include; power plants, highways, seaports, airports, water supply, security, telecommunications, railways, as well as other infrastructures and development projects as may be approved, from time to time, by the Federal Executive Council. This is specifically provided for under S.36 of the ICRC Act.

The ICRC Act basically applies to concession contracts by the Federal Ministries, Agencies, Corporations and other bodies empowered to enter into a concession

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<sup>288</sup>This Act is now in the Laws of the Federation of Nigeria 2010.



contract.<sup>289</sup> However, the ICRC Act and the National Policy and its Supplementary Notes<sup>290</sup> made pursuant to the powers vested in the Commission by the Act will also extend to all the infrastructure projects involving the Federal Government and any state or Local Governments that are partially funded by the Federal Government of Nigeria.

#### **4.2.3 Public Procurement Act 2007**

Before the enactment of Public Procurement Act of 2007 in Nigeria, procurement legislations and regulations were generally fragmented. Generally, negotiation of contractual conditions was not standardized as deliberate loopholes were created to give room for political maneuvering and manipulation in the tendering and award processes. In fact, in some cases, the contractors themselves chose the tendering method to be adopted. Because of the lack of clarity in the rules regulating public purchases, in most cases, reference is made to the publication in the Official Gazettes, which were seldom published and if at all, only accessible to only some selected few especially those at the corridors of power.<sup>291</sup>

However, with the passage of the Public Procurement Act in 2007, the procurement regulations were harmonized. The Act represents the central legislation for the control of Public Procurement in Nigeria at the federal level. The Act provides for the establishment of the National Council on Public Procurement and the Bureau of Public Procurement in Nigeria as the regulatory agency responsible for the monitoring and oversight of public procurements, harmonising the existing Government policies and practices by regulating, setting the necessary

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<sup>289</sup> See S.2 of the Act.

<sup>290</sup> See the Provision of S.34 of the ICRC Act which gives the commission the power to make regulations.

<sup>291</sup> Nigeria's Country Procurement Assessment Report. Summary of Findings And Recommendations Volume 1. Available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2001/06/08/000094946\\_01053004005048/Rendered/PDF/multi0page.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2001/06/08/000094946_01053004005048/Rendered/PDF/multi0page.pdf). Accessed on 19.08.13.

standards and developing the legal framework and professional capacity for public procurement in Nigeria.<sup>292</sup>

Public Procurement relates to the utilization of public funds to meet the daily requirements of governance. Although, the provisions of the Act do not specifically focus on PPPs, nevertheless, they are very relevant to the way government goes about its fiduciary relationship and responsibility in public purchase and acquisitions.<sup>293</sup> They therefore relate to regulations and standards that must be adhered to in public procurement.

Adoption of, and compliance to quality public procurement policies may therefore, to a large extent, be a barometer for measuring the genuineness and performance of various other general priorities and policies embarked upon by the government to foster sustainable economic development. This is because the attainment of key government set targets depends on how successful and efficient procurement laws and policies are implemented. Public procurement policies are instrumental to enhancing all governmental apparatus to produce an effective transparent and productive administration.

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<sup>292</sup>See the Preamble to the Public Procurement Act, CAP P44, Laws of the Federation of Nigeria, 2010.

<sup>293</sup> B.D.Oloworaran, *The Law and Practice of Public Procurement in Nigeria*, Global Behulah Publications, Porthacourt, 2011.

#### **4.2.4 The Fiscal Responsibility Act 2007<sup>294</sup>**

This Act provides for the prudent management of the nations resources, secure greater accountability and transparency in Fiscal operations within the medium term of Fiscal Policy Framework, and the establishment of the Fiscal Responsibility Commission which would ensure the promotion of the nation's economic objectives.

It should be categorically stated here that the Fiscal Responsibility Act does not have direct provisions on PPPs but on sound financial management of funds by the government ministries, agencies and departments, and in so far as PPPs are linked to the capital of departments, invariably, it is part of the legislations to be complied with and the compliance relates to ensuring compliance in the allocation and management of public expenditure these are the issues which the Fiscal Responsibility Act addresses and that is why it is one of the legislations that must be complied with.

#### **4.2.5 National Policy on Public Private Partnerships and its Supplementary Notes**

The National Policy was developed by the Commission in 2009 and duly approved by the Federal Executive Council to provide clear, consistent and a detailed process and procedural guides for all aspects of infrastructure development through PPPs and implementation ranging from project identification, evaluation, selection, procurement, operation, maintenance and performance monitoring. It contains provisions on the legal, institutional and financial frameworks for Public-Private Partnerships in Nigeria. It also contains provisions on the policy, economic, social

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<sup>294</sup>See The Fiscal Responsibility Act, 2007 Act No. 31. Available at<<http://frc-nigeria.org/Fiscal%20Responsibility%20Act.pdf>>. Last accessed on

and environmental objectives of the Federal Government of Nigeria for its infrastructure development programme.

The Supplementary Notes on the other hand provides further information on the National Policy on Public Private Partnerships in Nigeria. It sets out the roles and responsibilities expected of Federal Government Ministries, Agencies, Cooperation and other bodies involved in the planning and procurement of infrastructure investment projects. It further explains the roles of the ICRC Board in issuing guidelines in project selection and procurement. It also sets out the processes that private sector bidders will need to follow in order to prepare for a bidding opportunity, to submit a bid, and to arrange finance in finalizing a contract with government for the provision of new infrastructure or public services.

### **4.3 Institutional Landscape**

There are some governmental institutions that play key roles in PPP programme in Nigeria. Their functions and powers with respect to PPPs will be examined hereunder. These are:

#### **4.3.1 Infrastructure Concession Commission**

This commission is a creation of the ICRC Act.<sup>295</sup> It plays a key role in the coordination and monitoring of PPP programme in Nigeria. It has the mandate to issue and develop policies and procedures for effective coordination of PPP programme in Nigeria. It also acts as the national center of expertise for all PPP transactions in the country. It works closely with all the ministries, departments and agencies of the Federal Government in order to identify projects that are suitable for PPPs. This agency also serves as an interface between the government

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<sup>295</sup> See S.14 of ICRC Act.

and the private sector in order to promote effective communication on government policies and programmes.

In addition, it has the mandate to give advice to the Federal Executive Council (FEC) on the PPP national development policies and also on whether a project submitted to the FEC meets the requirements of the regulations or not. It also works with states in the development of their PPP policies in order to ensure that those policies and programmes are consistent with the best practice. Although, Nigeria being a federation, each of the states is responsible for its own PPP investment projects, however, where a state government requires a guarantee in order to finance its project, it can get such finance with the support of a guarantee from the Federal Government. In providing any such guarantees, the Government will have regard to best practices as exemplified by its own PPP Policy and guidelines.<sup>296</sup>

The Contract Monitoring Unit within the Commission has the responsibility to monitor compliance with the terms of the PPP contract between the parties. It also among others has the responsibility to maintain a database for all PPP projects and also be in custody of all PPP agreements between the government and the private partners.<sup>297</sup> Being a center of expertise, the commission provides technical assistance to all MDA in developing PPP Projects. Examples of PPP Projects sources from the commission's website are referred to as Appendix B.

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<sup>296</sup> See Infrastructure Concession Regulatory Commission. Available at <http://www.icrc.gov.ng/about.php>. Accessed on 03.09.14.

<sup>297</sup> See generally, Sections 19 and 20 the ICRC Act.

### **4.3.2 Bureau of Public Procurement**

The Public Procurement Act established the Bureau of Public Procurement in order to harmonise the existing government policies on procurement practices by ensuring probity, transparency and accountability in procurement process in Nigeria.<sup>298</sup> This Bureau plays a very cardinal role in ensuring that due process is followed especially in the procurement of Public works and services. The Bureau uses the pricing standards and benchmarks to ensure that prices of goods and services are fair and reasonable.

### **4.3.3 The National Planning Commission**

The commission has the mandate to develop a National Development Plan (NDP) for all infrastructure services by the Federal Government of Nigeria.<sup>299</sup> The MDAs will have to work with this commission in order to identify their long term plan for infrastructure projects and in order to determine whether such project can be funded through the MDA's budget or through PPPs. Any agency that intends to carry out a project under PPP must have to act in compliance with the commission's plan. The National Planning Commission also provides tools for economic appraisal of all investment projects including PPPs and carries out research on the economic appraisal of the government's infrastructure investment programme within the specified period.

### **4.3.4 Government Ministries, Departments and Agencies (MDA's)**

The ICRC Act allocates specific roles and responsibilities to Ministries, Departments and Agencies (MDAs) within the Federal Government for PPP project identification, planning, approval, procurement, and implementation. It

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<sup>298</sup> See Section 3 of the Public Procurement Act, 2007.

<sup>299</sup> This is usually for a period of 15 years.

therefore means that it is only the MDAs that can enter into a contract and grant concessions to the private sector proponents on behalf of the Federal Government of Nigeria.<sup>300</sup> According to Professor Paul Idornigie,<sup>301</sup> who stated that in granting concessions, it is important to first determine which Ministry, Department or Agency of the government that is empowered by the constitution and the Act establishing same to grant concession to the private proponent. This would involve determining whether the subject matter falls within the Exclusive, Concurrent or residual lists as contained in the Second Schedule to the 1999 Constitution.<sup>302</sup>

It is only the National Assembly by virtue of the powers conferred on it by the Constitution that can make laws in respect of the items listed on the Exclusive Legislative Lists.<sup>303</sup> Some of the items that are on the Exclusive Legislative List are telecommunications; defence; railways; prisons; arms and ammunitions; aviation, including airports, safety of aircraft and carriage of passengers and goods by air; construction, alteration and maintenance of federal trunk roads; maritime, shipping and navigation on national waters; military (Army, Navy and Air force) including any other branch of the Armed forces of the Federation; National Parks; Police; Posts, telegraphs and telephones; water from such sources as may be declared by the National Assembly.

While Concurrent Legislative List is a list in which both the National Assembly and State Houses of Assemblies can legislate on. Some of the items on this list are; Education Electricity/Power generation; Industrial, commercial or agricultural development to mention but a few. Having listed the areas in which the Federal

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<sup>300</sup>See S.1 of the ICRC Act 2005.

<sup>301</sup> Being an interview granted by Professor Paul Idornigie at the Institute of Advanced legal studies, Abuja in June, 2012.

<sup>302</sup>See the Second Schedule of the 1999 Constitution of Nigeria for the lists.

<sup>303</sup>S.4 of the 1999 Constitution of Nigeria gives the National Assembly the powers to make laws for the Federation and also the State Houses of Assembly the powers to make laws for their respective states.

Government Ministries, Departments and agencies can grant concessions, another important question to raise is which of these MDA's has the right to grant concession in respect of a particular project?

To answer this question, recourse would have to be made to the enabling Acts or laws creating or establishing the agency concerned. While some of these laws are clear as to which of these departments and agencies has the right to operate, maintain and manage the infrastructure to be concessioned, there are instances where the laws seem conflicting as to which authority has the power to do so. Some of these conflicting provisions are shown hereunder as follows:

#### **4.3.4.1 The Federal Airports Authority Act Vis-a-Vis the Federal Capital Development Authority Act**

The Federal Airport Authority of Nigeria Act<sup>304</sup> provides for the establishment of the Federal Airports Authority of Nigeria. Section 1(3) of the Act provides that the Federal Airport Authority shall have the powers to operate and maintain all airports in Nigeria. Section 1 of the Act provides:

*“S.1 (3) As from the appointed day, there shall be transferred to the Authority all the Airports maintained by the Ministry pursuant to S.6 of the Civil Aviation Act and the Authority shall maintain and manage those airports and any other airport provided by the minister pursuant to that Act.”*

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<sup>304</sup>See S.1(1) of the Federal Airport Authority of Nigeria Act, CAP F5. Laws of the Federation of Nigeria, 2010.



A community reading of the provisions of that section reveals that it is only the Federal Airports Authority of Nigeria that can grant concession in respect of construction, operation and maintenance of airports in Nigeria to any private sector. On the other hand, The Federal Capital Territory Act<sup>305</sup> which provides that the Federal Capital Development Authority (FCDA) shall have the powers to establish infrastructural services in accordance with its master plan and shall also have the powers to coordinate the activities of all ministries, departments and agencies of the Government of the Federation within the capital Territory.<sup>306</sup> While the Federal Airport authority claimed that by virtue of the provision of *S.1 (3) of the Federal Airport Authority Act*, it is the only authority vested with the power to grant concession in respect of airports. On the other hand, the Federal Capital Development Authority also claimed that it is the only authority that can grant concession in respect of the MDA's situated within the Federal Capital Territory. According to Professor Idornigie, the Nnamdi Azikiwe International Airport concession project was stalled because of the clear conflict as to which of these agencies of the Federal Government has the right to grant concession in respect of the Airport. While the Federal Airport authority claimed that by virtue of the provision of *S.1 (3) of the Federal Airport Authority Act*, it is the only authority invested with the power of granting concession. On the other hand, the Federal Capital Development Authority also claimed that it is the only authority that can grant concession in respect of the MDAs situated within the Federal Capital Territory.

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<sup>305</sup>CAP. F6, Laws of the Federation of Nigeria 2010.

<sup>306</sup> See generally the provisions of S.4 of the Federal Capital Territory Act.

#### 4.3.4.2 Federal Highways Act

This Act vests the powers of management, direction and control of Federal Highways throughout Nigeria in the Minister of Works and Housing, in respect of planning (including research and designing of those highways), the construction and maintenance, the supervision of users of such highways and the regulation of the traffic thereon.<sup>307</sup> The Act provides further that the Federal Government may in consultation with the State Government concerned acquire land for the purposes of construction of highways. Reference to land includes reference to a road other than a Federal Highway.<sup>308</sup>

An important issue which will often lead to disagreement under concession contracts is the issue of compensation for land acquired for the construction of the Federal Highways.<sup>309</sup> The Land Use Act provides that all the lands in a state are vested in the Governor of that state. So also, compensation shall be paid in respect of lands acquired for public purposes such as construction of Federal Highways. The question here is who pays the compensation?

The Federal Highways Act provides that compensation shall be paid in accordance with the Land Use Act for lands acquired for construction of the Federal Highways.<sup>310</sup> The Land Use Act provides that compensation shall be paid by the State Governor of the state concerned for lands acquired for overriding public interest (either for the state or the Federal Government).<sup>311</sup> However, in a situation where a state Government is not disposed to the construction of such Federal

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<sup>307</sup>See the provision of S.1 of the Federal Highways Act, Laws of the Federation of Nigeria, 2010.

<sup>308</sup>See S.3 (1) of the Federal Highways Act, LFN, 2010.

<sup>309</sup> See Section 1 of the Land Use Act 2010. Laws of the Federation of Nigeria.

<sup>310</sup>See S.3 (2) of the Federal Highways Act.

<sup>311</sup>See S.29 of the Land Use Act, CAP L5, LFN, 2010.

Highways within that state, then payment of compensation for lands acquired by the government will be a problem and this will hinder the progress of PPP projects.

#### **4.4 The Private Sector Participants**

Public Private Partnership projects normally require a range of skills, professionalism expertise and resources which may not normally be found in a single company. This is the reason why companies come together to form a consortium in order to execute the PPP project. All private participants (both local and international) in the bidding process must be commercial companies or partnerships operating under the relevant laws of their respective countries and in addition must possess the following:

1. They must possess the legal capacity to enter into the concession contract;<sup>312</sup>
2. The project proponent must possess the required professional and technical qualifications to carry out the contracts;<sup>313</sup>
3. Shall possess the financial capability to execute the contract;<sup>314</sup>
4. Shall possess the equipment and other relevant materials to carry out the infrastructure development or maintenance;<sup>315</sup>
5. Shall have adequate personnel to undertake and perform the obligations required under the contract;<sup>316</sup>
6. Not be insolvent or bankrupt and must not be involved in any insolvency or bankruptcy proceedings, or the subject of any form of winding up petition or proceedings;<sup>317</sup>

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<sup>312</sup>Sections 2(3) of the ICRC Act 2010 and S.16 (6) (b) of the Public Procurement Act 2010.

<sup>313</sup>See Section 16 (6) (a) (i) of the PPA 2010.

<sup>314</sup>S.16 (6) (a) (ii) of the Public Procurement Act 2010.

<sup>315</sup>S.16 (6) (a) (iii) of the PPA, 2010.

<sup>316</sup>S.16 (6) (a) (iv) of the PPA, 2010.

<sup>317</sup>S.16 (6) (c) of the PPA, 2010.

7. Must have paid all its taxes, pensions and other required social security contributions;<sup>318</sup>
8. Must not have any director who has been convicted in any country for any criminal offence relating to fraud or financial impropriety or criminal misrepresentation or falsification of facts relating to any matter.<sup>319</sup>

These are the legal requirements of a private company that intends to participate in project development through the PPPs in Nigeria.

#### **4.4.1 Constitutionality of Private Participation in Public Infrastructure in Nigeria**

It is important to mention that the legal framework for a sensitive development programme like Public-Private Partnerships must be in tandem with the constitution or other basic laws of the country. The constitution of the Federal Republic of Nigeria 1999 does not in any way mention the term, “Public-Private Partnerships”. However, Chapter II of the Constitution deals with the Fundamental Objectives and Directive Principles of State Policy wherein the ‘Economic Objectives’ of the government are clearly stated.

Section 16 of the Constitution of the Federal Republic of Nigeria provides:

- (1) *“The State shall, within the context of the ideals and objectives for which provisions are made in this Constitution-*
  - (a) *Harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self-reliant economy every citizen on the basis of social justice and equality of status and opportunity;*

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<sup>318</sup>S. 16 (6) (d) of the PPA, 2010.

<sup>319</sup>S. 16(6) (e) of the PPA, 2010.

*(b) Control the national economy in such a manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity:*

*(c) Without prejudice to its right to **operate or participate in areas of the economy**, other than the major sectors of the economy;*

*(d) Without prejudice to the right of any person to participate in areas of the economy within the major sectors of the economy, protect the right of every citizen to engage in any economic activities outside the major sectors of the economy.”*

Sub-section (4) thereof provides further as follows:

*“For the purpose of [section 16(1)]-*

*(a) the reference to the ‘major sectors of the economy’ shall be construed as a reference to such economic activities as may, from time to time, be declared by a resolution of each House of the National Assembly to be managed and operated exclusively by the Government of The Federation; and until a resolution to the contrary is made by the National Assembly, economic activities being operated exclusively by the Government of the Federation on the date immediately preceding the day when this section came into force, whether directly or through the agency of a statutory or other corporation or company, shall be deemed to be major sectors of the economy;*

*(b) ‘Economic activities’ includes activities directly concerned with the production, distribution and exchange of wealth or of goods and services; and;*

*(c) ‘Participate’ includes the rendering of services and supplying of goods.”*

It is clear from the foregoing provisions of the constitution that the Nigerian state is constitutionally mandated to (a) ‘operate or participate in sectors of the economy other than the major sectors,’ and (b) ‘manage’ and ‘operate’ the major sectors of the economy. The statement that Individuals may ‘*participate*’ in economic activities in any sectors means that private enterprises can be engaged in any sector

of the Nigerian economy.<sup>320</sup> In addition, the state is positively obliged under *section 16 (1) (d)* to ‘*protect the right of every citizen to engage in economic activities outside the major sectors of the economy.*’

The above quoted provisions therefore give the government the right to continue to operate and manage the major sectors of the economy or to invite private enterprises to come forth and help the government in the provision, operation and management of the economic sector.

The National Assembly acting pursuant to this and other provisions have therefore legislated to allow private enterprises to participate in the economic development of Nigeria. It follows therefore that by reason of the meaning of the word ‘**participate**’, it goes without saying that the participation of core investors and other private individuals in major sectors of the economy has the ‘blessing’ of the Constitution.

The right of the private sector to participate in the economic sector has also been given judicial recognition. *In Attorney General of Lagos State v. Eko Hotels Limited (2006) 18 N.W.L.R.(Pt 1011) 378, 439-440, Paras H-A. The Supreme Court stated thus;*

*“The facts of this case have once again brought to the fore the need for government to stay clear of operating business concerns as the government has the tendency to act in business as if it is acting in government. The government really has no business being in the running of a business and should allow the private sector to take over what rightly belongs to them. The government can however continue to hold shares, definitely not controlling shares of a purely business concern. This position is advised by the changes in the world economy, policies and ideology.”*

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<sup>320</sup>Ikeme, “Legal Regulation of Privatisation in Nigeria” in *Readings on Privatisation*, Onyekpere, E. (ed.) (Lagos: SERI, 2003) 3.

The above quoted portion of the Supreme Court judgment unequivocally shows that because of the changes in the world economy, policies and ideology, it is better for the government to allow the private sector take its rightful place which is the running of business. Therefore, the right of the private sector to participate in the major sector of the Nigerian economy is now recognised. Further, in recognition of the role of the private sector to boost the infrastructure requirement of Nigeria, Dr. Mrs Ngozi Okonjo Iweala put it succinctly thus:

*“One thing we all agree on is that the government will never be able to raise the resources needed to close the infrastructure gap in Nigeria. Strong and sustainable PPPs...private sector with the public sector acting as regulator can help.”<sup>321</sup>*

It is therefore beyond argument that private sector participation in the provision of infrastructure is very crucial to the overall development of a nation.

#### **4.5 Basic Principles for Successful PPP Procurement in Nigeria**

There are some basic principles which must be examined in order to measure whether a particular PPP procurement is in line with best practices. These principles help to enthrone integrity in the procurement process. These are:

##### **4.5.1 Transparency and Openness**

Transparency and Openness are very cardinal to a successful Public Private Partnership contract. This is because of the variety of services involved in these contracts and the need to demonstrate value for money. It is crucial that the contract is understood and agreed upon by all the interested parties and the quality of information within it is properly publicised.<sup>322</sup>The principle of transparency

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<sup>321</sup> See Public-Private Partnerships in Nigeria. Available at <http://www.icrc.gov.ng/>. Accessed on 15.08.13.

<sup>322</sup>See Why PFI Contracts need to be more transparent. Available at [www.guardian.co.uk/local-government-network/2012/jun/29/pfi-contracts-transparent](http://www.guardian.co.uk/local-government-network/2012/jun/29/pfi-contracts-transparent). Accessed on 6th September, 2012.

focuses on the entronement of accountability in the procurement process and that PPP procurement conforms to statutory provisions. The implication of this is that PPP procurement must follow a transparent procedure in all cases and at all times.

In PPP procurement, transparency relates to openness and fairness in all the processes and stages involved in PPP procurement. Starting from the conception of the PPP project through planning, to the stage of the invitation of the project proponent to bid and even up to the award level; the Infrastructure Concession Commission and other procuring agencies shall exercise and display the highest level of transparency. Transparency in PPP procurement helps in eradicating corruption, coercion and collusive practices. In all PPP transactions, transparency and fiscal discipline must be safeguarded and the public authority should ensure that effective measures to enthrone transparency and accountability and combat corruption are put in place.

In order to ensure more transparency, the Nigerian Parliament has passed the Freedom of Information Act which in May, 2011 with the aim of enthrone transparency, unearthing facts, battling corruption and holding public officials and institutions accountable in PPP procurement. The newly enacted FOI Act provides for the right of access to information held by government institutions notwithstanding any other provision to the contrary in any other Act or law.

Section 1 of the Act provides:

*“(1) Notwithstanding anything contained in any other Act, law or regulation, the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described, is established.*



*(2) An applicant under this Act needs not demonstrate any specific interest in the information being applied for.*

*(3) Any person entitled to the right to information under this Act, shall have the right to institute proceedings in the Court to compel any public institution to comply with the provisions of this Act.”*

Further, an application for access to an official record can be made in any form (orally or in writing) and by any person (whether personally or through a third party). Such official to whom such application is made shall provide the required information within 7 days from the day the application was received.<sup>323</sup> The Act also among others requires all government MDAs to proactively disclose basic information about their structure and processes and mandates them to build the capacity of their staff to effectively implement and comply with the provisions of the Act.<sup>324</sup>

Also in the same vein, by the provision of S.2 (4) of the ICRC Act, the Infrastructure Concession Regulatory Commission is required to publish the list of projects that are eligible to be undertaken under PPPs in at least three national newspapers having wide circulation in Nigeria, and such other means of circulation. Also the provisions referred to in S.16 of the Public Procurement Act<sup>325</sup> concerning the qualification and disqualification of such project proponents where appropriate must be contained in the notice or the standard forms.

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<sup>323</sup> See the Provisions of Sections 3 and 4 of the FOI Act, 2011.

<sup>324</sup> Freedom of Information Act Signals Consolidation of Nigeria's Democracy. Retrieved from [http://www.stakeholderdemocracy.org/index.php?mact=News,cntnt01\\_detail,0&cntnt01articleid=342&cntnt01origid=67&cntnt01returnid=122](http://www.stakeholderdemocracy.org/index.php?mact=News,cntnt01_detail,0&cntnt01articleid=342&cntnt01origid=67&cntnt01returnid=122). Accessed on 28<sup>th</sup> Nov, 2012.

<sup>325</sup>See LFN, 2010.

#### **4.5.2 Open Competitive Bidding**

This is also one of the means of enthroning integrity in PPP procurement. Open competitive bidding will no doubt increase the participation of private sector in infrastructure development. It will further ensure that all unnecessary barriers are dismantled and business activities are subject to appropriate commercial pressures. Due to the complex nature of PPP projects, it is important for the contracting entity to have the freedom to choose the private partner who appears to be the best in terms of financial strength, professional qualifications, equal treatment of the users, ability to ensure the continuity of the service and quality of the proposal.

The ICRC Act provides that the commission shall invite open and competitive public bid.<sup>326</sup> By this, it means that the Act gives room for the participation of more than one bidder. This will give room for the emergence of a bidder with the most technically and economically comprehensive bid.<sup>327</sup> The open competitive bidding method has also been adopted by the Public Procurement Act as the primary method of bid solicitation for the procurement of goods and works including related services.<sup>328</sup> The rationale for adopting this method as the principal method for soliciting bids from the public is that it presents the best process for adhering to the laid down objectives of public procurement as it relates to transparency, equality of opportunity, fairness, economy, competition and value for money.<sup>329</sup>

A procurement bid under the open competitive bidding method may adopt the International Competitive Bidding method (ICB) or National Competitive Bidding Method (NCB). While International Competitive Bidding method connotes the

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<sup>326</sup>See S.4(1) of the ICRC Act, 2005.

<sup>327</sup>See S.4 (2) of the ICRC Act.

<sup>328</sup> See S.40 of the Public Procurement Regulations for Goods and Works.

<sup>329</sup> Oloworaran B. D. The Law and Practice of Public Procurement in Nigeria at Page 156.

solicitation of bids from both domestic and foreign contractors, National Competitive Bidding method on the other hand means the solicitation of bids from domestic contractors and project proponents registered or incorporated to carry on business under the Nigerian Laws.

However, the Infrastructure Concession Act provides the circumstances where public bidding may not be necessary. These are:

1. Where after the close of bidding, only one contractor submitted bid or proposal.<sup>330</sup>
2. Where after the close of all bids and after examination of the bids submitted, only one contractor meets the prequalification requirements. Then in such a case, the concerned government institution may go ahead to undertake direct negotiation with the private company.
3. Where there is an unsolicited proposal; - This is purely an initiative of the private sector concerning areas where it deems it is expedient for the government to award a concession contract. Since this is an initiative of the private sector, there may not be any need for competition unless the Commission deems it expedient.

In some cases where technical specifications are made to bidders, bidders should be given the opportunity to submit tenders that contain and reflect the diversity of technical solutions so as to achieve a sufficient level of competition. Where technical specification is required, it should be drafted in such a way to avoid narrowing down competition through specifications that will favour a class of economic operator. Technical specifications are better drawn up in terms of

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<sup>330</sup>See S.5(a) of the Act.

functional and performance requirements of the project. This is the only way through which innovation and better services can be achieved.

#### **4.5.3 Rules on Confidentiality**

Except otherwise provided, governments or contracting authorities are not entitled to disclose information forwarded to them by the economic operators which have been designated as confidential, including trade secrets and the confidential aspect of tender. The government or contracting authority may sometimes impose some requirements on the economic operators which are aimed at protecting the confidential information which the government or contracting authority makes available during the concession award procedure.

Section 35 of the ICRC Act provides for the protection of information and trade secrets that are classified to be confidential and which are within the knowledge of the officials of the commission. Section **35** of the Act provides.

*“(1) a member of the Board, the Director-General or any other officer or employee shall-*

*(a) not, for his personal gain, make use of any information which has come to his knowledge in the exercise of his powers or is obtained by him in the ordinary course of his duty as a member of the Board or as the Director-General, officer or employee of the Commission;*

*(b) Treat as-confidential any information which has come to his knowledge in the exercise of his powers or is obtained by him in the performance of his duties under this Act;*

*(c) not disclose any information referred to under paragraph (b) of this subsection, except as required by law.”*

The section further makes provision for punishment of whoever contravenes the provision of (1) above thus;

*“(2) Any person who contravenes the provisions of subsection (1) of this section commits an offence and shall on conviction be liable to a fine of not less than N50,000 or imprisonment for a term not exceeding 2 years or to both such fine and imprisonment.”*

#### **4.5.4 Unsolicited Proposals**

An unsolicited proposal means a written proposal for a new or innovative idea that is submitted to the Ministries, Departments or Agencies of the government on the initiative of the private sector for the purpose of getting a concession contract from the Government. This proposal is not made in response to any request for proposals from the government. This is purely an initiative of the private sector concerning areas where it deems it is expedient for the government to award a concession contract. Unsolicited proposals may result from the identification by the private sector of an infrastructure need that may be met by a privately financed project. They may also involve innovative proposals for infrastructure management and offer the potential for transfer of new technology to the host country.

There are some sectors that require huge amount of money in order to develop the infrastructure such as electricity generation, unsolicited proposals is much encouraged since the Federal Government intends to develop a market for electricity supply in the country. However, in other sectors that do not require such huge amount and extra-ordinary technicalities, the MDAs should generally identify their priorities for investment through the planning process set out in the PPP Policy Statement.

#### 4.6 Procedure for the Award of Concessions

Basically, the contracting authorities normally indicate either in the contract notice or in the concession documents a detailed description of the minimum requirements to be met by the project proponent. All these information will enable the private party to decide whether to participate in the award procedure or not. Concession contracts shall be awarded to the private proponent on the basis of the criteria set out by the contracting authority and the relevant enabling laws.<sup>331</sup> The tender must comply with all the requirements, conditions and criteria laid down in the concession notice or in the invitation to confirm interest and in the concession award documents.

In Nigeria, the following cumulative procedures must be followed in awarding concession to a private partner:

1. Any Federal Government ministry or agency who wishes to award any concession contract in its ministry or agency must first of all prioritise its infrastructure projects in order of their importance to national development.<sup>332</sup>
2. After the relevant ministry has prioritised such infrastructure projects and before entering into any contract with any private proponent, the list of the projects will be sent to the Federal Executive Council for approval on the recommendation of the relevant sector, ministry or agency.<sup>333</sup>
3. The procurement process formally starts with the advertisement in at least three national newspapers having wide circulation in Nigeria.<sup>334</sup> The notice

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<sup>331</sup>Other enabling laws like the Public Procurement Act, Fiscal Responsibilities Act, the Companies and Allied Matters Act and other enabling laws.

<sup>332</sup>See Section 2(1) of the ICRC Act.

<sup>333</sup>See Section 2(2) of the ICRC Act.

<sup>334</sup>See S. 4(1) of the ICRC Act.

will invite bidders to submit Expressions of Interest for inclusion on a short list of private parties invited to bid for the project.

4. The bid documents shall provide all the necessary information to the bidders. These shall include the invitation to bid; Form and conditions of contract; Specific instructions to bidders; Technical specifications; Bills of Quantities and Drawings; Bill of Engineering Measurements and Evaluation; Delivery of time or schedule of completion; Schedule of Prices and other necessary appendices, including forms for *pro forma* Bid Bonds and performance guarantee.<sup>335</sup>
5. There is the need to organize a bidders' conference before the deadline for bidding expires, to provide further background (including possibly a site visit) and to show the authority's commitment to the project. These conferences may provide an opportunity for firms to identify viable potential bidding partners or advisers.
6. After the closure of the submission of bids by the project proponents, the Commission will then set up a committee to rigorously evaluate the different kinds of interests already expressed.
7. The Prequalification Document will provide more information on the proposed risk allocation for the project and the criteria against which tenderers will be prequalified and, ultimately, the contract awarded. The

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<sup>335</sup>See 120 (a-k) of the Public Procurement Act- Subsidy legislation, CAP 44, Laws of the Federation of Nigeria, 2010.

*Procurement Procedures Manual* provides further information on both the criteria for selection and the contents of the Prequalification Document.<sup>336</sup>

8. Where the evaluation committee has shortlisted the list of the qualified bidders, the criteria and the procedure for such short listing should be made known to the public.
9. In contracts concerning purchase of most works or goods, it is required that the lowest priced bid against a common specification or requirement is the most ideal and appropriate way of maximizing the overall benefit to the public. However, for contracts involving services and some works projects, quality and price should both be taken into consideration in choosing the winner of the bid. This is because; Value for money is the criterion that should be applied to determine the evaluation of bids and the award of concession contracts.
10. Also, during the concession award process, contracting authorities should ensure that all bidders or potential bidders have equal access to the same level of information. They should not provide information in a discriminatory manner which may put other bidders at a disadvantaged position.
11. It is also very cardinal to have a consultation with the private sector as part of project preparation process. The purpose of this consultation is to ensure that the private sector has the capacity required to meet the range of services required and, in the case of investors, the willingness to finance

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<sup>336</sup>See the Public Procurement Manuals.



the investment. The consultation may be structured and formal or conducted through informal contact. This task is to be performed by the PPP Resource Centre which is the body mandated to communicate with the private sector and advertise and also advertise the concession bidding opportunities to the general public.

12. The Bureau of Public Procurement, having satisfied that a private proponent that met all the conditions stipulated by the law and in the bidding document would then issue a certificate of “No Objection” before the concession will be finally ratified by the Federal Executive Council.<sup>337</sup>

#### **4.7 Contract Close**

The procurement process will be brought to an end after the final evaluation of either the initial tenders or Best and Final Offers from at least two of the bidders. This will identify the *“most technically and economically comprehensive bid”* and the pricing and other technical information it contains will form part of the information included in the Full Business Case submitted to the Federal Executive Council for approval. This Federal Government approval signals the end of the procurement process.<sup>338</sup> The documents to be submitted to the Federal Government for approval will define the affordability and value for money required for the project, as well as the limits of any Federal Government support or guarantee.<sup>339</sup> Once these have been done and provided the negotiations are still within the terms agreed upon, then the Accounting Officer of the relevant

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<sup>337</sup>See S.16 of the Public Procurement Act.

<sup>338</sup> See the provision of S.2(2) of the ICRC Act which provides that all projects for concessions must be approved by the Federal Executive Council after the recommendation by the relevant Ministries, Departments or agencies concerned.

<sup>339</sup>See S.3 of the ICRC Act which provides that no Federal Government Ministries, Departments or agencies shall give any guarantee, letter of comfort or undertakings in respect of any concession except it has been approved by the Federal Executive Council.

Ministries, Department or Agency will have authority to sign the PPP contract or concession.

In most cases during this stage, the Preferred Bidder may decide to commission some advance design or mobilisation work and the authority has the responsibility to ensure that the process of gaining legal access is completed. Nevertheless the period between appointing a Preferred Bidder and reaching financial close may take several months. During this time, the Authority will usually retain the option of reverting to the second placed bidder if an agreement can no longer be reached with the Preferred Bidder.<sup>340</sup>

#### **4.8 Duration of Concessions**

There is no specific time mentioned in the Act for the duration of concessions in Nigeria. However, most of the infrastructure concession contracts in Nigeria are normally for a period of 25 years.<sup>341</sup> Various factors influence the term or duration of the concession agreement. These include but not limited to the type of investment envisaged, the period it will take to recoup such investment and general government policies. S. 6 of the ICRC Act provides:

*“The duration of any concession shall be as may be specified in the agreement or contract governing the concession.”*

Both the MMA II and the Lagos-Ibadan expressway concession agreements stipulated 4 years gestation period and concession duration of 25 years so that the investors would have been able to recoup their monies. The agreement should include a consideration for the possibility of renewal of the contract and the Transition Period. There may also be need to re-negotiate or negotiate for early

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<sup>340</sup>See S.4(3) of the ICRC ACT.

<sup>341</sup> Both the MMA II Airport concession and the Lagos Ibadan Expressway concession were granted for a period of 25 years.

cancellation of the contract. Thus, the contract can provide for several cases for early cancellation, for instance, there may be a provision that the contract can be cancelled due to interference by the State or early cancellation on mutual understanding.<sup>342</sup> Such provisions may also include automatic cancellation in the event of dissolution, force majeure or liquidation or it may be at the instance of the State in the event of a serious breach of obligations.

#### **4.9 Participation by Foreign Companies**

In Nigeria, where an alien or a foreign company is interested in participating in the development of infrastructure through PPPs, such a person or company will have to first join in the formation of a company in Nigeria. Such company must comply with all enactments regulating their rights and capacities to undertake or participate in trade or business in Nigeria. A foreigner or foreign company must first take steps in order to get the company incorporated as a separate legal entity in compliance with the relevant legislations and until such company is incorporated, it cannot carry on business in Nigeria. Such a foreign company may however be allowed a place of business only for receipt of notices and other documents as matters preliminary to incorporation.<sup>343</sup>

A foreign company may also freely invest and participate in the operation of any enterprise in Nigeria except petroleum enterprises and enterprises in the “Negative List”. The alien may operate alone or in joint venture with a Nigerian by means of a company which must first of all be registered by the Corporate Affairs Commission (CAC) and thereafter registered with the Nigerian Investment Promotion Commission (NIPC).

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<sup>342</sup> Paul Obo Idornigie, *Designing, Negotiating And Drafting of Concession Contracts*. Retrieved from <http://www.nigerianlawguru.com/articles/commercial%20law/DESIGNING.NEGOTIATING%20&%20DRAFTING%20OF%20CONCESSION%20CONTRACTS.pdf>. Accessed on 09.12.12.

<sup>343</sup> See S.54 of the Companies and Allied Matters Act, LFN 2010.

However, by the provision of S.55 of CAMA, a foreign company may apply to the President of the Federal Republic of Nigeria for exemption from the provisions of S.54 of the Act if that foreign company belongs to one of the following categories, that is:

- (a) “Foreign companies (other than those specified in paragraph (d) of this subsection) invited to Nigeria by or with the approval of the Federal Government to execute any specified individual project;*
- (b) Foreign companies which are in Nigeria for the execution of specific individual loan projects on behalf of a donor country or international organization;*
- (c) Foreign government-owned companies engaged solely in export promotion activities; and*
- (d) Engineering consultants and technical experts engaged on any individual and specialist project under contract with any of the governments in the Federation or any of their agencies or with any other body or person, where such contract has been approved by the Federal Government.”*

It follows from the above provisions that such companies invited into Nigeria to provide financing, engineering and technical experts may be exempted from full registration with the relevant agencies prior to their engagement in infrastructure development projects in Nigeria.

#### **4.9.1 Exempted Foreign Company to Have the Status of Unregistered Company**

A foreign company exempted pursuant to the provisions of the Act shall have the status of an unregistered company and accordingly, the provisions of the Companies and Allied Matters Act applicable to an unregistered company shall

apply in relation to such an exempted company as they apply in relation to an unregistered company.<sup>344</sup>

According to Professor M.M. Akanbi<sup>345</sup> an alien or foreign company that intends to participate in the formation of companies or business in Nigeria must familiarize him/itself with the following laws:

- (1) Nigerian Investment Promotion Commission Decree No. 16 of 1995;
- (2) The Foreign Exchange (Monitoring and Miscellaneous Provisions) Decree No. 17 of 1995
- (3) Investment and securities Act No. 45 of 2010.
- (4) Immigration Act Cap 171 LFN 2010.
- (5) Industrial Inspectorate Act 180 LFN 2010
- (6) National Office of Technology Acquisition and Promotion Act Cap 268 LFN 2010.
- (7) The Companies and Allied matters Act cap 59 LFN 2010.
- (8) Infrastructure Concession and Regulatory Commission Establishment Act, 2005.”

#### **4.10 Dispute Resolution in PPP Contracts in Nigeria**

The legal framework for the settlement of dispute is an important consideration in the implementation of the PPP projects. Parties especially the private partners will feel safer and will be more willing to participate in the projects when there is the guarantee that disputes between/among the parties can be resolved fairly and efficiently.<sup>346</sup> Disputes may arise in all phases of the PPP projects, namely,

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<sup>344</sup> See S. 58 of CAMA.

<sup>345</sup> Being an interview granted at the Faculty of Law, University of Ilorin, Nigeria on 10.06.12.

<sup>346</sup> United Nations ESCAP, A Guidebook on Public-Private Partnership in Infrastructure, (United Nations, Bangkok) 2011, Pg 74.

construction, operation and even at the stage of final handing over to the public authority.

The legal framework for dispute resolution may be found in a number of statutes and different rules and procedures in the country concerned.<sup>347</sup> The legal instrument may include tax law, competition law, consumer protection law, laws relating to public procurement, company law, property law, Arbitration and Conciliation law, foreign investment law, acquisition and appropriation law and various other relevant statutes which can aid in the resolution of disputes between or among the parties.

It is important that the settlement mechanisms considered in the contract agreement are in line with the international best practices, particularly when large-scale investments from foreign private partners are involved. The commonly used dispute resolution methods include: facilitated negotiation, conciliation and mediation, adjudication by regulatory authority, arbitration and legal proceedings. Of all these methods, legal proceedings are the most unsuitable for settling disputes arising from PPP arrangement except in extreme circumstances.<sup>348</sup>

The contractual relationships of PPP arrangements suggest that parties to the agreement will be involved in performing various roles in the execution of the project. Undoubtedly, this situation will create a changing and dynamic environment. Further to this, uncertainty of contract terms and the bearing of risk will create disputes. Irrespective of the degree of complexity of the contractual structures, there are four major identifiable levels of dispute which SPV partners

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<sup>347</sup> In Nigeria for example, the main law on dispute resolution is the Arbitration and Conciliation Act and also most of the agreements contain clauses on arbitration which are intended to govern the particular transaction.

<sup>348</sup> This is because litigation is time consuming, costly and neither of the parties may even be satisfied with the outcome of the proceedings.

may likely be faced with. These are: upstream, intra-parties, downstream and third-party disputes.<sup>349</sup>

Upstream disputes are those disputes between the private sector and the public authority/government. These may involve unilateral actions of the government which may likely affect the policy or the legal and regulatory framework i.e. the issuance of ministerial decisions which results in project cancellations and variations. This change will impact upon the consistency of the PPP network of contracts: it will cause the project company to restructure the downstream substantive contracts, as well as its loan agreements with third-party financiers.

The second type, the Intra-parties disputes are the ones which relate to the project performance agreement. Partners may disagree over each partner's financial contributions to the financing of the SPV, or, one partner may go insolvent, and the financial burden falls in the arms of the remaining partners.<sup>350</sup> Downstream disputes occur from defaults of contractors, e.g. where sectional completion is not certified for reasons of contractors using materials that are substandard or the ones different from the ones specified in the contracts.

Risks in the PPP scheme may occur by actions of third parties to the scheme. Financiers often resort to overburdened unilateral change of interest rates affecting the process of repayment loans. This financial reform brings along a specific risk: Refinancing the project will amount to pursuance of further deals which may be negotiated on much more burdened terms than the previous agreements. Clearly, time overruns will amount to lower levels of profitability, as returns will be at less

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<sup>349</sup> Dimitriou Athanasakis, Effective Dispute Regimes for Large Infrastructure Projects in Greece; Being a paper delivered at the 3<sup>rd</sup> Hellenic Observatory PhD Symposium on 14<sup>th</sup> & 15<sup>th</sup> June, 2007.

<sup>350</sup> Ibid.

percentages and start at a later stage. Whatever the level of disputes, these will have a domino effect upon the progress of the parties' contracts and lead to some interfacing level of liability. But, there is a common decisional thread: the determination of causation and liability.

Therefore, the existence of a viable and adequate legal basis for the settlement of these disputes likely to arise in PPP contracts is inevitability in the effective implementation of PPP projects. Private parties (including the concessionaire, financiers and contractors) feel encouraged to participate in PPP projects when they have confidence that any dispute arising between/ among the contracting authority or other governmental agencies and the concessionaire; or between the private parties themselves can be resolved fairly and efficiently without wasting time.

Each PPP contract in Nigeria usually provides for the acceptable modes of settling disputes which must, of course, not be antithetical or obnoxious to the allowed dispute resolution system under the legal framework of the concerned country. The commonly used methods for dispute resolution in PPP contracts include facilitated negotiation, conciliation and mediation, non-binding expert appraisal, review of technical disputes by independent experts, arbitration, and legal proceedings.<sup>351</sup>

Even though most dispute resolution clauses often start with negotiation, as far as Nigerian court is concerned, an agreement to negotiate between the parties is

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<sup>351</sup> Peter Sheridan: PPP In-depth: PFI/PPP Disputes at p. 1 retrieved from [http://www.sheridangold.co.uk/articles/pfi\\_ppp\\_disputes.pdf](http://www.sheridangold.co.uk/articles/pfi_ppp_disputes.pdf). Accessed on 15.03.13. Page 72.



unenforceable as it is void for uncertainty.<sup>352</sup> The only advantage of negotiation is that it is believed that tiered dispute resolution provisions (which include negotiation) assist in providing parties with flexibility to try and resolve low value or less important problems/ disputes more swiftly and with lower costs and management time than those common under more traditional forms of contract.<sup>353</sup> Additionally, the pressures created by the security package required by the lenders and banks frequently act as a stimulus to settlement or early resolution of disputes using negotiation. Its failure is however those parties are not legally bound by it and as such if either of the parties is discontented with the outcome of the negotiation, the fact that the contract provides for an agreement to negotiate cannot stop such party from approaching the court.

Mediation is another dispute resolution option. The only difference between negotiation and mediation is the involvement of an independent third party known as a mediator. A mediator is a person called to assist the parties in concluding a settlement which may or may not be binding on the parties. Mediation is therefore an advanced negotiation. The effect of a mediation clause in PPP contract is not significantly different from that of a negotiation clause. The determining factor lies in the existence or otherwise of a special procedure to be followed in carrying out negotiation.

In mediation, the main objective is to resolve the differences between the parties through a negotiated agreement. The mediator does not have the authority to make a binding decision on the parties.<sup>354</sup> The only situation where such decision would be binding is where all the parties have agreed to such outcome. This is because,

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<sup>352</sup> Ibid.

<sup>353</sup> Peter Sheridan, op cit.

<sup>354</sup> H Brown and A Marriott, ADR Principles and Practice 2<sup>nd</sup> Edition,( Sweet & Maxwell, 1999) at Page 129.

the mediator has no authority or power except the one given to him by the parties involved. If any of the parties withdraws the authority or power so given, that ends the mediation process. Therefore, if the parties are unable to settle their dispute through this means, they will be at liberty to have their issues dealt with in another way. It is as a result of this that mediation may not be suitable for disputes involving big commercial transactions like PPP contracts because either of the parties may decide to opt out of the mediation process if he or she thinks that the outcome may not be favourable.

Where a contract provides for mediation as a means of resolving disputes without specifying a procedure to be followed, such mediation clause will have the same effect as a negotiation clause. On the other hand, where the parties have not only agreed to negotiate in good faith (assisted by a mediator) but have gone further to identify a particular procedure (such as the CEDR<sup>355</sup> mediation procedure), the effect will be different. In the latter case, there will be a sufficient certainty for a court to ascertain whether the parties' obligations have been complied with or not.<sup>356</sup>

This distinction is pivotal in that where there is a clear procedure as opposed simply to an agreement to negotiate with no specific procedure; the court can investigate and see whether the specific steps the parties agreed to take have or have not been undertaken. Be that as it may, since a mediation is conducted on a without prejudice basis, if the parties are not successful in concluding a settlement, the mediation will be of no effect and cannot be referred to in a court action.

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<sup>355</sup> This means Centre for Effective Dispute Resolution.

<sup>356</sup> See *Cable & Wireless Plc V. IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm), [2003] B.L.R. 89.

From the above cursory examination of both negotiation and mediation, it is obvious that they are both ridden with problems which go a long way to puncture a hole in their appropriateness to resolving PPP disputes. Litigation is equally not apposite for its time-wasting and cost-gulping propensity. Owing to this, the need to consider other viable options, such as arbitration, becomes necessary. The usefulness and effectiveness of arbitration *vis-à-vis* PPP dispute resolution is considered below.

#### **4.10.1 Resolving PPP Disputes through Arbitration**

The Nigerian ICRC Act which is the principal law that governs PPP contracts in Nigeria does not extensively provide for how dispute arising from the contract will be resolved. It only states thus:

*“No agreement reached in respect of this Act shall be arbitrarily suspended, stopped, cancelled or changed except in accordance with the provisions of this Act.”*<sup>357</sup>

It is worthy of note that there is nowhere in the Act where the procedure of settlement of disputes has been mentioned. Recourse would therefore be made to the Arbitration and Conciliation Act<sup>358</sup> in the resolution of disputes arising from PPP contracts in Nigeria.

Arbitration is a mechanism whereby two or more parties agree that their dispute will be decided confidentially by an independent tribunal. To be binding, it is a requirement of the law that the parties must agree that the dispute will be resolved by arbitration. Parties are also at liberty to include any specific requirement they deem fit within the agreement to arbitrate. For instance, the parties may agree that

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<sup>357</sup> S.11 of the ICRC Act, 2005.

<sup>358</sup> Arbitration and Conciliation Act, Cap 19, Laws of the Federation of Nigeria, 2004.

the dispute is to be determined by a single arbitrator, by a panel of three arbitrators or indeed fifteen arbitrators<sup>359</sup>. It is also within the exclusive discretion of the parties to specify the procedural rules to be applicable, the national law to be used, the language of arbitration<sup>360</sup> and even the country in which the arbitration is to be held.<sup>361</sup>

That arbitration provides a veritable platform for resolving emerging disputes in PPP is a widely conceded fact as shown in its global application in PPP dispute resolution. Its advantages are well documented and all this further underscores its appropriateness to PPP disputes.<sup>362</sup> For instance, one of the numerous advantages of arbitration is the ability of parties to have their disputes determined by an arbitrator knowledgeable in a relevant specialist area. This will go a long way in ensuring quick disposition of cases before the arbitral Tribunal; more so when PPP projects encapsulate multifarious technical and specialised subjects. By so doing, the parties will not need to spend so much time “educating” the arbitrator upon a particular specialised area; compared with a court which may have no experience in such area and may need considerable assistance from the parties. Invariably, the dispute is resolved more quickly and at a lower cost than equivalent court proceedings thereby bringing to the fore another invaluable advantages of arbitration (time saving and low cost).

The fact that a huge sum of money is often committed to PPP projects makes litigation undesirable. For example, the MMA2 project gulped a whopping sum of N20 billion. When some government agencies flout the contractual terms of the

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<sup>359</sup> See Section 6, ACA 2004.

<sup>360</sup> See Section 18, ACA LFN 2004.

<sup>361</sup> See Section 16, ACA LFN 2004.

<sup>362</sup> M.T. Adekilekun, O. A. Olatunji, C.C Gan and M.M Akanbi, ‘ Public-Private Partnership Initiative in Nigeria and its Dispute Resolution Mechanisms: An Appraisal, (2013) JMCL Vol. 40, 67-86.

agreement between the FG and BCSL, the latter had to engage in extensive negotiations to resolve the issue not because its rights have not been violated but because of the fear of protracted litigation that may ensue if those rights are to be pursued in a court of law.<sup>363</sup>

Another feature of arbitration that makes it apt for PPP disputes is that the award issued by an arbitrator or an arbitral tribunal is both binding and final, and may be enforced through the court.<sup>364</sup> Even though the fact that the Arbitration and Conciliation Act<sup>365</sup> allows for the setting aside of arbitral awards may appear to pose some irreconcilable drawback, upon closer perusal of the provisions of the Act, however this is not in any way a problem. That law specifically provides for when an arbitral award can be set aside in the following words:

*“A party who is aggrieved by an arbitral award may within 3 months by way of an application for setting aside, request the court to set aside the award in accordance with subsection 2 of this section.”<sup>366</sup>*

By that subsection, the court will only intervene to set aside an arbitral award on the proof of the party making the application that the award contains decisions on matters which are beyond the scope of submission to arbitration.<sup>367</sup> Even where this is the case, in order to prohibit facetious complaint against arbitral awards the subsection further provides that only the part of the award which contains decisions on matters not submitted to the tribunal may be set aside.<sup>368</sup>

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<sup>363</sup> See the Presentation by Wale Babalakin, op cit.

<sup>364</sup> See Section 31, ACA LFN 2004.

<sup>365</sup> Cap 19, LFN, 2004.

<sup>366</sup> See Section 29(1) ACA, LFN 2004.

<sup>367</sup> See Section 29(2) ACA, LFN 2004.

<sup>368</sup> Ibid.

The above provision, no doubt, goes a long way in limiting the influence of the court in off-setting arbitral awards and in discouraging parties from approaching the court for setting aside of such awards since proof is required. This makes it more appropriate to PPP disputes where parties cannot afford the luxury of time wasting.

In other climes, in recognition of the over-burdening effects of risks on the concessionaire, there are statutory provisions making the inclusion of arbitration clause in PPP contracts a non-negotiable. In Greece, for instance, any dispute regarding the implementation, interpretation or status of a PPP contract or ancillary agreement is settled exclusively by means of arbitration. In addition, the arbitration decision is final, irrevocable, not subject to appeal and is a legally executable title.<sup>369</sup> In Russia, the Concession Law clearly allows the inclusion of arbitration clauses providing for dispute resolution by arbitration tribunal or international commercial arbitration.

Provisions such as these are essential to checkmate what may at times be the excesses of the government. Since the government knows that the concessionaire will usually be unwilling to go to court because of fear of time-wasting, and in the absence of arbitration clause in such contract, government tends to contravene the contractual terms with impunity.

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<sup>369</sup> Article 31(2) of the Greece PPP Law.

Added to the above is the fact that PPP projects are capital-intensive with most part of the risks involved being shouldered by the concessionaire who is expected to build, design, operate and then transfer the project within the stipulated number of years. The concessionaire undertakes the operational risk, construction risk, commercial risk, and other forms of risks and therefore deserves to be protected against protracted litigation which may delay the recoupment of his invested loaned capital and prejudice his profit. The only available effective insulation to the concessionaire is the inclusion of arbitration clause in PPP contracts.

#### **4.10.2 Implication of Arbitral Clauses in PPP Contracts in Nigeria**

The implication of arbitral clauses in PPP contracts in Nigeria is that such provision suspends the jurisdiction of the court pending the conclusion of arbitration. This would apply only in a situation where the issue is raised before the defendant takes any step in the matter. An application seeking a stay of proceedings in the matter to enable parties to arbitrate is not granted as a matter of course. For such an application to be granted, the applicant must have taken no step in the proceedings.<sup>370</sup>

**S.5 (1) of the Arbitration and Conciliation Act** provides;

*“If any party to an arbitration agreement commences any action in any court with respect to any matter which is the subject of any arbitration agreement may, at any time after appearance and before delivering any pleading or taking any other steps in the proceedings, apply to court to stay the proceedings”.*

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<sup>370</sup> See Kano State Urban Development Board V. Fanz Construction Co. Ltd. (1990) 4 N.W.L.R. (Pt 142) 1.

The above stated principle has also been given judicial recognition in the case of *Enyelike V. Ogoloma & Ors (2008) 14 NWLR (Pt. 1107) @ page 247*.

#### **4.11 Termination of Concession Contracts**

The ICRC Act 2005 is silent on the termination of PPP agreement. However, as stated earlier in this research work, provisions relating to termination will be contained in the agreement between the parties. Such agreement must state the circumstances where termination is allowed and reasons for such termination. Thus, the contract can provide for several cases for early cancellation/ termination. For instance, the agreement may contain a provision for early termination by mutual understanding. However, whatever the case may be, there should be provision to the effect that no contract shall be arbitrarily terminated by any of the parties.

Nigeria has a history of arbitrary termination of contract. In November 2012, the Federal Government of Nigeria announced its decision to revoke the N89.53 Billion Concession of Lagos/Ibadan expressway awarded to Bi-Courtney Consortium since May 26, 2009 on grounds of what it described as serial breaches of the concession agreement by the construction firm, specifically its failure to meet up with the financial close agreed upon.<sup>371</sup>

The Minister of Works, Architect Mike Onolememen while briefing the newsmen on the termination stated thus;

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<sup>371</sup>See “Federal Government revokes Lagos/Ibadan Express way”. Retrieved from <http://scannewsnigeria.com/news/fg-revokes-concession-of-lagosibadan-expressway/>. Accessed on 20.11.12.



*“The Federal Government today, terminated the concession of the Lagos-Ibadan expressway granted to Bi-Courtney Consortium on 8th May, 2009, the concession agreement of which was signed by the parties on 26th May, 2009. The termination of the concession is consequent on the serial breaches of the concession agreement by Bi-Courtney Consortium and especially the failure of the company to reach financial close as provided for in the agreement.”*

*“The federal government wishes to assure that while it will continue to uphold the sanctity of contracts entered into by the federal government, it will not shy away from implementing provisions of contract agreements dealing with non-performance on the part of the contracting party”.*

On the legal implication of terminating the contract, the Minister for works said;

*“The legal implications of this termination have been carefully considered by both the Federal Ministry of Works and indeed the Federal Government. If you recall we have been on this issue for quite sometime now and we have meticulously followed the concession agreement. We have complied fully with the provisions of this agreement. We have had cause even in the past to write the concessioner to detail the breaches which it had committed in this agreement in this particular transaction and we have also followed the minimum and maximum number of days the contractor was expected to remedy the situation but failing which the Federal Government had no alternative but to take this course of action”*

*“For your information under this concession the construction period is supposed to last for four years and the four years will come to a close in about six months’ time and right now there is nothing on ground to suggest that the company is capable”*

On the likelihood of refunding the money spent on the project by Bi-Courtney, the Federal Government has said that there is no such plan because the firm did not keep to the terms of the agreement.

However, Bi-Courtney has instituted an action at the Federal High Court for unlawful termination of the contract. The company stated that as at the time the contract was terminated, the Federal Government had no right to do so and thereby claiming that it has spent over N3 Billion on the road since 2009.<sup>372</sup> According to Mr Oshobi of Bi-Courtney Nigeria Limited,<sup>373</sup> he stated thus:

*“If a project is supposedly not being well-executed, the appropriate thing is for the government to go to an arbitration panel and take up issues with the erring firm. What they have done now is to use executive fiat without consultations with Bi-Courtney Consortium to cancel the concession. This is never done anywhere in the world. This kind of attitude might scare away foreign investors.”*

The above stated fact signals that PPP contracts are being terminated with impunity in Nigeria. Before a party can terminate such a contract, there must have been a material breach of the contract by the other party and this, must have been communicated to the party in default. Also, the innocent party must ensure that it has complied with what is required of him by this Act and other relevant agreement before his decision to terminate the contract.

#### **4.12 Challenges Facing PPPs in Nigeria**

There are so many challenges facing PPPs in Nigeria. For ease of explanation, these will be discussed under the following:

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<sup>372</sup> See Bi-Courtney to Contest Contract Cancellation. Retrieved from <http://thenationonlineng.net/new/news/bi-courtney-to-contest-contract-cancellation-2/>. Accessed on 26.11.12.

<sup>373</sup> Being an interview granted by Mr. Oshobi of Bi-Courtney Nigeria Limited at the office at Afribank Street, Lagos Nigeria on 30.11.12.

## **4.12.1 Cultural Issues**

### **4.12.1.1 Resistance from the Civil Service**

Public-Private Partnerships are meant to be partnerships between the public and private sector in which responsibilities, risks and obligations are shared between the two in the most optimal way, to guarantee the highest benefit to the public. Unfortunately in Nigeria, the average civil servant tends to perceive the private sector concessionaire as the enemy that wants to deprive him of his job, relevance and income. The tendency is therefore to treat the Concessionaire as an adversary that must be overcome and run down at all costs.

According to Dr. Wale Babalakin SAN,<sup>374</sup> the resistance occurs in various ways, one example is the insistence on carrying out functions or charging fees from projects that have already been concessioned to the Concessionaire. For instance in Murtala Muhammed Airport II built through PPP in Lagos State, the regulator continued to charge fees for the delivery of aviation fuel to aircrafts operating from MMA II, a fee that should rightfully accrue to the Concessionaire under the Concession Agreement. The Concessionaire has had to engage in extensive negotiations to resolve this issue.

### **4.12.1.2 Negative Perception from the General Public**

The average Nigerian is still very suspicious of PPPs and believes it is a means of transferring the commonwealth of the nation to the favoured friends and cronies of the government in power. For instance, it is strange but true that till date most Nigerians believe that the Federal Government awarded a contract to the Concessionaire to construct the MMA II from which the Concessionaire made a

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<sup>374</sup> See the lecture delivered by Dr. Wale Babalakin at the Faculty of law 2009.

handsome profit and in addition won the right to operate the airport which is a gold mine.

According to Mr. Oshobi, the reality is that the Concessionaire invested in excess of N10 billion in equity and incurred debt in excess of N20 billion at double digit interest rates to complete the project. Solely at the initiative of the Concessionaire, the project was constructed to a standard that far exceeded what the government planned when it invited bids for the construction of Airport with the attended costs.

#### **4.12.1.3 Resistance from Staff Unions**

This is similar to the challenges faced with the civil service which constitute the staff union. The difference is that instead of using the regulatory functions, the union puts pressure on the government and the regulating agencies through union activities. For instance, the Concessionaire of MMA II has been prevented by the activities of the staff union from taking possession of a piece of land adjoining the airport which is paid for at a rate beyond its market value and for which it has an executed lease agreement. The land is intended to improve the facilities at the airport. The excuse was that the land was administratively allotted to the union in 1978.

In spite of the fact that the union has not been able to develop the land for the purpose for which it was allotted for a period of more than 30 years, and the fact that the Concessionaire, without prejudice to its legal rights, has offered to develop the required facility at its own expense on a nearby plot of land within the precincts of the airport complex, the staff union has refused to budge. Therefore in some

cases, the pressure from staff union could also be a challenge to the smooth operation of PPP agreements.

#### **4.12.1.4 Failure to Honour Contractual Agreements**

This is the most important challenge which the private sector is facing as regards the implementation of PPP contracts in Nigeria. An average public servant belief that government is not bound to honour its contractual obligations or that the government can unilaterally rescind contracts it voluntarily entered into after the counter-party has altered its position. Disregard for contractual obligations has been a re-occurring issue on concession contracts in Nigeria. For example, in the MMA II project, the most notable insistence is the failure or refusal of the Ministry of Aviation (the regulator agency) to perform its obligation to ensure that all schedule domestic flight into or out of Lagos State is operated from MMA II.

Two Airlines refused to relocate their schedule domestic flight operation to MMA II and the regulators condoned their recalcitrant behavior until one of them was eventually forced to re-locate after 2 (two) years of its operations. The other airline is still permitted to operate its scheduled domestic flights to Lagos State from the international wing of the airport. The flagrant refusal of the regulators to compel these airlines to relocate their operation to MMA II has had a significant negative impact on the revenue profile of the Concessionaire. Revenue expected from leases and advertisements have gone down due to the low traffic of passengers.

In 2012, the Federal Airport Authority of Nigeria (FAAN) inaugurated the General Aviation Terminal (GAT) which is in violation of the concession agreement entered into between the Federal Government of Nigeria and Bi-Courtney Aviation Services Limited. The concession agreement had given the exclusive right to house all domestic operations in Lagos State to Bi-Courteney Aviation Services Limited. However, the Minister of Aviation, Mrs Stella Oduah, had claimed that the newly reconstructed GAT does not belong to Bi Courtney Aviation Limited.<sup>375</sup>

Industry analyst and the Managing Director of Zenith Travels lamented the sorry state affairs and cautioned the government to avoid scaring away investors from the sector. He stated unequivocally thus:

*“I congratulate government for GAT but we need to look forward on sustainability which can only be achieved through PPP environment. But sadly looking backwards, almost all such arrangements were messed by shoddy packaging from government side and their inability to respect same agreement. It will hurt our airports and has almost wiped out our domestic airlines. Investors are fleeing; we use force to reverse agreements. It is not good.”*

The above averment clearly depicts the culture of impunity in honouring agreements voluntarily entered into by the respective ministries and departments of the governments and the resultant effects on the sector. This is certainly not good for the country.

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<sup>375</sup> See the Punch Newspaper of 23<sup>rd</sup> October 2012. Accessed from [www.punchonline.com](http://www.punchonline.com).

## 4.12.2 Funding Issues

### 4.12.2.1 The Challenge of Raising Long Term Credit Facilities Locally

PPP projects are mostly for long term. Most Nigerian banks only grant a short term or medium term finance. As a result, raising fund to finance any PPP project in Nigeria has become a major challenge. According to Mr Oshobi, he stated as follows:

*With respect to the MMA II, most banks were initially very reluctant about the project. At the beginning, the shareholders had to fund the project exclusively from equity. Eventually one bank showed interest and began to support the Concessionaire.<sup>376</sup> It was only after the project has taken shape that most banks finally showed interest and agreed to refinance the project. Infrastructure development requires long term finance and raising long term loans remains a challenge in the Nigeria.*

In the same view, in an interview with Dr. Femi Soyaju of the Department of International Development Law, Faculty of Law, University of Pretoria, he submitted as follows:

*“Nigeria has not made an appreciable impact in closing the infrastructure gaps due to lack of access to long-term financing. The fact is that private investors are in dire need of long term funds for investment in infrastructure. With easy access to finance, the appetite for private investment in the nation’s infrastructure market will increase exponentially. For example, banks in Nigeria tried in the past to fix these gaps in financing for long term infrastructure projects with short term loans which ended up in cost over-run by pushing up the cost of borrowing and leaving many projects un-bankable or financially unviable before even getting underway.”<sup>377</sup>*

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<sup>376</sup> That was Oceanic Bank of Nigeria now absorbed by Eko Bank.

<sup>377</sup> Being the text of an interview with Dr. Femi Soyaju on 4<sup>th</sup> day of March, 2013 at the University of Pretoria Campus, Pretoria, South Africa.

The situation seems to have improved in recent time with the consolidation of banks<sup>378</sup> which greatly increased the capacity of Nigerian banks to bear long term credit risk. The reforms Nigerian pensions system<sup>379</sup> and the consolidation of Insurance Sector (which in other economies are sources of long term funds) coupled with the gradual development of the nation's bond market may have begun to address this problem.

The recent Pension Funds and Revised Guidelines allow Infrastructure funds and private equity funds registered with the Securities and Exchange Commission (SEC), as well as Global Depositary Receipts (GDRs/Notes) and Eurobonds “issued by listed Nigerian companies for their operations within Nigeria, as certified and approved by SEC”.<sup>380</sup> For infrastructure projects to attract investments of pension assets in Nigeria, the guidelines provide that the projects must have been awarded to a concessionaire through an open and transparent process; must not be less than N5 billion in value; should be managed by a concessionaire with a good track record; should meet the due process requirements of Public Private Partnership (PPP) Policy;

*“and of the nature of core infrastructure which includes roads, railways, airports, ports, power and gas pipelines and related facilities, and other projects that may be approved by the commission from time to time.”*

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<sup>378</sup> This was done in 2005 where the minimum capital was put at N25 Billion. As a result, most banks had to merge and others were being taken over by other banks in order to meet the target.

<sup>379</sup> Pension reform in Nigeria started in 2004 with the enactment of the Pension Reform Act. As at August 2012, the total employees registered in the Contributory Retirement Savings were 5.23 million and the assets under management in the Retirement Savings Account Funds as at May 2012 is N1.4tn.

<sup>380</sup> See Kehinde Ibrahim 'Nigeria Pension Funds and Revised Guidelines retrieved from <http://nigerianpilot.com/index.php/business/4672-nigerian-pension-funds-and-revised-guideline>. Accessed on 4th November, 2012.



The guidelines provides further that for Specialist Infrastructure Funds seeking to attract pension fund investments, the guidelines stipulates that it must have 75 per cent of its projects located in Nigeria. Not more than 5 per cent of pension fund assets can be invested in Infrastructure funds, but up to 35 per cent of pension fund assets can be invested in infrastructure bonds, mortgage and asset backed securities and corporate debt securities.

In addition, raising funds internationally is not much easier and country risk issue always posed a major challenge. International financiers do not want to bring their moneys into financing infrastructure in Nigeria unless there is a government guarantee. Also, there may be some stringent laid down rules which the private sector have to strictly comply with before the international financier will part with their moneys.<sup>381</sup>

An alternative source of long term funding is the capital market particularly the bond market.<sup>382</sup> However, the recent downturn in the capital market suggests that this may not be a viable option for the time being. It should be noted however that Nigeria's capital market is probably still too shallow and underdeveloped for green-field infrastructural projects.

Typically in other countries, governments give sovereign guarantees to the Concessionaire of key infrastructure, as well as all kinds of other incentives to make it easier for the Concessionaire to raise finance. These are countries that have

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<sup>381</sup> See for example, Guidelines Procurement Under IBRD Loans and IDA Credit of May 2004 and Revised in October 1 2006 and May 1, 2010.

<sup>382</sup>The economic environment in Nigeria is sophisticated and suitable to create a sustainable vibrant bond market that can be vital in economic development. The economic environment in Nigeria is sophisticated and suitable to create a sustainable vibrant bond market that can be vital in economic development. The success of the bond market depends on the collaboration between the market operators and financial institutions including the Central Bank of Nigeria (CBN)

single digit interest rates unlike Nigeria. The idea in PPPs is to share the risks and the benefit between the public and private sector. The benefit for the government is essentially the infrastructure or service provided to the public and not profit for its operation.

In the case of Lagos/ Ibadan Expressway that was concessioned to Bi-Courtney Highway services Ltd under the Design, Build, Operate and Transfer (DBOT) agreement which was signed in May, 2009. The company was expected to raise money to finance the project. It was argued that in the face of the global economic meltdown, financing massive infrastructure projects had become a big challenge, and the government had to follow modern approach to infrastructure development all over the world. After 2 years when the concessioner could not raise funds locally, it signed an agreement with two South African giants in order to handle the project.<sup>383</sup> These were- Rand Merchant Bank and (RMB) and Group Five. Rand Merchant Bank was described as the Second largest financial institution in South Africa which won the 2011 banker Investment Banking Award as the most innovative investment bank from Africa.

Other partners include Vela VKE supporting engineers and consultants; Project Management International (PMI), experienced South African based construction expert, and Yolas Consultants. According to the concessioner, Group Five is a multi-disciplinary construction group with an established and growing international client base engaged in resources, energy and infrastructure delivery in Africa. Group Five was said to have completed five major highways like the Lagos/ Ibadan Expressway in Africa and many more around the world.

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<sup>383</sup> Armsfree Ajanaku, *Lagos-Ibadan Expressway: Diary of a failed Road Concession*. Retrieved from [www.nguardiannews.com](http://www.nguardiannews.com). Accessed on 4<sup>th</sup> December, 2012.

Its accomplishment also include; the successful delivery of King Shaka International Airport, KwaZulu-Natal, and a range of contract related to the World Cup organized in 2010 by FIFA in South Africa. Apart from being rated as one of the most empowered companies in South Africa, Group Five emerged as the winner in the Basic Industrial Sector by the Financial Mail in its Top Empowerment Company survey in 2011. This concession contract was however stalled because these foreign partners who were ready to finance this gigantic infrastructure project in Nigeria needed sovereign guarantee by the Federal Government of Nigeria which the government simply declined.

In the cases of MMA II and the Lagos/ Ibadan Expressway, no sovereign guarantee or other similar incentive was granted to ease the challenges of funding. Conversely, the Agreement was structured in a manner in which all financial risk accrued to the Concessionaire with none accruing to the government and the Concessionaire still had an obligation to pay concession fees to the government even before it began to make profit from its investment. The perception appears to have been that the primary objective of PPPs for the government is revenue (without incurring any risk or making any investment) instead of the provision of infrastructure and services to the public.

### **4.12.3 Regulatory Issues**

#### **4.12.3.1 Incessant changes in Relevant Political Office Holders**

Incessant changes of the relevant political office holders are also one of the challenges of PPP in Nigeria. Over a period of Seven (7) Years, the concessionaire of MMA II has had to deal with six different ministers and five different chief executives of the Federal Airports of Nigeria (FAAN). This has also imparted the

issue of inconsistency in policy. Maintaining and managing a relationship with the successive ministers and chief executives of the contracting agencies have been a major challenge. In the case of MMA II, each time the Concessionaire reaches a consensus or understanding on fundamental issues affecting the operation of MMA II, either the minister or the chief executive is changed; the process has to begin all over again. This is because each of these ministers has different policy thrusts, divergent opinions and perspectives on the Concession Agreement and the concession itself.

#### **4.12.4 Political Issues**

##### **4.12.4.1 Absence of the Political Will to ensure that PPPs work**

Despite the commitment of the Federal Government of Nigeria to ensuring that PPPs work, the respective agencies meant to implement government policies have sometimes failed to display the political will to ensure that these policies succeed. Unless governments and their agencies are absolutely determined that PPPs succeed there are sufficient vested interests in the country against PPPs that would ensure that the government's initiative to promote PPPs fail. This is particularly important in these early stages because if too many pioneering efforts to implement PPP schemes fail, potential investors will lose interest and this very useful tool for economic development would have been lost.

For example, the ongoing airport concession dispute between the Federal Airports Authority of Nigeria and its concessionaire, Bi-Courtney Aviation Services Limited, took a new twist in October 2012, with Federal Airport Authority of Nigeria disclosing that the Build, Operate and Transfer arrangement it had with the

company over the Murtala Mohammed Airport Terminal II in Lagos was only for a period of 12 years and not 36 years.<sup>384</sup>

#### **4.12.4.2 Risks associated with Political Transition**

Political transition may bring about a change in the governmental policies especially as PPP contracts are concerned. The Lagos Ibadan-Expressway was concessioned to Bi-Courtney during the administration of Late President Umaru Musa Yar' Adua whose administration had the zeal to take advantage of the opportunities inherent in the private sector. However, the present administration of President Goodluck Jonathan is not pursuing this drive with vigour.

One of the major concerns with the MMA II project was ensuring that it was commissioned before the administration that granted the concession left power.<sup>385</sup> This was borne out of anxiety for the tendency of new administration to reverse policy decisions of previous administrations.<sup>386</sup> Due to this concern the Concessionaire had to expedite action on the project to ensure it was suitable to commissioning before the terminal date of that administration. This significantly increased the cost but the objective was attained.

#### **4.12.5 Legal Issues**

##### **4.12.5.1 Legal Framework**

There are issues with the legal framework for PPPs in Nigeria. Some of these issues bother on inconsistencies of the relevant laws. Nigeria, being complex federating states, still has conflicting provisions as to which of the Ministries,

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<sup>384</sup><http://www.newsnets.com.ng/news/05/11/mma2-faan-bi-courtney-disagree-over-concession-tenure>.

<sup>385</sup> This was conceived and commissioned during the regime of Former President Olusegun Obasanjo (1999-2007).

<sup>386</sup> Being an interview granted by Mr Tola Oshobi of BOB & Co, Legal Practitioners in Lagos State on 30.09.12.

Departments or Agencies of Government that has the exclusive right to grant concession contract.

The Federal Airport Authority of Nigeria Act<sup>387</sup> provides for the establishment of the Federal Airports Authority of Nigeria. Section 3 of the Act provides that the Federal Airport Authority shall have the powers to operate and maintain all airports in Nigeria. A community reading of the provisions of that section reveals that it is only the Federal Airports Authority of Nigeria that can grant concession in respect of construction, operation and maintenance of airports in Nigeria to any private sector.

On the other hand, The Federal Capital Territory Act<sup>388</sup> which provides that the Federal Capital Development Authority shall be powers to establish infrastructural services in accordance with its master plan and shall also have the powers to coordinate the activities of all ministries, departments and agencies of the Government of the Federation within the capital Territory.<sup>389</sup> While the Federal Airport authority claimed that by virtue of the provision of *S.1 (3) of the Federal Airport Authority Act*, it is the only authority invested with the power of granting concession. On the other hand, the Federal Capital Development Authority also claimed that it is the only authority that can grant concession in respect of the MDAs situated within the Federal Capital Territory. There is the need to have clarity in the legislation so as to avoid conflict between these agencies of government.

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<sup>387</sup>See S.1(1) of the Federal Airport Authority of Nigeria Act, CAP F5. Laws of the Federation of Nigeria, 2010.

<sup>388</sup>CAP. F6, Laws of the Federation of Nigeria 2010.

<sup>389</sup> See generally the provisions of S.4 of the Federal Capital Territory Act.

Furthermore, the Act does not give the Commission sufficient power to supervise concessions and enforce compliance with its provisions. It appears that the Commission is largely a policy-making body. There is a real need to strengthen the Commission and make it a one stop shop for handling every detail pertaining to any infrastructure or service the government has decided to concession. Since its sole business will be concessioning, it should not be constrained by the tendency of other government agencies and ministries to hinder the progress of PPPs, due to the perception that it undermines their powers and sources of revenue.

#### **4.12.5.2 Slow pace of Justice Delivery System**

This is a major impediment to doing business in Nigeria. Because of the complex nature of the PPP agreements, there are bound to be disputes arising from the transaction. It is therefore envisaged that parties would approach the court for amicable settlement of their disputes. However, the justice system in Nigeria is indeed very slow. Delay of cases in Nigerian courts has become so worrisome. The Chief Justice<sup>390</sup> of Nigeria has urged judicial officers on speedy dispensation of justice because justice delayed is justice denied. Some cases spend as much as 20-30 years before they are finally concluded. As a result, the Concession Agreement for MMA II made extensive provisions on dispute resolution. There are about 3 levels of dispute resolution before the parties to the concession can head for court. The idea is that, any dispute would be satisfactorily resolved before it degenerates into protracted litigation. This has been very useful between the parties. However, where a third party dispute arises, parties will still have to resort to the courts and face the challenges of a slow justice delivery system.

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<sup>390</sup> Justice Aloma Mukhtar became the Chief Justice of Nigeria in 2012.

## **4.12.6 Other Issues**

### **4.12.6.1 Corruption**

This is a major impediment to doing business in Nigeria. This has become a national malaise and the greatest monster that Nigeria is facing. Corruption within the country's public sector poses a major challenge to the PPP Programme and development generally. The areas that are most affected by corruption are the Police, Judiciary, Public sector procurement and many others too numerous to mention. According to the 2013 Transparency International Index,<sup>391</sup> Nigeria was ranked 144 out of the 177 countries that were examined. There is no doubt that abuse of powers, bribery and secret dealings have continued to ravage public procurement in Nigeria. Despite the fact that anti-corruption agencies were established by successive government, very little has been achieved.<sup>392</sup> The legal loopholes and lack of political will in government facilitate both domestic and cross-border corruption in Nigeria. The country's public institutions and corporations must be more transparent in order to reduce the incidence of corruption in the country.

### **4.12.6.2 Dearth of Experts**

Nigeria is a federation with Thirty Six (36) states and the Federal Capital Territory. For PPPs to work successfully there is the need to build capacities in all the states so that each state and Federal Capital Territory can handle PPP arrangements independently. In South Africa, apart from the PPP Unit at the National treasury in Pretoria, each Municipal Unit has experts who handle PPP projects within their

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<sup>391</sup> See the Transparency International Index for 2013. Available at < <http://cpi.transparency.org/cpi2013/results/>> Accessed on 23.12.13.

<sup>392</sup> During the regime of President Obasanjo, two anti-graft agencies were established to fight corruption in Nigeria. These are Independent Corrupt Practices and Other Related Offences Commission (ICPC) and also the Economic and Financial Crimes Commission (EFCC).



municipality. Therefore, there is need to train more experts who would handle PPP projects in the various states and local governments.

#### **4.13 Conclusion**

In Nigeria and other African countries, access to critical infrastructure and services can be accomplished through Public Private Partnerships, where the government is expected to deliver the minimum standard of services to the people; the private sector brings capital, skills and their competencies.<sup>393</sup> Such collaborations will help in bridging the information gap between the public and private sector organisations, reducing the level of poverty and promote access to social and economic infrastructure which is critical in nation development.

The objectives of a typical PPP arrangement in Nigeria is the mission to contribute to the economic integration of the country, accelerate its economic growth and sustainable development, engender and sustain private sector collaboration in traditionally public sector projects and also expand local access to international market thereby ensuring a deeper economic integration with the global world.

To achieve the above stated objectives, there should be more commitments on the part of the stake holders to the PPP agreement. Governments should show more commitment to respect the sanctity of the partnership agreements. Government and its agencies should not see themselves as being superior to the private parties. It should also show that it has created an enabling environment for the PPP scheme to thrive in Nigeria. This would encourage especially the foreign investors to participate in infrastructure development in Nigeria.

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<sup>393</sup>A. AUzodima, Public Private Partnership and Nigeria's Development. Accessed from [www.Phishare.org](http://www.Phishare.org) on 23.08.12.

Nigeria, with its huge population, has the propensity for a large PPP market in Africa. This among others may make it a good destination for private investors. However, investors would not want to waste their monies where a good enabling environment has not been created.

In order for Public Private Partnership to thrive well in Nigeria, government must put in place sound laws, policies, regulations and institutions or in the alternative enhance the existing ones that are already in place as well as improve the enabling environment for private investors to thrive.

## CHAPTER FIVE

### PUBLIC PRIVATE PARTNERSHIPS IN SOUTH AFRICA: AN EXAMINATION OF THE LEGAL AND REGULATORY FRAMEWORK

#### 5.0 INTRODUCTION

The government of the Republic of South Africa recognizes the fact that infrastructure investment is a key priority if the country is to achieve its desired growth potential over the next few years. It is a key pillar of both the National Development Plan<sup>394</sup> and the New Growth Path<sup>395</sup> and provides a mechanism to support economic transformation, national growth and essential job creation in the country at a pivotal time in its economic history.

By a developing country standard, South Africa has better developed infrastructure such as roads, water, dams and health facilities, but investments in key economic infrastructure such as energy have lagged far behind the domestic demand.<sup>396</sup> In addition to this, the bulk of the existing infrastructure such as roads, railways and ports need adequate investment on maintenance and upgrading.

As part of this strategic approach to building economic resilience in South Africa, the investment and participation of private investors are considered as cardinal to the growth and development of the country. The country is now on a development plan to remedy the poorly implemented infrastructure plan during the apartheid

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<sup>394</sup> According to the NDP, it is the aim of the government of South Africa that by the year 2030, the country would have eliminated poverty and reduce inequality to the minimal level. The government seeks to realize the above stated goals by building capabilities, growing an inclusive economy, promoting leadership, enhancing the capacity of the state and promoting public private cooperation.

<sup>395</sup> This programme was launched by President Jacob Zuma in 2009. This initiative's main aims are to create decent work, reduce inequality and poverty and attract more investment for South Africa.

<sup>396</sup> Infrastructure Investment Key to improving Service Delivery. Retrieved from [www.treasury.gov.za](http://www.treasury.gov.za). Accessed on 16.05.13.

years, and to meet the demands of a growing economy and population.<sup>397</sup> If the government is to successfully lay a solid foundation for growth and development, reduce poverty and provide decent work for all South Africans, this type of partnership is essential.

In the year 2012, the cabinet established the Presidential Infrastructure Coordinating Commission to tackle the challenge of infrastructure deficits being faced by the country in recent times.<sup>398</sup> Its mandate amongst others are to plan and co-ordinate a national infrastructure plan, backed by the necessary political will to synergize infrastructure planning and implementation across all spheres of government, state agencies and private partners.

Public Private Partnerships began in the mid 1990s' with the tolling of part of the major national roads by the National Roads agency as a result of budgetary constraints.<sup>399</sup> The first project executed was a R2.6 Billion PPP project for the N3 and N4 toll road. This road links the South African provinces of Gauteng (comprising Johannesburg and Pretoria which is the main economic hub of South Africa), Limpopo and Mpumalanga to the port of Maputo in Mozambique. The N4 road project is a Build-Operate-Transfer (BOT) 30 – year PPP concession

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<sup>397</sup> See Infrastructure Development in South Africa.  
[http://www.mediaclubsouthafrica.com/index.php?option=com\\_content&view=article&id=125:South](http://www.mediaclubsouthafrica.com/index.php?option=com_content&view=article&id=125:South). Accessed on 13.04.13.

<sup>398</sup> The cabinet set up the Presidential Infrastructure Coordinating Commission (PICC) whose objectives among others is to bring together representatives of the three spheres of government for development cooperation. The PICC's mandate is to develop a 20 year infrastructure pipeline, to ensure forward planning of infrastructure development and curtail the stop-start syndrome around building infrastructure. Over the Medium-Term Expenditure Framework (MTEF) period, R845 billion has been approved and budgeted for public sector projects with some R300 billion in the energy sector and R262 billion allocated to transport and logistics projects.

<sup>399</sup> E.R Yescombe, Public-Private Partnerships Principle of Policy and Finance supra.

arrangement, at the expiration of which ownership will transfer to the two governments.<sup>400</sup>

Mozambique lacked the required funds to rehabilitate and maintain its own part of the N4 highway, the railway line and the ports which were long damaged as a result of the civil war that ravaged that country.<sup>401</sup> As at 1997, the total estimation of South Africa's requirement to fix its roads was estimated to be R37 billion, both governments were thus in need of funds to finance and maintain this all important infrastructure. As a result of this, the PPP approach was then resorted to, and with the cooperation of the private sector, the project became a reality.

For many years, government was committed to developing an investment friendly environment for PPPs. In April 1997, a team was appointed to come up with legislative and institutional frameworks for PPPs in South Africa. In 1999, the first major legislation on Public Private Partnerships in the country was enacted. These provisions are set out in Treasury Regulation 16 issued by the National Treasury in accordance with the Public Finance Management Act, 1999 (PFMA)<sup>402</sup> which for the first time established a dedicated PPP unit within the treasury in the year 2000. The main objectives of this Act are to enhance sound financial management and maximize service delivery through the effective and efficient utilization of limited resources.<sup>403</sup>

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<sup>400</sup>See Public-Private Partnerships in Africa, Part 1. Retrieved from [http://www.consultancyafrica.com/index.php?option=com\\_content&view=article&id=954:public-private-partnerships-in-africa-part-i-infrastructure&catid=82:african-industry-a-business&Itemid=266](http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=954:public-private-partnerships-in-africa-part-i-infrastructure&catid=82:african-industry-a-business&Itemid=266). Accessed on 16.04.13.

<sup>401</sup> Civil war began in Mozambique in 1977 and ended in 1992. During this time, most of the critical infrastructure was damaged and this led to a serious infrastructure deficit.

<sup>402</sup> Act No 1 of 1999, (As Amended by Act No 29 of 1999).

<sup>403</sup> See <http://www.treasury.gov.za/legislation/PFMA/default.aspx>. Accessed on 21.03.13.

In addition, a *PPP Manual* and *Standardised PPP Provisions* have been issued by the National Treasury as PPP practice notes in accordance with Section 76(4)(g) of the Public Finance Management Act to make the application of the Act and the regulations less difficult. Also, in order to carry along the various municipalities in the development drive, the Municipal Finance Management Act, 2003 (MFMA) was passed with its regulations. This legislation provides for municipal PPPs which are consistent with financial accountability.

The South African National Treasury, the key department which is saddled with the responsibility of monitoring and approving these deals, has developed various programmes and sound policies which are key factors in the growth of the scheme. The first PPP that was carried out in South Africa in accordance with National Treasury Regulation 16 was the Inkosi Albert Luthuli Central Hospital which was contracted to the private sector for 15 years under the Design, Finance, Build, Operate and transfer (DFBOT).<sup>404</sup> Under the arrangement, the Impilo Consortium was to upgrade and manage the facilities and information technology of an 846-bed state-of-the heart referral hospital. The capital value of this project is put at US\$746 million. This hospital is well equipped and provides services to the people of KwaZulu Natal and the Eastern Cape Province. The general opinion has been that PPP through which this hospital was built has delivered a quality service which could not have been achieved by the government alone.<sup>405</sup>

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<sup>404</sup> See PPP Quarterly, A publication of the PPP Unit, National Treasury South Africa. Number 28 of February, 2009.

<sup>405</sup> See M.T Adekilekun and C.C. Gan, Public-Private Partnerships in Infrastructure Development in Africa: A Magic-Wand for Socio-Economic Growth and Development. Being a paper Presented at the 2013 Symposium on Finding Solutions to Africa's Development, held on 23<sup>rd</sup> August, 2013.

Since the enactment of these laws, over 300 of such partnership projects have already been executed at both the national, provincial and municipal levels since the country became a constitutional democracy in 1994.<sup>406</sup> The government recognizes the fact that investment in the construction of roads, ports, railway systems, electricity plants, hospitals and dams will contribute to faster economic growth.

Former President Thabo Mbeki once put it succinctly thus on the challenges of sustaining economic growth and public spending and extending opportunities to all as follows;

*“We have to construct a new world that is more equitable and responsive to the needs of the poor, mobilize the all our people voluntarily to act together to achieve goals of reconstruction and development and to consolidate the practice of creating Public Private Partnerships”*<sup>407</sup>

As part of its projected plan in the 2013 budget, the government will invest over the next three years about R827 billion (about \$94) billion in the building of new and upgrade of existing infrastructures in the country.<sup>408</sup> South Africa’s economy continues to grow, but at a slower rate than expected. A growth rate of 2.7% is projected in 2013, 3.5% in 2014 and 3.8% in 2015.<sup>409</sup>

The pace of economic recovery of the nation will depend on the rate at which private investment and export are strengthened and the government is therefore exploring the measure to encourage Public-Private Partnerships for infrastructure development.

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<sup>406</sup> Philippe Burger The Dedicated PPP Unit of The South African National Treasury accessed from <http://Www.Oecd.Org/Mena/Governance/37147218.Pdf>. Last accessed on 27.12.13.

<sup>407</sup> See PPP Quarterly Supra Note 8 at Page 2.

<sup>408</sup> Infrastructure Investment Key to Improving Service Delivery. Budget 2013, People’s Guide. A joint Publication by the National Treasury and South African Revenue Service.

<sup>409</sup> Ibid.

## **5.1 Sector Level Analysis of the State of Public Infrastructure in South Africa**

### **5.1.1 Power**

South Africa's consistent economic growth and industrialization have witnessed a sharp upsurge in the demand for electricity. The demand for energy by the year 2030 is expected to be twice the current level.<sup>410</sup> This growth, together with rapid industrialization and electrification programmes especially in the rural areas means there would be an increase in electricity demands which may lead to overworked electricity infrastructure.

As a result of lack of adequate investment in the country's power infrastructure in the past few years, the demand for energy has increased and has gone more than what Eskom,<sup>411</sup> the state-owned agency which is in charge of energy generation and distribution can meet. Eskom produces about 34, 000 Megawatts of electricity in South Africa to meet the current demand, and the above figure is expected to grow on yearly basis.<sup>412</sup>

According to the South African Infrastructure Development Plan for 2013-2015, the biggest portion of investment in infrastructure is expected to come from Eskom which will invest R205.1 billion (about USD220 million) on power generation over the next 3 years.<sup>413</sup> Together with Eskom, the Department of Energy is taking steps to bringing electricity supply and distribution system into balance. Also, Eskom's new power stations in Medupi in Limpopo and Kusile are expected to start producing electricity by the year 2014 and 2015 respectively.

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<sup>410</sup>See South Africa Energy Supply. Retrieved from <http://www.southafrica.info/business/economy/infrastructure/energy.htm#.UW75qdnMYqA>. Accessed on 18.03.13.

<sup>411</sup> Eskom (Electricity Supply Commission) is a South African Public Utility which was established in 1923 by the government of South Africa. Generating Electricity in South Africa,. Retrieved from <http://www.eskom.co.za/c/article/208/generating-electricity/>. Accessed on 09.04.13.

<sup>413</sup> See budget 2013, Peoples Guide, op cit.



Also, through the Integrated Resource Plan, the government has embarked on promoting sustainable green energy scheme on a larger scale as envisioned in the Integrated Resource Plan 2010.<sup>414</sup> This plan envisages that 42% of electricity must be generated from the renewable resources within the 20 years projected. Also, there is the Integrated Municipal Infrastructure Project which will focus on 23 of the least developed districts. This will help in addressing and upgrading the infrastructure needs; this will include electricity, water, road and rail transportation which is meant to serve about 17million people living in these municipalities.

Independent power generation companies have been chosen.<sup>415</sup> The projects to be carried out include solar photovoltaic technology, wind, small hydro and concentrated solar thermal generators. The South Africa government is expected to procure from these private entities to meet the challenges of power generation and distribution.<sup>416</sup>

### **5.1.2 Transportation**

South Africa has a well-developed transport infrastructure more than any country in Africa.<sup>417</sup> The total network of road is about 747, 000 kilometers which are substantially motor able and in good condition. The country's ports and their facilities serve as a natural stopover for shipping from within the continent and the world over. In recognition of its importance to the country's growth and

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<sup>414</sup> The Integrated Resource Plan (2010-2030) is a plan that places specific emphasis on how to broaden electricity supply technologies in South Africa to include gas, imports, nuclear, biomass, renewable (wind, solar and hydro), in response to both the country's future electricity needs as well as reduce its CO<sub>2</sub> emissions. South Africa expects to procure about 3, 725MW of renewable energy through this process.

<sup>415</sup> In May 2012, the Department of Energy announced the names of 19 bidders who were selected as the preferred bidders for Window 2 of the Renewable Energy (IPP) programme that is expected to contribute to South Africa's energy mix .

<sup>416</sup> See Independent Power Producers Chosen. Retrieved from <http://www.southafrica.info/business/economy/infrastructure/ippbidders-230512.htm# UXFqZtnMYqA>. Accessed on 16.04.13.

<sup>417</sup> See South Africa's Transport Network. Retrieved from <http://www.southafrica.info/business/economy/infrastructure/transport.htm# UXGDe9nMYqA>. Last accessed on 26.11.13.

development, the government has highlighted the transport sector as a major contributor to the nation's economy. In fact, it is considered as an important engine for economic growth, national and international integration and social development, and in recent times, the government has unveiled its plans to invest heavily in order to improve the country's transportation network.

#### **5.1.2.1 Road Infrastructure**

South Africa has a total road network of about 747,000km which is in good condition. The Department of Transport has the responsibility for overall policy formulation while the responsibility of road construction and maintenance is vested in the South African National Roads Agency (SANRA) and the nine provinces and local governments.<sup>418</sup> According to a report credited to the South African Institute of Civil Engineering,<sup>419</sup> SANRA is responsible for about 16,200km of the national road network; there are about 185,000km under the supervision and maintenance of the Provinces and a total of 66,000km fall under the maintenance of the municipalities.

According to Finance Minister while commenting on the 2013 budget,<sup>420</sup> stated that government has allocated the sum of R32.9 billion over the next 3 years (2013-2015) for the upgrade of national roads. He stated further that a whopping sum of R27.6 billion has been allocated for the upgrading of provincial roads.<sup>421</sup> Only about 19% of the national roads in South Africa are toll roads, most of which are being supervised and maintained by SANRA, while the rest have been concessioned to private companies on build, operate, maintain and transfer basis.

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<sup>418</sup> See especially the 4<sup>th</sup> Schedule to the South African Constitution which spells out the areas of concurrent national and Provincial legislative competence.

<sup>419</sup> Retrieved from <http://www.southafrica.info/business/economy/infrastructure/transport.htm# UXGDe9nMYqA>. Accessed on 14.04.13.

<sup>420</sup> See budget 2013, Peoples Guide op cit.

<sup>421</sup> Ibid.

The Department of Transport is planning to vigorously engage the private sector in the building and maintaining of road infrastructure in the country to boost socio-economic growth and development.

### **5.1.2.2 Rail Infrastructure**

South Africa has an extensive rail network connecting the country with some other countries within the sub-Saharan region.<sup>422</sup> If the largest economy in Africa will continue to grow, improving its rail network of about 20, 247km will remain its priority. The rail network is managed by Transnet<sup>423</sup> which is an agency under the Department of Public Enterprises. Transnet Freight Rail (TFR) is the largest railroad and heavy hauler in southern Africa. It has about 21, 000km of rail network, out of which about 1, 500km are heavy haul lines with over 8, 200km of the lines electrified. Transnet Freight Rail is proudly placed to strategically improve the rail industry. It is the sixth-largest freight railway in the world with about 65,000 active wagons and over 25, 000 employees across the country. About 2.2-million passengers travel through train on daily basis in South Africa.<sup>424</sup> Metrorail commuter services is also helping in transporting people especially it covers towns and cities like Durban, Eastern Cape Province, Cape Town, and greater Pretoria and Johannesburg, focusing mainly on poorer South Africans.

Also, there is Gautrain which is a rapid rail link that connects Johannesburg and Pretoria. It is a R25.2 billion PPP project and it is the Africa's only high-speed train.<sup>425</sup> About 40,000 people use the service every day. The train travels at a high

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<sup>422</sup>The South African Transport System. Retrieved from <http://www.southafrica.info/business/economy/infrastructure/transport.htm#UXGDe9nMYqA>. Accessed on 16.05.13.

<sup>423</sup> Formerly known as Spoornet, it is an outstanding heavy haul freight rail company which specializes in the transportation of freight in the Southern Africa.

<sup>424</sup> See [http://www.southafrica.info/business/economy/infrastructure/transport.htm#UXJ8\\_9nMYqB](http://www.southafrica.info/business/economy/infrastructure/transport.htm#UXJ8_9nMYqB). Accessed on 18.04.13.

<sup>425</sup> See Passenger Rail Agency of South Africa. <http://www.info.gov.za/aboutsa/transport.htm>. Accessed on 12th April, 2013.

speed of 160 km/h, therefore making the journey between Pretoria to O.R Tambo International airport to be covered within 42 minutes.<sup>426</sup>

### **5.1.2.3 Airports**

South Africa has ten airports that handle more than 98% of the country's commercial traffic, with about 200, 000 aircraft landings and more than twenty million departing passengers every year. The O.R Tambo International Airport alone caters for more than Seventeen Million passengers annually and receives more than 105, 000 aircraft landings annually.<sup>427</sup>

In the year 2010, the sum of R20-billion was approved for the upgrade of all the airports ahead of the 2010 World Cup which was hosted by South Africa in 2010. These are O.R Tambo International Airport in Johannesburg, Cape Town International Airport and King Shaka International Airport which is outside the city of Durban and other seven domestic airports.

### **5.1.3 Telecommunications**

The telecommunication industry is one of the fastest growing sectors in the national economy, with physical infrastructure in particular playing a role in recent developments. In March 2009, Mobile Telecommunication Network (MTN) announced a R4.6 billion infrastructural operation to establish a next-generation network for its 17.5 million subscribers. For several years, the telecommunications industry in South Africa was the exclusive preserve of Parastatal Telecom. Telecom controls the Sat-3 under undersea cable, which enters South Africa near Cape Town and links the country to Europe via the west coast of Africa,

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<sup>426</sup> <http://gautengcompanies.co.za>. Accessed on 17.04.13.

<sup>427</sup> See <http://gautengcompanies.co.za>. Accessed on 17.04.13.

connecting South Africa to Europe and India via Kenya. The deregulation of the telecommunications industry has brought competition into the sector and this has created opportunities for increased competition in the telecommunications industry.<sup>428</sup>In the Guateng Province and other urban centers, telecommunication products and services are the equal of anywhere in the world.

## **5.2 The Legal Framework for Public-Private Partnerships in South Africa**

### **5.2.1 The Constitution**

The preamble to the South African Constitution which is the statement of intent and purpose for the Constitution, and those who are saddled with the control of the state and the entire citizenry provides among others for the duty of the state to improve the quality of lives of all citizens and build a nation that will be able to take its rightful place as a sovereign state in the comity of nations. It provides as follows:

*“We, the people of South Africa,  
Recognise the injustices of our past;*

*Honour those who suffered for justice and freedom in our land;  
Respect those who have worked to build and develop our country; and  
Believe that South Africa belongs to all who live in it, united in our  
diversity.*

*We therefore, through our freely elected representatives, adopt this  
Constitution as the supreme law of the Republic so as to;  
Heal the divisions of the past and establish a society based on democratic  
values, social justice and fundamental human rights;*

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<sup>428</sup> The emergence of Neotel as competitor to the already established parastatal, Telkom, has created opportunities for increased competition and efficiency into the sector.

*Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;*

*Improve the quality of life of all citizens and free the potential of each person; and*

*Build a united and democratic South Africa that is able to take its rightful place as a sovereign state in the family of nations.*

*May God protect our people.”*

This introductory statement emphasizes the role of the government to improve the qualities of lives of the people by increasing their access to basic necessities of life like water, good roads, hospitals, and telecommunication infrastructure among others.

Procurement regulation in South Africa has an interesting socio-political history.<sup>429</sup> During the long apartheid era, public procurement was used in such a way as to protect the interests of enterprises owned by the white minority and a clear discrimination against the black-owned enterprises. In particular, "tender procedures were complicated and favoured large firms to the detriment of small emerging firms."<sup>430</sup> After the apartheid, the new government of democratic South Africa resolved that public procurement would be utilised to democratise the economy and provide employment and business opportunities for marginalized and

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<sup>429</sup> Sope Williams Elegbe, *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification Measures*, (UK, Hart Publishing, 2012).

<sup>430</sup> World Bank, "Public and private sector procurement programmes and their contribution to emerging enterprises in South Africa" (Report prepared for the Workshop on Small, Medium and Micro Enterprise Development and Financing, 3 Nov. 1994); Sharp et al, *Assessment of Public Sector Procurement to Small, Medium and Micro-Enterprises* (1999).

disadvantaged individuals and communities, commonly referred to as 'target groups'.<sup>431</sup>

No doubt, in recognition of the importance of procurement to national development, the basic principles in which procurement system in the country were based were sanctioned by the constitution. Section 217(1) of the constitution provides for the way and manner that procurements including the PPP Procurements are to be carried out. The section provides thus:

*“When an organ of state contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.”*

According to the above quoted provision of the constitution, procurement process which includes the PPP procurement in goods or services must be done in a manner which is fair, transparent and cost effective.

Furthermore, **Section 33 (1)** of the constitution gives the citizens' rights to fair administrative action that is lawful, reasonable and procedurally fair. This provision is to the effect that whoever feels that his rights have been adversely affected by any administrative action has the right to challenge this in a court of law. This provision applies to all procurements carried out by the government in order to promote efficiency in administration. Further to this provision, the parliament has enacted the Promotion of Administrative Justice Act (PAJA) 2000. This Act gives effect to the provision of S.33 of the constitution and other matters connected thereto. It must be pointed out and emphasised that in South Africa,

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<sup>431</sup> See Sope Williams Elegbe, *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification Measures*. Page 84.

constitutional litigation may reach all the way to the Constitutional Court which is said to be fearlessly independent.<sup>432</sup>

### **5.2.2 Public Finance Management Act (PFMA)**

The Act<sup>433</sup> seeks to promote the principle of sound financial management with the aim of maximizing service delivery and to effectively utilize the limited resources. The main objectives of the Act include modernizing a system for the management of finances in the public sector; enabling public sector managers to manage the financial resources, and be held more accountable; ensuring the prompt provision of quality information; eliminating the waste and corruption in the use of public assets and other matters connected therewith. The PFMA is very cardinal to the functioning of public procuring institutions because it states the ground-rules for public financial transactions and mandates public institutions (especially those that are involved in procurement) to maintain sound procurement system.<sup>434</sup>

According to Mr. Innocent Khumalo<sup>435</sup>, the PFMA does not have direct provision on PPPs but on sound financial management of funds by the government departments, and in so far as PPP is linked to the capital of departments, invariably, it is part of the legislations to be complied with and the compliance relates to the powers of approvals of funds and if there is any guarantees to be given, these are the issues which the PFMA addresses and that is why it also applies to PPP projects.

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<sup>432</sup> Dikgang Moseneke, Deputy Chief Justice of South African Constitutional Court, delivered a lecture at the Georgetown University Law Centre entitled 'A journey from the Heart of Apartheid Darkness Towards a just Society: Salient Features of the Budding Constitutionalism and Jurisprudence of South Africa'. It was reported in the open-access law journal of the university (2012) *Georgetown Law, The Scholarly Commons*. It is also available at the official website of the Constitutional Court of South Africa.

<sup>433</sup> Act No 1 of 1999. See the *Government Gazette No 33059* dated 1 April, 2010.

<sup>434</sup> See S.38 (1) of the Act.

<sup>435</sup> Being an interview granted by Mr. Innocent Khumalo, Associate Partner, Ledwaba Mazwai & Co, Pretoria, South Africa on 28<sup>th</sup> February, 2013.



This Act gives effect to the provisions of Sections 213<sup>436</sup> and 215 to 219 of the Constitution of the Republic of South Africa. According to their combined provisions, there should be a national legislation enacted which shall among others establish the national treasury; provide for uniform treasury standards; prescribe the means and procedure of ensuring transparency and expenditure control by the government; and also to set the operational procedures for borrowing, guarantees, procurement and oversight over the various national and provincial revenue funds.<sup>437</sup>

Specifically of note is the provision of Section 76 of the Act which empowers the Treasury in making regulations and or issuing instructions to the relevant institutions to which the Act applies in the determination of a framework that is appropriate for procurement and system which is fair, equitable, transparent, competitive and cost effective. Pursuant to this provision, the Treasury has issued Regulation 16 in accordance with the power vested on it. This regulation governs PPP at the national level in South Africa.

### **5.2.3 Municipal Finance Management Act (MFMA) 2003**

The Municipal Finance Management Act<sup>438</sup> enacted in 2003 was made to ensure consistency in financial accountability for local spheres and it also provides for municipal PPPs and Treasury on feasibility. This Act provides in details for the three major tests of which PPP in South Africa is based. These are Affordability, Value for money and Risk transfer. It also provides in clarity for the PPP project cycle to be undergone by the parties to PPP contract. These are Inception, Feasibility Studies, Procurement and PPP contract management. Specifically,

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<sup>436</sup> This sector provides for the establishment of the National Revenue Fund into which all moneys received by the national government must be paid.

<sup>437</sup> See the preamble to the PFMA.

<sup>438</sup> Act No 56 of 2003.

**Section 120** of the **MFMA** provides that a municipal authority can enter into a PPP contract if it can demonstrate that the three tests mentioned above i.e. affordability, value for money and appropriate risk transfer to the private party are taken into consideration.

To ensure compliance and more accountability, the Minister of Finance in consultation with the Minister of Cooperative Governance and Traditional Affairs have by the powers conferred on them by **Sections 168 and 175** of the Act make regulations to deal effectively with the matters bothering on municipal financial misconducts. These regulations<sup>439</sup> also introduce measures to fight corruption in the public and private sectors through advocacy, strengthening the legal and policy frameworks and the proper implementation thereof.

#### **5.2.4 Treasury Regulation 16**

This regulation was issued by the National Treasury in accordance with Section 76 of the Public Finance Management Act 1999. This is the main regulation that governs PPP in South Africa. This regulation regulates the powers of the project officers and the accounting officers. It also provides for the stages in the PPP cycle; what approvals are to be obtained and also at what stage are the approval to be obtained.

#### **5.2.5 The PPP Manual**

The South Africa's PPP Manual was issued by the National Treasury as a guide for best practices for government institutions and the private parties and all PPP practitioners. There are Nine (9) different modules in the PPP manual and each of these modules is issued as a National Treasury PPP Practice Note in accordance

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<sup>439</sup> See Notice 556 of 2012.

with the Public Finance Management Act, 1999 (PFMA). This manual and the Standardized PPP provision issued by the National Treasury as Note 01 of 2004 are complementary and should be read together. National Treasury's PPP Manual mainly deals with what are expected to be done during the Project Preparation period. Different approvals including approvals I, IIA, IIB and III must be made in accordance with the provisions of the manual.

The manual is based on the past project experience of the country and also on the international best practice. It sets standards as to the risk-assessment whereby the government is required to prioritize affordable projects that are best suitable for the PPP project for quality public service delivery. Also, this manual also ensures the achievement of the black economic empowerment programme in PPPs, not only in ensuring equality and fairness in the selection and management of the private sector party, but also in subcontracting the projects so as to have local socio-economic impacts on the black people. It also stipulates what approval and at what stages to seek for these approvals.

#### **5.2.6 The Black Economic Empowerment Act 2003**

In an attempt to redress the economic effects of apartheid on the blacks in South Africa, the government has adopted a policy of Black Economic Empowerment which is designed to be broad-based, inclusive and in accordance with the objectives of overall growth and development. In accordance with the Black Economic Empowerment Act of 2003 and Section 76(4)(g) of the Public Finance Management Act, 1999 (PFMA), it is the requirement of these laws that the Special

Purpose Vehicle, (SPV) should be structured in such a way as to demonstrate the black economic empowerment.<sup>440</sup>

Specifically, the provisions relating to the code is contained in Module 2 of the National Treasury Public Private Partnership Manual, issued in compliance with Section 76(4) (g) of the PFMA 1999. This code applies to all government departments<sup>441</sup> and applies to all PPP transactions carried out in accordance with the National Treasury Regulation 16 to the PFMA. The code sets out government's policy instruments for achieving the BEE target. These are:

1. Direct black ownership of equity in the private party;
2. Black participation in the management and control;
3. Substantial subcontracting to black people and enterprises established by the blacks and
4. Local socio-economic impact of such project on the black people.

**Section 12 of the BEE Act** gives the Minister of Trade & Industry the power to publish and promote *“a transformation charter for a particular sector of the economy”* if he is satisfied that such a charter *“has been developed by major stakeholders in that sector; and advances the objectives of [the BBBEE Act].”* This Code for BEE in PPPs acknowledges the fact that the implementation of such transformation charters in the private sector will have a remarkable contribution in the economic empowerment of the blacks in South Africa, especially as PPP procurement is concerned.

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<sup>440</sup> Extract from Mr. Innocent Khumalo's interview.

<sup>441</sup> See S.10 of the BBBEE Act.

Some observations need to be made regarding the term “Black People”. It is pertinent to point out that “a black people” is “a generic term which means Africans, Coloreds’ and Indians”. This is a term capable of broad and liberal interpretation. It cannot be given a narrow and literal interpretation. This is clearly amplified by the landmark case of *CASA*<sup>442</sup> at the High Court in Pretoria in June 2008 which, *inter alia*, extended the protection of section 1 of the 2003 BEE Act to include the disadvantaged Chinese South Africans who could only be categorized as blacks because they are not whites.

Another matter of some constitutional importance may also be highlighted here. It must be emphasized that the affirmative action policy and law cannot be challenged for unconstitutionality on the ground that it causes reverse discrimination to the advantaged group despite their unpopularity. In South Africa, this is amply demonstrated by the famous case of *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others*.<sup>443</sup> Although this case is not a case of public procurement, its principle, *i.e.*, constitutional validity of affirmative action policy and law, is applicable here nevertheless. The BEE policy will be applied by the government departments and the PPP unit in two distinct phases of the PPP transaction. The first is in the appointment of a transaction advisor and the second, in the selection of a private party.

### **5.2.7 Preferential Procurement Policy Framework Act**

In accordance with **Section 217(3)** of the Constitution of South Africa which provides for a framework in the implementation of the procurement policy contemplated in section **217(2)**, the legislature has therefore enacted the

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<sup>442</sup> Acronym for “Chinese Association of South Africa”. Unfortunately this case was not reported.

<sup>443</sup> *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC).

Preferential Procurement Framework Act.<sup>444</sup> By the provision of **Section 217 (2)** of the constitution, governments and their agencies are empowered to use preferential procurement policies in order to advance and protect the interest of the blacks and coloured who were at the disadvantage end especially during the apartheid. Therefore, all state departments and agencies are required to put in place a sound policy regarding the preferential procurement and also to follow a standard procedure for procurement of goods and services. However, in adopting such a policy, the respective agencies must use a point system to ascertain whether the bids meet the contract criteria.

### **5.2.8 Prevention and Combating of Corrupt Activities Act**

South Africa has adopted a number of initiatives with the aim of combating corruption especially in the public sector.<sup>445</sup> In order to further prevent, combat, investigate and prosecute public sector corruption, the government harmonised the legislative framework on corruption and came up with the Prevention and Combating of Corrupt Activities Act.<sup>446</sup> This act provides for stringent measures to combat corruption and the establishment of a register of persons and companies convicted for corruption and thereby prevent them from benefiting from public sector procurement. Once a name of a person or enterprise is registered in the list of corrupt persons, he or she is disqualified from participating in the PPP procurement process.

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<sup>444</sup> See Act No 5 of 2000.

<sup>445</sup> One of these is the Public Service Anti-Corruption Strategy which was launched to fight bribery, embezzlement, fraud, extortion, abuse of power, conflict of interest, insider trading, favouritism and nepotism in the public service.

<sup>446</sup> See Act No 12 of 2004 vide the (Government Gazette 26311,28 April 2004).

### **5.3 Institutional Landscape**

This refers to the agencies of the government that have the right to grant or monitor the award of concession process. The main authorities that will be discussed hereunder are the government departments, PPP Unit of the National Treasury and Municipal PPP Unit.

#### **5.3.1 The National Treasury**

The National Treasury's PPP Unit which was established in the year 2000 is the most important of all the dedicated PPP units in South Africa. According to Section 215 of the South African Constitution, the National Treasury has the mandate to ensure accountability, transparency, and sound financial controls in the management of public finances. Section 76 of the Public Finance Management Act provides further that it is the duty of the National Treasury to make regulations for series of issues dealing with the effective and efficient management and use of financial resources. Some of the matters mentioned under this section are also applicable to PPPs.

Ahadzi and Bowles<sup>447</sup> posited that where there is a dedicated PPP unit which coordinates the PPP scheme, this will increase the confidence of the potential private investors. It stated thus:

*“...it is not surprising that the private sector is more concerned to see an established PPP unit within the client organization. A PPP unit suggests an experienced and able client team that has the power and authority necessary for an effective negotiation process. The absence of such a team may raise concerns about the public sector's project management*

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<sup>447</sup> Ahadzi, M and Bowles, G. 'Public-private partnerships and contract negotiations: an empirical study' (2004). Journal of Construction Management and Economics, 22(November), 967-78.

*strengths. This will be particularly pertinent where the functions of the public sector client are fragmented across a number of departments.”*

The roles of the National Treasury PPP unit can be broadly categorized into two.

These are:

1. Providing technical assistance to government departments, provinces and municipalities through project feasibility, procurement and management, and;
2. Providing National Treasury approvals during the pre-contract phases of a PPP agreement.

The PPP unit shall ensure that all PPP agreements are in compliance with the legal requirements of affordability, value for money and sufficient risk transfer<sup>448</sup> to the private sector. In addition to this, the unit shall promote an enabling environment for PPPs, facilitate certainty in the legal framework, guide public institutions in developing International best practices, provide training, drive the black economic empowerment initiative and disseminate information to the public on the activities of the unit.

The PPP unit serves as a center of knowledge and expertise and provides technical assistance to individuals and government departments during the PPP cycles. It also monitors the activities of these departments through its regulatory approval mechanism. The PPP Unit is comprised of fourteen different sectors with Seventeen professional staff.<sup>449</sup> Each of the staff is allocated projects based on their expertise and interests. These sectors are:

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<sup>448</sup>Philippe Burger The Dedicated PPP Unit Of The South African National Treasury accessed from <http://www.oecd.org/Mena/Governance/37147218.Pdf>. Accessed on 19.05.13.

<sup>449</sup> That was as at February 2012 when the researcher conducted an interview at the South African National Treasury.



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|-------------------|-----------------------------------|
| 1. Accommodation  | 8. Health                         |
| 2. Transport      | 9. Education                      |
| 3. Water          | 10. ICT                           |
| 4. Energy         | 11. Contract Management           |
| 5. Budget Support | 12. International Relations       |
| 6. Waste          | 13. Business Development          |
| 7. Tourism        | 14. Project Development Facility. |

### **5.3.2 Municipal PPP Unit**

South Africa has 284 Municipalities. The areas in which a municipality can carry out a PPP project are as listed under Parts A & B of Schedule 5 to the South African Constitution. According to Section 120 of the Municipal Finance Management Act, a municipal government may enter into a PPP arrangement only where it can demonstrate affordability, Value for Money and sufficient risk transfer. Section 120 (1) provides:

*“A municipality may enter into a public-private partnership agreement, but only if the municipality can demonstrate that the agreement will—*

- (a) Provide value for money to the municipality;*
- (b) Be affordable for the municipality; and*
- (c) Transfer appropriate technical, operational and financial risk to the private party.”*

Like the National Treasury, municipal PPP unit acts as a regulatory agency for the municipality and works independently from the government department which is desirous of implementing PPP. It ensures that the principles of affordability, value for money and risk transfer are complied with before the final ratification of a PPP agreement. The unit also provides technical assistance to government departments

during the PPP project cycle and monitors the department and agencies during the entire process.

### **5.3.3 Government Departments and Institutions**

This refers to the state departments and other institutions that can grant concessions. Regulation 16 defines an institution as

*“Institution” means a department, a constitutional institution, a public entity listed, or required to be listed in Schedules 3A, 3B, 3C and 3D to the Act, or any subsidiary of any such public entity.”*

Institutions therefore includes state departments, provincial entities, public entities and other government business enterprises listed in Schedules 3A, 3B, 3C, and 3D of the Public Finance Management Act. It is only government department and institutions that are vested with the powers to grant concession contracts. S.44 of the constitution gives the parliament the power to legislate on some matters listed in Schedules 4 and 5 of the constitution. These matters include airport, housing, public transport, public works and many others listed in the schedule.

Also, Section 104 of the constitution confers legislative competence on the provinces with respect to certain matters which they can legislate. These matters include provincial roads, provincial parks, facilities for accommodation, public transportation and other numerous items listed thereunder.

In essence, before an institution can grant concession contract, it has to first consider whether it is one in which it is only the national government that has power to grant concessions in respect of, or whether it is an area where the two governments have concurrent powers to legislate on. Therefore, the powers of the institutions must be exercised in accordance with the law.

#### **5.4 The Private Sector Proponent**

The National Treasury PPP Manual defines a private party in a PPP arrangement in terms of what is not. Therefore, a private party excludes a public institution or department of government involved in the PPP agreement to which the Act applies. They also neither include municipal entities, nor the accounting officer or other persons nor bodies acting for and on behalf of either the National Treasury, not any of the municipalities. Also, entities that are not out to make profit are also included in the definition of a private party so long as they can demonstrate that they have the capacity to carry out substantial financial, technical and operational risk in a PPP project.

The Standardized PPP provision which was issued by the National Treasury defines a Private Party (as defined by Regulation 16 issued by the National Treasury) as a special Purpose vehicle (SPV) which is incorporated to carry on a business in South Africa in accordance with the laws governing private company for the sole purpose of performing his rights and obligations under the PPP contract. All privately-owned firms seeking to participate in the contract award process must not have been found guilty for any crime related offences, or declared insolvent by any court of law, or blacklisted by their respective professional bodies or the Office of the Tender's Board and its successor (The Tender's Board was scrapped in 2004).

In addition to the above stated qualities of a private partner, Module 5 of the PPP Manual states the necessary information/questions which are required from a private partner and which must be in the affirmative before the contract can be awarded to the private proponent.<sup>450</sup> These are:

1. What is the consortium capability and strength of the party?
2. What does the proposed consortium composition and structure with their roles look like?
3. It is important to know the previous experience and skills of relevant bodies and subcontractors in projects that are similar to the one under consideration.
4. The genuineness of the agreements among the lenders, consortium members and subcontractors (if any)?
5. What is the financial and market standing of the consortium?
6. Directorship, equity and ownership of the business is also important criteria.
7. Does the party have the ability to fulfill the objectives of the Black Economic Empowerment and other socio-economic objectives?
8. Does the company have the capacity to deliver in the project?
9. Commitment of the company and the capacity to meet project timeline is also very important.
10. Does the company have the ability to raise debt and equity and to provide security for same?
11. Does the company have the competence to management the project?
12. Does the company also have the competence to manage the risk associated with PPP projects?

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<sup>450</sup> Module 5 of the South African PPP Manual. Accessed from <http://www.ppp.gov.za/Legal%20Aspects/PPP%20Manual/Module%2005.pdf>, on 5<sup>th</sup> May, 2013.

13. The company should demonstrate an understanding of key project complexities associated with PPP projects.

14. Whether the company has a previous relationship with the government or not? And

15. What are the Quality assurance systems that have been put in place?

All these are information/questions which the company/private sector must supply in the affirmative before the contract can be awarded to the company.

## **5.5 Key Principles in the South African PPP Regulatory Systems**

There are important principles that are applicable in the South African PPP regulatory systems. These principles help in the proper implementation of the actual objectives of PPPs. These are:

### **5.5.1 Equity, Fairness and Publication in Procurement**

The Constitution, National Treasury Regulation and other relevant legislations set out the procurement procedures in South Africa. This regime also applies to PPP transactions. The requirement for a system that is 'fair and equitable' in Section 217(1) of the constitution can be construed as requiring the adoption of a system that is fair without unjustifiable preferences and discrimination.<sup>451</sup>

Furthermore, Section 33(1) of the Constitution gives every person<sup>452</sup> the rights to fair administrative action that is lawful, reasonable and procedurally fair. This section states as follows:

*“(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*

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<sup>451</sup> See Sope Williams Elegbe, *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification Measures*, (UK, Hart Publishing, 2012). Pg 85.

<sup>452</sup> This may either be natural or juristic person. The latter will include a company or corporation or any commercial entity set up to operate a business enterprise.

*(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.*

*(3) National legislation must be enacted to give effect to these rights, and must -*

*(a) Provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*

*(b) Impose a duty on the state to give effect to the rights in Subsections (1) and (2); and*

*(d) Promote an efficient administration.”*

Sub-section (1) of Section 33 in particular is discussed here. It provides for reasonableness, lawfulness and procedural fairness in all dealings or transactions with the government or any of its departments or agencies. Procedural fairness relates to the principles of fairness going far beyond the common law principles of *audi alteram partem* and *nemo iudex in causa sua*.<sup>453</sup> Therefore, where a person's right to administrative justice has been adversely affected, such a person has a right to be given written reasons.<sup>454</sup> These reasons must be adequate, relevant, and cogent and must relate to the administrative action under scrutiny. The provisions on the right to be given written reasons are arguably meant to promote a more transparent, public-participatory, democratic and efficient administration. On the other hand, reasonableness relates to the substantive aspect of the *ultra vires* doctrine, by which a court is afforded the opportunity to investigate the justification of administrative actions. This fundamental right to just administrative action is evolving rapidly since the enactment and application of the Promotion of Administrative Justice Act 2000 (PAJA).

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<sup>453</sup> See the provisions of Sections 3 and 4 of PAJA 2000 and also the rules and regulations made under PAJA.

<sup>454</sup> See the provisions of s 5 of the PAJA.

The purpose of administrative justice among others include ensuring good governance in administration, ensuring fair dealings in administrative context, enhancing protection of the individual rights against abuse of state power, promoting public participation in decision-making, and strengthening the notion that public officials and governmental bodies are answerable and accountable to the public they are meant to serve.<sup>455</sup>

This<sup>456</sup> has been identified, developed and showcased by the Constitutional Court of South Africa and it has become a rich source and the new hallmarks of the country's administrative law going far beyond *Wednesbury* review. The right to just administrative action applies to all exercises of public power, and its contents generally include the concepts of lawfulness, rationality, procedural fairness and even the giving of reasons by administrators.<sup>457</sup> The three grounds of judicial review under Section 33 of the Constitution and the laws enacted thereunder apply equally to public procurement inclusive of PPPs. Each ground may operate independently and separately.<sup>458</sup>

The Promotion of Administrative Justice Act, 2000 (PAJA), imposes obligations on public authorities while discharging their administrative duties. For an administrative action to qualify as just, as required under the Act, it must satisfy the requirements of lawfulness,<sup>459</sup> reasonableness<sup>460</sup> and procedural fairness.<sup>461</sup> By

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<sup>455</sup> L.J. Kotze, The Application Of Just Administrative Action In The South African Environmental Governance Sphere: An Analysis Of Some Contemporary Thoughts And Recent Jurisprudence.

<sup>456</sup> The right to just administrative action.

<sup>457</sup> See *Masetlha v. President of the Republic of South Africa* 2008 (1) SA 566(CC), para78.

See LJ Kotze The Application of Just Administrative Action In The South African Environmental Governance Sphere: An Analysis of Some Contemporary Thoughts and Recent Jurisprudence. PER/PELJ 2004(7)2. Retrieved from [http://www.nwu.ac.za/webfm\\_send/11778](http://www.nwu.ac.za/webfm_send/11778). (Last accessed on 3<sup>rd</sup> May, 2013).

<sup>459</sup> The concept of lawfulness of administrative action has to be interpreted in compliance with the provisions of the *Constitution*, other enabling legislations and with the rules of common law.

<sup>460</sup> In the popular case of *Pharmaceutical Manufacturers Association of SA In Re: Ex parte Application of President of SA 2000 3 BCLR 241 (CC) para 85*. The South African Constitutional Court held that rationality or reasonableness is now the minimum threshold for the exercising all public powers. Therefore, administrative actions should be justifiable and reasonable.

Section 33 of the Constitution and the provisions of PAJA, any citizen who is aggrieved by an exercise of administrative action can apply to the court for judicial review. There is the right of access to the courts in section 34 of the constitution for whoever feels that his or her rights has been violated or is likely to be violated by an exercise of administrative action.

In affirming the application of the provisions of PAJA to administrative actions, the Constitutional court held in the case of *Minister of Health & another VS New Clicks South Africa (Pty) Ltd & Ors*<sup>462</sup> thus:

*“PAJA is the national legislation that was passed to give effect to the rights contained in section 33. It was clearly intended to be, and in substance is, a codification of rights. It was required to cover the field and purports to do so. A litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on section 33(1) of the Constitution or the common law. That would defeat the purpose of the Constitution in requiring the rights contained in section 33 to be given effect by means of national legislation.”*

In *Leon Joseph & others V. City of Johannesburg & others*<sup>463</sup> the Constitutional Court held that the provision of the Promotion of Administrative Justice Act 3 of 2000, require that government agencies and institutions must afford all citizens a procedure that is reasonable and fair before taking a decision that will materially and adversely affect their rights.

It follows, therefore, that all administrative actions or decisions taken in a PPP procurement process must comply with the mandatory criteria set out and prescribed by law. There should be openness, responsiveness and accountability in

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<sup>461</sup> Procedural fairness has to do with the observance of the rules of natural justice, which are aimed at achieving a minimum standard for fair administrative hearings and inquiries. They ensure that the administrative body/administrator applies its mind to the matter by adhering to certain procedural requirements, by acting fairly, and by giving the individual an opportunity to be heard.

<sup>462</sup> (2006) 2 SA 311 (CC) Para 95-96.

<sup>463</sup> In *Leon Joseph & others V. City of Johannesburg & others* CCT 43/09.



the decision-making process by all the governmental institutions. All bidders at every stage of the procurement process must be given an equal opportunity to compete and bid for the contract. In addition, beyond Section 33, the government, department and/or institution shall not take any action which is capable of prejudicing their competitiveness and all treasury approvals must be sought and obtained at the relevant stage of the procurement.

Therefore, the conduct of the officials of government departments and agencies could be challenged in a court of law by any citizen who feels aggrieved with the action of such public officer. Reverting to the case of *New Clicks*, it is better to argue and emphasise that PAJA is the default law applicable for purposes of judicial review. Reliance on either Section 33 or common law is permissible albeit rarely in the event of a lacuna in PAJA.<sup>464</sup>

In addition, the right of access to information is protected under the South African Constitution,<sup>465</sup> the Promotion of Access to Information Act (PAIA),<sup>466</sup> Standardized Public Private Partnership Provisions<sup>467</sup> and the Public Private Partnership manual.<sup>468</sup> The PAIA was enacted in response to a corresponding section in the Bill of Right. The Preamble to the Act gave a backdrop upon which the law was passed. It states:

*"The system of government in South Africa before 27 April 1994 ... resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations"*

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<sup>464</sup> *Pharmaceutical Manufacturers Association of South Africa: In Re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241.

<sup>465</sup> See s 32, which provides for the right of access to information held by the state, and by any other person (including private bodies), where the information is necessary for the protection of any rights. The right also makes provision for legislation (PAIA) to be passed to give effect to the constitutional right.

<sup>466</sup> Act No 2 of 2000.

<sup>467</sup> See generally Clause 95 of the Standardized Provision.

<sup>468</sup> All these legislations contain separate provisions on the right of access to information.

Section 32 of the constitution provides:

*“Everyone has the right to have access to;*  
*(1) Information which the government has; and*  
*(2) Information that someone else has if they need to protect any of their*  
*rights.”*

This constitutional right is rooted on the need to promote human rights by giving individuals the right to access to information that are necessary for protecting their rights, promotion of a human rights culture and ensuring social justice. The Act further seeks to foster a culture of transparency, accountability, and the efficient governance of public and private bodies.<sup>469</sup> Therefore under the constitution, information that a person may have access to is not only limited to the information that is within the domains of government, but rather extends to such information from an individual or a private body or entity, provided that that information is needed in order to protect the person’s right.

The Promotion of Access to Information Act sets out the detail procedure and processes through which such information may be accessed.<sup>470</sup> The Act provides that where the person or agency of the government refuses the request for information, “adequate reasons must be given.”<sup>471</sup> In ***Brümmer v Minister for Social Development and Others***,<sup>472</sup> The Constitutional Court explained the importance of the constitutional right of access to information thus:

*“The importance of this right . . . in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give*

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<sup>469</sup>See s 9(e), which gives the following as part of the PAIA’s objects, i.e. “...generally, to promote transparency, accountability and effective governance of all public and private bodies...”

<sup>470</sup> See S. 9 of the Act.

<sup>471</sup> See S. 25(3)(a), P AIA No 2 of 2000.

<sup>472</sup> [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC).

*effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency 'must be fostered by providing the public with timely, accessible and accurate information'.*

*Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas. . . . Access to information is crucial to accurate reporting and thus to imparting accurate information to the public.”*

See also the case of ***President of the Republic of South Africa & Ors V. M &G Media Limited***<sup>473</sup> where the Constitutional Court held that the constitutional guarantee of the right of access to information held by the state gives effect to openness, responsiveness and accountability as founding values of South Africa’s democracy.

The Standardized PPP Provisions and the PPP Manual lend credence to the constitutional access to information. These provisions gave an elaboration on the application of information disclosure and treatment of confidential information in PPP contracts.<sup>474</sup> The standardized provision also categorically states the obligation on the part of the private entities to make available any information that is required. However, in cases of sensitive commercial information, little information can be withheld due to public reasons.<sup>475</sup>

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<sup>473</sup> President of the Republic of South Africa & Ors V. M &G Media Limited CCT 03/11 [2011] ZACC 32.

<sup>474</sup> See Disclosure of Project and Contract Information in Public-Private Partnership Contracts. The World Bank Institute 2013. Accessed from <http://wbi.worldbank.org/wbi/Data/wbi/wbicms/files/drupal-acquia/wbi/Disclosure%20of%20Project%20PPP.pdf> on 11.17.13.

<sup>475</sup> See Clause 95.1, of the Standardized PPP Provisions.

### 5.5.2 Transparency, Competition and Cost Effectiveness

Section 217(1) of the Constitution<sup>476</sup> also requires that the procurement system should be 'transparent'. Transparency has been interpreted as requiring publicised contracts; rule-based decision making and opportunities for verification and enforcement; and disclosure of the rules governing procurement in general and governing specific procurements.<sup>477</sup> It was posited that the constitutional provisions on transparency were necessitated as a response to the culture of secrecy in the apartheid era, which was adopted in restricting the access of blacks to economic opportunities.<sup>478</sup>

It must be made clear that procurement process which includes the PPP procurement of goods or services must be carried out in a manner that is fair, transparent and cost effective. These basic requirements must be complied with by all organs of government in the procurement processes. In so far as they impact on the rights and interests of private persons or bodies adversely, recourse may be had to the laws infringed and appropriate remedial relief may accrue.

The principles of competition and cost-effectiveness which were entrenched in S.217(1) of the Constitution complement each other. Competition entails that a sufficient number of bidders are invited to bid for the available PPP contracts, ensuring that government does not pay uncompetitive prices. Competition in procurements will definitely support the anti-corruption efforts, this is because, if only the qualified and most economically viable bidders have access to available contracts, this will reduce the number and scope of corruption-induced awards and

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<sup>476</sup> See the 1996 Constitution, Act No 108.

<sup>477</sup> Sue Arrowsmith, "Towards a Multilateral Agreement on Transparency in Government Procurement" (1998) 47 (4) I. C. L. Q. 793,796.

<sup>478</sup> Watermeyer, "Transparency within the South African public procurement system" in Hoekman (ed.) Unpacking Transparency in Government Procurement (2004), 173.

remove the restrictions to participation created against non-corrupt bidders. Cost-effectiveness on the other hand can be construed to mean an obligation to obtain value for money for the project. This suggests that the procuring agencies should seek to get the best bargain and the most advantageous contractual terms.<sup>479</sup>

Also, Public-Private Partnerships procurement is subject to the Competition Act, 1998.<sup>480</sup> This Act seeks to encourage competition in the bidding process especially in PPP procurement in order to promote economic development, efficiency and an efficient functioning economy. Also, among the intendment of the Competition Act is to open the economy to a greater number of South Africans by encouraging sound competitive trade practices and eradicating restraints on the full and free participation in the economy. Specifically, Section 81 of the Act provides that the Act binds the state.

Furthermore, Treasury Regulation 16.5.3 (a) provides that all procurements including PPP procurement must be carried out with a principle that is fair, equitable, transparent, competitive and cost effective. This provision is in line with the constitutional provision relating to transparency, fairness and accountability especially in S.217 of the Constitution. In addition, under Regulation 16.5 issued by the National Treasury and the PPP Manual, a PPP unit is vested with the power of exercising quality control by certifying specific Treasury approvals at the different stages of PPP from inception to procurement.

For example, Treasury Regulation 16.5.4 states thus;

*“after the evaluation of bids but prior to appointing the preferred bidder, the institution must submit a report for approval by the relevant treasury*

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<sup>479</sup> See Sope Williams Elegbe, Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification Measures.

<sup>480</sup> As Amended by the Competition Amended Act, No 35 of 1999.

*demonstrating how the criteria of affordability, value for money, and substantial technical and operational and financial transfer were applied in the evaluation of the bids demonstrating how the criteria were transferred in the preferred bid.”*

All these point to the fact that the law requires the relevant institutions and bodies concerned to substantially conform to the legal requirements of fairness, transparency and accountability in the procurement process. Also, the PPP Manual provides for the signing of an anticorruption policy and the calling for forensic audits if fraud or corruption is suspected.

### **5.5.3 Rules on Confidentiality in PPP Contracts**

The general rule is that all information relating to the PPP Agreement should be made public.<sup>481</sup> However, that information that is considered to be commercially sensitive should be held confidential and protected from public access.<sup>482</sup> Where parties intend to hold information confidential, such a clause must be in the PPP Agreement.

It should be pointed out here that the Promotion of Access to Information Act, 2000 provides that both public and the Private Parties are obliged to make available any information relating to the agreement at their disposal. The Act however allows some information, including commercially sensitive information, to be protected from public domain. Parties to a PPP Agreement may sometimes want to oblige each other to protect the confidentiality of some information which has been imposed by either of the parties; however, such provisions cannot override the

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<sup>481</sup> S. 3 of the Promotion of Access to Information Act No 2 of 2000.

<sup>482</sup> See generally, S.36 (1) of the Promotion of Access to Information Act 2000.

provision of the Promotion of Access to Information Act with respect to the obligations of the parties.

Parties to the PPP Agreement should therefore define from inception, what information are regarded as confidential so that they do not extend confidentiality to those information that do not warrant protection. The test to be adopted in deciding whether certain information should be held confidential or not should be whether the disclosure of such an information would prejudice both legal and commercial interests of either of the parties.

Where certain information regarded as confidential is disclosed to a third party in any way due to no fault of either of the parties to the PPP Agreement that should not be held to be a breach of obligations and therefore would not attract any penalty. Parties should not be prevented or restricted from complying with the requirements regarding publicity imposed by some statutory bodies like the Securities and Exchange Commission or other regulators, merely because to that party, such information is confidential.

## **5.6 The PPP Project Cycle**

The PPP project cycle connotes the processes, procedures, procurement methods and approvals which a PPP project must go through from inception to contract management stage. These phases are important in order to guarantee a PPP procurement process that is transparent and cost effective. These are diagrammatically illustrated in Appendix C and D respectively while the list of Projects at the national level signed in terms of Regulation 16 are attached

Basically from the above diagrams, there are four stages in the cycle. These are:

- A. Inception
- B. Feasibility Study,
- C. Procurement and
- D. Contract Management

### **5.6.1 Inception**

In accordance with the provisions of Regulation 16.3 of the Public Finance Management Act, once an institution identifies a project that is suitable for PPP, the accounting officer shall register such project with the relevant treasury. Then such officer shall inform the treasury of such proposed project and then appoint an officer within or outside the institution who shall be in charge of the project and then at the request of the relevant treasury, appoint a transaction advisor. Those persons whose roles are vital in the preparation, monitoring and implementation of the project are:

1. The Accounting Officer
2. The Project Officer
3. The Project Team and
4. The Consultant/ Transaction Advisor

#### **5.6.1.1 The Accounting Officer**

The accounting officer has enormous responsibilities by ensuring that the project is properly executed. Throughout the life cycle of the project, he must provide the direction and vision and ensures that the processes and procedures adopted are consistent with the regulations governing it. The success and failure of such projects depend on his competence as to the management and general supervision.



He also appoints and receives reports from the project officer and provides strategic directions on the manner he carries out his work.

#### **5.6.1.2 The Project Officer**

A project officer is defined in **Regulation 16.1** as a person identified by the accounting officer or an institution that is capable of managing a PPP project from inception to conclusion. The project officer has to be appointed immediately the PPP project is identified and before it is registered. He has a duty to ensure that the project is completed on time, conforms with the budget and in accordance with the standards set by the treasury. He must identify for each of the phases and the required expertise and management expertise. He manages the project from planning to procurement and to the implementation stage. He also works closely with the consultant/ transaction adviser and approves payment in accordance to the budget set by the treasury. The project adviser must be an honest person and he must have the commitment to achieve best in the interest of the public. He must make decisions that will promote and protect the interest of the public at large.

#### **5.6.1.3 The Project Team**

The project team helps in formulating policies and facilitates management and political support. It also helps in communicating the progress of the project to the public whenever it is necessary. It is also part of its duties to oversee how monies are being spent on the project. The project team is headed by the project officer. The project officer should manage and coordinate the team members in accordance with the best practice.

Due to the fact that the project has to be in phases and stages, the project officer being aware of this should appoint people who have the expertise and knowledge to supervise the project from inception to the end.

#### **5.6.1.4 Consultant/Transaction Advisor**

Where an institution does not have an officer who can prepare or draft an appropriate strategic plan or who can prepare the feasibility studies, then such an institution should appoint a consultant or transaction advisor who will provide defined inputs into each of the phases where such inputs are required from inception to the end of the procurement stage. However, where the institution is satisfied that it has the capacity, skills and experience within it, there will not be any need to appoint any consultant or advisor.

#### **5.6.2 Feasibility Studies**

This is the Second phase of the PPP Procurement cycle in South Africa. The main essence of the feasibility studies is to demonstrate affordability and promptly show how value for money can be achieved through the transfer of risks to the private sector. It will show a comparative advantage in terms of operational and strategic benefits in undertaking the PPP project. It also describes the specific functions and the deliverables expected and the appropriate form in which the public authority should adopt in the implementation of the PPP project.

Mr Innocent Khumalo stated further that:

*“part of the essence of feasibility studies is to identify whether there are contradictory laws which can be picked up and at that stage, solutions can be proposed to it and to critically examine which government department has the right to grant the concession and also to know if there is a need to amend, to propose the amendment of some provisions and where they are insufficient for example, provisions can be made to supplement them. If a*

*need arises to cater for whatever risks relating to the project, that will be done at the feasibility study stage”.*

Feasibility studies comprises of the following key sections. These can be categorized under the followings:

1. Sector needs assessment;
2. Output specification;
3. Options analysis;
4. Construction of the Public Sector Comparator (PSC);
5. Demonstration of affordability; and
6. Preparation of a benchmark for value for money.

The report of the study will later be submitted to the PPP Unit for assessment to ensure whether it conforms to the principles of affordability, value for money and risk transfer. Thereafter, the recommendation based on its assessment shall then be submitted to the Financial Secretary. Also, at the feasibility stage, the Ministry of Finance must approve the budget set for the project and also gives government guarantees where it is required.

### **5.6.3 The Procurement Phase**

This is the Third stage in the PPP project cycle. There are five different stages under this procurement stage. These stages are: Prequalification; Request for Proposals; Best and Final Offer, where appropriate; Negotiations and Final Closure. The officers responsible are required to prepare bid documents including draft PPP agreement in accordance with the PFMA. Treasury Regulation 16 gives the accounting officer the responsibility of designing and managing the procurement process in such a way as to conform to the regulation’s requirements.

This implies that the module is not prescriptive, but rather lays a foundation for best practice as it has been developed in National Treasury-regulated PPPs. Due to the fact that PPP is still new in South Africa, it is expected that as new projects are being executed, the procurement process will further be refined to bring it in line with the best practices. In this phase, there are Three (3) approvals required. These are TA: IIA; TA: IIB and TA: III.

### **16.5 Procurement – Treasury approvals: IIA and IIB**

*16.5.1 Prior to the issuing of any procurement documentation for a PPP to any prospective bidders, the institution must obtain approval from the relevant treasury for the procurement documentation, including the draft PPP agreement.*

*16.5.2 The treasury approval referred to in regulation 16.5.1 shall be regarded as Treasury Approval: IIA.*

*16.5.3 The procurement procedure –*

*(a) Must be in accordance with a system that is fair, equitable, transparent, competitive and cost-effective; and*

*(b) Must include a preference for the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination in compliance with relevant legislation.*

*16.5.4 After the evaluation of the bids, but prior to appointing the preferred bidder, the institution must submit a report for approval by the relevant treasury, demonstrating how the criteria of affordability, value for money and substantial technical, operational and financial risk transfer were applied in the evaluation of the bids, demonstrating how these criteria were satisfied in the preferred bid and including any other information as required by the relevant treasury.*

*16.5.5 The treasury approval referred to in regulation 16.5.4 shall be regarded as Treasury Approval: IIB.*

### **16.6 Contracting PPP agreements – Treasury Approval: III**

*16.6.1 After the procurement procedure has been concluded but before the accounting officer or accounting authority of an institution concludes a*

*PPP agreement, that accounting officer or accounting authority must obtain approval from the relevant treasury –*

*(a) that the PPP agreement meets the requirements of affordability, value for money and substantial technical, operational and financial risk transfer as approved in terms of regulation 16.4.2 or as revised in terms of regulation 16.4.4;*

*(b) for a management plan that explains the capacity of the institution, and its proposed mechanisms and procedures, to effectively implement, manage, enforce, monitor and report on the PPP; and*

*(c) that a satisfactory due diligence including a legal due diligence has been completed in respect of the accounting officer's or accounting authority and the proposed private party in relation to matters of their respective competence and capacity to enter into the PPP agreement.*

*16.6.2 The treasury approval referred to in regulation 16.6.1 shall be referred to as Treasury Approval: III.*

Before the issuance of any document to any bidder in this stage, the treasury's approval termed '**Treasury Approval: IIA**' must first be sought and obtained. The relevant officer must issue and advertise a request for proposal with draft PPP agreement, he then receives and compares the bids submitted whether they are in line with the terms of the advert requesting for proposals. He would thereafter select among the bidders the preferred bidder and then prepares a value assessment report. The procedure of procurement must be such that is transparent, fair, equitable, competitive and cost effective. Also, preference should also be given to persons who are disadvantaged as a result of unfair discrimination against them and the relevant treasury shall comply with all laws that seek to protect and promote the advancement of such persons.

Immediately after the submission and evaluation of all bids, but prior to the selection of the preferred bidder, the concerned authority must submit a detailed report showing how the criteria of value for money, affordability and transfer of

risk to the private sector were applied in the bid evaluation process and stating any other information required by the treasury. Then once the treasury is satisfied that all the required steps have been taken and necessary information supplied, then the second approval termed **Treasury Approval IIB** shall then be granted.<sup>483</sup>

After the procurement procedure and where the accounting authority has complied with all the requisite requirements as to affordability, value for money and transfer of risks, but before the conclusion of the PPP agreement, then the accounting authority shall apply for approval from the relevant treasury. It must also be shown that a due diligence including a legal due diligence has been carried out in respect of the project and also the parties involved in relation to their competencies to carry out the PPP project. This approval is what is termed Treasury **Approval III**.<sup>484</sup>

It should be stressed that this procurement stage is very cardinal to the entire PPP project cycle because the success or failure of the PPP project will largely depend on the extent at which the relevant accounting officer or the accounting institution as well as the private party complied with the appropriate laws and regulations governing PPP. The bidding process should be conducted in accordance with the laws and international best practices.

#### **5.6.4 Contract Management Phase**

This is the last stage of the PPP Cycle. This stage spans through the procurement, development, delivery and exit stages. Therefore, contract management is applicable to commencement, contract signing, and service delivery and through to

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<sup>483</sup> This is in compliance with Regulation 16.5.4.

<sup>484</sup>See Regulation 16.6.2.

the exit of the private sector partner. It touches on virtually all the stages in the PPP cycle. During this stage, accounting officer will be responsible for PPP contract Management Measure outputs, monitor and regulate performance, liaise effectively with the government and other necessary parties and settle disputes (if any).

## **5.7 The Concession Award Process**

This is one of the stages in the PPP Cycle discussed above (Procurement Phase). It centers on the award process which is very germane and needs further elaboration. Module 5 of the PPP Manual issued by the National Treasury expatiates on how to go through the stages in PPP procurement and getting the required approvals and documentations at the necessary stages. **National Treasury Regulation 16.5 (1), (2) and (3)** are more detailed and explicit on the stages and approvals to be obtained. It is expedient to state that the institution concerned must comply with all the requirements of this and other legislations governing the award process. The regulation provides

*16.5.1 Prior to the issuing of any procurement documentation for a PPP to any prospective bidders, the institution must obtain approval from the relevant treasury for the procurement documentation, including the draft PPP agreement.*

*16.5.2 The treasury approval referred to in regulation 16.5.1 shall be regarded as Treasury Approval: IIA.*

*16.5.3 The procurement procedure –*

*(a) Must be in accordance with a system that is fair, equitable, transparent, Competitive and cost-effective; and*

*(b) Must include a preference for the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination in compliance with relevant legislation.*

*16.5.4 After the evaluation of the bids, but prior to appointing the preferred bidder,*

*The institution must submit a report for approval by the relevant treasury, demonstrating how the criteria of affordability, value for money and substantial technical, operational and financial risk transfer were applied in the evaluation of the bids, demonstrating how these criteria were satisfied in the preferred bid and including any other information as required by the relevant treasury.*

*16.5.5 The treasury approval referred to in regulation 16.5.4 shall be regarded as*

*Treasury Approval: IIB.*

It is important to state here that the procurement phases of the PPP go through distinct stages which are follows;

1. Pre-qualification
2. Request for Proposals
3. Best and Final Offer
4. Negotiations and
5. Financial Close

### **5.7.1 Pre-qualification**

In order to reduce the total number of private parties in the PPP procurement process, the National Treasury through the Manual provides for what is called Pre-qualification exercise. This is the first part of the PPP procurement process. It is a very important part of the PPP procurement process and it must be carried out in accordance with the applicable procurement legislations, regulations and best practice.

The objectives of this stage among others are:

1. To select a limited number of bidders who will be qualified financially, technically and who have sufficient skills and commitments to execute the



project. There should also be the will to meet the objectives of the Black Economic Empowerment policy.

2. This stage will also afford the bidders the opportunity of knowing the rules and regulations applicable in to the procurement process.
3. All vital information about the project circle will be disseminated at this stage.
4. It will also give the participants the opportunity of knowing what skills and qualities are expected from the private party in the procurement process.
5. It will afford the PPP Unit and other government departments to gather verifiable information from the private party which can be evaluated and which may enhance a more efficient and effective PPP process.

It is only the pre-qualified bidders that would be allowed to enter the Request for Proposal (RFP) stage. Other critical issues to be considered at this stage include the requirements of the parties who are eligible to participate in the bidding process; the bid bond; the number of prequalified bidders which is mostly kept to a minimum of three and maximum of four persons; the Black Economic Empowerment policies and whether there is any conflict of interest.

The following approvals must be obtained at this stage;

- a. The accounting officer or authority, who is the officer responsible for the implementation of the institution's procurement policy under the PFMA must give an approval to the project.
- b. The mandatory Treasury Approval (TA:IIA) must be obtained from the National Treasury at this stage.
- c. Such other approvals that may be required by specific institutions.

### **5.7.2 Request for Proposals (RFP)**

The next stage is for the institution to call for proposals from the private sector. This is done through publication of same in the institution's website and the media. The Request for Proposal (RFP) must provide information about the background to the project, the expected outcome and the time limit within which the project must be completed. It will set out the way and manner the procurement will be carried out and what should be done at what stage. It will also set out the laws, rules and regulations governing procurement, with the minimum requirement of compliance with the regulations. The processes must be described in details, including the processes and procedure for securing approvals and consents from the National Treasury.

It also sets out the standard specifications for the project, the commitments required from the bidders, the payment mechanism and penalty for non-compliance, the bid evaluation criteria and lastly the legal requirements for the PPP processes.

### **5.7.3 Best and Final Offer**

After the submission of bids, the bids have to be evaluated resulting in the selection of a preferred and reserved bidder. The evaluation process must be known to all the bidders and must comply with the relevant legislations and regulations governing it. The evaluation teams and committees will be appointed and all declarations and codes must be signed. The provisions of the Promotion of administrative Justice Act (PAJA) and the BEE Code must be specifically adhered to.

At this stage, the accounting officer or authority must submit to the treasury, the report of the value-for-money with an application for the approval of TA: IIB. It is only when this approval has been granted that the preferred and reserve bidders will be announced and thereafter, negotiations will commence with the preferred bidder. The preferred and the reserve bidders would then be required to accept the appointment and extend their bid bonds as a commitment to the process. The institution may replace the preferred bidder with the reserve bidder where he withdraws or negotiation fails.

#### **5.7.4 Negotiation**

After the preferred bidder and the reserved bidder have been chosen, the next stage is the negotiation stage. This is an important part of the procurement process. It is a process and not an event. Negotiation is important it bridges gaps that may be created in a contract; it helps in eliminating confusion, and assists in formal clarification of the terms and conditions of the agreement. It also helps in structuring a sound and durable agreement which will protect the interests of the parties thereto.

Where the negotiation is successful, it culminates into the award of contract thereby ending the procurement process. Both the institution and the private sector party go to the negotiation table with different motives. The institution and the private party have different perspectives on the negotiations stage. The institution will want to reduce the cost and maximize the value of the services to be provided through the partnership, while the private sector will be soliciting for a reduction in the risk and an increment in the margins. The negotiation should culminate in a

clear PPP agreement which will encompass all other ancillary agreements which are vital to the successful delivery of the PPP project.

#### **5.7.4.1 Basic Principles of Successful Negotiations**

The Manual has also laid down the basic principles which should guide a party to a successful PPP negotiation. Although, these principles are not exhaustive, but strict observance to them will help to achieving a successful negotiation. These are;

- a. The negotiating party should focus on interests and not on positions.
- b. He must as much as possible separate the people from the problem.
- c. He must do his homework and map out what he really wants from the negotiation. In fact, he should have prepared designed a detailed negotiation plan. This will allow him to make a pre-define positions and a fall back in case he does not have his way through.
- d. He should be fair in his dealings in order to build confidence.
- e. He should listen actively to the submissions of other parties.
- f. He should respect the other party's priorities and in some cases be prepared to compromise his position.
- g. He should not be in a hurry or be under pressure to take a decision at any given time.
- h. He should never have the notion that monopoly of decision is only for the preferred bidder.
- i. He should never be emotional and over reactive to whatever the other party says.

### **5.7.5 Contract Close**

The final selection of a private party signals the end of the complex procurement process and the beginning of new phase which requires distinct levels of institutional capability. The actual PPP agreement will have to be drawn at this stage. The project officer must ensure that adequate time and resources are devoted to the preparation of the agreement. It is always better that the preferred bidder is closely involved in the development of the PPP agreement because his involvement will help in building good working relationship between the parties.

In addition, a legal document covering the legal opinion, legal due diligence, capacity and competence of the parties to enter into a PPP agreement must be signed by the project advisor. This is essential in ascertaining that both parties have complied with the requirements of a valid PPP agreement. Some of the contents of the legal opinion are;

1. That the project falls within the PPP project under the Act;
2. That all the required approvals from the treasury have been obtained;
3. That the process of procurement complies fully with the relevant regulations and regulations;
4. That all future guarantees and financial commitments have been authorized;
5. That the relevant institution, by law, has the capacity to enter into such PPP agreement; and
6. That the authorized signatory has the competence to enter into such PPP agreement on behalf of that institution.

### **5.7.5.1 Getting the TA: III Approval**

Also during this stage, the Project Officer will apply for the approval of TA: III. This application presupposes a continuation of value for money report and also sets out the total negotiated cost for the project and the contingent liabilities which the institution has incurred. It also sets out in details, the institution's plans to manage the PPP agreement and establishes the legal due diligence conducted on the competence of the parties to enter the PPP agreement.

## **5.8 Duration of Concession Agreement**

The PPP Agreement must specify the duration of the concession agreement. There is a difference between the gestation period and the service period. The gestation period is the period between the signing of the contract to the day the project is completed. While service period is the period within which the project is put into operation.

The Standardized PPP provision No 2 of 2004 laid down what to be considered in the choice of duration for the concession agreement as follows:

1. The requirements of the contracting authority in relation to the Services;
2. The possibility of alternative uses of the Project Assets;
3. Affordability of the Services to be provided in the light of the institution's anticipated future budgetary allocations. Also, the economic usefulness of the Project is also to be considered. The general principle is that a PPP Agreement with a longer duration may be more affordable as this may reduce the amount of the Unitary Payments over the Project Term;
4. The necessity for any major replacement or refurbishment in respect of the Project Assets over the Project Term; and

5. The period for the debt repayment (where the debt repayment term is longer, this may allow for a longer duration of the concession agreement).

However, where the project asset has an alternative use in a way that it is possible for the private party to recover its investment by putting same on an alternative usage or selling them, these may influence a shorter date for the duration of the concession agreement. If this is the case, the Unitary Payments should be lower and the project term should be shorter than in the former case where the project term will be longer because of absence of an alternative usage for the asset.

According to Mr Lindokhule on the duration of PPP project in South Africa, he stated thus;

*“There is no specific rule that regulates the duration of concession agreement in South Africa. However, from the statistics of some of the projects already awarded and completed, the maximum contract duration is 30 years. The Chapman’s Peak Drive Toll Road which is a project under the Western Cape Department of Transport was concessioned for 30 years. Also, the Eco-tourism Manyeleti 3 sites awarded by the Limpopo Department of Finance, Economic Affairs and Tourism was also concessioned for a period of 30 years. The famous Guatrain Rapid Rail Link under the Department of Public Transport, Roads and Works under the (DBFOT) was concessioned for a period of 20 years and the Head office accommodation built by Rainprop Consortium has a 25 year concession period.”*

It is necessary to state that the most important thing is to determine a reasonable period for achieving a specified return on investment. The concession period should be one that will allow the private sector to recoup the moneys he has spent on the project and also to make his profit on the investment.

## 5.9 Participation by Foreign Nationals

An alien who wishes to participate in a PPP project in South Africa must first register a company under the laws of South Africa. All prospective foreign applicants will have to follow the under listed procedures:

1. No permits are required for a foreigner who wishes to engage in business except business permit. All foreigners who wish to engage in business or join in a partnership in South Africa must have at least R2.5 million which he must be ready to invest in business. This fund which must belong to the applicant and originates from the applicant's bank overseas will then be transferred to South Africa.<sup>485</sup>The business or partnership which the foreigner intends to start must be one that will create jobs for South African nationals. Between Six months and one year of commencement of operation, the applicant must submit to the Department of Labour, a proof that the business is employing South Africans.
2. Having obtained a business permit, the company must then be registered within 21 days of the start of business with the Registrar of Companies in accordance with S.13 of the Companies Act 2008.<sup>486</sup>
3. Where a company that is willing to participate in business in South Africa has already been registered in the overseas country, Such companies are required under the Companies Act of 1973 are regarded as “external companies” and are required to register with the Registrar of Companies in Pretoria. An external company is not required to appoint a local Board of Directors, however, it must appoint a person who is resident in South

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<sup>485</sup> Starting a Business in South Africa. Accessed from [http://sami.co.za/images/starting\\_business.pdf](http://sami.co.za/images/starting_business.pdf). Accessed on 15.05.13.

<sup>486</sup> Act No 71 of 2008.



Africa and who will be authorised to receive all processes and notices which are being served on the company. Such companies must also appoint a qualified auditor and must also have a registered office within the Republic of South Africa.

## **5.10 Termination of PPP Contracts**

Termination of PPP agreements in South Africa is generally governed by the provisions of the Standardized Note issued by the National Treasury in 2004. This note recognizes three broad ways of terminating a PPP agreement. The first one is by default of either of the parties, the second is where the private party is involved in a corrupt or fraudulent act in the procurement process and the third is where there is Force Majeure. These three situations will be discussed in seriatim:

### **5.10.1 Termination Due to Default by Either of the Parties**

Every standard PPP Agreement must deal comprehensively with the possibility of early breach by the private party. This will allow the institution to terminate for inadequate provision of services as agreed to in the concession agreement and also with this clause in the agreement, the private party can also terminate where the institution has failed to do what is expected of it under the contract. The termination clause in a PPP agreement must specify the act or acts of the Private Party which may give the institution the right to terminate and vice-versa. These acts, as far as practicable should be objective, clear and there should be room for reasonable tolerances bearing in mind the unpalatable and undesirable consequences of termination.

### **5.10.2 Termination Due to Corrupt Acts**

The standardized PPP Notes<sup>487</sup> provides that where a corrupt act or fraud is perpetrated against the public authority in the PPP procurement process and the performance of the PPP contract, such institution may terminate the PPP agreement on the ground of corrupt practices. The corrupt acts referred to also include gifts, and all other acts of grafts that are common in public procurement.

Therefore, every PPP Agreement must provide for termination as part of the consequences of corrupt dealings. The institution must have a right to terminate the agreement in such circumstances. Where the corrupt act is committed by the private party, its directors, shareholders, agents or any of its employees acting with the authority or knowledge of any of the directors of such a company, then such institution will have a severe remedy which is outright termination of the PPP agreement. In addition to this, the institution may also sue for compensation and also seek to recover the losses that it has suffered as a result of the private party's corrupt practices.

In the same vein, where the corrupt practices is perpetrated by a director or any of the agents of the subcontractor acting under the knowledge and authority of a director of the subcontractor, then the authority may subject to a notice in writing, terminate the agreement and treat it as a corrupt act of the private party, unless the private cause the subcontractor to be replaced within the period of the notice given.

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<sup>487</sup> See S.60(5) of the Standardized PPP issued as No 2 of 2004.

### **5.10.3 Force Majeure**

Force Majeure is an unexpected event that occurs due to no fault of either of the parties to a contract. Where an unexpected event occurs in such a way that both parties could not agree on a mutual solution to address the unexpected event, either of the parties has the right to terminate the concession agreement. Where the private party is the one who terminated for force majeure, the position is that he should still be compensated on termination for Force Majeure. The compensation which is payable on termination as a result of Force Majeure should reflect that neither of the parties is at fault.

### **5.10.4 Effects of Termination**

Where a party has elected to exercise his right to terminate, the PPP Agreement becomes terminated in accordance with the provisions of the agreement and the parties will no longer be required to perform any other obligations under the PPP Agreement. The agreement may, however, contain some provisions which will still be effective even after its termination (there may be provision for indemnity even after the termination). In addition, all the rights, duties and obligations that have been performed by the parties before the termination of the contract can still be enforced after the termination.

There are also certain rights and obligations that will arise only once the concession agreement is terminated and such must unequivocally be provided for as surviving the termination of the agreement. These include the procedure of transferring the project back to the public authority and the private sector's obligation to clear the construction site after termination. It is important that these provisions are set out in the agreement because where adequate provisions are not

made; this may result into unnecessary delay or interruptions in the provision of services.

#### **5.10.5 Compensation for Termination**

It must be categorically stated in the agreement that the private party is not entitled to any compensation on the expiry of the project term.<sup>488</sup> The Private Party will only be entitled to seek compensation where the institution has terminated the agreement before the expiry date. The value of the amount payable as compensation will depend on the reasons for the termination. Where the termination is as a result of the breach of the agreement by the public authority, the compensation accruable to the private party will be much more than the compensation payable to the private party as a result of force Majeure. In all cases, compensation payable by the private party as a result of default on his default should be lesser than the compensation payment on termination for any other reason.

In addition, the compensation accruable to the private party should also cover all amounts that are due to the third parties in the course of the contract like the subcontractors. This amount has to be thoroughly calculated in order not to extend beyond the first-tier subcontractor.

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<sup>488</sup> See S.63 of the Standardized PPP Provision No 2 of 2004.

### **5.11 Dispute resolution in PPPs**

The Arbitration Act,<sup>489</sup> Module 6 of the National Treasury PPP Manual and the Standardized provision<sup>490</sup> prescribe a detailed procedure for resolving dispute in PPP. It is therefore important for the parties to include this in the PPP Agreement. It is the requirements of these provisions that all disputes should first be referred to the respective liaison/project officers in order to proffer solutions to it. If these officers are unable to resolve the issue within time, then the dispute should then be referred to both the accounting officer of the institution and the Chief Executive of the private party.

If the dispute could still not be settled at this stage, then it has to be referred to an independent mediator appointed by the two parties to the dispute.<sup>491</sup> Where however, the dispute could still not be settled by the independent mediator, then it is at this stage that it has to be referred to the courts for settlement. It is therefore incumbent on both the project officer who acts for the institution and his counterpart who acts for the private party to ensure that management team understands the procedure for resolving disputes.

The project officer has the duty to facilitate cooperation and resolve disputes that may arise as early as possible. He should try to involve higher authority in resolving the disputes where need be and he should create the best atmosphere to facilitate quick and effective dispute resolution.

In order to ascertain the cause of the problems and finding a lasting solution to it, the project officer should:

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<sup>489</sup> Act No 42 of 1965.

<sup>490</sup> See Part 86 of the Standardised Provision.

<sup>491</sup> See also S.11 (1) of the Arbitration Act of 1945 as amended by Act No 49 of 1996.

1. Always record the problems as they occur;
2. Notify the private party of the problems in accordance with the mode set out in the PPP Agreement; and
3. Ensure that the approaches to be followed in resolving the problems are clear and documented.

The regulation requires that before a PPP dispute is taken to court, alternative means of settling disputes like informal conciliation must first be attempted because these modes will fast-track the resolution of the dispute by expert adjudicators. Also, resolving the dispute through an alternative means will also settle the dispute amicably. This is because the mode and procedure adopted is by a consensus of the two parties rather than by imposition of the law by the court. It is only where the informal attempts fail that the matter should then be referred to the court for adjudication. The PPP Agreement must therefore provide for informal resolution of certain urgent issues through conciliation because any delay in settling those issues will prejudice the interest of either of the parties.

It should be mentioned that Mediation, which is the resolution of dispute by a neutral third party is not specifically favoured by the rules in the PPP Standardization. The reason is because, in mediation, the neutral party has no power to render a decision which would be binding. Therefore, internal referral like informal conciliation is preferred than mediation.

Where the issues in dispute between the private party and the institution also extend to the private party and the subcontractor or another third party, then it will be better to join all parties in the proceeding. There are also instances where a party

who has a direct and substantial interest in the proceedings will be joined by operation of law as a necessary party. This is because; whatever decision is made at the end of the proceedings will have a direct effect on him.

The institution should refrain from being drawn into the disputes that arise between the private party and his subcontractors. The PPP Agreement should also provide that the private party should not stop the ongoing work or leave the sites while any dispute is still being resolved.

## **5.12 Challenges Facing PPP in South Africa**

The South African PPP programme, though ranked as one of the best in the world with policy, legal and institutional framework, still has its own challenges. These challenges are few compared to other countries like Nigeria and Ghana that were examined earlier in this research work. Few of the challenges identified here are inadequate personnel to attend to projects, delay in the preparation and execution of the project which hinders deal flow, conflicting laws and policies that govern the PPP projects and public mistrust on the part of private sector's involvement in the management and control of public assets.

### **5.12.1 Resistance from the Trade Unions**

There has been serious resistance by trade unions in South Africa on the proposed e-tolling of some roads in Gauteng province (this comprise of Johannesburg and Pretoria). There have been series of protests and demonstrations that government had no right to levy tolls on the users. The trade union, under the umbrella of Opposition to Urban Tolling Alliance (OUTA) had approached the High court of Pretoria for a judicial review of the decision of the South Africa National Road

Agency Limited (SANRA). The High Court ruled in favour of the trade unions and directed that full review of the e-tolling scheme should be carried out before the e-tolling could be introduced.

On appeal to the Constitutional court, it was argued by the appellants SANRA and the National Treasury that the decision of the trial court had caused a great delay in the implementation of its programme and that this has also prevented it from repaying a huge debt which he had incurred in building the roads. The Constitutional Court, in a unanimous decision overturned the decision of the trial high court and affirmed the argument of the appellants.<sup>492</sup> The constitutional court held that the interim order granted had an immediate and irreparable effect on the government and business and thus appealable. The court stated further that the interim order must be set aside because the trial High Court did not take into consideration the constitutional imperatives of the principles of separation of powers. The court held thus:

*"The High Court should have held that the prejudice that would confront the motorists in Gauteng if the interim interdict were not granted did not exceed the prejudice that the National Executive, National Treasury and SANRAL would have to endure were the temporary restraining order granted."*

While reacting to the judgment of the constitutional court, the Finance Minister Pravin Gordhan commended the judiciary and stated that Government respects the fundamental right of the citizens who felt aggrieved by the decision of any member of the public to approach the court for a judicial review. He went further to state thus;

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<sup>492</sup> The ruling of the Constitutional Court was delivered on 20<sup>th</sup> September, 2012.



*"Government remains convinced about the appropriateness of the Gauteng Freeway Improvement Project, with the user-pay principle, as part of our country's investment in road infrastructure and our collective drive to grow the economy."*

### **5.12.2 Inadequate Personnel**

Public Private Partnerships require a host of competent and skilled staff to successfully handle the complex PPP transaction. The required areas of competencies include human resources, project management; financial analysis, legislative and regulatory knowledge, legal, Black Economic Empowerment and insurance. South Africa's PPP is expanding. However, there are significant shortages in virtually all the disciplines listed above. As at January 2013, the National Treasury PPP Unit has only Seventeen (17) professional staff to handle hundreds of complex proposals that are being brought to it every time.<sup>493</sup> Out of this 17 skilled staff, in the PPP Unit, Project Evaluation has only two professionals; Business Development has two skilled staff while Financial Analysis section has three professionals. Also, Performance Monitoring and Evaluation has two competent staff, Municipal Desk Section has three professional while Information Technology Division has only one professional. This shortage of skilled and competent personnel is also a challenge to the Municipal PPP Unit.

It is also the view of the National Treasury that PPP projects takes longer time to implement, and that these projects require time and expertise that the treasury and other implementing agencies do not have internally. Both the National Treasury and the Municipal PPP units would therefore also like to have access to more expertise and more assistance in order to increase PPP deal flow.

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<sup>493</sup> Being part of the interview granted by Mr Hlatshwayo during the researcher's visit to the PPP Unit of the National Treasury in February, 2013.

### **5.12.3 Delay in Preparation and Execution of Projects**

Since 1999 when the PFMA was enacted till February 2013 (14 years), only Twenty Four (24) PPP projects have been executed at the National level.<sup>494</sup> Several projects have been signed both under the PFMA and the MFMA that are still in the pipelines. This delay may partly be as a result of the shortage of manpower and also a detailed and very cumbersome procurement procedure which must be followed in awarding PPP contract in South Africa.

### **5.12.4 Conflicting laws and Policies**

There are apparent overlapping responsibilities on the policy directions of PPPs especially in the municipalities. This confusion sometimes arose as to which agency performs certain functions among the Municipal PPP Unit, Department of Local Government and other national agencies or departments.<sup>495</sup> At the municipal level, there are also conflicting provisions in the legal framework between the Municipal Finance Management Act (MFMA) and the Municipal Systems Act (MSA).<sup>496</sup> One of the most apparent conflicting provisions is in the area of conducting a feasibility studies for a PPP project. Both Acts require that feasibility studies should be conducted; however, their provisions are not identical.

While under the MSA, an average time-frame for the conduct of feasibility studies is Two (2) years,<sup>497</sup> however, under the MFMA, a period of 6 Months has been fixed for the feasibility studies. Since a municipality is bound by the provisions of

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<sup>494</sup> That was as at February 2013.

<sup>495</sup>Key Challenges to Public-Private Partnerships in South Africa, an Initiative of the Presidency of the Republic of South Africa and the Business Trust. Retrieved from <http://www.castalia-advisors.com/files/12345.pdf>. Accessed on 14th May, 2013.

<sup>496</sup>The Municipal Systems Act (MSA) is one of the Acts enacted by the parliament with the aim of empowering the Local Governments to achieve its constitutional objectives. It has among other objectives to promote social and economic development, to ensure the provision of services to the community in a sustainable manner and encourage the involvement of communities and community organisations in the matters of local government.

<sup>497</sup> See S.78 of the MSA.

the two Acts, adequate care has to be taken in order not to contravene the provisions.

#### **5.12.5 Lack of Awareness on the benefits of PPPs**

There is the notion that the private sector's involvement is only to make profit and not really to provide the needed infrastructures for the nation. Also, that the private sector will not optimally utilize the infrastructure assets for the public interest, but rather for their personal aggrandizement. Some politicians do not subscribe to the idea of vesting the state resources into the hands of private sector, because this will mean ceding authorities, responsibilities and control of infrastructure assets, and this will connote vesting them with political powers. To them, unless a state is in control of its own resources, that state cannot exercise the right of political self-determination. Therefore, there is the lack of trust on the governmental objectives in harnessing the private sector resources to develop the nation's infrastructure.

#### **5.13 Lessons Learned from the South African Framework**

The following key lessons are learnt from the South African experience, and what is true of South Africa is actually true and can be adopted by most of the governments.

1. South Africa has adopted a highly regulated and formal approach to public procurement and Public-Private Partnerships by entrenching Constitutional provisions as well as binding legislation and regulations to achieve the procurement objectives. The Administrative Law in South Africa has developed at an unprecedented manner making the country to be one of the best in the world in terms of administrative laws and regulations especially with provisions on the administrative justice action.

2. South Africa has also incorporated various anti-corruption measures into its procurement regulations generally, and the effects of such mechanisms on the machinery of government will be great.<sup>498</sup> An example of this is the Prevention and Combating of Corrupt Activities Act.
3. The basic principles of transparency, accountability, fairness, cost-effectiveness and publicity have constitutional backings and other supporting legislations. These are very important principles that guide all procurements.
4. The provisions relating to dispute resolution in the South Africa's PPP are very comprehensive and effective. This is important in order to attract private sector to develop public infrastructure.
5. The establishment of a dedicated PPP Unit within the national treasury helps in understanding and appreciating the budgetary implications of PPPs. This is because PPP procurement is linked to the finances of government departments. Where the power to regulate the PPP is vested in a department which does not really understand these financial intricacies, this may lead to financial imbalances.
6. The Establishment of the PPP units at the Municipal and Provincial levels ensure that PPP projects are implemented at the Municipal and provincial levels. This will increase the PPP deal flow and drastically increase the pace of development at these levels.
7. A clearly defined evaluation and procurement processes enables the bid evaluation and the procurement to be transparent to a larger extent.
8. The delivery of a PPP project that is well structured and which is in line with the principles of affordability, Value for money and sufficient risk transfer is the ultimate objective of the South African PPP programme.

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<sup>498</sup> Sope Williams-Elegbe, *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification Measures*. Thesis submitted to the University of Nottingham for the Degree of Doctor of Philosophy. December, 2011.

9. Government must first explore the possibility of carrying out a project under the public procurement before contracting it under PPP. It is not all projects that fits into PPPs. It is only an alternative means of building infrastructure where public procurement will not be suitable.
10. The PPP Unit which coordinates and renders technical assistance to government departments should be more equipped with skilled staff. This will help in increasing the pace at which South Africa rolls out more PPP project.

#### **5.14 Conclusion**

The law and policy developed for Public Private Partnerships in South Africa make it amongst the leading countries in the field of PPPs in the world. The constitution, legislations and other policy framework put in place to govern PPP are comprehensive, detailed and encompass the detailed provisions for procurement and monitoring of PPP Projects. These have helped to boost the public service record in the delivery of PPP projects in recent years, and the project pipeline has continued to increase both in number and value-for-money principles that they contain.

Being a country whose PPP programme is still developing, there are still a few challenges which hinder the progress of PPPs and which the country must overcome within a short period of time. Skills shortages in the PPP unit and government departments which have resulted in delays in the implementation of concession agreements; conflicting legal and policy framework and lack of awareness on the importance of the PPP scheme are some of these challenges.

**CHAPTER SIX**

**AN EXAMINATION OF THE REGIONAL AND INTERNATIONAL  
LEGISLATIVE FRAMEWORKS FOR PUBLIC-PRIVATE  
PARTNERSHIPS**

**6.0 INTRODUCTION**

The United Nations Commission on International Trade Law (UNCITRAL) was established by the United Nations General Assembly in its resolution 2205 (XXI) of 17<sup>th</sup> December, 1966, as part of its commitments to facilitate the development of International trade and Investment.<sup>499</sup> UNCITRAL was given the mandate to further promote the codification, harmonisation and modernisation of international laws and conventions by preparing and promoting the adoption of a model legislative and non-legislative framework in different key areas concerning trade, investment and development.<sup>500</sup> UNCITRAL has set up different working committees to perform the substantive preparatory work on different aspects of law and which have been identified in plenary sessions. The working groups on Procurement and Infrastructure Development are part of them.<sup>501</sup>

In recognition of the importance of private sector in infrastructure development through Public-Private Partnerships, the United Nations UNCITRAL group is having series of deliberations with the aim of producing a standard model law and recommendations to the United Nation in order to further attract private investors in the development of public infrastructure. Series of International Colloquium were held in Vienna by the UNCITRAL working group with the aim of

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<sup>499</sup> For more information about the origin, composition and mandate of UNCITRAL, see “Basic facts about the United Nations Commission on International Trade Law” .Accessed from <http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>, on 07.06.13.

<sup>500</sup> UNCITRAL has produced several conventions and model laws. Few example of these are the texts and statutes on the Procurement and Infrastructure Development, International Commercial Arbitration and Conciliation, Electronic Commerce among others.

<sup>501</sup> See especially the reports of the UNCITRAL Working Group on Procurement from [http://www.uncitral.org/uncitral/en/commission/working\\_groups/1Procurement.html](http://www.uncitral.org/uncitral/en/commission/working_groups/1Procurement.html). Accessed on 13.11.13.

harmonising and codifying a model legislative guide on Public-Private Partnerships.<sup>502</sup>

On the importance of private sector participation in development through the PPPs, the United Nations Economic Commission for Europe reported in 2008 as follows:

*“Over the past fifteen years, governments have been struggling to achieve economic development and competitiveness through improving their basic infrastructure. Increasingly, governments are turning to the private sector for the financing, design, construction and operation of infrastructure projects. Once rare and limited, these Public Private Partnerships (PPPs) have emerged as an important tool for improving economic competitiveness and infrastructure services. They are increasingly being considered as a mechanism to fill an infrastructure deficit in many UNECE countries.”*<sup>503</sup>

Also, at the UNCITRAL Colloquium on Public-Private Partnerships held in Vienna in May 2013,<sup>504</sup> concerns of lack of legal certainty and regulatory stability for PPP transactions were raised as follows:

*“Concerns have been raised about the impact of a lack of uniform rules on the use of PPPs as a tool for infrastructure development and the provision of public services. The lack of legal certainty may increase transaction costs as standard terms may need to be negotiated on a project-by-project basis, which is has been reported, can further discourage the use of PPPs and lead to widely varying projects terms, with negative impacts on results and capacity. In some other countries, it was noted, PPPs are designed ‘on the spot’, without any domestic guidance, and sometimes taking inspiration from any suitable provisions in public procurement law. In others, the topic has been effectively set aside thanks to the absence of an adequate legal framework. Here, the experts suggested that public efficiency would be*

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<sup>502</sup> Among these were the UN Conference on Sustainable Development which was held in Rio de Janeiro, Brazil, from 20th – 22nd June, 2012. Also, there was the UNCITRAL International Colloquium on PPPs held in Vienna, Austria between 2<sup>nd</sup> - 3<sup>rd</sup> May, 2013.

<sup>503</sup> See UNECE Guidebook on Promoting Good Governance in PPPs, Avant Propos, available at <http://www.unece.org/fileadmin/DAM/ceci/publications/ppp.pdf>. Accessed on 09.06.13.

<sup>504</sup> See the Report of the Colloquium organised by UNCITRAL in Vienna, Austria between 2<sup>nd</sup>-3<sup>rd</sup> May, 2013 available at <http://www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2013.html>. Accessed on 10.06.13.

*enhanced through standardizing administrative procedures, while leaving enough flexibility to adapt the project agreements to the specific needs of each project.”*

In recent times, evidence has shown that the need to adopt PPP as a developmental strategy has increased and has gone beyond the nations of the European Community alone.<sup>505</sup> Other countries like China, the United States of America, South Korea, United Kingdom, Brazil, South Africa and India among several others have adopted this synergy. Another report from the UNCITRAL Secretariat stated that the total value of PPP transactions in India alone may exceed US\$1 trillion within the next five years while PPPs are also increasingly being used in other countries of Central and Southern America, China and other countries in the Asia and the Pacific region.<sup>506</sup>

While it is recognised that some countries have general specific laws regulating PPPs in their domain like Brazil, South Africa, South Korea, India, Portugal, Poland, Italy and some others, some other countries like China, Ghana and few others are in the process of coming up with specific legislations on PPPs. Other regular users of PPPs including the United States, Australia and United Kingdom have no relevant provision which has general application to PPP projects and services. They have however developed legislations for different sectors of PPPs.<sup>507</sup> United Nations Secretariat noted that there are varying figures as to the

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<sup>505</sup>Report to the Third Session of the Team of Specialists on Public-Private Partnerships 18-19 April, 2011 regarding Model PPP Laws. Retrieved from [http://www.unece.org/fileadmin/DAM/ceci/ppt\\_presentations/2011/TOS\\_PPP3/2.I.10\\_Richard\\_Armitage.pdf](http://www.unece.org/fileadmin/DAM/ceci/ppt_presentations/2011/TOS_PPP3/2.I.10_Richard_Armitage.pdf). Accessed on 10.06.13.

<sup>506</sup> See, for example, <http://www.eria.org/projects/PPP.html>, <http://www.adb.org/publications/public-private-partn-infrastructure-projects-case-studies-republic-korea>; [http://ppp.gov.ph/?page\\_id=107](http://ppp.gov.ph/?page_id=107); <http://www.adb.org/offices/pacific/strategy> <http://www.iadb.org/en/projects/project-description-title,1303.html?id=co-t1139>; [www.iadb.org/biz/ppt/0604grahamb.ppt#4](http://www.iadb.org/biz/ppt/0604grahamb.ppt#4).

<sup>507</sup> See for example, the Mitcham-Frankston Project Act of 2004(Victoria) which is a specific legislation for project related to the EastLink toll road PPP in Australia.



percentage of PPP projects being undertaken without a PPP law. However, it has been stated that the percentage of such projects is not less than 90%.<sup>508</sup>

There is no doubt that having a uniform legislative framework for PPPs would be a great tool not only for developing countries, but also for the developed nations who still need to build or modernise their ageing infrastructures. According to Simmons and Simmons,<sup>509</sup> it was reported that there is a great possibility for investors to shy away from nations that do not have adequate legal framework for PPPs.

## **6.1 Public-Private Partnerships in Other Jurisdictions**

Apart from the selected African countries examined in the preceding chapters in this thesis, it is pertinent to also briefly look at PPPs from other selected jurisdictions. These are:

### **A. Australia**

Australia is one of the countries using PPPs as a means of developing its infrastructures. Currently, the country has about 5% of the global PPP market. The participation of the private sector in developing public infrastructure has gradually increased over time. This is because the government has since adopted privatisation at both the commonwealth and the state levels. The government is also desirous of using alternative method of private participation including PPPs and PFI. The structure and size of Australia presents both opportunities and challenges considering the huge amount of resources needed to develop new and maintain old infrastructures.

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<sup>508</sup> See the Report of the Colloquium organised by UNCITRAL in Vienna, Austria between 2<sup>nd</sup>-3<sup>rd</sup> May, 2013 available at <http://www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2013.html>. Accessed on 10.06.13.

<sup>509</sup> See the Report submitted by Simmons and Simmons to the Third Session of the Team of Specialists on Public Private Partnerships 18-19 April, 2011 regarding Model PPP Laws. Retrieved from [http://www.unecce.org/fileadmin/DAM/ceci/ppt\\_presentations/2011/TOS\\_PPP3/2.1.10\\_Richard\\_Armitage.pdf](http://www.unecce.org/fileadmin/DAM/ceci/ppt_presentations/2011/TOS_PPP3/2.1.10_Richard_Armitage.pdf). Accessed on 10.06.13.

Currently, Australia does not have a well-developed PPP market similar to that of UK and there have been signs of the government to a well coherent PPP Policy. Although the country has executed some projects under the PFI model, however, there no coherent legal framework to regulate the projects. Each of the projects has its regulations and policies guiding same.

## **B. Ireland**

The first PPP project in Ireland were signed in the year 2000 after which the project stagnated. In 2005, the Finance minister announced that the government had accepted the new proposals for a new initiative to adopt PPPs with the aim of accelerating project delivery. The government entered into a PPP transaction with Eurolink Consortium for the construction of the N4/N6 Kilcock Kinnegad project with a concession period of 30 years. The project transfers 30 years traffic risk to the private sector. Since 2005, the government has entered into some PPP projects. The Irish roads programme has really benefited a lot from this initiative.

## **C. China**

Since the 1994 tax reform in China, financial pressure has pushed the local governments to seek private investment to help in providing infrastructure.<sup>510</sup> Initially from the mid-1990s, the country witnessed the making of a legal and policy framework for Public-Private Partnerships from year 2000 till the present time. PPPs projects in China have witnessed huge investment input especially from the international operators.

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<sup>510</sup> See Cheng CHENG & Zhengxu Wang, 'Public-Private Partnerships in China: Making Progress in a Weak Governance. Published by the China Policy Institute, University of Nottingham. Available at <http://www.nottingham.ac.uk/cpi/documents/briefings/briefing-56-chengchen-ppp.pdf>. Accessed on 14.08.2014.

However, the country is facing some challenges to the smooth implementation of PPPs, the most prominent of which is the fragmented legal and regulatory framework. The monopolistic tendency of the state in the provision of infrastructure has also limited the private sector participation to an extent. In recent time, a more coherent legal and regulatory framework is anticipated which will help in the smooth implementation of PPPs.

The China International Economic and Trade Arbitration Commission (CIETAC) which has been the leading arbitral institution in Asia will play an important role in settling PPPs and other disputes.<sup>511</sup> Real growth in international arbitration in the region has also gravitated to Singapore and Hong Kong.<sup>512</sup> The China International Economic and Trade Arbitration Commission (CIETAC) together with other arbitration institutions in the region are being increasingly used in cases involving commercial disputes instead of litigation, which is often viewed as time consuming, expensive and inefficient. This institution will therefore play a greater role in strengthening the PPP programme.

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<sup>511</sup> The China International Economic and Trade Arbitration Commission (CIETAC) is one of the major permanent arbitration institutions in the world. It was formerly known as the Foreign Trade Arbitration Commission, CIETAC was set up in April 1956 under the China Council for the Promotion of International Trade (CCPIT) in accordance with the Decision Concerning the Establishment of A Foreign Trade Arbitration Commission Within the China Council For the Promotion of International Trade adopted on May 6, 1954 at the 215th session of the Government Administration Council.

<sup>512</sup> The Singapore International Arbitration Centre (SIAC) and The Hong Kong International Arbitration Centre (HKIAC) are the principal arbitration venues in the Asia Pacific with a lot of disputes successfully resolved yearly.

## 6.2 Reasons for Modernisation and Harmonisation of PPPs at the International Level

There have been series of concerns raised that while PPPs represent a new area of financial, legal and government institutions, it has however not been treated as such.<sup>513</sup> There is clear lack of understanding of the project structure and procedures by the stakeholders; in fact, many projects have been abandoned and several others cancelled as a result of disputes which have arisen among the parties concerned.<sup>514</sup>

There have also been great concerns about the effects of a lack of a uniform rules governing PPPs as a tool for infrastructure development and the provision of public services. Where there is no legal certainty and standard terms for PPP programme, transaction cost of projects will increase because negotiation will be on project-by-project basis. This may further discourage the greater use of PPPs, as a solution to filling infrastructure gaps.

The report of the 2013 Colloquium on Public-Private Partnerships noted that in some countries, PPPs are designed “*on the spot*” without recourse to either any local or international provision on public procurement law that serves as a guidance for such projects.<sup>515</sup> The report further noted that public efficiency will be enhanced where there is standardization of the administrative procedures which can be adopted by countries without any barriers. However, leaving enough flexibility to adapt the agreement to the country specification is therefore recognised.

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<sup>513</sup> See Nicholas D, Devising Transparent and Efficient Concession Award Procedures, Uniform Law Review/ Revue De Derot Uniforme, NS- Vol XVII, 2012.

<sup>514</sup> See for example, the Lagos Ibadan Express way concession contract which was terminated by the Federal Government of Nigeria in 2012.

<sup>515</sup> See the 2013 Colloquium on PPP which was held in Vienna, Austria.

Currently, there are series of non-uniform legislative guides made by different international bodies to regulate PPPs at the international level. There are also a number of existing publications available from international bodies which are useful sources of guidance to lawyers responsible for drafting national legislation to create a legal framework to support the development and implementation of a PPP programme.<sup>516</sup> However, none of these legal frameworks can be considered as constituting a Model Law for PPPs. The need to have a common set of rules to govern PPP transactions has been on the increase.

Therefore, this research also seeks to examine the key international legal instruments relating to Public-Private Partnerships in infrastructure development. The work concludes that there is the need to revise the UNCITRAL PFIPs Guide and Model Provision in line with the current socio-economic realities. The work therefore suggested core principles which should be incorporated in a Model PPP Legislative Guide.

### **6.3 Current International Legislative Frameworks for Public-Private Partnerships**

There are currently some legislative guide or advice on Public-Private Partnerships at the international level. The most prominent which are examined in this work are:

- (a) UNCITRAL Privately Financed Infrastructure Projects (PFIPs) Instruments;
- (b) The United Nations Industrial Development Organisation (UNIDO's) Guidelines for Infrastructure Development through Build, Operate and Transfer (BOT) 1996;
- (c) The OECD "BASIC Elements of Law on Concession Agreements" 2000;

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<sup>516</sup> See the Simmons report, op cit.

- (d) European Bank for Reconstruction and Development (EBRD's) "Core Principles on Modern Concession Law" 2006; and
- (e) European Commission's Directives on the Award of Concessions.

All these will be discussed, analysed and evaluated one after the other.

### **6.3.1 UNCITRAL Privately Financed Infrastructure Projects (PFIPs) Instruments**

These instruments comprise of the UNCITRAL Legislative Guide on PFIP 2000 and Model Legislative provisions on Privately Financed Infrastructure Projects (PFIPs) 2003. These instruments contain both legislative recommendations and model provisions on privately financed infrastructure projects. The legislative recommendations and the model provisions contained therein are intended to assist and guide the law making bodies of member nations in the adoption of a model framework for PFIPs in their respective countries.<sup>517</sup> These recommendations are followed by notes that offer detailed explanations of the legal, regulatory, financial, policy and other issues that are discussed.

The summary of the recommendations in the instruments are set out hereunder:

1. That the constitutional, legislative and institutional framework to be adopted for privately financed infrastructure project should be one that will ensure transparency, fairness and long term sustainability of the project. The parliament of each member nation should ensure that all

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<sup>517</sup> Seungwoo Son, Legal Analysis on Public-Private Partnerships regarding Model PPP Rules. Retrieved from [http://www.uncitral.org/pdf/english/colloquia/public-private-partnerships-2013/20120704\\_Report\\_on\\_PPP\\_legal\\_IssuesSon\\_Seungwoover.11.pdf](http://www.uncitral.org/pdf/english/colloquia/public-private-partnerships-2013/20120704_Report_on_PPP_legal_IssuesSon_Seungwoover.11.pdf). Accessed on 13.11.13.

restrictions or hindrances on the participation of the private sector to the development and operation of infrastructure are eliminated.<sup>518</sup>

2. That the public authorities of the host countries should be identified by the law. This is important especially to know which organ of the government has the power to grant concession to the private sector for the development and operation of infrastructure projects.
3. That privately financed infrastructure projects may include concessions which are awarded for the construction and operation of new projects or upgrading and maintenance of an existing infrastructure projects.
4. That the enabling legal framework should identify the types and categories of infrastructure in respect of which concession may be granted.
5. That the enabling legal framework should also specify whether the Federal or central government has an exclusive power to grant concession in respect of a project or whether concession in respects of the same project can be granted concurrently with the states/ regional or Local governments. These powers are mostly found in the legislative lists of the constitution of the member states.<sup>519</sup>
6. That there should be an institution or coordinating body established to coordinate the activities of both the public and the private sector in respect of the project. This body should exercise its powers according to the statute establishing it.
7. That the power to regulate infrastructure services under this initiative should not be entrusted to body or institution that either directly or indirectly provide infrastructure services.

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<sup>518</sup> See recommendation No.1 on the constitutional, legislative and institutional framework.

<sup>519</sup> For example, these are contained the the schedules to the Nigerian, Ghanaian and South African Constitution.

8. That regulatory competence should be entrusted to an independent body that is autonomous in order to ensure that its decision is taken without any interference or pressure from public service providers or private infrastructure operators.
9. That the rules and regulations governing the procedures for the award of concessions should be made public. Regulatory decisions should be backed by reasons for arriving at such decisions and as much as possible, those decisions should be accessible to interested stakeholders through publications or other means.
10. The legal framework should establish a very transparent procedure for settlement of disputes or where there is a call for review of regulatory decisions by an independent and impartial body, which may include court review, and should set forth the grounds on which such a review may be based.
11. That where appropriate, there should be established a special procedure for the settlement of disputes among the parties concerning alleged violations of laws and regulations governing the relevant sector.
12. That no limitation whether statutory or otherwise should be imposed upon the contracting parties' ability to agree on how to allocate the risks in such a way that will suit the needs of the particular project.
13. Lastly, the enabling law should state how to access financial support from the relevant authority, and to what extent can such authority make a guarantee to a third party with a view to giving support to the private sector in the implementation of the project.



It should be mentioned that the provisions in the UNCITRAL instruments focus only on physical infrastructure projects and exclude all other projects which may involve the extraction and development of natural resources. There are emerging issues like using PPPs to develop agricultural land for mining and to create food security for the nation.<sup>520</sup> Also service concession which is emerging in recent times as a form of PPPs is also not covered in the Instruments.

In addition, significant issues relating to commerce are not addressed in the body of the UNCITRAL Instruments, but rather they are contained in the notes. This is important due to increasing industrialisation and urbanisation which is compelling governments to resort to the private sector to seek for alternative means of infrastructure financing. The financial turmoil which erupted in the mid-2007 in the U.S. has now become the worst global financial crisis ever recorded. This therefore necessitates that financial institutions/lenders should reposition themselves and take into consideration such measures to avoid in order. Therefore,

It is not in doubt that the level of global awareness of the existence of the UNCITRAL Guide and Model is low, and there has been scarce reliance on their provisions as sources of guidance in the drafting of PPP legislations by countries that have adopted PPPs.<sup>521</sup> The UNCITRAL instruments came into being more than a decade ago when PPPs have not really developed significantly. There was the global financial crisis which has now significantly affected the way and manner

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<sup>520</sup> See, further, Fairer Mining Concessions in Africa: How Can this be Achieved?, available at [http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/AEB%20VOL%203%20Issue%203%20avril%202012%20BIS\\_AEB%20VOL%203%20Issue%203%20avril%202012%20BIS.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/AEB%20VOL%203%20Issue%203%20avril%202012%20BIS_AEB%20VOL%203%20Issue%203%20avril%202012%20BIS.pdf), and Nicholas, *supra* and the sources cited therein.

<sup>521</sup> See Simmons& Simmons Report.

in which international projects are financed with a consequent result on the PPP transactions.<sup>522</sup>

According to a report by Simmons and Simmons,<sup>523</sup> the report admitted that though, the UNCITRAL Guide at best can serve as useful basis for assessing the readiness of a government's policy, financial, legal and regulatory framework to support PPPs, it was contended that both the UNCITRAL Guide and the Model Law do neither constitute nor purport to be a model law and, as far as the committee was able to gather, there is nothing in the law which can be viewed in the true sense as a model law relating to PPP.

### **6.3.2 United Nations Industrial Development Organisation (UNIDO's) Guidelines for Infrastructure Development through Build, Operate and Transfer (BOT) 1996**

This organisation issued a guideline for infrastructure development through Build, Operate and Transfer Projects (BOTs) in 1996. The guidelines provide a basic orientation needed to undertake a BOT project. It considers both financial and legal issues while carrying out BOT projects as well as the essential practical information on the structures that a good BOT project should take.

However, some of the features in UNIDO's BOT are very similar to what is obtainable in Public Procurement. For example, under the UNIDO's guidelines, the operator gets his revenue through a fee charged from the government rather than tariffs charged from direct users. This feature may qualify the BOTs as public

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<sup>522</sup> For example, there was the global economic meltdown which started in 2007 through 2009.

<sup>523</sup> This was the report submitted by Simmons & Simmons to the Third Session of the Team of Specialists on Public Private Partnerships 18-19 April 2011 on the Model PPP Laws. A/67/17, Report of the United Nations Commission on International Trade Law, 45th session, para 115, available at [www.uncitral.org/uncitral/commission/sessions/45th.html](http://www.uncitral.org/uncitral/commission/sessions/45th.html). Accessed on 01.07.13.

procurement in some respects. There is no doubt that one of the key principles of concession contracts is that it is the users and not the government that will pay directly for the use of the facilities.

Under the European Union Procurement Directives 2004/18/EC,<sup>524</sup> such concessions are not considered as part of public procurement. Article 2 of the UNCITRAL Model Law on Public Procurement defines ‘acquisition’ to include BOTs, but arguably not concessions.

Therefore, under the UNIDO’s Guideline, the line between Public Procurement and Public Private Partnerships is not clear. Therefore, there is the need to identify the features of PPPs separate from that of Public Procurement. This will ensure clarity in the PPP projects.

### **6.3.3 The OECD BASIC Elements of Law on Concession Agreements 2000**

The Organisation for Economic Co-operation and Development and the Istanbul Stock Exchange (ISE) convened a group of experts with a view to assisting it in formulating basic elements for private infrastructure financing in the transition economies<sup>525</sup> based on the international best practices in order to ensure that project financing by the private sector becomes a more viable option for the much needed infrastructure financing in the region.

It is against this backdrop that it was realised that a huge amount of capital is required to modernise the ageing infrastructures especially those of the transition

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<sup>524</sup> Guidelines for Infrastructure Development through Build-Operate-Transfer (BOT) Projects <http://www.unido.org/resources/publications/imported-publications/guidelines-for-infrastructure-development-through-build-operate-transfer-bot-projects.html>. Accessed on 10.06.13.

<sup>525</sup> A transition economy is one that is changing from centrally planned economy to free market economy.

economies of Central/Eastern Europe and the Former Soviet Union and to reconstruct the Balkans after a decade of war and neglect. It was further realised that this amount can neither be sourced from developmental assistance nor from the government budget alone. The enormity of the investment required for economic reconstruction and development would require governments to mobilise and harness all potential resources, both public and private through the public-private partnerships initiative in transition economies.

In carrying out the search for this model framework, the OECD had the followings as its objectives:

1. To provide information to Eurasian legislators on the guiding legal principles and best international practices with respect to concession agreements;
2. To contribute to the harmonisation of the relevant legislation in the Eurasian region; and
3. To elaborate on these principles and practices with a view to providing assistance to Eurasian Governments in the negotiation of actual concession agreements.

This document produced 18 key provisions to complement existing laws on concessions with the aim of facilitating privately financed infrastructure projects in the Black sea/ South East Europe.<sup>526</sup> The document is couched in a form of legal provisions that can be found in law statutes. The law does not purport to qualify as a model law that can guide all concession agreements.<sup>527</sup> The basic elements have contributed to the existing jurisprudence on concession in the following ways:

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<sup>526</sup> See, further, the Simmons and Simmons Report, which notes that the UNCITRAL Guide and Model provided a basis “point of departure” for the Basic Elements which are made available at [http://www.oecd.org/LongAbstract/0,3425,en\\_33816563\\_33816964\\_33959803\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/LongAbstract/0,3425,en_33816563_33816964_33959803_1_1_1_1,00.html). Accessed on 17.05.13.

<sup>527</sup> See PPP in Infrastructure Resource Centre. Retrieved from <http://ppp.worldbank.org/public-private-partnership/library/oecd-basic-elements-law-concession-agreements>. Accessed On 14.11.13.

- (a) It serves as a source on which interested countries can draft their respective laws on concession agreements;
- (b) It offers a reference point for negotiating concession agreements;
- (c) It offers suggestions to problems that may likely arise in the negotiation of concession agreements;
- (d) It establishes a basis for the coordination of advice to all transition economies in respect of concession agreements;
- (e) It also helps in the harmonisation of legislations relating to concession agreements with international standards and best practices; and
- (f) It helps in facilitating and promoting a common approach to addressing issues relating to concession agreements.

It should be noted that the basic elements address key issues on privately financed projects and concessions; however, the scope of the legal text and guidance only focuses on the transition economies.<sup>528</sup> Transition economies are those countries that are changing from centrally planned economy into a free market economy. While the UNCITRAL Instruments on PFI focus only on infrastructure projects, OECD elements focus not only on infrastructure, but also on natural resources.<sup>529</sup>

#### **6.3.4 European Bank for Reconstruction and Development's (EBRD's) 'Core Principles on Modern Concession Law' 2006**

The European Bank for Reconstruction and Development EBRD has issued a set of “**Core Principles**” with the main aim of identifying and promoting sound principles in the area of concession and Public-Private Partnerships within the

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<sup>528</sup> See the discussion paper of the UNCITRAL Colloquium on PPPs held In Vienna between 2-3 May, 2013. Accessed from [http://www.cnudmi.org/pdf/english/colloquia/public-private-partnerships-2013/Discussion\\_Paper\\_260313.pdf](http://www.cnudmi.org/pdf/english/colloquia/public-private-partnerships-2013/Discussion_Paper_260313.pdf)

<sup>529</sup> Seungwoo Son, at Page 7.

European Union. This document also sets out principles to protect both the investors and the public authority.<sup>530</sup>

Among the core objectives of this document are to promote fairness, predictability, stability, and flexibility and to protect both the private investors and the public sector from unfair treatment and abuses. These Core Principles are based on transparency in the procedures in order to ensure fairness to all parties. These sets of documents were initially published on EBRD's website in the year 2005 soliciting for public comments before it was finally adopted in 2006.

The EBRD's document was drafted after a wide consultation and sourced from other international and regional texts. The following international texts on PPPs and concessions were used and considered.

1. The UNIDO Guidelines on BOT Projects issued in the year 1996;
2. OECD Basic Elements of a Law on Concession Agreements, 2000;
3. The UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, 2000;
4. UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects, 2003;
5. European Commission Interpretive Communication on Concessions Under Community Law (2000/C 121/02);
6. European Commission Guidelines for Successful Public-Private Partnerships, 2003; and
7. European Commission Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions, 2004.

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<sup>530</sup>See Core Principles for a Modern Concession Law. Retrieved from [http://www.ebrd.com/pages/sector/legal/concessions/core\\_principles.shtml](http://www.ebrd.com/pages/sector/legal/concessions/core_principles.shtml). Accessed on 19.06.13.

There are ten (10) core principles adopted by the EBRD for Modern Concession Law (MCL) within the Union. The principles are summarised hereunder with their sources:

**(a) There should be clarity in the Modern Concession Law (MCL) for the private sector**

There is no doubt that clear legal framework and good government policies are very important in attracting private sector to participate in infrastructure development. The existence of an attractive legal and business environment will certainly signal the commitment of the government to development. This strategy should generally be developed and integrated in the legislative document to be approved for concessions by the national governments.

This principle was taken and developed from UNIDO's Guideline for Infrastructure Development through BOTs. These two documents (both UNIDO and EBRD) stress the importance of adopting a sound legal and regulatory framework in order to show the commitment of the state in the promotion of sound business environment by enhancing and protecting the interest of potential investors.<sup>531</sup>

**(b) A Model Concession Law should create a sound legislative foundation for concessions**

For the private sector to effectively participate in the development of infrastructure there should be an enabling legal framework. An enabling legislative foundation is important to clearly establish the roles and responsibilities of all the stakeholders.

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<sup>531</sup> See Principle 1 of the IBRD document for a modern concession law.

The concession legal framework should be one that will foster a clear, predictable, and stable legal environment for concession projects.

This principle was sourced from the UNCITRAL Legislative Guide which in its first recommendation, emphasises the importance of having a solid legislation because it will not only set out in clear terms the investment regime necessary for concessions, but it will also signal the commitment and readiness of the state to enter and be bound by the concession agreement.

**(c) A Model Concession Law should provide clarity of rules**

Every concession law should have clear rules which will define the extent and scope of its application. Where there is legal clarity and precision in the rules, such will help in ensuring predictability of the concession regime, stability and validity of the concession agreement as well as ensuring the prevention of ungrounded arbitrary actions by the contracting authorities. The rules in the MCL should give a detailed definition of concession, contracting authorities and the extent of their powers, the list of sectors and infrastructure that can be concessioned, as well as the criteria for selection of concessionaires. This principle is based on the 2<sup>nd</sup>-5<sup>th</sup> recommendations of the UNCITRAL.

This recommendation as contained in the Legislative Guide further stresses the need to have detailed rules that defines and identifies the organ of government responsible to grant concession, the categories of infrastructure that are eligible under the scheme, the responsibilities of the contracting parties and the powers of the institution that is responsible to oversee and coordinate the projects.



**(d) Model Concession Law should provide a stable and predictable concession legal framework**

Privately financed projects are mostly for a long time. In the course of implementation, some factors may change which may adversely affect the smooth implementation of the project, and one of this is the legislation. Incessant changes in the relevant legislation may adversely affect the agreement and which may in turn affect the sustainability of the project.

In order to ensure the stability and predictability of the project, government should avoid incessant changes to the concession laws and should also include a proviso in the contractual agreement, stipulating the surviving applicability of the regime in force at the time the agreement was signed. This recommendation was taken from both recommendation 58 of the UNCITRAL Legislative Guide and the OECD Basic Elements Law on Concession which contain stability clause with the aim of protecting the concessioner from the possible changes of concession law by the government.

**(e) A Model Concession Law should promote fairness, transparency and accessibility to all the concession rules and procedure**

One of the basic principles guiding a concession is the fairness, transparency and accessibility of the rules and procedures governing the selection of concessionaires. An ideal MCL should guarantee a fair, transparent and competitive bidding and selection processes giving equal treatment to all potential investors. It should also afford the bidders the opportunity to sue in case any of the contract terms has been violated.

Recommendations 9 of the UNCITRAL Legislative Guide specifically provides that the rules and regulations guiding concessions should be fair, transparent and accessible to whoever wants to have access to them. Regulation 10 states the need for a MCL to provide for the establishment of an independent body to review the administrative decisions made in the process of granting concessions.

**(f) A Model Concession Law should be consistent with the country's legal system and other national legislations**

In order to avoid unnecessary collusion and inconsistencies, a Model Concession Law should not be inconsistent with the national legislation of the country. Where any inconsistency occurs, appropriate legislations should be made to ensure it is amended and brought in line with the country's legislation.

The UNCITRAL Legislative Guide reiterates the need for the concession laws to be in consonance with the constitutional provisions and other enabling statutes of the respective country. Typical examples will be the constitutional provisions stating the extent of a government agency to grant concessions. Any proviso in the concession law that stipulates a contrary position will be declared inconsistent by the court.<sup>532</sup>

**(g) Model Concession Law should allow for negotiability of concession agreements**

Freedom and flexibility are important factors to consider in negotiating concessions. This is because the parties will be able to factor in a variety of circumstances in allocating risks between them and it also ensures elaboration of more creative and financially efficient approaches to risk allocation.

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<sup>532</sup> Such laws must as a matter of law not inconsistent with the provisions of the constitution. See for example, the provision of S.1 of the Nigerian Constitution (As amended).

Recommendation 12 of the UNCITRAL Legislative Guide advises the legislative drafters against including provisions that will limit or curtail the capacity of either or both parties to negotiate with respect to a particular area of the concession provision. Therefore, parties' rights to negotiate should not be limited or restricted to a particular area of the agreement.

**(h) The Model Concession Law should allow for enforceability of the decisions of courts or arbitral tribunals**

In order to effectively protect the interests of parties to a PPP agreement, decisions of courts or arbitral awards should be enforceable for proper resolution of disputes among the parties concerned. This principle is especially very important in order to create a more attractive, predictable and secured investment climate for the investors. This principle, which is largely sourced from Recommendation 69 of the UNCITRAL Model law emphasises the importance of agreeing on a dispute resolution mechanism that is the best and most suitable for such kind of project.

**(i) Recommendation on the need for the government to support financially or give a guarantee for sourcing of funds**

There are instances where though, the private sector has the technical competence to execute the project; however, it may require some funds which would need to be sourced from either internally or externally. Government can therefore assist these potential investors by giving guarantees for the successful execution of the projects. This will make the project to be more attractive to the investors.

**(j) A good Mode Law should accommodate Security Interests**

As a rule, only approximately 30% of a concession project is financed by the concessioner. The remaining percentage (say 70%) is usually sourced from financing institutions such as banks and other lenders. Therefore, there is a need for a security arrangement whereby the concessioner gives the lender, security over its rights under the concession agreement.

However, in order for this security to be effective, the government should also give an assurance to the lenders that for the purposes of the security's enforcement, the proper procedures would allow the concession to be carried out and the lenders to "step-in" to the concession agreement. Thus, this mechanism guarantees the continuation and sustainability of the concession project and effectiveness of the investment.

It should be mentioned that although, the EBRD "core principles were developed from the UNCITRAL Legislative Guide and Model Law amongst others, it has however been observed that the EBRD still needs a greater clarity in the legislative framework on concessions.<sup>533</sup> This should be in form of enactment of new laws or amendment of the existing laws. It was also noted that there is the need for increased transparency in the selection process. This will involve adequate publicity for the invitation to bid and also in the selection process.

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<sup>533</sup> See Anita Ramasastry, A favourable concessions regime: A lender's perspective and perceptions from transition countries. Retrieved from <http://www.ebrd.com/downloads/legal/concessions/labadi.pdf>. Accessed on 04.11.13.

### 6.3.5 European Commission's Directives on the Award of Concessions

In recognition of the great economic opportunities offered by concessions, the European Commission evinced its intention to adopt a legislative initiative on Public Private Partnership projects.<sup>534</sup> This was informed by the fact that in the community, the award of works concession contracts is guided by a limited number of secondary legislations,<sup>535</sup> while in the case of service concessions, the general principles governing the Treaty of the Functioning of the European Union (TFEU) is the applicable law.<sup>536</sup>

However, the lack of legal certainty has occasioned serious distortions in the functioning of the internal market and is hindering the access of European businesses. Not only that, it also results in lack of efficiency in the way and manner businesses were carried out. In the explanatory memorandum of the Directive of the European Parliament and of the Council on the award of concession contracts,<sup>537</sup> the reasons for the Community's intention to adopt a single legislative framework were stated thus:

*“In the context of severe budgetary constraints and economic difficulties in many EU Member States, efficient allocation of public funds is of particular concern. An adequate legal framework for the award of concession contracts would favour public and private investment in infrastructure and strategic services at best value for money. The potential of a legislative initiative on concession contracts to create a supportive EU framework for PPPs was singled out in the Commission's 2009 communication on Mobilising private and public investment for recovery and long term structural change: developing public private partnerships.”*

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<sup>534</sup> See communication *The Single Market Act Twelve levers to boost growth and strengthen confidence* of 13 April 2011.

<sup>535</sup> These are separate legislations that are applicable in the respective member states.

<sup>536</sup> *Ibid.*

<sup>537</sup> Communication 2011/0437 (COD).

The main aim of this initiative therefore is to reduce the uncertainty surrounding the award of concession contracts which can result into great benefits to both the public authorities and the private economic operators in the development of infrastructures. A clear legal framework will also allow all economic operators within the EU effective access to the market.

The information gathered from different consultations with stakeholders on the need for a legislative framework for concession contracts was adopted by the Impact Assessment Board on 21<sup>st</sup> March 2011. The board on its part made further recommendations on certain vital issues that the legislative framework should address.<sup>538</sup> In the executive summary of the final Impact Assessment Report, the board put it succinctly thus:

*“The report confirmed the need for new legislation. It found that economic operators are faced with an unlevel playing field, which often leads to missed business opportunities. This situation gives rise to costs and is detrimental to competitors located in other Member States, contracting authorities and contracting entities and consumers. Moreover, both the definition of concessions and the precise content of the obligations of transparency and non-discrimination arising from the Treaty remain unclear. The resulting lack of legal certainty increases the risk that illegally awarded contracts will be cancelled or terminated early and it ultimately discourages the authorities from using concessions where this type of contract could be a good solution.”*

In December 2011, the Commission finally adopted its proposal on the award of concession contracts.<sup>539</sup> This proposal is part of the efforts of the Commission with the aim of consolidating and creating a modern legislative framework for the award

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<sup>538</sup> These include the differences in the treatment between concessions and public contracts and the reasons for the consequences of the distortions found in the different laws on concessions.

<sup>539</sup>As announced in the Single Market Act ([IP/11/469](#)).

of concession contracts within the EC. It is also made in consonance with the provisions of the Public Procurement Directives applicable within the EU.<sup>540</sup>

### **6.3.5.1 The Main Elements of the New Directives**

- (a)** The new rule gives a more precise and clearer definition of Concession.
- (b)** The scope of the application covers the award of works and services contract both in the classic and utilities sector.
- (c)** It makes provision for compulsory publication of such contract in the official Journal of the European Union provided their value is equal to or more than €5,000,000;
- (d)** It provides for concrete solutions to take care of unexpected changes in concession contracts as a result of unforeseen circumstances
- (e)** It establishes certain obligations in respect of the criteria for selection and award of contract to the bidders. These obligations are applicable to both the public authorities and the private firm;<sup>541</sup>
- (f)** The directive provides for no strict award procedures, but it however provides that such procedure as may be adopted should ensure that there is transparency and equal treatment of all parties especially with respect to negotiation.
- (g)** Provides for the application of the remedies directives<sup>542</sup> to all concessions. This is aimed at guaranteeing judicial protection for all European Union companies that are taking part in the bidding process.

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<sup>540</sup> See COM(2010) 608 final, point 1.4, proposal n° 17.

<sup>541</sup> These rules aim at ensuring that such criteria are published in advance, are objective and not discriminatory. In general, they are less rigid than similar provisions currently applicable to public contracts.

<sup>542</sup> Directives 89/665/EEC and 92/13/EC, as amended by Directive 2007/66/EC.

### **6.3.5.2 Legal Elements in the Directive**

The proposal derives its source from the relevant provisions in the Treaty on the Functioning of the European Union (TFEU).<sup>543</sup> Specifically, Article 114 (1) of the treaty provides:

*“Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.”*

It is the intendment of the drafters that this Directive will guarantee legal certainty, fairness and transparency in the award of concession contracts; as a result, this will ultimately contribute to improved investment opportunities and ultimately ensure better quality of works and services.

#### **(a) Provisions Relating to Legal Certainty**

The Directive aims to enhance legal certainty as it provides clear rules governing the award of concessions which the parties seeking to contract must comply with. In addition, the Directive also aims to give economic operators basic guarantees with respect to the award of concession contracts. The proposal further incorporates such provisions as to ensure substantial compliance with the principles of transparency, equal treatment and non-discrimination, so as to give

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<sup>543</sup> See Articles 53(1), 62 and 114 of the TFEU.



prospective tenders the opportunity to effectively compete with others.<sup>544</sup> This will allow for an overall economic advantage for both the contracting authorities and the prospective private firm. These criteria will further ensure the prevention of arbitrary decisions by the contracting parties and further provides that the criteria must be published in advance in order to give the prospective tenders the opportunity to know the detailed provisions.<sup>545</sup> The directive will apply to concession contracts awarded after it came into force.<sup>546</sup>

### **(b) Procedural Guarantees**

The Directive does not contain fixed and rigid procedures that must be followed unlike the Public Procurement Directives.<sup>547</sup> This will give room for the nations within the community to adopt a more flexible procedure, reflecting national legislations and allowing the award process to be structured in accordance with the legal system of the respective states. However, the directive provides a number of succinct procedural safeguards which must be adhered to in awarding concessions. These procedural safeguards are aimed at ensuring a fair and transparent process.<sup>548</sup>

The directive provides further that the criteria for selecting the winner should relate exclusively to the economic, financial and technical capacity of operators, should be made public and this should allow an economic operator to relying on the capacities of other entities, regardless of the legal nature of its links with those

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<sup>544</sup> See Article 24 of the Proposed Directive.

<sup>545</sup> See Article 18 of the Proposed Directive.

<sup>546</sup> As at the time of this research, the Draft Proposal is not yet in force.

<sup>547</sup> See the Public Procurement Directives 2012. Retrieved from

[http://ec.europa.eu/internal\\_market/publicprocurement/modernising\\_rules/reform\\_proposals\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/reform_proposals_en.htm). Accessed on 15.11.13.

<sup>548</sup> See Article 25 of the Directive.

entities, if the latter proves to the contracting authority or entity that it will have at its disposal the necessary resources.<sup>549</sup>

It has been stated that new rules on concessions will improve legal security for public authorities and economic operators across Europe in the provision of infrastructure projects such as ports, roads, dams and even in the provision of services to the citizens.<sup>550</sup> The Directive gives the contracting authorities the autonomy to decide on the best way to provide public services. This will give certain degree of flexibility to the states as to the choice of procedures to be followed in awarding concessions. However, whatever procedure is adopted, it should be one that ensures transparency and non-discriminatory criteria.

#### **6.4 Is there any Comprehensive Legislative Framework for PPPs at the International Level?**

There is no doubt that there is plethora of texts and documents from the United Nations,<sup>551</sup> multilateral agencies<sup>552</sup> and even multilateral development banks<sup>553</sup> on Public-Private Partnership projects. However, concerns have been expressed that there are multiple PPP approaches, practices and procedures being developed by various international bodies with the aim of regulating PPP transactions.<sup>554</sup> Public efficiency in PPP transactions can only be enhanced where there are standard legal and administrative procedures with certain level of flexibility to the specific needs of each project.

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<sup>549</sup> See Article 24 of the Directive.

<sup>550</sup> See the Europa Memo titled 'Commissioner Michel Barnier welcomes agreement on new rules for the award of concession contracts European Commission - MEMO/13/623 26/06/2013. Retrieved from [http://europa.eu/rapid/press-release\\_MEMO-13-623\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-623_en.htm). Accessed on 12.11.13.

<sup>551</sup> See the UNCITRAL Instruments.

<sup>552</sup> See the OECD Basic Principles, UNIDO Guidelines for PPP Projects and the European Commission's Directives on the Award of Concessions.

<sup>553</sup> See the EBRD Basic Principles.

<sup>554</sup> See the report submitted by Simmons & Simmons.

The rationale for adopting a single legislative framework for PPPs formed part of the deliberations at the UNCITRAL Colloquium on PPPs held in Vienna in May 2013 where it was stated thus:

*“A text addressing the legislative framework for PPPs would be an important tool not only for developing but also for developed countries, in which how to regulate PPPs remains a topic of considerable debate, despite many existing PPP projects. Additionally, some countries have very limited experiences in PPP, and the need for information and clarification on the subject is stated to be high”*

It is therefore beyond argument that there is the need for a comprehensive, consistent and up-to-date legislative framework to regulate Public Private Partnership Projects. Without this, investors may not have confidence in the business environment in which they contract.

## **6.5 Recommendations**

1. Any model law (whether at the national, regional or international level) that seeks to develop a framework for Public Private Partnerships must contain certain “Core Principles” that will guide the implementation of PPP Projects. These core principles are very cardinal for a successful PPP programme. A good model law should:

### **(a) Identify the relevant agencies that have the powers to grant PPP contracts and the extent to which such powers can be exercised**

This is one of the most important issues that a PPP Legislative Guide should address. Normally in a country, it is the government ministries, departments and other agencies that are vested with the powers to grant concessions. The law should specifically identify which of these ministries, agencies and departments is vested

with such powers in respect of a specific project. This will help to reduce duplication of same projects by different agencies or departments of government.

**(b) Identify the agencies responsible for the implementation of PPP projects at the Central/State/ Local or Municipal levels**

A good legislative guide should identify the agencies responsible for the monitoring and implementation of PPP projects. These agencies should be identified at all levels of government Federal/State/Municipal or Local Government as the case may be.

**(c) Identify and amend all potentially conflicting legislative provisions in the national laws**

All potentially conflicting national laws that could hinder the proper execution and implementation of PPP projects should be identified and amended. Due to the complex nature of PPP transaction, different laws may be applicable like laws regulating tax, insolvency, arbitration, land acquisition among others. Therefore, potentially conflicting areas of these laws must be identified and amended accordingly.

**(d) Allow contracting authorities to reasonably negotiate the terms of the PPP contract if necessary within the limits or guidelines specified by the law**

A model legislative guide should contain provisions allowing parties to a PPP transaction to negotiate the terms of the contract within the bounds allowed by the law and without fear or favour.

**(e) Establish a fair, equitable and transparent procedure for tendering and selection of bidders**

This is one of the core basic principles that a model legislative guide should contain. It should establish a standard procurement procedure that ensures transparency, fairness and equal treatment of all the bidders. It should also contain provisions to the effect that government agencies or department shall not take any action which is capable of prejudicing the interest of any of the parties.

**(f) Provide detailed and enforceable remedies for any party who wishes to seek redress either in a court of law or through Alternative Dispute Resolution mechanisms**

Such legislative Guide should provide for a comprehensive procedure for seeking redress through arbitration or a court of law. Because of the fact that PPP disputes are commercial disputes, there should be provision for internal mechanism for settlement of disputes, and it is only when this fails that a party can go to arbitration or finally to a court of law.

**(g) Contain Provisions for financial incentives or government guarantees for the Private sector where necessary**

The Model Legislative Guide should contain provisions for government assistance to the private sector. This may be in form of financial assistance or guarantee that the project will be executed successfully. These incentives will certainly spur the private firms to enter into concessions and it will also make the market to be more attractive.

**(h) Provide for the validity of security interests granted by the Contractor over its assets or cash-flow and to grant step-in rights to its lenders**

Due to the fact that most concessioners source a larger percentage of project money from the banks and other financial institutions, there will be the need for an arrangement relating to the security of the money. The guide may include a

provision relating to an assurance by the government that the proper procedure will be followed in order to execute the project and also that for the purpose of the security's enforcement, the lenders should be assured of the right to step in to the concession agreement. Thus, this mechanism guarantees the continuation and sustainability of the concession project and effectiveness of the investment.

2. Apart from the above principles, it is also pertinent to consider that the scope of projects that can come under PPPs should be expanded to include natural resources projects like mining and also the provision of service contracts. The model law should cover both soft<sup>555</sup> and hard infrastructure<sup>556</sup> and also natural resources<sup>557</sup> and services.

3. Elements of emerging legislations at the national level could also be incorporated into the model law. Some countries have developed national legislations for PPPs and this can be of help when updating the UNCITRAL Model Law. Evidence indicates that countries like Australia, Canada, United Kingdom, France and South Africa among others have developed their respective PPP legislations.

4. UNCITRAL Model Law should incorporate significant issues relating to commerce, especially considering the fact that demand for investment in infrastructure has now greatly exceeded the financial resources available to the public.

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<sup>555</sup> Example of soft infrastructure is the internet services.

<sup>556</sup> Bridges, Dams and roads among others are examples of hard infrastructure.

<sup>557</sup> These connotes reserves or other deposits of whatever nature such as gold, silver, oil and gas, hydrocarbons and other resources that may be found. See further the provision of Article 2(f) of the OECD Basic Principles.

5. The language to be adopted in the UNCITRAL Model Law should be succinct and comprehensive so as to serve as a guide for national legislatures in adopting a model law for their respective countries.

## **6.6 Conclusion**

There is no doubt that Public-Private Partnerships (PPPs) can play a very significant role in the development of a nation through the development of social and economic infrastructure like roads, dams, airports, bridges, hospitals and educational institutions among others. There is also no doubt that PPP enhances efficiency in public services and can assist a nation in harnessing private capital to build infrastructure that will support economic growth. In fact, private finance is now a big business and it has drastically changed the landscape of public procurement. For PPPs to successfully drive economic growth and prosperity, certain conditions precedent must exist. These include sound policies, laws, implementation strategies good institutional set-up. The writer is mindful of the focus of this chapter is on an international model law.

At the international level, there is the need to have a coherent approach to all methods of infrastructure development and provision of services through the establishment of a clear, consistent and comprehensive model legislation whose application will transcend a nation's border. The main reason for this is that since PPPs involve the transfer of national assets to the private sector, then all transactions should be subject to the same rules regarding governance, transparency, competition, objectivity in decision making and dispute resolution procedure and so on.

From the foregoing analysis, it is clear that the UNCITRAL Instruments regulating PFIP do not constitute a model law. It should therefore be revised to incorporate the legislative provisions in the OECD Basic Elements, EBRD Core Principles and other emerging issues that need to be addressed in PPPs. All these taken together can serve as a checklist for the stake holders and other prospective investors to measure whether a nation's legal system has adequate provisions for PPPs or not.



## CHAPTER 7

### CONCLUSION AND RECOMMENDATIONS

#### 7.1 INTRODUCTION

In this concluding chapter, the writer will revert to the objectives of this research mentioned at the beginning of this thesis. Chapter 1 of this thesis put forward four objectives for this research namely:

1. To examine and evaluate the legal and regulatory framework for Public Private Partnerships in infrastructure development in Ghana, Nigeria and South Africa and other core international legislative frameworks for purposes of reforms and creating a sound investment environment for private investors;
2. To analyse the roles and responsibilities of the regulatory agencies under the relevant regulations, laws and conventions;
3. To identify the issues and challenges facing the implementation of PPP in Ghana, Nigeria and South Africa after their adoption; and
4. To propose reforms and recommendations in order to close the gaps in the existing legislative framework for PPPs in these countries as well as the international agencies.

The specific issues addressed in Chapters III-VI of this thesis are meant to achieve the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> objectives as stated above. Having examined the existing legal and regulatory framework for Public Private Partnerships in Infrastructure Development in Ghana, Nigeria and South Africa, as well as core regional and international legal frameworks on same, this chapter seeks to bring together the answer the earlier questions posed in the previous chapters in order to achieve the above objectives.

## **7.2 Review of Chapters II-VI**

Chapter II centers on the meaning, definition and the conceptual framework for the study. Discussion here centers mainly on the definition of concepts, differences between Public Private Partnerships and other procurement models such as public procurement and privatization. The chapter further discusses the different types of Public Private Partnerships as well as the necessary and vital agreements which are important in a PPP transaction.

Chapters III, IV and V examine the regulatory regime of Public-Private Partnerships in Ghana Nigeria and South Africa respectively, with specific focus on the legal and regulatory framework put in place. The chapter further examines the functions and powers of the regulatory agencies and the contracting authorities in the grant of PPP contracts because it is important to determine the agency that has the power to grant and ensure the successful implementation of the projects. The chapters also discussed the basic principles that are important and which may serve as a tool-kit in measuring the investment environment for PPP programme in a particular country. These are transparency, accountability, fairness in the bidding process, publicity and confidentiality among others. The chapters thereafter examined the challenges facing the PPP programme in their respective jurisdictions.

Chapter VI on the other hand examined the PPP legislative frameworks made by the UNCITRAL and some other international agencies so as to serve as guides for nations to adopt as PPP at the national level. Specifically, the UNCITRAL Instruments on Privately Financed Infrastructure Projects (PFIPs), United Nations

Development Organisation (UNIDO), the OECD and the European Bank for Reconstruction and Development (EBRD) legal instruments were examined in order to determine whether each of them can serve as a model law that can successfully serve as guide for nations willing to adopt PPPs.

### **7.3 Findings**

This research work carried out an extensive review of the relevant laws and regulations governing PPPs in the three selected countries. As at the time of writing this research, Ghana has not enacted a PPP law yet, it only uses a mere policy issued by the Minister for Finance and Economic Planning. The brief findings are as follows:

#### **7.3.1 Adequacy of the Existing Legal Framework**

Among the three national laws examined, South Africa has the most comprehensive legal framework compared to what is obtainable in Ghana and Nigeria in relation to PPP regulatory framework.

##### **7.3.1.1 Findings on Transparency, Accountability and Fairness of PPP Procurement**

The study showed that unlike Ghana and Nigeria, South Africa has series of legislations and regulations to ensure that a fair and transparent procedure is followed in PPP procurement process. The constitution itself contains provisions to this effect. Section 217 of the constitution provides that such procedure must be transparent and fair. Several other legislations like the Promotion of Administrative Justice Act, 2000, Promotion of Access to Information Act, the Competition Act, Preferential Procurement Act, the PPP Manual and the modules make extensive

provisions in order to ensure that PPP procurement process is transparent. The Promotion of administrative justice Act in Particular provides that official acts of government agencies must be lawful, reasonable and in accordance with a procedure that is fair.

Competition laws which encourage sound competitive trade practices and eradicates restraints on the full and free participation in the economy have not been enacted in Nigeria and Ghana. Although, competitive bidding is mentioned in both the ICRC Act of Nigeria and the Ghana PPP National Policy, the procedures for achieving a fair competition are not clearly stated. This law is vital to a sound PPP procurement because it ensures that the most competent bidder emerges through a fair competitive procedure.

From the findings on the adequacy of the law on this point, South Africa has the most comprehensive laws that can ensure transparency, accountability and fairness in procurement process followed by Nigeria and Ghana in that order.

#### **7.3.1.2 On the Right of foreign Nationals to Participate in PPP process**

This study has shown that all the national laws of the countries examined allow foreign operators to participate in the provision of infrastructure through the PPP initiative. This right to participate has certain conditions that vary from one jurisdiction to the other. In Ghana, the law allows any foreign investor who intends to participate in infrastructure development in the country to team up with a Ghanaian entrepreneur or a firm for a joint venture in order to form a partnership or company. The Government of Ghana has no overall economic or industrial strategy that discriminates against foreign-owned businesses. In some cases a foreign

investment may enjoy additional incentives if the project is deemed critical to the country's development. However, under the Ghana Investment Promotion Centre Act, 1994 (Act 478), a foreign investor must have an equity capital of not less than US\$10,000 and must be in partnership with a Ghanaian before he can form a company or participate in any Joint Venture in Ghana.

In Nigeria, a foreign expatriate may operate alone or in joint venture with a Nigerian by means of a company which must first of all be registered in Nigeria. Such an alien is free to participate in the procurement processes in Nigeria provided it has complied with the relevant legislations in Nigeria. However, S.55 of the Companies and Allied Matters Act provides that a company may apply to the President for exemption from registration in Nigeria where such company is invited to Nigeria by or with the approval of the Federal Government to execute any specified individual project. This provision is intended to attract foreign companies that have the competence and capabilities of executing gigantic projects but who may wish to avoid the procedure of registration in Nigeria.

Findings revealed that any foreigner who wishes to participate in business in South Africa requires no other permit except business permit. Such a company must have at least R2.5 million which he must be ready to invest in the country. Such business or partnership which the foreigner intends to start must be one that will create jobs for South African nationals.

### **7.3.1.3 Adequacy of the Law on Dispute Resolution Mechanism**

Findings revealed that it is only the South African framework that makes extensive provisions for dispute resolution in PPP procurement process. The ICRC applicable in Nigeria only mentions that parties shall refer to arbitration in case of dispute, however, the procedure and other necessary provisions are not provided in the law. The National Policy applicable to PPPs in Ghana is silent on dispute resolution mechanism for PPP contracts. In both Nigeria and Ghana, the respective Arbitration and Conciliation Act applicable in each country govern PPP disputes in those countries.

In South Africa however, Module 6 of the National Treasury PPP Manual and Part 86 of the Standardized provision applicable to PPPs prescribe a detailed procedure for resolving dispute in PPP procurement. Findings further showed that it is the intendment of these provisions that disputes must first be settled internally by the Project Officer and Accounting Officers respectively. The regulation requires that before a PPP dispute is taken to court, alternative means of settling disputes like informal conciliation must first be attempted because these modes will fast-track the resolution of the dispute by expert adjudicators. The study further showed that the PPP regulations do not favour Mediation, which is the resolution of dispute by a neutral third party. The reason is because, in mediation, the neutral party has no power to render a decision which would be binding. Therefore, internal referral like informal conciliation is preferred than mediation.

From the findings on this point, South African legal framework has comprehensive provisions for resolution of PPP disputes through an alternative dispute resolution mechanism that is effective. There is no doubt that investors will be more confident if the dispute resolution mechanism is effective and result-oriented.

This research work also examined the international legislative framework. This is the discussion in Chapter VI. It was pointed out that the UNCITRAL Model Law on PFIPs and other legislative framework examined are not comprehensive enough to constitute a model law that can guide all countries that wish to adopt PPP as a solution to their infrastructure deficit. UNCITRAL Model Law at best can only serve as a guide for countries that wish to adopt a national law to regulate their PPP Programme. What a comprehensive model law should contain is provided in this chapter under recommendations. It is further suggested that the UNCITRAL Model Law and other international legislative framework should be revised so as to make it comprehensive.

#### **7.4 The Roles and Responsibilities of the Regulatory Agencies in the Successful Implementation of Public-Private Partnerships Programme**

The second objective is to examine the roles and responsibilities of the concerned agencies in order to ensure a successful PPP programme. In doing this, the study identified and examined the regulatory authorities in the selected jurisdictions. Findings on this are as follows:

##### **7.4.1 On the Power of the Agencies that can grant Concessions**

The findings from the three countries examined reveal that the power to grant PPP contracts is vested in the Ministries, Department and agencies (MDAs) of government concerned. Therefore, the extent of the powers of the respective

agencies is contained in either the constitution or the enabling laws establishing such institution. The rationale for having such provision in the constitution is to clearly spell out which level of government or agency has the powers to grant concession. In Nigeria and South Africa that have different layers of government, the powers are contained either the exclusive or residual legislative list in the constitution. These lists provide for the areas where the federal or state or municipal governments have legislative competence. Ghana operates a unitary system of government; therefore, the possibility of conflicts on which organ has the powers is almost non-existent.

#### **7.4.2 Functions and Effectiveness of the Regulatory Agencies in the Implementation of PPP Programme**

Findings on the above showed that South Africa has the most effective regulatory agency for the implementation of PPPs. The PPP Unit of the National Treasury has rolled out more PPP projects than the other two countries. Findings further revealed that in Ghana and South Africa, the main regulatory agencies which are the Public Investment Division and the PPP Unit are situated within the Ministry of Finance and the National Treasury respectively. Research shows that the reason why these agencies are within the ministry of finance and the national treasury is mainly to ensure sound financial management of funds by the MDAs. As a result of the fact that PPP is linked to the capital of the MDAs, the National treasury and the MOFEP will be able to properly monitor and ensure full compliance with the power of approval of funds and if there is any guarantee to be given.



As a result of this, it was found that it is better for the regulatory agency to be established within the ministry of finance or National treasury. Due to off-budget nature of PPPs, the establishment of the agency within the finance ministry will help to appreciate the budgetary implications of PPPs.

However, in Nigeria, the Infrastructure Concession Commission is under the direct control of the presidency which is a political institution. Some of the PPP projects that have failed in Nigeria are not unconnected with the fact that the commission lacks proper implementation strategy. Part of the reasons for this is because majority of members of the board of the commission are politicians who know little or nothing about PPP programme. The Lagos / Ibadan Highway project which was concessioned to Bi-Courtney Nigeria Limited failed because vital issues which the commission ought to have addressed during the feasibility studies were not addressed. The Commission has very little effective powers under the Act establishing it and it may likely end up being largely a monitoring and policy-making entity without the capacity to enforce compliance, particularly on the side of the government.

The study therefore found that the PPP regulatory agency in South Africa is more effective and this accounts for an increase in the deal flow of PPP transactions in the country.

## **7.5 Challenges Facing PPPs**

The challenges facing PPPs are discussed in each of the chapters dedicated to each of the selected countries studied. These are:

### **7.5.1 Lack of Comprehensive Legal Framework**

The study found that lack of clarity and comprehensive legal framework poses a major challenge to the PPP deal flow in Ghana. The country still relies on the National Policy which was made by the Ministry of Finance and Economic Planning. The Proposed PPP law which is still pending to be passed will likely address this challenge once it is enacted into law. This lack of comprehensive legal framework is not a challenge to the South African PPP Programme. A lot of Acts, Regulations and Manuals and Modules have been made with the aim of complementing one another on PPP issues. This is one of the success stories for South Africa's PPP programme.

In the absence of a sound and comprehensive legislative initiative, the rules on the definition and award of PPP contracts and other vital issues will emerge from decisions of courts, leaving legal uncertainty to persist and its attendant price and protracted litigation.

### **7.5.2 Challenge of Raising Long Term Credit Facilities**

The study found that this is a major impediment to the implementation of PPP programme in Nigeria. PPP projects are mostly for long term. Most Nigerian banks only grant a short term or medium term finance. The Multi-Million Dollar Lagos/Ibadan Concession Project failed because the concessioner could not raise the credit facilities locally. When the concessioner got some infrastructure

financiers outside the country, the Federal Government of Nigeria then refused to give a guarantee which was a condition agreed upon between the concessioner and the financiers. If this challenge is not adequately addressed, it would be difficult for the private sector to execute gigantic projects which require huge funding in Nigeria.

This is not a major challenge to the implementation in Ghana and South Africa. In fact, South Africa has executed series of gigantic projects involving huge finances with the support of local banks and other financiers. Rand Merchant Bank and Group Five have been in the fore-front of those that finance PPP projects in South Africa. The Dedicated PPP Unit also recommends guarantees for any developer that needs to source for funds externally.

### **7.5.3 Dearth of Experts**

The study found that the three countries still need more experts to accelerate the rate at which PPP projects are being rolled out and monitored. Because of the complex nature of PPP transactions, expertise should be developed to cover various areas such as contract management, legal, policy and financial aspects of the PPPs. This is the only way by which there can be an appreciable increase in the deal flow of PPP projects. This will greatly help to monitor and increase the deal flow of PPP projects.

#### **7.5.4 Lack of Political Commitment**

On this point, it was found that the governments of Ghana and South Africa have shown high degree of commitments to make PPPs work. In fact, to further demonstrate its commitment to PPPs, the government of Ghana has appointed a minister of state in the presidency, whose role is mainly to see to the proper implementation of PPP Programme in the country. The minister will be responsible for policy issues while the PPP Advisory Unit of the Public Investment Division will still be the main regulatory body.

In Nigeria, lack of government commitment has also been a major challenge. After the Bi-Courtney Aviation Services spent about 25 Billion Naira on a BOT project at the Murtala Muhammed Airport in Lagos, in October 2012, the Federal Airport Authority of Nigeria suddenly came out to introduce a new dimension disclosing that the Build, Operate and Transfer arrangement it had with the company over the airport was only for a period of 12 years and not 36 years.

Not only that, in the concession of Lagos/ Ibadan Expressway concession project that was granted to Bi-Courtney Nigeria Limited, the Federal Government of Nigeria blatantly refused to give a guarantee to the international financiers who already expressed their readiness to finance the very important road project in Nigeria. After the concessioner could not raise all the funds, but within the time given to the developer for the project, the Federal Government abruptly terminated the road contract without any consultation with the developer.

All these point to the fact that the Federal Government of Nigeria only pays a lip service to making PPPs work in the country. It was further found that government has the culture of impunity when it comes to fulfilling its obligations under the contract especially where a private sector is concerned. This is as a result of the fact that the government always feels it is in an unequal position in dealing with the private sector. This lack of commitment on the part of the government will scare away private investors who want to invest in infrastructure project in the country.

#### **7.5.5 Corruption**

Findings revealed that this is another major impediment to PPP process. This is most pronounced in Nigeria than Ghana and South Africa. Although, Ghana and South Africa are not totally insulated from corruption, however, the degree of corruption in contract procurement in Nigeria is alarming. The legal loopholes and lack of political will in government facilitate both domestic and cross-border corruption in Nigeria. The 2013 Transparency International Index, which ranked Nigeria as 144 out of the 177 countries examined stated that abuse of powers, bribery and secret dealings have continued to ravage public procurement in Nigeria.

#### **7.5.6 Slow and Weak Justice Administration System**

Although, PPP dispute being commercial in nature are normally referred to arbitration and if it fails, it can then be referred to the regular courts. Findings on this revealed that slow pace of justice delivery is not healthy for a PPP programme. Most of the private developers borrowed money from banks and other financial institutions to finance the project. Therefore, they do not want their monies to be tied down while the protracted litigation goes on indefinitely in court. Aside PPP

commercial disputes, a litigant may want to challenge the administrative action of the regulatory agencies or even a breach of the provisions relating to transparency, fair competition and access to information. All these will have to go to the regular courts of law and not to arbitration.

Findings revealed that South Africa's judicial system is very strong, speedy and effective. The Constitutional Court is fearless and very independent, likewise other courts of record. This has been demonstrated in several cases earlier cited in the discussion in Chapter 5 of this thesis. This has really increased the confidence that the private sector has in the entire procurement system.

The judicial system in Nigeria is slow and tainted with corruption. Cases can linger on in court for 20-30 years or even more before they are finally concluded. This certainly does not support the nation's drive to attract investors to develop infrastructure in the country and certainly reduces the confidence that the investors have in the judicial system.

#### **7.5.7 Conflicting Laws and Policies**

This research revealed that for PPPs to work smoothly, all conflicting laws and policies have to be amended to allow a proper implementation of the PPP programme. In South Africa, there are apparent overlapping responsibilities on the policy directions of PPPs especially in the municipalities. This confusion sometimes arose as to which agency performs certain functions among the Municipal PPP Unit, Department of Local Government and other national agencies or departments. There are also conflicting legislative provisions in the legal framework especially between the Municipal Finance Management Act MFMA

and the Municipal Systems Act MSA. One of the most apparent conflicting provisions which this study depicted relates to the time requirement for conducting feasibility studies. Although, both laws stipulate that feasibility studies should be conducted at the municipal level, their provisions are however not identical.

In the same vein, the study revealed that in Nigeria, conflicting legal and regulatory framework poses a great challenge. As discussed in Chapter 4 of this thesis, there is apparent conflicting provision between the Federal Airport Act and the Federal Capital Development Authority Act as to which agency has the powers to grant concession in respect of the airport situated at the Federal Capital Territory. Conflicting claims by both agencies have led to abandonment of the Nnamdi Azikiwe Airport concession project.

## **7.6 Conclusion**

Governments all over the world are greatly encouraged to grasp the opportunities provided by the private sector which are: the availability of large capital to meet the growing needs of infrastructure projects; competence and efficient management of resources; skills and access to advanced technology; as well as transparency and accountability to drive a nation to achieve sustainable socio-economic development. The paradigm shift is now from ‘government-providing’ to ‘government enabling’ approach in the provision of infrastructure.

Today, there is a worldwide revolution for infrastructure provision through the Public-Private Partnership initiative. This paradigm shift to PPPs from other procurement methods can help African nations and other developing nations to achieve the Millennium Development Goals (MDGs) and sustainable development.

This will also help these nations to take their rightful place in the global economies. As a result of globalization which has removed barriers to a nation's border, it will be increasingly difficult for any nation to remain competitive if its infrastructure development continues to perform at a sub-optimal level. However, there is still a lack of realization of these very fundamental conditions on the part of many developing countries.

A comprehensive legal framework is one of the hallmarks of a successful PPP programme. This is because it will provide a high level of legal certainty and regulatory stability which are very cardinal in creating an enabling environment for PPPs to thrive. This will go a long way in helping nations to achieve sustainability in Public-Private Partnership programme. The legal regime may either be codified in a special law or it may be scattered over many legal instruments. However, the former is most preferable. Where there are special laws, then the law will be more certain and easy to access. However, where the legal instruments are scattered such as company law, property law, intellectual property law, public procurement law, foreign investment law, tax law and many others, then all such applicable laws, operational rules, statutes, guidelines and other specified institutional and administrative arrangements will together constitute the legal regime for public-private partnerships.

Successive governments in Africa and other developing countries have shown concerns for the state of infrastructure in their countries in various ways, especially through government's direct involvement in infrastructure provision, albeit, with a limited degree of success. Public Private Partnership arrangements have great potentials to provide new infrastructures and upgrade the ageing ones. However,



the current legal and regulatory framework in Nigeria and Ghana respectively does not accurately reflect what is required to provide sound investment environment for the PPP programme.

South Africa has undoubtedly developed one of the best legal and regulatory regimes for efficient PPP regime with stringent measures against inefficiencies and leakages. The number of projects being carried out under the PPP programme is increasing by the day. Comprehensive legal framework, strong and effective dispute resolution mechanism, strong political commitment, early establishment of PPP Unit in the National Treasury, the black economic empowerment impacts, strong financial market and competitive public sector as well as extensive communication are part of the success factors for PPP Programme in South Africa. Although, South Africa PPP regime has its own challenges, nevertheless, it is still the preferred model among the countries studied because of its comprehensive legal and regulatory regime.

Public-Private Partnerships are thus attractive enough for the government to adopt because they may not require any immediate cash spending from the government; they can enhance the provision of critical infrastructure and service delivery; they allow for the transfer of risks associated to the project to the private sector and they provide relief from the burden of costs of design, construction and maintenance of the projects. Properly coordinated and well managed partnerships between the private sector and the governments will help developing nations to achieve socio-economic development. It is in fact a modest and achievable development initiative provided that everything is put in place to make it happen!

## **7.7 Recommendations**

As shown from the findings in sections 7.3 to 7.5 above, the following recommendations are put forward:

### **7.7.1 To Ghana**

1. A comprehensive legal and regulatory framework is very essential in sustaining PPP programme. The National Policy on PPP which is the main document regulating PPPs in Ghana is not comprehensive enough to ensure a successful PPP programme. There should be certainty in the law on PPPs in order to clarify and define the obligations of the contracting parties and the regulatory agencies. In the absence of a sound and comprehensive legislative initiative, the rules on the definition and award of PPP contracts and other vital issues will emerge from decisions of courts, leaving legal uncertainty to persist and its attendant price and protracted litigation.

2. The law and policy regulating PPPs in Ghana as presently constituted do not support the drive to fully ensure transparency and accountability in the bidding process. Transparency and accountability enthrone integrity in the PPP procurement process. This would ensure that all bidders are treated fairly and equally and would afford them the same opportunities. Laws that promote transparency and accountability should be enacted to complement the provisions of the National Policy on PPP. Examples of these are the Competition law, Freedom of Information Law, Preferential Procurement Law among others. Once the investors have confidence that the bidding process is transparent, Ghana PPP programme will attract the best and most economically viable bids.

3. Information is also another very viable tool to monitor procurement processes. The freedom of information law should be enacted to afford Ghanaians access to information about the activities of the government, agencies and the officials with respect to the allocation of public resources. This is a potent power to fight corruption. It is trite that corrupt practices flourish in darkness and secrecy, so any attempt that is aimed at opening governments and their agencies to public scrutiny is very likely to advance anti-corruption efforts. Information law will also promote transparency and reduce corruption. There is no doubt that a bad government needs secrecy to survive. Keeping governmental actions in secrecy will ensure continuous wastes, ineffectiveness, inefficiencies and gross abuse of power to survive. There is a certain impunity that enables non-performing governments; public and even private institutions to continue to hold sway over the people because the people are basically kept in darkness and ignorance. The Freedom of Information Act is a powerful weapon against this culture of impunity.

4. An effective dispute resolution mechanism should be put in place in order to resolve any potential dispute between the parties. Private parties (including the concessionaire, financiers and contractors) will be more encouraged to participate in PPP projects when they have confidence that any dispute arising between the contracting authority or other governmental agencies and the concessionaire; or between the private parties themselves can be resolved fairly and efficiently without wasting time. Because of the commercial nature of PPPs, where huge amount of money is committed to the projects, litigation will be undesirable. Each PPP contract should therefore provide for an acceptable mode of settling disputes which must, of course, not be antithetical or obnoxious to the allowed dispute resolution system under the legal framework of the concerned country.

5. There is the need to train more experts in order to be able to develop capacities in the relevant agencies of government in Ghana. Expertise should be developed to cover contract management, legal, policy and financial aspects of the PPPs. This is the only way by which there can be an appreciable increase in the deal flow of PPP projects in Ghana.

### **7.7.2 To Nigeria**

1. The government should be more committed to making PPPs programme work in Nigeria. It is one thing to have regulations for PPPs, and it is another thing for the governments and their agencies to be committed to making PPPs work. Politicians and bureaucrats must be absolutely committed to ensure that PPPs succeed, if not, the government's initiative to boost infrastructure through the PPPs will fail. In addition to this, the government should also provide political guarantees to investors where such is needed. The Federal Government has not shown enough commitments to support the initiative and that is why not much success has been recorded since the inception of the scheme.

2. Governmental policies should be consistent and in tandem with the PPP agreement. Inconsistencies of government policies in Nigeria are also likely to scare investors away and may even frustrate the private sector out of partnerships with the government.

3. Corruption has become a national malaise and a major problem that hinders development in Nigeria. As much as possible, corruption in PPP Procurement process should be reduced to the minimal level. Ideally, there should be zero tolerance for any form of corruption. This can be achieved if the government itself

is committed to this cause. The laws on corruption should also be strengthened. Although, there are laws against corrupt practices in the country, they are not being implemented properly by the respective institutions established for that purpose. In South Africa, the Prevention and Combating of Corrupt Practices Act was specifically enacted so as to provide for stringent measures to combat corruption by establishing a register of persons and companies convicted of corruption in the country in order to prevent them from benefiting from public sector procurement. Very useful lessons could be learned from the United Kingdom and Singapore where corruption was the culture in the two nations. However today, corruption has been reduced to the barest minimal level.

4. The Infrastructure concession commission which is the main PPP regulatory agency should be strengthened for successful implementation of the PPP programme. The Commission has very little effective powers under the Act establishing it and may likely end up being largely a monitoring and policy-making entity without the capacity to enforce compliance, particularly on the side of the government. Adequacy and certainty of PPP laws are therefore, vital for effective public-private cooperation.

5. The Infrastructure Concession Commission should also be more insulated from politics in the concession award process. The fact that the commission is under the direct control of the presidency portends that its policies and decisions will be influenced by politicians rather than experts in the area of procurement. The commission should rather be brought under the wing or control of a ministry that looks across line ministries: typically a ministry of finance, economy or planning. The advantage of this is that such dedicated unit will fully appreciate the budgetary

implications of PPP projects due to the off-budget nature of PPPs. In addition, the dedicated unit may create a center of knowledge and expertise that can provide individual departments with technical assistance and also will be able to keep a watchful eye on departments and agencies through its regulatory approval mechanism.

6. In Nigeria, there is the need to train more experts in order to be able to develop capacities in the relevant agencies of government. Apart from the federal/national level, states and local governments should also develop expertise in the area of PPPs. Expertise should be developed to cover contract management, legal, policy and financial aspects of the PPPs. This is the only way by which there can be an appreciable increase in the deal flow of PPP projects at the various levels of government.

7. The law should be strengthened to further promote transparency and fair competition among the bidders. Transparency and accountability enthrone integrity in the PPP procurement process. Like South Africa, Nigeria should also enact law on fair competition. Laws that promote transparency and accountability should be enacted to complement the provisions of the main PPP legislation. Examples of these are the Competition Law and Preferential Procurement Law among others. Once the investors have confidence that the bidding process is fair and transparent, PPPs will attract the best and most economically viable bids.

8. Laws and mechanisms for resolving PPP and other procurement disputes should be made comprehensive and clear. The ICRC Act only provides that in cases of disputes, parties shall refer the dispute to arbitration and no more. The

procedure and the rules of engagement were not provided. A clear and detailed dispute resolution mechanism will no doubt increase and enhance the confidence in the procurement system.

9. Inconsistent laws should also be harmonised and amended. There are still conflicting provisions in some statues e.g. there exists a conflict between the Federal Airport Authority Act and the Federal Capital Development Authority Act. This and other potential conflicting provisions should be resolved and harmonised.

### **7.7.3 To South Africa**

1. South African government should address the shortage of skilled staff in the PPP Unit. The numbers of staff are smaller in number compared to the number of PPP projects that are in the pipeline. Adequacy of skilled staff will help in increasing the deal flow.

2. The few conflicting provisions should be amended and harmonised. For example, the apparent conflicting provisions between the period for conducting feasibility studies in the Municipal Finance Management Act MFMA and the Municipal Systems Act MSA should be harmonised.

3. Laws are not carved on stones. What is sufficient today may not be so in the nearest future. There must always be room for continuous improvements and this must be made as part of the culture of an advanced legal system.

#### **7.7.4. To UNCITRAL and other International and Regional Legislative Agencies**

1. The UNCITRAL Instruments on PPPs need to be revised with a view to bringing it in line with the current trends. This is the only way in which the legal instruments will be relevant as a guide for countries that intend to adopt PPPs as an alternative to other procurement methods. There is the need to have a coherent approach to all methods of infrastructure development and provision of services through the establishment of a clear, consistent and comprehensive model legislation whose application will transcend a nation's border. Therefore, for the purpose of convenience, it will be better if all PPP transactions are subject to the same or substantially similar rules in all nations that are signatory to the UNCITRAL law.

2. The scope of projects that can come under PPPs in both UNCITRAL and UNIDO's instruments should be expanded to include agriculture, natural resources projects like mining and also the provision of service contracts. The model law should cover both soft and hard infrastructure and also natural resources and services.

3. Elements of emerging legislations at the national level could also be incorporated into the model law. Some countries have developed national legislations for PPPs and this can be of help when updating the UNCITRAL Model Law. Evidence indicates that countries like Australia, Canada, United Kingdom, France and South Africa among others have developed their PPP legislations.



4. UNCITRAL Model Law should incorporate significant issues relating to commerce, especially considering the fact that demand for investment in infrastructure has now greatly exceeded the financial resources available to the public.

5. The language to be adopted in the UNCITRAL Model Law should be succinct and comprehensive, so as to serve as a guide for national legislatures in developing countries in adopting a model law for their respective countries.

6. Finally, any model law (whether at the national, regional or international level) that seeks to provide a framework for Public Private Partnerships must contain certain “Core Principles” that will guide the development and implementation of PPP Projects. These basic principles are very important in order to achieve success in the PPP programme. It is therefore suggested that a good PPP model law should:

- (a) Identify the relevant agencies that have the powers to grant PPP contracts and the extent to which such powers can be exercised. This is one of the most important issues that a PPP law should address. Normally in a country, it is the government ministries, departments and other agencies that are vested with the powers to grant concessions. The law should specifically identify which of these ministries, agencies and departments that is vested with such powers in respect of a specific project. These powers are mostly spelt out in the constitution and other enabling statutes of the respective country. This will help to reduce duplication of same projects by different agencies or departments of government.

- (b) Establish and identify the entities that are responsible for the implementation of PPP projects at the Central/State/ Local or Municipal levels. This mainly deals with the regulatory agencies. These agencies are responsible for the implementation of PPP laws and policies. They are also in charge of monitoring and compliance with the relevant rules and regulations.
- (c) All potentially conflicting legislative provisions in the national law should be identified and amended. This is very important so as to reduce the possibility of conflicts. Due to the complex nature of PPP transaction, different laws may be applicable like laws regulating tax, environmental law, insolvency, Arbitration, land acquisition among others. Therefore, potentially conflicting areas of these laws must be identified and amended accordingly. This will ensure a smooth application and implementation of the Programme.
- (d) A model PPP law should give room to allow contracting authorities to reasonably negotiate the terms of the PPP contract if necessary within the limits or guidelines specified by the law. Sometimes, this may be necessary in order to bring the project in conformity with the prevailing socio-economic realities. This should be done in line with the law and established customs and without fear of favour.
- (e) Establish a fair, equitable and transparent procedure for tendering and selection of bidders. This is one of the core basic principles that a model legislative guide should contain. It should establish a standard procurement

procedure that ensures transparency, fairness and equal treatment of all the bidders. It should also contain provisions to the effect that government agencies or department shall not take any action which is capable of prejudicing the interest of any of the parties.

- (f) Provide detailed and enforceable remedies for any party who wishes to seek redress either in a court of law or through arbitration. The law should provide for a comprehensive procedure for seeking redress through arbitration or a court of law. Private parties (including the concessionaire, financiers and contractors) will be more encouraged to participate in PPP projects when they have confidence that any dispute arising between the contracting authority or other governmental agencies and the concessionaire; or between the private parties themselves can be resolved fairly and efficiently without wasting time. Because of the commercial nature of PPPs, where huge amount of money is committed to the projects, litigation will be undesirable. Each PPP contract should therefore provide for an acceptable mode of settling disputes which must, of course, not be antithetical or obnoxious to the allowed dispute resolution system under the legal framework of the concerned country. Because of the fact that PPP disputes are commercial disputes, there should be provision for internal mechanism for settlement of disputes, and it is only when this fails that a party can go to arbitration and finally to a court of law. Risk management should be made as part of the corporate culture. Where risks are properly managed, disputes may be avoided or minimised for cost saving purposes.

- (g) Contain Provisions for financial incentives or government guarantees for the Private sector where necessary. The Model Law should contain provisions for government assistance to the private sector. This may be in form of tax breaks or guarantees that the project will be executed successfully. These incentives will certainly spur the private firms to enter into concessions and it will also make the market to be more attractive.
- (h) Provide for the validity of security interests granted by the Contractor over its assets or cash-flow and to grant step-in rights to its lenders. Due to the fact that most concessioners source a larger percentage of project money from the banks and other financial institutions, there will be a need for an arrangement relating to the security of the money. The law or guide may include a provision relating to an assurance by the government that the proper procedure will be followed in order to execute the project and also that for the purpose of the security's enforcement, the lenders should be assured of the right to step in to the concession agreement. Thus, this mechanism guarantees the continuation and sustainability of the concession project and the investment.
- (i) Incorporate provisions that aim at addressing ways to improve sustainability issues in PPP procurement. Environmental and developmental provisions in PPP procurement law will help in developing green public procurement and it will further encourage more environmentally friendly designs.

The above stated recommendations are very vital to a successful PPP programme in the three countries examined and in any developing nation. In fact, if these recommendations are taken into consideration in drafting or developing a PPP programme, there is no doubt that the number of successful projects executed under PPPs will continue to increase both in terms of quality and quantity.

## SELECTED BIBLIOGRAPHY

### Books

- Adekilekun, M.T. "Public-Private Partnerships and Sustainable Development in Nigeria,"(2012) in *Law and Sustainable Development in Africa*, Bondzi-Simpson P.E, Egbewole W.O, Etudaiye M.A and Olatunji A.O. (eds) (Surrey: Grosvenor House Publishing Limited).
- Akanbi, M.M. & Olatunji, O.A, "Sustainable Development and Housing Delivery in Nigeria: An Examination of the Legal Perspective of the Public-Private Partnership Initiative", (2012) *in Law and Sustainable Development in Africa*, edited by P.E. Bondzi-Simpson, Egbewole W.O, Etudaiye M.A, Olatunji AO. (Surrey: Grosvenor House Publishing Limited).
- Akenroye, T.O, Oyegoke A.S & Ama Bassey Eyo, "Development of a Framework for the implementation of Green Procurement in Nigeria" (2013) *Int. Journal of Procurement Management* Vol 6 No.1 1-23.
- Arrowsmith, S, John Linarelli and Don Wallace, Jr, *Regulating Public Procurement: National and International Perspectives*, (The Hague, Kluwer Law International, 2000).
- Arrowsmith, S, *Public Procurement: Basic Concepts and the Coverage of Procurement Rules in Public Procurement Regulations: An Introduction*, Sue Arrowsmith (ed), (2010). Available at <http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf>.
- Avery, N., *Public-Private Partnerships: A critical Analysis* (London: Globe Publishing Ltd, 2006).
- Bing, L. & Akintola A., "An Overview of Public Private Partnership", In Akintola Akintoye, Mathias Beck, and Cliff Hardcastle (eds) *Public-Private-Partnerships: Managing Risks and Opportunities* (Oxford, Blackwell Publishing Company, 2008).
- Harris, C. 'Private Participation in Infrastructure in developing countries: Trends, Impacts and Policy Lessons. (Washington, The World Bank, 2003). Also available at <http://rru.worldbank.org/Documents/PapersLinks/1481.pdf>.
- Delmon, J. *Project Finance, BOT Projects and Risks*.(Kluwer Law Law International:2005).

- Delmon, J., Shareholders Agreements, In Jeffrey Delmon (ed) in Project Finance, BOT Projects and Risks (Kluwer Law International, 2005).
- Delmon, J., Public Private Partnership Projects in Infrastructure: An Essential Guide for Policy Makers, (Cambridge, Cambridge University Press, 2011).
- Farquharson, E., Torres de Mastle, C, Yescombe E.R. and Encinas, J. How to Engage with the Private Sector in Public Private Partnerships in Emerging Markets, (Washington D.C., World Bank, 2011).
- Foster V. and Pushak, N. 'Policy Research Working Paper on Ghana's Infrastructure: A Continental Perspective, (Washington D.C, TheWorld Bank 2011).
- Grimsey, D. and Lewis, M.K, Public Private Partnerships: The Worldwide
- Guasch, J.L. Granting and Renegotiating Infrastructure Concessions: Doing it Right. (Washington D.C, World Bank Publication, 2004).  
Guide. (Herndon; USA, World Bank, 2008).
- Hammami, M., Ruhashyankiko, Jean-Francois and Yehoue, E.B. Determinants of Public Private Partnerships in Infrastructure. (Washington D.C. International Monetary Fund, 2006).
- Karangizi, S., Framework Agreements in Public Procurement: A Perspective from Africa, in Reform of the UNCITRAL Model Law on Procurement: Procurement Regulation for the 21<sup>st</sup> Century Sue Arrowsmith (ed), ( Danvers, USA, Thompson Reuters, 2009).
- Lienert, I. 'International Monetary Fund Working Papers: Where does the Public Sector End and the Private Sector Begins? (Washington D.C., I.M.F Publishers, 2009).
- OECD, Public Private Partnerships: In Pursuit of Risk Sharing and Value for Money (UK, OECD Publishing, 2008).
- Oloworaran, B.D. The Law and Practice of Procurement in Nigeria, (Porthacourt: Benuch Legal Consult,2011).
- Oyebode, G. & Makinde, O., The International Comparative Legal Guide to PFI/PPP Projects. (Lagos,Global Legal Group Publishing, 2007).  
Revolution in Infrastructure Provision and Project Finance.(United Kingdom, Edward Elger Publishing Limited, 2007).
- Harnandez-Gracia, R "The Global Challenges of International Public Procurement", In Roberto Harnandez-Gracia, (ed), International Public

- Procurement: A guide to Best Practices (London: Globe Business Publishing Limited, 2009). 7
- Hernandez-Garcia, R., “International Public Procurement: A guide to Best Practice”, (London: Globe Business Publishing Limited, 2009).
- Peter Zunzlik, ‘The Procurement of ‘Green’ Energy’ in Social and Environmental Policies in EC Procurement Law, new Directives and New Dimensions’ Sue Arrowsmith and Peter Zunzlik (eds), (Cambridge University Press, 2009), 369.
- Sawant, R.J, “Infrastructure Investing: Managing Risks& Rewards forPensions, Insurance Companies and Endowment”,(New Jersey: John Willey & Sons Inc).
- Sharma, J. Public Private Partnership Projects in The United States, Roberto Hernandez Garcia,( ed), International Public Procurement: A Guide (London : Globe Business Publishing, 2009).
- Williams-Elegbe, S. Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification Measures, (UK, Hart Publishing, 2012).
- Twain, M., Offtake Purchase Agreements, In Jeffrey Delmon (ed) Project Finance, Bot Projects and Risks.(UK, Kluwer Law Law International, 2005).
- United Nations ESCAP, A Guidebook on Public-Private Partnership in Infrastructure, (United Nations, Bangkok) 2011, pg 74.
- Urio, P., Public-Private Partnerships: Success and Failure Factors for In Transition Countries, (Washington D.C., University Press of America, 2010).
- World Bank, Attracting Investors to African Public-Private Partnerships: A project Preparation (Washington, The World Bank, 2011).
- Yehoue, E. B, Hammani, M.R and Jean-Francois, International Monetary Fund Working Papers: Determinants of Public-Private Partnerships in Infrastructure, (Washington D.C., I.M.F., 2006).
- Yescombe, E.R. Public-Private Partnerships: Principles of Policy and Finance, (Oxford: Elsevier Publishing Ltd, 2007).



## Articles

- Adekilekun, M.T, Olatunji, O.A, Gan, C.C & Akanbi, M.M. "Public-Private Partnership Initiatives in Nigeria and Its Dispute Resolution Mechanism: An Appraisal" (2013) JMCL Vol 40 67-86.
- Adjei, A.B. Challenges in the handling of Procurement Complaints: Ghana's Experience (2011) 38 JMCL Page 1.
- Agboli M.I, & Emery, J.J, "Encouraging Effective Dialogue and Advocacy in Nigeria: The Better Business Initiative. Retrieved from [www.publicprivatedialogue.org/case\\_studies/The%20Better%20Business%20Initiative.doc](http://www.publicprivatedialogue.org/case_studies/The%20Better%20Business%20Initiative.doc) on 15th June, 2012.
- Agboli, M.I & Emery, J.J. "Encouraging Effective Dialogue and Advocacy in Nigeria: The Public-Private Dialogue. Retrieved from [www.publicprivatedialogue.org/.../The%20Better%20Business%20Ini](http://www.publicprivatedialogue.org/.../The%20Better%20Business%20Ini). Accessed on 4th March, 2012.
- Ahadzi, M & Bowles, G. 2004. Public-private partnerships and contract negotiations: an empirical study. *Journal of Construction Management and Economics*, 22 (November), 967-78.
- Akanbi, M.M. "Privatisation and Commercialisation of Investments: How Beneficial are they to Developing Economies in Africa?" (2010) 11 J. World Investment & Trade. Available at <http://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/jworldit11&id=421&print=section&section=27&ext=.pdf>. Last accessed 04.12.13.
- Andre Santos Raquel and Alexandre Andrade, "Corporate Governance in Public Private Partnerships"(2010), *EPPPL Journal*, Volume 4 Page 209,(Berlin, Lexxion mbh).
- Andrew C. & Geoff, "DBOM Contracts in Australia". (2011)*International Construction Law Review*, Vol 28, Page 275(Lexxion mbh: Berlin).
- Babalakin, B.O. Public Private Partnership: Infrastructure Development as a vehicle for Economic Development. Being a Paper Presented at the 2nd Mustapha Akanbi Public Lecture Organised by the faculty of Law University of Ilorin, July, 2009.
- Burnett, M. "A new EU Directive on Concessions- the Right approach for PPP?"(2008), (*EPPL Journal*) Volume 4 Page 185(Berlin, Lexxion mbh).

- Craven, R., Procurement Procedures under the Private Finance Initiative, (2011) 38 JMCL Page 45.
- Dimitriou A., Effective Dispute Regimes for Large Infrastructure Projects in Greece; Being a paper delivered at the 3rd Hellenic Observatory PhD Symposium on 14th & 15th June, 2007.
- Iheme, “Legal Regulation of Privatisation in Nigeria ” (2011) in Readings on Privatisation, Onyekpere, E. (ed.) (Lagos: Sabara Publishers).
- Kwadwo Sarkodie Arbitration in Ghana – The Alternative Dispute Resolution Act 2010, (2011). International Construction Law Review, Page 3. Also available at [http://www.mayerbrown.com/files/Publication/5ee12231-1295-4559-8167-89d93cdf2a06/Presentation/PublicationAttachment/91e048fe-67d4-4e3f-9d10-8bbf9861e753/ArbitrationGhana\\_Sarkodie.pdf](http://www.mayerbrown.com/files/Publication/5ee12231-1295-4559-8167-89d93cdf2a06/Presentation/PublicationAttachment/91e048fe-67d4-4e3f-9d10-8bbf9861e753/ArbitrationGhana_Sarkodie.pdf). Accessed on 09.11.13.
- Mohamed A.M.I., International Infrastructure Agreements and PPP in Developing Countries: Substantive Principles, (2011) EPPPL Journal, Vol. 3 (London).
- Nicholas, D, “Devising Transparent and Efficient Concession Award Procedures”, Uniform Law Review/ Revue De Derot Uniforme, NS- Vol XVII, 2012.
- Nyagwachi, J. & Smallwood, J. “South African Public Private Partnership (PPP) Projects”, (2008) Journal of Construction, Vol 1 No 2, (Cape Town, Crown Publication).
- Oshio, E. and Stewart,N.F ‘ The Legal and Institutional Frameworks of Privatisation in Nigeria: A Discourse. Accessed from <http://nigerianlawguru.com/articles/company%20law/THE%20LEGAL%20AND%20INSTITUTIONAL%20FRAMEWORKS%20OF%20PRIVATISATION%20IN%20NIGERIA,%20A%20DISCOURSE.pdf> on 23.03.11.
- Oshio, E. and Stewart , N.F, ‘The Legal and Institutional Frameworks of Privatisation in Nigeria: A Discourse’. Available at <http://nigerianlawguru.com/articles/company%20law/THE%20LEGAL%20AND%20INSTITUTIONAL%20FRAMEWORKS%20OF%20PRIVATISATION%20IN%20NIGERIA,%20A%20DISCOURSE.pdf>. Last accessed 08.05.13.
- Peter Farlam ‘Putting Partnerships Together’. Available at [www.oecd.org/dataoecd/44/4/34867724.pdf](http://www.oecd.org/dataoecd/44/4/34867724.pdf). Accessed 01.05.12.

Philippe Burger The Dedicated PPP Unit Of The South African National Treasury  
accessed from <http://Www.Oecd.Org/Mena/Governance/37147218.Pdf>.  
Accessed on 06.07.13.

### **Internet Sources**

2013 Investment Climate Statement Issued By The Bureau of Economic and  
Business Affairs, Ghana. Retrieved From  
<Http://Www.State.Gov/E/Eb/Rls/Othr/Ics/2013/204648.Htm>. Accessed On  
27.11.13.

A.Uzodima, Public Private Partnership and Nigeria's Development. Available at  
[www.Phishare.org](http://www.Phishare.org). Accessed on 23.09.11.

Act 663- Antidotes to Corruption in Procurement . Public Procurement Authority  
Bulletin. Retrieved from [http://ppaghana.org/documents/Bulletins/PPAE-  
BulletinJulAug2013Final.pdf](http://ppaghana.org/documents/Bulletins/PPAE-BulletinJulAug2013Final.pdf). Accessed on 24.11.13.

An Introduction to Public- Private Partnerships  
<[http://www.partnershipsbc.ca/pdf/An%20Introduction%20to%20P3%20-  
June03.pdf](http://www.partnershipsbc.ca/pdf/An%20Introduction%20to%20P3%20-June03.pdf)>. Accessed on 8.03.12.

Anita Ramasastry, A favourable concessions regime: A lender's perspective and  
perceptions from transition countries. Retrieved from  
<http://www.ebrd.com/downloads/legal/concessions/labadi.pdf>. Accessed on  
04.11.13.

Armsfree Ajanaku, Lagos-Ibadan Expressway: Diary of a failed Road Concession.  
Available at [www.ngrguardiannews.com](http://www.ngrguardiannews.com). Accessed on 04.12.12.

Shapiro, B.S. P3 Concession Agreements-Risks and Rewards. Retrieved from  
<http://www.shk.ca/docs/P3ConcessionAgreements.pdf>. Accessed on  
11.04.12.

Bi-Courtney to Contest Contract Cancellation. Retrieved from  
[http://thenationonlineng.net/new/news/bi-courtney-to-contest-contract-  
cancellation-2/](http://thenationonlineng.net/new/news/bi-courtney-to-contest-contract-cancellation-2/). Accessed on 26.11.12.

Build Operate and Transfer Contract.  
<http://www.investopedia.com/terms/b/botcontract.asp#axzz1pQvK3o40>.  
Accessed on 2nd April, 2012.

- Cau Fuguo, Yan Yuying & Zhou Fen, Towards Sustainable Public Procurement in China: Policy and Regulatory Framework, Current Developments and the Case for a Consolidated Green Public Procurement Code. Available at <http://www.ippa.org/IPPC4/Proceedings/07GreenProcurement/Paper7-7.pdf>. Accessed on 13.08.14.
- Chief Justice calls for legal framework for public-private partnerships in Ghana. Retrieved from <http://www.modernghana.com/news/490314/1/cj-calls-for-legal-framework-for-public-private-pa.html>. Accessed on 23.11.12.
- Concessions, Build-Operate-Transfer (BOT) AND Design- Build-Operate-Transfer Projects. Retrieved from <http://ppp.worldbank.org/public-private-partnership/agreements/concessions-bots-dbos>. Accessed on 02.04.12.
- Core Principles for a Modern Concession Law. Retrieved from [http://www.ebrd.com/pages/sector/legal/concessions/core\\_principles.shtml](http://www.ebrd.com/pages/sector/legal/concessions/core_principles.shtml). Accessed on 19.06.13.
- Definition of Build, Own, Operate and Transfer. Retrieved from <http://searchcio.techtarget.in/definition/BOOT-build-own-operate-and-transfer>. Accessed on 01.04.12.
- Developing Public-Private Partnerships (PPPs) for Infrastructure Development in Nigeria-Fundamentals of the Contract Agreement, Contract Management and Dispute Resolution. Accessed from [www.waliuwais.com/?page\\_id=788](http://www.waliuwais.com/?page_id=788) on 21st June, 2012.
- Disclosure of Project and Contract Information in Public-Private Partnership Contracts. The World Bank Institute 2013. Accessed from <http://wbi.worldbank.org/wbi/Data/wbi/wbicms/files/drupal-acquia/wbi/Disclosure%20of%20Project%20PPP.pdf> on 10.11.13.
- Doing Business 2013: Smarter Regulations for Small and Medium-Size Enterprises. Retrieved from [http://publications.worldbank.org/index.php?main\\_page=product\\_info&cPath=1&products\\_id=24391](http://publications.worldbank.org/index.php?main_page=product_info&cPath=1&products_id=24391). Accessed on 29.11.13.
- Electrical Power in Ghana – Overview. Retrieved from <http://www.mbendi.com/indy/powr/af/gh/p0005.htm>. Accessed on 21.11.13.
- Federal Government revokes Lagos/Ibadan Express way. Retrieved from <http://scannewsnigeria.com/news/fg-revokes-concession-of-lagosibadan-expressway/>. Accessed on 26.11.12.

- Francis K. A. Allotey and Felix K. Akorli, Telecommunications in Ghana.  
Retrieved from <http://www.vii.org/papers/ghana.htm>. Last accessed 21.10.13.
- Freedom of Information Act Signals Consolidation of Nigeria's Democracy.  
Retrieved from  
<http://www.stakeholderdemocracy.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=342&cntnt01origid=67&cntnt01returnid=122>.  
Accessed on 28.11.12.
- Freedom of Information Act: A Powerful Weapon Against Corruption; ...So Why Has Its Passage Continued To Remain Elusive To The Ghanaian Parliament? Retrieved from  
<http://www.modernghana.com/news/454616/1/freedom-of-information-act-a-powerful-weapon-again.html>. Accessed on 24.11.13.
- Generating Electricity in South Africa,. Retrieved from  
<http://www.eskom.co.za/c/article/208/generating-electricity/>. Accessed on 9th April, 2013.
- Ghana begins review of procurement processes. Retrived from  
<http://www.ghanabusinessnews.com/2013/09/12/ghana-begins-review-of-procurement-processes/>. Accessed on 25.11.13.
- Ghana Economic Outlook. Retrieved from <http://www.afdb.org/en/countries/west-africa/ghana/ghana-economic-outlook/>. Accessed on 21.11.13.
- Ghana Infrastructure Plans. Retrieved from  
[http://www.mofep.gov.gh/CG2012/userfiles/file/ghana\\_infrastructure.pdf](http://www.mofep.gov.gh/CG2012/userfiles/file/ghana_infrastructure.pdf).  
Last accessed on 19November, 2013.
- Ghana Infrastructure Report Q1 2013. Retrieved from  
<http://www.marketresearch.com/Business-Monitor-International-v304/Ghana-Infrastructure-Q1-7259384/>. Last accessed on 18.11.13.
- Ghana Public Private Partnership Bill. Retrieved from  
<http://www.mofep.gov.gh/?q=news/060713>. Last accessed on 18.11.13.
- Ghana signs railway contract with Chinese firm. Retrieved from  
<http://www.modernghana.com/news/306377/1/ghana-signs-railway-contract-with-chinese-firm.html>. Last accessed 19 .11.13.
- Ghana Will Soon Have A National Competition Law. Retrieved from  
<http://ghanaconsumerwatch.wordpress.com/2009/06/16/ghana-will-soon-have-a-national-competition-law-issuer/>. Accessed on 25.11.13.

- Ghana: Parliament Passes Revised Law Governing Investments. Retrieved from [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_1205403648\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_1205403648_text). Accessed on 29.11.13.
- Ghana: World Toilet Day Commemorated in Accra. Retrieved from <http://allafrica.com/stories/201311201258.html>. Last accessed on 21.11.13.
- Ghana-PPP Projects. Retrieved from <http://www.worldbank.org/projects/P125595/ghana-ppp-project?lang=en>. Accessed on 13.11.13.
- Ghana's cabinet approves Right to Information Bill. <http://www.globaltimes.cn/content/787808.shtml#.UpRSIsRmxBw>. Accessed on 26.11.13.
- Ghana's power challenges and national productivity. Retrieved from <http://www.ghanabizmedia.com/ghanabizmedia/december-2012-cover-story/867-ghanas-power-challenges-and-national-productivity.html>. Accessed on 21.10.1313.
- Idornigie, P.O, “Designing, Negotiating And Drafting of Concession Contracts.” Retrieved from <http://www.nigerianlawguru.com/articles/commercial%20law/DESIGNING,NEGOTIATING%20&%20DRAFTING%20OF%20CONCESSION%20CONTRACTS.pdf>. Accessed on 9.12.12.
- Independent Power Producers Chosen. Retrieved from <http://www.southafrica.info/business/economy/infrastructure/ippbidders-230512.htm#.UXFqZtnMYqA>. Accessed on 16th April, 2013.
- Infrastructure – Transportation in Ghana. Retrieved from <http://www.gipcghana.com/invest-in-ghana/why-ghana/infrastructure/transportation-infrastructure.html>. Last Accessed on 19.11.13.
- Infrastructure Concession : Challenges and Opportunities. See the Nigerian Pilot Daily Newspaper of 14th Nov, 2011. Accessed from <http://nigerianpilot.com/?q=content/infrastructure-concession-challenges-and-opportunities> on 26.04.12.
- Infrastructure Concession Contracts: An Introduction. Retrieved from <http://www.cuts-international.org/pdf/Viewpointpaper-InfrastrConcessContract-intro.pdf>. Accessed on 10th April, 2012.

Infrastructure Development in South Africa.

[http://www.mediaclubsouthafrica.com/index.php?option=com\\_content&view=article&id=125:South](http://www.mediaclubsouthafrica.com/index.php?option=com_content&view=article&id=125:South). Accessed on 13.04.13.

Infrastructure Investment Key to Improving Service Delivery. Budget 2013, People's Guide. A joint Publication by the National Treasury and South African Revenue Service. Retrieved from [www.treasury.gov.za](http://www.treasury.gov.za). Accessed on 16.05.13. Infrastructure

Infrastructure Telephony in Ghana. Retrieved from

<http://www.gipcghana.com/invest-in-ghana/why-ghana/infrastructure/ict-infrastructure.html>. Accessed on 21 November, 2013.

Kehinde Ibrahim'Nigeria Pension Funds and Revised Guidelines retrieved from <http://nigerianpilot.com/index.php/business/4672-nigerian-pension-funds-and-revised-guideline>. Accessed on 04.11.12.

Key Challenges to Public-Private Partnerships in South Africa, an Initiative of the Presidency of the Republic of South Africa and the Business Trust. Retrieved from <http://www.castalia-advisors.com/files/12345.pdf>. Accessed on 14.05.13.

Lecture delivered on "Designing a world-class Public-Private Partnerships Infrastructure and Framework for Malaysia", by Tan Sri Nor Mohamed Yakcop at Marriot Hotel Putrajaya on 2nd March, 2010. See [http://www.epu.gov.my/c/document\\_library/get\\_file?uuid=a6e97d78-1fe0-40a3-96d5-157afb28d996&groupId=34492](http://www.epu.gov.my/c/document_library/get_file?uuid=a6e97d78-1fe0-40a3-96d5-157afb28d996&groupId=34492). Accessed on 13.03.12.

Main Legislation and Policy Documents Regarding Decentralization and Local Governments in Ghana. Retrieved from [http://books.google.com.my/books?id=BoLxNCD29CkC&pg=PA98&lpg=PA98&dq=overview+of+the+Ghana+Financial+administration+act+2003.&source=bl&ots=b7TJKsMpPV&sig=pkcuQOn9w\\_S22VtVcjQeE6IKjow&hl=en&sa=X&ei=5IORUpa1AYjZrQfx0YHIAw&ved=0CHMQ6AEwCQ#v=onepage&q=overview%20of%20the%20Ghana%20Financial%20administration%20act%202003.&f=false](http://books.google.com.my/books?id=BoLxNCD29CkC&pg=PA98&lpg=PA98&dq=overview+of+the+Ghana+Financial+administration+act+2003.&source=bl&ots=b7TJKsMpPV&sig=pkcuQOn9w_S22VtVcjQeE6IKjow&hl=en&sa=X&ei=5IORUpa1AYjZrQfx0YHIAw&ved=0CHMQ6AEwCQ#v=onepage&q=overview%20of%20the%20Ghana%20Financial%20administration%20act%202003.&f=false). Accessed on 24.09.13.

New Partnership Project to Mobilize Private Investment for Ghana's Infrastructure. Retrieved from <http://www.modernghana.com/news/386267/1/new-partnership-project-to-mobilize-private-invest.html>. Accessed on 11.11.13.

- Nigeria's infrastructure yet to meet requirements for economic development  
<http://businessdayonline.com/NG/index.php/economic-watch/18806-nigerias-infrastructure-yet-to-meet-requirements-for-economic-development>. Accessed on 28.02.2012.
- Overview of Corruption and Anti Corruption in Ghana. Retrieved from  
<http://www.u4.no/publications/overview-of-corruption-and-anti-corruption-in-ghana/>. Accessed on 30.11.13.
- Oxford Dictionary of Politics. Retrieved from  
<http://www.answers.com/topic/public-private-partnership>>. Accessed on 8.03.13.
- Passanger Rail Agency of South Africa.  
<http://www.info.gov.za/aboutsa/transport.htm>. Accessed on 12.04.13.
- PPP in Infrastructure Resource Centre. Retrieved from  
<http://ppp.worldbank.org/public-private-partnership/library/oecd-basic-elements-law-concession-agreements>
- Public Investment Division. Retrieved from  
<http://www.mofep.gov.gh/?q=divisions/pid>. Accessed on 24.11.13.
- Public Private Partnership (PPP) in Ghana. Retrieved from  
<http://www.ghanaweb.com/GhanaHomePage/features/artikel.php?ID=269857>. Last accessed on 18.11.13.
- Public Private Partnerships: An Overview. Available at  
<http://www.adb.org/Documents/Handbooks/Public-Private-Partnerships>  
<http://rru.worldbank.org/Documents/PapersLinks/1481.pdf>hip/Chapter1.pdf. Accessed 14.03.12.
- Public Procurement Directives 2012. Retrieved from  
[http://ec.europa.eu/internal\\_market/publicprocurement/modernising\\_rules/reform\\_proposals\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/reform_proposals_en.htm). Accessed on 15th November, 2013.
- Public-Private Partnership: A new strategy of infrastructure financing in Ghana.  
 Retrieved from <http://www.ghanabizmedia.com/ghanabizmedia/august-2012-policy/755-public-private-partnership-a-new-strategy-of-infrastructure-financing-in-ghana.html>. Accessed on 13.11.13.



- Public-Private Partnerships in Africa, Part 1. Retrieved from  
[http://www.consultancyafrica.com/index.php?option=com\\_content&view=article&id=954:public-private-partnerships-in-africa-part-i-infrastructure&catid=82:african-industry-a-business&Itemid=266](http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=954:public-private-partnerships-in-africa-part-i-infrastructure&catid=82:african-industry-a-business&Itemid=266).  
Accessed on 16th April, 2013.
- Report to the Third Session of the Team of Specialists on Public-Private Partnerships 18-19 April , 2011 regarding Model PPP Laws. Retrieved from  
[http://www.unece.org/fileadmin/DAM/ceci/ppt\\_presentations/2011/TOS\\_PP3/2.I.10\\_Richard\\_Armitage.pdf](http://www.unece.org/fileadmin/DAM/ceci/ppt_presentations/2011/TOS_PP3/2.I.10_Richard_Armitage.pdf). Accessed on 06.10.12.
- Reports of the UNCITRAL Working Group on Procurement from  
[http://www.uncitral.org/uncitral/en/commission/working\\_groups/1Procurement.html](http://www.uncitral.org/uncitral/en/commission/working_groups/1Procurement.html). Accessed on 13.11.13.
- Savas, E.A, Privatisation and Public-Private Partnerships. Retrieved from  
[http://www.cesmadrid.es/documentos/sem200601\\_md02\\_in.pdf](http://www.cesmadrid.es/documentos/sem200601_md02_in.pdf). Accessed on 17.03.12.
- Seungwoo Son, Legal Analysis on Public-Private Partnerships regarding Model PPP Rules. Retrieved from  
[http://www.uncitral.org/pdf/english/colloquia/public-private-partnerships-2013/20120704\\_Report\\_on\\_PPP\\_legal\\_IssuesSon\\_Seungwoover.11.pdf](http://www.uncitral.org/pdf/english/colloquia/public-private-partnerships-2013/20120704_Report_on_PPP_legal_IssuesSon_Seungwoover.11.pdf).  
Accessed on 13.11.13.
- Sikhumbuzo Gqoli, Public-Private Partnerships in South Africa. Retrieved from  
<http://www.oecd.org/dataoecd/59/10/35624345.pdf>. Accessed on 19th April, 2012.
- South Africa's Transport Network. Retrieved from  
<http://www.southafrica.info/business/economy/infrastructure/transport.htm#.UXGDe9nMYqA>. Accessed on 08.07.13.
- Starting a Business in South Africa. Accessed from  
[http://sami.co.za/images/starting\\_business.pdf](http://sami.co.za/images/starting_business.pdf). Accessed on 06.05.13.
- The Legal Dynamics of Privatisation in Nigeria, Retrieved from  
[www.babalakinandco.com](http://www.babalakinandco.com). Accessed on 15.02.11.
- The National Policy on Public Private Partnerships in Ghana. Retrieved from  
[http://www.mofep.gov.gh/sites/default/files/docs/pid/ppp\\_policy.pdf](http://www.mofep.gov.gh/sites/default/files/docs/pid/ppp_policy.pdf).  
Accessed on 23.08.13.

The official Records of the General Assembly, 49th Session adopted on 17th February, 1995, Supplement N0 17 and Corrigendum (A/49/17 and Corr1). The full texts of the provision are available at [www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure/1994Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model.html). Accessed on 13.11.13.

The online Etymology Dictionary Retrieved from <http://dictionary.reference.com/browse/infrastructure>. Accessed on 02.04.12.

The origin, composition and mandate of UNCITRAL, see “Basic facts about the United Nations Commission on International Trade Law” (accessed from <http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>). Accessed on 06.07.13.

The Project Appraisal Report of the African Development Fund accessed from [http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/NIGERIA%20-%20PAR%20%20-%20CB4PPPi%20\(2\).pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/NIGERIA%20-%20PAR%20%20-%20CB4PPPi%20(2).pdf) on 06.03.12.

The Report of the Colloquium organised by UNCITRAL in Vienna, Austria between 2nd-3rd May, 2013 available at <http://www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2013.html>. Accessed on 10th June, 2013.

The Report of the Colloquium organised by UNCITRAL in Vienna, Austria between 2nd-3rd May, 2013 available at <http://www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2013.html>. Accessed on 10th June, 2013.

The Report submitted by Simmons and Simmons to the Third Session of the Team of Specialists on Public Private Partnerships 18-19 April, 2011 regarding Model PPP Laws. Retrieved from [http://www.unecce.org/fileadmin/DAM/ceci/ppt\\_presentations/2011/TOS\\_PP3/2.I.10\\_Richard\\_Armitage.pdf](http://www.unecce.org/fileadmin/DAM/ceci/ppt_presentations/2011/TOS_PP3/2.I.10_Richard_Armitage.pdf). Accessed on June 10, 2013.

Threading a Public Private Partnership Path that Works”, Retrieved from <http://www.ghanabizmedia.com/ghanabizmedia/july-2011-policy/364-treading-a-public-private-partnership-path-that-works.html>. Accessed on 17th April, 2012.

Transportation Infrastructure and Development in Ghana. Retrieved from <http://ideas.repec.org/p/hal/psewpa/halshs-00607207.html>. Last accessed on 19.11.13.

UcheOha, Infrastructure Concession in Nigeria: Challenges and Opportunities. Being a paper delivered at the 5th National Diasporal Conference, held at the TranscorpHilton , Abuja between 25-27th July, 2011. Retrieved from <http://www.icrc.gov.ng/wp-content/uploads/2011/07/Infrastructure-Concession-Challenges-Opportunities-final.pdf>. Accessed on 25.02.12.

UNECE Guidebook on Promoting Good Governance in PPPs, Avant Propos, available at <http://www.unece.org/fileadmin/DAM/ceci/publications/ppp.pdf>. Accessed on 9th June, 2013.

Updating our road infrastructure. Retrieved from <http://graphic.com.gh/editorials/3032-updating-our-road-infrastructure.html>. Accessed on 19.11.13.

Why PFI Contracts need to be more transparent. Retrieved from [www.guardian.co.uk/local-government-network/2012/jun/29/pfi-contracts-transparent](http://www.guardian.co.uk/local-government-network/2012/jun/29/pfi-contracts-transparent). Accessed on 06.09.12.

William Dowokpor, “Public Private Partnership (PPP) in Ghana”(2013). Retrieved from <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=269857>. Accessed on 30.11.13.

World Bank definition of Public-Private Partnerships<<http://ppp.worldbank.org/public-private-partnership/overview/what-are-public-private-partnerships>>. Accessed on 08.03.12.

### **Publications or Conference Papers to Date**

1. **M.T. Adekilekun & C.C. Gan**, “Towards a sustainable Legal and Regulatory Framework for Public-Private Partnerships in Malaysia: Lessons From the South African Experience” delivered at the 1<sup>st</sup> International Conference of the Africa-Asia Development University Network (AADUN) and the Africa’s Asian Options held between 11<sup>th</sup>- 13<sup>th</sup> March, 2014.
2. **M.T. Adekilekun & C.C. Gan**, “Public-Private Partnerships in Infrastructure Development in Nigeria: A Catalyst for National Security”, delivered at the 4<sup>th</sup> Annual International Conference organized by the Faculty of Law, University of Ilorin Nigeria with the theme “Security, Peace and Conflict Management in Africa: Options For National Integration in Nigeria” held between 16<sup>th</sup>-18<sup>th</sup> Oct, 2012.
3. **M.T Adekilekun & C.C.Gan**, “Public Private Partnership in Infrastructure Development in Africa: A Magic Wand to Socio-Economic Development”. Being a paper delivered at the 2013 Symposium on Finding Solutions to Africa’s Development, held at the University of South Africa (UNISA) between 23-24 August, 2013.

### **Articles Submitted for Publication in referred Journals**

1. M.T Adekilekun & C.C. Gan “Public-Private Partnerships in Infrastructure Development: Lessons from the South African Legal and Institutional Framework”, Submitted to the Public Procurement Law Review published by Sweet and Maxwell, **(Under Peer Review)**.
2. M.T Adekilekun, O.A. Olatunji, C.C. Gan and M.M. Akanbi, “Public Private Partnership Initiative in Nigeria and Its dispute Resolution Mechanism: An Appraisal”,

Published by the Journal of Malaysian and Comparative Law (JMCL) Vol 40, 2013. 67-86.

3. M.T. Adekilekun & C.C. Gan, “Public-Private Partnerships in Infrastructure Development in Nigeria: A Catalyst for National Security”, accepted for publication by Inderscience Publishers vide a letter dated 9<sup>th</sup> December, 2013.

### **Chapter in Books**

1. M.T Adekilekun & C.C.Gan, “Public Private Partnership in Infrastructure Development in Africa: A Magic Wand to Socio-Economic Development”, submitted to the Thabo Mbeki African Leadership Institute, **(Under Peer Review)**.

2. M.T Adekilekun & C.C.Gan, “Towards a sustainable Legal and Regulatory Framework for Public-Private Partnerships in Malaysia: Lessons From the South African Experience” Submitted to the International Institute of Asian Studies, Amsterdam University, **(Under Peer Review)**.

## **APPENDIX A**

### **List of Interviewees and Core Issues Covered**

- Professor Paul Obo Idornigie has worked with the Bureau of Public Enterprises where he has participated in different privatisation projects. He is currently a lecturer at the Nigeria Institute of Advanced Legal Studies in Abuja. He was interviewed on the legal framework for PPPs in Nigeria. He also explained a lot of challenges facing PPPs in Nigeria. He was interviewed at the Institute of Advanced Legal Studies in Abuja, Nigeria on 06.06.12.
- Professor M.M. Akanbi was formerly the Dean of Law, Faculty of Law, University of Ilorin. He is an expert in commercial arbitration. He was mainly interviewed on Alternative Dispute Resolution as a means of settling PPP disputes being commercial disputes. He also explained the right of foreigners to participate in businesses in Nigeria. 10.06.12.
- Mr. Oshobi is a lawyer and he is involved in the development of PPP projects generally in Nigeria. He is a staff of Bi-Courtney Nigeria Limited and he spoke generally on the challenges the company was facing especially the with the concession of Murtala Muhammed Airport and the Lagos Ibadan Expressway which were granted to Bi-Courtney Nigeria Limited. The interview took place at the head office at Afribank Street, Lagos Nigeria on 30.19.12.
- A staff of the Infrastructure Concession Commission gave interview on condition of anonymity. She was interviewed mainly on the regulatory issues and challenges the commission is facing in regulating PPPs in Nigeria. The interview took place at the Commissions head office in Abuja on 02.07.12.

- In Ghana, Mr Ekow Coleman of the PPP Advisory Unit of the Public Investment Division in Accra was interviewed. He spoke on the importance of private sector involvement in infrastructure development in Ghana. He also spoke on the procedure for granting concession contracts under the PPP national Policy in Ghana. The interview took place at the Ministry of Finance and Economic Planning on Wednesday 9.01.13
- Professor Bondzi-Simpson is the Dean of Law, University of Cape-Coast, Ghana. He was interviewed on the legal framework for PPPs in Ghana. He further spoke on the challenges facing PPPs in Ghana which he identified mainly on the lack of comprehensive legal framework. He was interviewed at the Law Faculty, University of Cape-Coast on in January 2013. He was interviewed on 11.01.13
- Mr Lindokwule Hlatshwayo is the head of Tourism Development at the PPP Unit of the National Treasury in Pretoria, South Africa. He was interviewed generally on the regulatory issues and challenges facing PPPs in South Africa. He was interviewed at the PPP Unit of the National Treasury on 25.02.13.
- Mr. Innocent Khumalo, is an Associate Partner, of Ledwaba Mazwai & Co, Pretoria, South Africa. Ledwaba Mazwai is a leading Law firm that is involved in PPPs since the commencement of the programme in South Africa. Mr Khumalo gave an analysis of the legal framework of PPPs in South Africa. He also spoke on the historical background of PPPs and the challenges facing PPPs in South Africa. He was interviewed on 28.02.13.
- Dr. Yemi Soyeju is the Coordinator, Centre for Law and International Development at the University of Pretoria, South Africa. He was interviewed on the challenges facing PPPs in both Nigeria and South Africa. He also spoke on the challenges of PPPs in Nigeria and how this can be addressed. He was

interviewed on 5<sup>th</sup> and 6<sup>th</sup> March, 2013 at the University of Pretoria, South Africa.



## **APPENDIX B**

### **Questionnaire**

These questionnaire is applicable in the three countries visited for the interview.

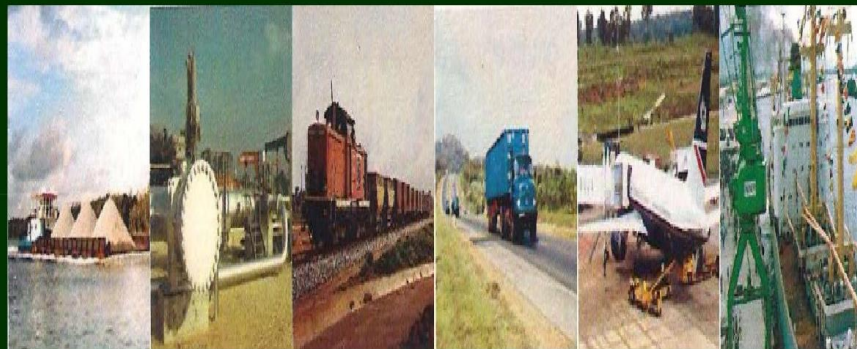
- ✓ Kindly tell me your name and your designation?
- ✓ For how long have you been working in this organisation?
- ✓ Can you tell me about Public-Private Partnerships in this country?
- ✓ Can you give a brief historical background of PPPs in this country?
- ✓ Are there legal and regulatory framework governing PPPs in this country?
- ✓ When was the first legislation on PPPs made in this country?
- ✓ What are the applicable legal and regulatory framework on PPPs that you know in this country?
- ✓ Can you just shed more light on the relevant provisions of the legislations relating to PPPs?
- ✓ What are the projects executed on PPPs so far and how many of them are successful?
- ✓ Is this country a federating state or unitary state?
- ✓ Are there regulatory agencies in place to regulate and monitor PPPs?
- ✓ Are they in place at both at the federal and state levels?
- ✓ Is there any mechanism for dispute resolution for PPP disputes?
- ✓ What is the procedure for dispute resolution recognised by the law?
- ✓ Which of them is the most effective in settling PPP and other commercial disputes?
- ✓ What is the position of the law on non-indigenous contractors, can they participate in PPP programme?
- ✓ What laws and regulations cover foreign participants?
- ✓ So far, what are the challenges that you think PPP programme has encountered in this country and how do you think they can be addressed?

## APPENDIX C



INFRASTRUCTURE CONCESSION REGULATORY  
COMMISSION (ICRC)

SOME OF NIGERIA'S INFRASTRUCTURE PROJECTS  
UNDERGOING PPP DEVELOPMENT



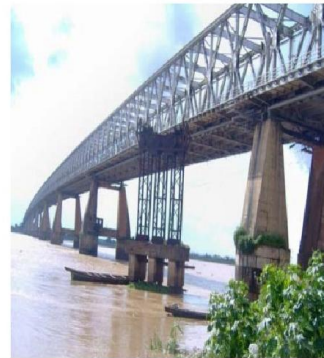
## 1

## ROADS

- **Client:** Federal Ministry of Works
- **Project Name:** Rehabilitation and Upgrade of Murtala Muhammed Airport Road
- **Description:** 2.8km dual carriage Apakun - Murtala Muhammed Airport (MMA) road is to be expanded from its present width of 4 lanes to 8 lanes with 2.75m shoulders on either side, including vehicular bridges and pedestrian bridges at appropriate locations.
- **Preferred PPP Model:** Build Operate Transfer (BOT)
- **Revenue Model:** To be defined by business case
- **Project Status:** Preferred OBC consultant to be selected. Thereafter, further market development activities will be carried out.



- **Client:** Federal Ministry of Works
- **Project Name:** 2<sup>nd</sup> Niger Bridge
- **Description:** Bridge is a 6-lane dual carriageway of approximately 1.760m long and 32.4m wide including 14km long approach road with three (3) river bridges and three (3) interchanges on the approach road
- **Preferred PPP Model:** Build Operate Transfer (BOT)
- **Revenue Model:** To be defined by business case
- **Project Status:** EOI submitted from interested concessionaires and Transaction Advisers (TA). Further market development activities in progress.



- **Client:** Federal Ministry of Works
- **Project Name:** River Niger Bridge at Nupeko
- **Description:** Bridge on river Niger at Nupeko will serve as a link to various communities between Niger State and Kwara State. Site visits revealed that the bridge was under construction at some point, but was abandoned. The FMoW is now seeking to implement the project under the PPP scheme
- **Preferred PPP Model:** Build Operate Transfer (BOT)
- **Revenue Model:** To be defined by business case
- **Project Status:** consultants engaged to undertake the development of the Outline Business Case (OBC). Adverts have been placed in local newspapers requesting EOIs from interested concessionaires



**2****POWER**

- **Client:** Federal Ministry of Power
- **Project Name:** Small and Medium Hydro Power Projects
- **Description:** Hydro Power generation of up to 43 mega watts from existing Ten (10) Small and Medium dams
- **Preferred PPP Model:** Rehabilitate/Build Operate Transfer (RBOT) model
- **Project Status:** Expressions of Interests for Transaction Adviser to take the project to market have been submitted. Evaluation and further market development activities in Progress.



- **Client:** Federal Ministry of Power
- **Project Name:** PHCN 3 Large Hyrdro Power Plants
- **Description:** Concessioning of Kainji, Jebba and Shiroro in partnership with BPP
- **Preferred PPP Model:** Build Operate Transfer (BOT) model
- **Project Status:** Currently awaiting submission of bid documents (March 2012) by qualified concessionaires following the conclusion of physical data room and due diligence activities.

**3****AGRICULTURE**

- **Client:** Federal Ministry of Agriculture & Rural Development
- **Project Name:** 25 Silos complexes
- **Description:** The Federal Ministry of Agriculture and Rural Development intends to concession 25 Silo Complexes located in different parts of the country to allow for greater participation of farmers and the Public in the Agricultural Transformation Agenda.
- **Preferred PPP Model:** Rehabilitate/Build Operate Transfer (RBOT) model
- **Revenue Model:** To be defined by Business Case
- **Project Status:** Evaluation of Expressions of Interests submitted for OBC consultant to commence as soon as go-ahead is received from relevant Ministry





4

**SOCIAL INFRASTRUCTURE**

- **Client:** Federal Ministry of Women Affairs
- **Project Name:** National Centre for Women Development
- **Description:** National Centre for Women Development hopes to transfer operation of its facility in Abuja comprising of a 100 bed guest house with underground parking facility, 1200 seat auditorium and 300 seat auditorium via PPP.
- **Preferred PPP Model:** Rehabilitate, Lease, Operate and Transfer
- **Revenue Model:** User Charges
- **Project Status:** Selection of Transaction Adviser underway



5

**TRANSPORT**

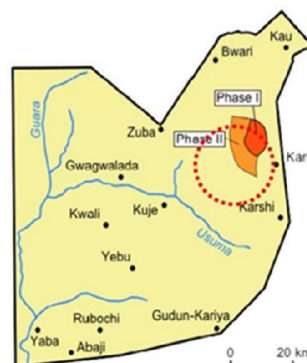
- **Client:** Federal Ministry of Transport/Nigeria Ports Authority (NPA)
  - **Project Name:** Rehabilitation and Upgrade of Kiri Kiri Lighter Terminals I & II
  - **Description:** NPA is undertaking the process to concession the terminals to private operators for a variety of possible uses including fishing and container operations
  - **PPP Model:** "Landlord Port Model" for the Nigerian ports in line with the ports reform programme
  - **Revenue Model:** Rent or lease charges
  - **Project Status:** OBC consultant selected and it is expected that the OBC and market development activity would be completed in 2012.
- 
- **Client:** Federal Ministry of Transport/National Inland Waterway Authority (NIWA)
  - **Project Name:** Rehabilitation and Upgrade of Onitsha Inland Waterway Port
  - **Description:** The Onitsha River Port has a 180m quay length berth with other facilities which include: warehouse, mechanical workshop, administrative offices and cargo handling equipment.
  - **Preferred PPP Model:** Rehabilitate/Build Operate Transfer (RBOT) model
  - **Project Status:** Request for Proposal to be sent to select bidders for business case development. Further market development activities to be done in 2012



## 6

## URBAN DEVELOPMENT

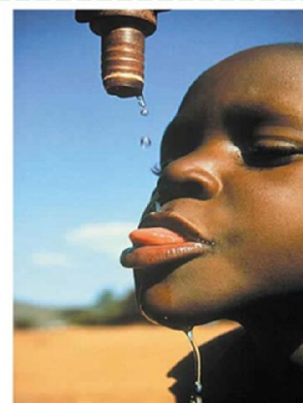
- **Client:** Federal Capital Territory Administration (FCTA),
- **Project Name:** Development of Katampe District
- **Description:** Accelerated development of urban districts across the Federal Capital Territory (FCT), with Katampe district as a Pilot Case.
- **Project Cost Estimate:** N61 billion
- **PPP Model:** Build Operate and Transfer (BOT)
- **Revenue Model:** User Charges
- **Project Status:** The Concession Contract was signed on 19th Oct, 2010. Ground breaking ceremony was held on the 2<sup>nd</sup> of February 2012



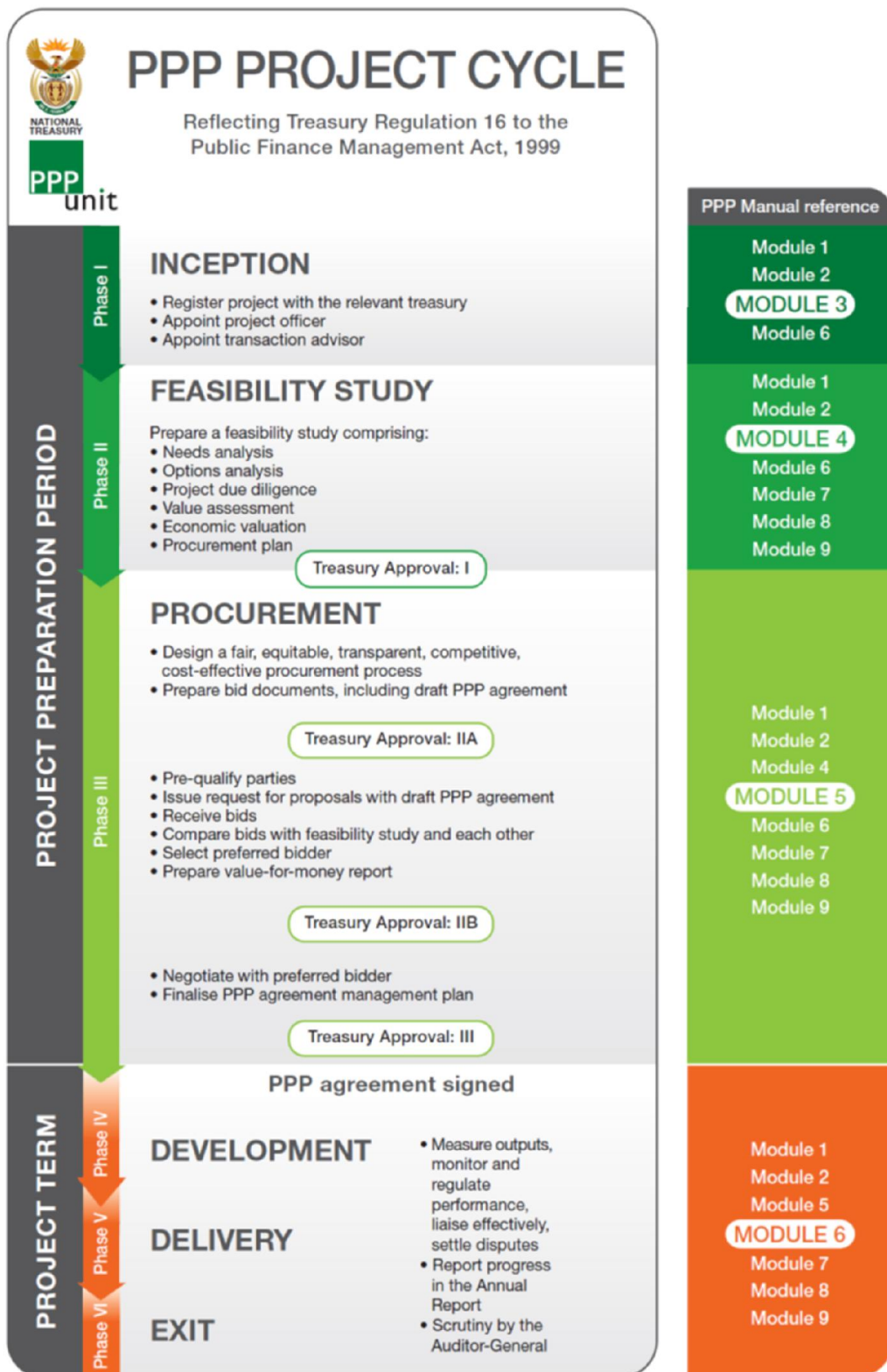
- **Client:** Federal Capital Territory Administration (FCTA),
- **Project Name:** Development of Four Districts
- **Description:** District infrastructure comprising of roads, bridges, drainage, water distribution, street lighting, power distribution and telecoms in Mabushi, Kado, Gwarimpa and Durumi Districts of the FCT.
- **Preferred PPP Model:** Design, Build, Finance, Operate and Transfer (DBFOT)
- **Revenue Model:** Developmental levies
- **Project Status:** Selection of preferred concessionaire in progress



- **Client:** Federal Capital Territory Administration (FCTA),
- **Project Name:** Reticulation and upgrade of Kuje Waterworks
- **Description:** The Project involves construction of a dam, water treatment plant, laying of distribution network and storage tanks to provide safe portable water supply to the residents of Kuje Town and its environs.
- **Preferred PPP Model:** Build Operate and Transfer (BOT)
- **Revenue Model:** User Charges
- **Project Status:** A preferred bidder has been selected to develop the Outline Business Case (OBC) and negotiations and further market development in progress.



## APPENDIX D



The PPP Project Cycle

Source: The National Treasury

## APPENDIX E



Similar to the now familiar PPP project cycle for national and provincial government, the Municipal Finance Management Act's PPP regulations, promulgated on 01 April 2005, provide a clear PPP path for municipalities to follow.

But instead of 'Treasury approvals' as required under the Public Finance Management Act, the MFMA requires Treasury 'views and recommendations' on the feasibility study, the procurement documentation and the terms of the negotiated PPP agreements prior to signature.

Here are the regulated steps which the municipality must follow



### The Municipal PPP Project Cycle

Source: The National Treasury.



## APPENDIX F

### PPP Projects signed in terms of Treasury Regulation 16, AS AT February 2013

PPP type indicated by combination of private party risk for: **D**: design; **F**: finance; **B**: build; **O**: operate; **T**: transfer of assets back to government  
BEE: Black economic empowerment vfm: value for money; PFMA: Public Finance Management Act 1999

1	Project and government institution	PPP type; Contract duration; Date of Financial Close	Contact official	Private Partner	BEE as % of equity and Sub-Contracting	Financing and Arrangers	Transaction Advisors to government	Value to gvt (NPV of unitary charge)	NPV of benefit to government
2	Inkosi Albert Luthuli Hospital KwaZulu-Natal Dept Health	DFBOT 15 years December 2001	Hermann Conradie 033-395 2019	Impilo Consortium (Pty) Ltd comprising: Mbekane Health & Wellbeing, AME International, Vulindlela Holdings, Siemens, Drake & Skull, Oname	Equity: 40% Sub-c: 40%	Debt: 70% Equity: 20% Gvt contribution: 10%  Rand Merchant Bank	Pricewaterhouse-Coopers; White & Case; EC Harris; Aloecap; Hiltron	R4.5 billion	N/a
3	Eco-tourism Manyeleti 3 sites. Limpopo Dept Finance, Economic Affairs, Tourism	DFBOT 30 years December 2001	Charles Maluleke 015-290-7300	Koko Moya Wilderness Trail (Pty) Ltd; Tinswala Lodges (Pty) Ltd; Pungwe Game Reserve (Pty) Ltd	Equity: 30% 30%, 40% Sub-c: 30%, 30%, 40%	Equity: 100%	DBSA; White & Case	N/a	R25 million cash
4	Universitas and Pelonomi Hospitals co-location Free State Dept Health	DFBOT 21 years November 2002	M Khumalo 051-408 1532	Community Health Management/ Netcare consortium	Equity: 40% Sub-c: 40%	Equity: 100%	Ignis; Naude's Attorneys	N/a	R43 million cash plus R38 million in form of upgrade
5	Information Systems Department of Labour	DFBOT 10 years  December 2002	Deon Haasbroek 012-309 4551	Siemens Business Solutions Consortium	Equity: 30% Sub-c: 25%	Equity: 100%	KPMG	R1.5 billion	N/a
6	Chapman's Peak	DF(part)BOT	A J Neil	Capstone 252 (Pty)	SPV : 30%	Debt: 44%	Ignis; Jeffares &		R 450

	<b>Drive toll road</b> Western Cape Dept Transport	30ears May 2003	021-483 2004	Ltd comprising: Concor, Thebe Investments, Marib Holdings, Haw & Ingles	Design & construct sub- c: 10% Ops & maintain sub- c: 50%	Equity: 10% Govt. Contribution: 46%  Rand Merchant Bank	Green; Hofmeyr, Herbstein & Gilwala; Intertoll; Decathlon	N/a	million in form of capital works and operations
7	<b>State Vaccine Institute</b> Dept Health	Equity partnership 4 years January 2004 Extension to December 2009	Mpho Maloka 012 312 0834	Biovac Consortium	Equity: 15% Sub-c: n/a	Equity: 100%	Pricewaterhouse- Coopers; Deneys Reitz	N/a	R15 million systems investment; & NPV vfm of R60m over current spend
8	<b>Humansdorp District Hospital</b> Eastern Cape Dept Health	DFBOT 20 years June 2003	Eugene Jooste 040-609 3702	Metro-Star Hospital (Pty) Ltd comprising: Metropol Hospital and Season Star Trading 123	Equity: 25% increasing to 40% Construct sub-c: 50% Ops & maintain sub- c: 40%	Equity: 90%  Govt Contribution 10%	Ignis; PH Inc	R18.9 million	R15 million upgrade plus R34 million cash
9	<b>Fleet Management</b> Eastern Cape Dept Transport	DFO 5 Years August 2003	Fahiem Narkedien 043 604 7412	Fleet Africa Eastern Cape (Pty) Ltd	Equity: 25% Sub-c: 25%	Debt: 100%  Rand Merchant Bank	Deloitte & Touche	R553 million	N/a
10	<b>Head Office Accommodation</b> Dept of Trade & Industry	DFBOT 25 Years August 2003	Hamida Fakir 012 310 1564	Rainprop Consortium comprising: WBHO, Atterbury Property Holdings, Parkdev S.A., Reberve Facility Management, Propnet,	Equity: 55% Design & Construct sub- c: 43% Facilities Manage sub- c: 50%	Debt: 80% Equity: 8% Govt. Contribution: 12%  Standard Corporate & Merchant	Ignis, Utho Capital, Ledwaba Mazwai/MasonsB.I. Assoc.	R870 million	N/A

				Zwelinzima Holdings, Prop 5 Corp, Rainbow Construction, WDB Investment Holdings, PDSA		Bank			
11	<b>Cradle of Humankind Interpretation Centre Complex</b> Gauteng Dept Agriculture, Conservation, Environment and Land Affairs	DBOT 10 years October 2003	Mags Pillay 011-355 1012	Furneaux Stewart Gapp consortium comprising: Stocks, Fikile, Thebe	Operating equity: 53% Construction sub-c: 40% Ops sub-c: 25%	Govt: 100% capex Equity: 100% opex	Pricewaterhouse-Coopers; White & Case	N/a	R39 million cash
13	<b>Gautrain Rapid Rail Link</b> Gauteng Dept Public Transport, Roads & Works	DBFOT 20 years September 2006	Jack van der Merwe 011 355 7300	Bombela Consortium, made up of Bombardier Transportation, Boygues TP, Murray & Roberts, Strategic Partners Group and RATP Development	Equity: 25% Sub-c: 10 %	Capital Contribution: 87% Debt: 11% Equity: 2%	Khuthele; Arcus Gibb; Kagiso Financial Services; Ledwaba Mazwai; Masons	N/A	Capital Value: R23,09 billion
14	<b>National Fleet Management</b> Department of Transport	DFO 5 years September 2006	Mkhululi Yekani 012 309 3165	Phavis World Fleet Solutions	Equity: 50% Sub-c: 50%	Equity: 100%	Deloitte & Touche; Madhlopa Attorneys	R213 million	R919 million
15	<b>Western Cape Rehabilitation Centre &amp; Lentegeur Hospital</b>	Facilities Management November 2006	Kim Lowenhertz 021 483 5844	Mpilisweni consortium	Equity: 45% Sub-c: 40%	Equity: 100%	KPMG; Africon; Deneys Reitz	R38,685 million	R 334 million
16	<b>Polokwane Hospital Renal Dialysis</b>	DBOT 10 years 1 December 2006	Edward Lamola 015 293 6362/61	Clinix/Frensus Emang Thabang	Equity: 40% Sub-c: 50%	Equity: 100%	Ignis, Munyai malaka; SPP; Phatsoane Henney, Inc, Vela VKE; Resolve Workplace Solutions	R88,35 million	N/a
17	<b>Dept. of Education Serviced Head Office</b>	DBFOT 27 years	Johan Visser 012-3125439	Sethekgo Private Party (Pty) Ltd	BEE: 25%	Debt 90% Equity 10%	KPMG, Deneys Reitz, Turner &	R706 989m	Capital Value

	Accommodation	23/04/2007				SCMB	Townsend		R512 264m
18	Eastern Cape Dept of Health . Port Alfred & Settlers Hospital.	DBFOT 17 years 7 May 2007	Eugene Jooste 040 609 3702	Netcare Consortium	Equity:40% Sub-c:60%	Debt:78% Equity:22% Pure Equity:10% S/holders Loan:90%	Ignis; PH Harris; Annette vd Merwe; HBS Consulting Inc	R275million	Capital Value: R168.6 million
19	Western Cape Nature Conservation Board	DBFOT 30 years	Adnaan Abrahams (021) 483-4874	Madikwe Investments	BEE: 21%	Equity: 100%	Vela VKE	N/A	Capital Value R40 million
20	Northern Cape Dept of Transport, Roads & Public Works	DFO 5 Years	Elliot Monosi (053) 839-2162	Nyumbane Fleet Services	BEE 100%	Debt: 100%	Dean Zimu & Associates	N/A	R342 million
21	Dept. of International Relations & Cooperation	DBFOT 25 Years	Bernice Africa (012) 351-1407	Imbumba Aganang Consortium	TBC	TBC	TBC	TBC	TBC
22	Phalaborwa Hospital	DBFOT 15 Years	ME Lamola (015) 293-6000	Clinix Phalaborwa Private Hospital (Pty) Ltd	BEE 85%	Debt: 92% Equity: 8%	IGNIS	N/A	Capital Value R90 million
23									
24									
25									