

Privatization and Commercialization of Public Enterprises in Nigeria

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Introduction

It is a truism that the privatization of public enterprises or state owned enterprises (SOEs) or economic sectors raises constitutional, legal, strategic, emotional, institutional and economic issues and challenges.

The word 'privatization' is a concept as well as a process. As a concept, it is not only emotive but controversial. As a process, the methods adopted vary from sector to sector, country to country and in Nigeria from one phase to another. It also has both a narrow and broad meaning. Yet at another level, it can mean the privatization of a sector or the entire economy. Sometimes the level of irreversibility of the privatization transaction is critical in determining its classification.

As a concept it is the process of transferring ownership and sometimes control of a business, an enterprise, an agency, a sector or public enterprise from the public sector to the private sector. Some transfers will involve the introduction of private entry, often by the abolition of monopolies or barriers to entry and the introduction of competition. In a narrow sense, privatization implies permanent transfer of control from the public sector to the private sector¹Broadly, privatization involves all forms of public private

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partnership (PPP) where measures are adopted for the transfer from the public sector to the private sector of activities exercised until then by a public authority. It is in this broad category that we have sub-contracting, management contracts, lease and concessions².

As a process, privatization describes the sequencing of transactions and the methods of sale. For example, how do you determine the public enterprise or sector to be privatized? Secondly, how do you determine the strategy to be adopted in privatizing a public enterprise? Thirdly, how do you attract investors – local or international? Fourthly, how do you determine whether it is full or partial privatization? Fifthly how do you carry out due diligence on the enterprise? Sixthly who and how will the transaction documents (Advertisement for Expression of Interest, Information Memorandum, Non-Disclosure Agreement, Request for Proposals, Share Sale/Purchase Agreement, Asset Sale Agreement, Shareholders Agreement, Concession Agreement and Management Contract) be prepared. Seventhly, who is the approving authority and what administrative structures will you create?

According to the provisions of section 14 of the Privatization and Commercialization Act³, ‘commercialization’ means the reorganization of enterprises wholly or partly owned by the Federal Government in which such commercialized enterprises shall operate as profit-making commercial ventures and without subventions from the Federal Government. Although the Act⁴ did not define ‘commercialization’, section 8 of the Act provides thus:

Notwithstanding the provisions of any other enactment and without prejudice to the generality of section 6 of this Act, a commercialized enterprise shall operate as a purely commercial enterprise and may,

¹Section 14 of the Privatization and Commercialization Act, Cap 369, Laws of the Federation of Nigeria, 1990, now repealed, defines privatization as the relinquishment of part or all of the equity and other interests held by the Federal Government or its agency in enterprises whether wholly or partly owned by the Federal Government. Unfortunately, there is no definition of the word ‘privatization’ in the Public Enterprises (Privatization and Commercialization) Act, Cap P38, Laws of the Federation of Nigeria, 2004 (hereinafter referred to as “the Act”. See also AminaTukur Othman *Privatization in Nigeria* (Kaduna: Ta’alim Limited, 2003) p 1 and Sam Amadi *Privatization & Public Good: The Rule of Law Challenge* (Lagos: Centre for Public Analysis & Research, 2008) p xv

²For example, Design-Build (DB), Build-Transfer (BT), Design-Build-Maintain (DBM), Design-Build-Operate (DBO), Build-Operate-Transfer (BOT), Design-Build-Operate-Maintain (DBOM), Build-Own-Operate (BOO), Build-Own-Operate-Transfer (BOOT), Rehabilitate-Operate-Transfer (ROT) and Design-Build-Finance-Maintain (DBFM).

³Id

⁴Id

subject to the general regulatory power of the Government of the Federation

- (a) fix the rates, prices and charges for goods and services it provides;*
- (b) capitalize its assets;*
- (c) borrow money and issue debenture stocks; and*
- (d) sue and be sued in its corporate name.*

It is clear, therefore, that when a public enterprise is fully commercialized, the expectation is that it should operate as a purely commercial enterprise without subventions from the Federal Government.

Section 33 of the Act defines a 'public enterprise' as any corporation, board, company or parastatal established by or under any enactment in which the Government of the Federation, a Ministry or extra Ministerial department or agency has ownership, or equity interest and includes a partnership, joint venture or any other form of business arrangement or organization.

For ease of exposition, therefore, this paper is divided into seven parts, namely, Part I dealing with Historical Perspective; Part II with Privatization Challenge; Part III with the First Phase; Part IV with the Second Phase; Part V with the Third Phase; Part VI with Reform Activities, Part VII with the Journey So Far and the Concluding Paragraph.

Part I

Historical Perspective

The history of privatization is traceable to the Ancient Greece when governments contracted out almost everything to the private sector and in the Roman Republic when private individuals and companies performed the majority of services including tax collection (tax farming), army supplies (military contractors), religious sacrifices and construction. As an ideology, perhaps privatization is traceable to the golden age of the Han Dynasty in China. Taosim came into prominence for the first time at a state level and it advocated the *laissez faire* principle of Wu wei. Even during the Renaissance when most of Europe practiced feudalism, the Ming Dynasty of China began once more to practice privatization especially with regards to their manufacturing industries.⁵

In more recent times, Winston Churchill's government privatized the British steel industry in the 1950s, Western Germany's government embarked on large-scale

⁵<http://en.wikipedia.org/w/index.php?title=Privatization&oldid=497534217>

privatization, including selling its majority stake in Volkswagen to small investors in a public share offering in 1961 and in the 1970s General Pinochet implemented a significant privatization programme in Chile. However, it was in the 1980s under the leaderships of Margaret Thatcher in the UK and Ronald Reagan in the USA that privatization gained worldwide momentum. Similar exercises were carried out in Eastern Europe and the former Soviet Union with the assistance from the World Bank and the US Agency for International Development; while Japan privatized the Japan Post. There were also privatizations in France, Belgium, Denmark, Italy, Netherlands, Spain, Argentina, Brazil, Cuba, Indonesia, Malaysia, Peru, Singapore and Venezuela. In other words, privatization transactions took place in developing and transition countries as well as in industrialized countries.

In Nigeria, the Report of the Presidential Commission on Parastatals⁶ set up in 1981 under the ShehuShagari Administration revealed that public enterprises were characterized by misuse of monopoly power, defective capital structure, mismanagement, corruption and nepotism. Consequently, the Commission (also known as Onosode Commission) recommended that there should be an increased role for the private sector especially in parastatals where security and other sensitive aspect of public policy are not as paramount as the satisfactory delivery of service to the people.

Similarly, the International Monetary Fund (IMF), in considering the request by the Federal Government for a loan under Shagari's Administration imposed certain conditionalities. One of them was the divestiture of ownership, management and control of some public enterprises. The debate on whether Nigeria should embark on privatization resonated throughout the regime of Buhari/Idiagbon until General Babangida in his 1986 Budget Speech announced government's intention to divest its holdings in certain key sectors of the economy and subsequently promulgated the Privatization and Commercialization Act No. 25 of 1988.⁷

⁶See Federal Republic of Nigeria, Report of the Presidential Commission on Parastatals, Lagos, Federal Government Press, 1981, p 63

⁷See also Amupitan J 'Private Placement Method of Privatization in Nigeria' in *New Vista in Law*, Vol. 2, 2002 pp 343-356

From 2003 to 2007, Nigeria attempted to implement an economic reform program called the National Economic Empowerment Development Strategy (NEEDS). The purpose of the NEEDS was to raise the country's standard of living through a variety of reforms, including macroeconomic stability, deregulation, liberalization, privatization, transparency, and accountability. The NEEDS addressed basic deficiencies, such as the lack of freshwater for household use and irrigation, unreliable power supplies, decaying infrastructure, impediments to private enterprise, and corruption. The government hoped that the NEEDS would create 7 million new jobs, diversify the economy, boost non-energy exports, increase industrial capacity utilization, and improve agricultural productivity. A related initiative on the state level is the State Economic Empowerment Development Strategy (SEEDS).

Part II Privatization Challenge

The concept of privatization poses its own challenges. In this context, it is apposite to examine the objectives of privatization. In the words of Guislain⁸

Defining privatization objectives is an important exercise that should be undertaken as early as possible. Many privatization programs have foundered when clear objectives were lacking or where conflicting objectives were simultaneously pursued. The definition of objectives is not an easy task, however, and it is made no easier by the multiplicity of possible objectives and actors with different, often conflicting interests

The objectives⁹ can be discussed under various heads including:

Efficiency and Development of the Economy

In emerging economies, the key objectives are the creation of a market economy, encouragement of private enterprises and expansion of the private sector in general. Others are the promotion of macroeconomic or sectoral efficiency and competitiveness,

⁸Guislain P *The Privatization Challenge: A Strategic, Legal, and Institutional Analysis of International Experience* (The World Bank: Washington, DC, 2001) 16. See generally Ioannis N Kessides *Reforming Infrastructure: Privatization, Regulation, and Competition* (The World Bank: Washington, DC, 2004); Antonio Estasche & Gines de Rus (eds) *Privatization and Regulation of Transport Infrastructure: Guidelines for Policymakers and Regulators* (The World Bank, Washington, DC, 2000); and Luis A Andres *et al The Impact of Private Sector Participation in Infrastructure: Lights, Shadows and the Road Ahead* (The World Bank, Washington, DC, 2008)

⁹ See also H R Zayyad 'Privatization and Commercialization in Nigeria'.

<http://unpan1.un.org/intradoc/groups/public/documents/aapam/unpan028228.pdf>

elimination of rigidities, promotion of competition particularly by abolishing monopolies, development of efficient capital markets, improvement of access to foreign markets for domestic products, promotion of foreign investment, promotion of domestic investment and maintenance or creation of employment.

The whole concept of core investor sale introduced in the third phase of the privatization programme was aimed at the promotion of macroeconomic or sectoral efficiency and competitiveness.¹⁰

Efficiency and Development of the Enterprise

It is assumed that because public enterprises are funded wholly or partly by government and also run by government they are run inefficiently. Consequently, in terms of public enterprises, privatization will introduce new technologies and promote innovation while the private investors will upgrade plant and equipment, increase productivity, including utilization of industrial plant, improve the quality of the goods and services produced, introduce new management methods and teams and allow the enterprise to enter into domestic and international alliances essential to its survival¹¹.

Budgetary and Financial Improvements

In Nigeria, a conservative estimate shows that between 1975 and 1995, \$100 billion¹² was spent on public enterprises and that the funding of these enterprises has been a drain on the treasury. In the words of President Obasanjo 'It is conservatively estimated that the nation may have lost about USD800 million dollars due to unreliable power supply by NEPA and another USD4000 million through inadequate and inefficient

¹⁰An example of this is the privatization of Aluminium Smelter Company Plc where the core investor is RUSAL of Russia and the Eleme Petrochemical Company Limited where the core investor is Indorama of Indonesia. RUSAL is the leading aluminium smelter in the world while Indorama has operated similar plants in Indonesia and Thailand successfully.

¹¹ Almost all the enterprises in the third phase of privatization were non-performing. Delta Steel Company Plc was shut down in 1995 until privatized in 2005, Ajaokuta Steel Company Ltd and National Iron Ore Mining Company Ltd were not completed, Aluminium Smelter Company Plc was shut down. Similarly other than the Anambra Motor Manufacturing Company Ltd and Peugeot Automobile of Nigeria Ltd, all the motor vehicle and truck assembly companies were shut down. Other than non-performance there was a high level of debt overhang, staff and pension liabilities and corruption. Due to debt level of Nigeria Airways, National Fertilizer Company Nigeria, Nigeria, Jos Steel Rolling Company Ltd, Oshogbo Steel Rolling Company Ltd, Katisina Steel Rolling Company Ltd, Calabar Cement Company Ltd, Nigeria Sugar Company, Bacita, and Nigeria Newsprint Manufacturing Company Limited were liquidated.

¹² I Omoleke, et al 'An Examination of Privatization Policy and Foreign Investments in Nigeria' in *African Journal of Political Science and International Relations* Vol. 5(2), pp 72-82, February 2011

fuel distribution.¹³ Thus the objectives of privatization in this regard include the reduction of the financial drain on the state in the form of subsidies, unpaid taxes, loan arrears and guarantees given, mobilization of private resources to finance investments that can no longer be funded from public finances, generation of new sources of tax revenue, limitation of the future risk of demands on the budget inherent in state ownership of businesses, including the need to provide capital for their expansion or to rescue them if they are in financial crisis.

A cursory examination of the appropriations made between 1970 and 1999 and 1999 and present will show that no appropriations were made to the public enterprises listed for privatization. Instead the proceeds of sale were paid to the government treasury for the purpose of appropriation.

Similarly the \$500 million paid by Transcorp for 51% of NITEL shares was insufficient to cover the staff benefits.

One major challenge for the reform of the power sector is the funds necessary to pay off the staff benefits and the creditors of the former NEPA.

Income Distribution or Re-Distribution

Before the privatization programme, share ownership was limited and in very few hands. Besides government owned and operated the 'commanding heights' of economy. Privatization is seen as fostering broader capital ownership and promotion of popular or mass capitalism. It also provides avenues for the development of a national middle class, foster the economic development of a particular group, encourage employee ownership, and restore full rights to former owners of property expropriated by previous regimes. In Nigeria, the thrust of the first phase of the privatization programme was the actualization of this objective¹⁴.

Political Considerations

Although maximizing economic efficiency and return on investment will normally be the main objectives of a privatization programme, in practice other considerations of a political, social nature also influence the choices of the authorities. In the midst of

¹³Obasanjo, O 'Imperative of Privatization' in Privatization Handbook, 2000, p 4

¹⁴ In the *Final Report of the Technical Committee on Privatization & Commercialization*, Vol. 1, page iv, 800,000 new shareholders were created and out of initial investment of N652 million, the proceeds realized exceeded N3.7 billion thus creating a capital gain of nearly 600%.

tension between the conflicting objectives, other political considerations include the reduction of the size and scope of the public sector or its share in economic activity and re-definition of the field of activity of the public sector, abandoning production tasks and focusing on the core of government functions, including the creation of an environment favourable to private economic activity. Other political considerations include the reduction of the opportunities for corruption and misuse of public property by government officials and SOE managers, reduction of the grip of a particular group on the economic and raising the government's popularity and its likelihood of being returned to power in the next elections.

In practice the multiplicity and sometimes mutually incompatible nature of the objectives make it essential to rank them. The more objectives there are, the more complex the entire privatization process.

As will be shown shortly, the reform activities carried out by the National Council on Privatization/Bureau of Public Enterprises are aimed at restricting the role of government to regulation and creation of institutions while the private sector runs the enterprises as can be seen in the ports in Nigeria¹⁵.

Other Challenges¹⁶

Other than the objectives, there are other challenges including:

a) Constitutional

The question often asked is whether privatization is constitutional given the provisions of section 16 of the Constitution of the Federal Republic of Nigeria, 1999, as amended¹⁷ dealing with economic objectives and whether the provisions of the Act are not inconsistent with the Constitution? Section 16 of the Constitution provides, *inter lia*, as follows:

- (1) *The State shall, within the context of the ideals and objectives for which provisions are made in this Constitution –*
(a) *harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self-reliant economy;*

¹⁵The concession of NnamdiAzikiwe International Airport was almost concluded before it was aborted. It was meant to be a pilot study. One major issue that led to its abortion was the conflict between the Federal Airports Authority and the Federal Capital Development Authority as to the ownership of the airport.

¹⁶ See Michel Kerf and Warrick Smith *Privatizing Africa's Infrastructure: Promise and Challenge* (The World Bank, Washington, DC, 1996

¹⁷Hereinafter referred to as "the Constitution".

- (b) *control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity;*
- (c) *without prejudice to its right to operate or participate in areas of the economy, other than the major sectors of the economy, manage and operate the major sectors of the economy;*

.....

- (2) *The State shall direct its policy towards ensuring -*
 - (a) *the promotion of a planned and balanced economic development;*
 - (b) *that the material resources of the nation are harnessed and distributed as best as possible to serve the common good;*
 - (c) *that the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or a of a group; and*

.....

- (3) *A body shall be set up by an Act of the National Assembly which shall have power –*
 - (a) *to review, from time to time, the ownership and control of business enterprises operating in Nigeria and make recommendations to the President on same; and*
 - (b) *to administer any law for the regulation of the ownership and control of such enterprises.*

Commenting on this provision, Sam Aluko¹⁸ stated thus:

The economic philosophy of the present Federal Government is hinged on the market: “that government has no business in business”. Therefore, all the existing government projects, plants, enterprises, refineries and shareholdings in industries, trade, banking, finance and agriculture must be privatised and sold, so that government, particularly the Federal Government, can concentrate on governance, forgetting that a government that cannot run an industry successfully cannot govern efficiently. So, the Bureau of Public Enterprises (BPE) has been very active, since the present regime came on board on May 29, 1999, in selling off enterprises, including houses and other landed properties owned by the Government. Such a philosophy violates the Nigerian Constitution not only by abandoning the control of the major sectors of the

¹⁸ Sam Aluko ‘Federal Government Reform Agenda and the Nigerian Economy: 1999-2007: A Critical Assessment: <http://www.nigeriavillagesquare.com/articles/guest-articles/the-nigerian-economy-1999-2007-a-critical-assessment.html>. See Also Omolete et al at 73-74, ‘Privatization in Nigeria: Critical Issues of Concern to Civil Society by OtiveIgbuzor delivered at the Power Mapping Roundtable organised by the Socio-Economic Rights Initiative (SERI) held at Niger Links Hotel, Abuja: 3 September, 2003.

Nigerian economy but also by offering Nigeria for sale to domestic and foreign private interests and concerns.

When the provisions of section 16 of the Constitution are read with the provisions of all enactments on privatization and commercialization¹⁹ and other relevant enactments²⁰ dealing with the review of the ownership structure and control of business enterprises operating in the country, it becomes clear that the ultimate goal of privatization includes the actualization of the economic objectives in the Constitution. As will be shown shortly, the reform activities including the drafting of the Competition Policy and the Federal Competition and the Consumer Protection Commission Bill are also aimed at meeting the economic objectives in the Constitution²¹. It is noteworthy that all commentators on this section 16 always reproduce section 16(1) to (2) and some times subsection (4) without reproducing subsection (3) that validates the enactments on privatization and control of the economy.

In Article 34 of the French Constitution of 1958, privatization requires parliamentary approval. The Constitutions of Benin²², Morocco²³, Senegal²⁴,

¹⁹ Especially the Act which provides for privatization and commercialization mode, partial and full privatization and commercialization, management of privatized and commercialized enterprises, allotment of shares, etc

²⁰ For example, the Nigerian Investment Promotion Commission Act, Cap N117, LFN, 2004, the Nigerian Communications Commission Act, 2003, the Electric Power Sector Reform Act 2005 and the Investments and Securities Act, 2007 and the enabling laws of all other regulatory authorities.

²¹Amadi, *Op Cit* at 163 has argued that the jurisprudential basis of the contention that privatization of public enterprises in Nigeria is unconstitutional is weak but that the privatization process flouts fundamental constitutional objectives. A thorough reading of Amadi's work will show that there was no proper demonstration of understanding of the concept and process of privatization. The assertions in the work are too general and lacked empirical evidence. For instance, at page xxv, Amadi asserted that the privatization process lacks credibility and transparency due partly to the method of divestment which emphasized core investor sale and not public offers. A cursory examination of the provisions of the Investments and Securities Act, 1999 or 2007 and the Nigerian Stock Exchange requirements for listing will show that almost all the public enterprises listed in the third phase had no track record to qualify for listing and therefore, public offers cannot be an option or a privatization method. In the first phase of the privatization exercise, as will be shown shortly, public offers were used because of the nature of the enterprises privatized and the enabling law so expressly provided but not industrial sectors like steel and aluminium, oil and gas, transport, insurance, paper and sugar companies that the enabling law provided for core investor sale if public offers are impossible. How could the National Fertilizer Company of Nigeria, Aluminium Smelter Company Plc or Ajaokuta Steel Company Limited or NITEL or NEPA or Delta Steel Company PLC, etc be privatized by way of public offers?

²²Article 98 of the Constitution provides that the rules pertaining to nationalizations and transfers of enterprises from the public to the private sector are a matter of law.

²³Article 35 of the 1972 Constitution (preserved in the 1992 Constitution) declares that the nationalization of enterprises and the transfer of enterprises from the public to the private sector are matters of law.

Togo²⁵ and other countries with French legal tradition requirement parliamentary approval.

b) Do we need a law on privatization? This varies from country to country but in Nigeria, we have the Act. In countries like the UK, Australia, Malaysia and New Zealand, there is no enabling legislation. In such systems it is generally considered that in the absence of explicit prohibition, the government possesses inherent power to privatize public assets and enterprises without the need for special legislative authorization.

c) Legal

The legal status of SOEs to be privatized varies greatly and affects the choice of privatization techniques. For example, it is easier to privatize SOEs established under the provisions of the Companies and Allied Matters Act (CAMA)²⁶ than those established under statute. That was why it was easier to privatize (or attempt to privatize) NITEL than NEPA or the Ports and Railways. Indeed, in the first phase of the privatization programme, almost all the enterprises were limited liability companies. This can be contrasted with the third phase dealing with the industrial sectors.

d) Purpose of Governance

The other challenge is 'what is the purpose of governance'? It is argued that under the social contract theory of Locke and Rousseau, it is the duty of government to provide public goods and, therefore, such public goods should not be privatized. Originally some of the public goods exhibited natural monopolies and the initial capital outlay was high. It was thought that they were best provided by government. However, with information technology and the

²⁴Article 56 of the Constitution of March 7, 1962 states that 'the National Assembly shall hold the legislative power. It alone shall vote the laws. The rules concerning....nationalization of enterprises and transfer of enterprise from the public to the private sector shall be established by law'. As mandated by the Constitution, Law No. 87-23 of August 18, 1987, permits privatization of the SOEs listed in a schedule annexed to the law.

²⁵²⁵ In Togo, privatization has been carried out without any special enabling legislation. The 1979 Constitution did not list privatization among the matters that are within the exclusive jurisdiction of parliament. This situation changed, however, with the constitutional revision of October 14, 1992. The Constitution's new Article 84 provide that 'the rules concerning nationalization of enterprises and transfer of ownership of public sector enterprises to the private sector shall be set by law'

²⁶ Cap C20, Laws of the Federation of Nigeria, 2004

knowledge and resources available to the private sector, this argument is being faulted.

e) Valuation Methods

When a public enterprise is to be privatized whether by share sale or asset sale, the critical question is what valuation method should be adopted. Should it be the historical cost, book value, replacement cost, discounted cash flow and a combination of some of all? Empirically even when a method is adopted, different valuers will give different values. What happens if the book value is highly inflated. For example, at the time that the Aluminium Smelter Company Plc at IkotAbasi, Akwalbom State was to be privatized, the book value was about \$3bn; the plant was not producing, the cost to government of maintaining the plant and other personnel and overhead cost was N134m monthly, construction was incomplete and the cost of a new plant was about \$1bn. More fundamentally, while gas supply was critical to the operations of the plant, there was no gas plant around and the plant was dependent on the Nigerian Gas Company Limited for the supply of gas. Secondly if gas is supplied at commercial rate, the plant was not viable unless subsidized by government.

This scenario was replicated at the Delta Steel Company Plc at Aladja, near Warri, the Ajaokuta Steel Company Limited, the Nigerian Iron Ore Mining Company Ltd, the Steel companies at Jos, Katsina, and Oshogbo; the car assembly plants at Bauchi, Kaduna, Ibadan and Lagos; the paper companies at Iwopin, Oku Ibokun, Jebba; the sugar companies at Sunti, Lafiaji and Bacita. Most of these companies were shut down before they were listed for privatization and yet the workers will still being paid.

Whatever method is adopted, the value of a public enterprise is what a prudent buyer is willing to pay for it despite the seller's valuation methods.

f) Transaction Cost

Before a public enterprise is taken to the point of sale and there is completion and proceeds received, costs are incurred. Transaction Advisers – legal, technical, financial and management are usually engaged. The privatization agency, the Bureau of Public Enterprises (BPE), incur other costs including

enterprise visit, due diligence, and data room exercise. Unfortunately, there is no budgetary allocation for the purpose of privatizing any public enterprise and yet, section 19 of the Act provides thus:

- (1) There is hereby established in the Central Bank of Nigeria an account to be known as the Privatization Proceeds Account into which shall be paid **all proceeds** received from the privatization of public enterprises before and after the commencement of this Act.*
- (2) The funds in the account established under subsection (1) of this section shall be utilized for such purposes as may be determined by the Government of the Federation from time to time. (emphasis added)*

The critical question is what is the meaning of 'all proceeds'. Does it refer to the gross proceeds or net proceeds? The position of the BPE is that since there is no budgetary allocation for privatization, the proper construction is that it is the net proceeds but the National Assembly feels otherwise.

g) Stakeholders

World wide, privatization is unpopular. The concept itself is emotive and controversial essentially because it means several things to several stakeholders. The issue here is how the various interests are to be reconciled. The stakeholders include the Federal Government, President of the Federal Republic of Nigeria, the Vice-President who is also the Chairman of the National Council on Privatization (NCP), other members of the NCP especially the Minister of Finance and the supervising Minister of the public enterprise to be privatized, the Managing Director of the public enterprise, the unions, the workers, the pensioners, the Nigerian public and the Development Partners.

h) Strategic/Core Investor

Section 33 of the Act defines a 'strategic investor' as a reputable core investor or group of investors having the requisite technical expertise, managerial experience and the financial capacity to effectively contribute to the management of the enterprises to be privatized. All the stakeholders are interested in who emerges as the core investor. In such choice, should the focus be on technical or managerial or financial giving the conflicting objectives of privatization?

i) Privatization Methods²⁷

Privatization methods include share sale or core investor sale, asset sale, management contract, public offer, private placement, leases, auctions, concession, sale by share issue, debt-equity swap, management/employee buy out and guided liquidation. How do you determine the best method for a particular public enterprise?

j) The Post Acquisition Plan (PAP)

In the third phase of the privatization programme, all core investor sales were accompanied by a Post Acquisition Plan (PAP). The challenge posed here is if the investor pays too high for the public enterprise so as to increase the revenue to the treasury, there may be no funds for rehabilitating the public enterprise. What should be the proper policy of government – pay very high purchase price and forget about revamping the sector or pay low and have funds to turn around the public enterprise?

Lastly there is the fear of creating private monopolies from public monopolies. The rest of this paper will be devoted to addressing the privatization challenge.

Part III First Phase (1988-1993)

Any casual observer of the Nigerian economy since the colonial period through independence especially during the oil boom era of the 1970s, will observe a large parastatal sector. In the words of Zayyad²⁸

The parastatal sector is composed of such economic activities as banking and insurance; oil prospecting, exploration, refining and marketing; cement, paper and steel mills; hotels and tourism; sugar estates; etc. A survey undertaken by the Technical Committee on Privatisation and Commercialization (TCPC) shows that there are nearly 600 public enterprises at the federal (national) level alone, and an estimated 900 at the state (regional) and local government levels. The estimated 1,500 public enterprises in Nigeria account for between 30 and 40 per cent of fixed capital investments and the same proportion of formal sector employment. . . . These investments were valued at over

²⁷ See Bureau of Public Enterprises' Privatization Procedures Manual, March 2006 p 20

²⁸ H R Zayyad *Privatization and Commercialization in*

Nigeria: <http://unpan1.un.org/intradoc/groups/public/documents/aapam/unpan028228.pdf>

N36 billion at their historical book values. The returns from these investments had never exceeded two per cent per annum, which is less than 25 per cent of the annual subventions from the government to the public enterprise sector.

Of course, with the oil boom of the 1970s, nobody was concerned with the large size until the fall in the world market for oil in the 1980s. More fundamentally, these public enterprises were accused of misuse of monopoly powers, defective capital structure, bureaucratic red tape in their relations with supervising ministers, mismanagement, nepotism and corruption. It became clear, therefore that the government could not support such activities and the programme of privatization and commercialization was embarked as part of the Structural Adjustment Programme of 1986.

The first legal framework for the privatization programme was the Privatization and Commercialization Decree²⁹. This marks the first phase in the privatization programme in Nigeria. The Privatization and Commercialization Act had three parts, namely, Part I dealing with privatization (sections 1 – 11), Part II dealing with commercialization (sections 12- 13) and Part III dealing with miscellaneous matters. (sections 14 – 15). Section 1 listed public enterprises for partial³⁰ and full privatization³¹ while section 3 provides for the establishment and composition of the Technical Committee on Privatization and Commercialization. The functions of this Committee are spelt in section 4 of the Privatization and Commercialization Act. The privatization method was expressly stated in section 6 of the Privatization and Commercialization Act as offer for sale in the capital market. The choice of this method was the need to ensure wider share ownership in Nigeria and the desire to extend the frontiers and depth of the Nigerian capital market.

²⁹ No. 25 of 1988 which later became an Act of Parliament and Cap 369, Laws of the Federation of Nigeria, 1990 (hereinafter referred to as “the Privatization and Commercialization Act”)

³⁰In the First Schedule, Part I, 11 Commercial and Merchant Banks, 4 Agricultural, Cooperative and Development Banks, 3 Oil Marketing Companies, 3 Steel Rolling Mills, 3 Air and Sea Travel Companies, 4 Fertilizer Companies, 3 Paper Mills, 3 Sugar Companies, 5 Cement Companies, and 6 Motor Vehicles and Truck Assembly Companies were listed for partial privatization. In these public enterprises the shares held by the Federal Government varied from 31.53% to 100%.

³¹ In the First Schedule, Part II, 65 enterprises were listed for full privatization. On the whole a total of 111 enterprises were to be privatized. Out of this number, 88 enterprises were privatized in the first four years. See Final Report of the Technical Committee on Privatization and Commercialization, page 14

Under section 7, not less than 10 per cent and not more than 20 per cent of the total shares on offer shall be allotted to associations and interest groups such as, but not limited to, State Investment Agencies, workers, trade unions, market women organizations, universities, friendly societies, local and community associations. Similarly, not more than 10 per cent of the shares on offer shall be reserved for the staff of the company.

Section 12 of the Privatization and Commercialization Act provides for partial³² and full³³ commercialization of enterprises and when commercialized, such fully commercialized enterprises were expected to operate as purely commercial enterprises, without any subvention from government while those to be partially commercialized still received subvention from government but with a high level of autonomy..

From the categorization, it is clear that enterprises for privatization (either partial or full) are those incorporated under the provisions of the relevant company enactment while those to be commercialized were essentially statutory corporations. Similarly whereas enterprises to be privatized required divestiture, no divestiture is involved in the case of commercialization. In all 110 enterprises were to be privatized while 35 were slated for commercialization.

In the Final Report of the Technical Committee on Privatization and Commercialization³⁴, the Committee stated that seven enterprises were unprivatizable in their present conditions for reasons ranging from technical insolvency to un auspicious operation environment.³⁵

In the case of enterprises for commercialization, Reform Packages and Performance Agreements were prepared. The Performance Agreements entered into with some of the enterprises.³⁶

³² In the Second Schedule, Part I, 14 enterprises were listed for partial commercialization.

³³ In the Second Schedule, Part II, 11 enterprises were listed for full commercialization. On the whole a total of 35 enterprises were to be commercialized.

³⁴ 4 June, 1993 at page vii

³⁵ The enterprises are the three Inland Steel Rolling Mills that were eventually liquidated; the paper mills at Jebba and Oku Ibokun (eventually liquidated), Savannah Sugar Company Limited (was privatized in 2002 with a high debt overhand) and the Nigerian National Shipping Line Limited.

³⁶ Such enterprises include Nigerian Airports Authority, National Power Plc (created out of NEPA), Nigerian Security, Printing & Minting Company, Eleven River Basin Development Authorities

Part IV Second Phase (1993-1999)

The promulgation of the Bureau of Public Enterprises Decree³⁷ marked the second phase of the privatization and commercialization programme in Nigeria. The BPE Act is in four parts, namely, Part I dealing with the establishment of the Bureau of Public Enterprises (sections 1 – 9), Part II with Financial Provisions (sections 10 -12), Part III with Privatization and Commercialization (sections 13 -18), Part IV with Public Enterprises Arbitration Panel (sections 19 – 22) and Part VI with miscellaneous matters (sections 23 – 27).

In place of the Technical Committee on Privatization and Commercialization, section 1 of the BPE Act established the Bureau of Public Enterprises while section 3 deals with its functions. Section 13 of the BPE Act is *inparimateria* with sections 1 and 6 of the Privatization and Commercialization Act. In other words, enterprises are listed for partial³⁸ and full³⁹ privatization and the method is offer for sale or private placement. Similarly section 14 of the BPE Act is *in parimateria* with section 7 of the Privatization and Commercialization Act in terms of allotment of shares except that subsection (5) of section 14 of the BPE Act introduced allotment to the indigenes of each State of the Federation and the residents of the Federal Capital Territory, Abuja.

Sections 17 and 18 of the BPE Act which are *in parimateria*⁴⁰ with sections 12 and 13 of the Privatization and Commercialization Act, dealing with partial⁴¹ and full⁴² commercialization and the status of commercialized enterprises.

Section 19 of the BPE Act provides for the establishment of Public Enterprises Arbitration Panel. The powers of the Panel are spelt out in section 20 of the BPE Act. Unfortunately, the powers of the Panel are limited to disputes arising under a

³⁷ Decree No. 78 of 1993 (hereinafter referred to as “the BPE Act”)

³⁸ In the Second Schedule, Part I, 3 Oil Marketing Companies, 3 Steel Rolling Mills, 2 Fertilizer Companies, 3 Newsprint Companies, 3 Sugar Companies, 4 Cement Companies and 1 Transport Company are listed for partial privatization. The shareholding ranged from 31.53% to 100%.

³⁹ In the Second Schedule, Part II, 13 Commercial and Merchant Banks, 13 Insurance Companies, 4 Hotels, 2 Salt Companies, 2 Textile Mills, 3 Transport Companies, 3 Breweries, 2 Wood Processing Companies and 6 Motor vehicle and Truck Assembly Companies were listed for full privatization

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⁴¹ In the Third Schedule, Part I, 23 enterprises were listed for partial commercialization.

⁴² In the Third Schedule, Part II, 14 enterprises were listed for full commercialization.

Performance Agreement prepared pursuant to the commercialization of an enterprises. Similarly the provisions of the Arbitration and Conciliation Act are not applicable to any matter which is the subject of arbitration under the BPE Act. Due to these limitations, the Panel was never set up.

Section 25 of the BPE Act repealed the provisions of the Privatization and Commercialization Act.

Unquestionably, the privatization programme was truncated during the second phase essentially due to stiff opposition and considerable controversy generated in the first phase especially the structural imbalance in the distribution of shares between the North and South of Nigeria. It is not on record that the Bureau of Public Enterprises that replaced the Technical Committee carried out any privatization exercise in terms of conclusion of any transaction during the period.

Part V Third Phase (1999- Present)

The third phase of the privatization programme was heralded with the promulgation of the Public Enterprises (Privatization and Commercialization) Decree⁴³. In his broadcast to the nation in October 1998, General AbdusalamAbubakar reaffirmed his commitment to the privatization programme and launched the third phase and set up the legal machinery for its actualization. The importance that the Federal Government attached to the privatization programme can be garnered from the Address by President OlusegunObasanjo on the occasion of the inauguration of the National Council on Privatization on 6 July, 1999 titled 'The Imperative of Privatization'⁴⁴ President Obasanjo, stated *inter alia*

Today's inauguration of the National Council on Privatization is, therefore, very significant in several important respects. Firstly, it is a critical step in our Administration's socio-economic agenda. Secondly, it is a demonstration of our commitment to institutional reforms. Thirdly, the response of stakeholders in the months ahead will enable us determine, with a great measure of accuracy, the extent to which we have regained international faith and confidence in our country in general and in our economy in particular.

⁴³ No. No. 28 of 1999, now Cap P38, Laws of the Federation of Nigeria, 2004 – the Act.

⁴⁴ See National Council on Privatization Handbook, 2nd Edition, May, 2000 pp 3 - 6

The Act, more than the two earlier enactments made far reaching provisions⁴⁵. Like the other two, the Act has six parts, namely, Part I dealing with privatization and commercialization⁴⁶ (sections 1 – 8), Part II deals with the establishment, tenure and functions of the National Council on Privatization (sections 9 – 11), Part III deals with the establishment, functions and powers of the Bureau of Public Enterprises, among others (sections 12 – 22), Part IV with Legal Proceedings (sections 23 – 26), Part V with the Public Enterprises Arbitration Panel (sections 27-30) and Part VI with miscellaneous provisions (sections 31 – 35).

One major difference between the provisions of the Act and the Privatization and Commercialization Act is section 2 of the Act dealing with mode of privatization⁴⁷. Unlike the other enactments that provide for offer for sale through the capital market or private placement only, section 2(3) of the Act provides that if shares cannot be offered for sale or private placement, the National Council on Privatization “may approve that the shares be offered for sale through a willing seller and willing buyer basis or through any other means”. It is in exercise of this power, the other privatization methods were adopted by the National Council on Privatization, acting through its Secretariat, the Bureau of Public Enterprises.

Another major difference is section 3 of the Act which empowers the Government of the Federation to further divest of its shareholding in the privatized enterprises in accordance with the policy guidelines and decisions issued, from time to time, by the National Council on Privatization and section 4 of the Act that provides for strategic (core) investor sale on such terms and conditions as may be agreed upon.

One anomaly in all the enactments is the provision that shares should be reserved for staff of the public enterprises to be privatized and the shares shall be held in trust by the public enterprises for its employees without indicating how the shares are to be paid for.⁴⁸ Are they to be paid for by the staff or the public enterprises?

⁴⁵ See Wale Babalakin ‘Legal Dynamics of Privatisation in Nigeria’ being a Paper presented at a Roundtable organized by First Bank of Nigeria in 2003 page 4

<http://www.babalakinandco.com/documents/LEGALDYNAMICSOFPRIVATISATION.pdf>

⁴⁶ The First Schedule to the Act deals with Privatization (Partial and Full) while the Second Schedule deals with Commercialization (Partial and Full). The enterprises are essentially the same as those in earlier enactments.

⁴⁷ See also section 13(5) of the BPE Act though the provisions in the Act are broader than those in the BPE Act.

⁴⁸ See section 5(3) of the Act.

Between 1999 and 2003, over 30 public enterprises were privatized⁴⁹ and from 2000 to 2007, 148 public enterprises were privatized (including the lease agreements [concession] of the terminal ports in Lagos, Calabar, Warri and Port Harcourt)⁵⁰.

It must be stated that whereas most of the enterprises listed in the First Phase were doing well and some already listed in the Stock Exchange, almost all the enterprises in the third phase could not meet the requirements of listing. Consequently the provisions in the enactments for sale by way of public offer or private placement could not be carried out in the third phase. The most viable option was that of strategic (core) investor sale who will turn around the enterprise and then ensure that it is listed. All the attempts made to list the shares of Sheraton Hotels and Towers, Abuja and that of Nigerdock Plc in the Nigerian Stock Exchange failed because they could not meet the listing requirements. The two enterprises likely to meet these requirements are the Eleme Petrochemical Company Limited and Transcorp Hilton Hotel. The Nigerian Aviation Handling Company PLC was privatized by way of share flotation.

Part VI Reform Activities

The critical importance of well-performing public institutions and good governance for development and poverty reduction has come to the forefront in the 21st century. Just as it was increasingly recognized in the 1980s that individual investment projects are less likely to succeed in a distorted policy environment, so it has become obvious in the 21st century that neither good policies nor good investments are likely to emerge and be sustainable in an environment with dysfunctional institutions and poor governance.⁵¹ Put

⁴⁹ Othman, Op Cit at v

⁵⁰ See the Bureau of Public Enterprises' Public Enterprises (Privatization and Commercialization) Act, 1999 published in May 2007, pp 44 – 53. It should be stressed that some transactions in the extractive industries sector (lead, zinc, barytes, salt in Cross River State, tin and allied mineral products in Plateau State, bitumen, kaolin, feldspar/quartz, etc) were subsequently aborted and are now being re-privatized

⁵¹ See Reforming Public Institutions and Strengthening Governance, A World Bank Strategy, November 2000 (The World Bank, Washington DC, 2000) p vii. See also The World Bank, Public-Private Infrastructure Advisory Facility: Private Participation in Infrastructure: Trends in Developing Countries in 1990-2001 (The World Bank, Washington, DC, 2003), Ashoka Mody (ed) *Infrastructure Delivery: Private Initiative and the Public Good* (The World Bank, Washington, DC, 1996), Michael U Klein and Bitahadijimichael *The Private Sector in Development: Entrepreneurship, Regulation and Competitive Disciplines* (The World Bank, Washington, DC, 2003), J Edgardo

differently, privatization and commercialization in Nigeria and the attraction of private investors to infrastructure delivery will be a mirage unless institutional reforms take place.

Globally, the last two decades have seen a fundamental shift in the paradigm of infrastructure delivery around the world. Governments in industrial and developing countries alike are retreating from owning and operating infrastructure and are focusing more on regulating and facilitating infrastructure delivery services provided by private firms. In the words of Cleaver⁵²

This shift offers the promise of more efficient investment in and operation of infrastructure services, as well as the potential to shift the burden of new investment from public budgets to the private sector. Particularly for developing countries, infrastructure privatization may also unleash large inflows of foreign direct investment and help develop local capital markets. In addition, bold privatization programs can send a clear message to international capital markets, the wider investor community and the local populace that governments are committed to improvement economic management.

The need to manage the Nigeria's economy efficiently can also be felt when considered along 183 countries. *Doing Business 2012*⁵³ is in its ninth edition. *Doing Business 2012* in a series of annual reports investigating the regulations that enhance business activity and those that constrain it in developed and developing countries has consistently shown that Nigeria lags behind other countries in Africa.⁵⁴ Out of about 183 countries, Nigeria came 114 in 2008⁵⁵, 118 in 2009⁵⁶, 125 in 2010⁵⁷, 133 in 2011⁵⁸ and 133 in

Campos and Jose Luis Syquia *Managing the Politics of Reform* (The World Bank, Washington, DC, 2006), Frank Sader *Attracting Foreign Direct Investment Into Infrastructure: Why Is It So Difficult* (The World Bank, Washington, DC, 2000), Timothy C Irwin *Government Guarantees: Allocating and Valuing Risk in Privately Financed Infrastructure Projects* (The World Bank, Washington, DC, 2007) and Tomoko Matsukawa and Odo Habeck *Review of Risk Mitigation Instruments for Infrastructure Financing and Recent Trends and Developments* (The World Bank, Washington, DC, 2007)

⁵² See Kevin M Cleaver, Foreword to Michel Kerf and Warrick Smith, Op Cit at vii

⁵³ A Publication of The World Bank and International Finance Corporation (The World Bank, Washington, DC, 2012)

⁵⁴ *Doing Business* focuses on key areas like starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting investors, paying taxes, trading across borders, enforcing contracts, resolving insolvency (formerly closing of business) and employing workers.

⁵⁵ *Doing Business 2008*, page 6

⁵⁶ *Doing Business 2009*, page 6

⁵⁷ *Doing Business 2010*, page 4

⁵⁸ *Doing Business 2011*, page 4

2012⁵⁹. Countries like South Africa, Botswana, Zambia, Morocco, Kenya, Egypt, Ethiopia, Uganda and Tanzania have consistently done better than Nigeria in this index. For instance in 2011 and 2012, South Africa came 36 and 35 respectively.

In 2005, the Infrastructure Concession Regulatory Commission Act was passed to provide a regulatory environment for the attraction of private sector participants to the delivery of infrastructure in Nigeria. This is consistent with the Government policy in fostering public-private partnership (PPP) in infrastructure delivery. In a sector where the Minister has a domineering role, no private sector participant will feel safe to invest. There was therefore the need to confine the Ministers to policy formulation where an independent regulator like the Nigerian Communications Commission and the Nigerian Electricity Regulatory Commission will regulate the key economic sectors. PPP can only thrive where the proper regulatory environment is created.⁶⁰

The National Council on Privatization (NCP) and the Bureau of Public Enterprises (BPE) have been known for privatization and commercialization without any regard to their reform activities. The NCP/BPE was involved in the drafting and passage of the following laws:

- a) Nigerian Communications Commission Act, 2003
- b) Pension Reform Act, 2004
- c) Electric Power Sector Reform Act, 2005
- d) The Civil Aviation Act, 2006
- e) The Minerals and Mining Act, 2007

Since 2002, the NCP/BPE has been working on the following reform bills, namely,

- i) Federal Competition and Consumer Protection Bill
- ii) The Ports & Harbours Bill
- iii) The Petroleum Industry Bill

⁵⁹*Doing Business 2012*, page 6

⁶⁰ Nicholas Avery (ed) *Public-Private Partnerships* (London: Global Business Publishing Ltd, 2006), Darrin Grimsey and Mervyn K Lewis *Public-Private Partnerships* (Cheltenham: Edward Elgar Publishing Ltd, 2007), Denton Wilde Sapte LLP *Public Private Partnerships: BOT Techniques and Project Finance* (2ndEdn, London: Euromoney Institutional Investor Plc, 2006), J Luis Guasch *Granting and Renegotiating Infrastructure Concessions: Doing It Right* (The World Bank, Washington, DC, 2004) , HK Yong (ed) *Public Private Partnerships Policy and Practice* (London: Commonwealth Secretariat, 2010), Gerd Schwartz et al (eds) *Public Investment and Public Private Partnerships* (New York: Palgrave Macmillan, 2008), John D Finnerty *Project Financing* (New York: John Wiley & Sons, Inc, 1996) and Scott L Hoffman *The Law and Business of International Project Finance* (3rdEdn, Cambridge, Cambridge University Press, 2008).

- iv) The Nigerian Railway Authority Bill
- v) The National Postal Commission Bill
- vi) The National Transport Commission Bill
- vii) The Road Sector Reform Bill
- viii) Inland Waterways Authority

The aim of these bills is to open the sectors to private sector participation and limit the role of government to policy formulation. The objectives of the bills can be summarized thus:

Federal Competition and Consumer Protection Bill

The objectives of the Bill are:

- a) To promote competition in the Nigerian economy;
- b) To ensure fair trading practices, efficiency, equal opportunities for all players in production, trade and commerce;
- c) To guarantee adaptability and balanced development of the Nigerian economy; and
- d) To protect consumers and end users of products and services from exploitation, unfair trade practices, price collusion etc.

To achieve these, the bill seeks to, among others:

- i) Repeal the Consumer Protection Council Act and harmonize its provisions into the new bill;
- ii) Repeal certain aspects of the Investment and Securities Act that conflicts with the intendment of the Act and its institutional arrangements;
- iii) Promote the welfare and interests of consumers and provide them with competitive prices and product choices;
- iv) Expand the space for domestic and foreign competition in a globalised market in Nigeria;
- v) Regulate monopolies, mergers/acquisition and all forms of business combinations; and
- vi) Prohibit restrictive business practices which prevent, restrict or distort competition or constitute the abuse of a dominant position of market power in Nigeria.

Two institutions will be created under the bill, namely, the Federal Competition and the Consumer Protection Commission and the Competition Tribunal with specific functions.

The Ports & Harbours Bill

The Bill seeks:

- a) To provide an appropriate institutional framework for the ownership, management, operation, development and control of ports and harbour to ensure the integrity, efficiency and safety of the ports based on the principles of accountability, competition, fairness and transparency;
- b) To repeal the Nigerian Ports Authority Act, No 38 of 1999;
- c) To separate landlord from operations and regulatory functions in ports and harbour;
- d) To promote efficiency in ports operations nationwide;
- e) To encourage competitive, qualitative and cost effective ports services;
- f) To reduce costs to government for provision of ports services;
- g) To encourage private investment in port infrastructure;
- h) To promote private sector participation in the provision of port services and facilities; and
- i) To promote and safeguard Nigeria's competitiveness and trade objectives.

The bill provides for the creation of a National Ports and Harbour Authority that will perform regulatory functions.

The Petroleum Industry Bill

The objectives of the Bill are to:

- a) enhance exploration and exploitation of petroleum resources in Nigeria and to promote petroleum production for the benefit of the Nigerian people;
- b) create a conducive business environment for petroleum operations;
- c) establish a progressive fiscal framework that encourages further investment in the petroleum industry whilst optimising accruable revenues to the Federal Government of Nigeria;
- d) establish a commercially oriented and profit driven National Oil Company;
- e) deregulate and liberalise the downstream petroleum sector;
- f) create efficient and effective regulatory entity;
- g) promote transparency, simplicity and openness;
- h) promote the development of Nigerian Content in the petroleum industry;
- i) protect health, safety and environment; and
- j) optimise domestic gas supplies, in particular for power generation and industrial development.

Various institutions will be created with specific functions.

The Nigerian Railway Corporation Bill

The bill seeks to:

- a) To Repeal the Nigerian Railway Corporation Act, 1955;
- b) To provide the appropriate market design and legal framework for the implementation of Government's reform programme;
- c) To clearly separate the roles of policy making, regulation and operation;
- d) To provide a platform for the introduction of private sector concessionaires;

- e) To make provision for economic and safety regulation by the National Transport Commission;
- f) To promote competition in the provision of railway services nationwide;
- g) Provide for the compulsory acquisition of land and Greenfield developments; and
- h) Introduce the provision of subsidies for public service obligations.

The National Postal Commission Bill

The Bill seeks to:-

- a) Repeal the Nigerian Postal Service Act, 1992;
- b) To promote the implementation of the National Postal Policy;
- c) Establish a regulatory framework for the postal industry;
- d) Promote the provision of modern universal, efficient and easily accessible postal services;
- e) Encourage private investments;
- f) Ensure fair competition in the postal industry;
- g) Encourage the development of postal service – manufacturing and supply sector within the economy;
- h) Protect the right and interest of service providers and consumers;
- i) Ensure that the needs of the disabled and elderly persons are taken into consideration;
- j) Ensure an efficient management including planning;
- k) Coordination, allocation and use of scarce national resources in the postal sector; and
- l) Establish the Nigerian Postal Commission with responsibility for the regulation of the postal sector.

The National Transport Commission Bill

The draft Bill seeks to establish the National Transport Commission (NTC) designed to be a multi-modal/sector regulator covering the transport sub-sectors of roads, rail, and marine. The NTC would introduce synergy and inter-modalism in the transport sector that has in the past operated in a haphazard and un-coordinated manner. It would perform roles akin to those of the Nigerian Communications Commission (NCC) for the telecommunication sector and the Nigerian Electricity Regulatory Commission (NERC) for the electric power sector.

In addition to the establishment of the NTC to be an effective, impartial and independent economic regulator of the regulated transport industry; the other objectives of the bill include:

- a) to promote the implementation of the national transport policy;
- b) to provide for an economic regulatory framework for the provision of services and supply of goods in the transport sector or regulated transport industry;
- c) to provide a mechanism for monitoring compliance of government agencies and transport operators in the regulated transport industry and provide advice to the Federal Government on matters relating to economic regulation of the regulated transport industry;
- d) to provide for an efficient operation and regulation of the transport sector through the consolidation and the removal of multiple and duplicate regulatory functions by the Federal Government and its Agencies;
- e) to protect the rights and interests of service operators and users within Nigeria; and
- f) to create an enabling environment for private sector participation in the provision of services in the transport sector.

The Road Sector Reform Bill

The bill seeks to provide the legal framework that will, among others:

- a) Repeal the Federal Roads Maintenance Agency (Establishment, etc) Act No 7 of 2002 and subsequent amendments;
- b) Improve service delivery;
- c) Create improved institutional structures;
- d) Separate policy functions from operations and management;
- e) Ensure improved funding of the sector;
- f) Involve the private sector in the financing and management of the sector;
- g) Encourage road users to use roads more responsibly and contribute to the cost of maintaining the road assets;
- h) Promote the sustainable development and operation of the road sector; and
- i) Facilitate the development of competitive markets and the promotion of enabling environment for the private sector participation in the financing, maintenance and improvement of roads in Nigeria.

Two institutions, namely, the National Road Board/Fund and the Federal Roads Management Authority, will be created under the bill with specific functions.

Inland Waterways Authority

The Bill seeks to:

- a) repeal the National Inland Waterways Authority Act 1997 and establish the Inland Waterways Authority of Nigeria, and locate its operations within the overall national transport sector reform policy with a view to improving efficiency in service delivery;

- b) attract private sector participation in management, infrastructure and technology development of the inland waterways and thereby reduce cost of transportation and service delivery;
- c) enhance competition;
- d) minimize the public treasury dependence of inland waterways development;
- e) provide for the management, control, operation and development of the inland waterways, private sector participation in the subsector; the regulation of the inland waterways; and other matters connected therewith; and
- f) reform the inland waterways subsector presently comatose owing to under-development, poor performance and exclusion of private operators, lack of infrastructure, inadequate funding and non-realization of sub-sector potential among others.

Part VII The Journey So Far

In the first phase, the enterprises scheduled for privatization – partial and full – include:

- ✓ Savannah Bank of Nigeria Limited
- ✓ Union Bank of Nigeria Limited
- ✓ United Bank for Africa Limited
- ✓ International Bank for West Africa Limited
- ✓ Allied Bank of Nigeria Limited
- ✓ Continental Merchant Bank Limited
- ✓ Nigeria Arab Bank Limited
- ✓ Nigeria Merchant Bank Limited
- ✓ First Bank of Nigeria Limited
- ✓ NAL Merchant Bank Limited
- ✓ Merchant Bank of Africa
- ✓ Federal Mortgage Bank of Nigeria
- ✓ Nigerian Industrial Development Bank Limited
- ✓ Nigeria Bank for Commerce and Industry Limited
- ✓ Federal Savings Bank
- ✓ Unipetrol
- ✓ National Oil and Chemical Company Limited
- ✓ African Petroleum Limited

- ✓ Nigerian Airways Limited Nigeria National Shipping Line Limited
- ✓ Nigerian Superphosphate Fertilizer Company Limited
- ✓ National Fertilizer Company Limited
- ✓ Nigeria National Paper Manufacturing Company Limited
- ✓ Nigeria News Print Manufacturing Company Limited
- ✓ Nigeria Paper Mills Limited

Others include the sugar companies, cement companies and motor vehicle and truck assembly companies. Out of the 111 SOEs, 88 were privatized.

It is easy to see, therefore, why in the first phase, the method of privatization adopted was that of offer for sale or private placement. All the enterprises slated for privatization were companies incorporated under the provisions of the relevant company law and did not require any restructuring or repeal of any enabling law before privatization can be carried out.

In the second phase, some of these enterprises were also listed for either partial or full privatization. Realizing the difficulty in privatizing all the enterprises listed by way of offer for sale or private placement, section 13(5) of the BPE Act provides thus:

Where an enterprise is not fit for privatization by public issue of shares or by private placement, the Bureau on approval from the Federal Government shall privatize the enterprise through a willing seller or willing buyer basis or through the process of asset stripping.

This was how Asset Sale became a privatization method adopted from the second phase till date.

In the third phase, the enterprises slated for partial or full privatization include:

- Nigerian Telecommunication Plc⁶¹
- Nigeria Mobil Telecommunications Ltd
- National Electric Power Authority
- Port Harcourt Refinery
- Kaduna Refinery and Petrochemicals
- Warri Refinery and Petrochemicals
- Eleme Petrochemicals Limited

⁶¹ In the first and second phases, NITEL was listed for full commercialization. After its commercialization, it was listed for partial privatization in the third phase.

- Federal Superphosphate Fertilizer Company Limited
- National Fertilizer Company Limited
- Nigeria Machine Tools Limited
- The steel companies in Jos, Katsina, Oshogbo, Ajaokuta, Delta and IkotAbasi
- Nigerian Coal Corporation
- Nigerian Iron Ore Mining Company Limited
- Daily Times of Nigeria Plc
- NICON Insurance Plc⁶²
- Nigerian Reinsurance Plc
- Federal Airport Authority
- Nigerdock Limited
- Nigeria Airways Authority
- Nigeria Paper Mills
- Lafiaji Sugar Company
- The cement companies at Ashaka, Benue, Sokoto, Nkalagu, Calabar and Ewekoro
- The motor vehicles and truck assembly companies in Enugu, Ibadan, Kaduna, Lagos, and Bauchi.

From 1999 when the third phase commenced none of the above enterprise could be privatized by way of offer for sale or private placement and hence the change of strategy from offer for sale to core investor sale. The idea was that the core investor will turn around the enterprises and then offer the shares for sale as was done in the case of Benue Cement Company Plc. Unfortunately, this objective has not been achieved due to various factors including debt overhang, pension liabilities, tax liabilities, staff salaries, unfavourable economic climate and corruption. In the third phase, 148 SOEs were privatized.

To assist the privatization process, the Technical Committee on Privatization and Commercialised issued Guidelines on Privatization and Commercialization of

⁶² Created out of NICON Insurance Corporation that was earlier slated for full commercialization

Government Enterprises⁶³; in 1999, the National Council on Privatization issued the Guidelines on Privatization and Commercialization and in March 2006 issued the Privatization Procedures Manual. These documents clearly set out the sequencing of transactions for offer for sale, debt conversion programme, core investor sale and 'guided liquidation' and how Transaction Advisers are to be procured.

With the assistance of development partners like the USAID, the World Bank and the DFID, the World Bank Guidelines on the procurement of works, goods and services were used in the privatization exercise.

In giving the word 'privatization' its broad interpretation, the NCP/BPE privatized the ports by way of leases (concession) and embarked on all forms of public-private partnerships.

The three main sectors yet to be fully reformed and privatized are the power sector, the petroleum sector and the extractive industries. In the case of the former, after the passage of the Electric Power Sector Reform Act, 2005, the assets and liabilities of the National Electric Power Authority (NEPA) were transferred to the Power Holding Company of Nigeria Plc. (PHCN). NEPA was unbundled into transmission, generation and distribution and 18 successor companies incorporated to carry out these functions. At the moment, assets and liabilities of PHCN have been transferred to the successor companies and the successor companies are, in turn, being privatized. The BPE has issued Request for Proposals (RFP) to pre-qualified bidders. The deadline for submission of bids for generation companies (gencos) is July 17, 2012 and for distribution companies (discos) is July 31, 2012.

The reform is progressing well. BPE has just entered into a management contract with Manitoba Hydro for the management of the grid system. This includes systems operation, market operations and transmission network operations.

BPE has also successfully set up the Nigerian Electricity Bulk Trading Company Plc (NBET) as the principal electricity buyer from the gencos for sale to the discos. NBET became necessary since both gencos and discos are being privatised. The gencos could indeed under the law sell electricity directly to the discos but at the present stage of our electricity market, that would not make commercial sense as the discos are

⁶³ See page 125 of the Final Report of the Technical Committee on Privatization and Commercialization

presently not credit worthy. Their efficiency in collection is very low - less than half of the value of the output received from gencos is being collected. Thus there is a huge payment risk on the part of the discos which would affect investment in gencos. As a credit enhancement mechanism for the buyers and indeed the market, it is intended that the World Bank would provide the partial risk guarantee (PRG⁶⁴) to the buyer and as the discos are going private, this would not be possible since the World Bank only deals with sovereigns and not private companies. NBET was set up as wholly FGN-owned, to be the buyer from the gencos so that the World Bank would provide the back stop to NBET against payment risk through its PRG. In other words, if NBET buys power from gencos and is unable to pay because the discos have not paid it (NBET), World bank would pay.

Also set up and running is the Nigerian Electricity Liability Management Company Ltd/Gte (NELMCO) headed. This company will assume and manage the industry's liabilities as the companies are being sold without liabilities. The NCP has given an order transferring all the liabilities of PHCN to NELMCO.

PHCN was incorporated pursuant to the EPSR Act to take step into the shoes of NEPA but now as a limited liability company not as a statutory corporation. The transfer order was duly made by NCP transferring the assets, liabilities, rights, obligations and employees of NEPA to PHCN.

The gencos, discos and TCN Plc (and now NBET and NELMCO) were all formed still pursuant to the EPSR Act as successors of PHCN along functional lines. The NCP has since made transfer orders transferring the assets, liabilities, rights, obligations and employees of PHCN to these companies. Therefore ideally, PHCN should be without assets and liability by now. PHCN presently does not hold any valid licence to engage in any electricity business.

In the case of the petroleum sector, since the NCP/BPE drafted the first version of the Petroleum Industry Bill (PIB) in 2005, there have been many versions that are being harmonized. The harmonized draft PIB has been approved by the Federal Executive Council and will be forwarded to the National Assembly for passage into law.

⁶⁴ See Timothy Irwin et al (eds) *Dealing with Public Risk in Private Infrastructure* (The World Bank, Washington, DC, 1997)

With regard to the commercialization programme, this was done only in the first phase. All attempts to commercialize the River Basin Development Authorities in the third phase failed essentially due to lack of cooperation from the relevant authorities concerned.

Conclusion

Nigeria is a middle income, mixed economy and emerging market, with expanding financial, service, communications, and entertainment sectors. It is ranked 30th in the world in terms of GDP (PPP) as of 2011, 133 in terms of doing business, among the Next Eleven Economies⁶⁵ and its emergent, though currently underperforming manufacturing sector is the third-largest on the continent, producing a large proportion of goods and services for the West African region.

Previously hindered by years of mismanagement, economic reforms of the past decade have put Nigeria back on track towards achieving its full economic potential. Nigerian GDP at purchasing power parity more than doubled from \$170.7 billion in 2005 to \$413.4 billion in 2011, although estimates of the size of the informal sector (which is not included in official figures) put the actual numbers closer to \$520 billion. Correspondingly, the GDP per capita doubled from \$1200 per person in 2005 to an estimated \$2,600 per person in 2011 (again, with the inclusion of the informal sector, it is estimated that GDP per capita hovers around \$3,500 per person). It is the largest economy in the West Africa Region, 3rd largest economy in Africa (behind South Africa and Egypt), and on track to becoming one of the 20 largest economies in the world by 2025⁶⁶.

Privatization in its broader sense has been used to reform the economy. However, the reform will be incomplete without institutional reforms in terms of passing the reform bills that have been drafted since 2003⁶⁷. The Federal Government must learn how to retreat from the provision of infrastructure and behave like responsible corporate citizen.

⁶⁵ Made up of Bangladesh, Indonesia, Mexico, Pakistan, South Korea, Egypt, Iran, Philippines, Turkey, Vietnam and Nigeria

⁶⁶ http://en.wikipedia.org/wiki/Economy_of_Nigeria

⁶⁷ A clear case is that of the ports. When port services were leased in 2005, it was expected that the Ports & Harbour Bill would be passed into law so that there will be a regulator for the sector. At the moment, the Nigerian Ports Authority is the landlord and regulator without regulatory powers.

She must learn to obey the laws and fulfill any obligation that she has undertaken to fulfill in any of the transaction documents. This is so because in almost all the privatized enterprises, Government has failed to honour her obligations and yet expects the private sector participant to honour its obligation with the threat of nationalizing the enterprise.

As in other parts of the world, privatization in Nigeria has remained emotive and controversial given the differing interests of the stakeholders. This is attributable to the different objectives of privatization. To the Minister of Finance, the interest may be what gets back to the treasury, to the workers and trade unions, how their jobs are protected and pension liabilities paid, to the tax authorities, whether taxes are paid promptly by the privatized companies and to the general public how the economy is being run efficiently.

Privatization is associated with technical efficiency. If privatized enterprises are properly run, there is no doubt that the economy as a whole will benefit. However, since the programme began in 1988, there is no doubt that budgetary allocation to the enterprises has been reduced. Unquestionably, there is a reduction of politically motivated resource allocation or appointment to boards of public enterprises in the Nigerian economy. Admittedly even if the process is correct, supervening economic events can ruin the programme.

It would seem that the Nigerian case is that privatization 'killed' some enterprises. A critical look at the enterprises in 1988 (600 federal and 900 states), 1993 and 1999 will show otherwise. Due to the high debt overhang, Nigeria Airways, NAFCON, the three Rolling Mills at Jos, Katsina and Oshogbo, Calabar Cement Company Ltd, Bacita Sugar Company and the newsprint at Oku Iboku were liquidated; Ajaokuta Steel Company, Aluminium Smelter Company and the National Iron Ore Mining Company were not completed; Delta Steel Company, Eleme Petrochemicals and Machine Tools were shut down. Other than PAN and ANAMCO, all the motor assembly plants were closed down before privatization. Indeed most of the enterprises were technically insolvent but for budgetary allocations and yet staff benefits were being paid and pension contributions and tax deductions were not remitted. Thus were the enterprises really national assets or national drain pipes?

Thank you for your attention and God Bless.

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