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Original Research Article

EFFECTIVE INSTITUTIONAL AND LEGAL REGULATORY FRAMEWORK: A PANACEA TO EFFICIENT ROAD INFRASTRUCTURE DEVELOPMENT

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Abstract: The establishment of Infrastructure Concession Regulatory Commission (ICRC) by the Federal Government of Nigeria under Act 2005 and the Public Procurement Act of 2007 to drive the implementation of Public-Private Partnerships (PPPs) in infrastructure development which supposedly serve as institutional, legal and regulatory framework for attracting private sector investment in infrastructure development in Nigeria with the aim of tackling the challenges of poor infrastructure development and to improve economic growth in the implementation of PPP strategies. This is also to ensure that the transfer of responsibility to the private sector in infrastructure development follows the best international practice which is best achieved through transparency, accountability and competitiveness. This paper examined the strength and limitations of the Nigerian PPP Institutional and Legal Regulatory framework for infrastructure development. The review of literature started with the assessment of the Nigerian National Policy on PPPs followed by the in-depth assessment of the Nigerian Government legal mechanisms in the implementation of PPPs such as the adoption of ICRC Act of 2005; the creation of ICRC office; and the Public Procurement Act of 2007. A critical evaluation of Nigerian PPP Institutional and Legal Regulatory Framework was also carried out. The study revealed that lot of challenges are impacting on the effectiveness of PPP framework in road infrastructure development in Nigeria the challenges were hereby attributed to poor Nigerian National PPP Policy thereby resulting to weak and inadequate institutional, legal and regulatory structure. The study therefore concluded that the current PPP policy in Nigeria must be reviewed so as to enhance the effectiveness of the institutional and legal regulatory structure.

Keywords: Public-Private Partnership, Institutional, Legal, Regulatory, Framework, ICRC

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1.0 Nigeria National Policy on Public-Private Partnerships: The relationship between good roads and economic development cannot be over emphasized, it is very clear that road infrastructure development plays a vital role in the economic well-being of any nation. Putting road infrastructure development statistics under perspective in Nigeria, this has clearly shown that Nigeria still has a huge task ahead in terms of road development. The total road network in Nigeria is currently estimated at about 200,000km which need to be improved and enhanced in order to bring the road infrastructure in Nigeria to the same level and standard with other thriving economies of the world such as United Kingdom, United States of America, China, Brazil, Turkey, India and South-Africa. In order to achieve this, Nigeria Government needs to make massive investments beyond the means available to government in order to close the road infrastructure gap through joint investment with private sector inform of Public-Private Partnerships. In view of this, the Federal Government of Nigeria therefore formulated a National Policy on Public-Private Partnership. The objectives of the said policy is classified into four groups to include; Economic, Social, Environmental and Value for Money. In the economic group as contained in the PPP National Policy, the economic objectives of the policy include;

- acceleration of investment in new infrastructure and upgrading of the existing infrastructures;
- to ensure efficiency in infrastructure investment;
- to enhance the availability and effectiveness of all infrastructure facilities in order to increase economic growth and access to international markets;
- to encourage private sectors by providing opportunities and an enabling environment in the provision of public infrastructure;
- to ensure best practice in infrastructure development;
- effective management of the risks created under PPP contracts

In the same vein, under social and environmental groups, the National PPP Policy objectives include;

- to maintain a balanced regional development in all the geo-political zones in Nigeria;
- to allow full access to quality public services for all members of Nigerian society;
- to ensure affordability of user charges for new or improved public service and provide value for money;
- to protect the employment rights and opportunities of employees and also resolving other social safety net issues before final proposed project approval;
- to improve the health, safety, and wellbeing of the public;
- to enhance the participation of small and medium sized investment in PPP projects
- to achieve a sustainable and conducive natural environment;
- to reduce greenhouse gas emissions and other pollutants

Furthermore according to the National Policy on PPPs (2003), the Federal Government of Nigeria is making no presumption about the relative efficiency or effectiveness of the public and private sectors in the development of infrastructure in Nigeria. Rather, the government will adopt PPP where there is likelihood of better value—and more affordable—services (Value for Money). The National PPP Policy further stated that all procurement decisions will be made on merit and all proposals subjected to thorough economic and financial cost benefit analysis.

2.0 PPP Legal Regulatory Structure in Nigeria

The existence of an appropriate legal and regulatory framework according to United Nations Commission on International Trade Law (2001) is a prerequisite to creating an enabling and sustainable environment that will foster private investment in infrastructure provision and maintenance; UNCITRA (2001) further stated that it is important to ensure that PPP legal and regulatory structure is sufficiently flexible and responsive to keeping pace with infrastructure developments rather than its provision and maintenance only. In a related development, Soyeju (2013) noted that PPP legislative framework provides the platform under which the public sector regulates and ensure the provision of infrastructure facility and offers protection of rights for both the public and private investors in infrastructure development. Soyeju (2013) further stressed that a fair PPP legislative and regulatory framework incorporates the wide and varied interests of all the investors in infrastructure development because the legal framework breathes the breath of life into the entire PPP policy for private participation in the infrastructure development while the regulatory system serves as the sub-set of the legislative framework this according to Shonekan (2011) promotes competition and also enables the investors to earn fair returns for the various risks taken in the infrastructure development transaction.

In order to make the NNPPP policy effective, Soyeju (2013) noted that the signing into law of the Infrastructure Concession Regulatory Commission Act (ICRCA) by the Federal Government of Nigeria on the 10th of November 2005 and the inauguration of Infrastructure Concession Regulatory Commission (ICRC) in 2008 and the subsequent approval of the National Policy on Public-Private Partnership by the Federal Executive Council (FEC) was a step towards establishing a proper legal regulatory environment in attracting private sector investors in infrastructure development especially road infrastructure development in Nigeria. This also allows for the involvement of private sectors in financing the development, operation and maintenance of infrastructure in Nigeria through PPP concession whilst the ICRC regulate, monitor and supervises the contract and the entire infrastructure development processes throughout the contract period. Basically the ICRCA allows for the granting of all PPP contracts by the Federal or State Government of Nigeria or any of their agencies, ministries, corporations or bodies. Soyeju (2013) listed seven key principles driven by the ICRC to include: value for money; public interest; output requirements; transparency; risk allocation; competition; and capacity to deliver. In pursuant of the Nigerian Government agenda in the provision of infrastructure, the Federal and State Government of Nigeria therefore came up with an investor-friendly legal and regulatory environment for PPP transactions aimed at leveraging private investment in tackling the menace of ineffective and inefficient infrastructure development in every part of Nigeria.

The legal issues inherent in PPP transaction in road infrastructure development according to Gatti (2008) revolve around two basic concepts which includes; (i) the special purpose vehicle or the project company and its economic and legal obligations, (ii) the network of the procurement agreement which regulate the relationship between the different stakeholders in the PPP concession for the road development. In a related development, BPD (2009) noted that PPP legal regulatory framework is aimed at designing, implementing and monitoring PPP transactions in infrastructure development by providing legal support and addressing the principles which governs the selection of concessionaires in any PPP concession for road infrastructure development, the PPP legislative and regulatory framework also provides recommendations and code of conduct for handling unsolicited proposals from private investors in road infrastructure development under PPP transactions.

UNCITRA (2001) therefore noted that for PPP legal and regulatory process to be credible, it must be transparent and objective, the rules and procedures must be lucid and objective for the purpose of fairness, impartiality and prompt action from the regulatory body concerned. This according to *ibid* creates a level playing ground for all the stakeholders in the road infrastructure development under PPPs to this end, BPD (2009) listed the main features of a suitable PPP legal regulatory framework to include;

i. A clearly defined policy which sets out the underlying PPPs principles and criteria;
ii. Clear definition of the contractual arrangements and PPP agreement;
iii. Established institutional settings that permits sound administrative coordination;
iv. Identification of PPP authorities and respective roles and responsibilities;
v. Establishment of a PPP units which will assist in the promotion of PPP transactions;
vi. Clear definition of provisions for providing modalities of financial support to PPP transactions;
vii. Sound transparent and competitive procurement procedure;
viii. Appropriate terms and conditions governing the PPP transactions;
ix. Clear definition of roles for tariff setting and revisions;
x. Regulated technical, environmental and safety standards;
xi. Clear dispute resolution processes.

However in Nigeria, according to ICRC (2012), Obozuwa (2013) and Adamu*et al*. (2015), the development of infrastructure through PPP is governed by the Federal Government law and legislations which include; (i) the Infrastructure Concession Regulatory Commission Act (ICRCA, 2005); (ii) the Public Procurement Act (PPA, 2007); and (iii) Regulations Issued by ICRC governing the PPP development process for the entire project life-cycle. The objectives of the government law and legislation according to ICRC (2012) include;

i. Empowering the public sector into entering a contractual agreement on investment with public sector,
ii. To ensure effectiveness and efficiency in the regulation and licensing of public service operators,
iii. To provide remedies for the protection of public infrastructure,
iv. To ensure adequate and appropriate application of the laws,
v. To encourage transparency, efficiency and competitive bidding procedures,
vi. Effective dispute resolution processes,
vii. To ensure consistency in the proposed PPP institutional and financial structure.

Furthermore, Obozuwa (2013) noted the government law and legislation governing PPP implementation covers; (i) Contract Agreement, (ii) Contract Management; and (iii) Dispute Resolution whilst the contract management process under PPP transaction in the government law and legislation does not only fix responsibilities but also allows timely response to any deviation in project development from the provisions in the contract agreements and thus help in avoiding disputes in the road infrastructure development.

The enactment of ICRC Act, 2005 is to govern the participation of private investors in the financing of infrastructure development, operation and its maintenance through PPPs (ICRC, 2012; Adamu*et al*., 2015). Furthermore, Adamu*et al*. (2015) noted that the Act permits the granting of PPP contracts or concession by any state of the federation, Federal Government ministry, agencies, corporations (MDAs). Similarly, the enactment of the Public Procurement Act, 2007 brought to life the establishment of the National Council of Public Procurement in Nigeria, this according to ICRC (2012) serves as the regulatory authority responsible for monitoring any Public Procurement in Nigeria. The PP Act, 2007 also harmonizes all the government policies and practices by regulating, setting standards and developing legal regulatory framework for any PPP transaction both at Federal and State levels in Nigeria. Figure 1 outlined the ICRC structure for PPP transaction in Nigeria.

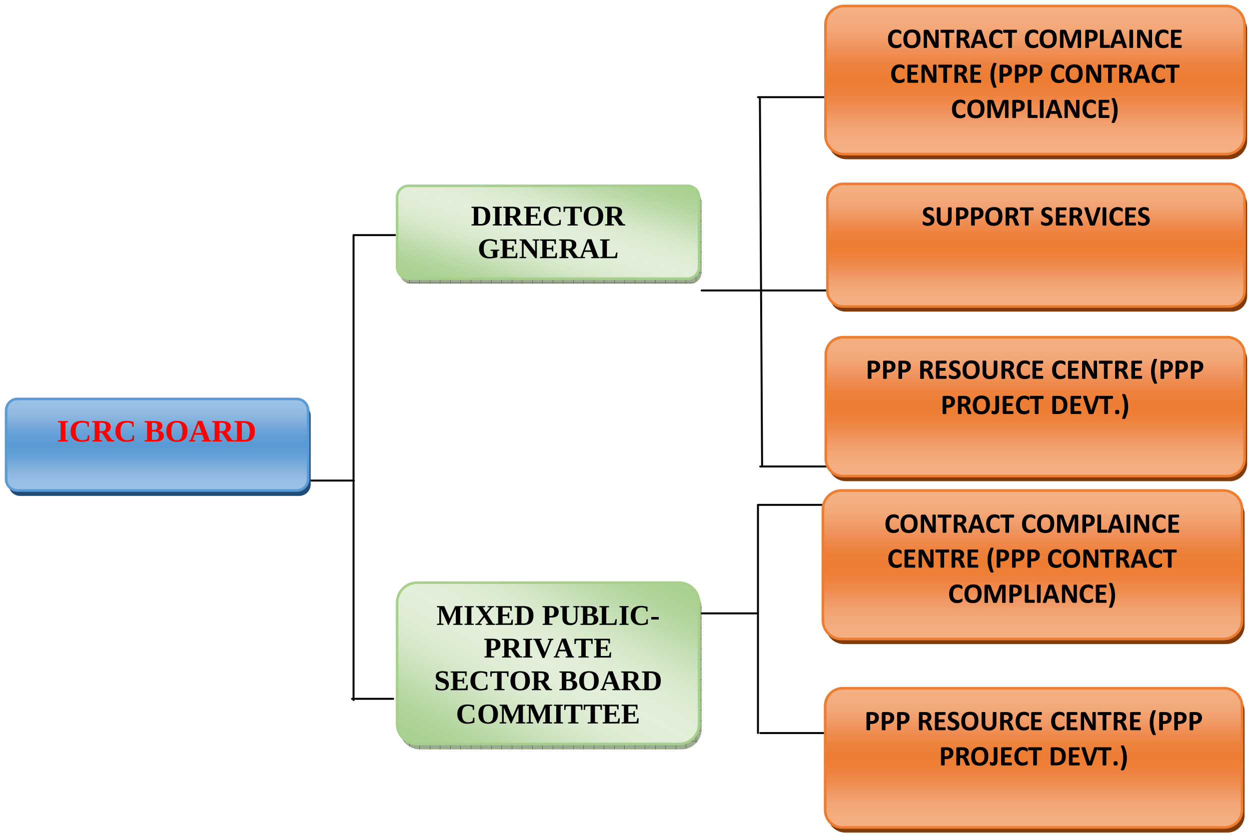

Figure 1: *ICRC Structure*

3. PPP Institutional Structures in Nigeria

The law and legislation governing the implementation of PPP in Nigeria allocates roles and responsibilities to various organs of both the Federal and States Government as the public investors within the PPP institutional structure for infrastructure development in order to ensure checks and balances in the system, as well as oversight of decision making process throughout the life-cycle of the road infrastructure development (ICRC, 2012; Adamu*et al*., 2015). Figure 2 depicts the various government organs/establishment and their respective roles and responsibilities in the implementation of PPP in Nigeria.

The development and issuing of guidelines on the implementation of PPP policies, processes and procedures in infrastructure development are the major responsibilities of ICRC. Ndubisi (2013) and Soyeju (2013) further stated that the commission also acts as the national centre of expertise on PPP in Nigeria. ICRC (2012) also noted that the commission works closely with the relevant government ministries, department and agencies in the identification of potential PPP projects and also acts as the interface with the private investors in promoting communication on PPP policies both at Federal and State levels in Nigeria.

In a related development, ICRC (2012) stated that the major responsibility of the commission is to monitor the effectiveness of both the Federal and State government's PPP policies and processes and also provides independent advice to respective Federal and State executive councils on public infrastructure development.

The motive behind this according to ICRC (2012) and Ndubisi (2013) is to ensure consistency, best practice and co-ordinated approach to the private investor.

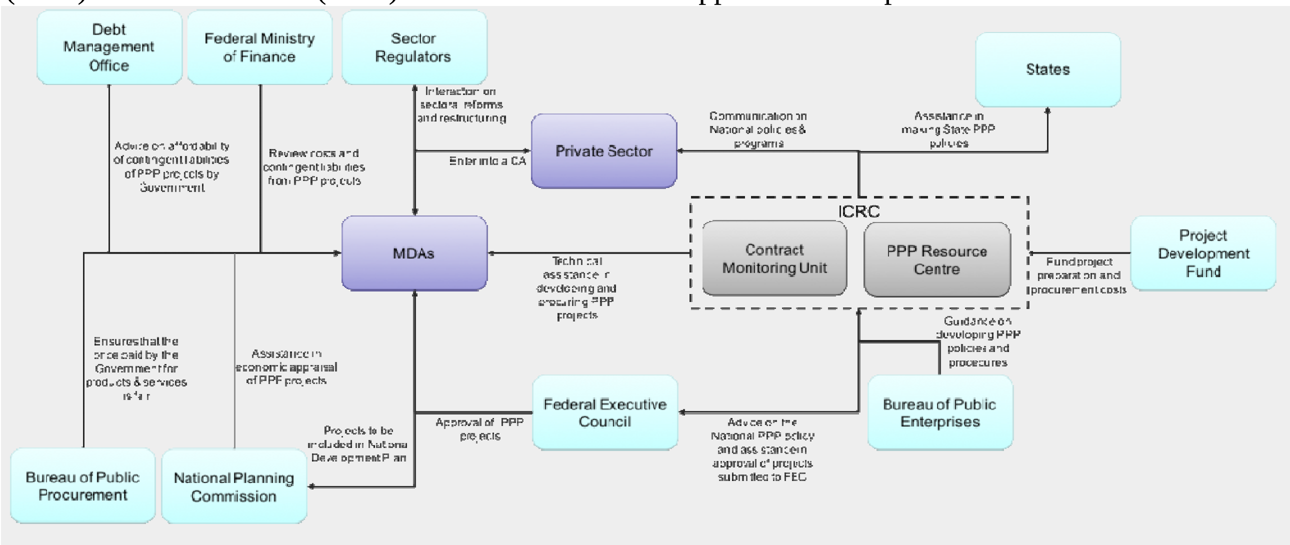

Figure 5: PPP Institutional Structure in Nigeria

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The PPP Resource Centre consist of professional personnel with legal, financial, and public administration backgrounds that provides the required expertise for the implementation of PPP in infrastructure development across different sectors both at Federal and State levels in Nigeria. The PPP Resource Centre according to ICRC (2012) operates within the ICRC acting as a central PPP knowledge section. The PPP Resource Centre according to Obozuwa (2013) and Adamu*et al*. (2015) was established to act as an interface between the public and private investors in the implementation of PPP policies and practices for infrastructure development and also to ensure that the public investment decisions are made primarily on commercial grounds at both the Federal and State Government levels in Nigeria.

Adequate investment strategy is a major prerequisite of the public sector involvement in infrastructure development, to this end according to ICRC (2012), the National Planning Commission prepares the Federal Government of Nigeria's National Development Plan based on the MDAs sector plan. The Plan according to ICRC (2012) sets out the public investor's 15 year investment strategy for all forms of infrastructure development to be financed in whole or in part from either the Federal or State budgets, project finance through borrowing or through current revenues of the Federal or State Government. ICRC (2012) further opined that NPC also acts as a centre of expertise providing tools and methodologies for economic appraisal of all the proposed government projects to be included in the National Development Plan and also developing the required guidelines and economic assumptions for cost-benefit analysis of the entire public infrastructure. Hence the management of public infrastructure development according to ICRC (2012) is the sole responsibility of the MDAs. Obozuwa (2013) noted that the MDAs prepares a long-term infrastructure development plans for road infrastructure investment and maintenance which are incorporated into the public 15-year National Development Plan. Further to this according to ICRC (2012) and Obozuwa (2013), the MDAs in consultation with ICRC are to identify the aspect of infrastructure development where PPP will likely offer better value-for-money over the traditional development strategy.

According to ICRC (2012) and Adamu*et al*. (2015), the Ministry of Finance is responsible for the financial management of all the infrastructure development under PPP in Nigeria the ministries also evaluate and manage fiscal risks associated with PPP transaction. ICRC (2012) opined that the ministry is to ensure that the forecasted costs and any financial support for the infrastructure development are affordable to both the Federal and State governments in the infrastructure development over the whole life-cycle of the infrastructure. As part of the ministry's responsibilities, it also review the costs and contingent liabilities to the investors while the project design and risk valuations are being refined at the project preparation and procurement phases of the road infrastructure development. Similarly, the establishment of the Debt Management Office (DMO) was done under the Debt Management Office Act 2003 (ICRC, 2012); its operations were being governed by the same act. The DMO was established to monitor any liability that may be created by Federal or State Government in any PPP infrastructure development in Nigeria and to also provide guarantees for State's infrastructure development. This is to ensure that the contingent liabilities created by any PPP transaction are properly managed within either the Federal or State Government economic and fiscal forecasts.

In a related development, the Bureau of Public Procurement (BPP) was set up the MDAs to ensure that due process is maintained in a procurement process of all public infrastructures under PPP. ICRC (2012) stated that the Bureaus use various techniques in its operations such as benchmarking to ensure that the money paid by the Federal or State Government for infrastructure developments are fair and reasonable. Similarly, the Bureau of Public Enterprises (BPE) was established by the Federal Government of Nigeria for the purpose of the privatization of Federal and State Government owned public utilities and assets. Other responsibility of BPE is to commercialize government owned enterprises through concession; the skill and capacity developed in the BPE operations are available for implementing PPP transactions in infrastructure development both at Federal and State levels in Nigeria.

4.0 The Challenges of PPP Institutional and Legal Regulatory Framework in Nigeria

In a study carried out by Sotola & Ayodele (2011), the study reveal that the involvement of private sector in infrastructure development in Nigeria has drawn some defined pattern against which the adoption of PPP for infrastructure development and provision can be best accepted in practice. The study further reveals that in most PPP transaction in Nigeria, the public sectors are the leaders and dominant partners in the transaction. In view of this, the law and the regulatory institution are far more favourable to the public sector; than being fair to both the public and private investors in the PPP transaction.

Soyeju (2013) and Adamu*et al.* (2015) listed some of the limitations and problems of the institutional and legal regulatory structure in PPP concessions which are attributed to the ineffective and weak Nigerian National PPP Policy, ICRC Act 2005 and PP Act 2007 to include;

i. Neglect of other relevant arms of government and MDAs in PPP transactions and the subsequent effects of Federal Government finances;
ii. Lack of clear definition of asset ownership and stream of income on the assets;
iii. Lack of provision for land acquisition for the proposed development;
iv. Ambiguity in the approval processes for PPP projects and granting of concession;
v. Minimal and restricted power of ICRC in PPP transactions;
vi. Lack of clear definition of relationship and coordination between ICRC and MDAs in PPP project monitoring and evaluation;
vii. Lack of limit in the private sector participation and mechanisms for dealing with unsolicited proposals;
viii. Lack of adequate legal protection for the private investor in PPP transaction;
ix. Lack of fairness in dispute resolution and efficient appeals;
x. Lack of proper audit or review of development process and outcome of PPP projects;
xi. Absence of proper public financial management in PPP transaction;
xii. Lack of alternative dispute resolution mechanism in the PPP transaction;
xiii. Lack of regulatory and enforcement provision in the legislation;
xiv. Lack of appropriate legal and regulatory framework at the State levels.

5. 0 Conclusion

This study examined the conceptual institutional and legal regulatory framework in Nigeria and thevarious challenges impacting on the effectiveness of PPP framework for road infrastructure development in Nigeria. Although the adoption of PPP strategies has been instrumental to reducing the financial burden on the Federal and State government in Nigeria in response to the increase demand for more road infrastructure coupled with the bad state of the existing roads in Nigeria by allowing the public sector to be the facilitator and framework regulator while the private sector are involved in the funding, construction and management of the road infrastructure which have been hampered by the inefficient and ineffective PPPs institutional and legal regulatory framework in Nigeria.

This paper examined the strength and limitations of the Nigerian Public-Private Partnership Institutional and Legal Regulatory framework for infrastructure development in Nigeria. The review of literature started with the assessment of the Nigerian National Policy on PPPs. This was followed with the in-depth assessment of the Federal Government legal mechanisms in the implementation of PPPs such as the adoption of ICRC Act of 2005; the creation of ICRC office; and the Public Procurement Act of 2007. A critical assessment of Nigerian PPP Institutional and Legal Regulatory Framework was also carried out. The findings of the study revealed that PPP institutional and legal regulatory structure in Nigeria have been ineffective in the development and provision of road infrastructure, the findings further revealed that the key challenges affecting the effectiveness and efficiency of PPP institutional and legal regulatory framework in Nigeria centres around the following factors ; (i) project preparation, procurement and management process, (ii) project bankable feasibility study and funding arrangement, (iii) balance risk allocation, legislation and regulation, and (iv) enabling project environment and institutional organs. This has resulted to the poor social-economic development being experienced in Nigeria today in areas of goods and human transportation and the general development in Nigeria. In view of this, in order to improve on the social-economic development in Nigeria via road infrastructure, the Federal Government of Nigeria will require about US$6 billion investment in road infrastructure provision within the next few years in Nigeria.

Finally, the study further revealed that the efficiency and effectiveness of PPP institutional and legal regulatory framework will depend upon the ability of the public sectors in addressing the key challenges of the PPP institutional and regulatory framework. The study therefore concluded that the conceptual PPP institutional and legal regulatory framework in Nigeria needs to be reviewed so as to enhance its effectiveness and efficiency.

References

[1]. Adam, M., Lowe, J. &Manase, D. (2015) "Public-Private Financed Road Infrastructure Development in North-Central Region of Nigeria" Journal of Management and Sustainability, 5(4), pp.58-67. Best Practices Document (2009) "Fostering the Development of PPP Models in COMESA Region" Biz Clim.

[2]. Gatti, S. (2008) "Project Finance in Theory and Practice: Designing, Structuring, and Financing Private and Public Projects" Elsevier, London.

[3]. Infrastructure Concession Regulatory Commission (2012) "Nigeria Public-Private Partnerships Manual" ICRC PPPToolkit.

[4]. Ndubisi, C. (2012) "Public Private Partnership.

[5]. The Nigerian Experience" Paper presented at the Capacity Building Programme for PPP in Infrastructure, ICRC Mbamene, Swaziland July 2012.

[6]. Obozuwa, D.E. (2013) "PPP as a Tool for Development in Nigeria" FPPPN Admin.

[7]. Omisore, S. (2014) "What Makes an Infrastructure Project Bankable" Infrastructure Stakeholders Forum, Stanbic IBTC.

[8]. Sotola, O. &Ayodele, T. (2011) "Public-Private Partnership; Will It Fix Infrastructure in Nigeria?" Initiative for Public Policy Analysis, Policy Paper.

[9]. Soyeju, O. (2013) "Legal Framework for Public-Private Partnership in Nigeria". De jure pp.814-832.

[10]. UNCITRAL (2001) "Legislative Guide on Privately Financed Infrastructure Projects" United Nation, A/CN, 9/SER.B/4 23