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A Comparison of Public-Private Partnerships in Nigeria & South Africa

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A COMPARISON OF PUBLIC-PRIVATE PARTNERSHIPS IN NIGERIA & SOUTH AFRICA

INTRODUCTION

In September 2017, Chidi Izuwa, acting Director General of Nigeria's Infrastructure Concession Regulatory Commission (ICRC), stated Nigeria would need approximately $100 billion over the next six years to finance quality infrastructure in the country.[1] In many countries, inadequate infrastructure continues to stifle economic, social, and political growth.[2] In response to the lack of funding and need for growth, countries have turned to private funding, through public-private partnerships (PPPs) for example, to meet these development needs.[3] PPPs are "long-term contractual arrangements between the government and a private partner whereby the latter delivers and funds public services using a capital asset, sharing the associated risks."[4]

1 Kunle Aderinokun, Obinna Chima, & Nume Ekeghe, *ICRC: $100bn Required for Nigeria's Infrastructure Development*, THIS DAY (Sept. 18, 2017), www.thisdaylive.com/index.php/2017/09/18/icrc-100bn-required-for-nigerias-infrastructure-development.

2 "Poor infrastructure is often a reflection of constraints that governments face, for example, lack of public funds, poor planning, or weak analysis underpinning project preparation." WORLD BANK GRP., WORLD BANK GROUP SUPPORT TO PUBLIC-PRIVATE PARTNERSHIPS: LESSONS FROM EXPERIENCE IN CLIENT COUNTRIES, FY02-12 vi (2014), ieg.worldbankgroup.org/sites/default/files/Data/Evaluation/files/ppp_eval_updated2.pdf; "Addressing these challenges will require a substantially larger annual level of investment in infrastructure, a significant increase in annual allocations for routine and periodic maintenance to ensure reliable infrastructure services, and increased attention to the institutional arrangements that support the infrastructure network of the country and the related services." AFRICAN DEV. BANK, AN INFRASTRUCTURE ACTION PLAN FOR NIGERIA: CLOSING THE INFRASTRUCTURE GAP AND ACCELERATING ECONOMIC TRANSFORMATION 17 (Aug. 8, 2013) https://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/An_Infrastructure_Action_Plan_for_Nigeria_-_Closing_the_Infrastructure_Gap_and_Accelerating_Economic_Transformation.pdf.

3 "African leaders are now throwing their nets wider and increasingly courting entrepreneurs and the private sector in general for partnerships in development. They have realised that sustainable economic growth on the continent cannot be achieved quickly without investments from both private and public sectors." *An Integrated Africa: A Boon to the Private Sector*, ZIMBABWE DAILY (Feb. 8, 2018), https://www.thezimbabwedaily.com/news/181259-an-integrated-africa-a-boon-to-the-private-sector.html.

4 ORG. FOR ECON. CO-OPERATION & DEV. (OECD), RECOMMENDATION OF THE COUNCIL ON PRINCIPLES FOR PUBLIC GOVERNANCE OF PUBLIC-PRIVATE PARTNERSHIPS 18 (May 2012) [hereinafter OECD], https://www.oecd.org/governance/budgeting/PPP-Recommendation.pdf.

While Nigeria and South Africa cumulatively account for almost half of Sub-Saharan Africa's gross domestic product,[5] their infrastructural makeups are vastly different.[6] In a 2015 study commissioned by the Public-Private Infrastructure Advisory Facility and the World Bank Group, the Economist Intelligence Unit profiled the operational maturity of nineteen African countries.[7] South Africa ranked first as the most mature country on the list.[8] South Africa was also the only country with market depth sufficiently capable of financing long-term investments.[9] While South Africa was top-ranked and the only country listed as "Developed,"[10] Nigeria ranked twelfth with an "Emerging" capacity to carry out sustainable PPPs.[11]

This Note will examine the regulatory and legal frameworks governing PPPs in Nigeria and South Africa.[12] This Note will also compare the enforcement, transparency, and effectiveness of PPPs within these legal and regulatory frameworks.[13] Lastly, this Note will discuss the social and cultural impact of PPPs within Nigeria and South Africa.[14] In comparing global, national, and local frameworks, this Note will examine why South Africa has made great progress and what Nigeria can adopt from South Africa's success.[15] This Note will also discuss recommendations Nigeria's infrastructure industries can implement to develop a full PPP regime that

5 David Malingha Doya, *Worst May Be Over As Biggest Africa Economies End Growth Rut*, BLOOMBERG MKTS. (Sept. 3, 2017), www.bloomberg.com/news/articles/2017-09-03/worst-may-be-over-as-africa-s-biggest-economies-emerge-from-rut.

6 *See generally infra* Sections III.A.1-2. (Nigerian states have autonomous PPP regimes separate from the federal PPP structure. South Africa's PPP structure is a centralized unit implemented through the National Treasury.).

7 The Economist Intelligence Unit is the research division of the Economist Group, publisher of the Economist. The Infrascope index comprises of nineteen qualitative and quantitative indicators. Each indicator had its own rubric and scoring system. The quantitative indicators are drawn from the Risk Briefing service of the Economist Intelligence Unit and World Bank. The qualitative indicators are drawn from primary sources, secondary sources, and data sources. Primary sources include legal texts, government websites, interviews, and press reports. ECONOMIST INTELLIGENCE UNIT, EVALUATING THE ENVIRONMENT FOR PUBLIC-PRIVATE PARTNERSHIPS IN AFRICA: THE 2015 INFRASCOPE 7 (2015), https://ppiaf.org/documents/2399/download.

8 *Id.* at 9.

9 *Id.* at 10.

10 Based on the overall scores from the indicators, each country was categorized as "Mature" (80-100), "Developed" (60-79.9), "Emerging" (30-59.9), or "Nascent" (0-29.9). *Id.* at 9.

11 *Id.*

12 *See generally infra* Section III.A.

13 *See generally infra* Section III.B.

14 *See generally infra* Section III.C.

15 *See generally infra* Section IV.

will benefit not only the industries themselves but also stakeholders and neighboring communities.[16]

The most vital recommendation is reform to Nigeria's PPP framework.[17] This Note suggests the implementation of a hybrid PPP framework to replace the current decentralized system.[18] Further, this Note encourages serious consideration of marginalized tribal/ethnic groups and communities that will be affected by PPP projects.[19] Lastly, this Note emphasizes the importance of consistency in PPP policies and programs in order to bring stability and legitimacy to the Nigerian PPP regime.[20]

I. BACKGROUND

For years, African countries have been considered the "preeminent emerging markets investment destination, attracting global investors across all sectors."[21] Much of the investment, which has led to growth in Africa's leading economies, is from the flow of foreign capital from private sources.[22] The flow of foreign capital is directed most prevalently towards infrastructure.[23] Perplexing, however, is that despite immense investment in African infrastructure and development, there has been little improvement in human development, infrastructural networks, business growth, or interdependence and coordination among neighboring cities, states, and countries.[24] As Africa is the least economically integrated continent in the world, there is great need for sound infrastructure in order

16 *Id.*

17 *See generally infra* Section IV.A.

18 *Id.*

19 *See generally infra* Section IV.B.

20 *See generally infra* Section IV.C.

21 Christopher Olobo, *6 Tips for plugging Africa's Infrastructure Gap Through Public-Private Partnerships*, THE WORLD BANK: INFRASTRUCTURE & PUB.-PRIV. PARTNERSHIPS BLOG (Nov. 1, 2016), http://blogs.worldbank.org/ppps/6-tips-plugging-africa-s-infrastructure-gap-through-public-private-partnerships.

22 Michael Heyink, *Private Equity: A Value Add Infrastructure Investor*, *in* INTO AFRICA 6 (Michael Osu ed., Aug. 2016), http://www.capitalmarketsinafrica.com/INTOAFRICA/INTOAFRICA_AUGUST_2016.pdf.

23 *Id.*

24 Josua Loots, *Public-Private Partnerships for Infrastructure Development in Africa: The Need for Human Rights-Focused Regulation*, HEINRICH BÖLL STIFTUNG (June 14, 2017), www.boell.de/en/2017/06/14/public-private-partnerships-infrastructure-development-africa-need-human-rights-focused.

to boost intra-African trade and raise the continent's competitiveness in the global economy.[25]

To meet African development needs, the African Union (AU) created the New Partnership for Africa's Development (NEPAD), an economic development program, to offset some of the foreign development investment issues in Africa.[26] Since the inception of NEPAD, programs directly targeted towards infrastructure and the leadership behind infrastructure development have emerged.[27] One such program is the Program for Infrastructure Development in Africa (PIDA).[28] PIDA promotes "regional economic integration by building mutually beneficial infrastructure and strengthening the ability of countries to trade and establish regional value chains for increased competitiveness."[29] In regards to leadership, the Presidential Infrastructure Champion Initiative (PICI) was created to push African leaders to accelerate infrastructure development goals under PIDA.[30] The goal of both PIDA and PICI is to promote economic growth and development between African countries through enhanced visibility, cleared bottlenecks, and coordination of resource mobilization.[31] However, these goals are only attainable through large financial investments, resulting in the need for private financing.[32]

PPPs represent a major route to securing private financing. PPPs have been defined in different ways by various organizations. The Organization for Economic Co-Operation and Development (OECD), for example, provides a flexible definition of PPPs as long-term contractual arrangements between the government and a private partner whereby the latter funds and delivers public services using a capital asset, sharing the

25 *Programme for Infrastructure Development in Africa (PIDA)*, NEPAD, www.nepad.org/programme/programme-infrastructure-development-africa-pida (last visited Jan. 31, 2018).

26 NEPAD focuses on the economic development of the African Union through investment in the following: "Human capital development (skills, youth, employment, and women empowerment); Industrialization, science, technology and innovation; Regional integration, infrastructure (energy, water, transport) and trade; Natural resources governance and food security." *About Us*, NEPAD, http://www.nepad.org/who-we-are/about-us (last visited Jan. 12, 2019).

27 *See infra* note 28-31.

28 PIDA was developed by the African Union Commission (AUC), NEPAD, the African Development Bank (AfDB), the United Nations Economic Commission for Africa (UNECA) and the Regional Economic Communities (RECs). *Programme for Infrastructure Development in Africa (PIDA)*, NEPAD, http://www.nepad.org/programme/programme-infrastructure-development-africa-pida (last visited Jan. 31, 2018).

29 *Arab Maghreb Union*, NEPAD, https://www.nepad.org/where-we-work/region/90.

30 *Presidential Infrastructure Champion Initiative (PICI)*, NEPAD, http://www.nepad.org/programme-details/1006 (last visited Jan. 31, 2018).

31 Loots, *supra* note 24.

32 *An Integrated Africa: A Boon to the Private Sector*, *supra* note 3.

associated risks.[33] Through this process, the government capitalizes on the skills, capital, and expertise of the private partner to perform substantial portions of the project.[34] Because the government typically pays for projects incrementally, the public and private entities share risks and rewards.[35] The government retains some measure of control through ownership of the project or contractual provisions allowing the public agency to dictate specific project processes.[36] Over time the government will acquire complete ownership of the project.[37] Due to the lack of funding, many developing countries continue to see significant potential and need for the increased use of PPPs to address infrastructure deficiencies.[38]

While there are many criticisms of PPPs,[39] the reasons developing countries seek PPPs remain relatively unchanged: the opportunity to gain the expertise and know-how, while utilizing private financing to build necessary infrastructure and increase economic status.[40] The World Bank supports PPPs because of "the potential to close the infrastructure gap by leveraging scarce public funding and introducing private sector technology and innovation to provide better quality public services through improved operational efficiency."[41] The World Bank further states that improvements in infrastructure and social services contribute directly to economic growth and poverty reduction.[42] The ability of PPPs to spur economic growth and reduce poverty are particularly important in underserved communities, such as Africa, where population growth has only led to increased destitution.[43] It is imperative to improve infrastructure to provide better opportunities for underserved communities.

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33 OECD, *supra* note 4. For the purposes of this Note, this is the definition of a PPP.

34 PRACTICAL LAW FIN., PUBLIC PRIVATE PARTNERSHIPS: ISSUES AND CONSIDERATIONS, Note 3-504-9995, https://uk.practicallaw.thomsonreuters.com/3-504-9995?.

35 *Id.* at 2.

36 *Id.*

37 *Id.*

38 Many public agencies do not have available funding to finance these projects or banks willing to take risks on such large projects. WORLD BANK GRP., *supra* note 2.

39 Disadvantages include high transaction costs, high financing costs, loss of operational control, loss of ongoing revenue source, and higher user fees. *See* PRACTICAL LAW FIN., *supra* note 34.

40 ECONOMIST INTELLIGENCE UNIT, *supra* note 7, at 10. Advantages also include risk transfer, the opportunity to construct the project, reduction of government debt, budget relief, cost savings, better performing assets, avoidance of underbidding, shorter construction periods, technical expertise, minimized waste, and revenue generation.

41 WORLD BANK GRP., *supra* note 2, at 7.

42 *Id.*

43 KATHLEEN BEEGLE, LUC CHRISTIAENSEN, ANDREW DABALEN & ISIS GADDIS, POVERTY IN A RISING AFRICA 21 (2016) (ebook), https://openknowledge.worldbank.org/handle/10986/22575.

There are a variety of forms of PPPs. On a scale of the most public to the most private forms of PPP, the OECD distinguishes the following types:

- Service contract[44]
- Management contract[45]
- Affermage and lease contracts[46]
- Concession[47]
- Build–operate–transfer (BOT) and similar arrangements (including BTO, BOO, DBO, DBFO)[48]
- Joint venture.[49]

Regardless of the type of PPP, governments must convince the private financier to invest in a given project.[50] There are many variables that the private party will consider before entering into a PPP. One common

44 Service contracts involve the government hiring a private company to perform tasks or services for a specified period of time. The government then pays the private company a predetermined fee for their service. ASIAN DEV. BANK, PUBLIC-PRIVATE PARTNERSHIP HANDBOOK 29 (2008), https://www.adb.org/sites/default/files/institutional-document/31484/public-private-partnership.pdf.

45 Management contracts expand the PPP services to include some or all of the management and operation of the service. The private company will have daily management control and authority while the government will be obligated for service provisions. *Id* at 31.

46 Affermage contracts require the private company to be responsible for the entire service. They are also responsible for the quality and service standards. Typically, the duration for these kinds of contracts is about ten years with the option of being renewed for up to twenty years. The private company collects revenue from customers, pays the government entity the affermage fee and keeps the remaining revenue. Further, a lease contract imposes the financial risk of operation and maintenance on the private company. In addition, the private company retains the right to collect revenue from customers and makes a specified lease payment to the contracting authority. *Id.* at 33.

47 A concession also requires the private company to be responsible for the full service, capital investment, and tariff collection from the end-users. Full services include "operation, maintenance, collection, management, and construction and rehabilitation of the system." *Id.* at 34. The government is required to establish and enforce the performance standards of the private company. *Id.*

48 These arrangements consist of a private company or consortium to finance and develop a new project. Upon completion of the contract, ownership is transferred to the government. "Variations on the basic BOT structure are":

> build–transfer–operate (BTO) where the transfer to the public owner takes place at the conclusion of construction rather than at the end of the contract; build–own–operate (BOO) where the developer constructs and operates the facility without transferring ownership to the public sector; design– build–operate (DBO) where the private sector provides design, construction, and operation of the infrastructure project; design–build–finance–operate (DBFO) where the responsibilities for designing, building, financing, and operating are bundled together and transferred to private sector partners.

Id. at 37-39.

49 Joint ventures require the government and private company to partner (either by forming a new company or assuming joint ownership of an existing company). Both parties will invest in the company and share the risk and benefits. *Id.* at 41.

50 *See infra* note 52.

consideration is whether the end-user is able and willing to pay for this investment.[51] Another consideration is whether a series of conditions can be met before considering the project. In order to assure payment for the service and the success of the PPP, the government will need to demonstrate the following are present in-country:

1. Political stability;
2. A continuous pipeline of bankable projects;
3. Transparent and efficient procurement;
4. Enforceability of contracts;
5. Equitable sharing of risks with the public sector; and
6. Certainty of the envisaged future cash flows.[52]

While these conditions may alleviate some of the risks associated with PPPs, problems may still persist throughout the entire process.

II. THE PROBLEM

While Nigeria and South Africa constantly remain the largest economies in Sub-Saharan Africa, the quality of infrastructure in Nigeria would not lead one to believe it.[53] While Nigeria and South Africa cumulatively account for almost half of Sub-Saharan Africa's gross domestic product,[54] a disparity exists between Nigeria's development and South Africa's.[55] In 2015, the Economist Intelligence Unit profiled and ranked fifteen African countries for their operational maturity.[56] Of the fifteen countries, South Africa was the only country with sufficient market depth to finance long-term investment.[57] Ranking first in operational maturity, South Africa is also the only country on the list with a

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51 ECONOMIST INTELLIGENCE UNIT, *supra* note 7, at 31.

52 *See supra* note 8.

53 Matthew Davies, *South Africa Regains Africa's 'Biggest Economy' Title from Nigeria*, BBC NEWS (Aug. 11, 2016), http://www.bbc.com/news/world-africa-37045276. Nigeria's "power sector's operational efficiency and cost recovery is among the worst in Africa, supplying about half of what is required, with subsequent social costs of about 3.7 percent of GDP." *See* Vivien Foster & Nataliya Pushak, *Nigeria's Infrastructure: A Continental Perspective* (World Bank, Policy Research Working Paper No. WPS5686, 2011), http://documents.worldbank.org/curated/en/819441468077937967/Nigerias-infrastructure-a-continental-perspective. "Water and sanitation in Nigeria are inefficiently managed and operated with very low levels of pipe coverage." *Id.* In regards to its potential, Nigerian irrigation development is very low. *Id.* Lastly, the transportation sector is deficient, with poor road networks and no maintenance. *Id.* Its air transport safety has also been subpar. *Id.*

54 *See* Doya, *supra* note 5.

55 *See generally* ECONOMIST INTELLIGENCE UNIT, *supra* note 7 (quantifying disparities between development in fifteen African nations) .

56 *Id.* at 6-7.

57 *Id.* at 9-10.

"Developed" overall score in its capacity to carry out sustainable PPPs.[58] Nigeria ranked twelfth with an "Emerging" capacity to carry out sustainable PPPs.[59] Many factors illustrate why South Africa's infrastructure regime is so far ahead of Nigeria's, such as its strong regulatory and legal frameworks.[60]

A. Regulatory & Legal Frameworks

Legislation and surrounding policies frame how project procurement occurs. While international organizations do not completely preempt the workings of solely national infrastructure projects, it is beneficial to understand the global, continental, and regional bodies before exploring the national regulatory frameworks within Nigeria and South Africa. On a global level, the OECD has outlined recommendations for PPPs in its Principles for Public Governance of Public Private Partnerships ("Principles").[61] These Principles "provide concrete guidance to policy makers on how to make sure that PPPs represent value for money for the public sector."[62] The Principles offer a set of guidelines that may be adopted by regulatory bodies within states. With a "growing body of international evidence [pointing] to the importance of a favorable regulatory environment,"[63] the Principles offer fundamental steps for developing sustainable PPP infrastructure projects. While neither Nigeria nor South Africa are OECD member states, they both have strong partnerships with the OECD and its member states.[64] With OECD partnerships and PPP guidelines, Nigeria and South Africa have a reference framework, used by many in the international community, to guide them in formulating their national frameworks.

Regionally, there are no concrete African regulatory agencies that govern African PPPs. However, some effort has been made to identify and

58 *See id.* at 9.

59 *Id.*

60 *See generally id.*

61 OECD, *supra* note 4.

62 *Id.* A Value for Money analysis measures the relative costs of a project procured using traditional public procurement methods and compares it with a PPP. PRACTICAL LAW FIN., *supra* note 34, at 6. By comparing the costs and benefits of traditional public procurement with a PPP, the public agency can determine the best value over the life of the project. *Id.*

63 OECD, *supra* note 4, at 11.

64 *See generally South Africa and the OECD*, OECD, http://www.oecd.org/southafrica/south-africa-and-oecd.htm (last visited Jan. 31, 2018); *NEPAD-OCED Africa Investment Initiative*, OECD, http://www.oecd.org/daf/inv/investment-policy/africa.htm (last visited Jan. 31, 2018); *Nigeria*, OECD, http://www.oecd.org/countries/nigeria/ (last visited Jan. 31, 2018).

address the issues facing the political, legal, and regulatory environments affecting PPPs. For example, the United Nations Economic Commissions for Africa (UNECA) and NEPAD have implemented a draft framework focused on the harmonization of policies, laws, and regulations to enhance private investment in African infrastructure.[65] This harmonization framework was presented to the African Union (AU) Assembly in 2017.[66] In 2016, PIDA also cooperated with the African Forum for Utility Regulators (AFUR) to create the African Centre of Excellence for Infrastructure Regulation (ACEIR). ACEIR's goal is to expand PIDA's scope and create a body of diverse, skilled professionals to find solutions to African infrastructural issues.[67] Using the hub-and-spoke model,

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65 The harmonization draft framework came after the 2014 Dakar Financing Summit (DFS) which emphasized a need for uniformity in order to enhance private-sector financing of trans-boundary infrastructure projects. NEPAD, *supra* note 26, at 19. Following the DFS, African Union (AU) heads of state requested the UNECA, NEPAD, relevant community members, and stakeholders to draft a regional framework which would harmonize policies, laws and regulations regarding private-sector investment in trans-boundary infrastructure projects. *Id*. UNECA then commissioned a study based on the following goals:

> 1. to enhance the capacity of member states to accelerate the implementation of the Dakar Agenda for Action by agreeing on a common operational framework for private-sector investment in trans-boundary infrastructure;
> 2. to garner comprehensive data on the available policies, laws and regulations relating to private-sector financing of trans-boundary infrastructure;
> 3. to increase understanding on the degree of disharmony of the available policies, laws and regulations on infrastructure financing; and
> 4. to accelerate the implementation of the Dakar Agenda for Action and, in particular, private-sector investment in the 16 DFS projects." This will lead to the development of a common regional framework for policies, laws and regulations on private-sector investment in trans-boundary infrastructure projects. During 2015 and 2016, the UNECA and the NEPAD Agency undertook joint fact-finding and data-collection missions to countries in the SADC, ECOWAS, COMESA and the AMU to find key elements that will be need for such a framework. The draft framework was validated in mid-November 2016 and will be presented to the AU Assembly this year.

Id.

66 *Id.*

67 The goal of the ACEIR is to create a "regional infrastructure development and management-focused 'center of excellence'" in order to develop Africa-specific models of regulation. *Id.* at 19. The ACEIR's work will predominantly focus on energy, communication, transportation, and water. *Id.* at 20. The ACEIR will be comprised of regulatory practitioners, professors, researchers, and internal staff members who will collectively research relevant areas such as engineering, economics, political science, public administration and law. *Id.* After such research, the ACEIR will publish and implement capacity-building initiatives for regulators, government officials and operators as well as policy dialogues between these parties. *Id.* Currently, it is "projected that ACEIR will be financed by AFUR members from donations from regulated African firms and operators, partner institutions and international development partners." *Id.*

ACEIR is intended to be a network of institutions throughout all five African regions recognized by the AU.[68]

There has since been no publication on the status of either of these regulatory efforts. Even with the prospect of trans-boundary infrastructure regulatory bodies and frameworks, the projects the ACEIR will oversee and whether these bodies will be effective remains unknown. With many national regulatory agencies incapable of following through or fully executing their regulatory provisions,[69] the African Union will need to find a mechanism to implement a regulatory framework that can be fully administered regionally.

While there are no regional regulatory bodies,[70] the Western and Southern African regions possess bodies focused on development and economic growth: The Economic Community of West African States (ECOWAS)[71] and the Southern African Development Community (SADC).[72] The ultimate goal of these organizations is to encourage integrated economic activity.[73] Like the European Union, ECOWAS may implement regulations and directives which must be followed by member

68 The hub-and-spoke structure is scheme where several actors, each remaining individually managed, pool their assets and information together and contribute to a central objective. *Id.* The hub is considered the central vehicle where information will be pooled. *Id.* ACEIR's main hub secretariat will be NEPAD and AFUR. *Id.* The spokes are the smaller, individually managed entities which will report their findings to the hub. *Id.* Selected AFUR members as well as regional academic institutions will be the spokes. *Id.*

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> Ghana, for example, has strong rules concerning project preparation, but there is a shortage of skills for managing such processes, while Uganda's PPP unit is not yet able to execute the full range of tasks required of it in the draft law. Moreover, PPP institutions are not always fulfilling their potential. Egypt and Cameroon have dedicated PPP units, but they are not as fully engaged as was intended.

ECONOMIST INTELLIGENCE UNIT, *supra* note 7, at 10.

70 In 2011, Nigeria's Infrastructure Concession Regulatory Commission "championed the establishment of an African PPP Network (AP3N) to serve as a regional platform for sharing experiences and peer-learning and development of best practices for PPP projects in Africa." *Milestones*, INFRASTRUCTURE CONCESSION REG. COMMISSION, www.icrc.gov.ng/about-icrc/milestones. Eight countries were represented during the inaugural meeting. *Id*. Since then, there has been no documentation evidenced in the ICRC Milestones of further AP3N Network meetings. *Id.*

71 ECOWAS is an AU-recognized regional organization focused on the economic integration and self-sufficiency of its member states. *History,* ECON. COMMUNITY OF W. AFR. STS., http://www.ecowas.int/about-ecowas/history/. Such integrated economic industries include manufacturing, transportation, telecommunications, energy, agriculture, natural resources, commerce, monetary and financial issues, and social as well as cultural matters. *Id.*

72 SADC is an AU-recognized regional organization focused on regional integration and poverty eradication within Southern Africa through economic development and ensuring peace and security. *Id.* SADC's goal is to enhance the quality of life of the people of Southern Africa through regional integration and sustainable development. *Id.*

73 *See supra* notes 70-71.

states.[74] ECOWAS implemented the Infrastructure Projects Preparation and Development Unit (PPDU),[75] which governs the preparation and development of regional infrastructure projects.[76] Like PPDU, the SADC includes the Infrastructure and Services Directorate, which focuses "specifically on the development and quality of strategic infrastructure in the Southern African region."[77] With the norms and standards set forth in these extranational organizations, Nigeria and South Africa have been able to create PPP regimes for national projects.

1. Nigeria

Relatively recently in its history, from 1999 to 2007 Nigeria produced a series of regulatory documents and assessments which led to the legislative implementation of PPPs.[78] Implementation and regulation of

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> Regulations have general application and all their provisions are enforceable and directly applicable in Member States. They are enforceable in the institutions of the Community. Decisions are enforceable in Member States and all designated therein. Directives and their objectives are binding on all Member States. The modalities for attaining such objectives are left to the discretion of States.

Regulations Directives & Other Acts, ECOWAS, http://www.ecowas.int/ecowas-law/regulations-directives-and-other-acts.

75 Established in 2014, the infrastructure Projects Preparation and Development Unit is an ECOWAS specialized agency which leads the preparation and development of regional infrastructure projects. *Infrastructure Projects Preparation and Development Unit*, ECOWAS, http://www.ecowas.int/specialized-agencies/ecowas-infrastructure-projects-preparation-and-development-unit-ppdu. The goal of PPDU is to "make financial regional infrastructure projects through the elaboration of feasibility studies (economic, financial, social, environmental, impact, etc.)." The functions of the PPDU include:

> 1. Identify, select and prioritize regional integration infrastructure projects, in consultation with the ECOWAS Commission, member States and the private sector;
> 2. Mobilize the resources required for project preparation and infrastructure financing;
> 3. Strengthen capacities, assist/support national and intergovernmental structures in charge for the implementation of infrastructure programs and projects; and
> 4. Promote public-private partnerships in infrastructure financing.

Id.

76 *Id.*

77 *Infrastructure & Services*, SADC, http://www.sadc.int/sadc-secretariat/directorates/office-deputy-executive-secretary-regional-integration/infrastructure-services.

78 Regulatory and Policy Documents for PPP in Nigeria

Regulatory and Policy Documents	Year Published
Privatization and Commercialization Act	1999
Nigeria: Country Procurement Assessment Report, Volume I	2000
Nigeria: Country Procurement Assessment Report, Volume II	2000

PPPs is led by Nigerian government agencies.[79] Two main sources of PPP regulation originated from these documents and assessments: the Infrastructure Concession Regulatory Commission Act[80] and the Public Procurement Act of 2007.[81] Addressing Nigeria's infrastructural gaps, the Infrastructure Concession Regulatory Commission Act (ICRCA) provides for the participation of the private sector in "financing the construction, development, operation, or maintenance of infrastructure or development projects of the Federal Government through concession or contractual arrangements."[82] The ICRCA in turn established the Infrastructure Concession Regulatory Commission (ICRC) to regulate infrastructure PPP endeavors of the Federal government.[83] The Public Procurement Act

The Infrastructure Concession Regulatory Commission Act	2005
The Fiscal Responsibility Act	2007
The Public Procurement Act	2007

Nehemiah Yakubu Sanda et al., *A Review of Public-Private Partnership for Building and Infrastructure Procurement in Nigeria*, 6 DEVELOPING COUNTRY STUD. 5, 9 (2016).

79 *See* ECONOMIST INTELLIGENCE UNIT, *supra* note 7, at 11.

80 "The Infrastructure Concession Regulatory Commission Act was enacted in 2005 and created the Infrastructure Concession Regulatory Commission to manage PPP transactions at the federal level. Since then, a number of transactions have been consummated using the PPP model in different sectors of the Nigerian economy." George Nwangwu, *The Legal Framework for Public-Private Partnerships (PPPs) in Nigeria: Untangling the Complex Web*, 7 EUR. PROCUREMENT & PUB. PRIV. PARTNERSHIP L. REV. 268, 269 (2012).

81 The Public Procurement Act of 2007 requires "public institutions and other relevant parties to ensure that all public procurements are conducted in a manner that is transparent, timely and equitable and based on the agreed guidelines, thresholds and standards." UDO UDOMA & BELO-OSAGIE, PUBLIC PROCUREMENT (2012), http://www.lexmundi.com/document.asp?docid=4978. In order for a contract to be awarded, the Tenders Board must award procurements goods, works and services within the threshold set in the regulations. Public Procurement Act (2007) Cap. (A14), § 22 (Nigeria).

82 Infrastructure Concession Regulatory Commission (Establishment, Etc) Act (2005) Cap. (A18) (Nigeria).

83 The ICRC "provides the regulatory and institutional framework for federal government ministries, departments and agencies (MDAs) to effectively partner with the private sector for infrastructure projects." *What We Do*, INFRASTRUCTURE CONCESSION REG. COMMISSION, http://www.icrc.gov.ng/about-icrc/what-we-do/. The functions of the ICRC include:

1. Promoting, facilitating, supporting and coordinating implementation of a sound PPP Process, while ensuring that principles of good governance are applied to all of the functions that form part of it;
2. Providing guidelines and transaction support and building capacity in all Federal Government Ministries, Agencies and Departments (MDAs) for project development, tendering, negotiation and contract execution;
3. Developing guidelines for monitoring contract compliance during construction, operation and contract termination and supporting the MDAs assigned to this task; and

(PPA) constituted the Bureau of Public Procurement, which is responsible for providing a legal and institutional framework for public procurement in Nigeria.[84] The powers of the Bureau of Public Procurement generally encompass regulating pricing standards and benchmarks, and "attain[ing] transparency, competitiveness, cost effectiveness and professionalism in the public sector procurement system."[85] Along with general PPP legislation, sector-specific legislation has also been passed to regulate various services, especially in public utilities sectors.[86]

The aforementioned laws, however, only pertain to federal bodies undertaking federal projects.[87] Thus, each Nigerian state government has autonomy over PPP units, projects, laws, and regulations within state borders.[88] The only way state governments are subject to federal regulations is through government funding.[89] Furthermore, additional

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4. Collaborating with other agencies, including similar state-level PPP units, to implement a cohesive national legal, policy and regulatory environment that is conducive to private sector investment in Nigeria's infrastructure projects.

Id.

84 The objectives of establishing the Bureau of Public Procurement include:

1. Harmonize existing government policies and practices on public procurement and ensure probity, accountability and transparency in the procurement process;
2. Establish pricing standards and benchmarks; Ensure the application of fair, competitive, transparent, value-for-money standards and practices for the procurement and disposal of public assets; and
3. Attain transparency, competitiveness, cost effectiveness and professionalism in the public sector procurement system.

Who We Are, BUREAU OF PUB. PROCUREMENT, http://www.bpp.gov.ng/who-we-are/.

85 BUREAU OF PUB. PROCUREMENT, http://www.bpp.gov.ng.

86 Examples of sector specific legislation include the Electric Power Sector Reform Act, 2005, which provides the statutory framework for participation of private companies in electricity generation, transmission, and distribution, and establishes the Nigerian Electricity Regulatory Commission (NERC), to regulate activities in the electricity sector, as well as the Federal Highways Act (2004) Cap. (F13), which empowers the Minister of Transport to construct federal highways, operate toll gates and collect tolls on the federal highways. Akasemi Ollor, George Etomi & Veronica Alaba Oyedeji, *Public Private Partnerships*, GETTING THE DEAL THROUGH (November 2017), gettingthedealthrough.com/area/71/jurisdiction/18/public-private-partnerships-nigeria.

87 Neil Cuthbert & Udayan Mukherjee, *Legal Insight: Overview of PPP Laws/Frameworks in Selected African Jurisdictions*, DENTONS (2016), https://www.dentons.com/en/insights/newsletters/2016/december/7/dentons-chinca-mea-project-reporter/dentons-chinca-mea-project-reporter-edition-2/legal-insight-overview-of-ppp-laws-frameworks-in-selected-african-jurisdictions.

88 ECONOMIST INTELLIGENCE UNIT, *supra* note 7, at 22.

89 Many state PPPs are financed and supported by the Federal Government. Hauwa ModuKumshe et al., *Public-Private Partnership and Nigeria's Infrastructural Development: A Panacea for Economic Growth*, 2 INT'L J. HUMAN. SOC. & SCI. 87, 91 (2015) (While "each State is responsible for its own investment projects, many PPP projects within a State will be financed with the

funding can be obtained through sub-government guarantees with the help of international organizations and agencies such as the World Bank.[90]

As each Nigerian state has the autonomy to create its own laws and regulations, there is an imbalance where some states have comprehensive regulation while others have little or no legal framework governing PPPs at all. For example, Lagos State enacted its Public Partnership Law in 2011,[91] and Rivers State enacted the Rivers State Public-Private Participation in Infrastructure Development Law in 2009.[92] In contrast, Kogi State's Public Private Partnership Law was passed in 2014, and the Bureau for Public Private Partnerships was established in 2016.[93] A major cause for the inconsistency across states is the preference of awarding contracts "to private firms to execute a project designed and financed by governments," which results in far less oversight, a higher chance of corruption, and fewer available funds.[94] Nigeria has a comparatively extensive regulatory and legal regime for PPP procurement and delivery at the federal level, while state legislation is still nonexistent or in its infancy, leading to a lack of available investment funds.[95]

support of a guarantee by 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.").

90 It should be taken into consideration that various agencies of the World Bank work through the federal government (i.e., provision of sub-sovereign guarantees to Nigerian states). Ollor, Etomi & Oyedeji, *supra* note 86.

91 Similar to the ICRCA, the objective of the Lagos State Public Partnership Law is to initiate, develop, and advise on public infrastructure and development strategies. Lagos State Public Partnership Law (2011).

92 Rivers State Public-Private Participation in Infrastructure Development Law (2009).

93 Kogi State Public Private Partnership Law (2014); Kogi State's Bureau for Public Private Partnership focuses on a Government-to-Business model where building relationships for the formation of PPPs at the State and local levels in order to increase quality goods, services, and facilities. Relatively new, the Bureau was established in March 2016. *Bureau of Public Private Partnership to Drive Kogi Economy – DG BP3*, KOGI REP. (Mar. 14, 2017), http://kogireports.com/bureau-of-public-private-partnership-to-drive-kogi-economy-dg-bp3.

94 In Nigerian publication, This Day Live, Deputy Governor of Osun State, Senator Iyiola Omisore discussed bottlenecks in Nigerian infrastructure. "Infrastructure procurement by state governments is still largely tied to the old model of contract awards to private firms to execute a project designed and financed by governments," noting that the utility of PPP projects has been highest in Lagos state, which implements a model that leverages private expertise more fully. Nume Ekeghe, *Omisore: Why Nigeria Has Poor Infrastructure*, THIS DAY (Nov. 28, 2016), https://www.thisdaylive.com/index.php/2016/11/28/omisore-why-nigeria-has-poor-infrastructure. With procurement based on government rather than private financing, there remains a shortage of investable funds for infrastructure. *Id.*

95 Many of Nigeria's local state governments and municipalities do not have laws regarding the implementation of PPPs. Because most of the states continue to utilize private contract procurement, there has not been a push for such laws. *See* Ekeghe, *supra* note 94.

2. South Africa

South Africa's regulatory bodies are informed by PPP legislation and heavily influential guidelines. The foundation of South Africa's PPP framework is attributed to the 1997 creation of a PPP task force.[96] The most pertinent legislation for PPP regulation is the Public Finance Management Act (PFMA).[97] The PFMA aims to promote "financial management in order to maximize service delivery through the effective and efficient use of the limited resources."[98] While the PFMA does not directly address PPPs, it governs all PPP procurement and delivery. Directly addressing PPPs, the PPP Manual and Standardized PPP Provisions are issued as Treasury PPP practice notes in terms of the PFMA.[99] Further, the Municipal Finance Management Act (MFMA) was created to modernize financial management and create a governance framework for the various players within local government.[100] These

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96 In April 1997, the South African Cabinet approved the appointment of an inter-departmental task team to develop a package of policy, legislative and institutional reforms to create an enabling environment for PPPs.

> Pioneering PPP projects were undertaken between 1997 and 2000 by the SA National Roads Agency for the N3 and N4 toll roads; by the Departments of Public Works and Correctional Services for two maximum security prisons; by two municipalities for water services; and by SA National Parks for tourism concessions. Drawing early lessons from these projects and from international experience, a Strategic Framework for PPPs was endorsed by Cabinet in December 1999.

Public Private Partnership, NAT'L TREASURY PPP UNIT, http://www.ppp.gov.za/Pages/About.aspx.

97 "The PFMA promotes the objective of good financial management in order to maximize service delivery through the effective and efficient use of the limited resources." *Legislation – Public Finance Management Act*, NAT'L TREASURY, http://www.treasury.gov.za/legislation/pfma.

98 The key objectives of the PFMA are based on the following goals:

- Modernize the system of financial management in the public sector;
- Enable public sector managers to manage, but at the same time be held more accountable;
- Ensure the timely provision of quality information; and
- Eliminate the waste and corruption in the use of public assets.

Id.

99 The South African National Treasury's PPP Manual is a best practice guide that informs public and private parties throughout the phases of the PPP project cycle for both national and provincial governments. Containing nine modules, each module is issued as a National Treasury PPP Practice Note in terms of the PFMA. *Public Private Partnership Manual*, WORLD BANK, https://ppp.worldbank.org/public-private-partnership/library/public-private-partnership-manual-national-treasury-ppp-practice-notes-issued-terms-public-0. Read together with the PPP Manual, the Treasury's Standardized PPP Provisions is a guideline addressing the common issues in PPP projects. *Id.*

100 The MFMA aims to modernize budget, accounting and financial management practices by placing local government finances on a sustainable footing in order to maximize the capacity of municipalities to deliver services to communities. *MFMA*, NAT'L TREASURY,

legislative acts and guidelines inform the manner in which South Africa regulates PPPs.

Unlike Nigeria, South Africa has a central public-private partnership unit, the Government Technical Advisory Centre (GTAC),[101] which is an independent entity that reports to the National Treasury.[102] Formally established in 2012, the GTAC advises and supports the Treasury regarding major infrastructure procurement projects, PPPs and service delivery improvement programs.[103] The objective for a centralized unit such as the GTAC is to have a hub of experts implementing and supporting the overall PPP process.[104]

Despite the centralized hub of experts implementing the PPP process, many believe the national rules are not effective on the municipal level and thus cause confusion.[105] In fact, PPP stakeholders found an overlapping conflict between the MFMA and the Municipal Systems Act (MSA) which addresses the municipalities.[106] Municipalities also struggle

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http://mfma.treasury.gov.za/Pages/Default.aspx (last visited Jan. 15, 2018). It also aims to put in place a sound financial governance framework by clarifying and separating the roles and responsibilities of the council, mayor, and officials. *Id.*

101 The "Government Technical Advisory Centre (GTAC) is an agency of South Africa's National Treasury, and was formally established in March 2012. GTAC provides advisory and technical consulting services to South African organs of state, and contributes to public service research and capacity building." *Overview*, GOV'T TECHNICAL ADVISORY CTR. (GTAC), https://www.gtac.gov.za/about-us/overview (last visited Jan. 15, 2018).

102 *South Africa*, PPP KNOWLEDGE LAB, https://pppknowledgelab.org/countries/south-africa (last visited Jan. 15, 2018).

103 Prior to 2012, the former Technical Assistance Unit of the National Treasury, the former Public-Private Partnership Unit, the National Capital Projects Unit, the Expenditure Performance Review Programme, and the Jobs Fund's project management unit were separated entities which was later consolidated into the GTAC. *See Frequently Asked Questions*, GOV'T TECHNICAL ADVISORY CTR. (GTAC), https://www.gtac.gov.za/Pages/faqs.aspx.

104 Centralized units "create a center of knowledge and expertise that can provide individual departments with technical assistance during the creation process of a PPP and keep a watchful eye on departments through its regulatory approval mechanism." AKINTOLA AKINTOYE & MATTHIAS BECK, POLICY, MANAGEMENT AND FINANCE OF PUBLIC-PRIVATE PARTNERSHIPS 85 (2008). Further, units with centers of expertise heighten the confidence of potential private investors. *Id.*

105 The Office of the Presidency of South Africa and the Business Trust requested the Castalia Consortium to prepare a report identifying the challenges faced by South Africa's PPPs in infrastructure. SUPPORT PROGRAMME FOR ACCELERATED INFRASTRUCTURE DEV. (SPAID), KEY CHALLENGES TO PUBLIC PRIVATE PARTNERSHIPS IN SOUTH AFRICA: SUMMARY OF INTERVIEW FINDINGS 1 (2007) [hereinafter SPAID], www.castalia-advisors.com/files/12345.pdf. The Castalia Consortium interviewed individuals from the private sector, implementing agencies, and government agencies responsible for PPP policy. *Id.* at i. Private sector actors as well as the various agencies responsible for PPP policy both find that the rules for PPPs do not work well for municipalities. *Id.* However, the staff of the PPP Unit has been working to solve these problems. *Id*. at ii.

106 The Municipal Systems Act was enacted in November 2000 in order to provide the mechanisms and processes necessary to assist the advancement of municipalities both socially and economically. *See* Municipal Systems Act 32 of 2000 (S. Afr.). Both, the MFMA and MSA, require

with ensuring the availability of sufficient human capital and resources to effectively implement the projects.[107]

As in Nigeria, in South Africa "capacity and skills shortages in government departments and provinces tend to constrain the pace at which the South African government is able to roll out PPPs."[108] Municipality government officials found parts of the MSA to be a mechanism to show the government's ineffectiveness.[109] Lastly, municipalities face great risk in budgeting multi-year outlays required by PPPs without receiving multi-year allocations for those projects.[110] With these gaps at the local government level, there is great need for PPP laws and regulations focused on the municipal level as well as stronger general enforcement of such laws.

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that feasibility studies be conducted for a PPP. *Id.* Because these studies are not identical, there have been discrepancies between the interpretation of the MSA regarding what the studies should include and the extensiveness of the analysis. SPAID, *supra* note 105, at 7-8. Municipal laws are also more complex than at the national level. ECONOMIST INTELLIGENCE UNIT, *supra* note 7, at 38.

107 Experts interviewed believed municipalities faced human resource constraints which were not experienced on the national level. There is a need for higher technical support and "basic supply chain management and procurement management skills, to the extent that they were having trouble spending conditional grants intended to address infrastructure backlogs." *See* SPAID *supra* note 105, at 8.

> In general, municipalities need education, awareness and training on the functions, benefits, challenges and other implications of PPP models. Lack of technical, management and legal capacity of municipalities make it difficult for PPP models to be successfully implemented in local government. Even though the results have indicated that investors or financiers have interest in local government water infrastructure, lack of technical oversight remains a challenge.

Cornelius Ruiters & Maselaganye P Matji, *Public-Private Partnership Conceptual Framework and Models for the Funding and Financing of Water Services Infrastructure in Municipalities from Selected Provinces in South Africa*, 42 WATER SA 291, 294 (2016), https://dx.doi.org/10.4314/wsa.v42i2.13.

108 *See* AKINTOYE & BECK, *supra* note 104, at 95.

109 "Many interviewees said municipal government officials view Section 78 [of the MSA] as at best, an onerous bureaucratic process addition to the requirements of the MFMA [or,] at worst, a requirement to demonstrate their own ineffectiveness or redundancy versus private operators." *See* SPAID, *supra* note 105, at 8.

110 This risk is considerably higher for municipalities than for national and provincial governments because municipalities require approval from the Treasury for PPPs. Treasury allocations come in the form of

> equitable shares or conditional grants [and] are not guaranteed for 20-30 years in the future. The remainder would need to come from municipal tax revenues of fees for basic services, yet many municipalities have been reluctant to use their full revenue raising powers, and unable or unwilling to fully collect fees for basic services.

Id. at 9.

B. Enforcement, Trnasparency & Effectiveness

1. Nigeria

In theory, Nigeria's extensive regulatory regime creates a sound foundation for legal enforcement of PPP procurement, delivery, and enforcement.[111] In practice, there have been many setbacks regarding contract enforcement, transparency, and efficiency in PPP projects.[112] The ICRC and Bureau of Public Procurement are the regulatory bodies responsible for ensuring all parties are held accountable for their performance.[113] Unfortunately, though these bodies address enforcement as key objectives, implementation of enforcement programs is lacking.[114]

The ICRC plays a statutory role in monitoring the overall effectiveness of the Government's PPP policy.[115] Instead of maintaining its own dispute settlement entity, the ICRC outlines guidelines for "Alternate Dispute Resolution"[116] that should be expressly stated within the contract.[117] These dispute resolution proceedings are essentially dependent on the contracting parties, who can request the ICRC to oversee arbitration.[118] Without concrete legal enforcement, implementation of PPP contractual duties is especially weak because of the imbalance of political power between

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111 *See* ECONOMIST INTELLIGENCE UNIT, *supra* note 7, at 35.

112 *Id.*

113 *See supra*, notes 82-83.

114 *See* ECONOMIST INTELLIGENCE UNIT, *supra* note 7, at 35.

115 Adedolapo Akinrele, Zelda Odidison, Jumoke Onigbogi & F.O. Akinrele & Co., *Nigeria*, *in* INTERNATIONAL PROJECT FINANCE AND PPPS: A LEGAL GUIDE TO KEY GROWTH MARKETS 22 (Jeffrey Delmon & Victoria Rigby Delmon eds., 2010).

116

> The PPP contract should specify a procedure for handling disputes under the terms of the PPP contract. A dispute resolution clause will set out that the parties will submit to dispute resolution in the event of any conflict. The most suitable method/s of dispute resolution would be adopted by the parties. The most common types of ADR for civil cases are mediation, settlement conferences, neutral evaluation, negotiation, fact finding, and arbitration.

ICRC, LEGAL & REGULATORY FRAMEWORKS 16 (2019), www.icrc.gov.ng/assets/uploads/2017/09/Legal-Regulatory-Framework-for-PPPs.pdf.

117 "PPP contracts will include clauses dealing with the resolution of disputes, and the ICRC may in some circumstances be used to arbitrate or provide advice within its wider public sector mission." ICRC, NATIONAL POLICY ON PUBLIC PRIVATE PARTNERSHIP NIGERIA 26 (2013).

118 *Id.*

private and public actors.[119] However, there are occasional circumstances where the threat of legal enforcement is persuasive.[120]

An additional bottleneck to the proper implementation of PPPs is transparency during the procurement stage. The Bureau of Public Procurement provides the legal framework regarding transparent procurement of PPPs.[121] With issues like favoritism and closed-door negotiations, the true motivations for selecting a bidder can be opaque.[122] Furthermore, some banking institutions have highlighted questionable practices in awarding contracts and whether those awards are corrupt.[123] The Bureau of Public Procurement has a protocol in pursuit of contractual remedies,[124] but the PPA does not list the measures that constitute corrective action at various stages during the dispute resolution process.[125] Lack of transparency in the implementation of existing rules has led to many public officials taking advantage of such conditions.[126] Overall,

119 "Politically powerful actors can steer legal processes in their favour, while private operators have been known to use the threat of a lawsuit when a dispute arises to force their government counterparty to bend to their demands." ECONOMIST INTELLIGENCE UNIT, *supra* note 7, at 35.

120 The "judiciary occasionally upholds PPP operator and investor rights and arbitration rulings, but the process can be slow." *Id.*

121 *See* BUREAU OF PUB. PROCUREMENT, *supra* note 85.

122 "Despite formal processes, closed-door negotiations do take place," sometimes allowing for favoritism. *See* ECONOMIST INTELLIGENCE UNIT, *supra* note 7, at 35. While a relationship of trust and understanding can be cultivated over time, closed-door negotiations have the potential to place newer and more qualified bidders at a disadvantage. *Id.*

123 Many question whether Nigeria has used "objective economic factors as the primary consideration in final project and contract awards." *Id.* at 36. Banking institutions in particular have stated that many PPP projects "are not properly packaged. In other words, they do not clearly outline a business case, or a clear path to profitability." *Id.*

124 Section 54(1) of the Public Procurement Act allows bidders to seek "administrative review for any omission or breach by a procuring entity under the provisions of [the] Act." Public Procurement Act (2007) Cap. (A14), § 54.1 (Nigeria). Section 54(2) of the Public Procurement Act mandates such complaints must first be submitted in writing to the accounting officer of the procuring entity. Procurement Act (2007) Cap. (A14), §54.2. Section 54 (3) of the Public Procurement Act states the bidder may make a complaint to the Bureau within ten business days after receiving a decision from the accounting officer. Procurement Act (2007) Cap. (A14), §54.3.

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> [P]resumably the accounting officer may set aside an improper decision and substitute his or her own decision for the decision of the procurement official. It is not clear, however, whether, and in what contexts, the accounting officer may offer further remedies such as damages, the suspension of contract performance, or the termination of a contract. Where a complaint is filed before the BPP, the BPP may provide yet further remedies to an aggrieved bidder. Thus, the BPP may suspend any further action by the procuring authority until the BPP renders a decision.

Sope Williams-Elegbe, *The Reform and Regulation of Public Procurement in Nigeria*, 41 PUB. CONT. L.J. 339, 361 (2012).

126 Not only has there been concern for transparent, meticulous, and comprehensive regulation of PPP public procurement, but there has also been great concern due to the lack of a supervisory

these gaps in the procurement process have caused uncertainty to the detriment of quality PPPs and the rights of those affected.[127]

Lastly, effective implementation of PPPs is stymied by corruption and lack of experience. In several studies detailing explanations for the slow uptake of PPPs, many found corruption to be the biggest issue.[128] Because Nigerian states are notorious for their corrupt private contract practices, the likelihood that private investors will be interested in entering into PPPs with state organizations is relatively low.[129] In addition to corruption, lack of experience among officials responsible for negotiating or carrying out PPPs has continued to hinder the procurement and implementation of PPPs. From the lack of knowledge among procurement officials[130] to bank financing inexperience[131] to the potentially corrupt awarding of contracts,[132] PPP projects suffer from the consequences of poor or unsophisticated governance. While there are many ways for the developers

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mechanism charged with the implementation of public procurement rules. *Id.* at 341. Lack of a supervisory mechanism equipped public officials with wide discretion "in conducting and managing the procurement process, which could easily be exploited, especially in a culture where corruption is endemic." *Id.*

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> The lack of clear regulation in public procurement also fostered unpredictability, as contract award criteria or guidelines could be changed at any time and also facilitated the award of contracts on a noncompetitive basis. This often meant that the Government did not receive value for money, especially where nepotism or cronyism prevailed.

Id.

128 In a survey determining the achievements using PPPs, the elimination of corruption ranked the lowest benefit. This evidence suggests corruption does not get eliminated but rather is adapted to fit the model. Abdullahi A. Umar, Noor Amila Wan Abdullah Zawawi, Mohd Faris Khamidi & Arazi Idrus, *Stakeholder Perceptions on Achieved Benefits of PFI Procurement Strategy*, 7 MOD. APPLIED SCI. 4, 36-37 (2013). Another study ranked corruption in the government as being the most severe cause of slow PPP adoption in Nigeria. AbdulGaniyu Otairu, Abdullahi A. Umar, Noor Amila Wan Abdullah Zawawi, Mahmoud Sodangi & Dabo B. Hammad, *Slow Adoption of PPPs in Developing Countries: Survey of Nigerian Construction Professionals*, 77 PROCEDIA ENGINEERING 188, 191 (2014).

129 Otairu, Umar, Zawawi, Sodangi & Hammad, *Slow adoption of PPPs in developing countries: Survey of Nigerian Construction Professionals*, *supra* note 128, at 193.

130 Interviews conducted with procurement officials showed that the "capacity of procurement officials remains a challenge. There was a clear difference in levels of understanding of the procurement function between procurement officials in high-profile and low-profile ministries, with high-profile ministries possessing staff with a higher degree of understanding." *See* Williams-Elegbe, *supra* note 125, at 365.

131 "Another strong challenge hinges on lack of experience in project financing by bank officials and technical expertise." Olatunji Fadeyi, Abimbola Adegbuyi & Edwin Agwu, *Assessment of Public-Private Partnership on Infrastructural Development in Nigeria: Challenges and Prospects*, 3 INT'L CONF. AFR. DEV. ISSUES 222, 222 (2016).

132 *See* ECONOMIST INTELLIGENCE UNIT, *supra* note 7, at 36.

of Nigeria's legal framework to cure its weaknesses and empower PPP projects, they have not done so yet.[133] Although the regulatory bodies are present, they are not successfully enforcing the key aims of the ICRCA or PPA. Without enforcement, the likelihood of increased investment appears low.[134]

2. South Africa

South Africa's PPPs are regulated by the Treasury Regulations, the PPP Manual, and the suggested content of the PPP contract (the "Standardized PPP Provisions").[135] South Africa is also notable for its Broad-Based Black Economic Empowerment Act (the "B-BBEE") and the Preferential Procurement Policy Framework Act 5 of 2000 (the PPPFA).[136] These acts are the primary sources for PPP enforcement, transparency, and fairness. South Africa's regulatory and legal environment is generally of high standard, but challenges remain.[137]

While some experts attribute the impressive design of PPP contracts to the South African legal community,[138] some PPP players find such legal

133 "Nigeria's legal framework does not sufficiently allocate responsibilities across institutions in ways that could lower transaction and operational costs, nor does it maintain checks and balances for scale and renegotiation risks, or provide strong incentives for enforcing high quality standards." *Id.*

134 *See id.* (noting that banking insitutions claim PPP projects in Nigeria do not provide "a clear path to profitability").

135 *See generally infra* Section III A.2.

136 The key objective of the B-BBEE was to

> promote the achievement of the constitutional right to equality, increase broad-based and effective participation of black people in the economy and promote a higher growth rate, increased employment and more equitable income distribution and establish a national policy on broad-based black economic empowerment so as to promote the economic unity of the nation, protect the common market, and promote equal opportunity and equal access to government services.

Broad-Based Black Economic Empowerment Act (2003) Cap. (53) (Nigeria).

Encompassing the B-BBEE, the Preferential Procurement Policy Framework Act 5 of 2000 and the Preferential Procurement Regulations of 2001 establish the obligation of government to award preferential procurement points to enterprises owned by historically disadvantaged persons, including females. *Preferential Procurement Policy Framework Act 5 No. 5 of 2000*, WORLD BANK GRP. PUB.-PRIVATE-P'SHIP LEGAL RES. CTR., https://ppp.worldbank.org/public-private-partnership/library/preferential-procurement-policy-framework-act-5-no-5-2000.

137 "At the regulatory level, subnational legislation is more complex than at the national level, and risk is generally greater for local projects. Some private-sector players consider local content requirements to be too demanding, and there are cumbersome administrative processes." *See* ECONOMIST INTELLIGENCE UNIT, *supra* note 7, at 38.

138 *See generally* Nathanael Bruchez, Public Private Partnerships (PPPs) in South Africa: To What Extent Are PPPs Suitable for the Long-term Development of Infrastructure in South Africa? (Apr. 22, 2014) (unpublished Masters thesis, University of Bern),

implementation lacking.[139] Private sector actors,[140] implementing agencies,[141] and government agencies each have separate grievances for the deficiencies of the legal framework.[142] However, a common complaint among stakeholders has been the inconsistent leadership, enforcement, and commitment to PPPs horizontally, vertically, and inter-temporally.[143] Inconsistencies also exist among investors on whether South Africa's robust "dispute resolution mechanisms, detailed quality indications, and clearly designated responsibilities" are either enticing or too strict.[144]

A centralized PPP oversight framework, like South Africa's PPP structure, brings advantages such as "better coordination, increased efficiency and a clustering of relevant skills in a single place."[145] Located at the highest levels of government, there is clear buy-in from key decision makers.[146] However, the centralized PPP framework also has major concerns and bottlenecks. For example, centralized PPP frameworks suffers from a lack of transparency and the association of projects with individual national leaders.[147] Some investors also believe the procurement process disproportionately favors government due to an asymmetry of information, whereby awards are based on information unavailable to

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http://www.rechtswissenschaft.unibe.ch/unibe/portal/fak_rechtwis/content/e6024/e6025/e118744/e144658/e271902/files271934/BruchezNathanael_Masterarbeut_ger.pdf.

139 The National Treasury possesses a strong legal framework; however, there was a lack of leadership on "why and under which circumstances PPPs should be used to achieve policy goals." *See* SPAID, *supra* note 105, at 3.

140 Private sector experts found that at the provincial and national level, the legal rules to be better suited for high value transactions in more developed PPP markets. *Id.* at 10. These rules are also inefficient at the municipal level. *Id.* In addition, private actors found the PPP Unit micromanages transactions. *Id.*

141 Implementing agencies "refer to national line departments, provincial government agencies, and municipalities"; these agencies have found the treasury rules for procuring PPPs too onerous or confusing. *Id.*

142 Government agency actors responsible for PPP policy found legal rules for smaller value projects needed to be streamlined. *Id.*

143 During the interviews held by the Castalia Consortium, many interviewees noted political inconsistencies. *Id.* at 3. Horizontally, policy direction on PPPs differed between line departments, provinces, and municipalities. *Id.* For example, some national departments supported the use of PPPs, while others were not as supportive. *Id.* In addition, policy and committed weaknesses existed which caused troubles when filtered down to government managers in charge of managing PPP transactions. *Id.* Lastly, commitment to PPPs is difficult due to the changes in political leadership. *Id.* at 4. The life of a PPP can be up to twenty years, and thus is exposed to the harms to the development of the policy environment for PPPs. *Id.*

144 *See* Bruchez, *supra* note 138, at 40.

145 *See* ECONOMIST INTELLIGENCE UNIT, *supra* note 7, at 11.

146 *Id.*

147 When these projects are associated with singular people instead of the broader institutional system, there can be a lack of involvement across key governmental departments who are necessary in the later stages of the PPP cycle. *Id.*

investors and judged under unpublished standards.[148] Along with concerns of information asymmetry, there are also long-term planning concerns that PPPs are solely a vehicle for securing large amounts of funding rather than the actual project.[149] Lastly, changes in political leadership continue to cause concern for investors who fear new leaders will not honor projects approved by previous parties.[150] Without measures in place to ease the concerns of investors, it will be difficult to continue to receive investment for such long term projects.

C. Social & Cultural Frameworks

1. Nigeria

In order for PPPs to be successful and long lasting, stakeholder management must be seriously considered.[151] Diverse stakeholders require tailored communication in order for their needs to be met.[152] Although revenue risk can be transferred to the end-user,[153] stakeholder buy-in and quality work is necessary to ensure a willingness to pay.[154] Articulating the

148 *Id.*

149 A critique of South Africa's PPPs is whether or not they actually transfer risk or improve long-term planning. *Id.* at 12. Rather, some individuals see PPPs solely as a vehicle for financing rather than a service delivery. *Id.*

150 "Commitment to PPPs suffers from the fact that policy on PPPs changes with changes in political leadership. Many interviewees also noted that frequent leadership changes within the PPP Unit had to some extent harmed the development of the policy environment for PPPs in South Africa." *Id.* at 4.

151 Stakeholders are those organizations and communities most affected by the project development. R. Osei-Kyei & A.P.C. Chan, *Developing Transport Infrastructure in Sub-Saharan Africa Through Public-Private Partnerships: Policy Practice and Implications,* 36 TRANSPORT REVS. 170, 180 (2016). This includes banks, investment funds, non-governmental organizations, labor unions, government and multilateral funders, community and party leaders, public service users, regulatory agencies, society in general, and the press. *Who Are The Stakeholders?* APMG INT'L, https://ppp-certification.com/ppp-certification-guide/121-who-are-stakeholders (last visited Jan. 15, 2018).

152 As there are many bodies to be considered, they must all be communicated with differently based on their needs. *See generally* R. Osei-Kyei & A.P.C. Chan, *supra* note 151, at 180.

153 "The underlying principle in Nigerian PPP transactions is that risks are allocated to the party best able to manage them. Revenue risks may be transferred to the private party when the costs of the service are being transferred to the end-users." *See* Ollor, Etomi & Oyedeji, *supra* note 86.

154 "The toll tariff gives the user a direct cost and the user can then make a decision on whether he will benefit sufficiently from 'buying' the road or if using an alternative would be more favourable." Collins Mudenda, *Road Tollıng in Zambia: A Literature Review*, 32 INT'L J. SCI.: BASIC & APPLIED RES. 105, 110-11 (2017); "This has the benefit of acting as an incentive for the private party to increase the quality of the service," because if the quality of service is poor, the end-user will not be willing to pay for the service. *See* Ollor, Etomi & Oyedeji, *supra* note 86.

shared interests of the country, private parties, and end-users is important in maintaining a level of trust.[155] Without their buy-in and shared investment in the project, many problems may arise.[156] Nigeria has faced several protests, strikes, and blatant refusal to pay PPP-related taxes and tolls.[157] This has come at the expense of all parties in the PPP process, because tariffs are necessary for the upkeep of the roads as well as the financial obligations to lenders.[158]

In order to fulfill long-term, high-value projects, the horizontal division[159] and vertical power relationships of a nation must be

155 Some citizens and stakeholders, especially end-users, oppose PPPs because of their fear the PPP method may be a conduit for official corruption. *See* Martin Oloruntobi Dada & Olukayode Sunday Oyediran, *The State of Public Private Partnership in Nigeria*, *in* PUBLIC PRIVATE PARTNERSHIPS: A GLOBAL REVIEW 248, 253 (Akintola Akintoye, Matthias Beck, & Mohan Kumaraswamy eds., 2016).

156 "Oppositions arise when end-users feel that they have not been adequately consulted or catered for in PPP projects such as highways that require tolling when alternative routes have not been provided.*"* *Id.* During the Economist's Future Cities conference in Lagos, Mariam Yunusa, Project Leader for the UN World Urban Forum, stated "PPP needs to be changed to public-private people partnership (PPPP)." *The Role of Public-Private Partnerships in Africa*, VENTURES AFRICA (Oct. 26, 2013), http://venturesafrica.com/role-public-private-partnerships-building-industries-thrive/. "There is a third 'P' that should be added to that so it will succeed, because when the government and the private sector agree, [in conjunction with] social capital, that makes these kinds of agreements work." *Id.*

157 The Lekki-Epe Express Toll Road is the first private toll project in Africa outside of South Africa. African Development Bank, *Lekki Toll Road Project - A Gateway to Nigeria's Economic Transformation*, ALLAFRICA (Apr. 30, 2013), https://allafrica.com/stories/201305021086.html. However, the Lekki-Epe Expressway has faced many challenges. For example, in December 2011, several protests, counter protests, traffic gridlock, and disorder took place once drivers were charged a toll fee. Jude Njoku, Olasukanmi Akoni & Bose Adelaja, *Lekki: Protests, Traffic Crisis as Tolling Begins*, VANGUARD (Dec. 19, 2011), https://www.vanguardngr.com/2011/12/toll-crisis-traffic-snarl-as-tolling-begins; Uwem Essia & Abubakar Yusuf, *Public-Private-Partnership and Sustainable Development of Infrastructures in Nigeria*, 3 ADVANCES MGMT. & APPLIED ECON. 113, 118 (2013). In November 2017, the announcement of an increase in toll gate fees led to social media backlash and online petitions to protest the planned bill. Wale Odunsi, *Lagos Government Halts Lekki Toll Hike as Residents Blast Ambode, LCC*, DAILY POST (Nov. 4, 2017), http://dailypost.ng/2017/11/04/lagos-govt-halts-lekki-toll-hike-residents-blast-ambode-lcc. Due to the great uproar following the increased fees, the Lagos State Government suspended the proposed tariff hike. *Id.* Most recently, in January 2018, unusually slow traffic at the toll gates was attributed to motorists claiming they were unaware of the new tariffs and unprepared to pay more. Bennett Oghifo, *Nigeria: New Toll Tariffs Take Effect at Lekki and Ikoyi Plazas*, THIS DAY (FEB. 2, 2018), allafrica.com/stories/201802020675.html.

158 The Lekki-Epe Expressway began tolling in December 2011 and "had remained the same despite the increase in the cost" of operations. *Id.* Without increasing their tariffs, especially with the influx of foreign exchange rates, road maintenance and loan obligations to both local and foreign lenders would not be met. *Id.*

159 "Horizontal division, such as that which is apparent in all oil-dependent countries between the charmed elites and the masses of poor," are more divided and perform worse than homogenous ones because of disputes over the "division of the spoils." Nicholas Shaxson, *Oil, Corruption, and the Resource Curse*, 83 INT'L AFF. 1123, 1128 (2007). In contrast, "societies unified by a common culture and strong middle class create a consensus for growth[,]" which includes the poor. *Id.*

considered.[160] Nigeria is a multi-ethnic country whose history of ethnic clashes has led to political, ethnic and militant groups.[161] Considering the social and ethnic relationships between the stakeholders is a necessary component to ensure the success of PPP implementation. Without buy-in from such stakeholders, it will be difficult to gain a return on this enormous investment.

2. South Africa

Culture, communication, and trust are all elements necessary for successful PPPs. Although the social and cultural makeup of Nigeria and South Africa are different, acts like the B-BBEE and PPPFA recognize marginalized citizens in a way that Nigerian law does not.[162] South Africa's local content requirement is an investment in its people which fosters social, economic, and political trust.[163] Such local content requirements not only mandate certain percentages of marginalized citizens to be included in projects, but also create the establishment and demand for services and goods in various markets.[164] With these markets

160 Vertical relationships address the relationship between citizens and the state. "To get ahead individuals look upwards to get access . . . and compete against, rather than collaborate with fellow citizens." *Id.* at 1129.

161 Such groups include the Movement for the Emancipation of Niger Delta, Movement for the Actualisation of Sovereign State of Biafra, Odua People's Congress, Boko Haram, Arewa Peoples' Front, Egbesu, Movement for the Survival of the Ogoni People, Ijaw Youth Congress, Niger Delta Peoples' Volunteer Force, Niger Delta Vigilante Group. Ben E. Odigbo, Raphael Valentine Okonkwo & Joy Eleje, *Conflicts Management for Public Private Partnership and Economic Development in Nigeria through Social Marketing Tools*, 2 INT. J. ECON. COM. & MGMT. 1, 6 (2014).

162 Although apartheid did not exist in Nigeria, there have been cultural divides between ethnic groups. Christopher McCrudden, *Social Policy Choices and the International and National Law of Government Procurement: South Africa as a Case Study*, 2009 ACTA JURIDICA 123, 133-40 (2009). South Africa's efforts to include black people and women to gain access, wealth, and equality has been beneficial to the overall South African economy. *Id*. Senator Iyiola Omisore stated "it is important that we do not gloss over the political and cultural issues that often constitute major disincentives to public procurement, via PPP arrangement." Odinaka Anudu, *Public-Private Partnership: Panacea to Nigeria's Infrastructure Decay*, BUS. DAY (Dec. 8, 2016), https://businessday.ng/opinion/article/public-private-partnership-panacea-to-nigerias-infrastructure-decay/.

163 Local content requirements mandate that a certain value of purchased goods and services must be sourced locally. Christopher Ettmayr & Hendrik Lloyd, *Local Content Requirements and the Impact on the South African Renewable Energy Sector: A Survey-Based Analysis*, 20 S. AFR. J. ECON. & MGMT. SCI. 1 (2017). "The argument for this tool is that spending is localized and manufacturing, as well as job creation, can be stimulated because industry will need to establish in the host economy." *Id.*

164 Market strength and potential growth must first be tested. South Africa's commitment to a renewable energy program has established a market for independent power producers and manufacturers. *Id.* at 3. With the establishment of this market as well as present demand, there is

comes the need for skilled workers; however, there appears to be a deficiency in local workers with the required skills.[165] The number of skilled workers that can do such projects is low, and those who can may not be skilled enough to participate in the projects effectively.[166] The result is a tension between the rigidness of local content requirements in order to build revenue within South Africa and the need to source foreign labor to ensure that fulfillment of such projects is completed effectively and efficiently.[167]

In addition, communication to all stakeholders must exist to avoid disruption. As in Nigeria, South Africa's PPP-related price changes have led to protests and refusal to pay tolls on PPP-financed projects.[168] In 2012, tens of thousands of protestors marched in protest of the electronic tolls on the new Gauteng PPP-financed highway.[169] Labor groups argue paying tolls as well as high taxes to get to work is unfair and will negatively impact the poor.[170] Government officials claim the impact to the poor is exaggerated,[171] but in considering issues like diverted traffic,[172] the government's apparent lack of substantiation for its claims is troubling. In addition, South Africa's government was criticized for its lack of public communication prior to approving the Gautrain Rapid Rail Link.[173] Without the inclusion of stakeholders like the end-users, unilateral

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potential for expansion. *Id.* "Because a strong supplier support was listed as a key driver, the existence of local manufacturers and suppliers of renewable energy technologies, components and ancillary items would be conducive to investment attraction." *Id.*

165 There have been ongoing tensions due to the influx of foreign labor. *Id.* However, the necessary skills are not present in the host countries. *Id.* at 8-9.

166 "South Africa possesses some technical skills to support investment in the renewable energy sector, but not at a level sufficient to support it effectively . . . . [R]eadily available skilled persons . . . [are] difficult to obtain, and although there is capability . . . , the number of persons able to offer their services to the market is limited." *Id.*

167 *Id.* at 7.

168 *See* ECONOMIST INTELLIGENCE UNIT, *supra* note 7, at 38. *South Africans March in Mass Protest at Toll Roads*, BBC (Mar. 7, 2012), www.bbc.com/news/world-africa-17283803.

169 "It was one of the biggest marches in recent years, and looked like the mass demonstrations against the apartheid system during the 1980s and 1990s, says the BBC's Milton Nkosi in Johannesburg." BBC, *supra* note 167.

170 *Id.*

171 *Id.*

172 "When tolls were implemented on the N1 between Pretoria and Bela-Bela in South Africa, a traffic diversion of 30-40% to the non-tolled alternative was experienced. This traffic diversion can have serious impacts on regular users of the alternative route." Mudenda, *supra* note 154, at 110.

173 "There is no mention of public consultation. The Gautrain Rapid Rail Link project has been criticized for lack of significant public consultations and legislative debates before it was approved and put to tender." Madeleine C. Fombad, *Accountability Challenges in Public-Private Partnerships from a South African Perspective*, 7 Afr. J. Bus. Ethics 11, 15 (2013).

decisions continue to diminish the accountability and integrity of South Africa's PPP regimes.[174]

Further, stakeholder mistrust of private sector involvement in infrastructure and PPPs id prevalent.[175] The PPP tendering process remains opaque, with many questioning whether the process's anticorruption systems are simply another form of corruption.[176] This mistrust has thrived in an environment where government officials, banking officials, private agencies, and other relevant parties have repeatedly been caught abusing the process.[177]

III. PROPOSED SOLUTION

Nigeria and South Africa both face very similar challenges regarding regulatory and legal enforcement, corruption, and cultural and social concerns. However, it appears that South Africa's centralized PPP

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174 "The non-disclosure of PPP contracts to the public raises issues of accountability, and could compromise perceptions of the government's integrity." *Id.*

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> Many individuals in the highest levels of leadership in national line departments, provinces, and municipalities mistrust private sector involvement in infrastructure. Powerful political constituencies also harbor strong suspicions of PPPs. Political leaders and their constituents dislike PPPs because of:
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> - Mistrust of private sector intentions, or more specifically, a belief that the private sector will try to take profit while shirking its responsibilities to provide infrastructure or infrastructure services. This belief often goes hand-in-hand with the belief that the public sector will always lose out when negotiating commercial contracts with the private sector because the private sector can bring more resources to bear in the negotiations
> - Fear of losing control of infrastructure assets, authority, or responsibilities. Political leaders may dislike private sector involvement in infrastructure because of a fear that they will have to cede responsibilities, authority, or control of infrastructure assets. Many constituencies dislike PPPs for similar reasons, namely, that the private sector will destroy, rather than create jobs
> - The detailed planning and outside scrutiny that PPPs require. PPPs require more work than traditional government procurement and subject government procurement to extensive scrutiny (and potential criticism) from the PPP Unit, the public, and other government agencies. Political leaders or other government officials may prefer to avoid such scrutiny because they view it as interference or micro-management.

See SPAID, *supra* note 105, at 8-9.

176 "As in most other African countries, in South Africa, the tendering process is still perceived to be riddled with corrupt practices in what has become known as *tenderpreneurship*." *See* Fombad, *supra* note 173, at 15.

177 In 2003, the former South African Minister of Transport resigned as a director of First Rand Bank, after allegedly accepting gifts and payments of more than R500,000 from a former fundraiser of a political party whose company was part of the winning N3 toll road consortium. *Id.* at 16.

framework, regulated local content requirements, and strong legal system have allowed it to be more successful in this regard than Nigeria. In order for Nigeria's PPP regime to progress, a centralized-local hybrid PPP unit should be implemented. In addition, thorough communication between cultural, ethnic, and regional communities is essential to make everyone feel that they have a voice in the conversation. Lastly, there is a need for program persistence on the national, regional, and continental level. In order for not only Nigeria but all African countries to become regionally independent, consistent development, analysis, and implementation of PPP and development programs are critical.

A. Hybrid PPP Unit

A hybrid PPP unit would consist of a central governmental body in charge of authorizing PPP projects with state and local government implementation. Because many state PPPs are government financed,[178] a hybrid unit would streamline the PPP process. States would make their case for procurement of PPPs and the ICRC would approve and award PPP contracts. Skilled experts would be sourced in a central location which would quicken advancement of projects and operational processing times.[179] Without such a national infrastructure scheme, development in Nigeria will remain decrepit, with some states completely lacking PPP regimes or the private financing to independently develop.[180]

Nigeria has an extensive but chaotic set of regulations, however, so understanding how all elements fit together and are to be properly implemented is nearly impossible.[181] A hybrid unit requires the primacy of federal ICRC regulations. However, legislative preemption would only be effective with concrete dispute resolution frameworks, legitimacy of judicial enforcement, and a skilled workforce to manage and enforce the streamlined PPP process.[182] Therefore, the ICRCA must be amended to consider these factors along with a mechanism to reconcile the ICRCA

178 *See* ModuKumshe et al., *supra* note 89, at 91.

179 Central units carry out a range of functions and coordinate across government actors. Nigeria has struggled with delayed government payments for contractors. Such an issue is a deterrent for future investors as well as banks lenders. *See* ECONOMIST INTELLIGENCE UNIT, *supra* note 7, at 10-11.

180 As Omisore stated, many states still use private contracts for projects. The issue with such projects is the use of government funding, causing a lack of investable funds. However, with a large deficit in the funding needed to build sustainable, necessary infrastructure, Nigeria will need more than government funding in order to foster growth and development. *See* Ekeghe, *supra* note 94.

181 *See generally supra* Section B.

182 "Ghana, for example, has strong rules concerning project preparation, but there is a shortage of skills for managing such processes." ECONOMIST INTELLIGENCE UNIT, *supra* note 7, at 10.

with other PPP related legislation. For example, the ICRC should also encompass sector-specific agencies and regulations in order to promote transparency and continuity.[183] Having all of these bodies under one umbrella would provide oversight and accountability that could deter corrupt behavior.[184]

With the most skilled experts working at the central hub of the PPP unit, the issue of capacity and skill shortages in many states within Nigeria would still remain.[185] However, starting with a central unit would allow Nigeria to see where such gaps exist and how to address them. Although the process of reform is laborious, Nigeria will need to invest in Nigerians through education and professional training programs and incentivize skilled Nigerians to remain in or return to Nigeria.

B. Social and Cultural Considerations

The end-user is often overlooked. Although individual citizens outside of the PPP process are likely pay the taxes that fund the framework of PPP, many feel left out of the conversation.[186] Not only are ordinary citizens ignored, but they are also subject to projects thrust upon them by leaders they do not trust. With users convinced the PPP model is just another road to official corruption, they will continue to strike, protest, and fight against PPPs. The greatest consequence is that investors and lenders may be deterred from providing much-needed capital for PPP infrastructure projects.

To deal with the sense of distrust among ordinary citizens, Nigeria must implement policies similar to the B-BBEE and PPPFA. Recognition of and collaboration with marginalized populations can have similar affects in Nigeria, where tribal/ethnic, religious, and socioeconomic divides continue to hinder progress.[187] Such policies have the ability to create markets, stimulate demand, and provide training for citizens who might otherwise be displaced by foreign labor.[188]

If Nigerian governments seek to utilize a PPP model where the costs are funneled to the end-user, there must be a sense of buy-in. Community

183 "In Nigeria . . . the road sector has more developed laws and practices than rail." *Id.* at 16.

184 *See* Williams-Elegbe, *supra* note 125, at 361.

185 *See* Ettmayr & Lloyd, *supra* note 163, at 1.

186 *See generally* Eric J. Boyer & David M. Van Slyke, *Citizen Attitudes Towards Public-Private Partnerships*, 49 AM. REV. PUB. ADMIN. 259 (2019).

187 Meg Handley, *The Violence in Nigeria: What's Behind the Conflict?*, TIME (Mar. 10, 2010), content.time.com/time/world/article/0,8599,1971010,00.html.

188 *See* Ettmayr & Lloyd, *supra* note 163, at 1.

leaders, business owners, labor unions, and other stakeholders should play a role in the deciding what projects should be approved through administrative process.[189] The perceived and actual needs of these end-users must align in order to avoid tensions and promote cooperation. This can only occur if they are being consulted extensively. Hikes in toll prices and taxes will be met with contention if they feel ignored, especially in an environment where corruption is such an issue.

C. *Program Persistence*

In order for PPPs to be taken more seriously and respected in Nigeria, persistence in the programs implemented is paramount. For example, it is unclear whether the African PPP Network is still in effect. In addition, PIDA drafted the harmonization framework and ACEIR.[190] ACEIR especially sounded promising because of its ability to bring experts and scholars all over Africa to disperse information on best practices.[191] However, there has been no follow up on the progress of these programs. It is necessary to prioritize PPPs both domestically and regionally. As many African countries are devoted to economic growth and independence, this will likely only be possible by working together to grow collectively.

CONCLUSION

Although Nigeria remains one of the wealthiest and most powerful countries in Africa, its people are suffering from bad roads, inconsistent energy supply, poor water quality, and an overall low quality of life. South Africa is far from perfect, but it has demonstrated a more consistent history of successful PPP projects over the years. Many factors contribute to this success, such as a strong legal community, a centralized PPP unit, and local content requirements. In order for Nigeria to progress, it will need to amend the ICRCA, increase the involvement of ordinary citizens, and implement lasting policies and programs to improve its PPP regime. Without these investments, investors will have no incentive to continue financing these projects. In addition, as surveys have shown, many people

189 "Integrated stakeholder meetings should be held from time to time at both national, states, local governments and community levels to sieve the feelings and opinions of the populace. These harvests of opinions will then be factored by policy makers into their social and security plans for the nation." Odigbo, Okonkwo & Eleje, *supra* note 161, at 12.

190 *See Programme for Infrastructure Development in Africa (PIDA)*, *supra* note 28.

191 *See supra* note 67.

believe that corruption will not decrease, but rather that officials will find other ways to continue taking advantage of the political and economic system while lining their own pockets. With protests as recent as January 2018, it is clear the interests of the government are not aligned with end-users. Without gaining their trust, end-users will not be willing to pay for the costs of the PPP projects. Thus, it is necessary for Nigeria to take its regulatory, legal, and social regimes seriously in order to progress in the PPP space.

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