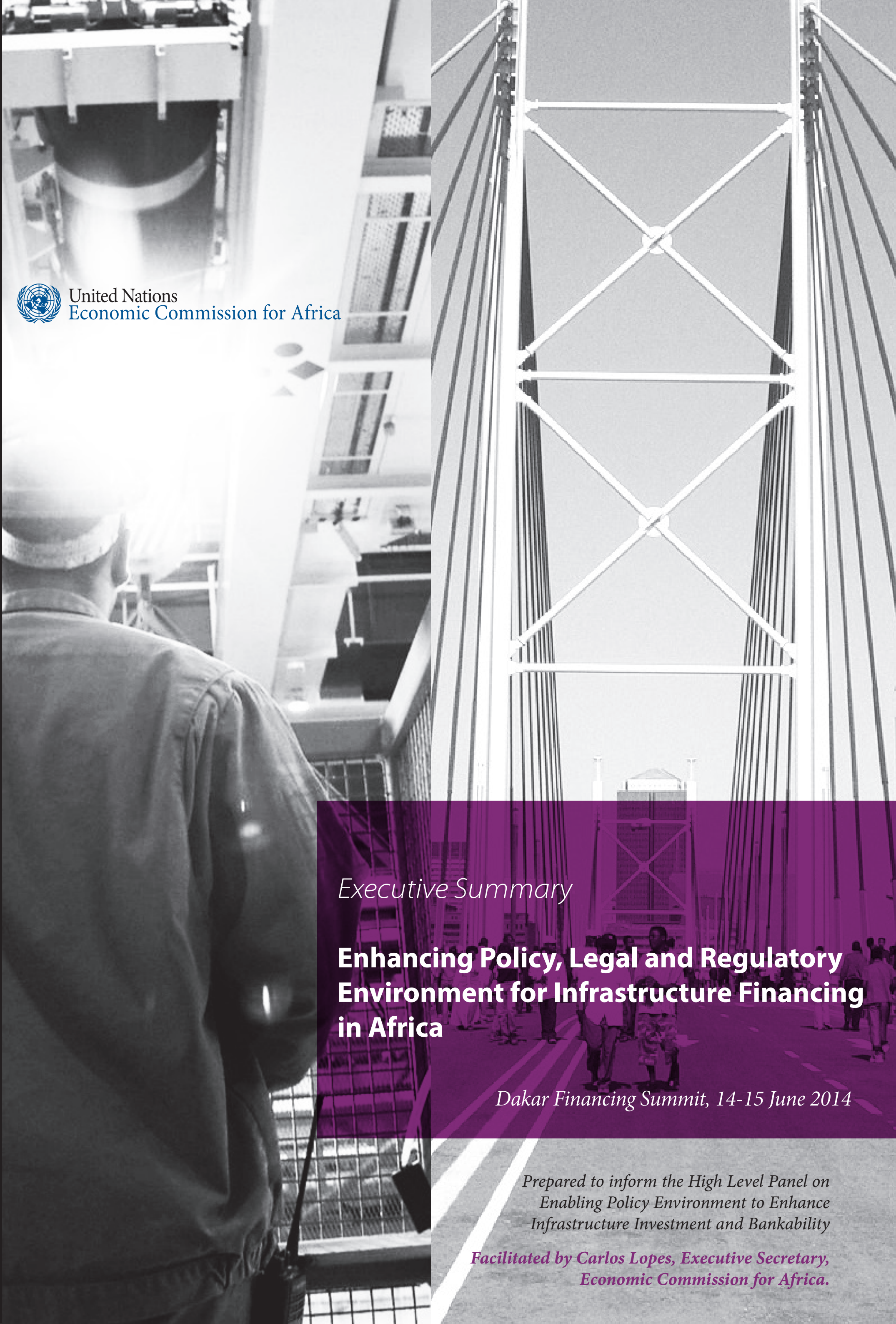

United Nations
Economic Commission for Africa

Executive Summary

Enhancing Policy, Legal and Regulatory Environment for Infrastructure Financing in Africa

Dakar Financing Summit, 14-15 June 2014

Prepared to inform the High Level Panel on Enabling Policy Environment to Enhance Infrastructure Investment and Bankability

Facilitated by Carlos Lopes, Executive Secretary, Economic Commission for Africa.

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Enhancing Policy, Legal and Regulatory Environment for Infrastructure Financing in Africa

This Executive Summary is based on a comprehensive study on "Enhancing Policy, Legal and Regulatory Environment for Infrastructure Financing in Africa"undertaken to inform the high level panel discussion on Enabling Policy Environment to Enhance Infrastructure Investment and Bankability led by ECA's Executive Secretary, Dr. Carlos Lopes at the Dakar Financing Summit on 15 June 2014.

It was carried out under the overall supervision of Adeyemi Dipeolu, Director, Capacity Development Division and the direct supervision of Adeyinka Adeyemi, senior adviser and the leader of the Infrastructure and Regional Integration Cluster in the Division. The study benefited substantively from the leadership and expertise of Prof. Konyin Ajayi, SAN, and his colleagues at the Olaniwun Ajayi law firm in Lagos and Robert Lisinge, transport specialist at ECA, who provided useful additions and commentaries which enhanced the quality of the study.

To receive the full report, send an email to Eskedar Bekele (ebekele@uneca.org), indicating your language of preference (English or French).

Section I:

Introduction

The State of Africa's Infrastructure& Report Objectives

There is growing consensus that Africa is transforming, as evidenced by remarkable economic performance in the last decade. A major preoccupation of African leaders today is how to sustain such positive momentum and broaden its benefits and inclusiveness to more people on the continent. Infrastructure has a critical role to play in this regard. No country has sustained rapid growth without keeping up fairly steep rates of public infrastructure investment. Infrastructure affects growth in two main ways – directly, through physical capital accumulation and indirectly through improvements in productivity. At the microeconomic level, investment in infrastructure enhances private activity by lowering the cost of production and opening new markets, and presenting new production and trade opportunities. At the same time, infrastructure investment in power generation, water sanitation and housing improves the social well-being of citizens.

Africa is making steady progress in improving its infrastructure, but much more needs to be done. The estimated infrastructure requirement of Africa, excluding North Africa, ($93 billion a year - $60 billion for capital expenditure and $33 billion for operations and maintenance) is huge. Estimates for the implementation of the Programme for Infrastructure Development in Africa (PIDA) alone, confirm the huge financial requirement to close the continent's infrastructure gap: an annual investment of US$7.5billion between 2012 and 2020 to deliver projects in the PIDA Priority Action Plan; and a total of $360 billion for PIDA's long-term implementation between 2012 and 2040.

Clearly, efforts to close Africa's infrastructure gap have to be stepped up, using more of the continent's domestic resources .

It is against this background that the NEPAD Heads of State and Government Orientation Committee (HSGOC), at its 19th Assembly in Addis Ababa, directed ECA and the NEPAD Planning and Coordinating Agency to undertake a comprehensive study on the mobilization of domestic resources for financing Africa's development and, in particular, the implementation of NEPAD projects. The study finds that Africa generates more than $520 billion annually from domestic taxes, $168 billion annually from minerals and mineral fuels, $400 billion in international resrves held by its Central Banks, about $40 annually in Diaspora remittances and the potential to raise $10 billion annually from securitization. Crucially, stock market capitilization in Africa had reached $1.2 trillion by 2007 while banking revenues stand at about $60 billion. The study also recommends nine Iinstruments through which Africa can further mobilize domestic resources for its infrastructure development. However, several obstacles have to be tackled before Africa can fully harness its domestic resource potential for infrastructure development. This includes: divergence in legal systems between countries; inadequate technical capacity; lack of transparency in procurement and tendering processes; political instability and insecurity in some parts of the continent, and inadequate resources for regional institutions to effectively play their expected role in infrastructure development, among others. Most importantly, the policy, legal and regulatory environment underpinning infrastructure financing in Africa needs to be enhanced – and this, essentially, is the focus of this Paper.

The next section of this paper (Section II) examines the applicable legal and regulatory regimes in Africa against the backdrop of the objective of regionally integrated infrastructure development. The Section considers Africa's regions and legal systems through the lens of strategic samples – Nigeria, South Africa, Egypt and the Côte d'Ivoire.

The Paper, in Section III, examines the trends and opportunities for investment and private sector participation in regional infrastructure projects, while highlighting existing collaborative efforts in this regard. What follows in Section IV is a consideration of the uniquely African challenges, factors and realities which may hinder the attainment of the continent's infrastructure development objectives.

Section V concludes the Paper with recommendations to assist in the implementation of a holistic regional and Continental strategy.

Section II

Overview Of Existing Policies, Legal And Regulatory Frameworks

This section entails an overview and comparative analysis of the regimes that obtain in Africa, using Nigeria, Côte d'Ivoire, South Africa and Egypt as case studies and comparing their experiences and realities in order to identify and extrapolate the commonalities, differences and shortcomings in the legal and regulatory approaches to infrastructure financing in these countries. This overview is undertaken with a view to examine the structure that exists in these countries particularly in relation to their polices and regulatory framework for national infrastructure development and cooperation with other neighbouring countries.

African governments seem in general to have recognised the pivotal role of infrastructure projects to economic growth, and while the level of detail and complexity of requirements vary from State to State, there appears to be a reasonable level of commitment to formulating policies, and enacting legislation which engenders foreign investment in infrastructure, and provides clear guidelines and procedures for instigating infrastructure projects, protecting investments and enforcing contractual rights and obligations.

For Nigeria, it is clear that infrastructure development is crucial to realizing its dream of becoming one of the top 20 economies in the world by the year 2020 and with the huge infrastructure gap in the country, it is clear that Nigeria cannot grow the economy at the desired rate, reduce poverty to an appreciable level and create jobs in sufficient quantity for its teeming youths, given the current state of the infrastructure in the country.

In the quest to develop high quality infrastructure through the leveraging of private sector capital, skills and expertise, Public Private Partnerships ("P3/ P3s") have been utilized by the Federal Government and indeed, the State Governments in Nigeria as a veritable tool for socio-economic infrastructure development. Some of the extant laws which seek to address these issues include, the Public Enterprises (Privatization & Commercialization) Act1which deals with privatization and commercialization of certain public enterprises, the Infrastructure Concession Regulatory Commission (ICRC)

1 Nigerian Public Enterprises (Privatization & Commercialization) Act Cap P38 Laws of the Federation of Nigeria (LFN)2004

Act, (the"ICRC Act") which provides for private sector participation in development financing, construction, operation or maintenance of federal infrastructure or development projects through concessions and similar contractual arrangements2.

In Egypt, very prominent is the single statute dealing specifically with P3s which is the law Regulating Partnership with the Private Sector in Infrastructure Projects, Services and Public Utilities under which P3 contracts can be awarded to private entities or to entities jointly owned by private and public entities. Egypt's Investment Incentives and Guarantees Law3 aims to boost production and foreign and domestic investment and also offers potentially good incentives for investors in specific sectors such as manufacturing and mining, transport, software, medical services, oil field services, agriculture and tourism.

The situation is different in Côte d'Ivoire and South Africa which have no specific laws that speaks to the financing of infrastructure or P3s. For Côte d'Ivoire, despite the lack of specific laws on infrastructure, foreign participation is not restrained under Ivorian law as the Ivorian Government actively encourages foreign investment with incentives, including tax reductions on equipment for private investors, aimed at encouraging investment in sectors that are key to the country's economic development, such as low cost housing construction, creation of factories and other infrastructure development.4

The Constitution of South Africa5 provides a general regime for contracts between South Africa and private entities.6 In addition to this generic constitutional prescription, infrastructure development is also regulated by the Public Finance Management Act7 ("PFMA"). The PFMA applies to public entities listed in Schedule 2 and 3 to the PFMA, the parliament, constitutional institutions and departments.8

2 Section 1, ICRC Act

3 (Law No. 8 of 1997), which repeals and replaces Investment Law No. 230 of 1989

4 Commonwealth Business Council, Africa Infrastructure Investment Report, Available from http://www.cbcglobal.org/images/uploads/docs/The_CBC_Africa_Infrastructure_Investment_Report_2013.pdf

5 No. 108 of 1996 as amended by the 17th amendment Act of 2012

6 Section 217 of the South African Constitution provides that "when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."

7 Act No. 1 of 1999 as amended by Act No. 29 of 1999

8 Section 3 PFMA

The foregoing are just a few examples of African countries and the efforts being put in place by African governments in ensuring infrastructure development in their jurisdictions. There are however various shortcomings such as the absence in most jurisdictions of policies or legislation which are specific to the financing of infrastructure projects or provide a framework for collaborative cum regional efforts at tacking the infrastructure deficit. These issues amongst others are examined in the next section.

Section III

Analysis of Trends, Opportunities and Challenges for Creating an Enabling Environment

The opportunities for infrastructure development in Africa are at once immense and overwhelming. Infrastructure investments in Africa have not kept pace with growth in population and demand, in comparison with more-developed jurisdictions. Africa's infrastructural deficit is well-documented and the impact of this deficit on global competitiveness and development is no longer news The infrastructural needs of Africa cuts across varying economic sectors such as Energy, Housing, Transportation, Water and Sanitation, Information Communication Technology, and Agriculture.

In dealing with the huge infrastructure decay in the Continent, African countries have recognised that collaborative efforts will offer several advantages including those derived from economies of scale, increased intra-African trade and provision of cross border professional services. As a result of the potential benefits of collaboration, there are currently several joint efforts geared at fostering the provision or improvement of infrastructure through the vehicle of existing Regional Economic Communities ("RECs") in Africa.

One regional initiative worthy of note is the PIDA which seeks to promote regional economic integration by bridging Africa's infrastructure gap,9 and to address the infrastructure challenges in Africa by establishing a common vision and global partnership to put in place an adequate, cost effective and sustainable regional infrastructure base to promote Africa's socio economic development and integration into the global economy. PIDA's projects are spread across four infrastructure sectors which are energy, transport, trans-boundary water and ICT.

At the heart of PIDA is the PAP10, a list of fifty-one immediately actionable programmes across the four main infrastructure sectors, all to have been initiated by the year 2020, and aimed at promoting regional integration.11 These fifty-one projects, targeted for completion by 2040, would enable

9 General information on PIDA Available from http://www.au-pida.org/about-pida

10 See paragraph 10

11 World Economic Forum in Collaboration with Boston Consulting Group. "Strategic Infrastructure in Africa: A Business Approach to Project Acceleration". Available from http://www3.weforum.org/docs/AF13/WEF_AF13_African_Strategic_Infrastructure.pdf

improved interconnection and integration between regions and countries.12

For the purpose of the Dakar Financing Summit for Africa's Infrastructure, sixteen out of these PAP projects have been designated to receive special attention (the "16 DFS Projects"). Of the 16 DFS Projects, six are focused on energy13, nine are focused on transport14 and one is focused on ICT15. This spotlight on energy and transportation clearly shows that there is a Continental recognition of the fact that the most pressing infrastructure needs in Africa are in these sectors and this is understandably so, as provision of power and good transportation services will have a ripple effect of stimulating trade, investment, industries and export which will then have the ultimate effect of creating more jobs and eventually improving the lives of the average African.

Access to and availability of adequate financing is, however, crucial to sustainable infrastructure development and all the laudable infrastructure projects can only materialize in an environment where there is access to adequate long term financing. The general trend in Africa is that infrastructure projects are financed through the participation of International Development Agencies and Development Finance Institutions, the floating by governments of infrastructure and diaspora bonds, the use of pension funds, local commercial banks and financial institutions and Sovereign Wealth Funds ("SWFs").

Despite the boundless potential for infrastructure development and finance, Africa continues to face several challenges which hamper its rate of growth. The challenges facing infrastructure development include, but are not limited to, divergence in legal systems, corruption, technical capacity inadequacies (otherwise known as brain drain), political instability, insurgence and terrorism, failure of regional institutions, and potential and kinetic finance amongst others.

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12 New Partnership for Africa's Development. "African Heads of State to be Held Accountable for Regional Infrastructure Projects.". Available from http://www.nepad.org/regionalintegrationandinfrastructure/news/3122/african-heads-state-be-held-accountable-regional-infr

13 Ruzizi III Hydropower project, Sambangalou Hydropower project, Nigerian- Algerian Gas Pipeline Project, North Africa Power Transmission Project, Batoka Gorge Hydropower Project, Zambia-Tanzania-Kenya project

14 Dar es Salam Port project, Serenje- Nakone Road project, Dakar-Bamako Rail Revitalization &Signalling project, Congo DRC Road/Rail Bridge & Kinshasa to Ilebo rail project, Abidjan-Lagos Capacity enhancement and one-stop border posts (OSBPs) project, Abidjan-Ouagadougou-Niamey-Cotonou Railway, Douala-Bangui-Ndjamena-Corridor project, Kampala- Jinja Road project, Eldoret-Nadapal Road Project.

15 Lusaka- Lilongwe ICT Terrestrial Project

Section IV:

Required Policy Measures, Frameworks &Instruments

Notwithstanding the identified challenges to infrastructure development in Africa, a key objective for the Paper is to provide recommendations on continental guidelines for the establishment of an enabling environment for regional infrastructure financing. This Section provides some recommendations, which are by no means exhaustive of the policies and strategies that may be effectively deployed on a regional plane.

Transparency, Waste and Capacity:

Foreign investment often comes with onerous conditions the breach of which leads to punitive damages awarded abroad, extraction of more capital than was injected and terms and practices which destroy the environment and lead to societal ill. Lack of transparency often leads to cheating through transfer pricing, transaction layering and invoice manipulation, all contributing to the sorry reality that oftentimes, only a minute fraction of sums provided on paper reach Africa.

It cannot be overemphasized that in negotiating and accepting finance for infrastructure, African countries must endeavour to promote transparency and capacity building through the use of proper professionals that will ensure not just a good deal on paper, but indeed value for money, and project monitoring to ensure the fairness obtained in bargain is seen through the project life. African States must therefore be careful with the money they accept and the parties they deal with.

Prioritising Non-Physical "Social" Infrastructure:

There is need to prioritize non-physical "social" infrastructure as the drive for infrastructural development will be unsustainable in the absence of socio-economic indices that enable a conducive environment for implementing and maintaining infrastructure projects. Simply put, if Africa remains plagued by political instability and civil unrest, high level of illiteracy, with limited access to dependable healthcare, and divided by the ever- widening wealth gaps created by the gross misallocation of resources, its ability to raise capital for physical infrastructure will remain challenging, while existing infrastructure will either decay from misuse or gross overuse.

Africa's economic profile has been described as schizophrenic, in view of the high rate of poverty in the face of sharp economic growth. An infrastructural development agenda for Africa must, therefore, be equally anchored on a commitment to developing a social equilibrium that will foster investor confidence, and attract the requisite capital needed to finance development projects. African governments must therefore invest more time and resources to deploy strategies that will improve the standard of life of the ordinary African. Since infrastructure development, in the end, is primarily about people and not structures, African governments must show improved commitment to enhancing social structures on the back of which physical structures may blossom.

Pooling Finance

Obtaining finance is one of the most critical challenges to infrastructure development in Africa. It is clear that reliance on individual government budgetary allocations alone to provide infrastructure is not enough and the paucity and unreliability of public funds make it imperative that African governments explore alternative means of of financing infrastructure projects. The reality of the current financial markets reveal that steadily intensifying global competition for scarcely available credit facilities make it imperative for African countries to resist the appeal of seeking only international funding and instead, find creative ways of unlocking access to capital available within the continent.

This can be successfully achieved through:

- Supporting regional integration initiatives which potentially provide a platform for deriving the benefits of economies of scale through the pooling of technical, financial and human resources- such as: (i)striving to establish an integrated African capital market, and it is perhaps plausible to accept thatregional cooperation and, at a later stage, integration, if carried out at the right pace and in a pragmatic way, could improve the liquidity, efficiency, and competitiveness of African stock exchanges.; and (ii)developing and putting measures in place to provide incentives for commercial banks with wide continental presence, to establish regional funds in collaboration with either host governments or SWFs, which may be used to finance large cross-border projects.

- Effective utilization of Africa-focused infrastructure funds, which provide a unique opportunity through which long-term international, institutional or regional funding can be pooled and applied, by sophisticated fund managers, to carefully selected projects; and

- Promoting innovative P3 initiatives.

Harmonising Regional Regulatory Frameworks

Providing an enabling environment for infrastructure investment is crucial to development. It will thus be crucial for African governments to harmonize regional regulatory frameworks for infrastructure development through the enactment of accessible and comprehensive laws on P3s in their respective jurisdictions, and concerted effort at ensuring that there are no gross disparities between the legal rights and obligations of project proponents. In line with the UNCITRAL recommendation, each state in a REC must ensure that regulations are duly implemented to provide for the comprehensiveness of rights, certainty and continuity, risk allocation and management as well as consumer issues. Domestic governmental authorities and authorisations should be reduced and the regulatory system simplified and centralized to avoid supervisory overlaps and administrative bottlenecks.

Developing Integrated Dispute Resolution Systems

A big factor pulling at the seams of regional infrastructure, much as domestic ones, is the failure of, and risk placed on what is seen as, a distrusted and inefficient legal system. Language barrier and reliance on different colonial philosophical approaches to interpreting and applying laws creates a wedge and stands in the way of what is optimal for investment . A starting point is to use Africa's leading centers. Mauritius, South Africa, Kenya, Uganda and Senegal, as a litigation hub the way London is to most international contracts. Kenyan, Senegalese or Ghanaian law can be used as the governing law and both visible and invisible barriers within the Continent will begin to crumble and decisions generated from this court would be respected.

Given the cost and time of arbitration, the courts remain the last hope of the common man for justice, and as such, the recognition of this sacred right upon which the pillars of fairness and the substratum of society are built, must inspire African governments to work vigorously, and together, towards restoring the integrity of their judicial apparatus for dispute resolution.

Capacity Building

African governments must work assiduously to improve technical know-how, curb the "brain-drain" syndrome, reduce the skills gap and build capacity within their States. This will require prioritizing and investing in education and skills development as a necessary corollary to cultivating human resource required to deliver infrastructure policies.

Miscellany

The need to reduce the significant capital flight from Africa is not in doubt. Whether this is a continuation of exploitation by foreign investors and their governments is a matter of debate for some. But what is beyond debate is that much too much is taken out of the continent illicitly. According to the High Level Panel on Illicit Financial Flows from Africa initiated by ECA and the African Union and led by former President Thabo Mbeki, about $50 billion is illicitly taken out of Africa every year. This money needs to be tracked; further leakage needs to be stopped and efforts should be made to return the money to its sources for investment in development, including infrastructure financing.

Section V: Conclusion

The key to sustainable physical infrastructure development in Africa lies in stable "social" infrastructure. African governments must embrace the ideals of integration and cooperation, first within States, and then sub-regionally and continentally. Each State must recognize and effectively utilize its unique strength and competitive advantage as a catalyst for pan-African development. In the end, there must be a sound, conscious and consistent continental drive towards accountability, transparency and good governance within Africa. The overriding importance of sound public administration, the integrity and reliability of the judicial process cannot be over-emphasised as the grounding philosophy for any prescriptive domestic or regional policy or legislation on infrastructure development or financing.

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