PROJECT FINANCE AND INFRASTRUCTURE DEVELOPMENT: DEVELOPING A SUSTAINABLE FRAMEWORK FOR AFRICA'S INFRASTRUCTURE DEVELOPMENT AND INDIGENOUS FINANCE

BY

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ABSTRACT

No matter the social and economic progress, epitomised by increase in the average Gross Domestic Product growth rate in Africa, the revolution of rising expectation stimulates people in Africa to desire enjoyment of uninterrupted social amenities and elevate the continent to the league of industrialised continents. These two desiderata strike a chord at infrastructural development, hence, a growing demand for socio-economic infrastructure. Power and energy generation and the growing need for low carbon power and energy efficiency actuated by concerns over climate change, as well as development of basic 'cold-infrastructure' such as utilities including access to water sanitation, transportation and housing are predicated on and continue to require significant infrastructure development. Accordingly, infrastructure development has been identified and recognised as a vehicle for sustainable growth, development and transformation in Africa, and a pre-requisite for the provision of basic services in the continent. Infrastructure is a catalyst for technology, research and development, skills development, industrialisation, manufacturing, job creation, investments, tourism, integration and intra-African trade. While projections show that there will be increase in infrastructure that are required in critical sectors between 2010 and 2040, in view of geometrically rapidly growing population, most African nations continue to suffer infrastructure deficit. This has undermined all the efforts towards achieving the much desired structural transformation and development. By its nature, infrastructure development is capital intensive and entails large-scale deals. The challenge of financing large-scale projects, especially in the wake of Global Financial Crisis, necessitates mobilisation of diverse sources of capital. This is all the more so as the commercial banks, the primary source of non-recourse funding, "face the tighter credit constraints that flow from the implementation of the Basel III accords" [1] . By those accords, stringent regulatory requirements for the management of bank capital have been specified. "Banks now have to assign a higher percentage of their liquidity to back long tenor commercial debt financing and this has placed upward pressure on project finance 'pure commercial' debt financing[2]. To fill the resulting liquidity gap requires recourse to lenders (including from Asia, Middle East and Latin America), involvement of export credit agencies, capital markets and multilateral development organisations. These resonate opportunities for some categories of investors. First, lenders, particularly in the emerging markets, look for diversified earnings. Secondly, foreign investors who are looking for overseas returns particularly from financing of infrastructure projects. And finally, for indigenous financiers. This paper is an attempt to developing a sustainable framework for Africa's infrastructure development. It examines the conceptual foundation of the terms 'infrastructure', and 'project finance'. In addition to giving a brief historical survey of project finance, the paper identifies the methods of infrastructure finance. In particular, the paper espouses

[1] Fletcher, Philip, "What Does it Take to be a Project Finance Lawyer", *Project Finance Thought Leadership, Expert Guides Best of the Best*, p. 68.

[2] David Gardner and James Wright, "Project Finance", pp. 12-13.

the policy thrust of African development strategy within the context of the salient African institutions for infrastructure development, as well as relevant global initiatives. Concluding remarks incorporate challenges to Africa's infrastructure development as well as some recommendations on how to accelerate infrastructure development in Africa without relegating indigenous financiers to the background.

1. INTRODUCTION

In every legal system, the essence of government is to serve as an agent of the State for purposes, *inter alia*, of providing services and amenities to her citizens. The welfarist argument for existence of government reinforces this responsibility of State. So also the citizens' revolutionary spirit of rising expectation engenders improved living conditions. To discharge this all important responsibility, enormous resources are required; there is therefore need for State to develop economically and technologically. Infrastructure development provides an impetus for such development. Africa, like the rest of the globe, recognises infrastructure as a veritable vehicle for sustainable growth, development and transformation in the continent d a prerequisite for the provision of basic services in the continent. In the development of modern society, undeniably successive African governments have invested huge capital in all aspects of infrastructures in their respective countries. According to the Infrastructure Consortium for Africa, the sum of USD 74.5 billion was committed to infrastructure financing in Africa in 2014. Out of this amount, the sum of USD 34.5 billion was committed by African national governments and USD 2.9 billion by the private sector. Notwithstanding these efforts, most African nations continue to suffer infrastructure deficit, and lag behind other countries in developing world. With geometrically rapidly growing population, there is credibility in the projections that there will be increase in infrastructures that are required in Africa in critical sectors between 2010 and 2040[3]. There is therefore an urgent need to ridge the infrastructure deficit by providing well-

[3] E/ECA/COE/31/17-AU/CAMEF/EXP/17(VII), Financing the Programme for Infrastructure Development in Africa.

functioning national and regional infrastructure. This requires huge financial resources and "strengthening of the international funding and delivery architecture"[4].

In order to achieve the objective of developing a sustainable framework for Africa's development, this work defines key concepts, justifies the need for constructive interaction between public and private sectors. It also identifies sources and methods of infrastructure finance to include not only domestic, regional and international financial resources, but also project finance, wholesale financing techniques and public-private partnerships. At the core of the discourse are two critical areas. First, the nexus between project finance, public-private partnership and infrastructure particularly at the national level. Second, the infrastructure development strategies adopted by Africa through both global and regional initiatives and blueprints. The concluding part of the paper discusses the challenges to infrastructure development. While proffering recommendations to overcome these challenges, the work shows the key role of good governance as an indispensable precondition for successful mobilisation of financial resources for accelerated infrastructure development.

2. DEFINITION OF CONCEPTS

Literally, 'infrastructure[5] refers to "the basic systems and services, such as transport and power supplies, that a country or organisation uses in order to work effectively"[6]. It is defined in *Black's Law Dictionary* as follows: "The underlying framework of a system; especially, public service and facilities (such as highways, schools, bridges, sewers, and water systems) needed to support commerce as well as economic and residential development"[7]. The World

[4] OSAA Office of the Special Adviser on Africa, "Financing Africa's Infrastructure Development" *Policy Brief 2015*, p. 2.

[5] It is also called "social overhead capital": See Bannock, G., Baxter, R.E. and Davies E.I. *Dictionary of Economics*, Bloomberg Press, 2003.

[6] Cambridge University Press, *Cambridge Advanced Learner's Dictionary* , 3rd Edition, Cambridge University Press, Cambridge 2008, p. 741.

[7] Garner, B.A., (ed) *Black's Law Dictionary,* 9th edition, West Publishing Co., Thomson Reuters, 2009, p. 851.

Bank[8] describes infrastructure in general term to encapsulate many activities referred to as social overhead capital and characterised by peculiar technical and economic features. These include services from (a) public utilities – power, piped water supply, telecommunications, sanitation and sewage, solid waste collection and disposal, and piped gas; (b) public works – roads and major dams and canal works for irrigation and drainage; (c) other transport sectors – urban and inter urban railways, urban transport, ports and waterways, and airports.

Scholars have also defined infrastructure. According to Fulmer, [9] infrastructure refers to the physical components of interrelated systems providing commodities and services essential to enable, sustain or enhance social living conditions. 'Infrastructure' is defined by Gardner and Wright "generically to refer to any capital intensive asset or group of assets which provides essential goods or services... and can be contractually structured to provide internally generated cash flows"[10]. It is in this regard that infrastructure has been referred to as the "basic installations and facilities on which the continuance and growth of a community or state depends"[11], and as extending to information facilities in term of information infrastructure[12]. Implicit in these definitions are that infrastructure refer to activities or services for good social life, and possess some characteristics. According to Anyanwu et al[13], these characterises are

(i) Indivisibility: Such services are indivisible among its users. Examples include gas turbine for the generation of electricity; bridges, etc.

(ii) Investment in them requires heavy capital outlay.

[8] World Bank, *World Development Report 1994: Infrastructure for Development*, Oxford, Oxford University Press, 1994.

[9] Fulmer, J., "What in the World is Infrastructure?". *PEI Infrastructure Investor*, 2009, pp. 30-32.

[10] Gardner, David and Wright, "Project Finance", p. 1.

[11] Babalola, Yemisi T. "Nigeria" Information Infrastructure Policy: Implications for E-Government", *Arabian Journal of Business and Management Review*, vol. 2, No. 111, June 2013, p. 18.

[12] Ibid. There, information infrastructure was used to denote "socio-technical systems composed of hardware, software, information content, human experts and network standards that facilitate information creation and exchange".

[13] Anyanwu, J. C., Oyefusi, A. and Oaikhena, H., *The Structure of the Nigerian Economy*, JOANEE Educational Publishers, Onitsha, 1997.

(iii) Investment in infrastructural facilities takes a long gestation.

(iv) They have low variable cost compared to the total cost.

Infrastructure should therefore be understood in terms of both hard and soft characteristics. It refers to systems, services and physical components by which social living conditions and societal development are attained and sustainable. By extension therefore, 'infrastructure development' is a system by which infrastructure is created, changed into a more advanced stage, improved, maintained and sustained.

'Project finance' and Limited Recourse Finance' are typically used interchangeably. In this regard, 'project finance' is regarded as a financing technique and

> the raising of finance on a Limited Recourse basis, for the purposes of developing a large capital-intensive infrastructure project, where the borrower is a special purpose vehicle and repayment of the financing by the borrower will be dependent on the internally generated cashflows of the project[14].

It is "used as a means of funding investment across a broad spectrum of industrial activities, notably in the natural resources, telecommunications, transportation, social services, power generation, and transmission sectors"[15].

According to Hoffman[16], project finance means the following:

> A nonrecourse or limited recourse financing structure in which debt, equity, and credit enhancement are combined for the construction and operation, or the refinancing of a particular facility in a capital intensive industry in which lenders base credit appraisals on the project revenues from the operation of the facility, rather than the general assets or the credit of the Sponsor

[14] Gardner and Wright, op.cit, p. 1.

[15] Fletcher, Phillip, "What Does it Take to be a Project Finance Lawyer", *Project Finance Thought Leadership*, Expert Guides Best of the Best, p. 68

[16] Hoffman, SLA, A Practical Guide to Transnational Project Finance: Basic Concepts, Risk Identification, and Contractual Considerations, Oakland, 1989, p. 1.

> of the facility, and rely on the assets of the facility, including any revenue-producing contracts and other cash flow generated by the facility, as collateral for the debt.

Similarly, Finnerty[17] gave the following definition of project finance:

> The raising of funds to finance an economically separable capital investment project in which the providers of the funds look primarily to the cash flow from the project as the source of funds to service Loans and provide the returns and a return on the equity invested in the project.

Young[18] equally identified in her definition the feature of the project financing method in which the means of paying for the project is project itself. She states:

> Simply put, project finance is a method of financing infrastructure where the means of paying for the project is the project itself. It refers to a range of financing structures where the funding of a project is dependent on the productivity of the project itself and not on the credibility of the sponsors or credit providers[19].

Project finance is a form of loan contract, but it is different from asset-based finance. In project finance, the loans with which projects are financed are based on the productivity and estimated output of the project and not on the value of the project. On the contrary, in the case of asset-based financing, finance is based on the value of the asset financed. The loan secured on the accounts, assets balance sheet and credit-worthiness of the borrower. Where, however, there is default on the part of the borrower, recourse can be made to the property which is the subject of the loan.

[17] Finnerty, J.D., *Project Financing: Asset Based Financing Engineering,* United States, 1996, p. 2.
[18] Young, Grace, Chinyere, "*Understanding the legal Fundamentals of Project Finance Contracts" NAUJILJ,* 2014, p. 1.
[19] Ibid.

'Indigenous finance' is used to include every system which involves the interest and participation of citizens of the respective African countries in the financing of projects and development of infrastructures in their countries.

The term 'public-private partnership' (PPP) has been defined by Savas as any arrangement between a government and a private sector in which particularly or traditionally public activities are performed by the private sector[20]. To Marcellus, ppp is "a model of the NPM [New Public Management] in which government collaborates with the private sector or other independent organisations in the provision of those public goods and services which the private and independent organisation can as well handle[21]. Public-private partnership (ppp) is "a specific form of project finance whereby a public service is funded and operated through partnership of government and then private sector, typically structured under a long term concession arrangement"[22].

'Global Financial Crisis' is used to refer to "the global period of economic stagnation and instability in the banking markets, which started in 2008 and has continued into 2011"[23].

3. IMPORTANCE OF INFRASTRUCTURE

Infrastructure is a catalyst for technology, research and development, skills development, industrialization, manufacturing, job creation, investments, tourism, integration and intra-African trade. Infrastructural facilities have been valued as having "a demand and supply effect".[24] From the point of view of having 'a demand effect', outputs are generated for other sectors of the economy[25] by investment in infrastructures. From the standpoint of having 'supply effect', outputs of infrastructures are vital inputs into other industries.

[20] Savas, E.S., *Privatisation and Public-Private Partnership*, Affiliated East West Press, New Delhi, 2001,

[21] Marcellus, I.O. "Public-Private Partnership Initiative in the Implementation of Government Programmes: Trends, Features and Practices in Nigeria", *Nigerian Journal of Public Administration and Local Government*, 2009, pp. 1-2, 14.

[22] Gardner and Wright, op. cit., p. 2.

[23] Gardner and Wright, op.cit, p. 1.

[24] Anyanwu, J. C.; Oyefusi, A. and Oaikhena, H., *The Structure of the Nigerian Economy*, JOANEE Educational Publishers, Onitsha, 1997, p.

[25] For example steel for bridges, wood and forest products for railway tracks.

The indispensability of infrastructural facilities have been underscored by Ozohu-Suleiman and Oladimeji as follows:

> …they are major lubricant in the wheels of economic growth and development. Good infrastructure raises productivity and lowers productivity costs. Infrastructure services also help the society to contribute to environmental sustainability. Socio-economic infrastructures which include; clean water and sanitation, non polluting sources of power, safe disposal of solid waste and better management of traffic in urban areas provide environmental benefits for all income groups[26].

There is therefore an urgent need to bridge the infrastructure deficit with well-functioning national and regional infrastructure, including roads, railways, ports, energy facilities, health facilities, water management and information and communication technology (ICT).

4. JUSTIFICATION FOR CONSTRUCTIVE INTERACTION BETWEEN PUBLIC AND PRIVATE SECTORS

By its nature, infrastructure development is capital intensive and entails large-scale deals. There is no gainsaying that corruption continue to put pressure on public treasury in virtually all African countries. Inefficiency has also devoid the state of capacity to deliver on infrastructure. Moreover, with the Global Financial Crisis, financing large-scale projects became a critical challenge that attenuated ease of project finance. Hence, the need for mobilisation of diverse sources. This is all the more so as the commercial banks, the primary sources of non-recourse funding, "face the tighter credit constraints that flow from the implementation of the Basel III accords" [27]. By those accords, stringent regulatory requirements for the management of bank capital have been

[26] Ozohu-Suleiman, Abdulhamid and Oladimeji, Lawal Abdullahi "Public-Private Partnership and Infrastructural Development in Nigeria: The Rail Transportation Sector in Focus", *British Journal of Education, Society and Behavioural Science (BJESBS)* 2015. 089, pp. 260-261.

[27] Fletcher, Philip, "What Does it Take to be a Project Finance Lawyer", *Project Finance Thought Leadership, Expert Guides Best of the Best*, p. 68.

specified. “Banks now have to assign a higher percentage of their liquidity to back long tenor commercial debt financing and this has placed upward pressure on project finance ‘pure commercial’ debt financing[28].

To fill the resulting liquidity gap requires recourse to lenders (including from Asia, Middle East and Latin America), involvement of export credit agencies, capital markets and multilateral development organisations. These resonate opportunities for some categories of investors. First, lenders, particularly in the emerging markets, look for diversified earnings. Secondly, foreign investors who are looking for overseas returns particularly from financing of infrastructure projects. And finally, for indigenous financiers. In all these, the State is not and cannot be the only actor. Hence, in its contribution to the debates, the United Nations stated that governing institutions should have an important objective of promoting constructive interaction between the state, private sector and civil society[29]. This underlines the inevitability of the ‘marriage of convenience’ between the private and public sectors.

5. INFRASTRUCTURAL DEVELOPMENT IN AFRICA

5.1 FINANCING OF INFRASTRUCTURE IN AFRICA

Infrastructure is capital intensive and therefore very expensive. Potential sources of infrastructure finance in Africa have been identified by Economic Commission for Africa (ECA) and NEPAD Agency to include domestic taxes, revenues from minerals and mineral fuels, international reserves in respective Central/Reserve Banks, remittance securitisation, diaspora remittances, stock market capitalisation, private equity market, bank revenues, international sovereign bonds and international aid. Since 2011, it is reported that a dozen countries have issued international sovereign bonds for the first time with the objective of financing large infrastructure projects.

[28] David Gardner and James Wright, “Project Finance”, pp. 12-13.

[29] United Nations Proceedings of the Workshop on Government-oriented Innovations as to Enhance State Capacity, on held at the Global Forum on Reinventing Government in Seoul, Republic of Korea; 2005.

As a result of its capital intensive nature, government and indeed public sector was the main source of infrastructure in Africa. The report by Infrastructure Consortium for Africa indicates that Africa's infrastructure services cost more than almost any place in the world. This makes African markets less competitive on the international level. The situation worsens for the 16 African Landlocked Countries where trading costs are 50 times higher than in African coastal countries.

5.2 METHODS OF INFRASTRUCTURE FINANCE

Three basic methods of infrastructure finance may be identified. These are project finance (Limited Recourse Finance), wholesale financing techniques and public-private partnership.

1. PROJECT FINANCE

Project finance often entails creation of international project contracts. The features of such contracts include that the lenders look primarily to the potential output of the project as a source of repayment for the debt; the credit assessment is based on the project itself and not on the creditworthiness of the borrowing entity; the security for loan is the project itself; the lender has little or no recourse to the assets of the borrower for debt repayment because in reality, a limited and not fully nonrecourse project finance is obtainable.

Being international in nature, it usually involves two or more countries, governments and/or international organisations. This demands that the draftsman should take cognisance of the legal and economic background of the various parties and the applicable laws which govern the contract at hand. It also involves the construction of long-term, capital intensive projects, characterised by high capital expenditures, long-term loan periods, and uncertain revenue streams[30]. Generally, a special purpose entity is created by the Project Sponsor to undertake the project and thus shield the Sponsor's other

[30] Investopedia, Non-Recourse Finance Available at: http://www.investopedia.com/terms/n/nonrecoursefinance.asp. Last accessed 11/06/2018.

assets from recourse by the Lender in the event of project failure. A syndicate of lenders and equity investors is often involved so that sufficient funds are raised and risks are effectively spread. The Lender would often assume control by placing a lien on all the project assets to ensure repayment of the loan sum because financing is secured by the project assets and not the Sponsor's assets. A series of foreseeable and unforeseeable risks and an endless cycle of possible risk-management options are involved. Therefore, drafting a potent project finance contract requires that the draftsman should be proactive and precise. It is a complex transaction which involves several parties, contracts and processes[31]. It encompasses diverse areas, *inter alia*, of law, business, corporate finance, securitisation, insurance, governance and economics.

In project finance, the borrower (the Project Company) is an SPV and the principal lender security are the future cashflows of the project itself – it is 'cashflow lending'. A single (or very small number) of assets are funded via a single borrower, presenting a uniform credit profile for all Lenders. In a project financing, the shareholders to the transaction are not contractually at risk if the project vehicle (borrower) defaults on its loans. A project financing is predicated on robust, long term and highly predictable financial modelling of forecast cash flows.

Historically, the origin of project financing technique can be traced to the U.S. It was widely adopted during the development of the North Sea oil field and also in the U.S. power market following the 1978 Public Utility Regulatory Policy Act (PURPA). The prolific use of project financing is also traceable to the U.K. In 1992, 'Private Finance Initiative' (PFI) began and since then successive British governments have actively promoted and managed the initiative. PFI has been described as "the commoditisation of public-private partnerships (ppp) into a systematic programme [32] . In 1999, the U.K.

[31] Young, G.C.; op. cit., pp. 138-139.
[32] Gardner and Wright, op. cit., p. 2.

government adopted the 'Standardisation of PFI Contracts (SoPC) and thus, effectively commoditised ppp and increasing the volume of ppp contracts in the U.K. The SoPC continued to evolve as a framework for ppp projects in the country.

In Africa, like many other developing countries, project finance can be said to be a relatively new technique of financing infrastructures. Before the 1970s, the predominant, if not the sole means of financing infrastructures in the continent was through government funds. The trend towards project finance came when government funds became limited and insufficient to carry out infrastructural projects single-handedly. With the adoption of privatisation and corporate financing policies, government sought other means of funding projects especially, equities, commercial loans bilateral and multilateral loans. These alternative means of financing were, however, still far from removing or alleviating the heavy burden on Government. This paved way for project finance as a viable alternative means of financing heavy infrastructures.

The rationale for project financing include the fact that it is predicated on the equitable allocation of risks between a project's stakeholders through various contractual relationships between the parties. Moreover, the cost of financing an infrastructure (investment) can be minimised to the extent that the loans are repayable over time from the net revenues from the project. Once the reliability of these revenues are established for purposes of repayment of the loans, project finance possesses a magical advantage and benefit.

The Merits and Demerits of Project Finance

Several merits of project finance have been identified: (i) project finance is particularly useful for the infrastructural development of emerging markets. It helps to finance heavy and expensive projects. It allows for development of several projects in different geographical areas. The high risk and capital involvement of such enormous projects make project financing one of the few available financing alternatives in the energy, transportation, and other major

infrastructure industries (ii) Nonrecourse debt financing (iii) Off-balance-sheet debt treatment: The Sponsor creates a legally independent entity to own the project assets; the project financing is off the Sponsor's balance sheet (iv) Leveraged debt: This involves borrowing money to finance a project in the hope that the project will make enough profit to cover the loan sum and all accrued interests without diluting the existing equities. However, the equity contributions of the parties may vary for numerous reasons (v) Avoidance of restrictive covenants in other transactions (vi) Favourable financing terms: Lenders may offer a more attractive interest rate and credit enhancement costs when the credit appraisal of a project is involved rather than when that of a Sponsor is involved. Though this is not always the case (vii) High capital returns (viii) Political risk diversification (ix) Risk sharing (x) Collateral limited to project assets (xi) Lenders are more likely to participate in a workout than foreclose (xii) Matching specific assets with liabilities (xiii) Expanded credit opportunities (xiv) Limited liability: The borrower's personal liability is limited due to the nonrecourse nature of project finance (xv) Funding for projects (xvi) The Lender is also able to use the project as collateral to obtain loans and to perform other transactions. This right is however influenced by the structure of the contract.

Project finance, is however, not without demerits: (i) Complexity of risk allocation (ii) Increased Lender risk (iii) Expensive and protracted due diligence (iv) High risks to Lenders leading to stringent terms, rates and supervision (v) Lender reporting requirements (vi) Increased insurance coverage (vii) It encourages unacceptable risk taking (viii) Complicated and complex (ix) It often ends up as a long-term transaction.

The Forms and Structures of Project Finance Contracts

Project finance takes several forms and structures. Some of these are as follows: (i) Build-and-Transfer (BT) Arrangement (ii) Build-and-Operate (BO)

Arrangement (iii) Build-Operate-Own (BOO) Arrangement (iv) Build-Operate-Transfer (BOT) Arrangement (vi) Build-Operate-Own-Transfer (BOOT).

The Parties to project Finance Contract

The principal parties to a project finance transaction or contract are as follows: (1) Project Sponsor (2) Project Company (3) Contractor (4) Lenders (5) Equity Investors and Bondholders (6) The Host Government (7) Experts and Professional Advisers.

In addition to the core project stakeholders listed above, there are typically a host of other advisors, experts and professionals: (i) due diligence advisors to the lenders which at a minimum will include technical and legal advisors but potentially also financial, insurance, auditing, tax, accounting, market and environmental advisors (depending on the specifics of the project) (2) Advisors to the Sponsors – typically financial, legal and technical advisors at a minimum; and (3) under a PPP framework, advisors to the procuring authority/government – again, typically financial, legal and technical advisors. Lawyers who have sound legal and commercial judgment coupled with cross-cultural skills can very well take advantage of project finance opportunities and contribute to infrastructural development in Africa.

Procedure for Project Finance Transactions

The first stage is the ***Project Identification*** whereby the Government identifies the project to be embarked upon. It then calls for ***Bids*** and the various intending Sponsors submit their tenders for the Government to select a qualified company which it contracts to s***ponsor*** the project. The Sponsor then contracts the ***Advising Bank*** which offers professional financial advice and services and also prepares the ***Bankable Documents*** for the transaction. The Advising bank then forms a ***Syndicate of Lenders*** with other banks and financial institutions which is more or less an alliance to fund the project by providing syndicate loan and spreading the risks. The Lenders would most often require some form of ***Guarantees*** from the Sponsor, Contractors, Suppliers, Experts and the

Government to serve as security considering the nonrecourse nature of the loan involved. Consequently, the Government may be required to bring a certain percentage of the required amount and the loan sum ends up being a percentage of the estimated cost of the project and not the full cost. The Lenders would also require ***Insurance*** for specific parts of the project and for specific project risks. The insurance policy must be clear on the interests, liabilities and limits of the parties; who pays the premium and who the beneficiary is. ***Securitisation*** which is the final stage is the creation of asset-based securities i.e. securities backed by a stream of cash flows[33]. It implies that the loan is attached to something, usually the project itself.

This procedure is not a universal trend. Some project finance transactions skip some of these procedures or merge some steps in one while some others are more complex and involve more procedural steps

2. WHOLESALE FINANCING TECHNIQUES: These include the following:

(a) Corporate Lending: Under an (unsecured) corporate loan, the lenders have recourse to all the assets of the company itself (regardless of whether the proceeds of the loan are used to finance a specific asset or not) or in the case of a secured loan, a specific asset of the company.

(b) Securitisation (Asset Backed Securities): A securitisation can only occur for cash generative assets (e.g. a loan portfolio which is generating interest payments). Project in a securitisation, there are typically a large volume of assets being financed via a single SPV (e.g., a portfolio of mortgages). The pool of assets may therefore be of a veritable credit quality and hence the financing instruments (bonds) are usually trenched accordingly.

(c) Leveraged Buy-Out (LBO): Highly leveraged transactions.

[33] Money terms, Securitisation Available at http://moneyterms .co.uk/securitization/. Last accessed 12/06/2018.

(d) Venture Capital: Venture Capital investments are speculative assessment of a company's potential to generate returns.

3. PUBLIC-PRIVATE PARTNERSHIP

The application of public-private partnership (ppp) to develop and deliver a wide range of infrastructures has become a regular practice in both developed and developing economies including those of Africa. Being a policy initiative of the government ppp can be entered at all levels of government (local, state and federal/central). Its history is intertwined with the evolution of project finance.

Forms of Public-Private Partnership Contracts

Ppp contracts can take many forms, but most common forms or options include: (a) service contract (b) management contract (c) lease (d) concession: (i) Build-and-Transfer (BT) Arrangement (ii) Build-and-Operate (BO) Arrangement (iii) Build-Operate-Own (BOO) Arrangement (iv) Build-Operate-Transfer (BOT) Arrangement (vi) Build-Operate-Own-Transfer (BOOT) (e) infrastructural development.

Evaluation of PPP Options

In evaluating the forms of ppp options best suited for infrastructural development, the capital intensive nature of the infrastructure is a critical determining factor. Where the infrastructure requires large sum of money which government cannot afford due to revenue constraints, the concession option of Build-Own-Operate-transfer is preferable because it has comparative advantage over the others, even though some other options can still be applicable. It all depends on the one that allows for high transfer of responsibilities and risks to the private sector. As Grimsey and Lewis rightly suggested, the choice of an option under ppp arrangement depends on the degree of ownership, funding and control[34].

[34] Grimsey, D. and Lewis M.K. *Public-Private Partnerships: The Worldwide Revolution in Infrastructure Provision and project Finance*, Edward Elgar, Cheltenham, 2007.

The success of a ppp contract is not necessarily determined by the concession option adopted, but on the provisions in the ppp contract and the fidelity with which they are complied with or enforced. Typical ppp contracts contain basic terms including process, appropriate risks allocation and risk sharing, value for money, government involvement to the extent of providing guarantees, avoiding delays and cost-runs.

There is a need for a legal and institutional framework to give teeth to the structure, enforceability and effectiveness of ppp contracts, for instance, in 2005, the Federal Government of Nigeria enacted the Infrastructure Concession Regulatory Commission Act (ICRCA) 2005. The legislation establishes the ICRC with the function, *inter alia* to (a) take custody of every concession agreement made under [the ICRC Act] and monitor compliance with the terms and conditions of such agreement; (b) ensure efficient execution of any concession agreement or contract entered into by the Government... [and] (c) perform such other duties as may be directed by the President... and as are necessary or expedient to ensure the efficient performance of the functions of the Commission[35]. The ICRC mandates every Federal Government Ministry, Agency and Corporation to prioritise infrastructure projects[36]. Notably, only priority projects that are qualified for concession are forwarded to the Federal Executive Council (FEC) for approval. As a result of this requirement, it is only the FEC that can grant and issue a guarantee, letter of comfort, or undertake any concession agreement made pursuant to ICRCA[37].

As promising as that enactment may portend in creating enabling institutional environment, it limits filing of suits against any member, officer, or employee of the Commission. By a combined effect of that provision in the law with those of the Public Officers Protection Act, access to justice by investor is restricted, and transparency and accountability are somewhat eroded. This is

[35] S. 20(a) – (d)
[36] S. 2(2).
[37] S. 3.

intolerable in private sector participation. The extent to which the Freedom of Information Act 2011 can provide a safety valve is debatable.

Aside from obstacles to dispute settlement, there is no consistency in government policies in many African countries. Political leadership tends to corrupt ppp model and even allow risks to be minimised, lack of political will, lack of public sector capacity, poor project design and structuring, distrust between public and private sectors and onerous guidelines on competitive tendering are some other factors that constitute barriers to effective ppp arrangement in Africa.

6. AFRICAN INFRASTRUCTURE DEVELOPMENT STRATEGIES

African leaders have made infrastructure development a pillar of the development strategy of the continent which is anchored on regional integration and the realisation of the African Economic Community enshrined in the 1991 Abuja Treaty. More recently, several blueprints and initiatives emphasised the importance of infrastructure for the continental transformation, as captured with the launch of the New Partnership for Africa's Development (NEPAD) in 2001, the adoption of the integrated strategic blueprint for continental infrastructure transformation for 2012-2040, also known as the Programme for infrastructure Development in Africa (PIDA) in 2012, and the adoption of the African Union Agenda 2063 and its first ten year implementation plan in 2015. Agenda 2063 envisions the development of world class, integrative infrastructure to support Africa's accelerated integration and growth, technological transformation, trade and development through the implementation of PIDA. PIDA envisages the development of 37,200km of highways, 30,200km of railways and 16,500km of interconnected power lines by 2040. It also plans to add 54,150 megawatt of hydroelectric power generation capacity and an extra 1.3 billion tons throughout capacity at the ports.

Africa has adopted a number of strategies, at the regional level to develop infrastructural facilities, both global and regional initiatives and blueprints have

been formulated and launched to support and facilitate Africa's infrastructure development.

(a) Salient Global Initiatives Support for Africa's Infrastructure Development

1. The Infrastructure Consortium For Africa (ICA)

The Infrastructure Consortium for Africa (ICA) was established in July 2005 as a recommendation to the G8 Summit in Gleneagles (UK) by the Commission for Africa, in order to help improve the lives and economic well-being of millions across the continent, by supporting the scaling up of investment in project development from public and private sources, through both regional programmes and country-specific initiatives. ICA is not a funding agency. It however, provides a platform to catalyse a step-charge in the financing of infrastructure projects and programmes across the continent. The ICA also helps to overcome technical and political challenges to building more infrastructure, and improve understanding of Africa's infrastructure development needs through the provision of better information. In this regard, ICA has established a Project Preparation Facilities Network to help address problems associated with project preparation. It provides a study on best practice and lessons learnt in coordinating project co-financing, information sharing and resource mobilisation. In addition, ICA, through its annual flagship report, monitors resource flows to infrastructure[38].

2. Sustainable Energy for All Initiative

The UN Secretary General's Sustainable Energy for All (SE4ALL) initiative was launched in September 2011 with the aim of achieving three main goals by 2030; first, ensure universal access to modern energy services; second, double the global rate of improvement in energy

[38] OSAA Office of the Special Adviser on Africa, Op. cit, p. 6.

efficiency; and third, double the share of renewable energy in the global energy mix.

Africa has been at the forefront of the implementation of the SE4ALL Initiative with 42 countries that opted into the initiative. Since May 2013, the African Development Bank has been hosting the SE4ALL Africa Hub in partnership with the African Union Commission (AUC), the NEPAD Planning and Coordination Agency (NPCA) and the United Nations Development Programme (UNDP)[39].

Among the key instruments to implement SE4ALL, the Sustainable Energy Fund for Africa (SEFA) was established in 2011 at the African Development Bank with Denmark's commitment of USD 56 million to allow the Bank to scale-up its engagement in the small to medium-sized renewable energy and energy efficiency space. In 2013, SEFA was transformed into a multi-donor facility with an initial USD 5 million commitment from the United States as part of a multi-year engagement under President Obama's Power Africa Initiative[40].

SEFA operates through three financing components all focused on unlocking private investments in small to medium sustainable energy projects:

(i) grants to facilitate the preparation of bankable projects;

(ii) equity investments to bridge the financing gap and infuse managerial capacity and

(iii) support to public sector in improving the enabling environment.

Since its inception, SEFA has played a key role in structuring the first truly Pan-African USD 150 million private equity fund focused on

[39] Ibid.
[40] Ibid.

renewable energy, African Renewable Energy Fund (AREF), for which it will also be an anchor investor with up to USD 35 million[41].

(b) Salient African Initiatives for Infrastructure Development

1. Presidential Infrastructure Champion Initiative (PICI)

PICI was established in 2010 following a proposal made by President Jacob Zuma to speed up regional infrastructure development, empowered through political championing of projects. The key roles of the initiative are to increase visibility, manage resource mobilisation, unblock bottlenecks, and ensure implementation[42].

Nine projects, meeting specified criteria, were identified for the initiative each overseen by a political "champion". Selected champions are responsible for bringing visibility to projects, clearing political bottlenecks; providing leadership, leading resource mobilization for project implementation, and ensuring project implementation within 5 years (implementation in this case meaning the projects have progressed from pre-feasibility to feasibility phases, feasibility to construction or have demonstrate evidence of progress)[43].

2. Programme for Infrastructure Development in Africa (PIDA)

Adopted by African Heads of State and Government in July 2012, PIDA aims to facilitate the physical and economic integration of the continent and achieve the aspirations of African people as encapsulated in the transformative AU Agenda 2063[44].

PIDA uniquely ties together existing infrastructure project on the continent with a well-analysed, evidence-based list of bankable future projects. The vision of PIDA is to strengthen Africa's regional integration, promote intra-African trade and improve the competiveness

[41] Ibid.
[42] Presidential Infrastructure Champion Initiative (PICI) Report; See OSAA Office of the Special Adviser on Africa, pp. 4-5.
[43] Ibid.
[44] Ibid.

efficiencies of African markets and the development of multimodal corridors to link hinterlands to ports. As such, PIDA has short – , medium – and long-term strategies for infrastructure projects through 2040. The short-term projects are part of the Priority Action Plan (PAP) which includes the first set of feasible projects that are ready for implementation with immediate effect towards achieving the outcomes of PIDA[45].

3. The African Strategic Infrastructure Initiatives

In order to promote the contributions of the private sector into the implementation of PIDA Priority Action Plan, in May 2012, the African Strategic Infrastructure Initiatives was launched at the World economic Forum on Africa. The PIDA Business Working Group was then established to facilitate the integration of the private sector concerns to fast-track the implementation of PIDA. More than 40 public and private institutions are member of the BWG which was endorsed by the 20th African Union Summit of January 2013[46].

4. Dakar Financing Summit (DFS) For Africa's Infrastructure

On June 15, 2014, President Macky Sall of the Republic of Senegal and Chair of the NEPAD Heads of State and Government Committee, NEPAD Heads of State and, the NEPAD Agency, the AUC, AfDB, ECA, World Bank and other partners convened for the Dakar Financing Summit (DFS) for Africa's Infrastructure in Senegal. The Summit's objective was to identify sustainable and innovative financing mechanisms for 16 high-impact and actionable infrastructure projects. The summit consisted of high-level discussions with decision makers and subject-level experts. The outcome of the summit, entitled the Dakar Agenda for Action (DAA), contained momentous declarations and endorsements. Prominent among these are

[45] Ibid.
[46] Ibid.

(i) The DAA endorsement of the African Development Bank's Africa 50 initiative, to serve as an African infrastructure investment platform.

(ii) The DAA call for the creation of more African-owned private equity funds to increase Africa's ownership of its own development.

(iii) The DAA urge on African nations for domestic mobilisation of resources, as well as increased private sector involvement and innovative financing mechanisms through financial markets such as infrastructure bonds, diaspora bonds and sovereign baked pension funds.

(iv) The DAA highlighted the need for strong political will by African governments and corresponding Regional Economic Communities (RECs) in implementing and investing governments to increase awareness of PIDA by all stakeholders and to prioritise the financing of the selected 16 infrastructure projects.

(v) The DAA endorsement of the establishment of the Continental Business Network (CBN) on Infrastructure Financing, organised by the NEPAD Agency and other partners. The CBN will comprise finance and business institutions from throughout the world for joint planning on capacity building, project preparation and implementation.

(vi) The DAA emphasis on the need to improve the capacity of the NEPAD infrastructure Preparation Facility (IPPF) to develop well-organised projects, the urgent need for energy infrastructure and ICT technology to boost industrialisation and the importance of strong financial and legal procedures to promote PPPs[47].

5. Continental Business Network

As an outcome of the Dakar Agenda for Action, the Continental Business Network on Infrastructure Financing was launched in June 2015 to provide African Heads of States with an Infrastructure Investment Advisory platform and drive infrastructure investments through improved

[47] Ibid.

project preparation, capacity development and overall project implementation[48].

7. CHALLENGES TO INFRASTRUCTURE DEVELOPMENT

1. There is low level of participation by lawyers in project financing and infrastructure development.
2. There is the challenge of conveying complex issues across time zones, languages and cultures in a manner that will make project participants understand the issues, resolution of such issues, without expense and delay.
3. As regards the challenge arising from ICT, there is the question or challenge of digital divide, 'information rich' and 'information poor'.
4. There is the challenge of the relationship between human rights and transnational privatised infrastructure projects (or public-private partnerships, ppps). Human rights issues, as a result of the effect of infrastructure projects, may arise. Human rights related infrastructure risks are inevitable.
5. Infrastructure development may, paradoxically, sometimes be 'infrastructure as battlefield' and suffer economic infrastructure terrorism as in the bombings of some infrastructures in some African countries and the examples of September II World Trade attacks in the U.S, the United Kingdom tube/bas networks highest and Spanish commuter trains[49].
6. Among the challenges to infrastructure development in Africa are challenges impeding the financing of infrastructure. These include –
   (a) High transaction cost,
   (b) multiplicity of regulations, permits and licenses required,

[48] Ibid.

[49] Vaugan, Stephen, "Law, Infrastructure and Human Rights' by Michael B. Likosky", 2007, *Journal of Law and Society*, https://.org/10.IIII/j.1467-6478.00408-3.x (accessed 7th June, 2018) pp. 1-2 when the author reviewed the book by Michael Likosky and published by Cambridge University Press, 2006, 230 pages).

(c) various government agencies and institutions which investors have to deal with in a typical infrastructure project,

(d) limited number of "bankable" projects,

(e) illicit financial flows,

(f) the banking sectors emphasis on short term loans and deposits (These two impede potential funding sources).

7. Another challenge is that which is related to lack of skills for project preparation and implementation.

8. Divergence in legal systems constitute a major challenge especially in the context of regional projects.

8. CONCLUSION

It is imperative to accelerate the implementation of infrastructure projects in Africa, particularly through mobilising adequate financing from domestic, private and innovative sources of funding. This is a feat that cannot be achieved on a gold plater. There are preconditions for successful mobilisation of financial resources. One very indispensable precondition is a functioning and effective government who must be committed to creating conducive environments for investment and creating private sector friendly policies. The latter responsibility of good governance involves strong institutions to implement the rule of law, transparency and space for political participation and ICT-based human capacity building that creates a skilled labour force. Multi-stakeholders interaction is inevitable in infrastructural development. Africa must leverage private sector investment through new models of public-private partnerships (PPS).

9. RECOMMENDATIONS

1. Lawyers should build up their capacity through training in project financing and infrastructure development laws, policies and practices. This will keep them abreast with accurate and acceptable draftsmanship style of adopting project financing and ppp contracts to applicable laws

depending on the contract and allocation and overcome the risk of drafting terms and conditions which may not be enforceable by law. To this end, lawyers should be properly guided by the guiding laws, model international trade laws such as the UNCITRAL Model Laws and ICSID Rules developed by some international organisations, project finance lawyers, project financiers and consultants. Lawyers should also be guided by some model contracts that have been developed overtime and in use in the international business world. The idea is not to copy them, but adopt them as a guide with variations as the need arises. Simplicity, clarity and effective communication and not ambiguity or circumlocution should be the hallmark of a proactive well-informed legal draftsman in project finance contract.

2. Project lawyers should imbibe the values of travel and thrive on travel, relish the subtleties of cultural differences and enjoy learning new language. Cross-cultural skills as well as sound legal and commercial judgment are needed by lawyers.
3. Project preparation and project development should be given greater focus. Experts should be employed in this regard.
4. Recommendation to legal draftsman in project finance contract.
5. Every African country should carry out a survey of infrastructural facilities needed in her country and come up with National Infrastructural Policy and Master Plan for urgent implementation including financing and new models of ppp arrangement.
6. African nations without ppp legislation should enact same. Those who already have such enactments should review them from time to time to improve on strengthen ppp provisions and the institutional frameworks by provisions that would expand the scope of responsibilities of respective infrastructural regulatory commissions and guarantee a workable degree of their autonomy.

7. There should be collaboration between relevant institutions responsible for infrastructural development without extenuating the autonomy of such institutions and within the framework of government public administration. In Nigeria, for example, there is the need for collaboration between the Infrastructural Concession Regulatory Commission and the Bureau of Public Procurement.
8. African nations should adopt international best practices in improving on infrastructural development architecture in their respective countries. It must be added that such practices should take cognisance of local peculiarities and should therefore adapt the practices to local conditions.
9. Accordingly, there is need for Africa to adopt and be committed to a consistent programme of human capacity building. This requires training and development of manpower in all facets of project financing and infrastructural development.
10. The Build-Own-Operate-Transfer (BOOT) option of ppp is recommended as a proactive strategy for transforming public infrastructures in Africa. The positive lesson from the success in the telecommunication infrastructure attests to the viability of ppp.
11. The African government responsibilities to develop infrastructures should not be sacrificed on the altar of 'marriage of convenience' expressed in project financing and ppp strategy for infrastructural development. Rather, these reforms should be galvanised with New Public Management (NPM), a contemporary approach to governance which have been adopted in such Anglo-Saxon countries as the United States, Canada, United Kingdom and Australia.
12. No better time than now should provision of ICT in African countries and involvement of the private sector in ICT capacity development be encouraged. To this end, appropriate legislative and policy frameworks should be put in place to protect data and collaborate with other countries

within and outside Africa in order to formulate information policy to guide regional and international exchanges and transactions.

13. Furthermore, information professionals should be involved in drafting such legal and policy frameworks.
14. Response mechanisms, legal and supra legal, must be created to mitigate human rights related infrastructure risks and the responses by project financing and infrastructure sponsor companies, financial institution and governments respond. Stakeholders including consumers, citizens, NGOs and even host government would delight in the reduction of infrastructure risks.
15. African governments should provide an enabling environment for infrastructure development, including adequate funding of appropriate institutions and legal frameworks.
16. In order to attract investors, it is critical to reduce transaction costs (such as taxes, fees, dues, levies, etc) payable by investors and financiers.
17. Government, private sector and development partners need to support the preparation of bankable projects. Special assistance should be provided to the "PIDA Technical Assistance (TA) Facility", located at the NEPAD Agency, to support the acquisition of immediate technical expertise, as well as the development of Member States' skills capacity through on the job-training of officials working in key government entities.
18. It is important to consider innovative financing products such as Listed Special Purpose Vehicles, as well as to tap into African financial markets, Diaspora remittances, intra-African investment and sovereign wealth funds.
19. The Dakar Agenda for Action should be implemented while paying a particular attention to encouraging private sector involvement in infrastructure development and promoting public private partnerships.

20. African governments should also promote policies that encourage indigenous or local “champions” who through their entrepreneurial efforts, can drive regional infrastructure projects that are both financially profitable and socially beneficial.

21. Africa should adopt some financial instruments by establishing various funds and institutions that will accelerate implementation of infrastructure projects. Such funds and institutions should include Africa Infrastructure Development Fund, Africa Credit Guarantee Facility and Strategic Development Sovereign Wealth Funds, and Sovereign Pension Fund, Africa-owned equity funds, and Regional Stock Exchange Markets.