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"Law as a Catalyst for Stimulating Investor Sentiments among Low to Middle-Income Individuals in the Development of Infrastructure in Nigeria"

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Abstract

As countries across the globe are confronted with the cost intensive nature of building, upgrading and maintaining public infrastructure, they turn to non-traditional approaches to funding infrastructural development, in an environment of budget deficits and other constraints. Competing demands for state funds make it imperative for the state to seek alternative sources of financing for public projects. One way of addressing this need is through project partnerships between the public sector and the private sector.

The infrastructure gap in many African countries is much wider than what the government infrastructure budget can address. In the case of Nigeria, the government has accepted that private funding and involvement in the development of public infrastructure is essential for the economy to thrive. Consequently, the country announced a public-private partnership policy in 2005. However, policy no matter how well researched and drafted requires the force of law if it is to be implemented effectively. Thus, the Nigerian legislature passed the Infrastructure Concession and Regulatory Commission Act 2005 to provide a frame work for the participation of private entities in the funding of infrastructure in the country.

This paper examines the role the law has played thus far in structuring a partnership between the public sector and the private sector in the delivery of public infrastructure. The paper notes that as is, the law promotes the participation of both foreign and local investors in infrastructure procurement in the country. In practice however, only high net worth individuals and institutions are involved in funding PPPs.

The argument of the paper is that mutual funds, by way of unit trust schemes, should be encouraged by law to pool funds in smaller thresholds from low to middle income earners in infrastructure funds. This would in turn give smaller investors ownership opportunity in those assets. The market in Nigeria is quite large and schemes that target the lower end of the market would achieve two objectives: firstly, greater acceptance of the policy and secondly, the benefit of returns on investment.

1. Introduction

Due to budget constraints and other competing demands for state resources, governments around the world find it challenging coping with the need to provide for adequate and reliable public infrastructure. To this end, several governments have adopted the private infrastructure financing model of procurement known as public-private partnerships (PPPs) to complement traditional public procurement methods.[1] However, because of the high cost associated with the procurement of infrastructure, private finance instruments have been skewed in favour of ultra-high net worth individuals and institutions using high entry thresholds set for such instruments by infrastructure fund managers.

This paper examines the role of law in structuring a model for private financing of infrastructure projects in Nigeria and argues in support of making such funding opportunities available to low to middle-income members of the society.

2. Law and the Quest for Economic Development

In every society whether primitive or civilised, there must be a body of rules which members of that society must regard as standard of behaviour without which there may be anarchy. This body of rules called law is geared towards the social arrangement of human existence.[2] Significantly, the law can be used as tool for administration, control, crime prevention, rehabilitation and justice as well as for the collection of revenue and taxes, all of which are outcomes of the process of development.[3] More so, the lack of sufficient protection of property rights in any legal system is tantamount to under-utilisation of capital.[4] The result of this for example, is the inability by many citizens of Nigeria to obtain credit from financial institutions as their properties are not recognised as sufficient enough to stand as collaterals for loans due to a cumbersome process for obtaining certificates of occupancy that has not been simplified by the legal process.

Development economists and policy makers consider the law as a vital ingredient in implementing state policies. Thus, reforming the legal system itself and the strengthening of laws to ensure contract rights, transparency and good governance has become a focus for policy makers in recent years.[5] Arguing further, Kennedy states that economic theories are transmuted into objectives to be pursued by policy makers and translated in turn into legal instruments.[6] Thus, law is needed to translate economic theories of development into state policy.

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[1] Jeffrey Delmon, *Public-Private Partnership Projects in Infrastructure: An Essential Guide for Policy Makers* (Cambridge: Cambridge University Press, Cambridge, 2011) p2.

[2] O Soyeju, *Making a Case for A Development-Driven Approach to Law as a Linchpin for the Post 2015 Development Agenda*, (2015) Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad (18) 2 at p376.

[3] Theo Scheepers, *A Practical Guide to Law and Development: An Introduction to the Law Applicable to Development and the Development Process in South Africa* (JUTA Kenwyn 2000) p118.

[4] Charles R Irish, 'Removing Impediments to the Mobilisation of Local Resources,' in Y Matsuura, *The Role of Law in Development: Past, Present and Future* (Nagoya: Centre for Asian Legal Exchange, 2005) 52.

[5] David Kennedy, 'Law and Development Economics: Toward a New Alliance,' in David Kennedy and Joseph E Stiglitz (eds.) *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century* (Oxford: Oxford University Press, 2013) 20.

[6] *Ibid.* 23.

While the role of law as an instrument of economic growth has been established, the conscious use of the instrument of law to bring about economic development especially in Africa is long overdue.[7] Given this assertion, it is imperative to use the law as a tool to bring about economic development in the continent. It is submitted that the way to achieving this objective is to emphasise development-driven laws to facilitate economic growth and development. Law can be described as development-driven where it is deliberately targeted at achieving specific development goals in any given society.

For law to stimulate development, there must be a clear and conscious state policy to bring about development. This process commences with policy makers deliberately responding to the needs, problems or aspirations of the citizens of any given society. Having identified the needs of the people through consultations and interactions with the citizens, a general discussion document is developed and drafted.[8] Having done so, policy makers take the next step of transforming policy into law. Significantly, no matter how well as policy is and the law that enables it is couched, the desired development can only be felt if the law is implemented effectively.[9] It is submitted therefore, that policy makers, especially in developing economies must not only think about great ideas but must also consider ensuring that development laws are successfully implemented to bring about the achievement of targeted goals.

3. Relationship between Infrastructure and Economic Development

It is not out of place to start with a definition for the term 'infrastructure' or 'public infrastructure.' The definition provided by Yescombe will suffice for the purposes of this paper. He defines the term as follows:

> Public infrastructure can be defined as facilities which are necessary for the functioning of the economy and society. These are thus not an end in themselves, but a means of supporting a nation's economic and social activity, and include facilities which are ancillary to these functions, such as public-sector offices or accommodation. Broadly speaking, public infrastructure can be divided into:
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> - 'economic' infrastructure, such as transportation facilities and utility networks (for water, sewage, electricity, etc.) i.e. infrastructure considered essential for day-to-day economic activity; and

[7] Mashood A Baderin, *Law and Development in Africa: Towards a New Approach* (2010) NIALS Journal of Law and Development 4 available at < http://www.nials-nigeria.org/journals/Prof.%20Moshood%20Lecture.pdf> accessed 6 April 2017.
[8] Theo Scheepers, *op. cit.* 18.
[9] *Ibid.* 18.

- 'social' infrastructure such as schools, hospitals, libraries, prisons, etc., i.e. infrastructure considered as essential for the structure of society.[10]

It is trite to note that modern economies cannot function without infrastructure, which basically provides a variety of critical services that are significant in determining any country's production and consumption possibilities.[11] The importance of infrastructure in any given economy is therefore of vital interest to policy makers. In the words of Delmon:

> Investment in infrastructure is critical to economic growth, quality of life, poverty reduction, access to education and healthcare, and achieving many goals of a robust economy. But infrastructure is difficult for the public sector to get right.[12]

Delmon notes further that poor infrastructure can be the reason behind the lack of economic growth in a nation as well as a reason behind that nation's lack of international competiveness.[13] It is submitted therefore that for the public sector to get infrastructure right, there must be a deliberate intention not only to fashion good policies but also to use the policies and the law to ensure successful implementation specific targets geared towards attaining economic development.

Upon examining a wide range of evidence on the impacts of infrastructure on economic development, Kessides[14] draws the following conclusions:

i. Infrastructure contributes to economic growth, both through supply and demand channels by reducing the costs of production, contributing to the diversification of the economy by providing access to the application of modern technology, raising the economic returns to labour;

ii. Infrastructure contributes to raising the quality of life by creating amenities, providing consumption goods (transport and communication services) and contributing to macroeconomic stability; and

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[10] E R Yescombe, *Publice-Private Partnerships: Principles of Policy and Finance* (Oxford: Butterworth-Heinemann, 1997) at 1.

[11] Marianne Fay and Michael Toman, 'Infrastructure and Sustainable Development,' (2010) being a Paper presented at the Korea-World Bank High Level Conference on Post-Crisis Growth and Development June 3-4, Busan, Korea.

[12] Jeffrey Delmon, *op. cit.* at i.

[13] *Ibid.* at 1.

[14] C. Kessides *The Contributions of Infrastructure to Economic Development: A Review of Experience and Policy Implications*, (1993) World Bank Discussion Papers No. 213. World Bank, Washington DC.

iii. Infrastructure does not create economic potential; only develop it where appropriate conditions (i.e. other inputs such as labour and private capital) exist.

With regards to Nigeria, the poor state of the country's infrastructure has negatively impacted on the country's economy resulting in higher production costs. Considering some specifics as far as infrastructure is concerned out of the estimated 197,000 km road network in the country only about 18 percent is paved.[15] The country's rail network consists of 4,3332 track km with only 30km of the track in the form of double track. More than 75 percent of the locomotive trains managed by the Nigerian Railway Corporation were not operational according to a report in 2009.[16] The country's performance with regards to water supply is abysmally poor. A major worry for the government of Nigeria is the poor state of power supply.

Given the country's objective of seeking to become one of the 20 largest economies in the world by the year 2020[17], the country needs to increase the volume of infrastructure projects that it is currently running through the PPPP model.[18]

The country as it is, will not be able to sustain the current population[19] and economic growth without enhancing its infrastructure. Following from this, it is estimated that the infrastructure spend for the country would grow from $23 billion in 2013 to about $77 billion in 2025.[20] It is expected that continuous investment in infrastructure in Nigeria will 'drive economic growth, provide jobs, and deliver vital services to the country and the majority of its citizens.'[21]

4. Law and the Role of Private Sector Participation in Infrastructure Development in Nigeria

To address its infrastructure challenges given budget deficits and other competing demands for state resources, the government of Nigeria passed the Infrastructure Concession and Regulatory Commission Act (ICRC Act) in 2005 to facilitate private sector participation in the provision of public infrastructure in the form of public-private partnerships (PPPs). In November 2008, the federal government of Nigeria developed a national public-private partnership policy to streamline the

[15] African Development Bank Group, *An Infrastructure Action Plan for Nigeria: Closing the Infrastructure Gap and Accelerating Economic Transformation* (Tunis, African Development Bank 2015) p17.
[16] *Ibid.* 18.
[17] See Nigeria's National Policy on Public Private Partnership, ICRC Abuja 2008.
[18] George Nwangwu, *The Legal Framework for Public-Private Partnerships (PPPs) in Nigeria: Untangling the Complex Web* (2012) European Procurement & Public Private Partnership Law p269.
[19] The World Bank's estimate for Nigeria's population as at 2015 is 180 million.
[20] Price Water House and Coopers Trends, Challenges and Outlook: Capital Projects and Infrastructure in East, South and west Africa (2014) PwC Report.
[21] Adekalu Balogun, 'Infrastructure Development in Nigeria: Better Late than Never,' available at <https://www.pwc.com/ng/en/assets/pdf/infrastructure-development-in-nigeria.pdf> accessed 3 June 2017.

procedure for PPP administration in the country. The purpose being to attract private investment in the development of infrastructure to enhance the country's economy. However, it does appear that there was no clear-cut policy for private investment in infrastructure before the passing of the ICRC Act in 2005 as it took three more years before the public authority drafted the National Policy on Public-Private Partnership which is akin to setting the horse before the cart.

Prior to the passing of the ICRC Act, some PPP transactions were consummated under the Public Enterprises Privatisation and Commercialisation Act 1999.[22] It has been suggested[23] that since the ICRC Act 200 does not in any way preclude further concessions arranged under the Public Enterprises Privatisation and Commercialisation Act 1999, the latter law should only apply in cases of brownfield projects while the ICRC Act 2005 should regulate all greenfield projects.[24]

The laws on PPP in Nigeria have impacted on the country's economy by facilitating the operation of partnerships between the public sector and the private sector in the provision of infrastructural facilities. The law promotes this by enabling the administration of PPP projects by the Infrastructure and Regulatory Commission (ICRC) which is a creation of the ICRC Act 2005. The laws outline and define the procedures, mechanisms and actions to be taken to achieve the country's vision of improving on the country's state of infrastructure and as a result impacting on the lifestyle of the citizens of the country.[25]

Furthermore, it is worthy of note that the laws define the role of the private sector, the public-sector partner, the regulating agency and the end-users of the facilities. All role players therefore, are acquainted with their responsibilities as defined by the law enabling the participation of the private sector in a role that was traditionally only played by the public sector. In addition, the existence of the law giving backing to PPP transactions assures the private sector of the commitment of the public sector to PPP deals.

5. Involving Low and Middle Income Earners in Infrastructure Financing in Nigeria

Given the supposed high cost involved in the procurement of infrastructure facilities, fund managers who administer Infrastructure Funds set high entry thresholds for investors who seek to take a position in any such investments. The reason being that infrastructure projects are long-term in nature

[22] For example, the concession of 26 seaports, the trade fair complex, Tafawa Balewa Square and some hydroelectric power plants were arranged under the Public Enterprises Privatisation and Commercialisation Act 1999. With the passing of the ICRC Act 2005, the latter law is the principal law regulating PPPs at the national level in the country.

[23] George Nwangwu, *op. cit.*

[24] Brownfield projects refer to facilities that have already been in existence but require rehabilitation while greenfield projects refer to projects that are not already existing but need to be built.

[25] Theo Scheepers, *op. cit.* 18

and funds invested must be by investors who would be patient enough to wait for several years before receiving returns on their investments and those who would suit this kind of investment are the high net worth investors and institutions[26].

The above notwithstanding, in a bid to explore other means of financing infrastructure given the fact that domestic commercial banks in the country are only able to offer short-term financing and the currency exchange risk that discourages foreign investors, it will suffice to consider pooling funds from the general population in specialised infrastructure funds that would augment the investments in private equity/high entry infrastructure funds.

Per World Bank data, Nigeria's population as at 2015 is 182 million.[27] The country is rated as 'lower-middle income.'[28] `What this means is that a greater percentage of Nigerians are within the lower and middle income range. If the population of the country is taken into consideration, there is a huge potential market for specialised infrastructure funds that can be tailored to cater to the investment needs of majority of the population.

While there is need to give teeth to the law to encourage infrastructure financing in the country, it is worthwhile to note that the country's Securities and Exchange Commission (SEC)[29] has made rules regulating investments in infrastructure funds under powers conferred by the Investment and Securities Act 2007 which provides as follows:

> The Commission may, from time to time, make rules and regulations for the purpose of giving effect to the provisions of this Act and may in particular and without prejudice to the generality of the foregoing provisions make rules and regulations……[30]

Under the SEC Rules for Infrastructure Funds, 'Infrastructure Fund' is defined to mean a specialised fund or scheme that invests primarily (minimum of 90% of scheme's assets) in the securities or securitised debt instrument of infrastructure companies; or infrastructure capital companies or infrastructure projects or special purpose vehicles which are created for the purpose of facilitating or promoting investment in infrastructure, and other permissible assets including revenue generating projects of infrastructure companies or projects or special purpose vehicles.[31] Notably, the SEC Rules are to apply to Infrastructure Fund constituted as collective investment schemes.[32]

Under Rule 4 of the SEC Rules on Infrastructure Funds, the conditions for the establishing of infrastructure Funds are set out. An Infrastructure Fund under the Rules may be open ended or close-ended and shall disclose the minimum number of units an investor can subscribe for. It is submitted

[26] For example, the Pension Fund Administrators in the country and other closed pension funds.
[27] The World Bank, 'Nigeria Profile' available at <http://data.worldbank.org/country/nigeria> accessed 3 June 2017.
[28] *Ibid.*
[29] The Commission is a creation of Section 1 of the Investment and Securities Act 2007
[30] Section 313(1) of the Investment and Securities Act 2007.
[31] Rule 1 SEC Rule on Infrastructure Funds.
[32] Rule 2(2) SEC Rule on Infrastructure Funds.

that whilst the SEC Rules on Infrastructure Funds has set in motion an opportunity for fund managers to set up specialised infrastructure funds, in practice however, the country's infrastructure funds like the Capital Hill Nigeria Infrastructure Debt Fund and the ARM Harrith Infrastructure Fund[33] are both structured to cater to the investment needs of ultra-high net worth investors.

It is the submission of this paper that fund managers should take the opportunity of the SEC Rules and establish low entry collective schemes to attract the low to medium income earners consisting of farmers, artisans, civil servants, teachers and traders who form the bulk of the population of the country. Nigeria's fund managers could borrow a leaf from the success and impact of Infrastructure collective investment schemes in India to establish similar funds in Nigeria. As at 2 June 2017 there at least 53 of such Infrastructure Mutual Funds listed in India.[34] For example, the Franklin Build India Fund whose objective is to generate capital appreciation by investing in companies engaged either directly or indirectly in infrastructure related activities including development, operations, management and maintenance of various infrastructure such as transportation, energy, resources and other infrastructure returned 25% annualised returns in the last five years, 36% annualised returns in the last three years and 40% returns in the last one year.[35] While the sorry state of infrastructure in the country may be a worry to the government, it is also an opportunity for private investors to investment in the development of infrastructure which is bound to boost the economy by way of returns on investments and job creation opportunities.

Following economic reforms that led to the Paris Club debt write-off in 2003, the passing into law of the Pension Reform Act 2004 that established the Pension Commission as well as provided for the setting up of privately managed pension fund administrators (PFAs)[36] and the banking sector reforms that necessitated the recapitalisation of the banks, there was increased activity in the Nigerian stock market with confidence ignited.[37] The stock market boom was short lived as the market crashed in 2008.[38] The global financial crisis that necessitated foreign investors divesting their investments as well as evidence of market manipulations are the factors that led to the crash of the Nigerian stock market.[39] Since then, investors in the country continue to seek alternative investment opportunities other than quoted equities as gains made in fixed income securities have not out performed inflation

[33] This Fund specialises and focuses on energy, transport and utilities projects in West Africa with the minimum entry amount of about N200 million for investors.
[34] See http://www.chapelhilldenham.com/index.php/nidf/ accessed 3 June 2017.
[35] KP Suresh, Top Five Infrastructure Mutual Funds to Invest in 2017-2018 (2017) available at < https://myinvestmentideas.com/2017/02/top-5-infrastructure-mutual-funds-to-invest-in-2017-2018/> accessed 3 June 2017.
[36] The Act put in place a contributory pension scheme that requires both employer and employee to contribute to a fund for the benefit of the employee.
[37] Nigeria's BB-Credit rating made it attractive for foreign investors as well as the basket of funds being managed by PFAs that were in search of investment instruments.
[38] E Chuke Nwude, *The Crash of the Nigerian Stock Market: What Went Wrong, The Consequences and the Panacea* (2012) Developing Country Studies Vol. 2 No. 9 p105.
[39] *Ibid.*

in recent years.[40] On this basis therefore, it is submitted that Infrastructure Mutual Funds can serve as alternative investment opportunities for low to middle income earners who are risk averse and have lost confidence in the stock market.

Public resistance to PPP projects is a challenge to such arrangements in Nigeria as this led to the failure of the first toll concession road in the country. There were wide-spread protests by human rights activists, residents along the Lekki-Epe corridor and road-users ultimately resulted in the buy-back of the Lekki-Epe Toll Road Concession by the Lagos State government.[41] It is not uncommon for the local community to be suspicious of any transaction that results in the transfer of a government facility to the private sector. It is submitted that where the ordinary man on the street has an opportunity to invest in infrastructure funds, it would create a sense of ownership among the citizens as they would see themselves as co-owners of such projects.

6. Conclusion and Recommendation

Given the Nigeria's poor state of infrastructure caused by poor maintenance of available infrastructure and limited funds, developing infrastructure in the country requires significant participation by the private sector in the form of PPP. It is doubtful whether the country will continue to attract foreign investments into infrastructure given the high foreign currency exchange risks as well as availability of foreign exchange for repatriation of capital and gains at the time of divestment. This situation calls for the creation of alternative opportunities to source funds for privately financed capital projects.

Arguably, while investments in PPPs are long term in nature and may attract only high net worth individuals and institutions who have enormous funds to consider such investments, it is worthwhile to provide similar opportunities to low to middle income earners who constitute the clear majority of the citizens of the country. The rationale is to give this category of persons not only a sense of ownership of PPP facilities but also to provide a means for generating additional income through alternative investment since there is widespread apathy against the quoted stocks on the stock exchange which has eroded investor confidence.

It is therefore recommended that the ICRC Act 2005 is amended to include that about 2 or more percent of the funding of all PPP projects in the country must be sourced via Infrastructure Mutual Funds. In addition, the Pension Reform Act as well as the Pencom Guidelines for investments in Infrastructure should stipulate a 0.5% asset under management investment in infrastructure mutual

[40] Equities and fixed income securities are considered as more traditional investment instruments. In recent years, investments in real estate and infrastructure are emerging as alternative investment opportunities.

[41] Chika Amadi, Patricia Carrillo and Martin Tuuli, *Stakeholder Management in Public Private Partnership Projects in Nigeria: Towards a Research Agenda* (2014) available at < http://www.arcom.ac.uk/-docs/proceedings/ar2014-0423-0432_Amadi_Carrillo_Tuuli.pdf> accessed 3 June 2017.

funds by all PFAs to grow the funds managed as Infrastructure Mutual Funds to make the management of such funds attractive to proven fund management companies with good track record in the country. Again, the SEC Rules on Infrastructure Funds must provide that Fund Managers who manage infrastructure funds must also establish ‘mirror’ Infrastructure Mutual Funds alongside their funds established for high net worth clients. Entry thresholds should be as low as N50,000 and should permit quarterly dividend pay-out. Finally, any such income returned on infrastructure mutual should be free from income tax to stimulate investor confidence.

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