Infrastructure in Africa: The Legal and Commercial Environment

Conrad Marais, Trinity International LLP

Africa Australia Infrastructure Conference
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Introduction – Key topics and themes

• A very broad topic: the dangers of over-generalisation
• Trinity International LLP
• The general commercial outlook – where are the opportunities? Observations in relation to fiscal regimes, current reforms and regulatory restructuring
• The importance of development finance institutions: relationship to Australia
• The legal framework and particular legal challenges
• Building blocks in developing your project
• Afternoon session: Risk mitigation with a focus on political risk and case study (Rabai IPP)
Trinity International

- Projects team of 20 senior lawyers in Perth, London and Johannesburg with a focus on emerging markets (particularly Africa) – project development, project finance, corporate & commercial
- Trinity highly rated by leading legal guides (Legal 500, Chambers - Projects, Finance, Power, Oil & Gas - Africa): Top 10 for Projects in Africa
- Combined African experience list of over 500 projects/transactions
- Over 100 active resources and infrastructure projects
- Competitive fees and risk-sharing structures (particularly relevant in high risk projects in Africa)
- African experience on-the-ground in Perth
- Strong network of clients including commercial banks, DFIs and investors, infrastructure providers, suppliers
- Network of correspondent firms across Africa
- Language capabilities
Trinity International

• Examples of Trinity transactions:

  POWER

  o Rabai power project (Kenya) – Power deal of the year (PF Magazine) – FMO, Proparco, Emerging Africa
  o 300MW wind project (Kenya) – Consortium of DFIs and commercial banks
  o Hydropower project (Zambia): Copperbelt Energy Corporation (DBSA/FMO investors)
  o US$450m Gas IPP (Ghana): Africa Finance Corporation
  o Coal IPP and Port (Kenya): Aldwych International (FMO and PAIDF investment)
  o $105m Olkaria III Geothermal (Kenya) - FMO, DEG, KfW, EAIF
  o US$400m ethanol, power, sugar project (Tanzania) – DBSA, AfDB
  o Fundraising Power Developer (Pan-African): PAIDF, FMO, DBSA
  o Kelvin power station acquisition (South Africa): FMO, DBSA (and Macquarie Bank)
  o Wind Project acquisition (Cape Verde): Africa Finance Corporation
  o Power project acquisition (Ghana): Africa Finance Corporation
  o $150m waste-to-energy power plant (Mauritius) – Standard Bank, DFI consortium
  o Wind project (Cape Verde) - Renewable deal of the year (PFI) – AFC
  o Geothermal project (Kenya) – Sustainable Energy deal of the year (PFI) – FMO, Proparco, EAIF
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TRANSPORT

- Lekki toll road (Nigeria) – African PPP of the Year (Euromoney) – Macquarie Bank.
- Accra to Kumasi Toll Road (Ghana) - FMO
- Airports disposal (Tanzania) – Macquarie Bank (funds AIIF, AIIM)
- Port development (Djibouti) – AfDB, Islamic Development Bank
- Locomotive Financing (Gabon) – Acting for CatFin
- Rail Contractor Financing (Malawi) – Acting for Lender
- Dredging Project (Mozambique) – Representing the Lenders
- Container terminal financing (Ghana) – Acting for the Lenders
- Toll Road (Uganda) – Early development phase acting for sponsor
- Rail infrastructure (Nigeria) – Acting for developer
- West African Airline Company (West Africa)
- Aviation Services LBO (Ghana) – Advising the Lenders
- Maputo Port concession (Mozambique)
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TELECOMS
- Telecoms financing (Pan-African) – Advising various DFI Lenders
- Ghana Telecom (Ghana) – Acting for Ghana Telecom (finance facilities)
- Telecoms establishment (Tanzania) – Alternative fixed link telephone system
- US$65,000,000 cross-border financing for Vodacom (Tanzania)
- Mobile Company Acquisition (Nigeria)
- Telecoms refinancing (Zambia)
- Telecoms financing (Chad)
- Telecoms establishment (South Africa)

AGRICULTURE
- $500m ethanol, sugar, power project (Tanzania) – AfDB and DBSA
- Eel aquaculture project (Madagascar, Mauritius)
- Biofuel project (Mozambique)
- Renewable forestry project (Uganda)
- Renewable forestry/energy project (Ghana)
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RESOURCES
- Coal seam gas development: (Botswana)
- Acquisition/development mining assets (Nigeria)
- Equinox Lumwana copper (Zambia): (EIB)
- Red Back mining (Ghana): (Proparco/EIB)
- Bauxite mine debt financing (Guinea): CDC
- Iron Ore Project (Sierra Leone)
- Copper mine development (Namibia)
- Acquisition gold mine (Burkina Faso)
- Coal mine acquisition (Botswana and South Africa)
- Copper mine development/operation (DRC)

OTHER
- Low cost housing
- Industry
- Pipelines
Economy and Finance

• **Economy**
  - General economic indicators
  - Outlook for 2013/2014 – 5-6% growth
  - FDI increase
  - Over half of Africa’s improved growth attributed to improvements in infrastructure
  - Ongoing challenges: war, corruption, bankability, infrastructure ($93bn needed for capital and maintenance)
  - Donor country fiscal pressures

• **Finance**
  - Use of African LMA
  - Standardisation/internationalisation of loan documentation in domestic markets
Energy and Power (2/4)

- The news everyone knows: significant electricity shortfalls
- Why? Bankability concerns - Creditworthiness of utilities
- Capex constraints
- See SADAC’s recent difficulties to raise $2.4b in funding from international sources
- Consumer pressure
- Resource projects complicating situation
- Huge potential in East Africa (wind, geothermal)
- Significant potential in renewable energy generally: see RSA REIIPP programme and other initiatives (PIDG Group Green Africa Power)
Energy and Power (3/4)

- Importance of Nigeria – its success will guide others:
  - 170M people, 1 in 7 in Africa: could match the USA by 2050
  - Key to unlocking Africa’s growth story – Goldmans
  - Citigroup reports that Nigeria will have the highest GDP growth between 2010 and 2050
- Undergoing significant sector reform to increase supply of electricity using private sector funding (up to 40 GW)
- Stages of progress:
  - 2001 – National Electric Power Policy
  - 2005 – Electric Power Sector Reform Act
  - Privatization of 4 thermal, two hydro and 11 distribution companies
  - 2012 – NIPP 10 power generation assets being privatised
  - Some current challenges
Energy and Power (4/4)

- Trinity progress
  - Two Solar PV IPPs (early stage development)
  - Ikot Abasi gas IPP (barge mounted)
  - Greenfield Azura 500MW gas fired IPP
  - Significant gas fired IPP (confidential)

- Generally very sophisticated legal and financial market
- Government recognition of issues relating to development: processes need to be streamlined
- Cautionary words: Investor confidence to be watched: elections, existing project challenges, distribution/generation privatisation process
Other Infrastructure (1/3)

- Roads

<table>
<thead>
<tr>
<th>Corridor</th>
<th>Roads in good condition (%)</th>
<th>Trade density ($ millions per kilometer)</th>
<th>Implicit velocity (kilometers per hour)</th>
<th>Freight tariff ($ millions per tonne-kilometer)</th>
<th>Profit margins (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Western</td>
<td>72</td>
<td>8.2</td>
<td>6.0</td>
<td>0.08</td>
<td>80</td>
</tr>
<tr>
<td>Central</td>
<td>49</td>
<td>4.2</td>
<td>6.1</td>
<td>0.13</td>
<td>70–160</td>
</tr>
<tr>
<td>Eastern</td>
<td>82</td>
<td>5.7</td>
<td>8.1</td>
<td>0.07</td>
<td>70–90</td>
</tr>
<tr>
<td>Southern</td>
<td>100</td>
<td>27.9</td>
<td>11.6</td>
<td>0.05</td>
<td>20–60</td>
</tr>
</tbody>
</table>


- Air transport: Low investment. Traffic flows to airports are too low to provide the scale economies needed to attract services from major airlines and service companies.
Infrastructure (2/3)

- Railways
Infrastructure (3/3)

• Ports
  o Many now deregulated
  o Volumes have tripled since mid-1990’s
  o But still plagued with delays

<table>
<thead>
<tr>
<th>Region</th>
<th>Range of truck cycle times</th>
<th>Range of container dwell times</th>
</tr>
</thead>
<tbody>
<tr>
<td>East Africa</td>
<td>3.5 hours to 1 day</td>
<td>5 to 28 days</td>
</tr>
<tr>
<td>Southern Africa</td>
<td>2 to 12 hours</td>
<td>4 to 8 days</td>
</tr>
<tr>
<td>West Africa</td>
<td>6 hours to 1 + day</td>
<td>11 to 30 days</td>
</tr>
</tbody>
</table>

Source: Mundy and Penfold 2008.

• Water supply
• Water resources
Private Equity

- Significant increase interest from investors: Despite market conditions, $1.1b deal value in 2012
- Mergers of management platform – Abraaj/Aureous and Duet/TRG
- Investments, principally, remain growth acquisition finance but that is starting to change
- Some issues raised about appropriateness of private equity in Africa
- Donor participation through private equity
**Agriculture**

- Currently advising on 5 large-scale agricultural project including by large global commodities groups (sugar, aquaculture, ethanol, livestock, renewable forestry)
- Significant development bank interest in agriculture
- Connection between resources and agriculture is growing
- Areas of concern:
  - Food security
  - Land issues
  - Bankability: financing them remains a challenge
  - Technical expertise
Resources (1/4): Challenges

- Active existing and opening new markets (Gabon, Burkina Faso in mining/ Uganda, Kenya, Tanzania in oil & gas)
- General financing environment remains difficult particularly in light of ongoing market, regulatory and fiscal uncertainty
- For resources, increased focus by governments on value extraction in the form of: increased share of profits; increased obligations on resource companies to invest in-country; increased State participation.
Resources (2/4): Profits

- Increased sovereign share of **mining sector profits** while attempting to balance private investment incentives

- Recent and proposed amendments to legislation:
  - increased royalties (e.g. in Tanzania, Mauritania, Burkina Faso but contrast others – Guinea and Botswana?)
  - increased corporate tax rates (e.g. Ghana)
  - a new tax on “super profits” (e.g. in Côte d’Ivoire and DRC, Tanzania)

- Some “maturing” of tax incentive schemes to encourage investors
Resources (3/4): Sponsor delivery

- Mining companies are being required to do more to *increase local employment and business opportunities*
- Illustration: Burkina Faso’s draft new Mining Code:
  - preferences given to local Burkinabé companies for supply of goods and services;
  - provisions increasing local employment through priority recruitment;
- Illustration: Mali’s new Mining Regulation
  - New rules to promote the development of local communities through Community Development Plans.
• **State Participation** in mining operations is viewed by many Governments as a means to:
  - extract economic benefits;
  - provide a measure of control; and
  - provide a means of knowledge transfer.

• State Participation has been identified by investors as one of the biggest risks affecting the sector.

• See:
  - Zimbabwe (51% to indigenous investors)
  - Burkina Faso (additional participation by “negotiation”)
  - Mauritania (optional maximum 10%)
WEF: Africa Competitiveness Report

- Report sets out a number of policy recommendations to increase African productivity into the future
  - Simplifying import export procedures – see the Uganda-Kenya revenue authorities digital exchange platform
  - Developing information and communication technologies
  - Improve energy:
    - reconsider subsidies and tariffs that are not cost-reflective
    - invest in the diversification of the energy mix
    - promote energy efficiency and pursue green energy
    - build competitive regional power pools coupled with the requisite legal and regulatory framework.
  - Improve transport:
    - upgrading rail transport links to ensure cost-effective transportation of bulky exports
    - increasing capacity storage in the port sector
    - improving feeder and rural roads, thereby enhancing inclusiveness.
  - Build “growth poles”
The importance of DFIs

- Who are these development finance institutions?
- Historic divide between resources and infrastructure financing in Africa:
  - Infrastructure – DFI stomping ground
  - Resources – private investment
- DFI involvement in resources has historically been low (particularly when compared to infrastructure).
- Very few opportunities for DFI debt financings to meet criteria for investment (most projects that have found capital are able to finance from the commercial debt and equity market).
- But, the thirst for infrastructure has changed the dynamic. The penny that links mining and infrastructure has finally dropped.

“African governments must strategically target tying mining investment to PPI in energy. After all, it is the sector that is most likely able to draw private participation and power purchase agreements underwritten by large mining operations can further help in unlocking finance” — UN Economic Commission for Africa: December 2011
The importance of DFIs

- DFIs have increasingly turned their attention to resources because:
  - larger projects – not only gold anymore (increased infrastructure needs for bulk commodities and therefore DFI involvement)
  - commodity prices (DFI financing more likely when conditions are challenging and equity and commercial debt not readily available)
  - foray of Australian mining companies (bring better ESI profiles)
  - creativity: Increased number of available facilities, funds, products
  - increased co-operation between commercial banks (e.g. Standard Bank, Nedbank, RMB, ABSA, Stan Chart) and DFIs
The importance of DFIs

- Benefits of DFI support and involvement
  - Long term debt
  - No need for political risk insurance?
  - Higher level of risk
    - Resources (i.e. projects outside of gold, nickel and copper)
    - Countries with higher risk profile
    - Infrastructure
    - Agriculture
  - Sovereign risk
  - Regulation/legislation reform
  - Contact in government
  - Infrastructure development
So, you want to invest in Africa?

- Corruption – the Opacity index (update on legislative reform in Australia)
- Administrative barriers to investment
- General approvals
- Sectoral licensing
- Site development
- Operational requirements
So, you want to invest in Africa?

**Senegal investment process**
- 23 different applications with supporting materials
- 31 government authorisations
- 9-24 month process

*Indicative only*
Legal and commercial structure

- 54 countries. 54 legal systems.
- Some specific issues to consider when structuring your project:
  - Applicable law (English, Portuguese, French – Common law, Religious, Pluralistic)
  - Types of corporate vehicles
  - Local shareholdings
  - Financing matters (capital restrictions, interest payments …)
  - Registering and enforcing of security
  - Insurance
  - Employment
  - Land
  - Dispute resolution
Building blocks of a sound project

- Understand the risks (and managing them)
- Where’s the money coming from?
- Logistics – are you on the ground?
- Feasibility – do you have a project?
- Local support
- Advisers – international and local
- Government support
- DFI support
- The importance of tax
- Capturing development costs
- Development fees
- Corporate structuring
- Compliance
The state of Africa

“The best time to plant a tree is twenty years ago. The second best time is now”

African proverb
Notice

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