Managing Legal Risks in Project Finance in the Democratic Republic of Congo: The Example of the Grand Inga Project

Submitted in partial fulfillment of the requirement of the Master's of Laws (LLM) degree in International Trade and Investment Law in Africa, to International Development Law Unit, Centre for Human Rights, Faculty of Law

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Declaration

I, NkitaNkongolo, hereby declare that this dissertation is my original work. Acknowledgement of citations and/or quotations belonging to others was provided by the use of references, accordingly. This research is presented in partial fulfilment of the requirement for the LL.M Degree in International Trade and Investment Law in Africa; constituting the first and only submission for the said academic award.

Certification

I declare that this Mini-Dissertation, which is hereby submitted for the award of Legum Magister (LL.M) in International Trade and Investment Law in Africa at International Development Law Unit, Centre for Human Rights, Faculty of Law, University of Pretoria, is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution.

Nkita Nkongolo

Dedication

To the Lord Jesus Christ who still gives me the breath in order to fulfill the vision; to Pastor George J. Martin, Sydney Khoza, Heman and Jade White; to my mother Clementine Bamona Tshimanga, who always said, wherever you go, you shall be the best; and to my dad Esaie Nkongolo Kalamba, who sees his achievements in his older age, and to Schadrack Bowa Kalamba and Adèle Kapinga Kabeya; and to my future wife for her prayers, this piece of work is yours.

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List of abbreviations

AES	Applied Energy Services
ACB	African Central Bank
AfDB	African Development Bank
AIB	African Investment Bank
AMF	African Monetary Fund
ANAPI	AgenceNationale pour la Promotion des Investissements
AU	African Union
BEL	Bujagali Energy Limited
BIT	Bilateral Investment Treaty
BITs	Bilateral Investment Treaties
BOT	Build-Operate-Transfer
BOO	Build-Operate-Own
BOOT	Build-Operate-Own-Transfer
CEO	Chief Executive Officer
CIOB	Chartered Institute of Building
COMECTRIK	Companie d'Eléctricité de Kinshasa
COLTAN	Colombo-tantalite
GDP	Gross Domestic Product
DRC	Democratic Republic of Congo
EAD	Exposure at Default
ESAP	Environment Services and Assessment Program
EU	European Union
FDI	Foreign Direct Investment

GPA	Government Procurement Agreement
GW	Giga Watt
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Court for Settlement of Investment Disputes
IDA	International Development Association
IFC	International Finance Corporation
IIEs	Institute of International Economics
ILO	International Labor Organisation
IMF	International Monetary Fund
IP	Intellectual Property
LDCs	Least-Developed Countries
LGD	Loss Given Default
LICs	Low Income Countries
MDGs	Millennium Development Goals
MICs	Middle Income Countries
MIGA	Multilateral Investment Guarantee Agency
MW	Mega Watt
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Development
OHADA	OrganisationenAfrique pour l'Harmonisation du Droit des Affaires
OPEC	Organisation for Petroleum Exporting Countries
OPIC	Overseas Private Investment Corporation
PCA	Permanent Court of Arbitration
PD	Probability of Default

PIDA	Program for Infrastructure Development for Africa
PPA	Power Purchase Agreement
PPP	Public-private partnership
REC	Regional Economic Community
ROT	Rehabilitate-operate-transfer
RSA	Republic of South Africa
SADC	Southern Africa Development Community
SEA	Social and Environmental Assessment
SNEL	SociétéNationaled'Eléctricité
SPC	Special Purpose Company
SPV	Special Purpose Vehicle
SOGEFOR	SociétéNationale des Forces Hydroéléctriques
SOGELEC	SociétéGénéraled'Eléctricité
TGRA	Three Gorges Reservoir Area
UNCITRAL	United Nations Center for International Trade Law
UNIDO	United Nations Industrial Development Organization
US	United States
USAID	United States Aid for Industrial Development
WB	World Bank
WBG	World Bank Group
WC	Washington Convention
WCD	World Commission for Dams
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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Abstract

The Democratic Republic of Congo (DRC) has been attracting investors' attention since the colonial era. It started from the country's early colonial history under King Leopold II of Belgium when the then colony nearly single-handedly satisfied global demand for rubber to manufacture tires for the growing automobile sector. It has substantial untapped gold, diamonds, uranium, cobalt and high-grade copper reserves. The DRC accounts for 55% of the global production of Colombo-tantalite (coltan), a vital component of mobile phones. Though, itsmining sector presents a high-risk high-return opportunity for investors, it also presents significant political and security risks underlined by a lack of robust infrastructure, especially power infrastructure.

Given the lack of critical infrastructure to support its mining industry, the DRC signed a Memorandum of Understanding (MoU) in 2009with the Republic of South Africa (RSA) in order to build Africa's largest hydropower project with an ability to supply electricity to both countries as well as a considerable number of other countries on the African continent. This was followed by the Grand Inga Hydropower Treaty of 29 October 2013. This treaty allowed them to finance the building of the huge Grand Inga Hydropower Project. This dam, when built, will also have the capacity to impact positively on their economies as well as that of the SADC region and the African continent.

In the light of the budgetary constraints, the DRC Government has been exploring various options to fund this colossal project especially from private sources. Unfortunately, the nature of the DRC's legal system and the kind of financing requirements are not too appealing to investors. Besides, the framework for managing legal risks in the funding of such critical infrastructure projects in the country is not well developed.

In the face of significant political, security and legal risks associated with project financing in the DRC, this study argues that there is a need to identify, assess and mitigate these risks, especially those of a legal nature, to facilitate the funding of the Grand Inga project.

CHAPTER 1: INTRODUCTION

1.1 Background

The Democratic Republic of Congo (DRC) is an African country situated in the centre of the continent with 9 neighboring countries, including Angola, Burundi, Congo (Republic of), Central African Republic, Uganda, Rwanda, Sudan, Tanzania across the lake Tanganyika and Zambia.The DRChas been attracting investors' attention since the colonial era. It started fromthe country'searly colonial history under King Leopold II of Belgium when the then colony nearly single-handedly satisfied global demand for rubber to manufacture tires for the growing automobile sector.[1]Itsmining sector presents a high-risk high-return opportunity for investors. It has substantial untapped gold, diamonds, uranium, cobalt and high-grade copper reserves.[2]The DRCaccounts for 55% of the global production of Colombo-tantalite (coltan), a vital component of mobile phones.[3] However, it presents significant political and security risks underlined by a lack of robust infrastructure.[4]

Given the way that climate change defines human presence, the need is ever greater today for substantial reduction of greenhouse gas emissions, air pollution etcetera. According to the Frankfurt School-UNEP Collaborating Centre for Climate & Sustainable Energy Finance (FS-UNEP CCCSEF),confidence in a low-carbon world has increased.[5]This confidence has led to more need for incentivising public-private partnership investment – including putting a price on carbon to provide markets with the right policy signals to move them to invest in climate solutions.[6]

[1] D Lunde, "The Grand Inga Illusion." file:///C:/Users/PN/Documents/IngaIllusion.pdf (Accessed November 28, 2015).

[2] KPMG Democratic Republic of Congo: Country Mining Guide 2014 https://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/mining-country-guides/Documents/democratic-republic-congo-mining-guide.pdf (accessed 5 September 2015).

[3]Lunde(n 1 above)

[4] KPMG. (n 2 above)

[5]Frankfurt School-UNEP Collaborating Centre for Climate & Sustainable Energy Finance (FS-UNEP CCCSEF)'Global Trends in Renewable Energy Finance' (2015)http://apps.unep.org/publications/pmtdocuments/Global_trends_in_renewable_energy_investment_2015-201515028nefvisual8-mediumres.pdf.pdf (accessed 10 October 2015).

[6]As above.

The DRC has also gonein the same direction by signing an international arrangement with the Republic of South Africa (RSA) in order to build Africa's largest hydropower project with a capacity to supply electricity to both countries as well as a considerable number of other countries on the African continent. Both RSA and the DRC have undergone negotiations which led to a signed Memorandum of Understanding (MoU) in 2009, followed by the Grand Inga Hydropower Treaty of October 29 2013. This treatyallowed them to finance the building of thehuge Grand Inga Hydropower Project. This dam, when built, will have the capacity to provide power to both countries and will impact positively on their economies as well as that of the SADC region and the African continent.

1.2 Problem statement

The DRC has very substantial untapped minerals such as gold, diamonds, uranium, cobalt and high-grade copper reserves.However, the country presents significant political and security risks underlined by a lack of robust infrastructure, especially the power infrastructure.

After having entered an agreement with the government of South Africa, the problem which remains to the financing of this colossal project is due to the fact that it entails stakeholders from different legal systems. In the light of its budgetary constraints, the DRC Government has been exploring other options to fund this huge project especially from private sources. However, the DRC's legal system and the kind of financing requirements are not too attractive to potential investors.

This study argues that there are obviously risks of legal nature in project financing in the DRC and that,in the face of these legal risks, there is a need to identify, assess and mitigate them in order to facilitate the funding of this mammoth dam.

1.3 Research question(s)

The main research question that this study will seek to answer is what are the inherent legal risks in financing the Grand Inga Hydropower project and how can these risks be mitigated to achieve the overall objective of the project?

In answering the main research question, the study will also respond to the following sub-questions:

i. What is the nature and context of project finance as a financing structure of critical infrastructure?
ii. What is the legal environment for project finance in DRC?
iii. What are the inherent legal risks and socio-environmental concerns in the financing of the Grand Inga Hydropower Project?
iv. How can these legal risks be mitigated and which international best practices can serve as example for the building of the Grand Inga Hydropower Project?

1.4 Objectives of the study

The objective of this study is to manage the inherent risks of a legal nature related to theGrand Inga Hydropower Project. It is important for these legal risks to be minimised in order to explore various options which will facilitate the realisationof the overall objective of the project. This study is relevant to researchers and academics because it builds on existing literature. In addition, it provides new insights and knowledge, particularly from the angle of the law of project financing in the DRC. This research also aims to allocate legal risks to the party best placed to manage them at least cost in order to optimise rather than maximise risks transfer. The research project is also an input for contracting states, RSA and the DRC; to help them improve their investment competitiveness regarding the project they intend to fund and receive optimal results in terms of value for money. Whengovernments start developing public-private partnerships (PPPs) in the market, they ultimately offload the burden that projects cause to their national annual budgets.However, they soon realize the complexity of PPP projects and the potential negative consequences if PPP agreements are not properly assessed and the sharing of risk and revenue are not well understood by all stakeholders.[7]

[7] E Istrate & R Puentes "Moving Forward on Public-private Partnerships: U.S and International Experience with PPP Units" 15.

1.5 Thesis statement

This study argues that there are inherent risks in financing projects, and that the Grand Inga Hydropower Project is not an exception. Ifthese intrinsic legal risks are well managed, it could create an insatiable appetite among private investors and accelerate capital inflows for the completion of the dam.

1.6 Literature review

Over the past few decades, energy trade has transcended national borders. With privatisation, the emergence of competitive markets, cross-border energy trade and regional integration, energy trade has become international in nature.[8]Diverse authors and publications of regional and international bodies have discussed issues related to energy infrastructure. The Grand Inga Hydropower project has also created a debate regarding its construction. Those who are against it argue that the project plans have been on the table for years without any substantive progress towards implementation. Some view conflicts arising from energy infrastructure as one of the principle reasons investors are hesitant to invest in such projects. On the other hand, those who support the idea of building the dam consider project financing as a way to respond to the need of infrastructure development.

In his article entitled 'The Grand Inga Illusion', David Lunde[9] concludes that the Grand Inga project is morally dubious. Its inapplicability to the local needs of the Congolese people, the responsibility and burden placed on the state, the exclusive benefits amassed by foreign companies and countries, and the social and environmental damage of the project indicate that the project will do more harm than good if undertaken.[10]The researcher, not sharing this view, thinks that the main concern about the Grand Inga dam is the lack of necessary know-how in managing relatedrisks to the satisfaction of stakeholders.

Kim Talus[11]argues that the long-term contracts feature is always a commonality of energy-related projects. Because most energy contracts have a long-term life, they have been the subject

[8] K Talus, ed., *Research Handbook on International Energy Law* (2014), 5.
[9]Lunde (n 1 above)13.
[10]As above.
[11] Talus (n 16 above) 124

of expropriation in many countries, resulting in sharp differences among countries. Even when referring to the oil industry, Talussays that there are conflicts which tend to develop realism in the arena. He proposes inclusion of stabilisation clauses when negotiating a bilateral investment treaty.[12] The researcher agrees with Talus, arguingthat energy regulation is one of the important legal instruments that countries should develop to promote energy infrastructure and ensure the protection of foreign investment in this particular field.

In his contribution, Ottinger[13]contends that China relies heavily on large hydroelectric dams of which one – the world's largest hydroelectric project in terms of generating capacity, the Three Gorges Dam on the Yangtze River in Hubei Province – was completed and fully operational since 2012. The construction of this dam was very controversial to the extent that many people were displaced and compensation did not correspond to the value of expropriated properties. He concludes that big dam's benefits go to the rich while the poor bear the costs.[14]

MB Likosky[15] also asserts that, to solve urban deficiency, the World Bank views infrastructure projects as a precondition to economic development and an essential step in ameliorating poverty. He refers tothe 'Cities Without Slums' action plan, an integral component of the Millennium Development Goals (MDGs), under which cities are encouraged to develop urban infrastructure (roads, communication, power, transport services, water and sanitation, serviced areas) with a view to attracting and sustaining productive investment.[16]Likoskyassertsthat the payment of such infrastructure be made through progressive taxation.[17]

Graham Vinter's[18] view is that the host government's attitude to a project is governed by the perception of what is in the public interest. The government may intervene to ease congestion in capital, to develop oil reserves or to provide low carbon power generation and energy efficiency projects to enhance national energy security and provide jobs. From the sponsors'

[12] As above.
[13] RL Ottinger *Renewable Energy Law and Development: Case Study Analysis* (2013) 39.
[14] As above.
[15]MB Likosky *Law, Infrastructure and Human Rights* (2006), 152.
[16] As above.
[17] As above.
[18] GD Vinter, G Price & D Lee (eds) *Project Finance: Legal Guide*(London: Sweet & Maxwell, 2013), 1.

perspective, Vintnerargues that the preponderant objective in a project is to make profits.[19] On the other hand, he also says that lenders providing loans to a project company cannot be treated as shareholders becausethey lend money for a margin.[20]

Hansen[21]states that public infrastructure used to be a job for governments. Theprivatisation movement arrived to the emerging markets late, but quickly became a force in defining the scope of infrastructural projects.[22] For Hansen, this movement has two sources: an ideological driver which is based on the wisdom and efficiency of the market, and the pragmatic driver being based on budget constraints.[23]These two sources create free markets which seem to correlate with higher economic growth.[24]

The researcher's view is that economic growth requires not only that the country should be naturally rich to afford funding of a big project, but it should be versatile in other areas. Funding of infrastructural projectsdepends on the strategy used by the government, which sector of the economy needs to be promoted and how this is done. Project financing can be an interesting approach for developing complex infrastructures such as those related to energy, roads or ports.

1.7 Research methodology

For the purpose of this research, descriptive, analytical,comparative and prescriptive approachesareadopted. With the descriptive approach, the study will describe project financing as long-term financing of infrastructure and industrial projects in DRC,while the analytical approach will be used to assess whether such funding methods address the legal inherent risks associated with the project. The comparative approach will be used to juxtapose case studies in order to better the funding of Inga Hydropower project with recommendations drawn from the use of prescriptive approach.

[19] As above.
[20] Vintner (n 26 above), 4.
[21] KW Hansen 'Political Risk Insurance and the Rise (and Fall?) of Private Investment in Public Infrastructure," in *Privatizing Development: Transnational Law, Infrastructure and Human Rights* in MB Likosky (ed.) (2005) *Privatising Development: Transnational Law, Infrastructure and Human Rights* 105.
[22] Hansen (n 29 above) 106.
[23] As above.
[24] As above.

Desktop and library-based approacheswill be used in this study whereby local and international legal instruments will constitute the primary source. Collectionof secondary data will involve preexisting books, articles, journals and reports from relevant participants.Other relevant materials shall be obtained online.

1.8 Chapters outline

Thethesis has six chapters. The first chapter is the introduction. Chapter two focuses on the nature and context of project finance as a financing instrument for critical infrastructure projects. Chapter three presents the legal environment of project finance in DRC. The focus in chapter four is the inherent legal risks in the financing of the Inga Hydropower Project. Chapterfive examines international best practiceswhich can be followed in the building of the Inga Hydropower Project. Chapter six provides possible recommendations that could be helpful to the government in attracting private investors to the Grand Inga hydropower project; it also makes some concluding remarks.

1.9 Scope and delineation

The scope of this study is limited to the analysis of the project financing accord reached between the DRC and RSA.

CHAPTER 2: THE CONTEXT OF INTERNATIONAL LAW AND THE BUSINESS OF PROJECT FINANCE

2.1 Introduction

Generally, it is agreed that an overall economic policy of openness, which includes integration with the global economy, through liberalisation of trade and investment and the recognition of private property rights, is necessary for economic growth.[1] Whereasgovernments used to play an important role in developing critical infrastructure projects, the tide has shifted, encouraging private participation in the development of such projects. The idea behind privatising public utilities is that states have never been good in business; on the other hand, private companies and individuals have business-related know-how as well as experience and the competitivespirit. Private operators can render efficient services at affordable prices and do not have budgetary constraint likegovernments.

Having stated the above, it is also essential to point out that project finance is not a new method of financing infrastructure. It has a long history.For example, in 1299 – more than 700 years ago – the English Crown negotiated a loan from the Frescobaldi (a leading Italian merchant bank of that period) to develop the Devon silver mines.[2] They entered into an agreement (the loan contract) which gave right to the bank to have control over the operating project for a year. Nointerest was mentioned in the loan contract; although the lender could take as much unrefined ore as it could extract during that year, it had to pay all costs of operating the mines.[3]

In the last decade (between 2004 and 2012) project financing has typically accounted for between 10 and 15 percent of total capital investment in new projects

[1] L Cao, 'An Evaluation of the World Bank's New Comprehensive Development Framework' in M Likosky (ed) *Privatizing Development: Transnational Law, Infrastructure and Human Rights*, 2005 28-29.

[2] JD Finnerty *Project Financing: Asset-Based Financial Engineering* (John Willey & Sons: Hoboken, 2013 2013), https://books.google.co.za/books?id=xMMa-mHWE-gC&pg=PA1973&lpg=PA1973&dq=john+finnerty+more+than+700+years+ago+%E2%80%93+the+English+Crown+negotiated+a+loan+from+the+Frescobaldi+(a+leading+Italian+merchant+bank+of+that+period)+to+develop+the+Devon+silver+mines.&source=bl&ots=BdJxHhpfZB&sig=XJZ_ILr4htW35kCvKSzE-h7QoqI&hl=en&sa=X&ved=0ahUKEwiw9dzZtdLNAhXlI8AKHf0EAfQQ6AEIGjAA#v=onepage&q=john%20finnerty%20more%20than%20700%20years%20ago%20%E2%80%93%20the%20English%20Crown%20negotiated%20a%20loan%20from%20the%20Frescobaldi%20(a%20leading%20Italian%20merchant%20bank%20of%20that%20period)%20to%20develop%20the%20Devon%20silver%20mines.&f=false (accessed 1 July 2016), 1973.

[3] Finnerty (n 2 above).

worldwide.[4]Thisindicateshow important this method of project financing has become for most countries in the world. In the US, for example, firms finance more than half the largest projects in the country through project companies.[5] Nevertheless, large projects are challenging. They need a high level of expertise owing to their complexity and sheer size.

A debate among academics and policymakers ensued when the so-called John Washington Consensus (WC) was coined by John Williamson.[6] He wrote a paper containing ten specific economic policy reformsthat crisis-wrackedLatin Americancountries and other developing countries had to implement to enjoy economic growth and sustainable development.

Itwas the origin of a new socio-economic movement in emerging countries where the role of private institutions became vital as their financial contribution and expertise were sought in infrastructure development. It was a time which witnessed the constraining of the regulatory powers of governments and the ascendancy of regulation by the private sector.

This chapter seeks to explain the importance of project finance. It also elucidates key legal and commercial risks which need to be addressed given that the project involves parties from different jurisdictions and legal cultures. This is of the essence since the identification of these issues will help to guarantee parties' interest, and create confidence, and bring them together in order to make the deal.

2.2 Definition of project finance

The term project finance is often misused; some use it to designate a fund-raising process made to cover a particular project cost, whereas others refer to it as a desperate financial situation that requires excessive funding alternatives.

[4] As above.
[5] As above.
[6] J Williamson 'The Washington Consensus as Policy Prescription for Development.' A lecture in the series "Practitioners of Development" delivered at the World Bank on January 13, 2004 http://www.iie.com/publications/papers/williamson0204.pdf (accessed 15 December 2015).

Conversely, Finnerty[7]contends that:

> Project financing may be defined as the raising of funds on a limited-recourse or nonrecourse basis to finance an economically separable capital investment project in which the providers of the funds look primarily to the cash flow from the project as the source of funds to service their loans and provide the return of and a return on their equity invested in the project.

From this definition, a nonrecourse debt is one based on the merits of the project rather than the credit of the project sponsor. An economic argument can be made that classic nonrecourse project finance is an inefficient and expensive financing technique.[8] Under this scenario, the lender does not have a direct legal obligation for repaying the project debt if the project itself fails to provide enough cash flow to service the debt. This is primarily the reason project financing should be based on predictable regulatory and political environments and stable markets, which combine to produce dependable cash flow.[9]

The nonrecourse feature of project financing being a classic form of debt, in this particular field, results in no potential liability to the project sponsor for the debts. Conversely, in most project financings, there are limited obligations and responsibilities forthe project sponsor.[10] The necessary recourse to support financing is determined by the unique risks presented by a project and the appetite of the credit markets to accept the risks.[11] For example, a lender would have limited recourse to the sponsor's assets when evaluating existing risk during the construction of a hydropower plant until it is complete.

Project financing objectivesareto avoid the nonrecourse debt which is expensive, and to shift to the project's assets rather than the sponsor's assets, a limited recourse debt. In doing this, it makes project financing more efficient and flexible than other methods of funding such as balance-sheet. The financing technique of global project finance is proven to have successfully brought together development, construction, operation, financing, and investment expertise worldwide.

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[7] Finnerty (n 2 above).

[8] SL Hoffman *The Law and International Business of Project Finance: A Resource for Governments, Sponsors, Lawyers, and Project Participants* (2007) 5.

[9] As above.

[10] As above.

[11] As above.

2.3 Sources of project finance

In project finance, there an international dimension in the laws that apply.[12] If a project involves parties from different jurisdictions, attention has to be paid to different regimes because of their role in the transaction as well as the allocation of risks. If taken from the Congolese perspective, four bodies of law impacting on project financing need to be considered: (i) Congolese "laws that regulate international transactions or disputes, which apply inside" the country; (ii) "laws of foreign countries; (iii) public international law; and (iv) conflict of laws or rules that determine which laws courts or arbitral tribunals will have jurisdiction over a dispute."[13]

A set of standards constituting *lex mercaterio*, from different arbitral centers, can be added to the abovementioned list of sources.

2.4 Private capital and infrastructure[14] development

Privately financed infrastructure entails the entry of foreign capital and the participation of foreign enterprises in sectors of an economy that previously and traditionally had been reserved for governmentsand the public sector.[15] Domestic capital may still be used when developing a typical infrastructure project. The distinction between foreign and local investments is necessary, andthe nature and forms of laws and regulations regulating infrastructure projects depends on the government(s) involved.[16]

Many of these projects are constructed by transnational infrastructure companies which complicates the situation. For example, if a single project involves different transnational companies from different jurisdictions, the impact of different legal systems on the said project development will have to be considered. Sometimes, some governments exclude infrastructure projects from public procurement.[17] Apart from bringing private capital into financing the provision of public services, previously delivered exclusively by governments, these public-

[12] Hoffman (n 8 above)20.
[13] As above.
[14] D Wallace Jr.'Private Capital and Infrastructure: Tragic? Useful and Pleasant? Inevitable?' in Likosky (n 1 above) 131.
[15] Wallace (n 14 above) 132.
[16] MB Likosky (ed) Privatizing Development: Transnational Law, Infrastructure and Human Rights, 2005, 9.
[17] As above.

private arrangements have been called by some a revolution in the way the government procures (and provides to the public) goods and services, namely cooperatively with the private sector.[18]

Despite history showing how, in ancient civilizations,governments were involved in regulating the national economy and dictating which industry could be owned by the private sector, Parker and Saal assert that there was a mixture of public (often including religious institutions) and private ownership of production and commerce[19]during ancient times. Means of production somehow moved from the state to private and back to state in different ways.

Be that as it may, the term 'privatisation'as used today can be traced back to 1930, which was the period of the great depression. In response to the downturn in the global economy, governments became heavily involved in regulating economies. Parker and Saal provide an excellent overview of this period (and of the later privatisations) and the power of ideas in influencing policy:

> At the end of the war, in Europe and throughout much of the world, capitalism was discredited in a way that is not easily imagined today. It seemed infirm, inept and incapable. It could not be counted on to deliver economic growth and a decent life. Nobody in Europe believes in the American way of life – that is private enterprise.[20]

The conditions existing then led many European governments to nationalisemajor firms. The Labor Party in Great Britain that ousted the Conservatives proceeded with thenationalisationof major industries in the United Kingdom. It nationalised coal, iron and steel as well as railroads and other public utilities with the belief that it would lead to effective and efficient management of the firms and lead to full employment, growth and a fairer allocation of resources.[21]Put differently, with the tremendous devastation caused by the Second World War, almost all European countries turned their backs on capitalism and embraced socialism in varying degrees, leading to increased Government involvement in the economy in comparison to the pre-war era.[22]

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[18] Wallace (n 14 above) 132.
[19] D Parker & D Saal (eds) *International Handbook on Privatization* (2003), 25.
[20] Parker & Saal (n 19 above) 27.
[21] As above.
[22] As above.

2.5 PPPs as a project finance structure

PPPs are not a new tool to fund and develop infrastructure. A railway linking Warsaw and Vienna started off as a private project in 1839; a majority of Russian railways were owned privately in 1878; France and Mexico concluded a PPP arrangement in 1860 to develop a railroad; and the growth of Japanese railroads was due to PPP.[23]PPPs' record in Great Britain dates back to the 17th century.

There is no common definition of a PPP. The World Bank Group (WBG) defines it as long-term contracts between a private party and a government agency, for providing a public asset or service, in which the private party bears significant risk and management responsibility.[24]PPPs are considered a third sector of the economy distinct from the state and the private sectors.

In the European context, Michael Likosky affirms the existence of an opinion establishing a third sector,[25] emphasizing that:

> A public-service sector is the sector of the economy in which services or activities, recognized as public in the sense that the State is seen as ultimately responsible for the provision of them, are nevertheless not provided by the State itself but by institutions which are, on the one hand, too independent of the State to be regarded as part of the State, but are, on the other hand, too closely to be thought of as simply part of the private sector of the political economy.

PPPsproceed through an array of schemes[26]and exist in a field resonant with acronyms[27] describing the possible legal and contractual arrangements giving privately financed infrastructure projects[28] such as build-operate-transfer (BOT), build-operate-own (BOO), build-

[23] Likosky (n 16 above) 32-33.
[24] World Bank (2015) 'World Bank Group Support to PPPs: Lessons from Experience in Client Countries' http://documents.worldbank.org/curated/en/2015/01/23721676/world-bank-group-support-public-private-partnerships-lessons-experience-client-countries-fy2002-12 (accessed 26 December 2015), 3.
[25] Likosky (n 16 above) 19.
[26] Likosky (n 16 above) 21.
[27] K Hansen,KW Hansen 'Political Risk Insurance and the Rise (and Fall?) of Private Investment in Public Infrastructure," in *Privatizing Development: Transnational Law, Infrastructure and Human Rights* in MB Likosky (ed.) (2005) *Privatising Development: Transnational Law, Infrastructure and Human Rights* 107.
[28] Wallace (n 14 above) 134.

operate-own-transfer (BOOT) and rehabilitate-operate-transfer (ROT). Each of the mentioned acronyms involves a different mix of public and private control over a defined period of time.[29]

Statistics show how PPPs have spread at the average of 15 to 20% across the globe, and how 134 developing countries have implemented new PPP projects in infrastructure development alone between 2002 and 2011, amounting to US$ 38 billion.[30] However the African continent does not feature highly in this because of its low demand for infrastructural projectscompared to other developing regions.[31]

BOT schemesare the most popular with their useactively promoted by the United Nations for Industrial Development Organization (UNIDO), which has seenhow ownership and control have evolved over time in the context of specific projects.[32]UNIDO was among the early 'adopters' within the UN system to develop a new model of technical assistance based on the PPP concept when it launched the first business partnership in 1999 with FIAT which focused on supplier upgrading in the automotive components industry in India.[33] This modality is facilitated by the Global Compact, an initiative launched by Kofi Annan in July 2000, with a view to strengthening the partnership between the UN system and the private sector.[34]

Embracing PPPs can help governments to improve their public procurement servicesdue to the fact that most forms of PPP involve a contractual relationship between the public and private parties and the fact that the long-term nature of these contracts creates a strong long-term mutuality of interest.[35]

[29] Likosky (n 16 above) 21.
[30] World Bank (n 24 above) 3.
[31] World Bank (2008) 'Attracting Investors to African Public-Private Partnership: A Project Preparation Guide' http://www.icafrica.org/fileadmin/documents/guides/Attracting-investors-to-African-PPP.pdf (accessed 26 December 2015), 1.
[32] As above.
[33] UNIDO, 'Independent Thematic Evaluation: UNIDO's Public Private Partnerships' (2014) https://www.unido.org/fileadmin/user_media_upgrade/Resources/Evaluation/THEM_PPP-2012-13_E-book.pdf (accessed December 26, 2015), 7.
[34] UNIDO (n 33 above) 8.
[35] World Bank (n 31 above) 3.

Regardless of the term used, Raphael Virginie[36] makes it clear that PPPs describe a process that involves:

- astate-controlled process of selecting a preferred investor group and negotiating a contract for that group's right to take over an asset for a specified time under specific conditions;
- alegal title to ownership of the facility remaining with the State;
- theinvestor's right to the tolls in return for the obligation to maintain and operate the facility so long as they fulfill the contract conditions;
- monitoring fulfillment of the contract's terms
- aprocess for arbitrating disputes over the contract; and
- provisions under which the facility reverts to the State at the end of the contract term or earlier if the private partner defaults on the contract.

2.6 Transnational characteristics of a project

Many projects in developed or developing countries possess specific characteristics. The fact that different governments get involved in the project tendering makes it more complex and adds more pressure on the authorities. The tension between different governmental, legal, and business cultures affects the privately financed infrastructure, where the capital comes from a country with different traditions from a country where the project is situated.Consequently, due diligence in a project financing is an important interdisciplinary process of legal, technical, environmental, and financial specialties. It is designed to detect events that might result in total or partial project failure. Participants involved in this process, besides project sponsors, are lawyers, engineering firms, fuel consultants, market consultants, insurance consultants, financial advisors, and environmental consultants, and non-governmental organizations.

In a transnational project, the host government could indirectly remove support later, after having agreed to implement the project, by slowing the permit process to a crawl or denying

[36] R Virginie, 'Public-private partnerships: Can the United States learn from the French experience to address its highways funding needs?'(2007) Unpublisheddissertation Tufts Universityhttp://dl.tufts.edu/catalog/tufts:UA015.012.073.00013 (accessed 29 December 2015).

outright the issuance of a needed permit. To alleviate this risk the project sponsor should, at the first instance, require from the host state a pre-establishment right.

Consideration has to be given to the way the project procurement is done for the harmonisation of the whole process. Therefore, powerful governments have promoted privatisation abroad on a bilateral basis. They also furnish legal assistance to developing countries, encouraging the adoption of laws conducive to foreign investment in the infrastructure sector.

2.7 International legal constraints

For public sector bodies, competition is necessary to achieve the best deal for the contracting authority.[37] In order to awarda project to a particular project-vehicle, the public sector typically solicits bids on a similar basis creating a level playing field for potential bidders.[38]

The Government Procurement Agreement (GPA), as negotiated by the World Trade Organization's (WTO) Member States in 1994, constitutes a global legal constraint for Government procurement related-markets. It is a plurilateral agreement with a quite limited reach, and has also certain thresholds which give flexibility to countries. Its paragraph 2 of Article I stipulates:

> This Agreement applies to procurement by any contractual means, including through such methods as purchase … lease, rental or hire purchase, with or without an opinion to buy, including any combination of products and services.[39]

Its main objective is to ensure open, transparent and fair competitive conditions in the Government procurement business. Therefore, when advising a utility or a public body which wishes to promote and bring about a particular project, it is important to ascertain what, if any, procurement rules apply.[40]Under the GPA, not all signatories are able to apply for certain bids in other signatory states. The fact is that a country may, at its discretion, implement dedicated rules for its public procurement.

[37]GD Vinter, G Price & D Lee (eds) *Project Finance: Legal Guide*(London: Sweet & Maxwell, 2013), 7.
[38] As above.
[39] Government Procurement Agreement, art I para 2.
[40] Vinter at al. (n 37 above) 7.

In the case of an EU Member State, the provisions of the relevant EU's Directives will apply.[41]The EU Public Procurement Directives dealing with the procurement of public works, supply and service contracts contain more flexible rules for the award of public works concessions but do not cover service concessions.[42]

Article 19 of the African Union (AU) Constitutive Act provides for the creation of three financial organs, namely the African Central Bank (ACB), African Investment Bank (AIB) and African Monetary Fund (AMF). These institutions will have a role to play in the economic integration of the African continent pursuant to the 1991 Treaty Establishing the African Economic Community (Abuja Treaty).[43]

The role of Bilateral Investment Treaties (BITs) as regard to public procurement also needs to be considered. There is a view that such treaties confer more advantages to foreign investors through the non-discrimination and other relevant provisions. Thus, Governments are obliged to treat foreign investors in the same way as domestic firms when it comes to procurement.

For example, Article 1 of the United States (US) BIT Model Treaty of 2012 defines investment as every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. These characteristics prove that the transfer of physicalproperty such as equipment, or physical property that is bought or constructed such asplantations or manufacturing plants[44] or any other typical infrastructure, could constitute a foreign direct investment.

It is worth pointing out that Foreign Direct Investments (FDIs) are more susceptible to unfair expropriation in emerging economies. In mitigating this risk, contractual parties have always inserted clauses on the protection of investment. Modern BITs have provisions incorporating investment protective principles, including: the principle of admission and establishment of investment, the national treatment principle, the most-favored principle, fair and equitable treatment principle, expropriation, the free transfer of funds and transparency

[41] Vinter at al. (n 37 above) 9.
[42] As above.
[43] African Union, 'The Financial Institutions' http://www.au.int/en/organs/fi (accessed 11 March 2016).
[44] M Sornarajah *The International Law on Foreign Investment* (2004) 8.

principles.In most BITs, state parties have also predetermined a set of procedures that will be available to fully and finally settle their matter arising from the investment.

2.8 Project finance key participants, their objectives and risk management

The challenge of any project financing is trying to reconcile differing objectives of the various parties so that each party, although possibly compromising its ideal position, nevertheless stands to gain at the completion of the project. A good understanding of parties' objectives is an essential pre-requisite to every negotiation. In a project financing, the host government, sponsors and lenders are participants; some of their objectives are separately mentioned below.

2.8.1 Host government

The host government'smain objective to a project would be, certainly, the public interest, perception and revenue generation. A government may wish to promote a new mass transit system in its capital in order to ease congestion or to develop oil reserves to earn hard currency (through production sharing or royalty arrangements) and to provide jobs.[45]

2.8.2 Lenders

According to the New Capital Accord, in its first version of January 2001, the Basel Committee recognized the essential difference between corporate financing and structured financing.[46] As for the former, the Committee gives priority to the ability of the current management of the beneficiary company to generate revenue and cash flow as a source of loan reimbursement.[47]

It is imperative to noticethat lenders simply providing loans to a project company cannot be treated as shareholders, despite the increased risks and rewards that they will be taking.[48] Whenever these institutions get involved in any business, giving out loans, they do it for a margin. Among many objectives that project lenders have, the following objectives are usually included:

[45] Vinter at al. (n 37 above) 3.

[46] S Gatti Project *Finance in Theory and Practice: Designing Constructing and Financing Private and Public Projects* (2008), 190

[47] As above.

[48] Gatti (n 46 above) 4.

- To make profits
- To assume only measurable or measured risks – only risks associated with a project after a careful due diligence exercise
- To have control over key project decisions: the banks' argument is that they are prepared to lend against a particular project profile in respect of which they have carried out an extensive due diligence exercise and, particularly because they have (usually) funded the greater part of the project's costs, they are entitled to prevent that the project profile being unacceptably changed
- To take control as soon as possible in times of hardship.[49]

2.8.3 Private sector sponsors

Besides making profits, which is their preponderant objective in a project, other objectives the private sector sponsors might have include the following:

- To satisfy a strategic corporate objective by completing the project
- To share risk in carrying out a project
- To carry out a project off balance sheet
- To minimise interference in the project – one of the principal concerns of large energy companies with project finance is the degree of interference (through covenant control) and reporting required by the host government and its lenders
- To retain control of the project for as long as possible in times of hardship – the sponsors will fear losing not only control of the project but also the value of their investment it they allow the host government to exercise its intervention powers or the lenders to enforce their security at too early stage.[50]

[49] Gatti (n 46 above) 5.
[50] Gatti (n 46 above) 3-4.

2.9 Project legal risk management

The terms risk and uncertainty are not the same. Distinguishing risk and uncertainty, Ross[51]suggests that uncertainty is the absence of information required for decision making whereas risk is the condition where information is still missing but probably distribution can be assigned to the occurrence of a particular event.

For that reason, Mahler[52] asserts:

> While legal problem solving will not be eliminated in tomorrow's legal paradigm, it will nonetheless diminish markedly in significance. The emphasis will shift towards legal risk management supported by proactive facilities, which will be available in the form of legal information services and procedures. As citizens learn to seek legal guidance more regularly and far earlier than in the past, many potential legal difficulties will be dissolved before needing to be resolved. Where legal problems of today are often symptomatic of delayed legal input, earlier consultation should result in users understanding and identifying their risks and controlling them before any questions of escalation.

In project finance, risk and uncertainty have to be restructured to avoid loss or damage because none of the project participants likes to be uncertain and take un-measurable risk as it is not prudent for single party to bear risks alone.Project risk management planning is the starting point of such restructuring. For that reason, project financing permits the sharing of operating and financial risks among various interested parties.[53] Risk taking needs a degree of certainty to allow each party to have knowledge of and confidence in what is under their capacity to control.

After project risk management planning, risk identification is probably the most important step. It involves identification of risk events that threaten the outcomes (cost, schedule or deliverables) of the project.[54] Because identification of risks is the most difficult step of risk management, Herman contends that the risk manager should be supported by a team of experts (within or outside of the project) to assist him or her with risk identification.[55]

[51]A Ross & P Williams *Financial Management in Construction Contracting* (2013) 43.

[52] T Mahler 'Tool-Supported legal Risk Management: A Roadmap'(2010) European University Institute http://cadmus.eui.eu/bitstream/handle/1814/15122/08_Tool_EN.pdf?sequence=1 (accessed 1 July 2016), 1.

[53] Finnerty (n 2 above).

[54] H Steyn *Project Management: A Multi-Disciplinary Approach* (2016) 385.

[55] As above.

Risks in project financing are compounded once they involve a resource deposit that is difficult[56]and expensive to access or requires the application of an innovative production technology.[57]Risks are fairlyhigh at the development stage, and they include failure to obtain permits or other governmental approvals; public opposition to the project; and weaknesses in the business framework of the deal (in the vernacular, "the deal doesn't make sense").[58]

After having identified risks at the first stage, design engineering and construction risks are those intrinsic during the project design and construction stages. In reality, during construction new risks arise whilst others settle.

The third period of risks identification is the start-up time. At this point, the contractor risks are about to be settled. New risks will be transferred to the project company as well as the operator once the performance signals are guaranteed after the test. The constructor is responsible for almost all construction risks, pursuant to the turnkey construction contract, and is required by lenders, equity investors (including sponsors) to prove that the project can operate at a level of performance necessary to service debt and pay operating cost.[59]

Operating risks are those arising when the project is accepted.[60] Risks related to shrinkage of raw materials or fuel, or a decline in demand for the output of the project as well as those related to technical problems, inflation, foreign exchange rates and convertibility, strikes, regulatory changes, political changes, uninsured losses, and management inefficiencies are on the operating risks list. Operating risks are primarily risks to the project company and the permanent loan lenders, but other project participants, such as the off-take purchaser, are concerned with whether the project operates.[61]

After risks have beenidentified, they need to be analyzed. Risk analysis entails an assessment of the probability that a risk event will occur, the consequence should the event

[56] A Shresta & I Martek 'Legal Risk Impact in Public-private Partnerships (PPPs): The Case of the Chinese Water Sector' http://www.wbiworldconpro.com/uploads/melbourne-conference-2014/management/1399203536_425-Asheem.pdf (accessed 29 June 2016) 28.

[57]The larger the project the riskier it generally is for a single firm to finance it on its own balance sheet. Because many projects are located in jurisdictions deprived of enough financial resources the host government or a local company are prevented from developing large projects on their own.

[58] Shresta & Martek (n 55 above) 28.

[59] Shresta & Martek (n 55 above)29.

[60] As above.

[61] As above.

occur, and derivation of the risk value of the event, based on both the probability and the consequence.[62] It implies that each risk event (condition) identified has to be reviewed and an assessment made of how likely the event is to occur and whatthe impact would be on the outcome of the project.[63]

Risk evaluation processes involve an evaluation of the relative importance of the risk event, while risk resolution is a formulation of treatment options or controls for the critical events.[64]Thisimplies the development of action plans to reduce the probability of a critical event occurring, or should this not be possible, the reduction of the consequence of the event.[65]

The last step in risk management is the risk control which consists in an ongoing activity during which the risks are closely monitored as specific events and conditions occur during the execution of the project.[66]

2.10 Termination of the project agreement

Events of default by the project company that may give the offtaker or contracting authority the right to terminate the project agreement should clearly be only of so fundamental a nature that the project is really no longer delivering the product or service required.[67]Defaults which may constitute fundamental include: failure to complete the project by an agreed backstop date; failure to develop the project or to be available for operation for prolonged periods of time (abandonment); failure of operating performance tomeet minimum required standards; non-payment of penalties; bankruptcy of the project company; and failure to adhere to other

[62] Steyn (n 54 above), 388.
[63] As above.
[64] Steyn (n 54 above) 392.
[65] As above.
[66]Steyn (n 54 above) 395.
[67]ER Yescombe *Principles of Project Finance* (2013) https://books.google.co.za/books?id=IY5qAAAAQBAJ&pg=PA145&lpg=PA145&dq=ER+Yescombe+Events+of+default+by+the+project+company+that+may+give+the+offtaker+or+contracting+authority+the+right+to+terminate+the+project+agreement+should+clearly+be+only+of+so+fundamental+a+nature+that+the+project+is+really+no+longer+delivering+the+product+or+service+required&source=bl&ots=ufD4ndGtyn&sig=RyuLEPd6NTLCyuX3gyaRDhobtE0&hl=en&sa=X&ved=0ahUKEwiTt5TjrdLNAhUhL8AKHdVOAagQ6AEIGjAA#v=onepage&q=ER%20Yescombe%20Events%20of%20default%20by%20the%20project%20company%20that%20may%20give%20the%20offtaker%20or%20contracting%20authority%20the%20right%20to%20terminate%20the%20project%20agreement%20should%20clearly%20be%20only%20of%20so%20fundamental%20a%20nature%20that%20the%20project%20is%20really%20no%20longer%20delivering%20the%20product%20or%20service%20required&f=false(accessed July 2016) 145.

obligations agreed to be fundamental under theproject agreement (for example, maintaining a minimum quality of service, subject to a reasonable grace period to remedy the default (unless the failure is a deliberate act by the project company).[68] A project agreement can also be terminated when a responsible Government finds that negotiation processes were not effective by including other participants such as civil societies and non-governmental organisations.

2.11 Socio-environmental feasibility and regulation of the project

2.11.1 Environmental and social concern

Sustainable energy development wasdefined at the Rio Conference on Environment and Development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[69]When governments or private sectors engage in an energy development project, consideration has to be given to the needs of the present and future generations. Of course, "without rules, every rational person sharing a commons is locked into a system that compels him to increase his use without limit."[70] Therefore "freedom in a commons brings ruin to all."[71]

An important approach to sustainable energy development can be found in the case of the Gabcikovo-Nagymaros Project (Hungary vs. Slovakia) where the International Court of Justice (ICJ) judge explained:

> Through the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks of mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic

[68]Yescombe (n 67 above).

[69]AJ Bradbrook, DP Hader & R Hermmersbach *The Law of Energy for Sustainable Development* (2005) 14.

[70]B Barton, A Lucas, L Barrera-Hernandez & A Ronne *Regulating Energy and Natural Resources* (2006) 335.

[71]As above.

development with protection of the environment is aptly expressed in the concept of sustainable development.[72]

Basically, some projects require two categories of land taking: one is temporary, for only a few months during construction activities, and the permanent one isfor the life of the project.[73] Environmental issues are an important aspect concerning transnational projects development, construction, and operation.[74]

Relevant laws have to expressly adopt sustainable development. The rationale is that, when doing so, states will meet the needs of the present without compromising the ability of future generations to meet their own needs.[75] In the era we are living in, environmental and social issues are increasingly material to businesses doing well in the short and long term.[76]

The African Development Bank (AfDB), in its environmental and social assessment procedures, has a primary objective to provide a formal process for the internal and inter-departmental environmental and social review of Bank-financed projects, programs and plans.[77] The procedures highlight the various steps that shall be followed to assess environmental and social risks and benefits duringthe project cycle. In addition, the Environment Services and Assessment Program (ESAP) aims to ensure the integration of environmental and social dimensions into the public sector project cycle from country programming to postevaluation. An integrated approach allows the assessment to take into account interrelations between environmental and social issues and to favor a multidisciplinary review of key concerns in a timely manner.

Non-governmental organizations (NGO) and community groups have to be considered when wanting to implement a project in certain area. Civil society has triggered protest, even

[72]*Gabcikovo-Nagymaros Project (Hungary vs. Slovakia)*(September 25 1997) 140.

[73] MM Roggenkamp, L Barrera-Hernandez & DN Zilman *Energy Networks and the Law: Innovation Solutions in Changing Markets* (2012) 84.

[74] Hoffman (n 8 above) 216.

[75] RV. Percival, J Lin & W Piermattei (eds) *Global Environmental Law at a Crossroads* (2014) 63.

[76]International Finance Corporation (IFC) IFC's Sustainability Framework: From Policy update to Implementatio http://www.ifc.org/wps/wcm/connect/62595d004df3e8cf8c02ac7a9dd66321/IFC_SF_Update-Implementation_2012.pdf?MOD=AJPERES (accessed 12April 2016).

[77]African Development Bank 'Environmental and Social Assessment Procedures'.http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/ENVIRONMENTAL%20AND%20SOCIAL%20ASSESSMENT%20PROCEDURES.pdf (accessed 12 April 2016)1.

violent conflicts, because of environmental degradation which has threatened public health. A project cannot have success in a society totally opposed to its enactment.

2.11.2 Project finance and human rights

Traditionally, human rights law has been viewed as comprised of rights that may be exercised against the government.[78]Modern conception has shifted this idea to exercising these rights against private enterprises, taken in the context of transnational infrastructure development. Among the claims that human rights strategists make, there is, on the one hand, human rights demands used to advance goals involving the distribution of resources (for example poor communities should have access to water supply even if they cannot afford to pay market rate for them).[79] On the other hand, there is a demand to make sure that projects do not impinge on the human rights of certain communities which are sacrificed in the short term for an uncertain future,[80] for example, thedisplacement of people as a result of an extensiveinfrastructure development.

It is also important to notethat public opposition to a project is an effective mechanism which may damage or destroy a project.[81] Potential risk mitigation techniques might include any of the following: building a base of local support for the project that clearly defines local benefits if the project succeeds; creation of additional community benefits, such as construction of schools, water-treatment facilities and similar infrastructure improvements; selection of a site that is less susceptible to opposition, even if more expensive; a careful approach to securing permits and approvals that cannot be effectively challenged or revoked; and maximizing environmental protections.[82]

2.12 Project company dispute resolution as legal risk mitigation

The system of state responsibility for injuries to aliens and their property was firstly established in the part of the world where no colonial relationship existed, butpower played a determining

[78] Likosky (n 16 above)49.
[79] As above.
[80] As above.
[81] Hoffman (n 8 above) 107.
[82] Hoffman (n 8 above) 108.

role.[83]The genesis of many of the rules ofstate responsibility is to be found in the relationship between the United States and LatinAmerica.[84]Besides the early rules on diplomatic protection, the US argued for the acceptance of an international minimum standard in accordance with which the alien should receive treatment.

Many modern bilateral investment treaties provide for the resolution of disputes arising from foreign investment by specifying arbitration in a neutral forum as the method of resolutionofinvestment dispute.[85]Settlement of investment dispute may be provided by parties choosing any of the types ofdispute resolution including diplomatic protection, amicable arrangement, local court, mediation or arbitration.

At the highest level, treaties entitle foreign investorsto initiate proceedings before an arbitral tribunal. The existence of suchprovisions in bilateral investment treaties is a major step that can be taken to ensurethe protection of the foreign investor by enabling him to have direct access to a neutralforum for the settlement of disputes that could arise between him and the host state.[86]

2.13 Conclusion

The foregoing chapter attempted to define the concept of project finance, public-private partnerships as well as the notion of risk.Itdetailedtransnational project finance related-risks and their mitigation in order to give broad idea to interested parties when willing to implement a project. Statistics have shown the importance of project finance, affirming that using the PPPs structure can be a good way to attract capital inflows and develop critical infrastructure.

However, the African continent does not benefit much from this opportunity, compared to other developing regions. Once project finance is much developed in a particular region or country, it fashions favorable conditions for FDI inflows grounded on the fact that it creates more confidence in interested partakers.

[83] Sornarajah (n 44 above) 36.
[84] As above.
[85] As above.
[86] As above.

CHAPTER 3: LEGAL AND REGULATORY ENVIRONMENT OF PROJECT FINANCE IN THE DRC

3.1 Country snapshot

The Democratic Republic of Congo (DRC), officially République Démocratique du Congo(RDC), is anAfrican state and the third-largest member state of the Southern Africa Development Community (SADC).It is situated in the centre of the African continent (0o00 N, 25o00E) and is spread over 2,344,858 square kilometers. It is slightly less than one-fourth of the size of the US and nearly two-thirds the size of the EU. It is the 11thlargest country in the world[1] with an estimated population of 75.5million.It shares borders with ninecountries, namely Angola, Burundi, Central African Republic, Congo (Republic of), Rwanda, South Sudan, Tanzania, Uganda and Zambia. Kinshasa, the capital city, is situated on the banks of the river Congo.

3.2 Business environment

Despite its abundant natural resources, robust economic growth rate and an overall strong macroeconomic performance for the past five years, poverty is still widespread in the DRC.[2]According to the International Monetary Fund (IMF), while the key social indicators have improved, the countrywas unlikely to achieve any of the Millennium Development Goals (MDGs) by 2015. The country's implementation of past policy recommendations wasbroadly satisfactory**,** but progress on critical structural reforms has stalled and the country is still fragile with many vulnerabilities.[3]

Doing Business 2016, a World Bank Group (WBG) publication, highlights how easyor difficult it is for a local entrepreneur to start, open and run a small to medium-size business when

[1] KPMG 'The Democratic Republic of Congo: Country Mining Guide'(2015 https://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/mining-country-guides/Documents/democratic-republic-congo-mining-guide.pdf (accessed 10 October 2015).

[2]IMF '2015 Article IV Consultation – Press Release; Staff Report; and Statement by the Executive Director for Democratic Republic of the Congo' https://www.imf.org/external/pubs/ft/scr/2015/cr15280.pdf (accessed 11 March 2016).

[3] As above.

complying with relevant regulations.[4] It tracks changes in policies capable of affecting positively or negatively the life cycle of a business in a country. It shows that the Congolese Gross Domestic Product (GDP) grew at the rate of 9.2 percent in 2015, being among the highest in the world. It is forecast to grow at an average of 8.2 percent in 2016-2017 before stabilizing at 6 percent in 2018-2020.[5]Despite its sustained increase in exports boosted by the production of new copper mines and gold, the current account deficit is expected toincrease to double digits by 2018 due to rising dividend outflows and imports.[6]

Another important feature of the business environment in the DRC is the progress made in implementing a one-stop shop for the establishment of companies – officially, "Guichet Unique". It was given effect by decree 12-45 of November 1 2012 which sets out its main functions.

This Chapter will analyse the legal environment and development of project finance in the DRC,focusing on the vital features ofeconomic policy reforms introduced inthe last decadeto modernise and liberalise certain keysectors of the economy and assessing specific policy reforms that could accommodate archetypal infrastructure projects and facilitate FDI inflows. The reforms instituted reflect the "Washington Consensus"[7] as the Government is determined to create an investment-friendly climate. References are also made to regional and global legal frameworks to which the DRC is a party and which are relevant to the law and business of international project finance.

3.3 Legal environment for project finance in the DRC

3.3.1 Introduction

The international legal regime for project finance is quite complicated with a host of rules which need to be carefully weighed. This is especially the case when it comes to dealing with a country such as the DRC, which is one of the least developed countries and has been characterised in

[4] World Bank Group 'Doing Business 2016: Measuring Regulatory Quality and Efficiency: Economy Profile 2016, Congo, Dem. Rep.' (2016) http://www.doingbusiness.org/data/exploreeconomies/congo-dem-rep/~/media/giawb/doing%20business/documents/profiles/country/ZAR.pdf (accessed 11 March 2016).

[5] As above.

[6] As above.

[7] J Williamson 'The Washington Consensus as Policy Prescription for Development.' A lecture in the series "Practitioners of Development" delivered at the World Bank on January 13, 2004 http://www.iie.com/publications/papers/williamson0204.pdf (accessed 15 December 2015).

modern times by political instability. Project finance is a new concept in the country, with every major department keen to play a role in PPP-related business negotiations with a view to helping the country to achieve robust economic growth. The efforts of the DRC Parliament to pass new laws to create an enabling environment for trade and investment to flourish have been well-received.

In March 2014, the Ministère du Portefeuille (Portfolio Department) discussed for the first time in public the subject of project financing, explaining its developmental significance, the involvement of the private sector and its role in bolstering economic growth. The Minister referred to Act 08-08 of July 72008 relating to the withdrawal of the state from portfolio business. The Minister noted that different challenges had forced the government to review its role in the economy. It would focus on the regulatory environment leaving the space of commercial and economic transactions to the private sector. Under the abovementioned law, the disengagement of the state from the economy of the country would see the management of state-owned enterprises transferred to the private sector without the transfer of ownership. These enterprises could take different forms, including concessions, contract management and sub-contracting.[8]

The reform of DRC's business laws have allowed foreign suppliers to bid for government contracts. However, it has been noticed that public procurement contracts have sometimes been executed without compliance with international standards, thus reducing transparency. With technical and financial support from the World Bank, a Tender Board now operates under the supervision of the Ministry of Budget. In April 2010, a new public procurement law was promulgated and it is hoped that it will enhance transparency and competitiveness among local and international bidders. The DRC has also adopted key implementing procedures and set up different institutionsto implement the new procurement law. Nonetheless, the DRC is not yet a signatory to the WTO Agreement on Government Procurement.

3.3.2 Public procurement in the African Union (AU)

At the AU level, there is no legal framework governing public procurement; nevertheless, a Program for Infrastructure Development for Africa (PIDA) exists. Its basic objective is to ensure

[8] General Provisions on the State Withdrawal from Portfolio Act 08-008 of July 7 2008 art 8.

that, at the regional level, regional economic communities (RECs) and selected infrastructure implementing agencies as well as the relevant countries involved are united and that the project developers are skilled.[9]

3.3.3 PPP development in the SADC region

At the SADC level, the PPP Regional Policy Framework has been drafted on the understanding that PPPs are an important procurement source for the delivery of typical infrastructure projects across the region. SADC member states recognize PPPs as complex instruments that require solid and transparent policies, strong institutional and regulatory bodies and proper legislative frameworks.[10]The policy contains some significant elements that encourage its member states to identify appropriate and competent institutions to procure and manage PPPs. The policy encourages member states to harmonise their PPP-related laws, which should be anchored on a clear domestic PPP Policy Framework, a functioning and strong institutional framework and a credible, transparent and stable legal system and consideration of key PPP drivers.[11]

3.3.4 Grand Inga hydropower treaty

Introduction

Building on a Memorandum of Understanding, which was signed on 12 November 2011, the Grand Inga Hydropower Treatywas signed on 29 October 2013 with the purpose of building the largest hydroelectric dam in Africa on the Congo River. The Treaty affirmed the joint commitment of the parties to the project, set up the requisite functional structures to implement the Treaty, and developed an enabling framework to facilitate the development of the project. The preamble recognizes the Inga site as a national asset for the people of the DRC.

[9] African Union (AU) 'Programme for Infrastructure Development in Africa (PIDA)' http://pages.au.int/infosoc/pages/program-infrastructure-development-africa-pida (accessed 22 March 2016).

[10] Southern African Development Community (SADC) 'SADC PPP Regional Framework'http://www.sadcpppnetwork.org/wp-content/uploads/2015/02/SADC-PPP-Regional-Framework-new-logo-final.pdf (accessed 22 March 2016).

[11] SADC (n 11 above) 3-10.

Grand Inga Treaty project finance

The project to develop a hydroelectric complex on the Congo River at the Inga site to generate electricity is the basic purpose of the Grand Inga Treaty. The agreement establishes competent institutions to oversee the project. In the case of the DRC, it is the Ministry responsible for electricity and/or such other Ministry or entity as may be designated by the Government from time to time.[12]In South Africa, it is the Department of Energy or such other Department or entity as may be designated by the Government from time to time. These institutions are mandated to implement specific provisions of the treaty.

The DRC has undertaken to take reasonable measures to procure 2,300 MW of power generated by the Phase I Inga 3 Low Head phase on terms including the tariff level to be agreed by the relevant entities, constitute the Agency (the Project Company), and adopt laws and regulations governing the Project. South Africa, on the other hand, has undertaken to take reasonable measures to procure 2500 MW of power generated by the Phase I Inga 3 Low Head phase on terms including tariff rates which will be agreed by relevant entities, and start negotiating an off-take agreement for the purchase of MW of energy generated by the Phase I Inga 3 Low Head phase.[13]

The provisions of Articles 9 and 10 of the treaty grant right of first refusal for off-take and equity to South Africa. However, the DRC or its relevant project company is entitled to sell the requested power to a third party if RSA refuses the offer in respect thereof, provided the amount of power proposed to be sold to a third party is equal to the requested power and the conditions of the sale are more favourable than those offered to the RSA, unless the DRC or the relevant project company, as the case may be, has first made the offer to sell the power to the RSA on such improved terms.[14]

In terms of equity, the agreement provides that the DRC shall use its reasonable endeavours to ensure that the developer appointed in respect of each phase reserves at least 15 per cent of the relevant project company share capital as available equity. The same clause gives South Africa the right to declare such an interest, after completion of the process for selection of

[12]Grand Inga Hydropower Treaty (Grand Inga Treaty) art 4 para 1(a).
[13]Grand Inga Treaty art 4 para 2 (a).
[14]Grand Inga Treaty art 9 para 7.

the developer of the relevant phase, to receive from the project company in priority to other minority equity investors, an invitation to subscribe to some or all of the available equity, such an amount being the offered equity.[15]

If any matter arises from the project or the interpretation of the treaty, the agreement provides for an amicable settlement of disputes. Nevertheless, the matter may be referred to arbitration within a period of six months, following the date on which such negotiations were requested by either party. Article 18 of the treaty sets out, among other things, the language to be used in the proceedings and venue of the arbitral tribunal.

3.3.5 Constitution of the DRC

Introduction

The Congolese constitution, which is just 10 years old, is progressive and dynamic. It is aimed at strengthening the political and administrative institutions of the country. The preamble sets out clearly the fundamental principles upon which it is built. It covers,among other things, state sovereignty; human rights, fundamental freedoms and duties of the citizen and the State.

Salient features relating to project finance

The Congolese constitution does not explicitly address the question of respect of contracts. Contract clauses and the question of taking a property by using due process is dealt with in other legislation such as the Civil Procedure Code, Investment Code (as discussed below) and others. The situation under Congolese law is different as compared to other jurisdictions such as that of the US where the question arises in both contract clause cases in the context of taking a property without due process under the Fifth and the Fourteenth Amendments to its constitution.[16] The Congolese constitution refers only to any act, agreement, any contract, arrangement or other fact, of which the effect of depriving the nation, the natural or legal person or part of their own livelihoods from their resources or their natural resources without prejudice to any international

[15]Grand Inga Treaty art 10 paras 2 & 3.

[16]SL Hoffman *The Law and International Business of Project Finance: A Resource for Governments, Sponsors, Lawyers, and Project Participants* (2007), 216

provisions on economic crimes, is an offense punishable by law.[17]The Law also calls upon Congolese citizens to respect the property of others. Further, it is the responsibility of the citizen to protect property, assets and public interests.[18] The State guarantees the protection of private property rights to individual or collective property acquired in accordance with the law or custom.[19]

3.3.6 Decree of the King-Sovereign of February 27, 1887 on commercial companies

As amended up to date, this decree determines five forms of companies that can be established in the DRC. In its first article, the law put limitations onassets belonging to individuals and those belonging to the company.

The following type of companyare recognised in the decree: partnership (lasociétéen nom collectif);limited commercial company (la sociétéencommandite simple); private limited liability company (la sociétéprivée à responsabilitélimitée);limitedshare liability company (la société par actions à responsabilitélimitée); and cooperative society (la sociétécooperative).

In the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA)region, where the DRC is state party, the Council of Ministers adopted the Uniform Act on Commercial Companies and Economic Interest Groups (Uniform Act) on 17 April 1997,an act which was revised on 14March 2014. This act made many changes to the existing forms of commercial companies such as the introduction of a new corporate form, the simplified joint-stock company (société par actions simplifiée), which can be established without a legally required minimum of share capital and so forth.

Aclose reading of Articles 908 and 919 of the Uniform Act showsthat Congoleseprovisions contrary to the lawgoverning commercial companies wererepealed on September, 12 2012.[20]It

[17]Constitution of the Democratic Republic of the Congo (DRC) art 56.

[18]Constitution of the DRC art 67.

[19] In its last paragraphs, art 34 of the Constitution of the DRC stipulates that the State encourages and ensures the security of private investment, both domestic andforeign. It states that no one shall be deprived of his possessions except in the case of the public interest andsubject to fair and prior compensation awarded under such conditionsby the law.No one's property shall be seized except by virtue of a decision taken by acompetent judicial authority.

[20] E Mukendi 'OHADA – SPRL et SARL Congolaises: Mise en Harmonie des Statuts ou Transformaation en Sociétés Organisées par l'AUDSC – GIE?'(2014) http://www.cabemery.org/fr/2014/04/20/ohada-sprl-et-sarl-

was found in the advisory opinion of the CCJA 001/2001/EP of 30April 2001 that contrary legislations/provisions cannotcoexist with the Uniform Act under Article 10 of the OHADA Treaty.[21]Thus existing Congolese laws on commercial companies were given a period of two years with effect from 12September 2012, to facilitate their functioning during the transitional period[22]in order to comply with the law.

3.3.7 Public Procurement Code 10-010 of 27April 2010

Introduction

The Public Procurement Code 10-010 of 27 April 2010, thereafter the Public Procurement Code, officially "Code des marchés publics", repealed ordinance-law 69-54 of 5 December 1969 as its provisions were not considered apposite to modern trends in this area. The legislation adopted public procurement procedures elaborated by the Organisation for Economic Development (OECD).[23] It clarified the manner in which public procurement is to be conducted, referring some matters to the terms of contract and other termsas set by law under the conditionscontained in the specifications.

Salient features relating to project finance

The Public Procurement Code established rules governing the award, execution, control and litigation of works, supplies, and intellectual services awarded by the state, provincial, decentralized and territorial entities, public enterprises and public institutions.[24] It applies to contracts awarded by entities of private law benefitting from funding or guarantees from legal personsof public law or acting in their name and on their behalf.[25] The Code includes contracts awarded under a financing agreement or an international treaty insofaras the Code provisions are not contrary to the provisions of the said agreement or treaty.

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congolaises-mise-en-harmonie-des-statuts-ou-transformation-en-societes-organisees-par-laudsc-gie/#.VzB98raF4dU (accessed May 9 2016).

[21] As above.

[22] As above.

[23] Public Procurement Code: Preamble.

[24]Public Procurement Code art 1 para 1.

[25] Public Procurement Code art 2.

In terms of the Public Procurement Code, the DRC has four different types of procurements covering works contracts, supply, services, and intellectual services or intellectual property. Services contracts can be grouped under two main headings of which the first group includes all types of projects in respect of which services are required by the project developer and which can be provided without a technical assistance.[26]

Article 37 of the Code accords more preferences, by granting the award firstly to national bidders, and lastly to regional and/or to international bidders.

3.3.8 The Investment Code 004 of 21February 2002

Introduction

The Investment Code 004 of 21 February 2002, thereafter the Investment Code,repealed Ordinance-Law 86-028 of 5April 1986 on Investment, and Ordinance-Law 81-010 of 2 April 1981 establishingfree zone plan for industrial use. The Investment Code and other business-related regulations changes were inspired by OECD disciplines as well as those of OHADA. to which the DRC is a state party. OHADA aims to assist its members to develop a favorable investment climate with a view to attracting foreign direct investment. OHADA has initiated several reforms, including the passing of the Uniform Act on the right of commercial companies and economic interest groups.

Salient features relating to project finance

The Investment Code was enacted to secure the conditions, advantagesand general rules applicable to investmentsmade in the DRC. Article 3 puts mining and hydrocarbons, banks, insurance and re-insurance, production of armaments and military-related activities, production of explosives, assembling of military equipment, paramilitary or national security service materials, production of arms and military, paramilitaries or security services activities, and commercial activities on the negative list. They constitute investment areas governed byspecial legislations. Despite the existence of special laws, any investment has to be done consistently

[26]Public Procurement Code art 10 para 1.

with the investment policy established by the national agency for the promotion of investments (ANAPI).

The Investment Code contains international investment standards for the promotion of investment and protection of investors including non-discrimination, national treatment, fair and equitable treatment, and non-expropriation (direct or indirect) except for public interest and upon compensatory indemnity.[27]Transfer of funds is guaranteed under the provisions of article 29 together with dividends, royalties, and all other offshore expenses made in order to invest in the country.

In terms of disputes arising from an investment made in accordance with the Investment Code, the law provides that, in the first 3 months, parties should try to resolve it amicably. If they fail to reach an agreement, the matter can be referred either to the International Center for Settlement of Investment Disputes (ICSID) or to the International Chamber of Commerce (ICC).

3.3.9 General Regime of Property, Land Tenure and Real Estate and SecuritiesLaw 73-021 of 20 July 1973

Introduction

The General Regime of Property, Land Tenure and Real Estate and Securities Law 73-021 of 20 July 1973 as amended and supplemented by the law 80-008 of 18July 1980, thereafter the General Regime of Property, is one of the pieces of legislation that has remainedunchanged since the fall of Mobutu Sese Seko's regime. It contains provisions relating to the law governing property, land, real estate and securities. It addresses the legal regime of disposals and the granting of concessions on public lands as established by Colonial Charter of 18October 1908.

Salient features relating to project finance

As the question of disposals and concessions remained unresolved under the colonial Charter of Congo-Belgium, the General Regime on Propertyprovided that a special legislation would

[27]Investment Code arts 25-26.

determine rules relating to mining and railroads concessions, disposals and concession of state property.[28]

From the view point of the General Regime on Property, the soil is an exclusive property of the state.[29]Applicable rules for the acquisition and disposal of concessions on the territory of the DRC are contained in this legislation. Foreigners are entitled to ordinary concessions which consist of long leases, areas, usufruct, use and leasing.

3.3.10 Industrial Property Law 82-001 of 7January 1982 and Protection of Copyright and Related (Neighbouring) Rights Law 86-033 of 5April

Introduction

The DRC has been a member of the World Intellectual Property Organization (WIPO) since 1967. The abovementioned laws as well as the General Regime on Propertyandthe Constitution of the DRC contain a number of provisions relating to the protection of intellectual property. These relevant intellectual property clausesarecontained in two different laws: the first the Industrial Property Law 82-001 of 7January 1982, thereafter the Industrial Property Law, and the Protection of Copyright and Related (Neighboring) Rights Law 86-033 of 5April 1986, thereafter the Protection of Copyright Law.

Salient features relating to project finance

The Industrial Property Law constitutes one of the main laws on intellectual property in the DRC. Its coverage does not include literary and artistic properties[30] which are subject instead to the Protection of Copyright Law. Under this ordinance-law, the author of a work of the mind enjoys an exclusive and intangible property right enforceable against all[31].

[28]Colonial Charter of Congo-Belgian art 15 para 1.
[29]General Regime on Property art 53.
[30] Industrial Property Law art 1.
[31] Protection of Copyright Law art 1.

Apart from the abovementioned intellectual propertylaws, Article 121 of the Penal Code of 2004 (as consolidated on November 30, 2004)[32] provides sanctions for those whoare found guilty of using falsified documents.

3.3.11 Electricity SectorLaw 14-011 of 17June 2014

Introduction

Electricityplays an important role in everyday life for a modern nation. Nowhere in the world there is development without dealing with the electricity sector. In order to help the country, improve its electricity sector, the Congolese legislature has adopted several containing major features relating to project finance, from its colonial era up until the enactment of the abovementioned electricity sector law.

Electricity law development in the DRC

Given the colonial industry's need for energy, the Kingdom of Belgium's intervention in this particular sector started from June 2 1928 with the passing of legislation relating to electrical power. This lawgave the right to the colony to build, transport and distribute electric energy usingtransmission lines along public roads.TheAct also allowed private companies or individuals to use public roads and build power drivers for the use and transportation of power under conditions to be imposed when the said permission was granted or under subsequent conditions.[33]

The decree of July 14, 1930 relating to the standardisation of the electrical energy stresses in the colony was also enacted. It fixed normal and admitted electrical distribution stresses in the Belgian-Congo. Addition was made to this list by the decrees of October 1, 1931, July 10, 1950

[32] Offenders who shall be punished with imprisonment from one to fifteen years and a fine of five thousand at twenty five thousand Zaïres: 1. Those who counterfeit or falsify the seals, stamps, marks or brands of the Congolese government and public administrations; 2. Those who have made use of such counterfeit or falsified objects; and 3. Those who have knowingly displayed for sale the products of these counterfeits or falsifications (see Penal Code art 121).

[33] Evolution du Secteur de l'Energie en Republique Democratique du Congo depuis la Colonisation a ce Jour: General Conditions on Electrical Energy Decree 02 June 1928, Article 2

February 2, 1951 and October, 27 1953 including respectively the voltage of 70 000 volts, 33 000 volts, 22 000 and 120 000 volts, and 150 000 and 200 000 volts.[34]

In 1931, another decree was implemented relating to the transport of electrical energy through private lands. This law provided that lands, at the time of its enforcement, which were neither registered nor the object of any contract or a native occupation right, were, as of right, encumbered in favor of the Colony, power distribution concessionaires and road licensees. However, there were requirements to be fulfilled before lands were used. The owner of the land or the occupant had to be consulted before using the said portion of land. The decree provided for compensation for damages encountered by the owner or occupant of the land during the building of power transmission lines.

Another legal instrument for energy regulation was the ordinance 147Bis/A.E of December 29, 1933 on power facilities: establishment and operating conditions for electrical installations as completed by orders 142/AE of October 20 1938, 61/301 of October1951 and 61/247 of July 24 1954 determining requirements to acquire a license granting, prior to the establishment of a power plant.[35]

The decree of July31, 1953 relating to import or export of electrical power put into place authorised agencies for the import and export of electric energy. All import and export of power using overhead transmission lines or underground lines were subject to the approval of the King. At this time, only Forces du Bas-Congo and the Forces Sanga were granted authorisation to import or export power with a limited timeframe of ten years.[36]

The royal decree of 9 October 1956 regulating general terms and expenses fixing applicable principles to concessions distributing electrical energy as accorded or renewed by the Congo-Belgian, came into existence with a view to renewing the energy distribution concession permit. Any concession should be concluded after consulting the General Governor with the

[34] Evolution du Secteur de l'Energie en République Démocratique du Congo depuis la Colonisation a ce Jour: Standardization of The Electrical Energy Stresses Decree 14 July 1930, Article 1 https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwilsZuH_8rNAhVPGsAKHap8AoQQFggaMAA&url=http%3A%2F%2Fwww.cate.cd%2Findex.php%3Foption%3Dcom_joomdoc%26task%3Ddoc_download%26gid%3D1%26Itemid%3D56&usg=AFQjCNG_V8emyQ39NUB6WhEPHb2o6IirtA&sig2=iTF1TCdR6CElfU2z5KHZyg&bvm=bv.125596728,d.d24(accessed 18 May 2016).

[35] Ordinance 14/Bis/A.E of December 29, 1933 art 1

[36] Decree of July 31 1953 arts 1 & 2

Minister of the Colonies representing the licensor during the meeting.[37] The conclusion of the convention had to be approved by a royal decree.

Different energy companies were established for the production and distribution of electricity in the country. In addition to the two companies mentioned above, the following were created: COGELIN in which the colony was the majority shareholder; la SociétéGénérale Congolaise des Forces Hydro Eléctriques (SOGEFOR), la Société Génrale Africaine d'Eléctricité(SOGÉLEC) and la Companie d'Eléctricité de Kinshasa (COMECTRIK) were established to resolve the energy need.

These companies worked together until Decree 70/033 of May 16 1970 relating to the creation of the Société Nationale d'Eléctricité (SNEL) came into place. The decision was made to establish one electrical energy company for the entire country. Some of the powers given to SNEL were:to capture and use Congo River water in the Inga region to produce energy; to build, rehabilitate or exploit dams either through their own agency or a third party; and to use and sell power.

Notwithstanding its creation in 1970, SNEL only started accomplishing its objectives on November 24, 1972 after the completion of the Inga I hydropower project. An extraordinary assembly was held on November 28, 1972 with the aim to discuss and agree on the future objectives of Force de l'Est, Force du Bas and COGELIN, in which the state was a majority shareholder. The vote was passed in favor of the state which consequently dissolved the three companies by buying out the totality of their shares, tangible and intangible properties which now belonged to SNEL, a fully state-owned company. It happened the same way in 1973 when SNEL absorbed COMECTRIK in Kinshasa by the Government decision of February 2, 1972.[38] The restructuring of these companies was an implementation of economic measures taken in accordance withOrdinance-law 67/01bis of January 1 1967 relating to Mining Union sister companies in the country which obviously needed more electric power.

Power supplier companies established in Katanga region were not yet affected by the restructuring measures. In this region, SOGÉFOR and SOGÉLÉC continued producing and

[37] Royal decree of October 9 1956 art 1

[38]Société Nationale d'Eléctricité (SNEL)Notre Histoire http://www.snel.cd/about/histoire.php (accessed 18 May 2016).

supplying energy to mining companies as well as households. Meanwhile, the construction of transmission lines that was in process from Inga region to Katanga, known as Inga-Shaba, was completed in 1976.[39] The State decided to transfer the ownership of SOGÉFOR and SOGÉLEC to SNEL on the basis that the latter was a specialized power agency in the country.

The restructuring action of these power companies and their absorption by a single state-owned company gave the Congolese Government full control over the newly established power supply agency, SNEL. The reason for the restructuring was to create a single entity, with approved know-how, to fully operate the Inga project.

Thus, in order to legally regulate the plenary and effective role of SNEL since the exploitation of Inga I and then to realize the economic measures of November 30, 1973 in the way that they touched the field of production and distribution of electrical power in Congo, three official texts were released in 1974 namely: Ordinance-Law 74/023 of February 9 1974 relating to the status of SNEL which, in article 1, redefined the company purpose as the generation, transmission and distribution of electricity throughout the national territory;[40] and Ordinance-Law 70/033 and Ordinance-Law 74/012 of July 10 1974, which dissolved the six previous power companies,and transferred their assets, rights, obligations and activities to SNEL effective January 1, 1974.

Salient features relating to project finance

The law seeks to liberalise the electricity sector. It regulates the production, transmission, distribution, import, export and marketing of electric power produced by any operator. It determines the legal regime applicable when pursuing activities in the electricity sector comprising concession and license, authorisation and etcetera. Rules governing the offering and awarding of contracts in the electricity sector are covered in the law.

3.3.12 Other regulations

There are several other regulations in the DRC which are relevant to the law of project finance, including the Labour Code 015-2002 of 16 October 2006. The Labour Code incorporates

[39]See above.
[40]Ordinance-Law 74/023 of February 9 1974 art 1.

international labor standards as inspired by the International Labour Organization (ILO). These standards include freedom of association, child labor, equality of opportunity and treatment, tripartite consultation, forced labor, labor administration and maternity protection.

The Civil Procedure Code is another piece of legislation which is relevant to project finance. It authorises a creditor to seize property or sums from his/her debtor.

3.4 **Conclusion**

This chapter tried to capture some ofrelevant DRC legislation which hasa bearing on the business and law of project finance in the DRC. For a country that has gone through several political upheavals, it was important for the legislature to enact new laws to enable the DRC to have a modern economy which would facilitate the inflow of foreign direct investment and enhance its participation in the global economy. It is the enactment of laws such as the Constitution of 2006, as amended,the Investment Code,Public Procurement Code,the Electricity Sector Law, the Industrial Property Law and the Protection of Copyright Law, which hasinspired confidence in the Congolese economy and enabled Congo to achieve impressive growth rates in the last decade. It is worth mentioning that the list of laws considered in this chapter is not exhaustive. Several other laws pertaining to businesses can be found online at www.ohada.com.

CHAPTER 4: INHERENT LEGAL RISK IN FINANCING THE GRAND INGA HYDROPOWER PROJECT

4.1 Overview

TheDRC has been attractive to foreign investors since the colonial era. Owing to the rapid expansion of its economy, the then colonial power, the Kingdom of Belgium, deemed it necessary to have access to secure and predictable electrical power. Different energy companies were established for the purpose of producing and distributing electricity in the country, up to the creation of the SNEL,the state-owned electricity utility.

SNEL and Mag Energy entered into a partnership agreement in orderto rehabilitate the Inga I and II plants. An investigation report on this partnership was debated in the plenary of 8 January 2009 in the lower house of the DRC Parliament. The analysis of the report was that the agreement clauses wereof a leonine contract.[1]Furthermore, the National Assembly recommended the Government audit of SNEL and referred the matter to the court of auditors.The parliamentary inquiry was prompted by differences of opinion on the agreement between the four players, namely the Ministries of Portefeuille and Energy, SNEL and Mag Energy.[2] Then, the four entered into an agreement relating to the rehabilitation of the groups residing in the central Inga. According to the Congolese Parliament, this partnership primarily benefited Mag Energy, which would gain amounts of energy and 110 millions of US dollars.

There is great interest around the world in the Grand Inga dam, which is currently planned to be the world's largest hydropower scheme. This huge dam, to be built on the Congo River, is part of a greater vision by the international community to develop a power grid across Africa that will spur the continent's industrial development.[3] Apart from legal, environmental and social concerns, other concerns are related to the vast profits that would be made by foreign companies that would invest in the mega-project, taking attention away from the developmental needs of the

[1]Radio Okapi 'Assemblée nationale : le contrat de partenariat entre la SNEL et Mag energy jugé léonin' (9 January 2009) http://www.radiookapi.net/sans-categorie/2009/01/09/assemblee-nationale-le-contrat-de-partenariat-entre-la-snel-et-mag-energy-juge-leonin (accessed 23June 2016).

[2] As above.

[3] Internationalrivers.com 'Grand Inga, DRC' https://www.internationalrivers.org/campaigns/grand-inga-dam-dr-congo (accessed 24 March 2016).

DRC, which is a least-developed country.[4] There are also issues of political volatility of the country and governance issues. These are linked with the issue of existing budgetary constraints facing by the Congolese Government, resulting in its inability to fund the project itself. Every project has an element of uniqueness and that implies some uncertainty in that respect.[5] It also indicates that risk in a project of that size cannot be eliminated – it can only be reduced to an acceptable level.[6]The legal perspective on risk becomes visible in the management of legal risk, a perspective which in itself is not new because practicing lawyers deal with risks on a daily basis.[7] The only new elements in risk management are: the conceptualization of these activities as a type of risk management; the search for more structured methods to carry out legal risk management tasks and the possible development ofsoftware-based tools to support legal risk management.[8]

As previously noted, the governments of the Republic of South Africa (RSA) and the DRC have entered into an agreement to build the Phase I Inga 3 Low Head Phase which will cost an estimated amount of US$12 billion. Once this phase is completed, it is estimated that it will produce 4800 MW of electricity. Without doubt, the Grand Inga project is the most ambitious project on the African continent, as it is expected to generate 39,500 megawatts once the whole project is completed. This could satisfy the energy needs of most African countries, as noted by the World Energy Council at a meeting it convened in 2008 in London, attended by potential investors in themammoth project.[9]

It is worth noting that, as far as the infrastructure sector is concerned, the electricity industry is the largest utility sector requiring significant capital expenditures every year.[10] The industry has changed from its origins in the 1880s with Thomas Edison's street lighting business to a giant global industry that affects everyone and has enormous economic and environmental

[4] As above.

[5] H Steyn *Project Management: A Multi-Disciplinary Approach* (2016), 375.

[6] As above.

[7] R Moorhead & S Vaughan 'Legal Risk: Definition, Management and Ethics'(The UCL Center for Law and Ethics)https://www.ucl.ac.uk/laws/law-ethics/research/papers/erc-executive-report-legal-risk-definition-management-ethics.pdf (accessed 1 July 2016) 4.

[8] Moohead (n 7 above).

[9] Chadbourne.com 'Hydrowpower in Africa' (November 2008) http://www.chadbourne.com/HydropowerinAfrica_Nov08_projectfnance (accessed 11April 2016).

[10]GS Neil *Infrastructure Finance* (2010) http://0-site.ebrary.com.innopac.up.ac.za/lib/pretoria/reader.action?docID=10366560&ppg=131 (accessed 30 March 2016), 116.

impacts.[11] The underlying contractual framework for Grand Inga hydropower project is important given the allocation of risks between various stakeholders which determines the risk profile that will be presented to the project's proposed lenders and investors.[12]

This chapter will analyse risks of a legal nature inherent in the Grand Inga hydroelectric project. The difficulties of managing inherent legal risks in this project relate to how to appropriately analyse parties' exposure to financing risk and how best to determine their mitigation through identification and assessment. Legalrisk management is vital because, if it is successful, it will determine the success of the project vehicle and create enthusiasm for interested investors in the DRC.

4.2 Definition of legal risk

A better understanding of legal risk, from a corporate perspective, should include all legal consequences of business risk and business risks with legal origins (such as uncertain law or unsatisfactory legal work product).[13]The difference between success and failure in business can only be determined by the way organisations handle legal risk management. Risks identification and risk management as well as the allocation of responsibility play a crucial role in the ability to influence stakeholders. Therefore, best practice suggests the cultural importance of how legal risk is defined and managed tothe perceived and actual approaches to risk within and outside the company.[14]

Two dominant approaches are at the basis to defining legal risk: one is a broad definition of all business risks with legal consequences, defining legal risk as significant legal consequences that flow from actions attributable to the business.[15]According to the second and narrower approach, Moorhead defines legal risk as risk originating in legal work product or legal uncertainty (which in turn has significant business consequences).[16] A legal risk has always a

[11] As above.
[12] GD Vinter, G Price & D Lee (eds) *Project Finance: Legal Guide*(London: Sweet & Maxwell, 2013), 89.
[13] Moorhead (n 7 above).
[14] As above.
[15] As above.
[16] As above.

legal issue as its cause. A legal issue consists of a set of facts that are assessed under a set of legal norms.[17]

4.3 Transnationalcharacteristic of Grand Inga hydropower project

Any project financing, domestic or transnationalis subject to governmental jurisdiction and action.[18] The Grand Inga project is no different. The CongoleseGovernment can constitute a risk to the project with respect to its cash flow because of the weakness of its currency, the Congolese Franc. Political instability is also a concern when a project needs to be implemented. Therefore, project sponsor implementation rights need to be guaranteed under a negotiated concession or license permit. The license/concession undertaking includes all necessary documentationto own, build, finance and operate the project.

In the case of the Grand Inga project, risks can be grouped into two categories – commercial and cross-border risks. This is primarily because of the different jurisdictions stakeholders come from.

4.3.1 Cross-border risk in financing Grand Inga dam

Currency-related risks

When a project involves foreign currencies, there is likely a present risk attached to it because of the long-term nature of project contracts. Foreign exchange risks arise in project financing most often because of the differences in the revenue currency on the one hand, and the debt and expense currency on the other hand.[19]Debt is a defining characteristic of nearly all projects and, when money is borrowed abroad, foreign exchangefluctuations can threaten the viability of the project.[20] When a host government requires the project company to obtain a certain portion of their financing from a foreign source, it may heighten the foreign exchange risk. The

[17] T Mahler 'Legal Risk Management' 'University of Oslo'http://www.uio.no/studier/emner/jus/jus/JUS5650/v12/undervisningsmateriale/Legal_risk_management_enforcement_course12.pdf (accessed 2 July 2016), 10.

[18] SL Hoffman *The Law and International Business of Project Finance: A Resource for Governments, Sponsors, Lawyers, and Project Participants* (2007), 40.

[19]As above.

[20] European Commission 'Guideline for Successful Public-Private Partnerships'(2003) http://ec.europa.eu/regional_policy/sources/docgener/guides/ppp_en.pdf (accessed 1 July 2016) 50.

exacerbation can be greatest when weak currencies areinvolved, putting projects in emerging economies at a greater risk.[21]

Three areas most concerned with foreign exchange risk are the non-convertibility (unavailability) of foreign currency, currency transfer (inability to transfer foreign exchange abroad), and currency devaluation risk which is caused by the fluctuation in foreign exchange rates.

Regarding the non-convertibility of currency, project stakeholders have to examine the Congolese foreign exchange regulations and gain an understanding of how they operate in practice. Developing countries have generally had a negative experience with foreign exchange volatility. Such issues have been experienced with balance of payments difficulties, where a government did not have adequate foreign exchange reserves to purchase vital goods or service its debts. Parties to the project prefer repayment from revenue-producing project contracts in a freely convertible currency to mitigate this risk. Also, the project business could be tied to a local export business that generates foreign exchange, so that the project revenue can be countertraded for a local company's products that can be used to reduce convertibility risk.[22]

Other agreements couldbe entered into with the CongoleseGovernment to guarantee availability or priority access to foreign exchange where possible. In addition to currency swaps on a commercial basis that can be agreed to ensure convertibility, a political risk insurance covering currency convertibility can be obtained from organizations such as the Multilateral Investment Guarantee Agency (MIGA), an affiliate of the World Bank Group, or the Overseas Private Investment Corporation (OPIC), a US government investment agency.[23]

In terms of currency transfer, the host government may prohibit the transfer of funds, whether in foreign or local currency. Most developing countries have exchange controls with gates built to check the passage of currency and put in placea threshold. This limitation can be done by the Banque Centrale du Congo (Central Bank of Congo) which converts foreign currency in its books but does not allow its transfer. Should this occur, the international investor or lender will not receive the required currency and will need either to accept a shortfall or

[21] As above.
[22] Hoffman (n 18 above) 41.
[23] As above.

accept another currency.[24] The host government may permit the retention of foreign currency, if received, in order to be used for a loan payment, debt service payment, equity investors or off-take sales as well as other project-related expenses.

Currency swaps on a commercial basis, political risk insurance from an international agency or tying the project business to a local export business that generates foreign currency as described above are other ways of mitigation of this risk. Other measures can also be used. The host government may allow related revenues-producing project contracts to make payment in hard currency. Agreements can be entered into with the host government guaranteeing currency transferability, giving priority access to currency availability. These agreements can be part of a sovereign guarantee of currency convertibility, or as part of existing regulations and government approval processes.[25]

Currency devaluation risk or rate of conversion risk is the term used to describe the difficulties encountered by a foreign borrower or foreign affiliate in making future payments due in a currency other than the currency in which revenues are earned.[26] For example, if the loan is made in US dollars and the revenues are earned in Congolese Franc, and repayment is made by a Congolese borrower in local currency. The risk will consist of the borrower being unable to generate sufficient funds to service the debt due to the local currency devaluation. Currency fluctuation rates may adversely impact on the project.

Control of this risk is possible through a variety of approaches, including indexing purchase prices under off-take contracts to inflation or fluctuations in the exchange rate,revenue payment in hard currency,raising debt in the local currency and using derivatives.

Indexing revenues involves linking the amount of payments made in a local currency to the rate of inflation or to a freely convertible (hard) currency, whereas derivatives include forward contracts, currency options, and money-market hedging techniques.[27] However, to the extent that these options are not practical; the currency devaluation risk can be shared among project stakeholders. In doing so, the host government can guarantee to make up any shortfall in debt

[24]Hoffman (n 18 above) 42.
[25]As above.
[26] As above.
[27]Hoffman (n 18 above) 44-45.

service and operating costs to the extent devaluation renders the project company unable to satisfy those obligations.[28]

If the project receives foreign currency from sale of the project's products, using an off-take contract as an example, it would be prudent for the project company to open an offshore account, pursuant to an agreement between the off-take purchaser and the project company. The off-take purchaser makes payments in foreign exchange directly to the offshore account, an account offshore from the country in which the project is located. This has to be done with the host country central bank approval.[29] Amounts on deposit in the offshore account will be used for paying interest and principal on project debt and funding reserve accounts withthe balance distributed to the project sponsors. When the project faces non-convertibility and transfer of currency risks, the offshore account can be used to cover these risks.[30]Hoffman[31] also adds that when an offshore collateral account is used, the project lender will want all associated legal risks to be addressed.

Permit and concession risk

A concession, which is essentially a license, is usually granted by a governmental or quasi-governmental authority. As such, it is the cornerstone of the build-operate-transfer (BOT) project finance model.[32] Its status determines the inalienable right of a state to control the entry of foreign investment.[33]

Several BITs provide the right of entry and establishment of nationals of contracting parties' and accord protection to their investments. Denial of entry where such pre-establishment rights are provided in the treaty can amount to a violation of the treaty.However, the entry of a

[28]Hoffman (n 18 above) 45.

[29] As above.

[30] As above.

[31] Other risks which need to be addressed for currency devaluation include: securing all host-country foreign exchange approvals for creation and maintenance of the account; create and perfect (to the extent available for perfection) a security interest in this account in the host country, in the country or countries where necessary for the project output purchaser and where the account is physically located; notification to, and acceptance by, the project output purchaser that all revenues will be deposited in this account; and where the host country controls the project company, consider obtaining a waiver by the World Bank of its negative pledge provision (As above).

[32] Vinter at al. (n 12 above) 99.

[33] M Sornarajah *The International Law on Foreign Investment* (2004), 88.

foreign enterprise may be denied by the host country and might not constitute a breach if it is proven that the said investment is not under the treaty coverage.

The project company must apply for and obtainall governmental permits necessary for the ownership, development, construction, start-up, operation, and financing of a project.[34] The government that grants these permits may, in an indirect way, provide their life extension or totally may waive them. At the implementation stage, the government and the project company can agree on one or a combination of the following options: waive all permit requirements, to the extent it is able to do so legally; pay the project sponsor any increased costs incurred due to delays; compensate for the failure to issue a permit, where possible; or guarantee that a list of agreed-upon permits, if completely and accurately applied for by the project company, will be issued.[35]

The concession agreement can also address matters related to post-issuance permit risks such as revocation, date of renewal of the permit and/or additional permits. Since the project is under the host government control, the implementation risk is expected to be well managed by the said government. It is important to examine the relevant domestic laws in order to determine if this agreement is legal and enforceable, and if a government agency has the power to waive all permit requirements. Generally, a concession agreement[36] is given for a period up to thirty years.

At this stage, it issufficient to note that the fair and equitable treatment standard has been expanded toinclude notions of transparency and legitimate expectations of the foreign investor.[37] But,if notions of fairness are to be taken into account, they wouldmake the context in which the fairness is to be assessed relevant so that the standardwould require taking into account whether or not the state interference was in responseto the malpractices of the multinational corporation.[38] Therefore, it is important for the investors to ensure that all the information has been made

[34]Hoffman (n 18 above) 47.

[35] As above.

[36] According to Hoffman, at the stage of negotiations, because the host government retains control over the project, it may require the following assurances from the project company: service requirements from the project company throughout the concession's term; rate regulation over facility output; a sufficient operation, maintenance, and repair procedure so that the project transferred at the end of the concession's term retains value; milestone dates that must be achieved, such as construction completion to terminate the concession if certain events occur to the project company or to project sponsors. See Hoffman (n 18 above) 48.

[37] Sornarajah (n 33 above) 204.

[38] As above.

public and accessible by the people of the DRC, and that they have expressed their opinion in regard to the Grand Inga project implementation.Investors and lenders mayalso prefer to see relevant requirements in local laws, concession agreements or in any other contractual documentation. These requirements may include approval of development and construction plans,assurances of raw material supply,work visas for management,acquisition of necessary real estate rightsand resolution of the risk allocation for the types of political risks such as expropriation and repatriation of profits.[39]

In an infrastructure development, capital construction is most fundamental, and itneeds to be scrutinised to avoid overruns because their occurrence might jeopardise the safety of the concession. Poor project definition,unknown geological conditions or looselydefined safety specifications can have dramatic effects on capital constructioncosts.[40]Mitigation of this construction risk could take the form of the host government requiring assurances from the project company that specialised engineering studies have been completed. Given that construction risk is alwaysassigned to the private party in the construction contract, mitigation is likely to include strong incentives foron-time completion of works.[41]

The existence of a BOT project will help to put together a financing plan which will ensure that the lenders get repaid and the shareholders get a sufficient return on their investment before the concession terminates.[42]Graham[43]argues that subsidies and tax concessions necessary for the project viability can be mentioned depending on the nature of the government entity granting the concession and that such matters may be subject to separate documentation with more appropriate DRC's Government entities.[44]

[39] As above.

[40]W Wereda European Commission 'Functioning of Local Public-Private Partnership (Co-financed by the European Union Funds) under Conditions of Risk and Turbulent Environmentshttps://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjqot_IzNLNAhVqIMAKHf4SANMQFggaMAA&url=http%3A%2F%2Fwww.enec.ro%2Fproceedings-archive-1%2Fenec-2011%3Fdownload%3D271%3AENEC%25202011%26start%3D20&usg=AFQjCNFYLa4YC_P8Be2FgqLtnrdUx00Ibw&sig2=6YK1WjMprJ9p_ewMHTaKPQ (accessed 1 July 2016), 419.

[41]As above.

[42] Vinter at al. (n 12 above) 99.

[43] Vinter at al. (n 12 above) 100.

[44]Vinter at al. (n 12 above) 101.

Political risk

In their search for revenues, multinational corporations often explore and invest in developing countries that lack the infrastructure needed or do not possess the financial prerequisites to conduct such operations on their own.[45]Such investments face, often, uncertainty due to risks of a political nature. Regardless of such conditions, multinational corporations, realising the value of acquiring an early market share even if it is in areas that appear risky, need to evaluate the political risks involved at all times.[46]

Political risk constitutes the adverse impact caused by unfavorable events that may originate in governmental discriminatory and regulatory policies, the expropriation of assets, and/or events emanating from the political system of the host country that may disrupt business operations, damage assets or endanger employees.[47]Assessments of the inherent strength andstability of local political institutions arecommon in the investment field; as political risk increases, so does the costof obtaining financing.[48]For example, when China opened up its economy, thesize of its market, the availability of cheap labour and its natural resources were major attractions. However, there was the need to balance these against the political risk to investment.[49] Countries entered into investment treaties with China in order to protect themselves against this risk.

Political risk is higher in developing economies due to political instability, succession or change of law. The gap between the DRC, Iran, Iraq, North Korea, Somalia and Zimbabwe and other high-risk countries has led to the creation of a very-high-risk category.[50]

For project finance transactions, particularly infrastructure, the unwillingness of the host government to support the project may manifest in many ways. It may consist of lack of support for privatisation programs,failure of the governing party to maintain a consensus on bidding and contracting programs,corruption,the absence of acompetitive bidding program,the degree of

[45] S Moen & D Lambrechts 'Corporate Social Responsibility as Risk Mitigation Tool – A Focus on Niger Delta, Southern Nigeria' (2013) 42 (2) *Africa Institute of South Africa* 90

[46] Moen & Lambrechts (n 45 above) 90.

[47] As above.

[48] Wereda (n 40 above), 420.

[49] Sornarajah (n 33 above) 174.

[50] Sornarajah (n 33 above) 174.

perceived openness of government in awarding contracts,contracting that does not appear to reflect terms received in similarly situated countries,press criticism of other objects in operation or development, thedegree of nationalist sentiment,historical experience of thegoverning party in transferring political power,and the instability of power where family members of a ruler receive preferential economic treatment.[51]

It is worth mentioning that changingor renegotiating contracts with a new government in developing economies is not totally avoidable. A number of production-sharing agreements have been negotiated in oil-producing countries by newly elected governments which thought that previous concession agreements were unbalanced and not in the national interest. Renegotiation may also be required due to a lack of respect for due process in granting the award.

For example, the ordinance 15/079 of October 13, 2015relating to the establishment, organisation and operation of a special service within the presidency of the republic called the Angence pour le Development et la Promotion du Grand Inga (Agency for the Development and Promotion of the Grand Inga Project) is a contested law to the extent that Senator Jacques Djoli urged the Senate to make a recommendation to the Executive for its withdrawal. For the senator, this text is anti-constitutional because it is not countersigned by the Prime Minister or the Minister in charge of Hydrocarbons.[52]The sentiment is that there will not be a proper due process in any step to be taken in implementation of the Grand Inga project. If the specialised institution is under the presidency, it might raise questions related to the transparency and inclusiveness of other participants to the discussions.

The World Bank has played an active role in foreign investment on the basis of the belief that their funding flows promote economic development.[53] It expressly subscribes to the classicaltheory that foreign investment brings such benefits to poorer states that it must be promoted by providing legal and other devices based on the belief that the elimination of political risks to investments thatexist in developing states will result in greater flows of foreign

[51]Hoffman (n 18 above) 52.

[52] Radiookapi.net 'RDC: le Gouvernement Appele a Retirer l'Ordonnance Creant l'Agence du Grand Inga (2016) http://www.radiookapi.net/2016/05/15/actualite/politique/rdc-jacques-djoli-demande-au-gouvernement-de-retirer-lordonnance (accessed 24 June 2016)

[53] Sornarajah (n 33 above) 65.

investment and lead to their economic development.[54]The DRC government should allow the project company to subscribe to political risk insurance, in order to mitigate political risk in the Grand Inga hydropower project.Apart fromMIGA, OPIC is among the agencies that provide political risk insurance to mitigate political risk in a project.

Regulatory and expropriation risk

Modern Bilateral Investment Treaties (BITs) prohibit nationalisation (expropriation) except upon prompt, adequate, and fair and equitable compensation. Expropriation is a direct or indirect interference with a foreign property and its prohibition is recognized in these BITs as a standard in international investment law. It is a risk that needs to be carefully examined because of its ramifications. There are certain projects which are deemed to be more vulnerable to expropriation such as energy production projects, oil and gas pipeline projects, roads, seaports, railroads, and airports.

In direct expropriation, the host government may nationalise the foreign property through direct action, whereas in an indirect expropriation it may take measures which aim to discourage the investor or deprive it ofthe project revenues. As the project finance market has expanded into developing countries, risks that arise include governmental decisions to cancel the project, to change the terms of the contract or not to fulfill its obligations to implement, for example, tariff increases agreed upon the contract.[55]

It must bedetermined in each case whether new regulations amount to expropriationwhich should be compensated.[56]These incidents may happen when the host government takes measures including increasing tax on a particular foreign industry amounting up to fifty percent or more of the business profit. It could also happen when passing new regulations which would increase the cost of doing business. Much of the support for thepayment of full compensation upon expropriation of foreign property is based on argumentsrelating to notions of unjust enrichment and acquired rights being general principles oflaw.[57] Regulatory and expropriation risk, like

[54] As above.

[55] World Bank 'Risk Allocation, Bankability and Mitigation in Project Financed Transactions'http://ppp.worldbank.org/public-private-partnership/financing/risk-allocation-mitigation (accessed 27 January 2016).

[56] Sornarajah (n 33 above) 77.

[57] Sornarajah (n 33 above) 86.

political risk, is high in developing countries since,upon attaining independence, some governments have deemed it necessary to renegotiate old concessions granted to foreign investors. It is also being fuelled by nationalist sentiments that seek the acquisition of control over the assets of the country.

Mitigation of regulatory and expropriation risk is possible by using an offshore collateral account funded with a sufficient debt-service reserve account which may give a reasonable time to project lenders to deal with expropriation. Adding co-financing with multilateral or bilateral agencies and the host government is also another approach which can be considered.[58] There could also be a clause prohibiting expropriation, except upon prompt, adequate and fair and equitable compensation in the concession agreement.

4.3.2 Commercial risk in financing Grand Inga dam

Beside cross-border risks, as discussed in the previous section, the Grand Inga project has several associated commercial risks which need to be dealt with to ensure its success. The section below lists some of important commercial risks related to the Grand Inga hydropower project.

Credit risk

Appraisal of creditworthiness for a given project is indispensable. From a project finance perspective, a project company's lack of creditworthiness is exchanged for the creditworthiness of the other project participants.[59]Among the Grand Inga's participants that must be creditworthy are included:

> …the project sponsors, to the extent they can provide completion or support guarantees; the contractor, operator, and fuel supplier for performance of the construction contract and operating agreement, as well as damages that may be payable under each contract; the off-take purchasers and users of the project, the host government, to the extent it undertakes financial support pursuant to guarantees or support agreements; and insurance companies, reinsurers, title insurers, and payment and performance sureties, to perform their obligations under the insurance policies and bonds issued by them.[60]

[58]Hoffman (n 18 above) 49.
[59] Hoffman (n 18 above) 60.
[60] As above.

According to Hoffman, completion risks can be allocated or mitigated in the following ways: fixed prices, a firm completion date construction contract, performance bonds, project sponsor completion guarantees, the selection of proven technology with which the contractor and operator have experience, host government guarantees, funding of reserves to cover cost output purchase agreements and input contracts that provide flexibility in project commencement.[61]

Delay in completion

The Chartered Institute of Building (CIOB) conducted a survey of the construction industry's knowledge and experience of different methods of project control, time management, record keeping, monitoring and training.[62] Respondents to the survey were also invited to report on their current projects, and projects that they had been involved with which had been completed over a three-year period, as todelays and extensions of timeframes and compensation for delay-related costs.[63]The research findings were that standard form construction contracts neither promoted nor encouraged efficient time management and it got to a point where there was a trend towards developing contracts that were increasingly punitive if not executed efficiently using good quality time management and project controls.[64]

Delay in the completion of Grand Inga project may result in an increase of construction costs and a concomitant increase in its debt service costs as well. Therefore it is vital to know, in terms of delay in completion, which party would be willing to control this risk. The constructor of the Grand Inga dam has to have "experience of a fully-linked critical path network being used to manage the sequence and timing ofthe work"[65] to avoid the delay in completion.

[61] As above.

[62] Chatered Institute of Building (CIOB)'Managing the Risk of Delayed Completion in the 21st Century' (2007 – 2008) hhttps://www.ciob.org/sites/default/files/CIOB%20research%20-%20Managing%20the%20Risk%20of%20Delayed%20Completion%20in%20the%2021st%20century.pdf (accessed 7 April 2016).

[63] As above.

[64] As above.

[65] CIOB (n 62 above).

Creditworthiness of South Africa as power purchaser

In nonrecourse and limited recourse project financings, lenders base credit appraisals on the projected revenues from the operation of the facility.[66]According to the Grand Inga Treaty, the republic of South Africa engages to procure 2500 MW out of 4800 MW of electricity production upon completion of the project. Further, South Africa has consented to purchase 50% of the total electricity produced by the Grand Inga project.

Revenue-producing contracts, such as off-take agreements, are critical.[67]It is the responsibility of the DRC to require from South Africa assurances ofsufficient cash to buy the power produced by the project. The off-take agreementbetween the two countries will constitute part of the framework for the Grand Inga project viability. In the case of determination of the creditworthiness of South Africa as power purchaser, it would begood for the government of South Africa to present its guarantees or otherwise multilateral support mightbe needed by the DRC government, with consideration to many factors such as power purchase industry's ranking; line of business and product lines; sensitivity to price fluctuations; and overall business practices and reputation.[68]There is also the issue of the South African rand which depreciates day by day. In this case, the DRCgovernment may ask South Africa to open an offshore account, with amounts on deposit in this account tobe used for purchasing electricity, based on the off-take agreement.

Interest rate risk

If a debt has been contracted in a foreign currency, this always has ramifications on the local currency, which may present weakness in depreciation. Thisis the case of the Congolese Franc which has been fluctuating against major currencies.This situation can cause difficulties for the project to service the debt.Interest rate projections have to be a component of the feasibility study, showing how the project economics may adapt to interest rate variation.[69] If the option of

[66] Hoffman (n 18 above) 63.
[67] As above.
[68] As above.
[69] Hoffman (n 18 above) 65.

a feasibility study is not a choice, interest rate hedging, such as interest rate swaps, caps, and collars for significant portion of the debt, must be obtained[70] from the Congolese government.

Force majeure

Force majeure is a term generally used in law to refer to an event beyond the control of a party.[71] It is a commercial law concept (alien to loan agreements) which absolves a party to a contract from fulfilling his or her obligations as a result of intervening factors outside his or her control.[72] As discussed in the third chapter, the question of liability in the event of force majeure is not treated the same way under the common law systems and civil law systems. Most observers would, however, agree that in contractual relationships between commercial parties, English Law has a predisposition towards imposing strict liability for breach.[73] Force majeure under English Law is treated according to the doctrine of frustration of contract, which encompasses situations such as: "performance becomes impossible, or performance becomes illegal, or events outside the control of the parties defeat the purpose of the contract."[74] On the other hand, civil law systems have an unforeseeable circumstances doctrine which is of more general application as stated in Article 1148 of French Civil Law of 1804 that no damages may be awarded when, as the result of force majeure or a fortuitous event, the debtor was prevented to give what was due or what he was obliged to do, or do what was forbidden. In the case of the Grand Inga project, if the other party is prevented from fulfilling its obligation due to a force majeure event:

> …a clause would state the party prevented would be bound to notify the other parties to the contract and use all reasonable endeavours to find a way of recommencing performance but, in meantime, would not be held to be in breach to the extent he was not able to perform his or her obligations by virtue of force majeure.[75]

There are several intrinsic risks to the Inga project which cannot be covered in this dissertation. Due diligence is therefore indispensable so that all participants would have knowledge of the project-related risks. Risks such as construction period risk, management experience and operator experience are also important to mitigate against. Among many means

[70] As above.
[71] Hoffman (n 18 above)
[72] Vinter at al. (n 12 above) 158.
[73] Vinter at al. (n 12 above) 159.
[74] As above.
[75] Vinter at al. (n 12 above) 160.

such as clauses to be embodied in contracts, "insurance can also be used as a risk mitigation tool during operation phase."[76]

4.4 Environmental, human rights and social risks associated with the Grand Inga hydropower dam

Discussions about the relevant WTO rules regulating energy trade have become more frequent over the past few years due to the implications of energy use on the environment and climate change and the recent accession of Saudi Arabia and Russia as well as the impending accession of other major oil and gas producers, including Kazakhstan, Azerbaijan, Iraq, Iran and Algeria.[77]

The use of hydropower as a renewable source of energy generation enjoys several major benefits over alternative sources, including being relatively pollution free, having low operating costs since no fuel is required, and the use of simple technology which is not energy intensive. Arguably, it is the most beneficial method to provide electricity on a grand scale.[78] Another benefit in the case of smaller hydroelectric projects is that their construction generally results in less environmental degradation than large dams, due to the fact that they rely on the diversion of a certain percentage of the river's entire flow into a catchment basin, rather than the blockage of the entire waterway.[79]

However, this is not the case with the Inga dam, as it would be situated on the largest waterfall in the world by volume, the Inga Falls,[80] which are a series of falls and rapids that drop in elevation via small rapids with its main falls of 4 km wide, dropping to about 21.37 metres near a bend and forming hundreds of channels and rivulets and many small islands.[81] It is believed that the construction of the dam will have extensive ecological as well as environmental impacts. Mitigation techniques to be examined may include physically rescuing animals from areas to be flooded, environmental flow releases, fish passes, and damaged floods.[82]

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[76] Hoffman (n 18 above) 68.
[77] K Talus, ed., *Research Handbook on International Energy Law* (2014), 275.
[78] P Musegaas & J Rinne in United Nations Environmental Programme (UNEP) UNEP Handbook for Drafting Laws on Energy Efficiency and Renewable Energy Resources Kenya (2007) 131.
[79] As above.
[80] Internationalrivers.com (n 3 above).
[81] As above.
[82] Musegaas & Rinne (n 234 above) 132

It is important to note that claims from displaced communities since the building of Inga I and II are still pending. These groups of claimants include the original resicdents of Camp Kinshasa, inhabited by SNEL former workers and a new village, Lubwaku, meaning "thrown away."Simon Malanda, representative of the displaced communities, affirms that families from six clans (Makhuku Vunda, Makhuku Manzi, Makhuku Futila, Ngimbi and Mbenza) who were living on the Inga site were forced to leave under orders from Belgium in 1920. Although the project did not move forward for more than 30 years, it prompted the Belgian authorities to undertake a population survey of the site.[83] Efforts by the affected communities to access compensation led to an arrangement with the Belgian colonial authorities for a lump sum of 781 000 Belgian francs[84] to be paid to the displaced people. This agreement was not respected prior to independence, and neither the Congolese Government nor SNEL has paid out compensation of any kind. Several pieces of correspondence with SNEL dating back to 1970 show a history of discussion regarding the claim and desire by the communities to ensure that the compensation is paid and that a revenue sharing scheme is put in place.[85]

In 1994, the Inga site communities wrote a letter to the SNEL in search of connection to electricity grid. However, to this day, none of the villages, including Manzi, located just 3 kilometres from the grid, are electrified.[86]

The Inga site clans were then absorbed into pre-existing villages. At this date, the Inga site local communities and customary landowners include Makhuku Vunda, Makhuku Manzi, Makhuku Futila, Ngimbi, Numbu and Mbenza (inhabitants of Camp Kinshasa) as well as villages Mvuzi 3, Lubuaku, Lundu, Kilengo, Kulu 1, Kulu 2, Kulu 3, Kimufu, Manzi, Yalala, Lufundi 1 and Lufundi 2. In May 2014, these communities, under the guidance of the NGO Action for Human Rights, Environment and Life (ADEV), addressed a petition to the Grand Inga project company, the World Bank Group, the African Development Bank as well as the Congolese Government seeking to benefit from the huge project and settle their previous claims. In their claims, the Inga site communities have expressed their discontent and worry pointing to,

[83] InternationalRivers.com 'Community History of Inga I and II' https://www.internationalrivers.org/resources/community-history-of-inga-1-and-inga-2-3622 (accessed 23 June 2016).

[84] As above.

[85] As above

[86] As above.

among other claimants, the clan members of Makhuku Futila who no longer possess any land for their existence as a social and cultural group.[87]

Several NGOs have raised their voices to show how Congolese civil society has been calling for the involvement of affected people in the development of the Grand Inga project. Justin Mobomi, coordinator of the Coalition d'ONG pour le suivi des reformes de l'action publique (CORAP), declared that their aim is to follow everything that is done to determine the impacts when the Grand Inga project is developed, including theenvironmental, economic and social impacts.[88]Mobomi insists on the fact that indigenous people living on the Inga site should be compensated before the implementation of the project to avoid the situation of Inga I and II, where the displaced have found themselves not compensated up to this day.

Further, when engineers from WESTCOR – a consortium created by the electricity utilities of Angola, Botswana, Democratic Republic of Congo,Namibia and South Africa – diverted their attention from electrical and construction challenges to actually looking at topographical maps, they realized that the original Grand Inga dam design would inundate all low-lying areas in the catchment, creating a massive lake that would flood two major cities,Kinshasa and Brazzaville, about 260 km upstream.[89]Sobered by the common sense appraisal,WESTCOR engineers concluded that "much of the river must flow as naturally as possible, keeping the impact on the environment to an absolute zero."[90]Chief engineer and CEO of WESTCOR, Pat Naidoo, asserted that "with sound engineering; much more output can be extracted with no impact on the environment."[91]

Mitigating risk related to the environment in the case of Inga dam would require having the benefit of the expertise of international financial institutions such as the International Finance Corporation (IFC) and the ADB. The IFC's Sustainability Framework, adopted in 2006 and

[87] Internationalrivers.com 'Petition of Inga Local Communities Likely to Be Affected by the Construction of Inga 3 Dam' https://www.internationalrivers.org/files/attached-files/codiclis_petition_english.pdf (accessed 23 June 2016).

[88] Radio Okapi 'Barrage hydroélectrique grand Inga : la société civile plaide pour l'implication de la population' (2015)http://www.radiookapi.net/2015/11/25/actualite/societe/barrage-hydroelectrique-grand-inga-la-societe-civile-plaide-pour (accessed 24 June 2016).

[89]K Showers, 'Grand Inga: Will Africa's Mega Dam Have Mega Impacts?' (5March 2012https://www.internationalrivers.org/resources/grand-inga-will-africa%E2%80%99s-mega-dam-have-mega-impacts-1631 (accessed 4 April 2016).

[90] As above.

[91] As above.

updated in 2012, contains the Policy on Environmental and Social Sustainability, which describes how the bank implements its commitment to sustainable development.[92]Thispolicy framework also contains Performance Standards, which define clients' roles and responsibilities in relation to environmental and social risk management.[93]In the Access to Information Policy, it defines IFC's institutional obligations in relation to transparency and accountability.[94]

In order to manage environmental related concerns, South Africa and the DRC should consider the involvement of IFC or the AfDB, or any other competitive international financial institution, from the feasibility study to the construction of the dam.The DRC should consider the adoption of the IFC's Sustainability Framework in order to mitigate social and environmental issues relating to the Grand Inga hydropower project.

Another way to mitigate environmental, human rights and social concerns in the Grand Inga project is to involve the Inga site communities in the negotiations of all the steps to be taken for the building of the dam. If they are not involved, this could endanger the life of the project. Among the Inga site local communities' claims, as presented in their petition, the Inga site landowners list the following:

1. an Environmental Impact Assessment and social studies have to be conducted independently for an accurate determination of the true extent of the impacts that will be generated by the Inga 3 project in particular and the Grand Inga Project in general; these studies should be headed and led by local communities and civil societies;
2. a commission must be established to finally and fairly adjudicate the unfinished conflict between the customary landowners of Inga and SNEL, in connection with the acquisition of SNEL's concession at Inga;
3. the facilitation of Participatory mapping of customary lands of the local communities that will be affected by the activities of the Inga 3 project should be facilitated;
4. permanent guidance and support of the NGO ADEV throughout the process of implementation of the Inga 3 project should be allowed;and

[92] International Finance Corporation (IFC) 'IFC's Sustainability Framework: From Policy Update to Implementation' http://www.ifc.org/wps/wcm/connect/62595d004df3e8cf8c02ac7a9dd66321/IFC_SF_Update-Implementation_2012.pdf?MOD=AJPERES (accessed 12 April 2016) 1.

[93] As above.

[94] As above.

5. a meeting which includes the participation of all stakeholders and the services of a mediator to facilitate discussion so that SNEL, other government entities, the World Bank and the African Development Bank come to hear the communities' concerns.[95]

4.5 Grand Inga hydropower project dispute settlement

If any matter arises from the project or the interpretation of the Grand Inga Treaty, the agreement provides for an amicable settlement of disputes. Nevertheless, the matter may be referred to arbitration within a period of six months following the date on which such negotiations were requested by either Party. Article 18 of the Grand Inga Treaty sets out, among other things, the language to be used in the proceedings and venue of the arbitral Tribunal. This procedure may raise the question of the pre-eminence of arbitral tribunals over local courts.

4.6 Project company dispute resolution as legal risk mitigation

Modern bilateral investment treaties provide for the resolution of disputes arising from foreign investment by specifying arbitration in a neutral forum as the method of resolutionofinvestment dispute.[96]Considering the vulnerability characterized by politics in the DRC, parties to the treaty have chosen amicable arrangement, mediation or arbitration for settling any matter arising from the project.

4.7 Conclusion

This chapter looked at different intrinsic risks to the Grand Inga hydropower project including political risk, South Africa creditworthiness, interest rate risk, regulatory and change of law risk, and delay in construction. The main concern in financing the Inga project has seemed to be not the amount of money needed but rather the manner in which diverse risks of legal nature have to be managed. As categorised into two categories in this chapter – cross-border risks and commercial risks – the Grand Inga hydropower project legal risks are multiple, but they only

[95] Internationalrivers.org Petition of Inga Local Communities Likely to Be affected by the Construction of Inga 3 Dam (2014) https://www.internationalrivers.org/files/attached-files/codiclis_petition_english.pd (accessed 8 July 2016).

[96]IFC (n 92 above).

need a proper mitigation structure to attract investors' appetite. The only legal means of managing these risksis found to be the drafting of legal documentation by which parties will be bound to fulfil their respective obligations.

CHAPTER 5: INTERNATIONAL BEST PRACTICES FOR DAM BUILDING

5.1 Introduction

Hydropower is the most flexible and consistent of the renewable energy resources, capable of meeting base load electricity requirements as well as, with pumped storage technology, meeting peak and unexpected demand due to shortages or the use of intermittent power sources.[1] It is estimated that only a third of the total world hydropower capacity has been developed, with most of this development and growth occurring in Europe. At the end of 2011, over 160 countries presented their hydropower resources capacity to the World Energy Organisation, containing a total capacity of 936 Giga Watts (GW) across 11,000 hydropower stations, with leading generating countries being China, Canada, Brazil and the US.[2]

With seven major rivers – the Nile, Niger, Congo, Senegal, Orange, Limpopo and Zambezi – Africa is well endowed with hydropower potential, but it is estimated that only 7% of Africa's hydropower potential has been harnessed, compared to 33% for Europe and 65% globally.[3] However, exploitation of this potential has historically been hampered by a mismatch between demand and supply that long-distance transmission line infrastructurehas not been able to be overcome.[4]

In order to tackle the challenges of climate change and to reach the goal of sustainability, technology plays a double – and perhaps contradictory – role as both the source of the problem and the solution to the impasse.[5] Of all of the technologies relating to climate change mitigation or adaptation, attention has especially been paid to energy technology, particularly renewable energy technology.[6] Renewable energy is likely to be a favourable tool which can be used to meet the needs of sustainable development because of its environment-friendly characteristics.

[1] World Energy Organisation 'Hydropower' https://www.worldenergy.org/data/resources/resource/hydropower/ (accessed 11 April 2016).
[2] As above.
[3] Chaadbourne.com Hydropower in Africa (2014) http://www.chadbourne.com/HydropowerinAfrica_Nov08_projectfnance (accessed 8 July 2016).
[4] As above.
[5] K Talus, ed., *Research Handbook on International Energy Law* (2014), 407.
[6] As above.

The United Nations Development Programme, the United Nations Department of Economic and Social Affairs and the World Energy Council declared in their report of 2008 that there were two important features linking energy production and use and sustainable development: one is the importance of adequate energy services for satisfying basic needs, improving social welfare, and achieving economic development – in short, energy as a source of prosperity; and the other is that the production and use of energy should not endanger the quality of life of current and future generations and should not exceed the carrying capacity of ecosystems.[7]

This chapter will look at two case studies on completed hydroelectric projects: Bujagali hydroelectric project in Uganda and Three-Gorges dam from China.

5.2 Bujagali hydroelectric dam

Bujagali hydroelectric station lies across the Victoria Nile, northwest of the town ofJinja and directly north of the former location of Bujagali Falls. The power station lies at the Buikwe and Jinja districts' borders at 0° 29'54.00"N, 33° 08' 15.00"E (latitude: 0.498325; longitude:33.137500).

The 250MW private hydroelectric power plant project at Bujagali was first approved in 1999 by the local parliament after a long year of discussions.The main development objective of the Bujagali Hydropower Project for Uganda was to promote growth through developing least-cost power generation for domestic use in an environmentally sustainable and efficient manner.[8]

The Ugandan Government, the World Bank Group (WBG), the African Development Bank (AfDB), Agence Française de Dévelopement, Barclays Bank, Standard Chartered Bank, European Investment Bank as well as Netherlands Development Finance co-operation funded and approved thr Bujagali Falls hydropower project in 2007 after a long delay and its "construction was completed in July 2012."[9]When planned, the plant costs were estimated at US $530 million, but theyincreased to $900 million. The project is run by Bujagali Energy Ltd

[7] R Lyster & A Bradbrook *Energy Law and the Environment* (2006) 10.

[8] World Bank 'Bujagali Private Hydropower Development Project' http://www.worldbank.org/projects/P063834/bujagali-private-hydropower-development-project?lang=en (accessed 13 April 2016).

[9]Power-Technology.com 'Bujagali Falls Hydropower Dam, Jinja, Uganda' http://www.power-technology.com/projects/bujagali/ (accessed 13 April 2016).

(BEL), a special-purpose vehicle owned by Industrial Promotion Services Ltd, which is part of the Aga Khan Fund for Economic Development, and Sithe Global Bujagali Holdings, an affiliate of Sithe Global Power LLC, part of Blackstone which is a US-based private-equity fund.[10] The project is subject to be executed under an IFC risk management instrument.

The costs of the project were divided into three components: construction costs, including engineering, civil works, supply and installation, and engineering, procurement and construction (EPC);development costs, consisting of land, access road, rights of way, resettlement, Community Development Action Plan, and project development; and, lastly, financing costs.[11]The Bujagali hydropower project consists of a small reservoir, a powerhouse, a rock fill dam, spillway, a 100 km transmission line, substations, and other associated works.[12]For the mitigation of social and environmental impacts, BEL has developed plans and programmes to address the potential impacts of its operations under IFC's Performance Standards.[13]Applied Energy Services (AES) Nile Power, a US energy company, before withdrawing from the project in 2003, also developed a Social and Environmental Assessment (SEA) document and a resettlement plan that was approved by the Government of Uganda and the World Bank in 2001.[14] AES committed itself to compensating all the project-affected people and also promised other development projects and benefits.[15]

Other social mitigation actions included education – where BEL has helped to construct and equip classroom blocks both at primary and nursery school levels – and youth skills training, which has seen over 400 young people acquire formal training in various skills. Health and sanitation interventions include the training and equipping of Village Health Teams, community-

[10] D Kalanaki 'Uganda in secret plan to buy back Bujagali hydropower project from investors' *The East African*.7 March 2015 http://www.theeastafrican.co.ke/news/Uganda-quietly-plans-takeover-of-Bujagali-dam/-/2558/2645286/-/150v0y1/-/index.html (accessed 13 April 2016).

[11] As above.

[12] As above.

[13] International Finance Corporation (IFC) 'Bujagali Energy Ltd.: Environmental and Social Review Summary'(2006) http://ifcext.ifc.org/ifcext/spiwebsite1.nsf/ProjectDisplay/ESRS24408 (accessed 13 April 2016).

[14] The National Association of Professional Environmentalist (NAPE) of Uganda 'Unsettling Business: Social consequences of the Bujagali hydropower project (2014) https://www.internationalrivers.org/files/attached-files/bujagali_unsettlingbusiness_1.pdf (accessed 13 April, 2016).

[15] As above.

based disease prevention/control and sanitation programmes, and the construction and supply of medical clinics.[16]

Power outages which wereaveraging 40 to 50 hours a week when Bujagalihydropower plant was commissioned, had averaged less than 10 hours a week since January 2013, affirmed Nick Jenkinson, managing director of Nile Breweries Ltd, a Ugandan subsidiary of brewing giant SABMiller.[17]More than 2,000 jobs were created (amounting to 60% tothe advantage of people from the dam area), and BEL was given license to operate the plant for a period of 30 years, after which it will be transferred to the Ugandan Government.[18]

The dam drownedthe treasured Bujagali Falls– a spectacular series of cascading rapids that Ugandans considered a national treasure.[19]One of the major issues that arose was resettlement of the people that were residing in the areas in which the dam was constructed.[20]Further the dam submerged a place with great cultural and spiritual importance tothe Basoga people – indigenous dwellers of the dam's project area – resulting in un-resolved compensation and resettlement-related issues and its transmission lines not being fully resolved.[21]

5.3 Three-Gorges dam

The Three Gorges dam is a project owned by the China Yangtze Powercompany and is situated on the Yangtze River by Sandouping town, Yiling district, Yichang Hubei province, in China.It is named Three Gorges because of the canyons formed by immense limestone cliffs including Xiling, Wu, and Qutang.[22] This dam is located at 30.8257500 (latitude in decimal degrees) and 111.0070600 (longitude in decimal degrees). Yangtze (Changjiang) River is Asia's longest (6300 km) river and the fifth largest in the world in terms of water discharge of 920 km^3per

[16]SALINI-IMPREGILO.com http://www.salini-impregilo.com/wp-content/uploads/dicono/bujagali.pdf (accessed April 13, 2016).

[17]THEEASTAFRICAN.CO.KE http://www.theeastafrican.co.ke/business/Sparks-fly-over-Umeme-failure-to-supply-power-to-businesses/-/2560/1721944/-/14iwveyz/-/index.html (accessed April 13, 2016).

[18]WORDBANK.orghttp://www.worldbank.org/projects/P063834/bujagali-private-hydropower-development-project?lang=en (accessed April 13, 2016).

[19]See above.

[20]Muwumuza Linda in Thesis Social and Environmental Effects of Bujagali Dam, Gavle University, 2014. http://www.diva-portal.se/smash/get/diva2:770175/FULLTEXT01.pdf (accessed April 13, 2016).

[21]INTERNATIONALRIVERS.orghttps://www.internationalrivers.org/campaigns/bujagali-dam-uganda (accessed April 13, 2016).

[22]PH Gleick & MJ. Cohen *The World's Water 2008-2009: The Biennial Report on Freshwater Resources*(2009)

year,historically the fourth largest in sediment discharge, 480 million tons per year[23] and the third longest river behind the Nile and the Amazon.[24] The dam is one and a half miles wide and more than 600 feet high which creates a reservoir hundreds of feet deep and nearly 400 miles long.[25]

The dam was constructed for a number of reasons. Among these were the objective of the Chinese Government to prevent flooding and produce hydroelectricity on a cost-efficient basis to power China's growth and economic development. In 1954, over 30,000 people were killed when the Yangtze burst its banks. Since then, it has been under constant watch and building the dam was thought to be a permanent solution to the problem.

The project was highly controversial due to its economic, social, environmental impacts. Significant concerns about its construction were raised, including that it posedgreat risks to the ecosystem of the Three Gorges Reservoir Area (TGRA)[26] and the surrounding areas. It was also deemed to affect the livelihoods of at least 20 million people above the dam and another 300 million downstream, and it was also argued that, when completed, itwouldfragment large, continuous habitats into smaller patches through dam-related activities such as the construction of new cities, counties, townships, and roads.[27] It is against this background that the Chinese Government held several community forums to explain the benefits of the projects and how the environmental and social impacts were being addressed, including the resettlement of people who would be affected by the project. It is envisaged that the Three Gorges dam activities will alter, among other things, the diversity and composition of biota, ecological processes like nutrient and water cycling, and that ultimately it will pose a great threat to the ecological safety of both the TGRA and the vast regions of middle and lower reaches of the Yangtze River.[28]

[23] Z Yang, H Wang, Y Saito, JD Millliman, K Xu, S Qia, G Shi (2006) *Dam impacts* on *the Changjiang (Yangtze) River sediment discharge to the sea: The past 55 years and after the Three Gorges Dam*http://onlinelibrary.wiley.com/doi/10.1029/2005WR003970/full (accessed 14 April 2016).

[24]B Kennedy 'China's Three Gorges Dam' (1999) http://edition.cnn.com/SPECIALS/1999/china.50/asian.superpower/three.gorges/ (accessed 14 April 2016).

[25] As above.

[26] Yang et al. (n 23 above).

[27] As above.

[28] As above

The Yangtze hydropower project was officially approved by the National's People Congress on April, 3 1992.[29]Its planned construction didnot start until 1994 with a planned budget of $25 billion. The construction was carried out by a consortium known as CIPM Yangtze Joint Venture which included three private companies (Acres International, SNC, and Lavelin International), and two state-owned utilities (Hydro-Quebec International and British Columbia Hydro International.[30] The World Bank was asked to supervise the feasibility study to ensure that it would form the basis for securing assistance from international financial institutions.[31] More than 20 000 people worked on the dam during the construction period. It produced its first electricity in 2003[32] and was fully completed in 2012.[33] It is 2,335.1 meters long and 182.8 square meters tall with its 32 major generators of 50 MW having each a capacity of 700 MW of electricity plus two smaller generators of 50 MW, for a total production capacity at full operation of 22, 500 MW, the equivalent of about 20 nuclear plants.[34]

Since its completion, the Three Gorges dam has enhanced the living standards of the people of China. Before it, much of China's electricity was produced by thermal power plants burning one of the dirtiest fossil fuels – coal.[35] Had the Three Gorges Dam not been built, 50 million more tons of coal would have been burned annually, producing 100 million tons of carbon dioxide, between 1.2 – 2 million tons of sulfur dioxide, 10,000 tons of carbon monoxide, and large quantities of particulates.[36] Gleick and Cohen assert that the Chinese Government has claimed the benefits of the dam included averting floods in late 2007 by storing waters that would have exceeded flood levels below the dam. The overall long-term flood-control benefits of the dam can, however, be established over the next several decades as a wider range of high flows are experienced.[37] It is also necessary to note the shipping benefits provided by the dam which has dramatically increased the depth of the water and improved navigation up to Chongqing, more than 600 kilometers upstream of the dam.[38]This has permitted the passage of

[30] As above.
[31] As above.
[32] As above.
[33]RL Ottinger *Renewable Energy Law and Development: Case Study Analysis* (2013), 39.
[34]As above.
[35] Gleick & Cohen (n 29 above)
[36] As above.
[37] As above.
[38] As above.

large quantities of cargo through the new lock system, from 18 million tons before the dam, to an estimate exceeding 50 million tons.[39]

However, Three Gorges Dam has also provoked discussion on other issues such as the fisheries impacts, seismicity induced by the reservoir and geological instability, and relocation and resettlement of displaced people, along with other long-term implications which will be fully understood with the passage of time. The latter include the magnitude of the dam and reservoir which are so large that they are already playing a role in military planning and in affecting local climate conditions.[40] More than one million people were displaced and relocated during the construction of the dam. A number of towns were submerged, including the major population centers of Fuling, Wanxian, and parts of Chongqing.[41]

5.4 Conclusion

This chapter looked at two case studies of recent hydropower projects, namely the Bujagali project in Uganda and Three Gorges project in China. In the case of the former, there were several negotiations between the Government of Uganda, indigenous people and the project company to reach an agreement and accommodate the interests of all stakeholders. According to indigenous beliefs, Bujagali is a cultural and spiritual site. The Government had to reach agreement with the indigenous people before construction could proceed. Construction of the dam has brought considerable benefits to the indigenous people and their communities as there have been new houses, toilets, clinics, schools, cultural centres and other recreational facilities as well as an increase in power.

TheThree Gorges dam has also enhanced the living standards of the people of China, since its completion.The dam has also played a significant role in regard to the reduction of carbon emission. Three Gorges Dam's major targets,such as the prevention of floods that has been successful as well as the sea transportation through the new lock system which has spurred the economy,were realised after its construction. It has largely contributed to the creation of thousands of jobs for local communities of the dam areas.

[39] As above.
[40] As above.
[41] As above.

However, the summarised report of the World Commission on Dams (WCD), created by the World Bank states:

> Large dams have forced 40-80 million people from their homes and lands, with impacts including extreme economic hardship, community disintegration, and an increase in mental and physical health problems. Indigenous, tribal, and peasant communities have suffered disproportionately. People living downstream of dams have also suffered from water-borne diseases and the loss of natural resources upon which their livelihoods depended. Large dams cause great environment damage, including the extinction of many fish and other aquatic species, huge losses of forest, wetlands and farmland. The benefits of large dams have largely gone to the rich while the poor have borne the costs.[42]

[42]Ottinger (n 33 above) 40.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

This dissertation focused on managing legal risks associated with the Grand Inga project in the DRC. It was detailed in six different chapters. After its first chapter on introduction, the second chapter was about the concept of international law and the business of project finance. The third chapter analysed the legal environment and development of project finance in the DRC, focusing on the vital features of economic policy reforms introduced in the last decade to modernise and liberalise certain key sectors of the economy.The fourth chapter focused on legal risks inherent in the Grand Inga hydroelectric project; and the fifth chapter looked at two international best practices for dam building. This chapter, chapter six,discusses general conclusion and recommendations.

6.2 Summary of findings

The developments discussed in the previous chaptershave underscored the importance of managing legal risks in infrastructure development. The international law and business of project finance has been found to be one of the most appropriate tools that countries, particularly developing and least-developed, may consider to attract foreign capital to fund infrastructural and other projects. Capital inflow is always conditional on a country's balance of payments which weighs significantly on its budget. With project finance, it is possible to attract foreign investment to ease the domestic restraint of raising capital. With the involvement of private capital, opportunities are limitless for governments seeking to upgrade their countries' infrastructure. Project financing helps parties to share risks and allocate them to the party best able to manage the risk effectively, which subsequently creates confidence in investors to make the necessary investment paving the way for the project to be realised.

From a Congolese perspective, this research has shown the eagerness of the government to exploit project finance to fund the construction of one of the most ambitious infrastructural projects in Africa. Different legislation has been enacted for the purpose of promoting project finance, including the Constitution of 2006, Investment Code, the Public Procurement Code, and

the Mining Code. The last decade has witnessed the institution of many reforms intended to create an enabling environment for trade and investment to flourish and so to modernise the Congolese economy.

In order to liberalise the electricity sector, the Electricity Sector Lawwas promulgated. The aim of this law was to permit the participation of private investors in infrastructure development. It was adopted pursuant to the Grand Inga Treaty, which envisaged the DRC passing relevant laws: "the DRC hereby undertakes to take reasonable measures to adopt such laws and regulations governing the project as the DRC may deem necessary."[1]This Treaty has also given power to the parties to develop an enabling framework in order to facilitate the development of the project.[2]

This study has also found that if attention is not paid to the interests of all stakeholders, there could be grievances which might affect the overall success of the project. In the case of Three-Gorges dam as well as the Inga I and Inga II projects, there are still un-resolved claims from some displaced people.

Lessons such as the consultation engaged by the Ugandan Government with the Bujagali communities and all types of benefit given to them may serve as example for the dam to be built in the Grand Inga hydropower project in the DRC. From the Chinese project, Three-Gorges dam, apart from preventing the flooding, there is more clean energy produced by developing the dam than burning millions of tons of coal to produce energy. Construction of this project has also added value for money and created more jobs. On consideration, it is all about public interest.

6.3 Conclusion

This dissertation scrutinised the management of legal risks in project finance in the DRC, specifically those associated with the Grand Inga hydropower project. The Grand Inga project involves stakeholders from different jurisdictions, and therefore the study analysed the intrinsic legal risks and mitigation measures that could be adopted to raise investors' comfort and facilitate capital inflows.

[1] Grand Inga Treaty art 4 para c.
[2] Grand Inga Treaty art 3 para 1 subpara d.

Further to the introductory chapter, the second chapter attempted to define the concepts of project finance, public-private partnerships as well as the notion of risk,detailing transnational project finance related-risks and their mitigation in order to give a broad idea to interested parties when willing to implement a project.

In its third chapter, the research captured some relevant DRC legislation which has a bearing on the business and law of project finance in the DRC. The legislature found it indispensable to enact new laws to enable the DRC to have a modern economy which would facilitate the inflow of foreign direct investment and enhance its participation in the global economy.

The fourth chapter looked at different intrinsic legal risks to the Grand Inga hydropower project including political risk, South African creditworthiness, interest rate risk, regulatory and change of law risk, and delay in construction. The main concern in financing the Inga project has seemed to be not the amount of money needed but rather the manner in which diverse risks of legal nature have to be managed. It grouped these risks into two: cross-border and commercial risks (akin to those experienced with other projects developed within a country).

In chapter five, the focus was on international best practices. In that regard, it examined two case studies, namely the Bujagali hydropower project in Uganda and the Three-Gorges dam in China. In the case of the former, several negotiations took place between the Government of Uganda, indigenous people and the project company to reach an agreement, accommodating the interests of all stakeholders.

The Three Gorges dam has also enhanced the living standards of the people of China, since its completion. The dam has also played a significant role in regard to the reduction of carbon emission. The realisation of its major targets, such as the prevention of floods that has been successful as well as the sea transportation through the new lock system,have spurred the Chinese economy,after the construction of the dam.

6.4 Recommendations

The potential of project finance to assist the economic development of the DRC cannot be doubted. Several sectors of the economy are still yet to be exploited, requiring significant capital for them to be developed. With project finance, the country can expect increased participation of the private sector and the influx of foreign direct investment which should result in robust economic growth and sustainable development. Notwithstanding the attractiveness of project finance, there are many risks, including legal and financial risks, which have to be addressed effectively for the project to be successful. Once identified, the riskshave to be allocated to the party best placed to deal with them.

In the case of the Grand Inga hydropower project, the government should consider excluding clauses that impinge on its ability to renegotiate and avoid freezing clauses when entering into a contract or an agreement. As in the case of Bujagali hydropower project, the author suggests that the government should include in the contractual framework clauses related to benefit sharing, so that indigenous people and their communities which will be affected by the building of the dam are adequately compensated. A project-based service for the community should be implemented in order to receive claims and proposals from affected people as long as the project is operating. Should the project company not observe this clause, it would be held to be in breach of its obligations and be obligated to provide compensation. Clauses to be observed by the project company should be specified clearly to avoid future disputes.

The author also recommends that the DRC government consider the enactment of a law governing PPPs in order to address its infrastructure deficit. This will be a mechanism that can help the country to address its major infrastructure gaps, so as to achieve economic growth and sustainable development. It would be advisable to establish a PPP unit, composed of experts which will be in charge of making decisions relating to PPP issues. A solid framework can improve the investment climate, lead to greater inflows of foreign investment which would spur economic growth and development.

The author also suggests that the DRC government consider acceding to the WTO GPA. This would strengthen the current project finance legal and regulatory environment of the country which is in the process of being developed. By doing so, it will promote transparency

and reduce the level of corruption in the country. It would also streamline the country's procurement procedures and enhance the competitiveness of the economy.

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