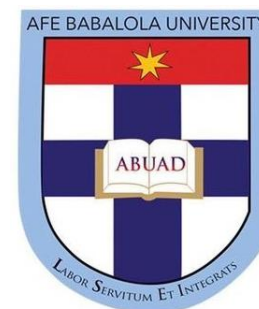




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PUBLIC PRIVATE PARTNERSHIPS AND INTERNATIONAL LAW: BUILDING THE BLOCKS FOR SUSTAINABLE INFRASTRUCTURE FINANCING

Jumoke Oduwole, MFR*

Being the text of the keynote lecture delivered at the 7th
Annual Conference of the International Law Association, held
in Abuja, Nigeria on Friday, 5th April, 2024.

1. INTRODUCTION

It is my pleasure to be here with the members of the International Law Association (Nigerian Branch) at its 7th Annual Conference and 10th Year Anniversary celebration to deliver the keynote address.

I would like to applaud the President of the ILA Nigerian Branch, Prof. Damilola Olawuyi, SAN, and the Executives of the Association for convening this conference; and especially thank the Vice President of ILA Nigeria Branch, and Chair of the Planning Committee - Ms Oludayo Olorunfemi, and the entire Conference Planning Committee for this kind invitation.

Over the years, Public-Private Partnerships (PPPs) have gained traction globally due to their potential to address infrastructure needs that exceed governmental budgets. They offer an avenue for leveraging private sector resources and capabilities to develop

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infrastructure that may not otherwise be feasible. By sharing risks and rewards, PPPs align the interests of both sectors toward successful project delivery.

The collaborative agreements between government entities and private sector companies to finance, construct, and manage public infrastructure projects are vital to delivering economic growth. These partnerships leverage the strengths of both sectors: the public sector's mandate for public service delivery and the private sector's efficiency and innovation. Research indicates that PPPs represent around 10 percent of developing countries' annual infrastructure investment and about 3 percent of global infrastructure spending. Many PPPs receive significant public financing, either directly or indirectly through guarantees. They are seen as mechanisms for enhancing service quality, increasing cost-effectiveness, and promoting innovation in infrastructure development. They have been utilised across a wide range of sectors, including transportation, energy, healthcare, and education, with varying degrees of success and challenges. PPPs can take various forms, each tailored to meet specific project needs and objectives. Some common types are: Build-Operate-Transfer (BOT), Build-Own- Operate (BOO), Design-Build (DB), or Buy-Build-Operate (BBO) PPPs.

Since the 1980s, PPPs have gained popularity globally and are used widely across the world. The World Bank's Private Participation in Infrastructure (PPI) database lists over 6,600 projects in low- and middle-income countries from 1990 to 2019, representing investments of over US\$1.5 trillion. In Europe, the European Investment Bank (EIB) lists over 1,800 projects totaling 370 billion euros across 28 countries since 1990. The US has fewer projects, with 30 in operation totaling US\$16.2 billion as of 2019. More recently, in 2022, the World Bank's

Private Participation in Infrastructure (PPI) database captures a total of US\$91.7 billion in private sector investment commitments as recorded across 263 projects, the equivalent to 0.25 percent of the gross domestic product (GDP) of all low- and middle-income countries.

In Latin America and the Caribbeans (LAC), with a total of US\$24.3 billion across 85 projects in 2022, LAC received the second largest investment commitment among all the regions in nominal terms. Representing 0.53 percent of regional GDP, making it the largest per-GDP PPI investment among the six regions.

In Africa, shortfalls in national budgets have seen African governments turn to public-private partnerships (PPPs) to bridge the financing gap. The African Development Bank (AfDB) states that Africa needs \$93 billion annually for infrastructure, which is approximately 15% of the continent's GDP with governments increasingly turning to PPPs to bridge the financing gap and deliver more efficient and cost-effective infrastructure.

In the last 10 years, the continent has welcomed partnerships in such infrastructure projects, with the construction of roads, bridges and dams being the most common. There are also partnerships in power generation, renewable energy, health, and telecommunications. Examples of PPPs at work in Africa include the Henri Konan Bridge in Côte d'Ivoire, the Lake Turkana Wind Power Project in Kenya, Senegal's Dakar-Diamniadio Road, power; water projects in Ghana, Nigeria and Rwanda, and the Tanger-Med port project in Morocco, among others.

PPPs are crucial for Africa's infrastructure development. Governments and the private sector should therefore collaborate to create effective PPPs.

2. WHY DO GOVERNMENTS NEED PPPs?

Governments around the world are increasingly turning to PPPs to address infrastructure gaps. The need for new infrastructure and the refurbishment of existing facilities often surpasses government budgets. PPPs offer a solution by attracting private sector investment and expertise, thereby sharing the risks and rewards of infrastructure projects.

a) To boost the Gross Domestic Product (GDP)

PPPs play a crucial role in boosting economic growth and GDP. By leveraging private sector resources and expertise, governments can undertake larger infrastructure projects that would otherwise be unattainable due to budget constraints. These projects stimulate economic activity, create jobs, and improve productivity, all of which contribute to GDP growth.

b) Infrastructure Financing

PPPs provide an alternative financing mechanism for infrastructure development. Instead of relying solely on government funding, PPPs allow private sector partners to invest in and manage infrastructure projects. This helps reduce the burden on government budgets and spreads the financial risk between public and private entities.

c) Sustainable Development

PPPs are vital for sustainable development. They enable governments to build modern, efficient, and sustainable infrastructure that supports economic growth and improves quality of life for citizens, also promoting innovation and technology transfer, which are essential for long-term

development goals. These also come with great benefits for both government and private sector such as;

- i. They provide better infrastructure solutions. This is particularly true in developing communities and countries. These partnerships help citizens not only get access to much-needed services but can also facilitate economic growth. Areas with better infrastructure attract more businesses, which creates more jobs.
- ii. They facilitate faster project completion. When it comes to construction, P3 tends to reduce project delays, and building cycles are faster. Private companies have more experience when it comes to managing projects and measuring performance because these tie directly to their profits.
- iii. They have greater Return on Investment (ROI). PPPs can generate better ROI in a couple of ways. Private-sector technology and innovation improve the operational efficiency of a project. There's also the possibility of incentives for delivering projects that are on time and within budget.

3. WHAT MAKES PPPs SUCCESSFUL?

3.1 Political Will

Political will is a critical factor in the success of public-private partnerships (PPPs) for infrastructure development. The concept of private sector involvement in managing or owning public services can be unfamiliar in many cultures. This is why securing support and buy-in for PPPs requires strong political leadership and commitment.

Political will is essential not only for initiating PPP projects but also for ensuring their success throughout their lifecycle. Governments demonstrate their commitment to the PPP model by providing a stable regulatory environment, transparent decision-making processes, and effective oversight mechanisms. This creates confidence among private sector partners and investors, encouraging them to participate in PPPs and contribute to their success.

3.2 Technical teams

Another key factor that leads to the success of PPPs is the presence of a strong technical team in government that understands the market, the potential pool of bidders, their requirements, their limitations, and ensures clarity and consistency in the process.

A strong technical team in government is perhaps even more important for contract management during the implementation phase. PPPs are a sophisticated business model that require very specific and strong financial, legal and technical skills to set the level of service, risk allocation/mitigation measures, project finance, legal provisions for contracts, contract monitoring based on outcomes, and the like. Government understands that firms investing large sums of money into a project will use the very best legal, financial and technical support to protect their interests. It is paramount that the skills on the government's side measure up to this, if only to avoid the risk of expensive renegotiations that would undermine the public benefits of the PPP.

3.3 The Sanctity of Contract

PPPs are built upon contractual agreements that delineate the responsibilities and obligations of each party involved. The sanctity of contracts is paramount for ensuring the smooth

sailing, functioning and success of PPP projects.

Upholding the sanctity of these contracts is crucial for maintaining trust and confidence between the parties. It ensures that both sides fulfil their commitments and obligations, thereby minimising risks and uncertainties associated with PPPs. Additionally, the sanctity of contract provides a mechanism for resolving disputes and enforcing compliance, essential for the long-term viability of PPP projects.

3.4 Rule of Law

The rule of law is a foundational principle that underpins the effective implementation and operation of PPPs. It ensures that all parties involved in a PPP are subject to the same set of laws and regulations, creating a level playing field for competition and investment. At its core, the rule of law ensures that all individuals and entities, including governments and private sector entities, are subject to and accountable under the law, by establishing clear procedures for contract enforcement, dispute resolution, and regulatory oversight, to reduce the likelihood of conflicts and ensure the stability and predictability of PPP projects.

4. LEGAL AND INSTITUTIONAL FRAMEWORK FOR PPPs

Today, we stand at a critical juncture in our quest for a transformative era in global infrastructure development, an era defined not just by the challenges we face but also by the innovative solutions we devise and sustainable development, particularly in the realm of infrastructure financing.

At the heart of this pursuit are PPPs, innovative mechanisms that blend the efficiency of the private sector with the public interest mandate of the government. These partnerships are not just contractual agreements but are the building blocks of our future infrastructure, paving the way for sustainable development across the globe. The foundation of their success does not lie solely in the hands of the financiers and engineers but also within the legal and institutional frameworks. The efficacy of PPPs is intricately tied to the legal and institutional frameworks underpinning them. These frameworks not only guide the formation and execution of PPPs but also ensure that these ventures align with broader developmental goals.

In the global landscape, characterized by varying legal systems and economic environments, creating a harmonious framework for PPPs presents a formidable challenge. Yet, it is a challenge we must address to harness the full potential of PPPs in sustainable infrastructure development and understand the pivotal role of legal structures in enabling or constraining the realization of PPPs' full potential. According to the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Privately Financed Infrastructure Projects, the existence "of an appropriate legal framework" is a prerequisite to creating an environment that fosters private investment in infrastructure and where it is in place, "it is important to ensure that the law is sufficiently flexible and responsive to keep pace with the developments in various infrastructure sectors" in the economy.

The frameworks for PPPs vary widely across countries, reflecting differences in legal traditions, economic development levels, infrastructure needs, and government priorities. However, there are common elements that tend to be present

in successful PPP frameworks globally - clear definitions of PPPs, a transparent and competitive procurement process, mechanisms for dispute resolution, and regulations on project financing and management.

4.1 Common elements of successful PPP frameworks

- a. **Legal Definition and Scope:** Establishing a clear legal definition of PPPs, encompassing the range of possible structures, and specifying the sectors or projects eligible for PPP implementation.
- b. **Regulatory and Institutional Framework:** Designating regulatory bodies or authorities responsible for PPP oversight, ensuring accountability, transparency, and adherence to best practices.
- c. **Procurement Process:** Articulating transparent, competitive, and equitable procurement procedures that uphold the principles of fairness, integrity, and value for money.
- d. **Contractual and Financial Frameworks:** Detailing the legal underpinnings for contract negotiation, risk allocation, financing arrangements, and project execution to ensure financial viability and sustainability.
- e. **Dispute Resolution Mechanisms:** Providing for the resolution of disputes through arbitration, mediation, or judicial proceedings, ensuring that conflicts are addressed efficiently and equitably. Thus, the international framework for PPPs is a patchwork of guidelines, principles, and best practices developed by entities such as the United Nations, the World Bank, and the International Monetary Fund. These international guidelines serve as a beacon, guiding countries in developing their legal frameworks and regulatory environments to support PPPs effectively.

However, the challenge lies in the harmonization of these frameworks. Countries differ in their legal traditions, economic conditions, and political contexts, making a one-size-fits-all approach impractical.

Yet, there are success factors identifiable across borders: transparent and competitive bidding processes, clear definitions of roles and responsibilities, and robust legal and institutional frameworks are among the key elements that contribute to successful PPP implementation.

Africa's embrace of PPPs is evident in its regional initiatives, such as the African Union's Programme for Infrastructure Development in Africa (PIDA), which aims to accelerate infrastructure development across the continent. The framework for PPPs in Africa is evolving, with countries at different stages of development and implementation.

4.2 African Case Studies

Case studies from across the continent reveal both successes and challenges. For example, the Gautrain Rapid Rail Link in South Africa demonstrates how PPPs can deliver high-quality infrastructure efficiently. However, challenges such as political instability, varying degrees of regulatory maturity, and limited local financial markets present hurdles to widespread PPP adoption.

4.2.1 Successful Example: The Henri Konan Bédié Bridge in Ivory Coast

The Henri Konan Bédié Bridge, a toll bridge in Abidjan, represents a notable success story in African PPPs. Completed in 2014, this project succeeded due to several factors, including a strong legal framework and government support - the Ivorian government provided clear legal and regulatory support for the

PPP, facilitating a conducive environment for private investment: effective risk management and extensive stakeholder engagement.

4.2.2. Challenging Example - The Maputo-Katembe Bridge in Mozambique

The Maputo-Katembe Bridge in Mozambique, despite being a remarkable engineering feat as Africa's longest suspension bridge, aimed to enhance connectivity between the capital, Maputo, and the district of Katembe, with the goal to stimulate economic growth and development in the southern region of Mozambique. However, it encountered significant hurdles after its completion in 2018. The project's challenges include cost overruns and debt concerns - the project's cost significantly exceeded initial estimates, contributing to Mozambique's external debt concerns; and low usage of the bridge - the toll fees set for crossing the bridge were considered high for many locals, leading to lower-than-anticipated usage. This reduced the expected revenue streams needed to make the project financially viable in the short term.

4.3 Nigeria's PPP Framework

In the case of Nigeria, the framework for PPPs has evolved to facilitate and regulate the participation of the private sector in the provision of public infrastructure and services.

Key legislation and guidelines governing PPPs in Nigeria include, The Infrastructure Concession Regulatory Commission (ICRC) Act, 2005; The Public Procurement Act, 2007; National Policy on Public-Private Partnerships, 2009; and Guidelines and Manuals at the Federal level.

The legal framework for PPPs existed only at the Federal level for a long time, with only a few states legislating on PPPs. At the Federal level in Nigeria, the framework for PPPs is anchored by the Infrastructure Concession Regulatory Commission (ICRC), established to regulate PPP activities, and ensure fair and transparent processes.

Notable PPP projects, such as the Lekki Toll Road and the Azura- Edo Independent Power Plant, showcase the potential of PPPs in delivering critical infrastructure. Yet, the journey has not been without its challenges. Legal ambiguities, bureaucratic delays, and difficulties in risk-sharing remain significant obstacles. “Take or Pay provision” risk. Nigeria's PPP framework aligns with international norms in its emphasis on transparent procurement, robust regulatory oversight, and clear legal provisions for contract management and dispute resolution. However, it is uniquely tailored to address its specific infrastructure deficits, economic context, and development aspirations.

The framework's evolution underscores a commitment to refining the legal structures that underpin PPP arrangements, thereby enhancing the attractiveness of Nigeria as a destination for PPP investments. This alignment with international best practices, coupled with the tailoring of regulations to meet local needs, presents a compelling model for PPP implementation in emerging economies.

While there are international principles and best practices for PPPs, each country adapts its framework to suit its unique context and objectives. In Nigeria, the PPP framework reflects the country's commitment to leveraging private sector expertise and financing for public infrastructure development, within a regulated and structured environment.

The analysis of PPP frameworks underscores the critical role of legal and regulatory structures in enabling and sustaining PPP initiatives. As countries continue to refine their PPP frameworks in response to evolving economic and developmental needs, the exchange of best practices and lessons learned becomes invaluable. Nigeria's experience, in particular, offers insights into the dynamic interplay between international norms and local imperatives in the cultivation of a legal environment conducive to PPP success.

4.3.1 Nigerian Case Study and Interesting Lessons Learned

Nigeria's quest to bridge its gaping infrastructure divide with PPPs has been a mixed bag of successes and challenges. Despite the challenges that have marked the journey, PPPs remain a path forward for Nigeria in closing its substantial infrastructure gap.

According to a recent KPMG report, bridging Nigeria's substantial infrastructure gap, estimated at 40% of GDP, requires a sustained annual expenditure of \$14.2 billion or 12% of its GDP over the next decade. Consequently, the Federal Government, drawing lessons from past experiences, is taking necessary steps to ensure an enabling environment that fosters trust among the private sector stakeholders in the PPP process and encourages participation.

For the government, the success of this alternative funding approach, anchored in the private sector's participation, is not merely a matter of securing much-needed funds; it is also an opportunity to harness the technical and managerial expertise of private sector entities. To this end, understanding the attendant benefits, the government has ensured the existence of a clear and coordinated policy on PPPs in Nigeria.

Building on the passage of the ICRC Act in 2005, several National Policies on PPPs, among other sector-specific legislations, have been issued, and authorities that regulate different services in the PPP ecosystem have been established. The Government has thus demonstrated its commitment to ensuring the successful execution of PPPs in Nigeria. These policies also create an enabling environment for PPP, boosting the confidence among potential private sector investors and eliminating potential political and market uncertainties. These steps have also been replicated at the sub-national level. Building on the existing framework, the Federal Government, through the ICRC, has taken significant steps to build knowledge capacity among key stakeholders in PPPs. This ensures that for future PPP projects, the Ministries, Departments, and Agencies (MDAs) and States can create well-structured and bankable PPP projects to attract private investment while safeguarding the public interest.

We have identified that for successful PPP projects, an understanding of how to design a PPP project that implements proper risk management is critical. There is a need to ensure that all risks associated with the project are properly identified, allocated, and mitigated at the start of the project, as doing so halfway through has been shown to be risky.

4.3.2 Azura-Edo Independent Power Plant

The Azura-Edo Independent Power Plant, a 450 MW gas-powered electricity generation project, stands out as a PPP success story in Nigeria for several reasons –

- a) Investor Confidence: The project successfully attracted significant foreign and local investment, showcasing investor confidence in Nigeria's PPP framework.
- b) Government Guarantees: The government provided partial

- risk guarantees to investors, mitigating financial risks and ensuring the project's viability.
- c) **Clear Contractual Agreements:** The project was underpinned by clear and enforceable contractual agreements between all parties, illustrating the importance of well-structured legal agreements in PPPs.

4.3.3 Other PPP examples in Nigeria

Other good examples in the energy sector include - North-South Power – a PPP with Niger State has helped ramp up electricity generation capacity in the country.

A clear example of the PPP implementation challenge is the Lekki Toll Road project, which was positioned to become the standard for future PPP projects across the country. Though a structurally good project, better stakeholder engagement was needed; better management of the FX risk. Investment was in USD but tolls were in Naira. LASG was forced to buy up the concession to avoid a price hike and this cost tax payers a lot of money.

Another example is the MMA 2 Airport, which delivered an airport, but has contractual issues and legal disputes with many lessons to be learnt. Why did three contract revisions occur even before construction? There was a “non-compete clause” saying Govt wouldn’t build another airport – thus, renovation of the MM1 wing led to a lot of legal issues. How do we avoid such situations in the future?

5. THE PEBEC'S ROLE IN FOSTERING PPPs ACROSS SUB-NATIONALS

Since October 2023, the PEBEC Secretariat has continued to implement its mandate as expressly directed by President Bola Ahmed Tinubu, and in tandem with the 8-Point Agenda of this Administration. This led to the inauguration of the third cohort of the Council on November 16, 2023, with a renewed mandate for its members, to urgently tackle regulatory and bureaucratic challenges being experienced by the private sector, as a means of encouraging more investment, productivity and competitiveness for exports.

Five workstreams are being prioritized by the FGN through PEBEC in 2024 to enable inclusive productivity by delivering Ease of Doing Business: Regulatory Reforms, including our ongoing 90- Day Regulatory Reform Accelerator; Legislative and Judicial Reforms – the establishment of small claims court in 28 states across the country; and our ongoing call till April 30, 2024 for input into our second Omnibus bill- Omnibus Bill 2.0; Subnational (State) Ease of Doing Business Reforms, Strategic Communications; and the new PEBEC Business Champions program.

At the PEBEC Secretariat, our commitment to fostering a thriving business environment has yielded invaluable insights which are instrumental to our continuous innovation to deliver systemic change and improvements in the Nigerian Business Environment.

For our subnational intervention, these insights were relevant in the co-design of the State Action for Business Enabling Reforms (SABER) program in collaboration with the World Bank. The SABER is the first program for results at a National scale in the

World. The Program is a \$750 million, 3-year (2023-2025) performance- based intervention designed to incentivize and strengthen business reforms across Nigeria. With the implementation of the SABER program – the objective to improve the business environments at the subnational level through the uptake on PPP legislations and the establishment of PPP offices in states is significantly improving, as this is one of the eight disbursement linked indicator areas.

Gleaning from key learnings in delivery of the PEDEC mandate, an enabling business environment plays a critical role in attracting investment and nurturing PPPs which are key drivers to driving infrastructural development and growth across nations. This understanding shaped the concept design of SABER, which focuses on the broad priority areas that are aimed at delivering the required framework for improving the country’s investment drive and development. The priority areas cut across Public-Private Partnership and investment promotion frameworks, Regulatory framework for private investment in fiber optic infrastructure, Land administration, Tax administration and Business enabling regulatory environment. In the SABER Program, it was critical in the program design that the PPP framework be included as a strategy to empower states to establish state-level technical PPP coordination units and developing project pipelines focused on priority infrastructure.

Notably, at the launch of the program, 31 states participated across the different program result areas. Specifically, in 2023, nine states (Anambra, Delta, Ekiti, Enugu, Katsina, Nasarawa, Niger, Ondo, and Zamfara) requested for technical support to establish PPP coordination units and build their PPP project pipelines.

6. CONCLUSION

In 2024, the Nigerian economy is expected to grow by 3.3 per cent and 3.7 per cent in 2025. The projected success of this year's economic outlook of our nation relies on the productivity and competitiveness, the contributions of businesses, which will be made possible by improved ease of doing business, increased investment, and improved infrastructure.

As we continue to drive collaboration and deploy PPPs as a tool for infrastructure development in Nigeria, we believe that as all key stakeholders embrace their roles in nation building, we can unlock the immense potential of PPPs and cultivate a dynamic and prosperous business environment in Nigeria.

Once again, I congratulate the organizers on the selection of a topical and impactful conference theme. I encourage you all to listen closely to the plenary sessions and the exceptional speakers lined up for this conference. And I wish you all a successful deliberation.