

**RESOURCES-FOR-INFRASTRUCTURE (R4I) INVESTMENT AGREEMENT BETWEEN RESOURCE-  
RICH SUB-SAHARAN AFRICAN (SSA) COUNTRIES AND CORPORATE DEVELOPERS: A  
COOPERATIVE PURSUIT OF MUTUAL INTERESTS OR POISONED CHALICE?**

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submitted in partial fulfillment of the requirements for the degree

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## DEDICATION

To my Awesome GOD – JEHOVAH – for His Faithfulness, Guidance, Wisdom and Protection upon my life and destiny. Thank You JESUS.

## ACKNOWLEDGEMENTS

First, I give all Glory to GOD for providing the Guidance and Wisdom for this research.

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## LIST OF ABBREVIATIONS

AICD	Africa Infrastructure Country Diagnostic
ANOC	Asian National Oil Companies
BOO	Build-Own-Operate
BOT	Build-Operate-Transfer
DB	Design-Build
DBFO	Design-Build-Finance-Operate
DBM	Design-Build-Maintain
DBO	Design-Build-Operate
DRC	Democratic Republic of Congo
EITI	Extractive Industry Transparency Initiative
FDI	Foreign Direct Investment
KNOC	South Korea's National Oil Company
MNCs	Multinational Corporations
NNPC	Nigerian National Petroleum Corporation
PDP	Peoples' Democratic Party
PPPs	Public-Private Partnerships
R4I	Resources-for-infrastructure
RFR	Right of First Refusal
SEPCO	Shandong Electric Power Construction Corporation
SSA	Sub-Saharan Africa
SWF	Sovereign Wealth Funds

## ABSTRACT

Infrastructure acts as a catalyst for human and economic development, and is also critical to the general functioning of society. It defines a country's business competitiveness and also creates jobs. Sub-Saharan Africa (SSA) is generally behind most developing regions on most standard indicators of infrastructure development. Lack of infrastructure is one of the major obstacles to sustaining poverty alleviation in this region, though the region is abundantly rich in natural resources, with new discoveries being continuously made. Given the constraints on traditional sources of infrastructure finance, resources-for-infrastructure (R4I) deals present one of the most promising financing techniques in bridging the infrastructure gaps in SSA. R4I agreements are a mechanism through which a state can procure critical infrastructure without having to produce enough revenue to support its financing. This model is used when a government wants to involve the private sector in resource projects, and desires to use nonrecourse financing to protect the state's coffers from credit exposure. Moreover, it can be leveraged when a state allows a private developer to exploit its mineral resources, and can borrow against its expected income from the resource development project. Therefore, the broad research question which this study will seek to answer is: does the R4I deal guarantee remunerative returns by ensuring mutuality of benefits? The issue here is that resource-rich SSA countries may not be getting fair R4I deals because they may not have the capacity to negotiate complex and innovative contractual agreements like a typical R4I deal with corporate developers. This incapacity undermines the potential benefits of R4I swaps as an innovative financing technique for procurement of infrastructure in these resource-rich SSA countries. Thus, this study will argue that given the lack of institutional capacity in most of the resource-rich countries of the SSA to negotiate complex contractual agreements, better training and capacity building may result in R4I deals being creatively used to achieve development objectives such as the procurement of infrastructure.

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## CHAPTER 1

### INTRODUCTION

#### 1.1 Background to the Study

Infrastructure acts as a catalyst for human and economic development, and is also critical to the general functioning of society.<sup>1</sup> It defines a country's business competitiveness and also creates jobs.<sup>2</sup> According to the Africa Infrastructure Country Diagnostic (AICD) conducted by the World Bank, Africa has a yearly infrastructure financing gap of US\$31 billion.<sup>3</sup> This has informed the call by African leaders for more international support in developing critical infrastructure on the continent. Moreover, due to lack of adequate infrastructure, Africa's infrastructure services are more expensive than those in other regions.<sup>4</sup>

Sub-Saharan Africa (SSA) in particular is behind most developing regions on most standard indicators of infrastructure development.<sup>5</sup> Lack of infrastructure is one of the major obstacles to sustaining poverty alleviation in this region,<sup>6</sup> though the region is abundantly rich in natural resources, with new discoveries being continuously made. However, many of these discoveries may not yet been exploited due to lack of access to infrastructure to process and transport these resources.<sup>7</sup> Improving infrastructure is therefore important for the development, and eventual exploitation of these resources.<sup>8</sup> With the procurement of needed infrastructure to support it, the oil, minerals and gas

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<sup>1</sup> Olufemi Olugbemiga Soyaju *Public assets financing in Nigeria: the imperatives for legal reforms to unlock domestic financial resources and foreign capital for infrastructure development* (unpublished LLD thesis, University of Pretoria, 2012), pg 54. Hereafter known as Soyaju's thesis.

<sup>2</sup> *Ibid.*

<sup>3</sup> Leveraging Extractive Industry Infrastructure Investments for Broad Economic Development: Regulatory, Commercial and Operational Models for Railways and Ports (May 2012) *Vale Columbia Center on Sustainable International Investment*, pg 1.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> Jeffrey Gutman et al (March 2015) *Financing African Infrastructure: Can the World Deliver? Global Economy and Development report*, the Brookings Institution, pg 9.

<sup>7</sup> Richard Abadie (ed) (2014) *Capital project and infrastructure spending: Outlook to 2025*, *Price Water House Cooper*, pg 38.

<sup>8</sup> *Ibid*, 39.

sectors in SSA countries will be more able to meet rising consumer demands.<sup>9</sup> This explains why it is important for SSA States to explore a mix of different financing techniques, including resources-for-infrastructure (R4I) deals, in order to finance infrastructure development.

R4I agreements are a mechanism through which a state can procure critical infrastructure without having to produce enough revenue to support its financing.<sup>10</sup> The major benefit of this model is that a state can get infrastructure assets faster than it would be able to if it had to wait to earn revenues from resource projects.<sup>11</sup> This model is used when a government wants to involve the private sector in resource projects, and desires to use nonrecourse financing to protect the state's coffers from credit exposure.<sup>12</sup> Moreover, it can be leveraged when a state allows a private developer to exploit its mineral resources, and can borrow against its expected income from the resource development project.<sup>13</sup>

## 1.2. Research Problem

Studies have shown that R4I swaps may have contributed to the fast growth of resource-rich SSA nations.<sup>14</sup> However, in some instances, these agreements have been criticized for not providing the host country with a fair deal, despite the fact that they enable the financing and development of critical infrastructure that African countries often require. One of the reasons why states may not be getting fair R4I deals is because of the absence of institutional capacity to negotiate complex contractual agreements.

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<sup>9</sup> *Ibid*, 42. For example, more capital investments are required to finance required infrastructure needed for natural gas exploitation in Mozambique and Tanzania.

<sup>10</sup> Halland Havard et al (2014) Resource Financed Infrastructure: A Discussion on a New Form of Infrastructure Financing, *World Bank*, pg 13.

<sup>11</sup> *Ibid*.

<sup>12</sup> *Ibid*, 31.

<sup>13</sup> *Ibid*.

<sup>14</sup> These countries include: Angola, Nigeria, Ethiopia, Chad, Mozambique and Rwanda.

The absence of transparency with regard to the cost of infrastructure projects has been criticized.<sup>15</sup> Finally, it has also been alleged that these swaps have weak linkages to the economy of the host nation.<sup>16</sup>

For example, one of the most prominent R4I deals is the *Sicomines* agreement between the Government of Democratic Republic of Congo (DRC) and a group of Chinese companies, which has generated national and international criticism.<sup>17</sup> Some critics have voiced concerns that the agreement is imbalanced, with estimates placing the value of the concessions between US\$40 and 120 billion, as opposed to US\$9 billion as per the agreement.<sup>18</sup>

In terms of the agreement, the Chinese government-owned bank provided a concessional loan of US\$3 billion for infrastructure investments separate from the mining project, and US\$3 billion for the copper-cobalt mine itself.<sup>19</sup> The operations started in 2015, and the Congolese government will repay the loan with the profits of the mining project.<sup>20</sup> Curiously, no financial details have been released about the *Sicomines* deal. The public only knows the interest rates, grace and repayment periods, but prices of minerals in mining concessions are unknown.<sup>21</sup> Though, admittedly, not always the case, in this particular instance this has led critics to allege that the traded oil and mining concessions are larger than the loan amount and that the natural resources are misused.<sup>22</sup>

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<sup>15</sup> Peter Konijn & Rob van Tulder 'Resources-for-infrastructure (R4I) swaps: A new model for successful internationalization strategies of rising power firms?' 260.

<sup>16</sup> Lucy Corkin 'Chinese construction companies in Angola: a local linkages perspective (2012)' 37 *Resources Policy* 475- 476.

<sup>17</sup> *Ibid.*

<sup>18</sup> China and Congo: Friends in Need (March 2011) *Global Witness*, pg 19. According to Johanna Jansson ,other criticisms voiced by the international community are: the \$9 billion loan was not concessional and was too big because of DRC's already existing \$13.1 billion external bilateral and multilateral debt. Moreover, the agreement was allegedly concluded secretly without broad national stakeholder agreement. See Johanna Jansson (October 2011) The *Sicomines* Agreement: Change and Continuity in the Democratic Republic of Congo's International Relations Occasional Paper 97 *South African Institute of International Affairs*.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.* The EITI and other transparency initiatives aim to address transparency issues. Moreover, some concession agreements are voluntarily made public by the firms involved for transparency reasons.

Therefore, it is in the light of the above that R4I agreements have been criticized for not providing host states with fair deals.<sup>23</sup>

### **1.3. Research Questions**

The broad research question which this study seeks to answer is: does the R4I deal guarantee remunerative returns by ensuring mutuality of benefits?

In answering the main research question, the following sub-questions will also be answered-

- i. What is the nature and context of the R4I swap as a financing model?
- ii. Which theory or theories, if any, underpin R4I as a variant of foreign investment?
- iii. Are R4I deals skewed in favour of the corporate developers as alleged by critics?
- iv. What are the policy and legal considerations needed to make the best strategic use of the R4I infrastructure financing model?

### **1.4. Thesis Statement**

Resource-rich SSA countries may not be getting fair R4I deals because they may not have the capacity to negotiate complex and innovative contractual agreements like a typical R4I deal with corporate developers and this incapacity undermines the potential benefits of R4I swaps as an innovative financing technique for procurement of infrastructure in these resource-rich SSA countries. Thus, this study will argue that given the lack of institutional capacity in most of the resource-rich countries of the SSA to negotiate complex contractual agreements, better training and capacity building may result in R4I deals being creatively used to achieve development objectives such as the procurement of infrastructure.

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<sup>23</sup> Halland Havard et al (2014) *World Bank*, pg 13.



### 1.5. Significance of the Study

Infrastructure development is a very important factor in creating a competitive business landscape in sub-Saharan African countries.<sup>24</sup> It provides the way to reduce poverty and improve the livelihood of poor families.<sup>25</sup> Lack of necessary infrastructure holds back per capita growth by 2% each year, and depresses firm productivity by as much as 40%.<sup>26</sup> It has been estimated that around US\$90 billion is needed to bridge Africa's infrastructure gap annually until 2020.<sup>27</sup>

Given the constraints on traditional sources of infrastructure finance, R4I agreements present one of the most promising financing sources in bridging the infrastructure gap in sub-Saharan Africa.<sup>28</sup> Hopefully, this study will assist policy-makers and governments to overcome the challenges associated with R4I agreements, whet the risk appetite of foreign investors to invest in the extractive industry sectors of sub-Saharan African countries. Finally, this study will make a significant contribution to legal scholarship in this field.

### 1.6. Preliminary Literature Survey

Two major strands of argument underpin this study. First is that infrastructure acts as catalyst and is critical to human and economic development and the general functioning of every modern society. Second is that, with a good institutional and negotiation capacity, the R4I financing agreement model can be creatively used by resource-rich nations in SSA to achieve development objectives through the procurement of critical infrastructure assets.

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<sup>24</sup> Ezechukwu U (January 2015) The Chinese Model of Infrastructure Development in Africa, Policy Brief Vol 1 Issue 10, *Centre for the Study of the Economies of Africa*, pg 3.

<sup>25</sup> *Ibid.*

<sup>26</sup> Alvaro Escribano et al (2008) Impact of Infrastructure Constraints on Firm Productivity in Africa, Working Paper 9, *Africa Infrastructure Sector Diagnostic*, World Bank, pg 7.

<sup>27</sup> Vivien Foster & Cecilia Briceno-Garmendia (2010) Africa's Infrastructure: A Time for Transformation. The International Bank for Reconstruction and Development, *Africa Infrastructure Sector Diagnostic*, World Bank, pg 7.

<sup>28</sup> Ezechukwu U (January 2015) *Centre for the Study of the Economies of Africa*, pg 3. Other financing techniques include Public-Private Partnerships, Sovereign Wealth Funds, project finance, etc (these are fully discussed in Chapter 4).

In an article,<sup>29</sup> Alexis Habiyaemye notes that scarce infrastructure is one of the major obstacles preventing resource-rich SSA countries from achieving their development objectives.<sup>30</sup> Thus, the arrival of countries like China in the African resource market has created new dynamics in the growth of Sub-Saharan African economies, through the conclusion of R4I agreements so that they build infrastructure assets in return for accessing resources in this region.<sup>31</sup> This author agrees with this line of argument in that infrastructure is indeed an enabler of growth and, in the face of financial constraints from the public sources, R4I agreements present a good way to acquire infrastructure. However, Habiyaemye does not dwell on the fact that resource-rich SSA countries need to develop their capacity to negotiate contracts as complex as R4I contracts.

Also, there have been concerns that the R4I swaps are skewed in favour of the corporate developers.<sup>32</sup> According to Peter Konijn and Rob van Tulder,<sup>33</sup> there has allegedly been lack of transparency with regard to the R4I deals, and the details of the cost of the infrastructure projects are not clear.<sup>34</sup> However the author believes that if the African partners involved can negotiate these contracts with transparency and appropriate policies in place, these contracts can benefit resource-rich countries in SSA and their local economies than they already do.

Vivien Foster & Cecilia Briceno-Garmendia,<sup>35</sup> in an eye-opening report, noted that nowhere in the world is infrastructure more potentially transformational and important as in Africa.<sup>36</sup> The duo contends that an estimated US\$ 93 billion (around 15% of the region's GDP) is annually needed to bridge the infrastructure gap in Africa.<sup>37</sup> In this regard, this author agrees that good infrastructure provision is integral to the development of SSA.

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<sup>29</sup> Alexis Habiyaemye 'Angola-Mode' Trade Deals and the Awakening of African Lion Economies' 25 *African Development Review* (2013) 636.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> Peter Konijn & Rob van Tulder 'Resources-for-infrastructure (R4I) swaps: A new model for successful internationalisation strategies of rising power firms?' (2015) 11 *Critical Perspectives on International Business* 274.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> Vivien Foster & Cecilia Briceno-Garmendia (2010) *Africa Infrastructure Sector Diagnostic*, pg 43.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid*, 65.

However, this report did not discuss the place of R4I agreements in bridging the serious infrastructure gap that exists in SSA.

### **1.7. Scope of Research**

SSA as a region is behind most developing regions on most standard indicators of infrastructure development. It is against this backdrop that the research geographically focuses on SSA, with particular emphasis on two of the resource-rich nations in the region, namely Nigeria and Angola. These countries are important within the context of this research, first as they represent Africa's largest producers and exporters of crude oil, and secondly they have concluded oil-for-infrastructure swap deals with China in the last decade. Besides, the extractive industries in these nations have a great growth potential over the next decade, and of course remain important sectors for investment.<sup>38</sup>

### **1.9. Proposed Research Methodology**

This research seeks to be analytical from a multi-disciplinary point of view, and will be comparative and exploratory. It will also do a comparative study of these issues amongst the two selected countries. Moreover, it will explore the benefits of concluding R4I agreements to finance needed infrastructure, and the inherent challenges.

### **1.10 Proposed Structure**

There will be six more chapters in this dissertation. Under chapter 2, the relevant theories that underpin R4I as a foreign-based creative financing model will be discussed. Chapter 3 will be a factual chapter that puts the role of infrastructure in a given society into context in SSA. Moreover, it will paint a graphic picture of the poverty of infrastructure in the sub-

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<sup>38</sup> See Jonathan Cawood (ed) (November 2014) Capital projects and infrastructure in East Africa, Southern Africa and West Africa: Trends, challenges and future outlook, *PricewaterhouseCoopers*, 38-40.

region. Chapter 4 will discuss the private sector participation in infrastructure procurement and the use of creative financing techniques and sources as market-based solutions for solving the poverty of infrastructure in resource-rich countries in SSA. In chapter 5, the issue of whether the model promotes cooperative engagement for mutuality of benefits or not will be analysed, and in particular whether it is skewed in favour of the foreign corporate developers? This will be examined using Angola and Nigeria as case studies. The comparative analysis will focus on why the Angola Mode worked in Angola but failed in Nigeria. Furthermore, chapter 6 will aim to identify the policy and legal considerations necessary to attract serious foreign corporate developers and make the best strategic use of the R4I financing option. Finally, in Chapter 7, conclusions will be drawn and recommendations made on how resource-rich SSA countries can overcome the associated challenges with R4I to derive utmost benefits and promote cooperative engagement for mutuality of benefits between the parties.

## CHAPTER 2

### UNDERGIRDING THEORIES

#### 2.1. Introduction

The main objective of this chapter is to explore the theories that underpin foreign direct investment (FDI) as a generic term for variants of cross-border investment models including R4I agreements.

#### 2.2. Theories that Underpin International Investment Including R4I

The following are some of the theoretical perspectives underpinning cross-border capital investments including R4I deals, and their implications generally for economic growth.<sup>39</sup>

##### 2.2.1. Pro-international investment theory

This is a view that has gained currency among multinational corporations (MNCs), counsel to foreign investors and capital-exporting governments. Basically, the view posits that foreign investment promotes economic growth, and benefits host countries, capital-exporting states and foreign investors.<sup>40</sup>

Pro-investment attitudes have resulted in enactment of national legal frameworks that allow foreign capital relative freedom of entry, place foreign investments on an equal pedestal legally with local enterprises and avoid special restrictions on the activities of foreign investors.<sup>41</sup> Pro-direct foreign investment attitudes are found among international institutions like the World Bank, not only among multi-national corporations and capital-exporting states.<sup>42</sup> The Bank has always stressed the importance of improving the investment environment in order to achieve economic development, and devotes much

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<sup>39</sup> Jeswald W Salacuse *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (2013) Oxford University Press: United Kingdom, 52.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*, 53.

<sup>42</sup> *Ibid.*

effort to helping states achieve this goal. National laws and state policies also play a major role in creating such environment.<sup>43</sup> Pro-investment theories are entrenched in many legal institutions, including national laws of many states that emphasize the importance of foreign investment for economic growth and in many international treaties.<sup>44</sup>

This theory is similar to the classical theory on foreign investment.<sup>45</sup> The classical theory posits that FDI is wholly beneficial to host countries, and that foreign capital brought into the host state ensures that domestic capital can be used for other public needs.<sup>46</sup> Moreover, foreign investors may bring new technology, locals could acquire new skills and new jobs are created.<sup>47</sup> However, this theory is losing popularity.<sup>48</sup> For example, where an MNC exploits scarce resources or labour without regard for the environmental impact, benefits may not accrue to the host state.

Therefore, classical theory supports the view that R4I model as a variant of foreign investment benefits host countries as it ensures the provision of infrastructure for economic growth and human development. However, this writer does not agree that R4I deal is wholly beneficial to host states. International mining, oil and gas companies very often have more information about resource-deposits in SSA resource-rich countries than the host states themselves.<sup>49</sup> This has resulted in public concerns that R4I agreements may be skewed in favour of corporate developers.<sup>50</sup>

### 2.2.2. Negotiation theory of international investment

This theory argues that FDI does not automatically bring benefits or losses to host states, and is thus neither inherently good nor bad.<sup>51</sup> The bargain negotiated between a host state

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<sup>43</sup>

*Ibid.*

<sup>44</sup>

*Ibid.*

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M Sornarajah *The International Law on Foreign Investment* 2ed (2004) Cambridge University Press:United Kingdom, 51, 56.

<sup>46</sup>

*Ibid.*

<sup>47</sup>

*Ibid.*

<sup>48</sup>

*Ibid.*

<sup>49</sup>

Sarah-Jane Danchie 'Taking resource ownership' (March 2016) No. 428 *African Business*.

<sup>50</sup>

*Ibid.*

<sup>51</sup>

Jeswald W Salacuse (2013) 56.

and the foreign investor regarding the distribution of costs and profits determines whether or not FDI is beneficial to a host state or not.

This theory is based on two crucial insights.<sup>52</sup> The first is that an international investment is not merely a transfer of assets from one state to another but is a deal between the investor and the host state.<sup>53</sup> It also distributes the costs and benefits of the agreement between both sides.<sup>54</sup> Thus, the ability of a resource-rich state to gain net positive gains from a R4I agreement depends on its capability to negotiate a good deal.<sup>55</sup> The terms of the deal should be found in the regulatory framework, investment legislation, and contracts affecting that transaction.<sup>56</sup> Moreover, the aim of the national legal framework is to maximize the benefits of and minimize the costs of any investment project.<sup>57</sup> To achieve this aim, national legal frameworks should provide for cautious screening and monitoring of all foreign investments and specify in detail the contributions such projects must make to the host state.<sup>58</sup>

The second insight on which the negotiation theory is based on is that negotiations between investors and a state do not end after the investor has made its investment.<sup>59</sup> The relationship between the two sides is a continuing negotiation because each side seeks to get better benefits from the investment, mostly at the expense of the other.<sup>60</sup> This theory proves the point that whether R4I deals are beneficial or not to host states partly depends on how well they negotiate the agreements.

### 2.2.3. Structural theory of international investment

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<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.* For instance, national investment laws and regulation influenced by this theory stipulate the number and quality of work opportunities for citizens, limitations on the repatriation of capital and profits and the level to which the investor must transfer useful technology, skills and knowledge to the host state.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, 56-57.

The benefits of foreign investment to host states depend on the nature of the deal they strike with foreign investors. Unfortunately, developing countries especially may not have the power to negotiate satisfactory investment benefits with foreign investors, and MNCs in particular, because of the asymmetries of power.<sup>61</sup> Many developing states suffer from a structural disadvantage in their dealings with international investors.

In this context, one can argue that SSA resource-rich countries suffer from a structural disadvantage in their dealings with the corporate developers in R4I deals. Countries can address this structural disadvantage in two ways: seeking ways to improve their negotiating capacity (e.g. improved training for officials involved in the negotiation process) and being extremely cautious in negotiating FDI deals.

#### 2.2.4. Law and development

This is a social theory of law which has the ideal of legal liberalism as its focal point.<sup>62</sup> Law is viewed as a method of social engineering and a tool to achieve development objectives. It also argues that laws and legal institutions can play a major role in achieving social change.<sup>63</sup>

Essentially, this theory posits that the law has a natural development function.<sup>64</sup> Thus, laws are required to ensure the institutional changes needed to implement more efficient development strategies.<sup>65</sup> In other words, law is multi-functional in a society as it could be used as a tool of administration, crime- prevention, rehabilitation and justice, and for collecting taxes which are consequences of the development process.<sup>66</sup>

Normally, the legal framework is the basis on which states regulate and ensure the provision of infrastructure to the public.<sup>67</sup> A fair legal framework incorporates the varied

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<sup>61</sup> *Ibid.*

<sup>62</sup> O Soyeju 'Making a Case for a Development-Driven Approach to Law as a Linchpin for the Post-2025 Development Agenda' (2015) 18 *Potchefstroom Electronic Law Journal* 372.

<sup>63</sup> *Ibid.* See Soyeju's thesis, 30.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> Soyeju's thesis, pg 137.



interests of the parties – the government and the corporate developer – and seeks to achieve an equitable balance between these varied interests.<sup>68</sup>

The legal framework also protects the rights of public service providers and customers alike.<sup>69</sup> Thus, the law can be used as a platform to facilitate development and infrastructure provision. When there is a strong legal framework, R4I contracts concluded between resource-rich countries in SSA and corporate developers may promote cooperative engagement for the mutual benefits of the parties concerned.

Rules are very important in defining the terms and the templates upon which financial capital flows. Therefore, when a country has a legal framework that has comprehensive laws and regulations that have transparency and fairness and very sound capacity for investment negotiations, the state has a better chance of leveraging R4I swaps as a financing option for the provision of critical infrastructure assets and promotion of national development priorities.<sup>70</sup>

#### 2.2.5. Neo-classical economic theory

One other assumption that underpin R4I deals is that private sector involvement in procurement, management and maintenance of public assets will improve the public allocation of resources, efficient maintenance and management of infrastructure assets for quality service delivery to the public. This assumption is supported by the neo-classical theory.

The neo-classical economic theory's focal point is the efficiency of markets, free competition and the primary role of individuals in determining optimal economic outcomes. Neoclassical economics as the contemporary version of the liberal economic model dominated development policy in the late twentieth century.<sup>71</sup>

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<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> *Natural Resource Governance Institute Reader* (March 2015) Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries, pg 6.

<sup>71</sup> Ann Seidman & Robert B Seidman (1994) *State and Law in the Development Process: Problem-Solving and Institutional Change in the Third World* St Martin's Press: New York, 92.

On the issue of public sector's procurement of the infrastructure, the argument is that the public sector generally has a legacy of poor performance and has always functioned ineffectively and inefficiently. Besides, the public sector lacks both the financial and technical wherewithal and capacity to handle the task involved in the procurement of public infrastructure and service delivery.<sup>72</sup> This line of thought could be traced to the first formulations of neo-classical theory and to the later rejection of Keynesian notion of the appropriateness of relatively extensive state's interventions.<sup>73</sup>

According to the neoclassical model of perfect competition, market forces ensure the allocation of scarce resources that best fits demand.<sup>74</sup> This is what is called 'Pareto optimality'. Market competition results in the most effective use of resources and all participants achieve their best possible position.<sup>75</sup> This theory seems to justify the assumption that there would be more innovation towards infrastructure investment because of competition between corporate developers and the forces of demand and supply when a market-based infrastructure financing model like R4I swaps are used.

### 2.3 Conclusion

This chapter has explored some of the theories that underpin FDI as a generic term for variants of cross border private capital investment models including the R4I. The conclusion is that these theories are to assist in understanding the complex issues involved in FDI including the R4I which is gaining currency as a variant of infrastructure investment financing solution in the resource-rich SSA countries.

Having discussed the relevant theories that undergird the thesis of this study, the discussion moves on to placing infrastructure into the context in the SSA region in Chapter 3.

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<sup>72</sup> *Ibid.*  
<sup>73</sup> *Ibid.*  
<sup>74</sup> *Ibid*, 93.  
<sup>75</sup> *Ibid.*

## CHAPTER 3

### INFRASTRUCTURE DEVELOPMENT

#### 3.1 Introduction

In the previous chapter, some of the theories that underpin FDI as a generic term for variants of cross-border private capital infrastructure investment models including R4I swaps were interrogated and the conclusion was that these are to assist in understanding the complex issues involved in FDI, like R4I swaps.

This chapter continues the discussion from a factual point of view, in that it places into context the role of infrastructure in promoting economic development in a society. It will attempt to define infrastructure and paint a graphic picture of the poverty of infrastructure in SSA and its implications for development. The chapter will also present a narrative of how infrastructure financing moved from the traditional public sector to private-sector led financing of infrastructure assets.

#### 3.2 What Is Infrastructure?

The starting point is to attempt to explain what the word ‘infrastructure’ connotes.

Authors have not agreed amongst themselves regarding the exact definition of ‘infrastructure’.<sup>76</sup> Albert Hirschman explained the term ‘infrastructure’ as:

‘Those services without which primary, secondary and tertiary production activities cannot function. In its widest sense, it encompasses all public services from law and order through education and public health to transportation, communication, power and water supply as well as such agricultural overhead capital as irrigation and drainage systems’.<sup>77</sup>

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<sup>76</sup> Soyeju’s thesis, pg 49.

<sup>77</sup> Albert O Hirschman (1958) *The strategy of economic development* Yale University Press: New Haven, 83.

According to Grimsey and Lewis,<sup>78</sup> the things that make up ‘infrastructure’ differ ‘from country to country and from one time to another’. In defining infrastructure, one must distinguish between economic and social infrastructure and within each of these, distinguish between hard (physical) and soft infrastructure.<sup>79</sup>

Lay people see infrastructure as the transportation that moves them, power they use, water they use and the communication systems they use to stay in touch with relations.<sup>80</sup> However, infrastructure can largely be defined as long-term physical assets that operate in markets with high entry barriers and to enable the provision of goods and services.<sup>81</sup> Infrastructure, whether social or economic, may also be defined as physical services and assets, and are crucial for the development and growth of an economy.<sup>82</sup> Critical infrastructure provides the crucial services that underlie society and is the backbone of the state’s economy, health and security.<sup>83</sup>

The combination of fundamental systems that support a community, region or country is infrastructure and it includes everything from water and sewer systems to road or rail networks to national power and natural gas grids.<sup>84</sup>

Infrastructure development is very crucial in catalysing a country’s economic growth.<sup>85</sup> Efficient and effective infrastructure is important for ensuring the proper

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<sup>78</sup> Darrin Grimsey & Mervyn K Lewis (2004) *Public Private Partnerships: The Worldwide Revolution in Infrastructure Provision and Project Finance* Edward Elgar Publishing: Cheltenham, 20.

<sup>79</sup> *Ibid*, 20.

<sup>80</sup> *Ibid*.

<sup>81</sup> ‘What is Social Infrastructure?’ available at <http://www.nzsif.co.nz/Social-Infrastructure/What-is-Social-Infrastructure/>, last accessed on 29/03/2016.

<sup>82</sup> Arunma Oteh ‘Capital Market as a Long Term Option for Financing Infrastructure Development’ available at [http://www.sec.gov.ng/files/Speech\\_infrastructure%20development%20-%20cbn.pdf](http://www.sec.gov.ng/files/Speech_infrastructure%20development%20-%20cbn.pdf), last accessed on 27/03/2016.

<sup>83</sup> ‘What is critical infrastructure?’ available at <https://www.dhs.gov/what-critical-infrastructure>, accessed on 29/03/2016.

<sup>84</sup> Tonderai N Gowero ‘Discuss various types of infrastructure necessary for a successful change process in urban areas’ available at [https://www.academia.edu/3694215/Discuss\\_various\\_types\\_of\\_infrastructure\\_necessary\\_for\\_a\\_successful\\_change\\_process\\_in\\_urban](https://www.academia.edu/3694215/Discuss_various_types_of_infrastructure_necessary_for_a_successful_change_process_in_urban), last accessed on 29/03/2016.

functioning of the economy.<sup>86</sup> Well-developed infrastructure decreases the effect of distance between regions, integrates the national market and connects it at little cost to markets in other countries.<sup>87</sup>

A well-developed communications and transport infrastructure network is a prerequisite for the access of resource-rich nations in SSA to economic growth fuelled by its resources.<sup>88</sup> Quality roads, railroads, ports and air transport make it easy to move resources from their sources to where it will be used, and improves the transportation of workers from their homes to work.<sup>89</sup>

### 3.3 Types of Infrastructure

Specifically, there are three classifications of infrastructure – physical, social and economic infrastructure.

Physical infrastructure includes the network that makes an industrialised nation function smoothly.<sup>90</sup> Components of physical infrastructure include bridges, drainage systems, roads, telecommunications systems, etc.<sup>91</sup> Soft infrastructure on the other hand, is the framework needed to maintain and keep the different institutions.<sup>92</sup> This includes the non-physical assets such as programmes and software, the financial system, organisational structure and governing rules.<sup>93</sup>

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<sup>85</sup> 'Building a Better World: Infrastructure's Role in Economic Growth' available at [https://www.frbatlanta.org/regional-economy/econsouth/vol\\_10\\_no\\_2/econsouth-vol\\_10\\_no\\_2-building\\_a\\_better\\_world.aspx](https://www.frbatlanta.org/regional-economy/econsouth/vol_10_no_2/econsouth-vol_10_no_2-building_a_better_world.aspx), last accessed on 29/03/2016.

<sup>86</sup> The Importance of Infrastructure (January 2011), Volume 1, *Puerto Rico Public-Private Partnerships Authority*.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> Tanya Grace Mulligan '2 main types of infrastructure' available at <https://tanyagracemulligan.wordpress.com/2013/02/19/2-main-types-of-infrastructure/> last accessed on 29/03/2016.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

Social infrastructure is a subset of the infrastructure industry.<sup>94</sup> It usually includes assets that encourage social services.<sup>95</sup> Social infrastructure is usually exclusively provided by a local or central government or related entities like universities.<sup>96</sup> The provision of social infrastructure is well suited to Public-Private Partnerships (PPPs), which have been used to finance public infrastructure.<sup>97</sup> Social infrastructure provides basic services for human survival in society. It improves the quality of life and touches mainly on the welfare of inhabitants of society, especially vulnerable groups and less developed communities.<sup>98</sup> Hard social infrastructure includes education and training buildings, housing, sewerage and drainage pipes, hospitals, water storage, dams and treatment facilities, child care and aged care institutions and penitentiaries.<sup>99</sup> Soft social infrastructure takes the form of social security systems which include community services. However these categories overlap.<sup>100</sup>

Economic infrastructure refers to core infrastructure that enhances productivity and innovation because it provides crucial intermediate services to business and industry.<sup>101</sup> Hard economic facilities include roads, highways, bridges, ports, railways, airports, public transport, telecommunications, electricity and gas generation, transmission and distribution.<sup>102</sup> Soft economic infrastructure assets include capacity building, vocational training, financial facilities for businesses like payments, credit, derivatives, equity, venture capital, etc.<sup>103</sup>

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<sup>94</sup> 'What is Social Infrastructure?' available at <http://www.nzsif.co.nz/Social-Infrastructure/What-is-Social-Infrastructure/> accessed on 29/03/2016.

<sup>95</sup> *Ibid.* Examples of social infrastructure assets include prisons, community housing, schools and hospitals. However, it does not extend to providing teachers at a school.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.* Some of these services are also provided by private entities like private hospitals and schools.

<sup>100</sup> *Ibid.*, 21- 22. Economic infrastructure assets like roads and transport networks may also enhance the quality of life even if it is not intended.

<sup>101</sup> *Ibid.*, 20.

<sup>102</sup> *Ibid.* Moreover, Information and Communication Technologies (optic fibre), other assets that are needed to facilitate research and development, technology transfer and trade are also part of soft economic infrastructure assets. Thus, economic infrastructure supports economic activity and is often characterised by demand-based revenue streams.

<sup>103</sup> *Ibid.*

Broadly speaking, states have the duty to ensure the provision of various infrastructure types to ensure the efficient functioning of society.<sup>104</sup> These infrastructure types are interrelated and limited.<sup>105</sup> The existence of a range of infrastructure-space for transportation, telecommunications, housing, education, health, power, waste disposal, business, sewerage, is necessary for a national economy to function.<sup>106</sup> Therefore, from the classifications above, it can be seen that ‘infrastructure’ embraces two broad classes of goods: social and economic infrastructure.<sup>107</sup>

### 3.4 Conclusion

This chapter has put into context the role of infrastructure in promoting economic development in a society and the fact that poor infrastructure exists in most resource-rich SSA countries. It is an irrefutable fact that these countries are behind in capacity to generate power, coverage of telephone lines and density of paved roads, compared to other developing countries elsewhere in the world.<sup>108</sup> This infrastructure gaps cannot be met by traditional public funding sources alone. This explains the need for the infusion of private sector capital to help in bridging the infrastructure gap that exists in SSA, as will be discussed in chapter 4.

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<sup>104</sup> Soyeju’s thesis, pg 52.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> Vivien Foster & Cecilia Briceno-Garmendia (2010) *Africa Infrastructure Sector Diagnostic*, pg 7.

## CHAPTER 4

### Infusion of Private Capital into Infrastructure Development through Market-Based Financing Techniques and Sources

#### 4.1 Introduction

In chapter 3, the role of infrastructure in promoting economic development in a society was put into the context of SSA and it was found that poor infrastructure exists in most of the resource-rich SSA countries. It was also argued that there are huge infrastructure financing gaps in Africa, SSA in particular and that the financing gaps cannot be bridged by the traditional public sector budgetary funding sources alone. Thus, there is a compelling need for the infusion of private sector capital to help in bridging the infrastructure gaps that exist in SSA.

This chapter's objective is to discuss the private sector participation in infrastructure procurement and the use of creative financing techniques and sources as market-based solutions for solving the poverty of infrastructure in resource-rich SSA.

#### 4.2 Infrastructure Investment in SSA

Infrastructure investment is important for economic growth and poverty reduction.<sup>109</sup> Yet, there are huge funding gaps which must be bridged to meet SSA's infrastructure requirements.<sup>110</sup>

Traditionally, the provision of critical infrastructure was financed solely through budgetary allocations. The dwindling economic fortunes in the developing nations, coupled with the rise in the demand for basic infrastructure and service delivery, long years of sub-optimal investment and poor maintenance culture have made the private financing of

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<sup>109</sup> Darrin Grimsey & Mervyn K Lewis 'Evaluating the risks of public private partnerships for infrastructure projects' (2002) 20 *International Journal of Project Management* 107.

<sup>110</sup> Aid for Investment in Africa's Infrastructure project (2012) Mapping Support for Africa's Infrastructure Investment, *Organisation of Economic Co-operation and Development*, pg 5.



infrastructure an imperative. In other words, infrastructure can no longer be financed relying on the public purse alone. Therefore, engaging private capital is very important in overcoming the obstacles faced by governments in the wake of increasing urbanization, limited public funds and the sheer depth and breadth of infrastructure investment requirements. From the experiences of other nations, it is evident that private investment offers a promising method of closing the funding gaps in SSA's infrastructure.<sup>111</sup>

#### **4.3. Public Private Partnership (PPP) as a model for infrastructure financing**

PPPs are a refined form of the private infrastructure financing initiative that begun in the early 1990s.<sup>112</sup> PPPs cover various transactions where the private sector is given the right to operate for an extended period, a service traditionally the responsibility of the state, depending on the state concerned.<sup>113</sup> They describe the provision of public goods and services through the joint participation of the state, private sector and the consumers.<sup>114</sup> These transactions can range from short-term management contracts (with little or no expense), through concession contracts which may include the design and building of substantial capital assets along with providing a range of services and the financing of the entire construction and operation, to joint ventures where there is a sharing of ownership between public and private sectors.<sup>115</sup>

Grimsey and Lewis believe that PPPs are not a form of privatization because the state has the ultimate responsibility.<sup>116</sup> Moreover, PPPs do not involve just the one-off engagement of a private firm to provide goods or services.<sup>117</sup> The emphasis is actually on long-term contracts and strict performance regimes like design-build-finance-operate

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<sup>111</sup> *Ibid.* See also Darrin Grimsey & Mervyn K Lewis 'Evaluating the risks of public private partnerships for infrastructure projects' (2002) 20 *International Journal of Project Management* 109-110.

<sup>112</sup> Darrin Grimsey & Mervyn K Lewis 'Are Public Private Partnerships value for money? Evaluating alternative approaches and comparing academic and practitioner views' *Accounting Forum* 29 (2005) 346. It must however be noted that there is no precise definition of PPPs.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.* In general, PPPs fill a space between traditionally procured state projects and full privatization.

<sup>116</sup> In the case of privatisation, the state no longer has a role in the operations of the infrastructure asset.

<sup>117</sup> *Ibid.*

(DBFO) or build-operate-transfer (BOT) projects to design, construct, finance, manage, and operate infrastructure under a concession, with income (either from the state or users) according to the services supplied.<sup>118</sup>

#### 4.3.1. Why PPPs?

Many states are now looking to the private sector to finance infrastructure.<sup>119</sup> With the PPP model, the state determines which services the public needs, and calls for tenders from private entities to finance, build or operate a service delivery facility for the public.<sup>120</sup> Thus, there is a contract between a public sector entity and a firm, in terms of which it provides a service or assumes technical, financial or operational risk in an infrastructure project.<sup>121</sup>

PPPs offer policy-makers an opportunity to improve the infrastructure delivery, because the estimated demand for infrastructure financing shows that government resources fall short of what is required.<sup>122</sup> Moreover, PPPs require states to think and behave in new ways that require new skills.<sup>123</sup>

In addition, PPPs are an effective method for infrastructure delivery for the following reasons. First, responsibilities like design, building, financing and operating (DBFO) are combined in one contract, and part of the risks are transferred to the private sector.<sup>124</sup> Secondly, PPPs encourage corporate firms to deploy their professional skills and creativity towards the development of critical infrastructure.<sup>125</sup> Thirdly, PPPs are a long-term and stable investment opportunity for corporate firms.<sup>126</sup> Fourthly, PPPs can mobilize more

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<sup>118</sup>

*Ibid.*

<sup>119</sup>

Staff of the World Bank (2009) Attracting Investors to African Public-Private Partnerships: A Project Preparation Guide, pg 15.

<sup>120</sup>

Soyeju's thesis, pg 113.

<sup>121</sup>

*Ibid.*

<sup>122</sup>

Staff of the World Bank (2009) pg 15.

<sup>123</sup>

*Ibid.* 16.

<sup>124</sup>

Soyeju's thesis, pg 115.

<sup>125</sup>

*Ibid.* These skills and knowledge can be extended to the public sector.

<sup>126</sup>

*Ibid.*, 116.

capital than the state can do alone for infrastructure investment from institutional investors like pension funds, and the private sector.<sup>127</sup>

PPPs can therefore bridge the infrastructure gaps that exist in SSA especially in the resource-rich countries.<sup>128</sup> PPPs also allow states to keep ownership of assets, while contracting a corporate developer to perform a specific function like building, maintaining and operating infrastructure like ports and roads, or providing services like electricity and water.<sup>129</sup>

#### 4.3.2. How are PPPs concluded?

Below are some of the several ways in which PPPs can be structured:

##### i. Concessions and privatization

In a concession, the public authority grants a private party the right to design, build, finance, and operate an infrastructure assets owned by the public sector. The concession contract is usually for a fixed period after which responsibility for operation reverts to the public authority or agency. The private sector party recoups its investment, operating, and financing costs and its profits by charging members of the public a user fees.<sup>130</sup>

The following are some of the forms of concession:<sup>131</sup>

<p>➤ <b>Build-Operate-Transfer (BOT) Project</b></p>	<p>This variant of concession allows for private sector to invest directly in large scale public infrastructure project development.<sup>132</sup> In a BOT Project, the project company gets its income by charging fees to the</p>
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<sup>127</sup> *Ibid.* PPPs also help the circular flow of money in the economy by attracting private capital to invest in infrastructure projects.

<sup>128</sup> Peter Farlam (2005) Assessing Public–Private Partnerships in Africa: Executive Summary, Nepad Policy Focus Series, *South African Institute of International Affairs*.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> Soyeju’s thesis, pg 126.

<sup>132</sup> *Ibid.*

	utility/government instead of the fees customers are charged. <sup>133</sup>
➤ <b>Design-Build (DB) Project</b>	The private firm designs and constructs a project for a public agency, in terms of DB partnerships. <sup>134</sup> This partnership reduces time, saves money and provides stronger guarantees and allocates additional project risks to the private sector. <sup>135</sup>
➤ <b>Design-Build-Operate (DBO) Project</b>	The state owns and finances the construction of new assets. The private sector designs, builds and operates the assets to meet agreed outcomes. <sup>136</sup> A DBO's documentation is usually simpler than a BOT or an entire concession because it involves no financial documents. <sup>137</sup> Moreover, it usually consists of a turnkey construction contract plus an operating contract, or a section added to the turnkey contract covering operations. <sup>138</sup>

<sup>133</sup> *Ibid.* In common law countries, some projects are called concessions, like toll road projects, which have some similarities to BOT projects.

<sup>134</sup> The National Council for Public-Private Partnerships 'Types of Partnerships' available at <http://www.ncppp.org/ppp-basics/types-of-partnerships/>, last accessed on 06/05/2016.

<sup>135</sup> *Ibid.* Moreover, it reduces conflict by having a single entity responsible to the public agency for the design and construction. The public sector partner owns the assets and is responsible for their operation and maintenance.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.* The Operator takes little or no financial risk on the capital and will be paid for the design-build of the plant, in instalments after the construction milestones are completed. The Operator will also be paid an operating fee for the operating period. The operator is responsible for the design, construction and operations. Thus, if parts must be replaced before their assumed life span is over, the Operator may be liable to replace them.

<p>➤ <b>Design-Build-Maintain (DBM) Projects</b></p>	<p>A DBM is similar to a DB except the fact that the private firm is responsible for the facility for some period of time.<sup>139</sup> The DBM's benefits are similar to those of the DB. However, the private firm has the maintenance risk and the guarantee is extended to include maintenance. The public agency owns and operates the assets.<sup>140</sup></p>
<p>➤ <b>Build-Own-Operate (BOO) Projects</b></p>	<p>The contractor constructs and operates a facility without transferring ownership to the public sector. The contractor retains the legal title to the asset, and there is no duty on the state to buy the assets or take title.</p>

On the other hand, privatisation can be defined as the transfer of the operational control of an infrastructure asset or enterprise from the state to the private sector.<sup>141</sup> The operational control is usually secured by majority ownership. Thus, any transaction in terms of which the state gives up control and ownership through a reduction in its equity interest, is under 'privatisation'.<sup>142</sup>

<sup>139</sup> The National Council for Public-Private Partnerships 'Types of Partnerships' available at <http://www.ncppp.org/ppp-basics/types-of-partnerships/>, last accessed on 06/05/2016.

<sup>140</sup> *Ibid.*

<sup>141</sup> Soyeju's thesis, pg 123. See also Paul Starr 'The Meaning of Privatization' (1998) 6 *Yale Law and Policy Review* 6.

<sup>142</sup> *Ibid.*

#### 4.4. Financing Techniques

Infrastructure projects naturally require extensive investment and a longer period for development, construction, startup and operation.<sup>143</sup> So, private investors or corporate developers not only finance infrastructure projects, but ensure they are run effectively.<sup>144</sup> Besides, corporate developers are incentivised to ensure that infrastructure projects are executed well, in order to secure their investments.<sup>145</sup>

Broadly, financing techniques can be classified into corporate and structured finance.<sup>146</sup>

##### 4.4.1 Corporate finance

This entails the funding of a project from the investor's balance-sheet resources. It is basically a corporate loan, hence, it is also known as balance-sheet finance.<sup>147</sup>

##### 4.4.2. Structured finance

Here, legal structures are used to isolate asset risk, resulting in reduced risk for the originator.<sup>148</sup> It also entails the monetization of any rights of payments by a party having the legal right to transfer those payments to another.<sup>149</sup>

For the purposes of this study, the discussion will now focus on project finance as a variant of structured finance.<sup>150</sup>

- **Project Finance**

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<sup>143</sup> State Bank of Pakistan 'Guidelines for infrastructure project financing' available at [www.sbp.org.pk](http://www.sbp.org.pk), accessed on 20/04/2016.

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*, 269.

<sup>147</sup> Scott L Hoffman (2008) *The law and business of international project finance* Cambridge: University Press, 20.

<sup>148</sup> Davis H 'The definition of structured finance: results from a survey' (2005) 11 *The Journal of Structured Finance* 5-10.

<sup>149</sup> *Ibid.* Examples include project finance, asset-backed securities, use of derivatives, and other risk-transfer mechanisms.

<sup>150</sup> See Wu Shen-fa & Wei Xiao-ping 'The rule and method of risk allocation in project finance' (2009) 1 *Procedia Earth and Planetary Science* 1757.

The worldwide process of deregulating utilities and privatising public-sector capital investment has driven the growth of project finance over the past two decades.<sup>151</sup> This has happened both in the developed world and developing countries.<sup>152</sup> Major project developers (their banks and financial advisers included) now run worldwide portfolios and are able to apply the lessons learned from one country to projects in another. States also benefit from these exchanges of experience.<sup>153</sup>

Generally, infrastructure financing is a component of project financing,<sup>154</sup> and project finance is a method of financing infrastructure where the lender relies mainly on the income generated by the project as security for the loan.<sup>155</sup> This is usually used for large and expensive projects like mines and power plants.<sup>156</sup>

Private finance for public infrastructure projects is not new.<sup>157</sup> In the 18th and early 19th centuries, private-sector financing based on toll revenues was used to refurbish the English road system.<sup>158</sup> Moreover, electricity, telephone industries, railways, water and telephone industries were developed using private sector investment.<sup>159</sup> In the first half of the 20th century, the state took over infrastructure investment, but this trend has been reversing over the last two decades.<sup>160</sup>

Project finance as a financing tool is a suitable method for states to attract infrastructure investments on a non-recourse.<sup>161</sup> This is because the private sector assumes completion and operation risks, but only when the cash flow is enough to cover a project's capital and operating costs.<sup>162</sup>

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<sup>151</sup> ER Yescombe *Principles of Project Finance* (2002) Elsevier: UK, 5.

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.*

<sup>154</sup> Soyeju's thesis, 268.

<sup>155</sup> Black's Law Dictionary, 8<sup>th</sup> edition, 663.

<sup>156</sup> *Ibid.* See also LM Farell 'Principal-agency risk in project finance' (2003) 21 *International Journal of Project Management* 547.

<sup>157</sup> Yescombe (2002) 5.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.*

<sup>161</sup> Havard Halland et al (2014) *World Bank*, pg 28.

<sup>162</sup> *Ibid.*

The following are the benefits of project finance to third parties-

- **Risk transfer:** a project finance contract transfers risks from the public to the private sector, like project cost overruns.<sup>163</sup> Moreover, it provides for payments only when specific performance objectives are met. Thus, the risk of not meeting these objectives is passed to the private sector.<sup>164</sup>
- **Lower project cost:** private finance is now widely used for projects that would have been built and maintained by the public sector. Apart from the fact that the public sector is relieved from pressure, the private sector also builds and operates such investments more cost-effectively than the public sector, even though there is a higher cost of project finance compared to public sector finance.<sup>165</sup>
- **Third party due diligence:** the public sector may benefit from the independent control and due diligence of the project the lenders exercise. This is because lenders want to ensure that all duties under the Project Agreement are clearly fulfilled and that other Project Contracts deal with risk issue appropriately.<sup>166</sup>
- **Transparency:** Project finance is self-contained, thus, the true costs of the service or product can be easily monitored.<sup>167</sup>
- **Technology transfer:** project finance provides a way of producing market-based investment in infrastructure for which the local economy may have neither the skills nor the resources.<sup>168</sup>
- **More investment in public infrastructure:** project finance provides funding for more investment in infrastructure that the public sector might not be able to provide because of budgetary constraints.<sup>169</sup>

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<sup>163</sup> Yescombe (2002) 18.

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.* Project financing deals with the assets, liabilities, costs and revenues of the particular project.

<sup>168</sup> *Ibid.*, 19.

<sup>169</sup> *Ibid.*, 17-18.



According to Yescombe, various risks associated with project finance include the following:<sup>170</sup> first, the special purpose vehicle (SPV)'s or sponsor's freedom of action is restricted contractually by the lender. Secondly, there are so many parties involved making the procedures more complex. Thirdly, it takes a long time to negotiate and document all financial arrangements. Fourthly, preparation expenses, financing costs and interest rates are much. Fifthly, renegotiation and restructuring processes can be difficult. Finally, the absence of specific legislative mechanisms for project finance transactions in most of the African countries is partly responsible for the failure of many of these projects.<sup>171</sup>

#### 4.4 Creative sources of financing for infrastructure development

There are some creative financing sources that can be used for infrastructure development and they include the following-

##### 4.5.1. Sovereign Wealth Funds (SWFs)

An SWF is a government-owned entity or fund usually established from official foreign currency operations, balance of payments surpluses, state transfer payments, fiscal surpluses and/or receipts from resource exports.<sup>172</sup> The definition of an SWF excludes state-owned enterprises (SOEs) in the traditional sense, state-employee pension funds, assets managed for an individual's benefit, amongst other things.

Forty-three percent of SWFs investing in infrastructure prefer to invest in emerging markets.<sup>173</sup> One investor that has targeted infrastructure assets in emerging markets is GIC Private Limited (a Singaporean corporation). In 2014, it bought a stake in Neptune Stroika Holdings, a Philippines-based hospital group which owns a diagnostic center and eight hospitals in the country. In October 2013, the GIC invested in IFC Global Infrastructure Fund, which invests in a broad range of economic assets in emerging markets.<sup>174</sup>

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<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.*, 279.

<sup>172</sup> See <http://www.swfinstitute.org/sovereign-wealth-fund/>, last accessed on 29/04/2016.

<sup>173</sup> 'Sovereign Wealth Funds Investing in Infrastructure' available at <http://www.valuwalk.com/2016/05/sovereign-wealth-funds-investing/>, last accessed on 13/11/2016.

<sup>174</sup> *Ibid.*

#### **4.5.2. Pension Funds**

A pension fund is a fund established by an employer to facilitate and organise the investment of employees' retirement funds which the employer and employee contribute.<sup>175</sup> Institutional investors like pension funds are attracted to infrastructure investment because it helps with liability driven investments and provides duration hedging.<sup>176</sup> Infrastructure projects are long-term investments that could match the long duration of a pension fund's liabilities.

For example, the British government is working on getting domestic pension funds to invest in rail, new nuclear power and broadband projects, ahead of a mid-year budget statement in November 2016. The government does not want them staying in the form of cash or government bonds, but to earn good returns on development projects.<sup>177</sup>

#### **4.5.3. Remittances**

International migrant remittance flows may be one of the biggest sources of external finance in developing countries.<sup>178</sup> They represent about three times the amount of official development assistance and over half of FDI developing states receive.<sup>179</sup> Remittances have been found to originate from low-skilled immigrants living and working in developed countries.

Remittances are a stable and huge source of external financing that can be leveraged to finance infrastructure development in SSA. For example, money repatriated home by

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<sup>175</sup> Available at <http://www.investopedia.com/terms/p/pensionfund.asp>, last accessed on 29/04/2016.

<sup>176</sup> Raffaele Della Croce (September 2011) Pension Funds Investment in Infrastructure: A Survey, International Futures Program, *Organisation for Economic Cooperation and Development*.

<sup>177</sup> 'UK working to get pension funds to finance infrastructure: Sunday Telegraph' available at <http://www.reuters.com/article/us-britain-politics-pensions-idUSKCN1280Y6>, last accessed on 13/11/2016.

<sup>178</sup> Officially recorded remittances to developing countries went beyond US\$125 billion in 2004. This made them the second largest source of development finance after FDI.

<sup>179</sup> Alex Julca 'Can remittances support development finance in developing countries?' available at [http://www.un.org/en/development/desa/policy/wess/wess\\_bg\\_papers/bp\\_wess2012\\_julca.pdf](http://www.un.org/en/development/desa/policy/wess/wess_bg_papers/bp_wess2012_julca.pdf), last accessed on 29/04/2016.

Africans in the diaspora has been a steady source of financing of fundamental social services and infrastructure in Francophone African countries south of the Sahara.<sup>180</sup>

#### **4.5.4. Islamic bonds**

Islamic bonds are securities that States, Islamic banks and other corporations in Islamic states issue.<sup>181</sup> They differ from the conventional variety, because buying them, represents ownership in a tangible asset, as entrenched in the regulations governing Islamic finance.<sup>182</sup>

The Islamic bonds market has been growing despite the financial crisis of 2007/8.<sup>183</sup>

### **4.5 Risks associated with infrastructure project finance in resource-rich SSA countries**

There are some risks associated with infrastructure financing in resource-rich SSA<sup>184</sup> and they are grouped into global and elemental risks which include the following:<sup>185</sup>

- No risk sharing structures;
- No long term funds for infrastructure financing;
- Fear of policy reversal by government because infrastructure projects normally span 15-20 years which is about 4-5 regimes;
- Uncertain political or economic environment, amongst others;
- Operating risk- higher operating costs; and
- Environmental impact.<sup>186</sup>

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<sup>180</sup> Fondo Sikod & Gerard Tchouassi, 'Diaspora Remittances and the Financing of Basic Social Services' (2006) 5 Perspectives on global Development and Technology 239.

<sup>181</sup> Chijioke Kennedy Oji (March 2015) Bonds: A Viable Alternative for Financing Africa's Development, *South African Institute of International Affairs*, 8-9.

<sup>182</sup> *Ibid.*

<sup>183</sup> Soyeju's thesis, pg 299.

<sup>184</sup> A Ng & Martin Loosemore 'Risk allocation in the private provision of public infrastructure' 25 *International Journal of Project Management* (2007) 67-68.

<sup>185</sup> Soyeju's thesis, 268-269.

<sup>186</sup> *Ibid.*

#### 4.6 Conclusion

In this chapter, private sector participation in infrastructure procurement, and the broad range of creative financing techniques as market-based solutions for solving the poverty of infrastructure in resource-rich SSA were discussed.

It was found that states now turn to PPPs to finance needed infrastructure in SSA, while they still retain some responsibility for the infrastructure assets. All the financing models discussed above all have advantages and disadvantages that might make them more or less attractive. Thus, R4Is are an alternative infrastructure financing model that could address the shortcomings presented by the other financing models. In the next chapter, the place of R4I agreements in bridging the existing infrastructure gaps in resource-rich SSA countries will be examined.

## CHAPTER 5

### Resource-For-Infrastructure (R4I) Financing Model

#### 5.1 Introduction

In chapter 4, private sector participation in infrastructure procurement, and the broad range of creative financing techniques and sources as market-based solutions for solving the poverty of infrastructure in resource-rich SSA were examined.

The main aim of this chapter is to investigate the origin, nature and context of R4I deals, and their place in bridging the infrastructure gaps in resource-rich SSA countries. This chapter will also interrogate whether the R4I agreements promote cooperative engagement to the benefits of both the resource-rich countries in SSA and corporate developers.<sup>187</sup> Finally, the possible reasons why the Angola Mode succeeded in Angola, but failed in Nigeria will be discussed.

#### 5.2 The nature and origin of R4I agreements

The nature and origins of R4I agreements are discussed below:

##### 5.2.1 Nature of R4I

Essentially, the R4I model involves an interrelated three step process. First, the resource-rich state and the corporate developer agree on a resource development and production license.<sup>188</sup> The resource developer would then seek to convert its exploration license to a development and production license, which when issued, must have a firm development timeline and a fiscal regime that provides clear income flows to the state when the resource is being produced.<sup>189</sup> Secondly, the income flows that the state will receive from the resource production project would be pledged to a lender as collateral for a credit

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<sup>187</sup> R4I agreements are also called 'Angola Mode' agreements.

<sup>188</sup> *Ibid*, 31.

<sup>189</sup> *Ibid*.

facility.<sup>190</sup> Thirdly, it is necessary to contract with entities that specialize in the construction of specific types of infrastructure to build needed infrastructure.<sup>191</sup>

R4I agreements can be divided into single- and multipurpose agreements.<sup>192</sup> The single-purpose agreement entails the construction of a large-scale turnkey energy project (for example, a hydropower dam or a thermal power plant) by a construction company, financed by a financial institution through a resource-backed loan.<sup>193</sup> Long term sales agreements of oil or primary goods like cocoa, are used to secure the loan.<sup>194</sup> The multipurpose agreement on the other hand entails the construction of various infrastructure projects in transport, agriculture, water, education and health.<sup>195</sup>

In addition, the loan is secured through ownership stakes in extraction or compensatory trade.<sup>196</sup> In the case of compensatory trade, the future income from the oil or mineral exports is used to repay the loan. In some cases, this involves long-term oil supply contracts with oil companies.<sup>197</sup> However, in the case of the ownership stakes, Chinese companies conclude joint venture agreements with local mining firms to develop and operate mining projects.<sup>198</sup>

Now that the nature of R4I agreements and their role in financing infrastructure have been explained, the question is: what are their origins?

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<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid*, 32.

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid*, 8-9.

<sup>194</sup> *Ibid*, 9.

<sup>195</sup> *Ibid.* Infrastructure financed through R4I agreements includes roads, railways, information and communication technology (ICT) power plants, water works, schools, and hospitals. These infrastructure projects are financed by a line of credit supplied by a financial institution (such as the Chinese Development Bank or China's Exim Bank), usually with non-concessional terms and conditions. Moreover, what makes these loans attractive to African political elite is that they are not tied to any political conditions. See also Chris Alden and Ana Christina Alves (September 2009) China and Africa's Natural Resources: The Challenges and Implications for Development and Governance Occasional Paper 41 *South African Institute of International Affairs*, pg 18.

<sup>196</sup> *Ibid.*

<sup>197</sup> *Ibid.*

<sup>198</sup> *Ibid.*

### 5.2.2. Origin of R4I

There are several development models that were traditionally used for financing infrastructure development. The R4I model may have developed from a mix of these.<sup>199</sup> First, there is the traditional resource development model which is used for export-oriented projects like minerals and hydrocarbons.<sup>200</sup> The agreement is based on a licensing regime in the case of extractive projects, usually a mining law, in terms of which a developer may apply for exploration and eventually production and/or development licenses.<sup>201</sup>

Secondly, there is the traditional government infrastructure purchasing model. With this, states have bought and built infrastructure for their citizens.<sup>202</sup> These projects have been financed with tax revenues, usually through bank borrowing and issuing bonds.<sup>203</sup> Developing countries usually get grants and concessional finance from international financing institutions to develop infrastructure. Under this model, private developers are not involved and there is no need to develop a financial model to show investors that each specific infrastructure will produce enough income to ‘pay off’ the investment.<sup>204</sup>

Thirdly, there is the most recently used project finance model.<sup>205</sup> This model became the major way to attract private capital into infrastructure projects in developing countries in the late 1980s. It is also a major infrastructure financing model used by the private sector across the globe.<sup>206</sup>

Finally, there is the public-private partnership model which is the newest financing model.<sup>207</sup> This model is a common term used as a stand-alone model over the past ten to fifteen years.<sup>208</sup> Although it resembles the project finance model, it gives more room for state involvement initially and over time. It is usually used where the project finance model

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<sup>199</sup> Halland Havard et al (2014) *World Bank*, pg 13.

<sup>200</sup> *Ibid.*

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid*, 20.

<sup>203</sup> *Ibid.*

<sup>204</sup> *Ibid.*

<sup>205</sup> *Ibid*, 22.

<sup>206</sup> *Ibid.*

<sup>207</sup> *Ibid*, 26.

<sup>208</sup> *Ibid.*

has been considered but cannot work because of a gap in the project only the state can fill. It can be applied in many ways, and it is thus very flexible.<sup>209</sup>

### 5.3. Challenges associated with R4I agreements

The nature of R4I deals has been explored above. However, the question is: do these agreements promote cooperative engagement for mutuality of benefits?

#### 5.3.1. Negotiating disparity regarding resources

The nature of R4I agreements makes it a controversial topic, with resultant debate arguing for and against its uses and benefits.<sup>210</sup> Part of this debate is that few SSA resource-rich countries know the extent of the resources they have, and they do not have a clear idea of the value of their resources.<sup>211</sup> However, international oil, gas and mining companies usually have better knowledge of the extent of the resources of their host SSA countries, in what quantities, the costs of extraction and the potential profits involved.<sup>212</sup> This may be the reason why there are concerns that R4I agreements are skewed in favour of corporate developers. Thus, it is important that a state knows the extent of its resources in order to better negotiate with corporate developers looking to conclude an R4I deal.<sup>213</sup> It is crucial to invest in more geological surveys to comprehend the nature and scope of the state's natural resources.<sup>214</sup> Doing this would give the state an edge when negotiating R4I deals. It has been found that African countries depend on information provided by investors, to their detriment.<sup>215</sup> This information asymmetry has the consequence that resource-rich SSA countries negotiate blindly and run the risk of giving away resources at very low prices.<sup>216</sup> Thus, many resource-rich countries take a passive role in optimising the benefits from their

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<sup>209</sup>

*Ibid.*

<sup>210</sup>

Havard Halland et al (2014) *World Bank*, pg 6.

<sup>211</sup>

Sarah-Jane Danchie 'Taking resource ownership' (March 2016) No. 428 *African Business*.

<sup>212</sup>

*Ibid.*

<sup>213</sup>

*Ibid.*

<sup>214</sup>

*Ibid.*

<sup>215</sup>

*Ibid.*

<sup>216</sup>

*Ibid.* This has cost Africa as much as \$1.4 trillion over the past 3 decades, according to the ADB.



extractive sectors, due to their weak capacity in verifying information such as the extent of their resources, the value of the resources and the cost of extraction.<sup>217</sup>

It is not exactly known how much resources lie underground in or offshore Africa. Africa's natural wealth can lift millions out of poverty and set Africa on a path of prosperity for many years. This has not happened in many resource-rich countries, with few exceptions.<sup>218</sup> Actually, poverty levels are usually higher in such countries than in less endowed nations.<sup>219</sup> Thus, if Africa's natural resources are well-managed, they can transform Africa.

### 5.3.2. Fiscal flexibility

R4I by conventional principles is undesirable because it reduces future fiscal flexibility by allocating funds for infrastructure<sup>220</sup> However, it may be the best option available in countries with weak public administration. Paul Collier argues that allotting resource revenues for investment may be preferable especially where there are high spending pressures, even though fiscal flexibility is not desirable.<sup>221</sup> Other authors like Justin Yifu Lin, Weels and Yan Wang argue that committing resource revenues to infrastructure may help in preventing capital flight in countries with weak political and financial institutions.<sup>222</sup> Moreover, Wells argues that there is little evidence to prove that R4I deals involve more corruption than other extraction agreements in host economies.<sup>223</sup> In his view, the weak ability of poor countries to negotiate and enforce complex agreements is a problem that

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<sup>217</sup> *Ibid.*

<sup>218</sup> Notable exceptions are Botswana, Namibia, and South Africa (to some extent), where mining may have resulted in significant benefits to their economies, like economic growth, job creation and stability. See DIAMOND FACTS.ORG *Economic Impact* [http://www.diamondfacts.org/index.php%3Foption%3Dcom\\_content%26view%3Darticle%26id%3D132%26Itemid%3D169%26lang%3Den](http://www.diamondfacts.org/index.php%3Foption%3Dcom_content%26view%3Darticle%26id%3D132%26Itemid%3D169%26lang%3Den), (last visited 11/30/2016).

<sup>219</sup> *Ibid.* Recent evidence suggests that Africa loses about \$60 billion yearly in price misrepresentation and illegal outflows in the extraction of oil, gas and mineral reserves.

<sup>220</sup> Havard Halland et al (2014) *World Bank*, pg 6.

<sup>221</sup> *Ibid.*, 17. Paul Collier made comments on the report.

<sup>222</sup> *Ibid.*

<sup>223</sup> Wells Louis T 'Infrastructure for Ore: Benefits and Costs of a Not-So-Original Idea' available at <http://www.vcc.columbia.edu/content/infrastructure-ore-benefits-and-costs-not-so-original-idea>, last accessed on 16/02/2016.

must be solved independently of R4I as a financing model.<sup>224</sup> The R4I model should be evaluated like any other contract, and should be compared to other ways of financing infrastructure. Therefore, the R4I model is neither good nor bad for host economies.<sup>225</sup> Finally, Olufemi Soyaju notes that the R4I model should complement other innovative sources of infrastructure financing, and not just be an alternative.<sup>226</sup>

### 5.3.3. Question of transparency

The major concern associated with R4I deals is that they do not comply with Extractive Industries Transparency Initiative (EITI) requirements.<sup>227</sup> The parties do not disclose the particulars of the actual negotiated terms of the contracts, and the shadow relative prices used to calculate long-term barter agreements couched in these contracts.<sup>228</sup> In addition, a potential conflict of interest may exist where the seller and buyer of the minerals is the same firm or both firms are controlled by the same state.<sup>229</sup> Critics have also alleged that the R4I swaps are permeated with corruption.<sup>230</sup> Even though this is true in some cases as in Nigeria,<sup>231</sup> these accusations have not all been backed with hard evidence.<sup>232</sup>

### 5.3.4. Local economic linkages and good governance

Studies have shown that Chinese construction companies for example, have weak linkages with the local economy.<sup>233</sup> In other words, Chinese firms mainly import their own

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<sup>224</sup> *Ibid.*

<sup>225</sup> *Ibid.*

<sup>226</sup> Soyaju's thesis, pg 318.

<sup>227</sup> 'The EITI Requirements' available at <https://eiti.org/eiti/requirements>, (accessed on 16/02/2016)..

<sup>228</sup> Machiko Nissanke & Marie Soderberg (2011) The Changing Landscape in Aid Relationships in Africa: Can China's Engagement Make a Difference to African Development? *Swedish Institute of International Affairs*, pg 25. .

<sup>229</sup> Peter Konijn & Rob van Tulder 'Resources-for-infrastructure (R4I) swaps: A new model for successful internationalisation strategies of rising power firms?' 260. In the Democratic Republic of Congo (DRC), for example, two major construction companies own almost sixty-eight percent of the mining joint venture, Sicomin.

<sup>230</sup> *Ibid.*

<sup>231</sup> Alex Vines et al (August 2009) Thirst for African Oil: Asian National Oil Companies in Nigeria and Angola, A Chatham House Report, *Chatham House*.

<sup>232</sup> Peter Konijn & Rob van Tulder 'Resources-for-infrastructure (R4I) swaps: A new model for successful internationalisation strategies of rising power firms?' 260.

<sup>233</sup> Lucy Corkin 'Chinese construction companies in Angola: a local linkages perspective', *Resources Policy* 37 (2012) 475.

workforce, materials and equipment.<sup>234</sup> It is estimated that under 5 percent of all materials are sourced locally.<sup>235</sup> And if these linkages are not made, the infamous ‘resource curse’ phenomenon comes into play.<sup>236</sup>

Furthermore, there have been concerns which suggest that China imprudently lends to African nations with little commitment to ‘good governance’.<sup>237</sup> This may, according to traditional donors who raised these concerns, increase the risk of future debt crises along with the deterioration of debt sustainability.<sup>238</sup>

Other fundamental issues that have been raised concern measures to ensure the quality of the infrastructure provided, the integrity of the construction process, a good fiscal scheme to manage the income generated after the infrastructure capital has been paid, and maintenance of the infrastructure after it has been completed.<sup>239</sup>

#### 5.4. The Angola mode

This sub-heading will discuss possible reasons why the Angola Mode worked in Angola, but not in Nigeria.

Nigeria’s former Head of State, President Olusegun Obasanjo, created a scheme to entice Asian National Oil Companies (ANOCs) from Taiwan, India, South Korea, and China to acquire oil blocks for the first time in Nigeria.<sup>240</sup> However, the scheme was awkward.<sup>241</sup> In return for their commitment to invest in downstream and infrastructure projects, the ANOCs were given the Right of First Refusal (RFR) and discounted signature bonuses on a

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<sup>234</sup> Peter Konijn & Rob van Tulder ‘Resources-for-infrastructure (R4I) swaps: A new model for successful internationalisation strategies of rising power firms?’ 260.

<sup>235</sup> *Ibid.*

<sup>236</sup> Sarah-Jane Danchie ‘Taking resource ownership’ (March 2016) No. 428 *African Business*.

<sup>237</sup> *Ibid.*

<sup>238</sup> *Ibid.*

<sup>239</sup> Havard Halland et al (2014) *World Bank*, pg 8-9.

<sup>240</sup> Alex Vines et al (August 2009) Thirst for African Oil: Asian National Oil Companies in Nigeria and Angola, A Chatham House Report, *Chatham House*, pg 7.

<sup>241</sup> *Ibid.*

number of oil blocks.<sup>242</sup> The concept of the R4I deal was new but its introduction compromised the transparency of the oil licensing rounds of 2005, 2006 and 2007.<sup>243</sup>

The first loan China's Exim Bank gave Nigeria was to finance the construction of power stations at Geregu (138 MW), Omotosho (335 MW) and Papalanto (335 MW) in Kogi, Ondo, and Ogun states respectively in 2005.<sup>244</sup> Shandong Electric Power Construction Corporation (SEPCO), a Chinese company, constructed the Papalanto plant and China's Ex-Im Bank arranged to provide US\$300 million out of the US\$400 million construction cost.<sup>245</sup> The transaction was resource-backed such that PetroChina, a firm, got the deal to buy 30 000 barrels of crude oil daily from the Nigerian National Petroleum Corporation (NNPC) for one year, but renewable.<sup>246</sup>

In 2006, China's Ex-Im Bank agreed to finance almost US\$5 billion worth of projects.<sup>247</sup> In this financing contract, it made contributions of US\$2.5 billion to a critical Lagos-Kano railway upgrading project and US\$1 billion to Abuja Rail Mass Transit project which involved constructing a high-speed rail link between Lagos and Abuja.<sup>248</sup> Moreover, the Bank agreed to finance a light railway system connecting Murtala Mohammed International Airport and Nnamdi Azikiwe International Airport with the Lagos and Abuja city centres respectively and a contribution of US\$1 billion to the 2,600 MW Mambilla Hydropower projects.<sup>249</sup>

President Obasanjo left office in May 2007 after spending his two-term limit in office. President Umaru Yar'Adua succeeded him and spent the first 18 months taking stock.<sup>250</sup> Several decisions of the Obasanjo administration were cancelled, either because they involved much corruption, projects were not executed or they were deemed not to be

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<sup>242</sup>

*Ibid.*

<sup>243</sup>

*Ibid.* Despite much criticism from the West, both parties believed it was a 'win-win' deal.

<sup>244</sup>

Soyeju's thesis, pg 318.

<sup>245</sup>

*Ibid.*

<sup>246</sup>

*Ibid.*

<sup>247</sup>

*Ibid.*

<sup>248</sup>

*Ibid.*, 318-319.

<sup>249</sup>

*Ibid.*

<sup>250</sup>

*Ibid.*

in the national interest.<sup>251</sup> Two main projects linked to these R4I deals were cancelled in May and June 2008.<sup>252</sup>

An ad-hoc committee of Nigeria's House of Representatives had recommended in 2008 that all oil blocks awarded to ANOCs should be revoked.<sup>253</sup> It reasoned that the introduction of the RFR one week before the 2005 bidding round took place, compromised the transparency and fairness of the auction.<sup>254</sup> Later investigations concluded that the way in the blocks had been awarded in 2005, 2006 and 2007 had been irregular.<sup>255</sup> Thus, President Yar'Adua abandoned the RFR principle.<sup>256</sup>

In 2009, South Korea's NOC (KNOC) sued India's NOC<sup>257</sup> and the Nigerian government. This was because a powerful political figure in Nigeria's ruling party – People's Democratic Party (PDP) – made a move to give two oil blocks that KNOC had been awarded under the Obasanjo government by exercising its RFR in terms of an R4I deal, to ONGC.<sup>258</sup> ONGC and the Nigerian government were co-defendants. The court ordered the government to temporarily postpone its decision until there was a full hearing. In the interim, Nigeria's Attorney-General had instructed the Department of Petroleum Resources (DPR) which handles bidding rounds to refund the money paid on the two blocks.<sup>259</sup> Later, a Nigerian federal court decided that the government had illegally revoked the offshore oil exploration rights from KNOC.<sup>260</sup>

The question then arises as to why did the Angola Model succeed in Angola but fail in Nigeria?<sup>261</sup> The political context in which the R4I agreements were concluded is

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<sup>251</sup> *Ibid.*

<sup>252</sup> *Ibid.* The whole arrangement began to fall apart at this point.

<sup>253</sup> *Ibid.*, 2.

<sup>254</sup> *Ibid.*

<sup>255</sup> *Ibid.*

<sup>256</sup> *Ibid.*

<sup>257</sup> Oil and Natural Gas Corporation (ONGC).

<sup>258</sup> Alex Vines et al (August 2009) Thirst for African Oil: Asian National Oil Companies in Nigeria and Angola, A Chatham House Report, *Chatham House*, pg 2.

<sup>259</sup> *Ibid.*

<sup>260</sup> *Ibid.*, 2-3.

<sup>261</sup> Angola was the country where the first complex R4I agreement was concluded with China. See chapter 1 above where the details of this agreement is discussed.

important. In Nigeria, the ‘cash-hungry’ political elite sought to profit from its Asian partners’ desire for oil.<sup>262</sup> However in Angola, the government treated its relationship with China with care, so that it grew to the mutual benefit of both nations.<sup>263</sup> Moreover, Angola was motivated by the necessity to quickly access funds to finance its recovery after its war.<sup>264</sup> Nigeria on the other hand lacked any motivation. The Yar’Adua Administration may not have done enough to see the R4I scheme succeed.<sup>265</sup>

Essentially, what led to the failure of the Angola Mode in Nigeria may have been the failure of the Obasanjo administration to properly manage the scheme.<sup>266</sup> No follow-up mechanisms were implemented to enforce the agreements.<sup>267</sup> Angola on the other hand was able to manage its relationship with its Asian partners despite challenges that arose along the way.<sup>268</sup>

Additionally, the ANOCs that concluded R4I agreements under Obasanjo’s Administration did not comprehend the political context of that time.<sup>269</sup> NNPC in Nigeria is dysfunctional and has been used by successive Nigerian leaders for personal gain.<sup>270</sup> Moreover, the regular changes between military and civilian governments in Nigeria may have led to uncertainty and confusion regarding her policies.<sup>271</sup>

On the other hand, it was easier for China to relate with Angola because it has a stable and long-established government along with a functional oil company, Songola.<sup>272</sup>

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<sup>262</sup> Alex Vines et al (August 2009) Thirst for African Oil: Asian National Oil Companies in Nigeria and Angola, A Chatham House Report, *Chatham House*.

<sup>263</sup> *Ibid.*

<sup>264</sup> *Ibid.*

<sup>265</sup> *Ibid.*

<sup>266</sup> *Ibid.*

<sup>267</sup> *Ibid.*

<sup>268</sup> *Ibid.* Angola had less of a political motive, thus, the R4I scheme was successful for both Angola and its Asian partners.

<sup>269</sup> *Ibid*, 1.

<sup>270</sup> *Ibid.*

<sup>271</sup> *Ibid.*

<sup>272</sup> *Ibid.*

Angola has the same ruling political party since its independence and the same head of state for thirty years, thus, a better policy consistency.<sup>273</sup>

Finally, there is a big difference between the investment scene in Nigeria and Angola.<sup>274</sup> In Nigeria, there was so much instability from militant action against oil installations in the Niger Delta (Nigeria's oil producing region), and this disrupted production a lot.<sup>275</sup>

## 5.5. Conclusion

This chapter has investigated the origins and nature of R4I deals. It also investigated whether R4I agreements promote cooperative engagement to the benefits of both parties or are skewed in favour of the corporate developers. Finally, this chapter interrogated why the Angola Mode worked in Angola but failed in Nigeria.

It was shown that the R4I scheme succeeded in Angola because she has a stable government, and the process was driven by commitment on the part of the Angolan government to rebuild it after her civil war. Thus, it managed her relationship with her Asian partners well. In Nigeria however, the R4I deals were permeated with corruption and the change of government just after the conclusion of the agreements. The Yar'Adua Administration may not have made enough effort to see the R4I scheme succeed in the overall national interest, thus it failed.<sup>276</sup> Finally, R4I deals can be used to bridge the infrastructure gaps in the resource-rich SSA countries, if used creatively and wisely, and if the agreements are negotiated without any hope of personal gain.

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<sup>273</sup> *Ibid.*

<sup>274</sup> *Ibid.*

<sup>275</sup> *Ibid.*

<sup>276</sup> See Alexandra Gillies (February 2009) Reforming corruption out of Nigerian oil? Anti-Corruption Resource Centre, *Centre of International Studies*, University of Cambridge, pg 1-4.

## CHAPTER 6

### POLICY CONSIDERATIONS AND LEGAL IMPERATIVES

#### 6.1 Introduction

In chapter 5, the origins and nature of R4I deals were investigated and importantly, it probed whether R4I deals promote cooperative engagement to the benefits of both parties or are skewed in favour of the corporate developers. The reasons why R4I worked in Angola but failed in Nigeria were also examined. It found that R4I scheme succeeded in Angola because the country has a relatively stable government, and the Angolan government was committed to its success, which was not necessarily the case in Nigeria.

This chapter aims to investigate the policy considerations and legal imperatives required to attract foreign corporate developers and ensure successful implementation of R4I agreements in bridging the infrastructure gaps that exist in the resource-rich SSA countries. Moreover, general guiding rules that may help host states in creating an efficient legal framework for privately financed infrastructure will be discussed.

Compared with other parts of the world, governance indicators are weak in SSA.<sup>277</sup> Thus, substantial risks arise from poor administration, inadequate protection of property, contract rights, poor transparency, and especially regulatory and policy uncertainty.<sup>278</sup> There has been a call for clear policies that will inspire confidence in foreign investors and lower investment risks.<sup>279</sup> Thus, policy certainty and specific policies that address R4I agreements are needed to create a friendly policy environment.

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<sup>277</sup> DA Barber 'Bad Policies Hinder Africa's Renewable Energy Growth' available at <http://afkinsider.com/75448/africas-renewable-energy-growth-hindered-policies/>, accessed on 31/05/2016.

<sup>278</sup> *Ibid.* See also John Page 'Africa's Failure to Industrialize: Bad Luck or Bad Policy?' available at <http://www.brookings.edu/blogs/africa-in-focus/posts/2014/11/19-africa-failure-industrialize-page>, accessed on 31/05/2016.

<sup>279</sup> *Ibid.*



Important elements of national policies are: the mechanisms used to ensure the adequate functioning of infrastructure markets, the way in which the sector is structured and the level of competition sought for each infrastructure sector. National policies to promote private infrastructure investment normally come with measures designed to foster competition between public service providers or to prohibit monopoly where competition is possible.

Accordingly, in the next two sections, the discussions will focus on the policy considerations and legal imperatives that would ensure sustained flow and success of the R4I deals in the resource-rich countries of SSA.

## 6.2 Policy considerations

The financing gaps for sustainable infrastructure are largely the consequence of poor policies, institutional failures, and lack of investors' familiarity with greener projects and technologies.<sup>280</sup> A positive 'enabling environment' is one characterised by reliable contract enforcement, transparency, effective institutions, sound policies, and other sectors-specific factors which make it easier to mobilise private finance.<sup>281</sup> On the other hand, a poor enabling environment which is characterised by flawed procurement processes, unreliable counterparties and distorting subsidies can raise the cost of private finance to the point where infrastructure projects are not economically feasible.<sup>282</sup>

It is instructive to note that governance is the essence of any government and it is done through the medium of policy. A good government is a function of good policy and it is policy that translates government objectives into programmes. A policy is only successful when it delivers the desired results.

Policies cannot be effective if they are not implemented. States must thus create policies that would define them as fertile investment locations and will proactively market

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<sup>280</sup> Aaron Bielenberg et al (January 2016) Financing change: How to mobilize private sector financing for sustainable infrastructure, *McKinsey & Company*.

<sup>281</sup> *Ibid.*

<sup>282</sup> *Ibid.*

the investment opportunities within them to foreign investors.<sup>283</sup> Attracting FDI helps to link a state's domestic economy to global value chains in major sectors.<sup>284</sup> The potential benefits require effective and clear policy making that responds to the needs of a state and implementation of these policies.<sup>285</sup>

Policy can be defined as the basic principles which guide a state. It can also be defined as the aims that a political party or state seeks to achieve and preserve in the interest of the national community. Thus, the statement of intent that sets out the aims to be achieved over a period of time is policy.<sup>286</sup> Policy can be made in anticipation of a situation or event, in order to determine a certain outcome, or in response to a need. Moreover, policy is influenced by a people's philosophy, beliefs, sentiment, experiences, and history. Policy drivers include the strategy and ideology of the governing party, the needs of the voters, the developmental plans of the state, and current realities.<sup>287</sup>

The basics of policy making can be described as follows: first, a need is identified.<sup>288</sup> Secondly, the person who will take responsibility is identified. Thirdly, the policy maker will research and gather the information necessary to formulate the policy. Fourthly, a draft policy is prepared, after which stakeholders are consulted. Fifthly, the policy is finalised, and then approved. Finally, the policy is implemented. Thus, the policy-making process is consultative, process-driven and thorough when done properly. Good policy results where there are objective, transparent and clear deliverables; fact-based decision making; clear communication; and appropriate evaluation of costs and benefits.<sup>289</sup>

It is also very important for policies to be sustainable, so that they can survive a change of government. Infrastructure projects naturally require extensive investment and a

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<sup>283</sup>

*Ibid.*

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FDI also helps in increasing exports, supply chain spillovers, introducing new technologies, and creating more jobs.

<sup>285</sup>

'Investment Policy & Promotion' available at <https://www.wbginvestmentclimate.org/advisory-services/international-trade/investment-policy/>, accessed on 31/05/2016.

<sup>286</sup>

JD Thyse, unpublished LLM (Extractive Industry Law in Africa) lecture, 'Rights to and Regulation of Extractive Industries', June 2016.

<sup>287</sup>

*Ibid.*

<sup>288</sup>

*Ibid.*

<sup>289</sup>

*Ibid.*

longer period for development, construction, start-up and operation.<sup>290</sup> Typical infrastructure investment agreements take about two decades to be completed. Therefore, as investors spend much money and time in investment projects as big as R4I agreements, there is a need for an assurance that their investments will be protected in the event of a change of government. The example of Nigeria is very instructive here. In addition, policy has a big impact on legislation.<sup>291</sup> Thus, the state, Non-Governmental Organisations (NGOs), the industry and local communities must come to the table to deliberate how policies can be formed which will aid sustainable development on the basis of R4I agreements.<sup>292</sup>

Specifically, policy may be defined as regulatory measures, system of laws, funding priorities and courses of action regarding a particular matter, enacted by a public entity or its representatives.<sup>293</sup> So, the state makes policies, enacts law to backs them up, and allocates resources.

Generally, some of the indicators host states may use in developing their policies to improve foreign investment flows such as R4I deals include the following:<sup>294</sup> first, states should adopt and implement non-discriminatory treatment of domestic and foreign investors and reduce sectoral restrictions.<sup>295</sup> Secondly, all investment procedures should be streamlined.<sup>296</sup> Thirdly, the policies should ensure that legal and regulatory frameworks are improved to reduce investment risks and prevent unlawful expropriation in order to increase the confidence of investors.<sup>297</sup> Finally, policies should ensure that foreign firms

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<sup>290</sup> State Bank of Pakistan 'Guidelines for infrastructure project financing' available at [www.sbp.org.pk](http://www.sbp.org.pk), accessed on 20/04/2016.

<sup>291</sup> JD Thyse, unpublished LLM (Extractive Industry Law in Africa) lecture, 'Rights to and Regulation of Extractive Industries', June 2016.

<sup>292</sup> *Ibid.*

<sup>293</sup> 'Definitions of Public Policy and the Law' available at <https://mainweb-v.musc.edu/vawprevention/policy/definition.shtml>, last accessed on 31/05/2016.

<sup>294</sup> *Ibid.*

<sup>295</sup> *Ibid.*

<sup>296</sup> *Ibid.*

<sup>297</sup> *Ibid.*

maximise positive spill-over effects of foreign investment and linkages for the local economy.<sup>298</sup>

### 6.3 Legal imperatives

Policy considerations must be backed up by law in order for them to be properly enforced. So, legislation usually plays a major role in promoting investment in infrastructure projects. The legislation should represent a guarantee of stability of the state's legal infrastructure. It is therefore important for rules to be established which define the terms and templates through which financial capital flows into a country. Thus, a sound legal framework is needed for R4I agreements to be creatively used to bridge the infrastructure gaps in resource-rich SSA. These policies and laws are referred to as development policy and development law.

Development law is based on development policy, which comes into existence through a policymaking process. This process begins when states respond to the needs and aspirations of their citizens.<sup>299</sup> Official policy is written into laws. Policy becomes law through a law-making process.<sup>300</sup> In most resource-rich SSA countries, once the Executive approves a policy, the responsible minister drafts legislation. Then, stakeholders, interest groups, and citizens probably present draft bills for comment. Afterwards, it goes to the Parliament of the state for deliberation before it is passed as an Act.<sup>301</sup>

The rights, duties and rules of states and companies are contained in a system of legal documents called a legal framework. Documents that constitute a state's legal framework include its constitution, legislation, regulations, policy and contracts. Policy and laws are supposed to carry more authority than a contract. However, contracts can be concluded to explicitly override legislation and regulation. Countries with detailed laws and

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<sup>298</sup>

*Ibid.*

<sup>299</sup>

Theo Scheepers *A Practical Guide to Law and Development in South Africa* (2000) Juta: Kenwyn, 18. The problems and needs of citizens are identified through inquiries, consultation and research.

<sup>300</sup>

*Ibid.*, 19.

<sup>301</sup>

*Ibid.*

policies have a more stable legal infrastructure than those that leave more aspects open for negotiation in individual contracts.

So, an effective legal framework is very essential to the success of R4I agreements in SSA's resource-rich countries.<sup>302</sup> It is also essential to ensure that the law is flexible enough to keep pace with developments in infrastructure sectors. A good legislative framework must be transparent, fair and be capable of sustaining infrastructure provision in the long term.<sup>303</sup>

For instance, when granting concession rights on an infrastructure asset, an appropriate legislation is needed to vest in the corporate developer the exclusive legal right to operate and earn income through the collection of consumer fees during the period of the concession so that it can recoup its capital investment in the asset.<sup>304</sup> Moreover, legislation is needed to protect public users from exploitation by limiting changes to customer fees and other charges the firm may charge.<sup>305</sup>

Outside the above, there are however general guiding principles discussed below that may help in creating a suitable legal framework for R4I projects in resource-rich countries in SSA-<sup>306</sup>

#### **i. Transparency**

A transparent legal framework contains clear and easily accessible rules and efficient processes for their application.<sup>307</sup> This creates certainty and enables potential investors to estimate the costs and risks of their investments, and thus offer their most favourable terms. Moreover, transparent terms and administrative processes

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<sup>302</sup> UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2001) United Nations Commission on International Trade Law, *United Nations*, pg 23. See also Olufemi Soyaju 'Legal framework for public private partnership in Nigeria' (2013) 34 *De Jure* 818.

<sup>303</sup> *Ibid*, 23-24.

<sup>304</sup> Soyaju's thesis, pg 138.

<sup>305</sup> *Ibid*. The legislative framework may include the scope of the authority to award concessions; certain conditions the concessionaire must meet; a description of the tender process and the selection criteria, maximum period for the concession amongst others.

<sup>306</sup> UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2001) United Nations Commission on International Trade Law, *United Nations*, pg 23.

<sup>307</sup> *Ibid*.

may encourage openness through provisions that require the publication of administrative decisions.<sup>308</sup> Besides, when appropriate, this may include a duty to state the grounds on which they are based and to disclose other information that is relevant to the public.<sup>309</sup>

## ii. Fairness

Generally, the legal framework is the basis on which states can regulate and ensure the provision of infrastructure services to the public.<sup>310</sup> It is also the basis on which the rights of customers and public service providers can be protected. This is why legislation must be transparent and fair.<sup>311</sup> A fair legal framework considers the various interests of customers, public service providers and the Government (which could sometimes be conflicting) and seeks to achieve an equitable balance between them.<sup>312</sup>

Thus, the absence of a clear, transparent, fair and predictable legal framework would lead to legal fluidity; prevent the bankability of projects and the flow of required domestic and cross-border capital into the infrastructure development scene.<sup>313</sup>

## iii. Long-term sustainability

A crucial objective of local legislation on infrastructure procurement is to ensure the constant provision of infrastructure services with more attention being paid to environmental sustainability.<sup>314</sup> Insufficient arrangements for the maintenance and operation of public infrastructure assets result in decreased service quality, more

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<sup>308</sup> *Ibid*, 24.

<sup>309</sup> *Ibid*.

<sup>310</sup> Soyeju's thesis, pg 137.

<sup>311</sup> *Ibid*.

<sup>312</sup> *Ibid*.

<sup>313</sup> Soyeju's thesis, pg 137. See UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2001) United Nations Commission on International Trade Law, United Nations, pg 25.

<sup>314</sup> *Ibid*.

costs for users, and seriously limit the efficiency in all infrastructure sectors.<sup>315</sup> It is also crucial that the host country has the institutional capacity to undertake the many tasks entrusted to public bodies involved in infrastructure projects throughout their phases of implementation.<sup>316</sup>

#### iv. Regulations

Regulation is a sub-set of the legal framework<sup>317</sup> and it is crucial to entrench a regulatory system that inspires confidence in foreign investors through fair and transparent procedures. Regulation is defined as the diverse set of instruments by which states set requirements for citizens and businesses.<sup>318</sup> It is a tool of the state to improve the quality of government effectiveness and economic performance. It also provides a predictable legal framework within which citizens and businesses can act, plan and invest.<sup>319</sup> Social, administrative and economic regulations have been used by states to align better private and public interests in markets.<sup>320</sup>

Regulatory quality is a ‘mutually supportive agenda’<sup>321</sup> and crucial in developing a framework that fosters a friendly investment environment based on accountability, transparency and rule of law.<sup>322</sup> For instance, there is a positive and close relationship between the aim of promoting competition policy, regulatory reform and the aim of promoting high quality regulation.<sup>323</sup>

Regulatory policy is also an important part of a wider governance framework, whose goals are policy coherence, efficiency, accountability, legitimacy, transparency, amongst others.<sup>324</sup> Thus, the link between the promotion of regulatory quality with other

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<sup>315</sup>

*Ibid.*

<sup>316</sup>

*Ibid.*

<sup>317</sup>

Soyeju’s thesis, pg 139.

<sup>318</sup>

*Ibid*, pg 3.

<sup>319</sup>

*Ibid.*

<sup>320</sup>

*Ibid.*

<sup>321</sup>

Taking Stock of Regulatory Reform: A Multidisciplinary Synthesis (2004) OECD.

<sup>322</sup>

*Ibid*, pg 6.

<sup>323</sup>

*Ibid.*

<sup>324</sup>

*Ibid*, pg 4.

horizontal policies.<sup>325</sup> Therefore, the regulatory policy is important in order to achieve these goals.

Regulations are more specific than legislation.<sup>326</sup> They contain the details required to fulfil the legislature's mandates. A conducive regulatory environment creates a level-playing field for all parties involved concluding R4I agreements.<sup>327</sup>

It is also important to state that regulatory enforcement is a major factor in developing trust in the state and a well-functioning society.<sup>328</sup> If regulations are not properly enforced, the aims of the state in promulgating them cannot be fulfilled. Thus, efficient compliance with rules and regulations is very important to develop trust in the state and a well-functioning society.<sup>329</sup> Regulatory enforcement is therefore very important in safeguarding economic development, health and safety, protect the environment, and deliver other essential public goods.<sup>330</sup>

A regulatory framework usually includes procedural rules that direct how the institutions in charge of regulatory functions can exercise their powers.<sup>331</sup> Transparency and objectivity make the regulatory environment more effective.<sup>332</sup> Procedures and rules should be clear and objective to ensure fairness and should be made public to ensure transparency. When regulatory agencies make decisions, they should state the reasons for making such decisions within a reasonable time.<sup>333</sup>

## v. Judicial system

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*Ibid.*

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*Natural Resource Governance Institute Reader (March 2015) Legal Framework: Navigating the Web of Laws and Contracts Governing Extractive Industries, pg 1.*

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*Ibid.*

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*Ibid.*

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*Ibid.*

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*Ibid.*

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UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2001) United Nations Commission on International Trade Law, *United Nations*, pg 35.

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*Ibid.*

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*Ibid.* Such reasons should be made available to interested parties by publishing it or through other means.



It has been argued and accepted that economic growth cannot last if it is not supported by a good, impartial judicial system.<sup>334</sup> It is very crucial for the legal system to provide a way of resolving disputes between two private parties, and a private party and the state. Courts are a way of resolving disputes justly.<sup>335</sup> The fairness of judicial decisions is known first by the independence of judges-perceived and real. There must be enough safeguards to ensure that both judicial decisions are independent of the influence of powerful state officials and private parties, and political decisions.<sup>336</sup>

An independent judiciary supports economic growth and legal reform by consistently and efficiently enforcing clear rules.<sup>337</sup> This also applies to infrastructure investment such as R4I deals.

Whether the legal system is one of common or civil law tradition, it must entrench adequate checks and balances on the arms of government- legislative, executive and judicial.<sup>338</sup> The legislature should be the enlightened arm that enacts and amends the rules for stimulation and sustenance of foreign investment. The executive branch needs to effectively carry out the Legislature's mandate.<sup>339</sup> The judiciary must act as the nation's guardian in ensuring that the other two arms operate within their mandates.<sup>340</sup>

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<sup>334</sup> V Sundararajan (2005) *Financial Sector Assessment: A Handbook* World Bank: Washington: DC, 235.

<sup>335</sup> *Ibid.* Courts resolve disputes through judgements that are based on independent fact finding. The state then enforces these judgements. State enforcement is what distinguishes courts from alternative dispute resolution (ADR) mechanisms. State enforcement also limits potential violence, and improves business climate. However, other branches of the government must also comply with the law. The judicial system provides checks and balances against arbitrary action. Nonetheless, courts must be accessible, be fair, and work efficiently, in order to fulfil its role as the state's guardian.

<sup>336</sup> *Ibid.* Other branches of the states should not ignore or override judicial decisions. When they do, they should of course be subject to legal action. Nevertheless, judges' independence means that judicial decisions should be based on nothing more than applicable facts and laws.

<sup>337</sup> *Ibid.* An effective judiciary must apply and enforce laws and regulations efficiently, predictably and impartially.

<sup>338</sup> *Ibid.*

<sup>339</sup> *Ibid.*

<sup>340</sup> *Ibid.*

### **6.3. Conclusion**

This chapter has investigated the policy considerations and legal imperatives needed to attract corporate developers and ensure successful implementation of R4I deals in bridging the infrastructure gaps that exist in the resource-rich countries in SSA. It also discussed the general guiding rules that may help policy-makers enact an efficient legal framework for private financing of public infrastructure. The aspects of regulation and judicial system were also discussed.

The conclusion is that infrastructure projects span a long time, and are very expensive. Thus, it takes a stable and efficient legal framework and regulatory environment to ensure the success of R4I deals. Of course, a strong legal environment is necessary to whet the risk appetite of the corporate developers to conclude R4I agreements in the resource-rich countries in SSA.

## CHAPTER 7

### CONCLUSIONS

#### 7.1. Recap of the research problem

Studies have shown that Sino-African trade through R4I swaps may have played a major role in the fast growth of resource-rich SSA nations.<sup>341</sup> However, these agreements have been criticized for not providing host states with fair deals, despite the fact that they could enable the financing and development of critical infrastructure that African countries need. One area of contention has been the absence of transparency regarding the cost of infrastructure projects undertaken. For example, the *Sicomines* agreement between the Government of Democratic Republic of Congo (DRC) and a group of Chinese companies has generated national and international criticism. Finally, it has also been alleged that these swaps have weak linkages to the economy of the host nation. Therefore, the research question which this study sought to answer was: does the R4I deal guarantee remunerative returns by ensuring mutuality of benefits or skewed in favour of the corporate developers who are stronger?

It was against the backdrop of the above that this study argued that although the resource-rich countries of SSA may not have the capacity to negotiate a typical resource-for-infrastructure deal, better training and capacity building could result in the R4I financing deal being creatively used to achieve development objectives such as the procurement of crucial infrastructure.

#### 7.3. Summary of findings

Chapter 2 explored some theories that underpin FDI as a generic term for various cross-border investment models, including R4I agreements. These theories were meant to assist in comprehending the complex issues underpin in FDI, including R4I deals. In chapter 3, the

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<sup>341</sup> Alexis Habiyaremye "Angola-Mode' Trade Deals and the Awakening of African Lion Economies' 25 *African Development Review* (2013) 636. See also Standard Bank 'Africa to benefit from China infrastructure investments' available at <http://www.standardbank.com/Article.aspx?id=-242&> accessed on 04 January 2016; Dunia P. Zongwe 'Digging Socio-Economic Rights: Leveraging Africa's Natural Resources Endowment for Infrastructure Development' available at <http://ssrn.com/abstract=1827942>, accessed on 01 February 2016.

role of infrastructure in promoting economic development in a society was examined. It also found that poor infrastructure exists in most resource-rich SSA countries and that traditional financing mechanisms cannot bridge the existing infrastructure gaps. Thus, there is the need for the infusion of private sector capital into these countries to bridge the gap. In chapter 4, the role of infrastructure in enhancing socio-economic development in a society was placed into the context of resource-rich SSA. A broad range of private sector financing options that can be used to finance infrastructure assets was investigated. It was found that states now use the PPP model to finance infrastructure, while they still retain some responsibility for the infrastructure. Thus, R4Is are an alternative financing model that could address the shortcomings presented by the other models. Furthermore, in chapter 5, the origin and nature of R4I deals were examined. It also investigated whether R4I agreements are skewed in favour of corporate developers. It was found that several factors determine whether an R4I deal will benefit both the host state and corporate developer(s), including local economic linkages, transparency, and the state possessing adequate information. Finally, it examined possible reasons why the Angola Mode worked in Angola, but failed in Nigeria. It found that the Mode succeeded in Angola because of its stable government and political commitment. In Nigeria, however, the scheme was permeated with corruption and political instability. Finally, chapter 6 investigated the legal imperatives and policy considerations required to attract corporate developers and ensure successful implementation of R4I deals to bridge the infrastructure gaps. It concluded that infrastructure projects are very capital- and risk-intensive. Thus, a stable legal framework is required to attract corporate developers and ensure the success of R4I deals.

#### **7.4. Final conclusions**

The final conclusion is that there is an absence of institutional capacity of resource-rich SSA countries to negotiate complex agreements like R4I deals. However, with better training and capacity building coupled with enhanced negotiation skills for an asymmetry of bargaining power, R4I deals can be used creatively to attain development goals such as the procurement of infrastructure.

## 7.5. Recommendations

Therefore, based on the findings above, the author makes the following recommendations:

- States should develop an efficient and stable legal and regulatory framework that would not just attract FDI, but protect the state's interests.
- States should improve its institutional negotiation capacity by investing in capacity-building (training their bureaucrats, etc) that relates to the negotiation of complex contractual agreements.
- Policy has a big impact on legislation. Thus, the state, civil society, industry and local communities should engage in meaningful dialogue that will help the state make policies which will aid sustainable development on the basis of R4I agreements.

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