

**PROJECT FINANCE LAW AND REGULATION IN TANZANIA: A CRITICAL  
ANALYSIS**

**By**

**GEOFREY P. NGWEMBE**

**Supervisor: A/Prof TRACY GUTUZA**

**A MINOR DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE  
REQUIREMENT FOR THE AWARD OF THE MASTER'S DEGREE OF  
COMMERCIAL LAW IN THE FACULTY OF LAW, UNIVERSITY OF CAPE  
TOWN**

**2018**

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

## **CERTIFICATION:**

I, the undersigned, certify that I have read and hereby recommend for acceptance by the University of Cape Town, a minor dissertation titled **PROJECT FINANCE LAW AND REGULATION IN TANZANIA: A CRITICAL ANALYSIS** in partial fulfilment of the requirements for the award of Master's Degree of Commercial Law of University of Cape Town.

---

**A/Prof. TRACY GUTUZA**

**(Supervisor)**

Signed this \_\_\_\_\_ day of \_\_\_\_\_ 2018

## **DECLARATION:**

‘I GEOFREY P. NGWEMBE declare that **PROJECT FINANCE LAW AND REGULATION IN TANZANIA: A CRITICAL ANALYSIS** is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references’.

---

**Signature:**

**Ngwembe, Geoffrey P.**

## **COPYRIGHT:**

This paper is a copyright material protected under the Berne Convention, the Tanzania Copyright Act, 1999 and other international and national enactments on intellectual property. It may not be produced by any means, in full or part, save for short discourses, and subject to acknowledgement, and after the prior obtaining written permission of the author or University of Cape Town on that behalf

©2018 Copyright, Ngwembe, G.P.

All Rights Reserved

## **DEDICATION:**

To my beloved parents and family.

## **ACKNOWLEDGEMENTS:**

With a heartfelt gratitude and praise to Almighty God, for enabling me to write this dissertation, and through health, power and opportunity granted to me.

Wholehearted thanks to my supervisor, A/Prof. Tracy Gutuza for devoting her time, without tiring, and helping to fulfil this piece of work. Her constructive criticisms and comments is what has produced a paper of this standard, as she paved the way into what seems an impossible mission.

Also many thanks to Advocate Lwijiso Ndelwa for devoting his effort and valuable time and assessing as well as criticising, where possible, and henceforth, to produce a piece of work that will be valuable, not only on personal and business perspectives, but also on the national level.

Many thanks to all who may have put in a valuable word, or an idea, that found expression in this work. To all of them, I simply thank you all!

## **ABSTRACT:**

Long term finance schemes are, to a little extent, employed in Tanzania since major economic reforms which occurred in the 20<sup>th</sup> C. Shifting from public finance mechanism, the government of Tanzania have initiated mechanism such as PPP in order to instil private sector in engaging in several economic activities.

As projects basis form of investment have been adopted in catering with developmental plans, especially in becoming an industrialized nation – Tanzania - by 2025, an effective legal and regulatory framework for project finance is crucial.

Despite having PPP, Tanzania still faces several challenges, especially on its recognition and implementation, mainly, inadequate legal framework as project finance not only caters for PPP transactions, but also for private and public finance of projects, lack of specific regulatory body/division, as well as extensive government interference in projects.

The lack of an effective legal and regulatory framework for project finance mechanism deters its success unless it is redressed, hence the purpose of this dissertation which is to ascertain and review project finance setting in Tanzania, experiences and lessons will be drawn from the UK and South Africa in determining the legal and regulatory framework of project finance in Tanzania, tackling of challenges within, and way forward in the incorporation of project finance mechanism as a new mechanism in Tanzania's jurisdiction.



## **ABBREVIATIONS:**

AEMFC	African Exploration Mining and Finance Corporation Bill
BBBEEE/B-BBEE	Broad-Based Black Economic Empowerment
Cap.	Chapter of Law
CMSA	Capital Market and Securities Authority
DAWASA	Dar es Salaam Water and Sewerage Authority
DSE	Dar es Salaam Stock Exchange
EU	European Union
EWURA	Energy and Water Utilities Regulatory Authority
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
GN	Government Notice
MEM	Ministry of Energy and Minerals
OECD	Organisation for Economic Co-operation and Development
PFI	Private Finance Initiative
PFMA	Public Finance Management Act
PFU	Private Finance Unit
PPP	Public Private Partnership
REA	Rural Energy Agency
REIPPP	Renewable Energy Independent Power Producer Procurement Program
SADC	Southern African Development Community
SoPC	Standardisation of PFI Contract
SPV	Special Purpose Vehicle
SUMATRA	Surface and Marine Transport Regulatory Authority
TANROADS	Tanzania National Roads Agency
TCRA	Tanzania Communications Regulatory Authority
TIC	Tanzania Investment Centre
TPDC	Tanzania Petroleum Development Corporation
Tshs.	Tanzania Shillings
UK	United Kingdom
USD	United States Dollars
URT	United Republic of Tanzania

## **STATUTES, POLICY and REGULATIONS:**

### ***Tanzania***

1. Capital Markets and Securities Act, No. 5 of 1994
2. Capital Markets and Securities (Amendments) Act, No. 10 of 2010
3. Capital Markets and Securities (Foreign Investors) Regulations, 2003
4. Capital Markets and Securities (Foreign Investors Amendments) Regulations 2014
5. Capital Markets and Securities (Foreign Companies Public Offers Eligibility and Cross Listing Requirements) Amendment Regulations, 2005
6. Capital Market and Securities (Corporate Governance) Guidelines, 2002
7. Companies Act, No. 12 of 2002 [Cap. 212, R.E. 2002]
8. Copyright Act of 1999
9. Dar es Salaam Water and Sewerage Authority, Cap 273
10. Electricity Act, 2008
11. Executive Agency Act [Cap 245, R.E. 2002]
12. Export Processing Zones Act, 2002
13. Fair Competition Act, No. 8 f 2003
14. Income Tax Act, 2004
15. Land Act of 1999 [Cap. 113, R.E. 2002]
16. Land Amendment Act, 2004
17. Law of Contract Act [Cap. 345, R.E. 2002]
18. Mining Act, No. 14 of 2010 (Cap. 123 of the Laws of Tanzania)
19. National Public Private Partnership Policy, November 2009
20. Petroleum (Exploration and Production) Act of 1980 (Cap 328 of the Laws of Tanzania)
21. Ports Act, 2004
22. Public Private Partnership Act (PPP Act), No. 18 of 2010
23. PPP Amendment Act, No. 3 of 2014
24. PPP Act No. 18 of 2010 – Regulations of 2011, GN 165/2011
25. Public Procurement Act, No. 7 of 2011
26. Public Procurement Act – Regulations of 2013
27. Roads Act, 2007
28. Road and Fuel Tolls Act, Cap. 220
29. Rural Energy Act, 2005

30. Special Economic Zones Act, 2006
31. Surface and Marine Transport Regulatory Authority Act, No. 9 of 2001
32. Tanzania Communications Regulatory Act, 2003
33. Tanzania Civil Aviation Authority Act, 2003
34. Tanzania Investment Act, 1997
35. Tourism Act, No. 29 of 2008
36. Village Land Act of 1999
37. Waterworks Act, Cap 272
38. Waterworks Regulations of 1997

### ***South Africa***

1. Constitution of the Republic of South Africa, 1996, as amended from time to time
2. Broad-Based Black Economic Empowerment Act, 2003
3. Broad-Based Black Economic Empowerment Amendment Act, No. 46 of 2013
4. Companies Act, No 71 of 2008
5. Companies Amendment Act, No. 3 of 2011
6. Co-operative Banks Act, No. 40 of 2007
7. Credit Ratings Services Act, No. 24 of 2012
8. Division of Revenue Act, No. 5 of 2012
9. Financial Markets Act, No. 19 of 2012
10. Municipal Finance Management Act, No. 56 of 2003
11. National Credit Act, No. 34 of 2005
12. National Empowerment Fund Act, No. 105 of 1998
13. National Energy Act, No. 34 of 2008
14. National Environmental Management Act, No. 107 of 1998
15. National Water Act, No. 36 of 1998
16. Public Finance Management Act, No. 1 of 1999
17. Treasury Regulations GN 740/2002
18. Water Research Act, No. 34 of 1971
19. Water Services Act, No 108 of 1997

### ***UK***

1. Energy Act 2008
2. National Audit Act, 1983
3. National Audit Act 2011

## TABLE OF CONTENTS:

CERTIFICATION: .....	i
DECLARATION: .....	ii
COPYRIGHT:.....	iii
DEDICATION: .....	iv
ACKNOWLEDGEMENTS: .....	v
ABSTRACT:.....	vi
ABBREVIATIONS: .....	vii
STATUTES, POLICY and REGULATIONS: .....	viii
TABLE OF CONTENTS:.....	x
Chapter One: INTRODUCTION .....	1
<b>1.1 Introduction:</b> .....	1
<b>1.2 Statement of the Problem:</b> .....	2
<b>1.3 Research Questions:</b> .....	3
<b>1.4 Objective of the Research:</b> .....	3
<b>1.5 Significance of the Research:</b> .....	4
<b>1.6 Synopsis of Chapters:</b> .....	4
Chapter Two: CONCEPTUAL FRAMEWORK OF PROJECT FINANCE .....	6
<b>2.1 Introduction:</b> .....	6
<b>2.2 Meaning of Project Finance:</b> .....	7
<b>2.3 History of Project Finance:</b> .....	10
<b>2.4 Aspects of Project Finance:</b> .....	13
<b>2.4.1 Legal Aspects of Project Finance:</b> .....	13
<b>2.4.1.1 Project finance legal structure</b> .....	14
<b>2.4.1.2 Contractual arrangements</b> .....	19
<b>2.4.1.3 The role of the host country</b> .....	23
<b>2.5 Conclusion:</b> .....	26
Chapter Three: PROJECT FINANCE IN TANZANIA.....	28
<b>3.1 Introduction:</b> .....	28
<b>3.2 Evolution of Project Finance in Tanzania:</b> .....	28
<b>3.3 Legal and Regulatory Regime:</b> .....	30
<b>3.3.1 Laws and Regulations</b> .....	32
<b>3.3.2 Regulatory Regime/Framework</b> .....	41

<b>3.4 Effectiveness of Project Finance Legal and Regulatory Framework in Tanzania</b> .....	43
<b>3.5 Conclusion</b> .....	46
Chapter Four: COMPARATIVE ANALYSIS OF PROJECT FINANCE LEGAL AND REGULATORY REGIME IN THE UK, SOUTH AFRICA AND TANZANIA .....	48
<b>4.1 Introduction</b> .....	48
<b>4.2 Project Finance in the UK</b> .....	48
<b>4.2.1 Legal Regime of Project Finance in the UK</b> .....	51
<b>4.2.2 Regulatory Regime of Project Finance in the UK</b> .....	52
<b>4.3 Project Finance in South Africa</b> .....	55
<b>4.3.1 Legal Regime of Project Finance in South Africa</b> .....	57
<b>4.3.2 Regulatory Regime of Project Finance in South Africa</b> .....	60
<b>4.4 Comparative analysis of Project Finance in Tanzania, UK and South Africa</b> .....	66
<b>4.4.1 Project Finance Structures</b> .....	66
<b>4.4.2 Contractual Regulation (and Security)</b> .....	67
<b>4.4.3 Role of Host Country</b> .....	70
<b>4.5 Conclusion</b> .....	76
Chapter Five: CONCLUSION AND RECOMMENDATION .....	78
<b>5.1 Conclusion</b> .....	78
<b>5.2 Recommendations</b> .....	81
BIBLIOGRAPHY:.....	83

# Chapter One: INTRODUCTION

## 1.1 Introduction:

Tanzania has experienced a number of major economic reforms which aims to bolster the economic growth rate of the country. Economic reforms were in three phases (since independence): first, from 1961 – 1967 involves the promotion of market economy through consideration of public sector as a source of support for private sector growth; second, 1967 – 1983 through the Ujamaa Policy which included nationalisation of all means of production; and third, 1983 to date, a phase which involved the liberalization of trade via the structural adjustment programs.<sup>1</sup>

The economic reforms were followed by the liberalization of the financial sectors during the last decade where the reforms covered various areas that aimed to review structural, organization procedures, operational arrangements and policy issues related to financial systems. Further the economic reforms enhanced the quality and efficiency of credit allocation which streamlined the banking industry.<sup>2</sup>

Aggressive steps have been taken by Tanzania to reverse socialist policies after the 1983 reforms. These steps include financial support from donors and multilateral institutions (like IMF) hence economic recovery and stabilization.<sup>3</sup> This includes the involvement of foreign bank, bond investors, Development Finance Institutions, Export Credit Agencies (ECA's) include ECIC in South Africa, GIEK in Norway, UK Export Finance in the UK and Ex-Im Bank in the US, and International Financial Institutions (IFIs) and Multilateral Development

---

<sup>1</sup> OECD (2013), "Overview of progress and policy challenges in Tanzania," in OECD Investment Policy Reviews: Tanzania 2013, OECD Publishing, p.24-25

<sup>2</sup> Lucky Yona and Eno L. Inanga, 'Financial Sector Reforms in Bank Regulations and Supervision and its Impact on Banking Competitiveness and Economic Efficiency of Commercial Banks in Tanzania' (2014) Vol. 5, No. 4, Research Journal of Finance and Accounting, p.1

<sup>3</sup> Tanzania Business Law Handbook, Vol. 1, Strategic Information and Basic Laws, Tanzania, 2015, International Business Publications (IBP Inc.), pg. 32

Bank (MDBs) – such as the World Bank, International Monetary Fund (IMF), African Development Bank (AfDB), European Investment Bank (EIB), Asian Development Bank (ADB) and East African Development Bank (EADB).

Ownership entailed an attribute during economic reforms and it was noticed that, in such reforms, private sectors were ignored on economic issues.<sup>4</sup> Hence, the government preferred public ownership of assets, so limited recourse projects are being developed alongside, on-balance-sheet government projects.<sup>5</sup>

With a growth demand for investment (especially in the infrastructure and industrial sectors) and project financing being used as a means of financing, specific legislation to encourage and enable investment in projects involving both public and private sectors was enacted and passed in 2010, the Public Private Partnership Act.<sup>6</sup> The project financing technique helps in alleviating investment risk and raise finance at a relatively low cost, to the benefit of sponsor and investor alike.

Project finance in Tanzania can be observed in infrastructure investments where they are usually financed by project finance (where lenders and investors rely on the strength of the borrower's balance sheet for their loans).

## **1.2 Statement of the Problem:**

Following the enactment of the PPP Act in Tanzania, and even prior to it, concerns emerge on the political risk as it plays a role in both the development and changes in law, regulation and bureaucracy surrounding project financing transactions. With short-term loans, credit skills, labour intensive structuring, high cost of professional services and asset allocations and some

---

<sup>4</sup> *Ibid*

<sup>5</sup> International Financial Law Review (IFLR), *2017 Project Finance Report: Tanzania*, (9 December 2016),

<sup>6</sup> *Ibid*

other similar challenges to project finance transactions, the need for effective project finance regulation is inevitable.

Thus, an analysis of the legal and regulatory framework of project finance in Tanzania requires a consideration of corporate governance; industrial regulation, taxation, customs and immigration law circumventing project finance; reliability of laws and the judicial system (forum, choice of law and sovereign immunity of the organ); changes of law and/or policy in affecting project finance deals; and environmental and social consideration, and permits.

### **1.3 Research Questions:**

The legal questions to be addressed in order to meet the objectives of this dissertation are:

- (i) What is the legal and regulatory framework for project finance in Tanzania?
- (ii) Do the enabling laws and regulatory framework meet the desired purpose of project finance in Tanzania?
- (iii) Are there any lessons for Tanzania from the UK and South Africa in regard to project finance legal and regulatory framework?

### **1.4 Objective of the Research:**

The main objective for this study is to ascertain and review the project finance setting in Tanzania and addressing its contribution towards investment and general economy of the country.

In light of the main objective, the study shall examine the effectiveness of the legal and regulatory framework in Tanzania with regard to that of the UK and South Africa as



jurisdictions used in a comparative study in order to establish the lessons that Tanzania can adopt.

### **1.5 Significance of the Research:**

The findings of this study may influence public policy as well as a specific legislation on the application of project finance as a tool for facilitating investment transactions in Tanzania. As one of the goals is to establish which lessons could be learned from the UK and South Africa, the study may be significant to both legal and personnel and the legislature in understanding the strengths and weaknesses in the legal and regulatory framework of project financing in Tanzania.

Further, the study will analyse the aspect of project finance transactions to scholars and general public as it points out the opportunities, success, challenges and risks associated in the transaction.

### **1.6 Synopsis of Chapters:**

The dissertation will comprise of five chapters, **Chapter One**; will provide a general introduction and overview of the dissertation. It will outline the main research questions to be analysed, and will set out the purpose and significance of the analysis. **Chapter Two** will provide a general overview and conceptual framework of Project Finance. This includes the general understanding of project finance, its history and legal issues associated with project financing transactions.

**Chapter Three** will consider the legal and regulatory framework of project financing in Tanzania. It will include an extensive study of project finance regulation and shall be made by providing examples of several sectors such as infrastructure and energy. Furthermore, a critical analysis of the weaknesses and strengths of the system will be undertaken.

**Chapter Four** will consider the project finance regulation in the UK and South Africa vis-à-vis Tanzania. The laws and bodies established in the UK and South African will be analysed with a view of establishing lessons which Tanzania can learn and make some amends where necessary.

**Chapter Five** will set out the conclusion and recommendations for an effective legal and regulatory regime of project finance in Tanzania.

# Chapter Two: CONCEPTUAL FRAMEWORK OF PROJECT FINANCE

## 2.1 Introduction:

There are many attempts by literature to define the term ‘project finance’. The term has been used in many contexts over the years and its meaning has evolved.<sup>7</sup>

Before setting out the meaning of ‘project finance’, it is important to distinguish between the term ‘project finance’ and ‘financing projects’. Richard Tinsley states that project finance is an attractive alternative [to other financing structures such as corporate finance] enabling project sponsors to shed risks to the banks or capital debt markets. Further, it allows that company or group to go on to develop other projects – to become a serial developer.<sup>8</sup>

By contrast, the financing of projects comprises of the traditional methods of financing including corporate loans for private sector projects, government borrowing or export credits from the World Bank (WB) and the International Monetary Fund (IMF), or public-sector debt for public sector projects.<sup>9</sup>

Project financing has been used for large, complex, and expensive constructions (such as power plants) or systematic undertakings (for example, environment and transport infrastructure).<sup>10</sup>

John D. Finnerty<sup>11</sup> points out that project financing is a well-established financing technique. Although project financings transactions have certain common features, the financing on a

---

<sup>7</sup> John Dewar, *International Project Finance: Law and Practice*, (Oxford University Press, United States, 2011), p. 1

<sup>8</sup> Richard Tinsley, *Advanced Project Financing: Structured Risks*, (Euromoney Institutional Investor PLC, UK, 2<sup>nd</sup> Edition, 2014), p. 1

<sup>9</sup> E.R. Yescombe, *Principles of Project Finance*, (Yescombe Consulting Ltd, UK, 2002), p. 1

<sup>10</sup> Michael P. Malloy, *International Project Finance: Risk Analysis and Regulatory Concerns*, (18 Trans Nat'l Law, 89, 2004), p. 89

<sup>11</sup> John D. Finnerty, *Project Financing: Asset-Based Financial Engineering*, (John Wiley & Sons Inc., New Jersey, USA, 2<sup>nd</sup> Edition, 2007)

project basis necessarily involves tailoring the financial package to the circumstances of a particular project.<sup>12</sup>

## **2.2 Meaning of Project Finance:**

Project finance is difficult to define but easy to recognize.<sup>13</sup> A huge body of literature defines project finance in different ways. The definition of project finance is of critical importance when analysing project financing because the results of the analysis can be dramatically different depending on the definition.

The Basel Committee on Banking Supervision (BASEL II) provides an official definition of project finance to mean:

*'A method of funding in which the lender looks primarily to the revenues generated by a single project, both as the source of repayment and as security for the exposure. This type of financing is usually for large, complex and expensive installations that might include, for example, power plants, chemical processing plants, mines, transportation infrastructure, environment, and telecommunications infrastructure. Project finance may take the form of financing of the construction of a new capital installation, or refinancing of an existing installation, with or without improvements.'*<sup>14</sup>

Stefano Gatti defines project finance as

*'the structured financing of a specific economic entity – the SPV, or special purpose vehicle, also known as the project company – created by sponsors using equity or*

---

<sup>12</sup> *Ibid* p. 1

<sup>13</sup> Philip Fletcher, *Rules of Negotiating Project Finance Deals*, (International Finance Law Review (IFLR), November, 2005), p. 1

<sup>14</sup> Basel Committee on Banking Supervision, *International Convergence of Capital Measurement and Capital Standards – A Revised Framework Comprehensive Version*, Bank of International Settlements, June 2006, Basel, Switzerland, p. 53

*mezzanine debt and for which the lender considers cash flows as being the primary source of loan reimbursement, whereas assets represent only collateral*<sup>15</sup>

Gatti's definition of project finance, highlights some major distinctive features of a project finance deal, namely: that a debtor is a project company (SPV) which is financially and legally independent from the sponsors; lenders (financial institutions especially banks) have only limited recourse (or no recourse at all) to the sponsors (equity investors) after the project is completed; debt and equity instruments as major financing tools of the project at which the cash flow generated by the project entity will cover for the operation costs and repayment of capital and interests, and further, sponsors provide collateral/security to lenders for receipt and assets of the project.<sup>16</sup>

Scott L. Hoffman, also, defines project finance as:

*'a non-recourse or limited recourse financing structure in which debt, equity and credit enhancement are combined for the construction and operation, or the refinancing, of a particular facility in a capital-incentive industry, in which lenders base credit appraisals on the projected revenues from the operation of the facility, rather than the general assets or the credit of the sponsor of the facility, and rely on the assets of the facility, including any revenue-producing contracts and other cash flow generated by the facility, as collateral for the debt.'*<sup>17</sup>

Scott's definition of project financing places the emphasis on using non-recourse or limited recourse which will enhance repayment of funds (investments) to the participants through debt

---

<sup>15</sup> Stefano Gatti, *Project Finance in Theory and Practice: Designing, Structuring, and Financing Private and Public Projects*, (Academic Press Advanced Finance Series, UK, 2008), p. 2

<sup>16</sup> *Ibid*

<sup>17</sup> Scott L. Hoffman, *The Law and Business of International Project Finance*, (Kluwer Law International, Netherlands, 2<sup>nd</sup> Edition, 2001), para 1.01

or equity instruments (or both) as well as credit enhancement mechanisms in financing or refinancing a particular industry.

Nevitt, P.K. and Fabozzi F.J., also define project finance as

*‘a financing of a particular economic unit in which a lender is satisfied to look initially to the cash flows and earnings of that economic unit as the source of funds from which a loan will be repaid and to the assets of the economic unit as collateral for the loan.’<sup>18</sup>*

From the above definition, debt/loan by a lender is used to raise capital of the project and the lender looks at the assets of the economic unit (a project finance legal structure which can be a company, a joint venture or a partnership)<sup>19</sup> for the return of investment (repayment of the loan).

Richard Tinsley in his book *Advanced Project Financing* defines project finance as:

*‘A funding structure that relies on future cash flow from a specific development as the Primary source of repayment with that development’s assets, rights, and interests legally held as collateral security. Where the sponsor/project developer gives completion and start-up (financial) support this is called Type 1 project finance; and where the project financiers rely on the builder/contractor to do this, it is labelled: ‘Type 2 project finance’ – the builder/contractor’s ‘package’ provides completion support.’<sup>20</sup>*

---

<sup>18</sup> Peter K. Nevitt & Frank J. Fabozzi, *Project Financing*, (Euromoney Institutional Investor PLC, London, UK, 7<sup>th</sup> Edition, 2000), p. 1

<sup>19</sup> See para 2.4.1.1 below

<sup>20</sup> Richard Tinsley, *op. cit.*, p. 2; also see in Tinsley, CR, ‘Introduction and glossary,’ in *Practical Introduction to Project Finance: practical case studies*, 1996, Euromoney Books

In light of the given definitions above, similarities that could be drawn from all of them are that project finance is a non-recourse or limited recourse financing structure, used in financing or refinancing capital incentive-industry for a long term whereby lenders rely on the assets of the facility and other cash flow generated by the facility in reimbursing their investments.

For the purpose of this dissertation, the term ‘project finance’ means “*raising of finance for a new project, secured against future revenues rather than an existing corporate balance sheet or other existing assets.*”<sup>21</sup>

The rationale behind the definition chosen is that, (i) project finance transaction entails the raising of finance for a particular project, and can be through equity or loan; (ii) project finance transactions involves the return of investment to the participants; (iii) project finance transaction is for a new project (however not necessary); (iv) project finance is a non-recourse or limited or limited recourse financing and sometimes referred as ‘off-balance sheet financing’ as it is accomplished by using credit of a third party to support the transaction, at which, such a third party becomes a sponsor.<sup>22</sup>

### **2.3 History of Project Finance:**

Project finance, a relatively new financial discipline, has evolved rapidly over the past two decades. The worldwide process of deregulation of utilities and the privatization of public-sector capital investment have been a driving factor towards the growth of project finance.<sup>23</sup>

However a broader view of its history incorporates centuries of discrete venture-by-venture financing.<sup>24</sup> Project finance is said to trace its roots back to the 13<sup>th</sup> century (1299) where the

---

<sup>21</sup> *Ibid*

<sup>22</sup> Peter K. Nevitt & Frank J. Fabozzi, *op. cit.*, p. 1

<sup>23</sup> E.R. Yescombe, *op. cit.*, p. 5

<sup>24</sup> Charles T. Haskell, *Advanced Modelling for Project: For Negotiations and Analysis*, (Euromoney Books, London, UK, 2005), p. 4

English Crown negotiated a loan from the Frescobaldi (a leading Italian merchant bank of that period) to develop the Devon silver mines.<sup>25</sup>

One of the earliest examples of using project finance is found in the Greek merchants' funded vessel-specific expeditions. Another example is the 1554 French concession granted to Adam de Craponne for the development/construction of a canal between the Durance and Rhone rivers.<sup>26</sup>

Around the world, the use of project finance was used in the 18<sup>th</sup> and 19<sup>th</sup> centuries where the use of private sector funding gained momentum especially in toll revenues of railway, water, gas, electricity, and telephone industries, which were developed in the 19<sup>th</sup> century with private sector investment.<sup>27</sup>

In the 20<sup>th</sup> Century (around 1970s), project finance entered a modern phases where it was used for large natural resource projects.<sup>28</sup> A significant regulatory structure for project financing transaction was established in the USA with the introduction of United States' Public Utility Regulatory Policy Act in 1978 (commonly known as PURPA). Finnerty, J.D. has stated that PURPA established a foundation for long-term contractual obligations which are sufficiently strong to support non-recourse project financing to fund construction costs.<sup>29</sup>

Further, the UK's legal and regulatory structure of project finance is found in the Private Finance Initiative which commenced in 1992 and brought the commoditisation of public-private partnerships (PPP) and later in 1999 refining the framework of PPP through the "Standardisation of PFI Contracts".<sup>30</sup>

---

<sup>25</sup> John D. Finnerty, *op. cit.*, p. 4, Also cited in Charles T. Hankell, *op. cit.*, p. 4

<sup>26</sup> Richard Tinsley, *op. cit.*, p. 1

<sup>27</sup> E.R. Yescombe, *op. cit.*, p. 5

<sup>28</sup> Notable example is a Trans-Alaska Pipeline System (TAPS) between 1969 and 1977

<sup>29</sup> John D. Finnerty, *op. cit.*, p. 4; Also cited in Charles T. Hankell, *op. cit.*, p. 5

<sup>30</sup> PFI stands for Private Finance Initiative



In developing countries, much of the financing of infrastructure development came from the host government, multilateral institutions and export financing agencies. As early as the 1970s – however, following the constraints<sup>31</sup> on public funding, the private sector developed as a significant financing source for infrastructure<sup>32</sup> as governments accept the role of the private sector in developing, constructing and operating large-scale infrastructure projects.<sup>33</sup>

Towards the end of 20<sup>th</sup> century and early 21<sup>st</sup> century, project finance has increasingly broadened business worldwide to the extent of supporting infrastructure financing (energy and power, mining and natural resources, oil and gas, transportation and telecoms). However, recently the use of project finance (especially by the developed countries) has broadened the participation of the private sector in traditional public sector activities such as hospitals, schools and prisons.

The geographical and sectorial reach of project financing has grown considerably, following widespread privatisation and deregulation of key industrial sectors around the world.<sup>34</sup> The geographic breakdown of loan volumes indicates a concentration of project finance loans in four significant geographic areas – Western Europe, North America, Africa and the Middle East, and South Asia – which respectively account for around 19.2%, 18.5%, 14.4%, and 7.3% of the total value of project finance loans in 2013.<sup>35</sup>

Between 2003 and 2013, sub-Saharan Africa has closed 158 project finance deals with debt totalling USD 59 billion,<sup>36</sup> a rise of 2.7% to 5.4%<sup>37</sup> which represents a very small portion of

---

<sup>31</sup> Such as reduction of financial aid funding, lack of financial creditworthiness to support the volume of infrastructure projects through FDI or credit support

<sup>32</sup> Yves Alhouy and Reda Bousha, “The Impact of IPPs in Developing Countries – Out of the Crisis and into the Future,” Public Policy For The Private Sector World Bank Note No. 162 (Dec. 1998)

<sup>33</sup> Scott L. L. Hoffman, *op. cit.*, p. 25

<sup>34</sup> Marco Sorge, The nature of credit risk in project finance, BIS Quarterly Review (Bank for International Settlements, Basel), December 2004, p. 92-93

<sup>35</sup> OECD Journal: Financial Market Trends, *Financing Infrastructure – International Trends* by Raffaele Della Croce and Stefano Gatti, 2014, Vol. 1: 127

<sup>36</sup> Arnaud Dornel, *Project Finance for Infrastructure in Africa*, The World Bank, 2014, p. 5

<sup>37</sup> OECD Journal: Financial Market Trends, *op. cit.*, p. 129

the global project finance market. Also between 2003 and 2013, over 5000 projects closed worldwide and raised a total debt of USD 2 trillion.<sup>38</sup> Sub-Saharan Africa accounted for 3% only.<sup>39</sup>

In Africa, 21 sub-Saharan countries had one or more project in the last 10 years whereby top countries were Nigeria (USD 17 billion), Ghana (USD 11 billion), South Africa (USD 10 billion) and Angola (USD 4 billion) which accounted for 70% of sub-Saharan Africa's total. Countries like Tanzania, Madagascar and Zimbabwe have a contribution of less than a billion USD in project finance deals.<sup>40</sup>

## **2.4 Aspects of Project Finance:**

When embarking on a project finance transaction, there are a number of issues/elements to be taken into account including, inter alia, the project risk (or credit risk<sup>41</sup>), the legal aspect, the project development and management as well as the project funding (which covers the economic aspect of project finance). For the purpose of this dissertation, the legal aspects of project finance will be evaluated.

### **2.4.1 Legal Aspects of Project Finance:**

As project financing expands into new industries and regions, the attendant legal issues have become increasingly complex and the ability to predict where difficulties will arise has become more challenging.<sup>42</sup>

---

<sup>38</sup> Arnaud Dornel, *op. cit.*, pg. 5

<sup>39</sup> *Ibid*

<sup>40</sup> *Ibid* at p. 6

<sup>41</sup> As referred by Marco Sorge, *op. cit.*, p. 91

<sup>42</sup> John Dewar, *op. cit.*, p. 4

The legal aspects of project finance refer to the outline of financial and economic/industrial planning for the development of the project as reflected in a system of legal/contractual relationships that are binding for the participants.<sup>43</sup>

Addressing the legal issues is fundamental in dealing with an initial structural complication. It covers disciplines of law ranging from civil procedure, contracts, property, trusts, torts equity, and conflicts of laws.<sup>44</sup> It incorporates aspects such as industrial regulation; taxation; corporate governance; customs and immigration law circumventing project finance; changes of law and/or policy in affecting project finance deals; and environmental and social considerations.<sup>45</sup>

Gatti, S., points out that the legal issues inherent to project finance essentially evolve around two basic concept or groups of concepts which are: (i) the project company and its economic/legal function; and (ii) the network of contracts that regulate the relationship between different players in the project.<sup>46</sup>

However, in addressing the legal aspect of project finance consideration shall be taken of the following legal matters: (i) project finance legal structure: that is the nature which the project shall be legally operated; (ii) contractual arrangements; and (iii) the legal role of the host country in project finance.

#### **2.4.1.1 Project finance legal structure**

Project financing transaction involves a number of equity investors (sponsors), a syndicate of banks or other lending institutions that provide loan to the operation, hence a special purpose

---

<sup>43</sup> Stefano Gatti, *Project Finance in Theory and Practice*,: Designing, Structuring, and Financing Private and Public Projects, Academic Press Advanced Finance Series, UK, 2008, p. 233

<sup>44</sup> John Dewar, *International Project Finance: Law and Practice*, Oxford University Press, USA, 2011, p. 4

<sup>45</sup> See para 1.2 above

<sup>46</sup> Stefano Gatti, *op. cit.*, p. 233

vehicle (SPV) is created for each project for the purpose of shielding other assets owned by a project sponsor from detrimental effects of a project failure.

A special purpose vehicle (commonly known as the Project Company), in legal sense, is a legal entity born along with the project and does nothing but own, develop build/construct, operate and maintain the project.<sup>47</sup> It suffices to say that the SPV is the bridge (centre) of all project finance.<sup>48</sup> Hence making project finance more complicated from other alternative financing methods (like corporate finance) as the project has no assets of its own, other than the project itself.<sup>49</sup><sup>50</sup>

The understanding of contractual arrangements in project finance is important as they are also used as ways to pre-commit the actions of the management of the SPV and the obligations of every key participant in a very detailed way.<sup>51</sup> It is thus James F. Penrose denotes that the selection of the form of business organization for the project company is an important step in project development.<sup>52</sup>

Thus, in determining the legal structure for project finance, there are a number of significant factors that affect the precise nature of the organization, to mention a few: (i) tax laws in the host country; (ii) tax treaties; (iii) foreign exchange rules of the host country;<sup>53</sup> (iv)

---

<sup>47</sup> Scott L. Hoffman, *op. cit.*, para 5.02

<sup>48</sup> For this purpose, OECD Rules define Project Finance Transaction as a “financing of a particular economic unit in which a lender is satisfied to consider the cash flows and earnings of that economic unit as the source of funds from which a loan will be repaid and to the assets of the economic unit as collateral for the loan.” Also cited in Aneta Spaić, *Legal Aspects of Mitigating Risks In Project Finance: Mitigating Commercial and Political Risks in Project Finance*, (Podgorica, Fakulet, 2<sup>nd</sup> Edition, 2009), p. 16

<sup>49</sup> C. S. Bjerre, *Project Finance Securitization and Consensually*, 12 *Duke J. Comp. & Int'l L.* 411, 415 (2002)

<sup>50</sup> See Exhibit 3, *Moody's Investors Service, Default and Recovery Rates for Project Finance Bank Loans, 1983-2011*, Feb. 4. 2013, p. 7

<sup>51</sup> Corielli, F., Gatti, S. & Steffanoni, A., *Risk Shifting Through Nonfinancial Contracts: Effects on Loan Spreads and Capital Structure of Project Finance Deals*, *Journal of Money Credit and Banking*, Vol. 42, No. 7, October 2010, p. 2

<sup>52</sup> James F. Penrose, *Special-Purpose Entities in Project Finance Transactions*, 2J *Of Project Finance*, 59, 1996

<sup>53</sup> Scott L. Hoffman, *op. cit.*, para 5.02

transferability of equity interests; (v) lender preference; (vi) accounting treatment and objectives.<sup>54</sup>

#### *Forms of Project Finance Structure:*

The forms of a project financing entity are, namely: a Project Company; a Partnership; and a Joint Venture.

##### **2.4.1.1.1 Project Company (or Special Purpose Company)**

Perhaps the most common of all project finance legal structures, the Project Sponsor<sup>55</sup> incorporates an entity which is wholly-owned, solely to develop, construct, own, operate and maintain a particular project at a specific site. It is a newly organized entity formally responsible for a specific project finance deal.

A Project sponsor(s) normally incorporate a Project Company for the reason that the project company corresponds with the project itself as the entire cash flow has to be entirely attributed to the company.<sup>56</sup>

Incorporating a project company is advantageous as it allows the owners (project sponsors) to enjoy the limited liability of the company; they have a separate legal entity which give the company powers to enter into contracts and to institute and defend legal proceedings in their own name; as well as perpetual succession. However, a Project Company may have a number of significant disadvantages such as, subject to administrative complexity like its incorporation and management; may have less operational flexibility than the alternatives (that is, partnership

---

<sup>54</sup> *Ibid*, para 7.03

<sup>55</sup> Is the individual (often manager or executive) with overall accountability for the project and primarily concerned with ensuring that the project delivers the agreed business benefits.

<sup>56</sup> Stefano Gatti discusses the reasons for incorporating Project Company by categorizing them into two major reasons: defensive reasons; and positive reasons. See Stefano Gatti, *op. cit.*, p. 235-236

and joint venture) on the basis of decision making; as well as the effect of double taxation to equity investors at the corporate and shareholder level.<sup>57</sup>

#### **2.4.1.1.2 Partnership**

Project sponsors are likely to either be directly or through a subsidiary, partners in a partnership – a partnership formed to own and operate the project.

A partnership in project finance can limit the number of its partners and can make them jointly and severally liable for certain other project-related responsibilities whichever of the general partners incur in the regular course of business or within the scope of their authority.<sup>58</sup> The partnership structure of Project Finance does not afford non-recourse or limited recourse liability of its Partners.<sup>59</sup> Tax implications and collateral considerations are one of the key considerations in forming a suitable partnership structure in project finance (see para 2.4.1.3.2 below).

A key criteria for successful partnership models in project finance transactions include strong political support, a committed sponsor, a sound regulatory framework, a viable off-taker or source of service fees, support from users of the service and sensible, logical allocation of risk and market interest and capacity.<sup>60</sup>

Thus, partnership models of project finance can be either by Public-Private Partnership (PPP), Independent Power Projects (IPP) or private project. Public-private partnership or PPP, one of the complex partnerships in project financing transactions, offers an internationally applied

---

<sup>57</sup> John Dewar, *op. cit.*, p. 48

<sup>58</sup> John D. Finnerty, *op. cit.*, p. 114-115

<sup>59</sup> Scott L. Hoffman, *op. cit.*, para 7.08

<sup>60</sup> PWC, *Capital Projects And Infrastructure In East Africa: Southern Africa And West Africa: Trends, Challenges And Future Outlook*, (November 2014), pg. 12

standard tests to determine whether a PPP is the appropriate vehicle for procuring a public asset or service, to include: risk, affordability; and value for money.<sup>61</sup>

Nevertheless, IPPs (normally in power plants projects) are mostly privately financed and are power projects that mainly privately developed, constructed, and owned, with a significant proportion of private finance, and with long-term power purchase agreements (PPAs) with a utility or another off-taker.<sup>62</sup> IPPs are privately arranged especially through partnerships – the government and international donors, private party to another private party – where the laws of contract and partnership apply.

#### **2.4.1.1.3 Joint Venture (or unincorporated joint venture)**

In some projects (especially complex projects like oil and mining) a number of entrepreneurs join forces in developing a project. In this sense, a joint venture (in a project finance) is formed where each participant owns an undivided interest in the real and personal property, and shares in the benefits and risks of the project in direct proportion to the ownership percentage.<sup>63</sup>

Joint venture differs to that of Partnership as the former is a contractual arrangement between two or more parties (companies) for the purpose of executing a particular business undertaking or project and for a limited period of time *while* the latter is an association of two or more persons to carry on as co-owners of a single business enterprise for profit (as well as any loss incurred).

---

<sup>61</sup> National Treasury: PPP Unit, *Introducing Public Private Partnerships in South Africa*, (October 2007), pg. 5 – 6

<sup>62</sup> Anthon Eberhard, Katherine Gratwick, Elvira Morella, and Pedro Antmann, 2016, *Independent Power Projects in Sub Saharan Africa: Lessons from Five Key Countries*, Directions in Development, Washington, D.C.

PEI (Power Engineering

<sup>63</sup> John D. Finnerty, *op. cit.*, p. 103

Whether being under equity joint venture<sup>64</sup> or contract joint venture (or joint venture agreement),<sup>65</sup> joint venture does not confer limited or non-recourse liability to project sponsors as the members attempt to limit their liability to the amount of capital contributed to the joint venture.<sup>66</sup>

#### **2.4.1.2 Contractual arrangements**

Irrespective of the structure used, that is whether it is a partnership, a joint venture or a SPV, the contractual agreements between the various parties to the project financing arrangements will largely not differ.

Project finance is built on a foundation of legal documents and contracts, ranging from pre-development agreements, construction contracts to operation and management contracts (O&M contracts) and more. It is why Sara Møller Tof also term Project Finance as “contract finance”<sup>67</sup> as contract helps in conjecturing the forthcoming cash flows on which the reimbursement of the debt is contingent.

The contractual arrangement in project finance is portrayed in several models/forms of contracts, to mention a few: (a) off-take contract;<sup>68</sup> (b) operation and maintenance

---

<sup>64</sup> Older and less flexible type in which two or more parties set up a separate legal entity to act as the vehicle for carrying out the project

<sup>65</sup> An arrangement where two or more parties come together for a particular business project, sign a contract outlining the terms under which they will work together and develop a new entity to their mutual benefit, and normally involves a sharing of resources, which could include capital, personnel, physical equipment, facilities or intellectual property such as patents.

<sup>66</sup> Scott L. Hoffman, *op. cit.*, para 7.11

<sup>67</sup> Sara Møller Tof, *Project Finance And Political Risk: An Empirical Study Of The Relationship Between Project Finance And Political Risk*, (Aarhus School of Business, Aarhus University, August 2008), p. 8

<sup>68</sup> An off-take contract, typically used on process-plant projects, regulates the relationship between the project company who produces a product and sells it to an off-taker.



agreements;<sup>69</sup> (c) shareholder (project sponsor) agreement;<sup>70</sup> (d) availability-based contract;<sup>71</sup> (e) concession agreement;<sup>72</sup> and (f) engineer, procurement and construction contracts (EPCs).<sup>73,74</sup>

The underlying of contractual framework in project finance is important as it apportions risks<sup>75</sup> among parties (like project sponsors, lenders, financial advisors, technical advisors, legal advisors, debt financiers, equity investors, regulatory agencies, multilateral agencies).<sup>76</sup> Also, a number/network of nonfinancial contracts are used in project finance in order to limit the managerial discretion of project sponsors as well as making cash flows verifiable to lenders and reducing the negative impact of unexpected events on project cash flows.<sup>77</sup>

In this perspective, it is worthwhile to note Scott L.L. Hoffman who stated that;

‘Because the ability of the project company to produce revenue from project operation is the foundation of a project financing, the contracts constitute the framework for project viability and control the allocation of risks.’<sup>78</sup>

---

<sup>69</sup> An operator of a project and a SPV are governed by an O&M Contract whose purpose is to ensure the Operator meets performance guarantees tied to maximizing revenues under the project’s off-take agreements, allocating the risk of any operational deficiencies of the facility, and manage the cost of operating the facility, and in particular, ensuring that project revenues will cover all operational and other costs.

<sup>70</sup> A shareholder agreement governs the relationship between a SPV and shareholders including matters relating to management and voting; development, construction, and operating stage financing, working capital financing; amounts and dates of additional capitalization.

<sup>71</sup> Mostly used in PFI-Model projects, where a Contracting Authority pays a project company for making the project available for use.

<sup>72</sup> Concession agreement is a project agreement between a project company and a contracting authority, under which, in return for designing, building, financing and operating a project to provide or upgrade public infrastructure, the project company may levy User Charges (example tolls) by users of the project.

<sup>73</sup> It gives the project company a fully completed and equipped facility and provides for delivery by the contractor of a facility that satisfies specified performance criteria, for a fixed or predictable price, and completed on a specified date.

<sup>74</sup> Andrew Fight, *Introduction to Project Finance*, (Butterworth-Heinemann Publications, Great Britain, 2006), Chapter 4

<sup>75</sup> Such risks includes, but not limited to, operational cost, reliability; supply reliability, quality, cost; political environment, war, local hostility, current inconvertibility; legal, documentary and tax risk; macroeconomic risks; off-take volume, price; and modelling and analytical risk.

<sup>76</sup> Vinter, G.D., *Project Finance: A Legal Guide*, 3<sup>rd</sup> Edition, Sweet & Maxwell, London, 2004, p. 77

<sup>77</sup> Francesco Corielli, Stefano Gatti, & Alessandro Steffanoni, *Risk Shifting Through Nonfinancial Contracts: Effects on Loan Spreads and Capital Structure of Project Finance Deals*, *Journal of Money Credit and Banking*, (October 2010, Vol. 42, No. 7:1)

<sup>78</sup> Scott L. Hoffman, *op. cit.*, para 16.01

Contracts (and numerous sub-contracts<sup>7980</sup>) in a complex contractual arrangements (such as Process-plant Project) are used in project finance by both developed countries<sup>81</sup> and developing countries<sup>82</sup> as well emerging markets.<sup>83</sup> It is thus Marcos Sorge states that “... several long-term contracts such as construction, supply, off-take and concession agreements, along with a variety of joint-ownership structures are used to align incentives and deter opportunistic behaviour by any party involved in the project”.<sup>84</sup>

Due diligence is required in the completion of a suitable contractual arrangement of a project as it is an essential tool for lenders in valuing a project.<sup>85</sup> In addressing issues relating to contractual arrangement of a project, it is also important to denote the extent of contractual risk associated in the project.

Contractual arrangements/structure tend to limit a number of risks associated in project financing transactions including: supply/inputs risk (at which supply agreements involving requirement contracts, take or pay contracts as well as output contracts are used to remedy/balance the supply quantity obligations with the amounts the project is able to sell); foreign exchange risk<sup>86</sup> (where the main contract architecture used to remedy the risk is the use of forward contracts/derivatives followed by cross-border parallel structures); operating risk – technical component (where O&M contract is used to minimise technology risk);<sup>87</sup> operating risk – cost component (here cost guarantee and sales contracts are used to remedy the risk);

---

<sup>79</sup> The project contracts that may be signed by the project company and can include EPC Contract (for a construction contractor and project company), operation and maintenance contract (for an O&M Contractor and project company), building-services contract, fuel or other input supply contract

<sup>80</sup> E.R. Yescombe, *op. cit.*, p. 163

<sup>81</sup> Developed country is a sovereign state that has a highly developed economy and advanced technological infrastructure relative to other less industrialized nations, example United Kingdom, Germany and Australia.

<sup>82</sup> A poor agricultural country that is seeking to become more advanced economically and socially

<sup>83</sup> An emerging market economy describes a nation's economy that is progressing toward becoming more advanced, usually by means of rapid growth and industrialization. Example, Brazil, Russia, India and China

<sup>84</sup> Marcos Sorge, *op. cit.*, p. 94

<sup>85</sup> Stefano Gatti, *op. cit.*, p. 239

<sup>86</sup> Foreign Exchange Risk arises from a mismatch of the currency of the revenues, operating costs, and the debt.

<sup>87</sup> Other means to minimise technology risk include technology management, technology warranty, quality assurance, and technology guarantee.

operating risk – management component<sup>88</sup> (management contracts, labour contracts and training contracts are used to mitigate this risk); environmental risk<sup>89</sup> (can be remedied through environmental management and rehabilitation management/revenues, at which specialists in supplying environmental equipment and services structure this risk via their contractual arrangements); infrastructure risk (infrastructure contract, government commitments, pooled infrastructure can be used when drafting respective contract structure in infrastructure project); completion risk<sup>90</sup> (through turnkey construction contract, multi-party turnkey contracts and partnering charters/alliance contracting, such a risk can be mitigated).<sup>91</sup>

In catering the risks associated in contractual arrangements of a project, the risk allocation analysis can be made with regard to the following aspects:<sup>92</sup>

- (i) Does the opposite party have technical competence and sufficient creditworthiness?<sup>93</sup>
- (ii) Do the terms and conditions of the contract properly pass-through the intended risks?<sup>94</sup>
- (iii) What are the minimum thresholds and limits on liabilities to the counter-party?<sup>95</sup>
- (iv) Where and how is the contract enforced?<sup>96</sup>

---

<sup>88</sup> It is one of the risks badly reviewed and structured as it is a truism that many mega-projects depend on a few good people at the top.

<sup>89</sup> Environmental risks carry the likelihood forms emissions (of dangerous solids, liquids and gases); catastrophe; contextual; contamination; and sustainability. In such circumstance, it is natural for a government to be wary of unscrupulous companies who abandon the SPV and the government is left with the clean-up job and cost.

<sup>90</sup> Also called development, delay and cost-overrun, or construction risk, is the key concern in any project yet to be built. However, it is not present when taking over a project already in existence and producing cash flow (as in a privatisation where the government is selling off an operating enterprise)

<sup>91</sup> Richard Tinsley, *op. cit.*, p. 210 - 365

<sup>92</sup> Charles T. Haskell, *op. cit.*, p. 25

<sup>93</sup> *Ibid*

<sup>94</sup> *Ibid*

<sup>95</sup> *Ibid*

<sup>96</sup> *Ibid*

### **2.4.1.3 The role of the host country**

Despite having a suitable contractual structure for a specific project financing at hand, the location of the project is certainly the one that can neither be structured around nor wished away as it is the political and social stability as well as its legal structure of the host country will be of concern to all investors and lenders.

The growth and extensive use of project finance, recently, has caused several legal issues and hence being more challenging to host countries, especially, countries which have never seen financing or commercial transactions at large scales. A good example is in areas of West Africa and (recently in East Africa) where international oil companies are exploring energy resources (like gas in Tanzania) and resulting into billions of dollars of investments and capital costs.<sup>97</sup>

However, the political and social stability of the host country is of vital concern to the investors and lenders. Similarly, the laws and regulation of the host state affects virtually every aspect of the project company's activities, and courts as well as other governmental institutions have a wide discretion in interpreting and implementing the law covering such project.<sup>98</sup>

A decision to proceed with a project involves a number of critical issues for the host government/country. For example, the legal analysis of the role of host country is essential in project where a number of legal factors are to be assessed, including: legal certainty and change in law; taxation; corporate governance; and, regulation and authorisation.

#### **2.4.1.3.1 Legal certainty and change in law**

Public policy and law changes may affect the life of a project, and at an extreme circumstance, the changes in law can result in actual or 'creeping' expropriation, as John Dewar describes.<sup>99</sup>

Matters pertaining to law, the awards and or judgements enforcement in the home jurisdiction

---

<sup>97</sup> Philip Fletcher, *op. cit.*, p. 1

<sup>98</sup> John Dewar, *op. cit.*, p. 7

<sup>99</sup> *Ibid*, p. 13

of the assets, the borrower or other project parties, also a general focus of choice of law on either English or New York law,<sup>100</sup> the neutrality of the forum of decision making, the evidential or procedural rules applied in such forum, are important to be addressed especially to a more acute country where no tradition of reported case law applies.<sup>101</sup>

Concerns over legal and regulatory certainty are perhaps more acute in relation to projects operated in regulated industries or those that have significant social or environmental impact. Hence utilization of regional integration and the harmonization of disparate legal systems can be an alternative for countries with little clarity to their laws on project finance.<sup>102</sup>

#### **2.4.1.3.2 Taxation:**

Taxation differ from country to country and even from project to project. As all projects are subject to taxation (or some form of taxation), the tax regime will generally have a significant impact on the project's economy. It is thus John D. Finnerty states that "*When deciding whether to approve a proposed project, a host government should consider the stream of future tax revenues the project is likely to generate...*"<sup>103</sup> Taxes such as corporate taxes, sales or value-added taxes are to be expected to be imposed to the project company and they are used (especially by project sponsors) to assess the return of the investment (project) after-tax basis.<sup>104</sup>

Certainty and clarity of tax regime is the assurance of expected economic return of the project (and in project finance). Thus, a host country may consider a number of reliefs in order to facilitate effective project investment. However, in consideration of reliefs under withholding

---

<sup>100</sup> A good example is the Bermuda Company saga in West Africa as the company borrowed loans to finance the purchase of the products from the producer where the financing documents were governed by New York Law and project's bank accounts were charged to the lenders under English law in London.

<sup>101</sup> Phillip Fletcher, *op. cit.*, p. 3

<sup>102</sup> Phillip Fletcher and Andrew Pendleton, *International Project Finance*, The Projects and Construction Review, (Law Business Research Ltd, 2<sup>nd</sup> Edition, June 2012), p. 8

<sup>103</sup> John D. Finnerty, *op. cit.*, p. 275

<sup>104</sup> John Dewar, *op. cit.*, p.8

taxes,<sup>105</sup> it is likely that some degree of relief from the effects of the withholding requirement available under an applicable double-taxation treaty or the domestic laws of the country in which investors or lenders are situated.<sup>106</sup>

Further, the importance of fiscal stability clauses in taxation should not be undermined as they provide for a long payback and profitability period (generally exceeding 10 years), and bind the host country in abstaining from changing the tax rules once the investment is sunk and revenues starts to accrue.<sup>107</sup>

#### **2.4.1.3.3 Corporate Governance:**

Corporate laws (and local accounting practices) are key to project companies established under the local law. Investors, normally, quest for fluidity of the company in distributing profits to shareholders without any legal constraints.

The effectiveness of the corporate governance is sometimes checked, by foreign investors, on ascertaining the benefits from limitation on their individual liability for the obligation of the project company, as well as their rights such as respect of the rights of minority shareholders, voting rights, and pre-emption rights.<sup>108</sup>

#### **2.4.1.3.4 Regulation and authorisation:**

The host government/country is vested with an ongoing role of ensuring a smooth regulatory climate for future projects and project financing.<sup>109</sup> This encompasses issuance of licences and permit compliances and the regulatory structures which facilitate simple and smooth

---

<sup>105</sup> Countries apply withholding tax to dividend payments, management fees, interest payments, and royalty payments made to foreign entities, and often governed by a treaty save for countries which incorporate withholding tax provisions in their Tax legislations. See John D. Finnerty, *op. cit.*, p. 129

<sup>106</sup> Phillip Fletcher and Andrew Pendleton, *op. cit.*, p. 7

<sup>107</sup> Mario Mansour, *Fiscal Stability Clauses*, pg. 2, [www.academia.edu/20489971/Mansour\\_04\\_-\\_Fiscal\\_Stability\\_Clauses-unpublished](http://www.academia.edu/20489971/Mansour_04_-_Fiscal_Stability_Clauses-unpublished)

<sup>108</sup> John Dewar, *op. cit.*, p. 8

<sup>109</sup> Andrew Fight, *op. cit.*, p. 49

implementation of project finance as well as prohibition on ownership of real estate, local partnering requirements, and outright prohibitions of foreign investment.<sup>110</sup>

Many project operate in regulated industries that require ongoing compliance with detailed laws and regulation. It is to be understood that the manner in which regulation and authorisation is imposed can vary significantly. Philip Fletcher points out that the analysis of the regulatory environment involves two basic ideas: to determine the rights granted to, and the obligations that are imposed; and to assess the risks associated with the introduction of changes to the regulatory regime that could operate to the detriment of the project company, its investors or its lenders.<sup>111</sup>

Thus, a host country/government need not impose negative regulations in project financing. Positive regulation such as tax holidays are also key in influencing investment environment and facilitating project financing in the country.

## **2.5 Conclusion:**

While project finance is based upon certain fundamentals, it continues to evolve in form and practice through new components or applications. For example, the widespread post-1980s drive to privatise government service delivery adds a further perspective to the broadening application of project finance principles. Many professionals from engineering, the built environment and law have become associated with the delivery of capital assets in private finance initiative (PFI) arrangements,<sup>112</sup> public private partnerships (PPP)<sup>113</sup> or similar such

---

<sup>110</sup> See Scott L. Hoffman, *op. cit.*, para 7.06

<sup>111</sup> Phillip Fletcher and Andrew Pendleton, *op. cit.* p. 7

<sup>112</sup> Here a private sector service provider is typically given responsibility for designing, building, financing and operating assets from which public services are delivered.

<sup>113</sup> A generic term that encompasses a number of partnership options for service delivery.

ventures. These initiatives have reflected problems typically addressed in the core project finance model, such as managing incentive conflicts and other risks.

It is opined that poorly conceived PFI or PPP arrangements may represent the flawed evolution of a generally sound model, taking place under political pressure for the public sector to devolve more and more risks to private sector agents. While aspects of PFI and PPP transactions are within the project finance domain, they may be conceived and constructed without due consideration of the high asset-specificity of project finance, which is crucial in its transactional integrity.



## **Chapter Three: PROJECT FINANCE IN TANZANIA**

### **3.1 Introduction:**

This chapter oversees the extensive study of the domestic and international project finance regulation in Tanzania. Through the study of the aforesaid, the extensive areas of examination shall be on the evolution of the project finance regulation in Tanzania, the Legal and regulatory framework of project finance in Tanzania, the effectiveness of legal and regulatory framework of project finance in Tanzania; and the concluding statement on the light of the study of project finance in Tanzania.

### **3.2 Evolution of Project Finance in Tanzania:**

Year 2010 is of high importance in the aspect of project finance in Tanzania because of the enactment of the PPP Act as one of the main law for regulating and governing projects regime. However, before the year 2010 (and even currently), Tanzania has been a strong favourite of FDIs<sup>114</sup> and foreign donations in several developmental sectors such as Health and Infrastructure.<sup>115</sup> It suffices to point out that FDI, still, remains a dominant type of financing of foreign direct investment in Tanzania and its inflows grew sharply by 46.4% in 2012 to USD 1,799.6 million.<sup>116</sup>

From the study of Tanzania's National Bureau of Statistics (NBS) in 2007, which revealed a more sizeable economy with a 31.4% larger 2013 GDP, the growth which has been driven by

---

<sup>114</sup> In 2013 alone, FDI inflows of 618.3million USD have been accumulated following increased natural gas exploration activities as well as various gas field support services. See 2013 Tanzania Investment Report

<sup>115</sup> Notable is the construction of TAZARA Flyovers funded by Japanese government through grant aid of an estimated cost to USD45m. See Helmet News, *Tanzania: Dar es Salaam Flyover Construction Scheduled For October*, (July 27 2016)

<sup>116</sup> Tanzania Investment Report 2013: Foreign Private Investment; Also see US Department of State, Tanzania Investment Climate Statement, June 2015, p. 4, where they reckon that the Government of Tanzania has attracted USD 1.87 billion of FDI inflows since 2013, a 72% increase from the previous year and the highest in the East Africa region.

transportation, communication, agriculture, manufacturing, electricity, wholesale and retail trade, real estate, and business services, as well as the rise of energy and mining sector's contribution to the GDP (in recent years), the government of Tanzania has taken deliberate steps to encourage private-led growth (economy).

This recalls the statement produced by the former (third) president of Tanzania, His Excellency Benjamin William Mkapa when he stated:

*“...My Government is determined to create such effective and efficient public service that will be relevant to the changing needs and times. To succeed, we call for the full cooperation and support of all stakeholders in a spirit of genuine PARTNERSHIP between Government and the Private sector to promote competitive growth, job creation and enhancement of national wealth...”*( President Benjamin W. Mkapa, 2000).<sup>117</sup>

Since 2000, despite the continuing use of FDI and foreign donations and grants, efforts have been made in pursuing both domestic and international projects, in Tanzania, via the PPP approach. This has been noticed through the Millennium Development Goals (MDGs) and National Strategy for Growth and Reduction of Poverty (NSGRP) – United Republic of Tanzania, 2005 - which both have called for innovative methods and provision of regulatory frameworks that have direct relations with the private sector, hence, have placed the public at the core of the programme.<sup>118</sup>

Before the enactment of the PPP Act, and in the words of Hon. Mizengo P. Pinda (former Prime Minister of the URT), most PPPs implemented in Tanzania are concession arrangements for

---

<sup>117</sup> Prof Josephat Itika, Dr Oswald Mashindano & Dr Flora Kessy, Success And Constraints For Improving Public Private Partnership In Health Services Delivery In Tanzania, Esrf Discussion Paper No. 36, Dar es Salaam Tanzania, p. 8

<sup>118</sup> *Ibid*

running existing enterprises with limited provisions for rehabilitation and new investments.<sup>119</sup> Apart from the aforesaid, four challenges have prompted the enactment of the PPP Act, which are: (a) lack of comprehensive policy, legal and institutional frameworks that provide clear guidelines and procedures for development and implementation of PPPs; (b) lack of realistic and comprehensive technical, socio-economic and commercial feasibility analysis which leads to poor project design; (c) inadequate enabling environment which includes lack of long-term financing instruments and appropriate risk sharing mechanisms; and (d) insufficient capacity negotiations, procurement, implementation and management of PPPs.<sup>120</sup>

In light of the evolution of PPP Act in Tanzania, it suffices to point out, that the government of Tanzania, to a degree, has responded to the call to reform and improve the investment climate. This is through the “Big Results Now” (2012 – 2015) capital expenditure program which seeks to transition the country from low to middle-income, supported by the Vision 2025, the 15-year Perspective Plan (2010 – 2025) and the First Five-Year Development Plan (2011 – 2016) which have also identified PPPs as a mean to attract new investment.<sup>121</sup>

### **3.3 Legal and Regulatory Regime:**

It should be noted that Tanzania recognises PPP, a specific form of project finance where a public service is funded and operated through a partnership of government and the private sector, typically structured under a long-term concession arrangement. In return, the SPV receives a defined revenue stream over the life of the concession from which the private sector

---

<sup>119</sup> National Public Private Partnership Policy, November 2009, The United Republic of Tanzania: Prime Minister’s Office, Dar es Salaam

<sup>120</sup> *Ibid*

<sup>121</sup> [pppknowledgelab.org/countries/tanzania](http://pppknowledgelab.org/countries/tanzania)

investors extract returns.<sup>122</sup> However, it suffices to point out other project finance forms/structures include process-plant projects<sup>123</sup> and infrastructure projects.<sup>124,125</sup>

The legal regulation for project finance in Tanzania is by the PPP Act No. 18 of 2010 as amended by the PPP Amendment Act No. 3 of 2014 and PPP Act No. 18 of 2010 – Regulations of 2011, GN 165/2011. The Act was enacted to encourage participation of private sectors (parties) across infrastructure sectors,<sup>126</sup> however a small positive impact has been noticeable as, still, lack of access to finance is a bottleneck for many private sectors,<sup>127</sup> and foreign investors are given an upper-hand in such projects.

Other laws which lays a crucial foundation of project finance regulation are: the Public Procurement Act No. 7 of 2011, and the Public Procurement Act – Regulations of 2013, which regulate PPP procurement; the Companies Act No. 12 of 2002 (Cap. 212 of the laws of Tanzania) which provides for the establishment, regulation and dissolution of (domestic and foreign) companies; and the Capital Markets and Securities Act (CMSA) No. 5 of 1994 as amended by the Capital Markets and Securities (Amendments) Act No. 10 of 2010 which provides for regulation of financial instruments (equity, debt, and hybrid instruments) which are used for raising finances in project(s).

---

<sup>122</sup> Dejan Makovše & Daniel Veryard, *The Regulatory Asset Base and Project Finance Models: An Analysis of Incentives for Efficiency*, Discussion Paper 2016-1, International Transport Forum, Paris, France, February 2016, p. 21

<sup>123</sup> These are projects where there is an input at one end of the project, which goes through a process within the project, and emerges as an output. Key contractual documents include Project Agreement, Engineering, Procurement and Construction Contract (EPC Contract), Input-Supply Contract, and, an Operation and Maintenance Contract (O&M Contract)

<sup>124</sup> This includes Privatized and Private-Sector Infrastructure, Public-Private Partnerships (covering both Concessions and PFI Model), and Revenue Bond (a structure only found in the U.S. market)

<sup>125</sup> E.R. Yescombe, *op. cit.*, p. 14 - 20

<sup>126</sup> OECD, *Overview of progress and policy challenges in Tanzania*, in OECD Investment Policy Reviews: Tanzania 2013, (OECD Publishing, 2013), pg. 31

<sup>127</sup> PwC, *Africa Gearing Up – Future Prospects In Africa For The Transportation & Logistics Industry*, South Africa, 2013, pg. 75

### 3.3.1 Laws and Regulations

#### 3.3.1.1 Public Private Partnership Act, No. 18 of 2010

In 2009, the government of Tanzania issued the Public-Private Partnership (PPP) Policy with the PPP Act and PPP Regulations released in 2010 and 2011 (as amended in 2015), respectively.

The Act was amended in 2014, and was signed and published in the Gazette in December 2014, and thus is now law. Previously, the PPP Act had a Coordination Unit under the Prime Minister's Office (PMO), which has been replaced under the Amendment by a PPP Centre (still under the PMO), though it should be noted that the PMO PPP Centre is not yet operational.<sup>128</sup>

In theory, PPP projects can either be proposed by the government (solicited bids) or by private parties (unsolicited bids). In practice, most recent applications have been made on an unsolicited basis. Although, the processes have many similarities, for example, that a feasibility study must be carried out before the project can be submitted for public sector approval,<sup>129</sup> there are key differences, like, the party responsible for progression of the project through the phases of the process, and the point in the process the Contracting Authority (CA) selects a party to develop the project differs<sup>130, 131</sup>.

Worth noting [several] PPP projects prior to drafting a PPP Policy, the Act or the Guidelines, in Tanzania, include the Kilimanjaro International Airport (KIA) PPP Project whereby the airport and its estate were concession for 25 years to Kilimanjaro Airports Development Company (KADCO) in 1998. Other PPP projects include the Tanzania International Container

---

<sup>128</sup> Section 2,4 & 5 of the PPP (Amendment) Act (Cap 103) of 2014

<sup>129</sup> Section 11

<sup>130</sup> Section 10 (read together with Section 10 of the PPP (Amendment) Act (Cap 103) of 2014)

<sup>131</sup> Clyde & Co, *Public Private Partnerships In Tanzania: The New Regime Explained*, (Project & Construction, September 2013)

Terminal Services (TICTS) container terminal concession in the Port of Dar es Salaam in 2000, and the central railway corridor concession in 2007 where the concession for operation of passenger and freight services granted to RITES Limited (India Company).<sup>132</sup>

Several PPPs under the Act are in process, but none have yet reached financial closure. These include Chalinze super highway in Dar es Salaam; Arusha to Moshi Toll Road; Mbegani Port project in Bagamoyo; Mwambani Port project in Tanga; Kisarawe Cargo Freight Station; Expansion of the Mtwara Port; Improvement of the Kilwa Port; and Expansion of Kasanga and Kigoma ports.

### ***Project Finance Structure/Entity***

The Act is silent on the formation of a project structure, however, through the PPP Agreement, the private party (either natural or legal being) finances, operates, maintains public infrastructure, and is paid for its use; the asset concerned usually reverts to public-sector control/ownership at the end of the contract term.

This means, a PPP project in Tanzania can take form of a company, a partnership or a joint venture. A good example is the Nyerere Bridge (also dubbed Kigamboni Bridge) – Dar es Salaam is a joint venture project between the National Social Security Fund (60% - sixty percent) and the Government (40% - forty percent)<sup>133</sup> with a total cost of Tshs. 254.12 billion.<sup>134</sup>

---

<sup>132</sup> Axil Consulting The Cross Sector Advisory, PPP Country Paper Tanzania, Submitted to SADC-DFRC 3P NETWORK Public-Private-Partnership Working Group, 2013, p. 8

<sup>133</sup> National Social Security Fund, Kigamboni Bridge, [www.nssf.or.tz/index.php/investments/kigamboni-bridge](http://www.nssf.or.tz/index.php/investments/kigamboni-bridge)

<sup>134</sup> Tanzania Transport – Tanzania Inaugurate Nyerere Bridge Linking Dar es Salaam to Kigamboni, (April 22, 2016)

Thus, a private party,<sup>135</sup> at most, is either a project vehicle or establishes a project vehicle, frequently being a company, separately, independently and especially established for the sole purpose of delivering the project at hand.

### ***Contractual Arrangements***

*Section 3* of the Act defines an agreement to mean a public private partnership agreement entered into in terms of the Act, whereas, a public-private agreement is defined as a contractual arrangement between a contracting authority<sup>136</sup> and a private party entered into in terms of the Act.

Under the Act, public private partnership agreement (PPP Agreement) – the main agreement/contract recognised in the Act - can be entered by a contracting authority with a private party for performance of one or more of the functions of that contracting authority.<sup>137</sup>

The PPP agreement must, among other requirements, be in writing and provide for the assets, if any, to the contracting authority, at the termination or expiry of the duration, and provide for the payment to the private party, by way of compensation from a revenue fund of charges or fees collected by the private party from users or customers of the service provided by it.<sup>138</sup>

Such concessions/agreements are used generally for the operation of infrastructure projects in Tanzania. Further, the Act restricts transmission or assigning of rights, obligation and controlling interests in any project to the third party by the private party without the prior written consent of the contracting authority.<sup>139</sup> Further, every agreement entered into under the Act shall be governed and construed in accordance with the laws of Mainland Tanzania or any

---

<sup>135</sup> Defined under *section 3* of the Act to mean a party to the agreement other than a contracting authority (any Ministry, government department, local authority or statutory corporation)

<sup>136</sup> A contracting authority includes any Ministry, government department, local authority or statutory corporation. (section 3 read together with section 10 of the PPP Act, 2010)

<sup>137</sup> Section 12(1)

<sup>138</sup> Section 12(2)

<sup>139</sup> Section 12(5)

other laws agreed by the parties.<sup>140</sup> The agreements may include construction agreements, sales agreement and the like.

### ***Host Country***

The PPP (Amendment) Act established the Public Private Partnership Centre (PPP Centre)<sup>141</sup> and the PPP Technical Committee<sup>142</sup> and repeals the Coordination Unit and Finance Unit (the Unit).<sup>143</sup>

The PPP Centre resembles the former Unit however its functions/authority has been expanded, among other things, include to deal with fiscal risk allocation and other financial matters of all PPP projects.<sup>144</sup> Also the PPP Centre regulates the PPP Technical Committee and the PPP Facilitation Fund through monitoring and providing technical assistance and evaluating their implementations.<sup>145</sup>

The PPP Technical Committee, comprised of a number of public officials including the Deputy Attorney General,<sup>146</sup> among other things, considers and approves PPP proposals made to it by the PPP Centre, submits approved PPP proposals to the National Investment Steering Committee for scrutiny, approves allocation of funds from the Public Private Partnership Facilitation Fund (the Facilitation Fund),<sup>147</sup> and assigns to contracting authorities terms and conditions for utilisation of the Facilitation Fund.<sup>148</sup>

---

<sup>140</sup> Section 12(4) of the Act

<sup>141</sup> Section 3 of the PPP Amendment Act

<sup>142</sup> Section 7 *Ibid*

<sup>143</sup> One of the main functions of the Unit was to make assessments of all projects submitted to it, approve proposed projects and feasibility studies, and advise on policy in relation to PPP projects – Section 7 of the PPP Act, 2010

<sup>144</sup> Section 5 of the PPP Amendment Act - Functions of the PPP Centre

<sup>145</sup> *Ibid*

<sup>146</sup> Section 7(1) of the PPP Amendment Act

<sup>147</sup> Section 10B *Ibid*

<sup>148</sup> Section 7A *Ibid*



Nevertheless, in the promotion of PPP projects and investments, the TIC through section 6 of the TIC Act as amended in *section 29* of the PPP Act, 2010, the TIC promote private sector participation in the provision of public services through public-private partnership.

However, not giving the mechanisms of dispute settlement, settlement of disputes is a critical element in any project agreement. The Tanzanian judicial system must, therefore, be continuously improved to boost the confidence of concessionaires, financiers and contractors to participate in various infrastructure projects.<sup>149</sup>

### **3.3.1.2 Companies Act, No. 12 of 2002**

The Companies Act No. 12 of 2002, a product of the Companies Ordinance No. 46 of 1931 is marked to be a starting point to vital changes in the Company law regime in Tanzania.<sup>150</sup> Its enactment in 2002 repealed and replaced the Ordinance No. 46, and came into force/effect on 1 March 2006 after was assented by the President on 27 June 2002. The Act specifically deals with companies and other associations, to provide for more comprehensive provisions for regulation and control of companies, associations and related matters.<sup>151</sup>

As it is recalled from the previous chapter, the most common principal business structures of project companies in Tanzania are limited liability companies;<sup>152</sup> these may be private or public and may also be foreign or locally owned. However, it suffices to recognise other forms of business structures of project finance, in Tanzania, which include Partnership<sup>153</sup> and joint venture.<sup>154</sup>

---

<sup>149</sup> Paul Kibuuka, *op. cit.*

<sup>150</sup> Robert Mecky, *The Companies Act and A Single Shareholder Company: An Appraisal*, 2013

<sup>151</sup> Preamble of the Companies Act No. 12 of 2002

<sup>152</sup> By shares (Section 3(2)(a) of the Companies Act) or by guarantee (Section 3(2)(b) of the Companies Act)

<sup>153</sup> Governed under Part XI of the Law of Contract Act [Cap 345, R.E 2002]

<sup>154</sup> A commercial enterprise undertaken jointly by two or more parties that otherwise retain their distinct identities.

Section 27<sup>155</sup> of the Companies Act defines Private Company to mean any company which by its articles restricts to transfer its shares, limits the number of its members to fifty (50) and prohibits any invitation to the public to subscribe for any shares or debentures of the Company.<sup>156</sup> These types of companies are supposed to submit for filing annual returns and any other statutory fillable documents to the Registrar.<sup>157</sup>

SPV's can, also, be in the form of a Public Company whereby *section 3(3)* of the Companies Act defines [a] Public Company as a company limited by shares or guarantee and having a share capital, being a company the memorandum of which states that it is to be a public company.

Further, Part XII of the Companies Act provides for Companies Incorporated outside Tanzania (hereinafter known as Foreign Companies). These types of companies are incorporated outside Tanzania mainland and they come in the country as branches of such foreign companies. Even if all subscribers and/or shareholders are nationals of the United Republic of Tanzania, the companies are regarded as foreign.<sup>158</sup>

In the course of project finance transaction deal, a project company's assets may be held as security by a project lender. Such securities include mortgages,<sup>159</sup> pledges,<sup>160</sup> and Charges over company assets. Part IV of the Companies Act provides for Registration of Charges. The Act does not provide for the meaning of a 'Charge' but can generally mean a security behind a loan, which, in Tanzania, can be *floating charge*<sup>161</sup> and/or *fixed/specific charge*.<sup>162</sup>

---

<sup>155</sup> Section 27 – 29 of the Companies Act provides for Private Companies

<sup>156</sup> In such circumstance, the restriction on the members on the right to transfer their shares can be through the power of the board of directors to refuse register transfer of shares (Part II of the Schedule to the Companies Act), and through the right of pre-emption in favour of the other Members.

<sup>157</sup> Like changes of particulars of directors, change of company names

<sup>158</sup> Section 433 of the Companies Act

<sup>159</sup> Governed under the Land Act No. 4 of 1999, and the Village Land Act No. 5 of 1999

<sup>160</sup> Regulated under the Law of Contract Act, Cap 345, R.E. 2002

<sup>161</sup> Is a security interest over a fund of changing assets (e.g. stocks) of a company

<sup>162</sup> Is a liability to a creditor that relates to specific assets of a company

*Section 96(1)* of the Companies Act provides for the requirement of registration of a charge, at which failure to do so, the officers of the company responsible will be held liable,<sup>163</sup> a requirements of which a project company is required to undertake. As both fixed and or floating charge can be created on a company's property, less restrictions as well as reduction of tax duties<sup>164</sup> will ease the project transaction.

The key changes introduced under the Companies Act 2002 for companies operating in Tanzania are indeed largely driven by a recognised need to clarify the existing law, though they do offer additional protection for those dealing with Tanzanian companies, and for the Company itself (and indeed for its creditors) in the event it finds itself in financial difficulty.<sup>165</sup> Such changes include Insolvency provisions where prior to the Companies Act, in this respect, affords an orderly and fair process for insolvent companies and their creditors.

### **3.3.1.3 Capital Markets and Securities Act, 1994<sup>166</sup>**

The Capital Markets and Securities Act of 1994 is the basic law which regulates the conduct of business in capital markets. Among other things, it establishes the Capital Markets and Securities Authority (CMSA) for the purpose of 'promoting and facilitating the development of an orderly, fair and efficient capital markets and securities industry in Tanzania'<sup>167</sup> hence the enforcement organ.

---

<sup>163</sup> Sec. 101(2) of the Companies Act

<sup>164</sup> A nominal stamp duty of 10,000/= Tshs and registration fees of 15,000/= Tshs must be payable for a 'Charge' to be valid and registered. See Stamp Duty Act of 1972

<sup>165</sup> Krista Van Winkelhof, *Company Law Reforms in Tanzania: The Companies Act 2002*, (July 24, 2013)

<sup>166</sup> The Capital Markets and Securities Act (Act No. 5 of 1994 as amended by the Capital Markets and Securities (Amendments) Act, No. 10 of 2010)

<sup>167</sup> Preamble of the Capital Markets and Securities Act

The CMSA major role in project finance is to provide appropriate mechanisms for mobilizing long term savings and ensuring efficient allocation of resources to productive sectors in that way stimulate economic growth.<sup>168</sup>

Reflecting the characteristics of developing countries with regard to their underdeveloped equity markets, the importance of the stock exchange in the economy of Tanzania is currently low. However, loans/debt<sup>169</sup> and equity (subscription/issuance of shares)<sup>170</sup> remain as major financing sources of project finance.

The fragility in the global financial systems<sup>171</sup> calls for the Tanzania Capital Market and Security Authority to enshrine and shield, not only domestic banks and investors, but also attract foreign investors, in favouring the issuance of equity than debt, as it is reasoned that debt may cause financially sound firms and investors, to become insolvent once they are subject to a downturn of fixed repayment schedules, as debt is subjected to term loans required to be refinanced at the end of term, *while*, equity has no fixed repayment obligations, and in a downturn of the project, the firm in question simply cuts its dividends payments, without breaching any repayment terms, as equity is perpetual and does not require refinancing.

The Act comes together with a number of regulations<sup>172</sup> including the Capital Markets and Securities (Foreign Investors Amendments) Regulations 2014 which set limitations on foreign investment in government bonds and publicly traded securities, though controversy has held

---

<sup>168</sup> Section 10 of the Capital Markets and Securities Act – General functions of the CMSA. Other functions of CMSA include advising the Government on policies and all matters relating to the securities industry

<sup>169</sup> Whether being partnership or company, loans/debt instrument have been used by banks and other financial institutions (domestic or foreign) in project finance transactions. In Tanzania, especially in the capital market, loans/debt instruments must be integrated with the exchange control requirements and the Income Tax Act of 2004 where tax on interests and deduction expenses are made to the borrowers' taxable income.

<sup>170</sup> Unlike debt, share subscription does not amount to payment of tax, however other formalities are to be followed

<sup>171</sup> Debt hurts economic activity as new debt does not fund new productive assets and they create fragility. The dotcom bubble of 1990s did not create financial crisis even though losses amounted to USD 4 trillion and were equity in nature, whilst the 2008 financial crisis losses were estimated at USD 2 trillion and caused a financial crisis as they were debt in nature.

<sup>172</sup> Regulations in the Capital Market and Securities Authority are made under section 148(1) of the Capital Markets and Securities Act, 1994, as amended in 2010

up implementation of the Regulations.<sup>173</sup> The Capital Markets and Securities (Foreign Companies Public Offers Eligibility and Cross Listing Requirements) Amendment Regulations, 2005, sets out the eligibility criteria and disclosure requirements for foreign companies to make public offers or cross list at the DSE.

Further, the Capital Market and Securities (Corporate Governance) Guidelines, 2002, the project participants (such as shareholders, lenders, and investors) rights are protected as the guidelines aim at improving and strengthening corporate governance practices by issuers of securities through the capital markets.

#### **3.3.1.4 Law of Contract Act [Cap. 345, R.E. 2002]**

The Law of Contract Act among other things regulates Partnership.<sup>174</sup> Section 190(1) of the Law of Contract Act defines a partnership to mean the ‘relationship which subsists between persons carrying on business in common as defined with a view of profit’.

In Tanzania, a partnership (in this sense, of a project finance transaction) must arise out of contract and not status.<sup>175</sup> Two or more individual as well as corporate bodies can enter into a partnership to carry out a project. Thus, the partners are known collectively as a firm.<sup>176</sup>

A partnership in Tanzania must comply with a number of restrictions such as: choice of a partnership name must be within the limits of the Business Names (Registration) Act,<sup>177</sup> registration of a partnership deed to the Registrar of Documents,<sup>178</sup> payment of tax

---

<sup>173</sup> Tanzania Investment Report 2013: Foreign Private Investment; Also see US Department of State, Tanzania Investment Climate Statement, June 2015, p. 5; CMSA Annual Report 2014-2015 p. 23

<sup>174</sup> Part XI of the Law of Contract Act [Cap. 345, R.E. 2002]

<sup>175</sup> Section 191(1) *Ibid*

<sup>176</sup> Section 190(2) *Ibid*

<sup>177</sup> Specifically Section 4 and 9 of the Act

<sup>178</sup> Regulated under the Registration of Documents Act

(individually)<sup>179</sup> and the Law of Contract Act [Cap. 345, R.E. 2002] which regulates the formation, operation and dissolution of partnership.<sup>180</sup>

However different from other jurisdictions, Tanzania does not have categories of partners and partnership but rather a general partnership and partners (general partner<sup>181</sup> and dormant partner).<sup>182</sup> Each partner in a partnership must be competent to contract; age of majority; of sound mind; and is not disqualified from contracting by any law to which he is subject.<sup>183</sup>

Partners are jointly and severally liable (unlimited liability). The liability as well as rights and duties of a partner can be determined by a partnership deed or the Law of Contract Act<sup>184</sup> where there is absence partnership deed.

### **3.3.2 Regulatory Regime/Framework**

Regulatory framework or regime is defined to mean the existence of the necessary infrastructure which supports the control, direction or implementation of a proposed or adopted course of action, rule, principle or law,<sup>185</sup> and usually established by a government to regulate a specific activity.<sup>186</sup>

As most projects affect the involvement of the government, specific bodies are/were established for the purpose of dealing with project finance transaction in each (and specific) sector.

---

<sup>179</sup> Section 48 and 50 of the Income Tax Act of 2004 as revised in 2008

<sup>180</sup> Section 212 to 226 of Law of Contract Act [Cap. 345, R.E. 2002]

<sup>181</sup> This is a standard type of partner where a general partner has a right to participate in the management of the partnership and a right to share in the profits.

<sup>182</sup> This is a general partner, in essence, who has no active role in the management of the firm but has the right to share of profits and is responsible for the liabilities of the firm.

<sup>183</sup> Section 10 read together with Section 211 of the Law of Contract Act [Cap. 345, R.E. 2002]

<sup>184</sup> Section 194, 200 and 201 *Ibid*

<sup>185</sup> [www.caricomstats.org/Files/ICT/Justification%20-%20Policy%20and%20Reg%20Framework.pdf](http://www.caricomstats.org/Files/ICT/Justification%20-%20Policy%20and%20Reg%20Framework.pdf)

<sup>186</sup> [www.financepractitioner.com/dictionary/regulatory-regime](http://www.financepractitioner.com/dictionary/regulatory-regime)

General approvals for the establishment and conduct of projects are determined by the Ministry of Finance and Economic Affairs,<sup>187</sup> Tanzania Investment Centre (TIC),<sup>188</sup> Export Processing Zones Authority (EPZA),<sup>189</sup> and Special Economic Zones Authority (SEZA).<sup>190</sup>

However, a number of sectorial organs/bodies governed by respective ministries have also been established to include: agriculture;<sup>191</sup> energy (minerals, power, oil and gas);<sup>192</sup> telecommunications and transportation (airports, roads, railways and ports);<sup>193</sup> tourism;<sup>194</sup>

---

<sup>187</sup> The office is responsible for overall revenue, expenditure and financing of the government of the United Republic of Tanzania and provides advice on the broad financial affairs in support of government's economic and social objectives.

With respect to project finance – especially when the project is publicly financed – is required to provide – among its other duties - for the budget of a specified project, for example construction of Standard Gauge Railway, with regard to a specific sector, for example railway sector and advice the government via the parliament in its implementation. Nevertheless, the Minister can give guarantees on behalf of the government in respect of the Government Loans, Guarantees and Grants Act, Cap. 134

<sup>188</sup> However, the general aim of the TIC is in investment facilitation and investment promotion as per the Tanzania Investment Act, 1997, lenders and sponsors as investors in a project [finance transaction] are generally regulated by TIC. Among other things, the TIC provides incentives to large investors on tax, immigration, guarantee as well as land usage. Tanzania owners of projects are awarded incentives if they qualify a US\$100,000 requirement unlike foreign investors who are required to have a minimum of US\$300,000 by the Act – Section 2(2)(a)&(b)

<sup>189</sup> Established under the Export Processing Zones Act, 2002, the EPZA administers, governs and supervise projects locating in export processing zones

<sup>190</sup> The Authority, chaired by the President, and established under the Special Economic Zones Act, 2006, has the general obligation of approving as well as overseeing projects locating in special economic zones.

<sup>191</sup> A number of projects are conducted under the Ministry of Agriculture, Livestock and Fisheries in conjunction with Ministry of Finance and Economic Affairs and other foreign partners like World Bank (WB) AND Food and Agriculture Organization of the United Nations (FAO) such as Food Systems Development (with FAO); Agriculture Sector Development Programme (with AfDB); Global Agriculture and Food Security Programme; as well as Tanzania Agricultural Sector Development Project –PHRD (with World Bank).

Interestingly, currently, agriculture financing is purported due to inadequacy of public and private sector agricultural financing in Tanzania hence a positive indicator of modernization and development of the sector.

[www.tanzaniainvest.com/agriculture/agriculture-loans-nmb](http://www.tanzaniainvest.com/agriculture/agriculture-loans-nmb)

<sup>192</sup> It is one of the major investment area in Tanzania where a number of projects are observed. The Minister of Energy and Mineral Resources – and subsidiary regulatory bodies and agencies such as TMAA, EWURA, REA and TPDC - is the overseer of all activities (including investment projects) of energy sector. The Authority is derived from a number of legislations: Mining Act, No. 14 of 2010; Electricity Act, 2008; Rural Energy Act, 2005; Petroleum (Exploration and Production) Act of 1980.

<sup>193</sup> The sector is headed by the Minister for Infrastructure Development – and subsidiary regulatory bodies and agencies such as TCRA, RAHCO, SUMATRA, TCAA, and TPA - regulate all approvals, licences, permissions, and respective matters on projects in ports, telecommunications, roads, railways, airports. Such power is generated from Tanzania Communications Regulatory Act, 2003; Roads Act, 2007; Road and Fuel Tolls Act, Cap. 220; Railways Act, 2002; Surface and Marine Transport Regulatory Authority Act, No. 9 of 2001; Tanzania Civil Aviation Act, 2003; Ports Act, 2004

<sup>194</sup> Investment projects and proposals are to be regulated by the Minister of Natural Resources and Tourism, established under the Tourism Act, No. 29 of 2008

water, sewerage and irrigation;<sup>195</sup> trade, industry and competition; education and technical knowledge; and the like.

The aforesaid regulatory bodies generally provide approvals, licences and regulations in the conduct of projects, when they are privately built, operated and owned (B.O.O), however involved when public finance mechanism of project financing is employed.

Public Finance Act, No. 6 of 2001 is fundamental when dealing with public financing of a project as it lays down the means of control, management, and regulation of the collection and use of the finances of Tanzania and enhancing parliamentary control and supervision of public funds.<sup>196</sup>

Recalling the second question of the dissertation, “*Do the enabling laws and regulatory framework meet the desired purpose of project finance in Tanzania?*”, as there is no specific regulatory body dealing with project finance (transaction), the additional issue is whether there is a need of having a specific regulatory body or division. As the aim, in Tanzania, is to attain economic certainty and to have better legal and regulatory environment in various economic investment transaction, the matter before hand shall be addressed below.

### **3.4 Effectiveness of Project Finance Legal and Regulatory Framework in Tanzania**

Having many regulatory bodies in various sectors, still, several factors are to be assessed in order to assess its positive influence as well as challenges facing them, namely: legal factors; regulatory factors; and socio-political and economic factors.

---

<sup>195</sup> Regulated under the Ministry of Water and Irrigation, all projects related to water supply, irrigation and sewerage services must be approved by the Minister responsible. A number of laws are employed such as the Waterworks Act, Cap 272, the Waterworks Regulations of 1997, and Dar es Salaam Water and Sewerage Authority Act, Cap 273 – specific legislation for Dar es Salaam City.

<sup>196</sup> Preamble to the Act read together with Section 24 and 37 of the Act



*Legal factors:*

The enactment of PPP Act in 2010 and its associated regulations, on the face of it, implies the government of Tanzania wants to ensure that projects to be conducted in the ideal form of PPP. However, influencing private sectors in engaging in project finance transactions, PPP (projects and transactions) – a form of project finance, is faced with a number of challenges, to mention a few: inadequate PPP skills and knowledge, poor contracting and tendering documents, inadequate project management, inadequate legal framework and misinformation on financial capacity of private parties.<sup>197</sup>

Further, Tanzania, still, lacks a clear legal framework, for regulating project finance in respect of private transactions and public finance transactions – not disregarding PPP Act which regulate PPP form of project finance transactions. Thus, a need for redress is needed in order to ensure certainty and sustainability of the legal framework for project financing transactions.

*Regulation factors:*

Recognising a number of governmental agencies/bodies in various sectors, a government influence is too huge affecting the flexibility and conduct of private sectors in project finance transactions. Further, there is no clear regulatory body or division specific for project finance in Tanzania.

It is opined that either a separate regulating body should be established or a division within the TIC specific for project finance to be established dealing with all forms of project financing

---

<sup>197</sup> Neema Kavishe and Min An (2016), Challenges for Implementing Public Private Partnership in Housing Projects in Dar es Salaam City, Tanzania, In: P W Chan and C J Neilson (Eds.) Proceedings of the 32nd Annual ARCOM Conference, 5-7 September 2016, Manchester, UK, (Association of Researchers in Construction Management, 2016, Vol. 2: 938)

transactions and have a superior authority over all PPP projects and transactions to be conducted in Tanzania.

However, the role of both public and private institutions is recognised, especially banking and financial institutions and capital markets, as they lack or have very limited funding due to high lending rates with short term payment periods<sup>198</sup> and infancy of capital markets, respectively, rendering the inefficiency of domestic project financing deals.<sup>199</sup>

Also coupled with multiple taxes and fees as well as partial/weak enforcement of some land laws, Tanzania's prospect of project finance is in difficulty hence a remedy to such constraints should be addressed to reflect positive image towards the future of project finance mechanism.

*Socio-political and economic factors:*

Without disregarding the influence of legal and regulatory factors, socio-political and economic factors are important in assessing the effectiveness of project finance regime in Tanzania.

As noted that Tanzania, at most, depends on foreign funding in running projects, excessive foreign dependency marks future challenges especially in repayment, legal problems as well as economic and socio-political challenges. This is a result of insignificant middle income class (that accounts for less than 3% in Tanzania),<sup>200</sup> corruption and bureaucracy, absence of market transparency enhancing decisions – despite having Fair Competition Commission, political interference in technical decisions, existence of less risk and lucrative investment options,<sup>201</sup>

---

<sup>198</sup> Lending rates >17% for local currency and 8% for foreign currency

<sup>199</sup> Moses Kusiluka (PhD), Opportunities and Challenges of East African Property Markets for Foreign Investors with Emphasis on Tanzania, Presented at SAIBPP Convention 4-6 November 2015, Durban South Africa: Advancing Property Practitioners Beyond Borders

<sup>200</sup> However, the question of middle class is still in debate in Tanzania hence many of them may not fall in the categorization made by 'Deloitte on Africa'. See Zitto Na Demokrasia, 'Who is the Middle Class? Who is the Middle Class in Tanzania', (08/07/2013)

<sup>201</sup> A good example is 11-12% treasury bonds, 13-13.5% treasury bills, 13% certificate of deposits

less number of bank participants – accounting about 6% of the population has access to banks, limited banking system assets,<sup>202</sup> slow pace of capital market institutions development,<sup>203</sup> shortage of skilled manpower, to mention a few.<sup>204</sup>

In light of the aforementioned constraints, Tanzania should ensure self-sustainable and nurture the growth of middle income population as well as increasing the strength and sustainability of banks and financial institutions and capital markets, a few measures to mention, in order to assure positive impact and have effective project finance regime for current and future use.

### **3.5 Conclusion**

With little influence from Tanzania’s corporate governance and capital market structures, as they are still underdeveloped, the need for long-term funding is inevitable, as there is a need for the Tanzanian government to raise additional domestic revenues and expand its revenue sources.

Nonetheless, positive projections are also drawn through the Banking and Financial Institutions (Capital Adequacy) Regulation 2014<sup>205</sup> whereas the need for banks to ensure the adequate availability of long-term funding is ensured as it will impact the structuring of investment projects in Tanzania.

Thus, for the success of project finance deals in Tanzania, firstly, banks should have adequate funds in order to issue long-term funding as it is Basel III accord and Solvency II regime

---

<sup>202</sup> That is 10bn USD and high lending rates of 18-21%

<sup>203</sup> The Dar es Salaam Stock Exchange, currently comprise of 25 listed companies whose market share is still insufficient to cover vast project financing transactions in Tanzania. See African Markets, Dar es Salaam Stock Exchange (DSE) – Listed Companies, [www.african-markets.com/en/stock-markets/dse/listed-companies](http://www.african-markets.com/en/stock-markets/dse/listed-companies)

<sup>204</sup> Moses Kusiluka (PhD), *op. cit.*

<sup>205</sup> Banking and Financial Institutions (Capital Adequacy) Regulations 2014 is made under section 71 of the Banking and Financial Institutions Act, No. 5 of 2006

emphasis on banks to have a strong financial bases in order to offer the long-term funding, though it is early to mention of its effects.<sup>206</sup>

---

<sup>206</sup> Basel III is a global, voluntary regulatory framework on bank capital adequacy, stress testing, and market liquidity risk intended to strengthen bank capital requirements by increasing bank liquidity and decreasing bank leverage. [www.basel-iii-accord.com/](http://www.basel-iii-accord.com/)

# **Chapter Four: COMPARATIVE ANALYSIS OF PROJECT FINANCE LEGAL AND REGULATORY REGIME IN THE UK, SOUTH AFRICA AND TANZANIA**

## **4.1 Introduction**

In this chapter, laws and bodies established in the UK and South Africa shall be comparatively analysed (with that of Tanzania) with a view of grasping a suitable module of legal and regulatory framework to be adopted in Tanzania.

## **4.2 Project Finance in the UK**

Project finance continues to be the primary mechanism for procuring and developing assets in industries like mining, power generation, power transmission, telecommunications, pipelines, transport and other infrastructure in the UK. Recently (notable) project finance deals in 2015 and 2016, to mention a few, included the £2.2 million Thames Tideway Tunnel project, and the Galloper Offshore Wind Farm Notable project finance deals in the UK.<sup>207</sup>

In the UK, private finance initiative (PFI) has been given an upper hand in most project finance transactions commoditising PPP into a systematic programme<sup>208</sup> and supporting high volume of PPP contracts, which led to standardisation of PFI contracts version 4 (SoPC4)<sup>209</sup> – however was replaced by the publication of ‘PF2: A User Guide’,<sup>210</sup> hence making the application of PFI and PPP similar in terms of practice than theoretically.

---

<sup>207</sup> International Comparative Legal Guides (ICLG), *Project Finance 2017*, (03/04/2017), [iclg.com/practice-areas/project-finance/project-finance-2017/england-and-wales](http://iclg.com/practice-areas/project-finance/project-finance-2017/england-and-wales)

<sup>208</sup> David Gardner and James Wright - HSBC, *Project Finance*, pg. 2, [www.hsbcnet.com/gbm/attachments/products-services/financing/project-finance.pdf](http://www.hsbcnet.com/gbm/attachments/products-services/financing/project-finance.pdf)

<sup>209</sup> *Ibid*

<sup>210</sup> Getting the Deal Through Project Finance – United Kingdom, (May 2016), [gettingthedealthrough.com/intelligence/44/article/5089/project-finance-united-kingdom](http://gettingthedealthrough.com/intelligence/44/article/5089/project-finance-united-kingdom)

In overview, PFI and PPP, however varying on debt pricing, debt tenor, documentary and the transaction size, as it came to develop in the UK reflected a diverse cross-section of views on the political spectrum.<sup>211</sup>

Before the introduction of PFI in 1992 in the UK, the foundations for project financing were laid since the 1970s where, in the power sector, the British Petroleum raised \$945m from a syndicate of 66 banks to develop its Forties field in the North Sea.<sup>212</sup> Further, the UK governments were guarded in their ability to use private capital in the financing of public sector projects.<sup>213</sup>

PFI was, later, introduced in the early 1990s and aimed to introduce private sector skills and finance into the provision of public sector services.<sup>214</sup> PFI is structured so that the private sector obtains finance - usually from a bank - to design, build and operate a facility for the benefit of the public. In return, the public sector grants this private sector partner a long-term contract to run the facility - usually for 25-30 years.<sup>215</sup> Once the facility has been built, the public sector pays the private sector a monthly fee over the life of the project which is used to service the bank loan which financed the project which is used to service the bank loan which financed the project.

PFI has traditionally been used because; (i) it is argued that the public sector gets better value for money in the long term by transferring the risks of building and running the facility over the life of the project to the private sector. This means that the private sector, which is generally perceived as more efficient, manages the risks of the project; and (ii) since the public sector is

---

<sup>211</sup> Frederick Pretorius *et al*, *Project Finance For Construction & Infrastructure: Principles and Case Studies*, (Blackwell Publishing, UK, 2008), p. 221

<sup>212</sup> Priscilla Anita Ahmed & Xinghai Fang, *Project Finance in Developing Countries: Lessons of Experience No. 7*, International Finance Corporation (IFC), Washington D.C., U.S.A., 1999, p. 16

<sup>213</sup> European PPP Expertise Centre (EPEC), *United Kingdom – England: PPP Units and Related Institutional Framework*, (June 2012), pg. 8

<sup>214</sup> Priscilla Anita Ahmed & Xinghai Fang, *op. cit.*, p. 16

<sup>215</sup> Mark Sandford, *Local government in England: capital finance*, House of Commons Library, (Briefing Paper Number 05797, 27 June 2016), pg. 19; See also, HM Treasury, *A new approach to public private partnerships*, December 2012

essentially purchasing a service rather than outlaying the significant capital cost of building, for example, a school or a hospital, it does not need to account for this cost as a liability on its balance sheet. This means that the public sector does not have to borrow to finance the capital cost.

Coupled with some constructive arguments of usage above, PFI constitute of several features such as: risk transfer; output specification; whole life performance of the asset; and performance related payments.<sup>216</sup>

Despite the changes made in 1992, and in 1993 where the Private Finance Panel (PFP) was created whose role, among others, was to encourage greater participation in PFI by both the public and private sector, and over 550 PFI projects worth over GBP 46 billion, currently the government is missioned to review PFI in a manner to create a new model for delivering public assets and services that takes advantage of private sector expertise, but at a lower cost to the taxpayer.<sup>217</sup>

As a result the public sector engaged with the private sector in providing public services through a wide range of policy areas such as information and communication technology, schools (through 'Building Schools for the Future' programme,), waste, health (through Local Improvement Finance Trust, or LIFT<sup>218</sup>) and housing /regeneration at local authority level (through joint ventures, often called "Local Asset-Backed Vehicles").<sup>219</sup> As of 2012 in the UK - England, there are were 36 PFI projects in procurement with a combined capital value of around GBP 4.7 billion.<sup>220</sup>

---

<sup>216</sup> Frederick Pretorius *et al*, *op. cit.*, p. 224

<sup>217</sup> European PPP Expertise Centre (EPEC), *op. cit.*, at pg. 9

<sup>218</sup> [webarchive.nationalarchives.gov.uk/+/www.dh.gov.uk/en/Managingyourorganisation/NHSprocurement/Publicprivatepartnership/NHSLIFT/index.htm](http://webarchive.nationalarchives.gov.uk/+/www.dh.gov.uk/en/Managingyourorganisation/NHSprocurement/Publicprivatepartnership/NHSLIFT/index.htm)

<sup>219</sup> European PPP Expertise Centre (EPEC), *op. cit.*, at pg. 9

<sup>220</sup> *Ibid* at pg. 11

Despite of the growth and advancement of project finance transactions in the UK, several challenges such as repayment risk, off-take risks, operational risks as well as political risks<sup>221</sup> are visible hindering further growth. One crucial political risk is BREXIT (British-Exit)<sup>222</sup> whose implication to the investment, project finance transactions and economic affairs of the UK are yet to be assessed and seen. However, it is of the opinion that currency fluctuation of the British (Sterling) Pound may be one of the important denominators of the challenges to be faced in project finance transactions.

#### **4.2.1 Legal Regime of Project Finance in the UK**

England does not have a specific law which apply to all PFI/PPPs, however, sufficient flexibility and certainty within the statutory and common law framework to recognise permit PPP/PFIs. Land-related agreements, concessions and the like, and permits and consents, are normally governed by the law of the location of the project.<sup>223</sup> This infers that if a project is located in Wales and England then English law would apply, unlike in Scotland where Scottish law would apply.<sup>224</sup>

Despite of lack of specific PFI/PPP law in the UK, the UK government has transposed the Public Sector Directive<sup>225</sup> and the Utilities Directive<sup>226</sup> into national legislation through the

---

<sup>221</sup> Milbank, Identifying and Managing Project Finance Risks: Overview (UK), p. 2-7, at [uk.practicallaw.com/5-564-5045](http://uk.practicallaw.com/5-564-5045)

<sup>222</sup> A referendum passed on 23 June 2016 to leave the European Union. The UK Government invoked Article 50 of the Treaty on the European Union on 9 March 2017 and thus the UK leaving the EU on 29 March 2019

<sup>223</sup> Powers tend to be derived from a public body's constitutional document or from specific legislation

<sup>224</sup> International Comparative Legal Guides (ICLG), *Project Finance 2017: England & Wales*, (03/04.2017), [iclg.com/practice-areas/project-finance/project-finance-2017/england-and-wales#chaptercontent13](http://iclg.com/practice-areas/project-finance/project-finance-2017/england-and-wales#chaptercontent13)

<sup>225</sup> 2004/18/EC which applies to public works contracts, public supply and public service contracts

<sup>226</sup> 2004/17/EC for entities operating in the water, energy, transport and postal services sectors



Public Contracts Regulations<sup>227</sup> and the Utilities Contracts Regulations,<sup>228</sup> hereinafter being *Procurement law*, however, changes may occur once the UK exits the European Union (EU).

The regulations provide for specific, regulated and standardised procurement procedures for PPP/PFI. Further, the regulations specify four procurement procedures, namely: the open procedure;<sup>229</sup> the restricted procedure; the negotiated procedure;<sup>230</sup> and the competitive dialogue procedure.<sup>231</sup>

#### **4.2.2 Regulatory Regime of Project Finance in the UK**

In analysing the UK's project finance regime, the following factors are going to be taken into consideration: the legal certainty and change in law; taxation system; corporate governance; and regulation and authorisation.<sup>232</sup>

##### *Legal certainty*

With lack of specific law regulating project finance deals, still, UK is mostly advanced with regulations in place governing sectors responsible in order to ensure the project finance deals are in effective. This includes energy sector where through the Energy Act of 2013 received Royal Assent on 18 December 2013 and also implemented key aspects of Electricity Market Reform (EMR) - a policy initiative pioneered by the UK Government to mobilise GBP 110 billion of capital investment required by 2020 to ensure a reliable and diverse supply of low-carbon electricity.<sup>233</sup>

---

<sup>227</sup> SI 2006/5

<sup>228</sup> SI 2006/6

<sup>229</sup> Not used for PFI projects in England

<sup>230</sup> Used more widely in England in 2006

<sup>231</sup> Since 2006, it has been government policy that PFIs should usually be procured under the competitive dialogue procedure

<sup>232</sup> See para 2.4.1.3 above

<sup>233</sup> International Comparative Legal Guides (ICLG), *op. cit.*

## *Taxation*

In UK, a 20% rate of income tax is exerted on any payment of yearly interest<sup>234</sup> - same for corporate profits tax rates as from 1 April 2015.<sup>235</sup> Consequently, a UK company paying yearly interest on a debt security will generally have an obligation to deduct 20% of such interest payment and account for this withheld amount to the UK tax authorities.<sup>236</sup> Double tax reliefs in the UK reduces withholding tax and is regulated unilaterally (where the credit method is used) and through treaties where an extensive tax treaty network is imposed on all types of income, limit the taxation by one country of companies resident in the other and protect companies resident in one country from discriminatory taxation in the other.<sup>237</sup>

Further, there are no UK tax incentives provided preferentially or specifically to foreign investors or creditors<sup>238</sup> but only for UK businesses, to mention a few: tax incentives for R&D incentives;<sup>239</sup> and expenditure on certain energy efficient assets which may qualify for 100% tax deduction in the year of acquisition.<sup>240</sup> Specific incentives are afforded to foreign investors in relation to the construction and operation of projects and businesses in specified locations.<sup>241</sup>

In essence, tax system in the UK favours domestic entities involved in project finance transaction hence boosting their financial strengths and banking capacity minimizing foreign dependency on their projects.

## *Corporate governance*

---

<sup>234</sup> *Ibid*

<sup>235</sup> Deloitte, *Taxation and Investment in United Kingdom 2015: Reach, Relevance and Reliability*, (Deloitte Touché Tohmatsu Limited, 2015), p. 10, [www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-unitedkingdomguide-2015.pdf](http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-unitedkingdomguide-2015.pdf)

<sup>236</sup> U.K. Tax Laws and Tax System: U.K. Tax Rates 2013-14, (April 2013), [www.worldwide-tax.com/uk/uk\\_taxes\\_rates.asp](http://www.worldwide-tax.com/uk/uk_taxes_rates.asp)

<sup>237</sup> Deloitte, *op. cit.*, pg. 14-15

<sup>238</sup> International Comparative Legal Guides (ICLG), *op. cit.*

<sup>239</sup> Large companies can qualify for enhanced deduction at a rate of 130% R&D expenditure. For small and medium-sized entities (SMEs), a rate of 230% tax deduction can be exerted on R&D expenditures.

<sup>240</sup> Deloitte, *op. cit.*, pg. 3-4

<sup>241</sup> International Comparative Legal Guides (ICLG), *op. cit.*

Normally, a shareholders' agreement, in a project finance transaction, codifies matters relating to corporate governance and ownership of the Project Company (or partnership or joint venture).<sup>242</sup>

In relevance to project finance deals in UK, corporate governance is reflected when a project company seeks for debt instruments under the London Stock Exchange where the UK Listing Authority (UKLA), a division of the Financial Conduct Authority, issue rules which cover principles ranging from corporate governance to accounting standards and disclosure of information.<sup>243</sup>

### *Regulation and authorisation*

Regulatory bodies and/or the UK Government agencies are determined on the exact nature of the project. General government approvals and/or restrictions are, at most, regulated by Local Authorities, National Infrastructure Planning, Welsh Assembly Government, Environment Agency, Health and Safety Executive (HSE) as well as Marine Management Organisation (MMO).<sup>244</sup>

Nevertheless, institutional responsibilities for PPP/PFIs in England are shared between different bodies reflecting the maturity of the market and the level of devolution that exists. Bodies responsible for regulating PFI/PPPs in England include: Line Ministries; The Office of

---

<sup>242</sup> David Gardner and James Wright, *opt cit.*, pg. 6

<sup>243</sup> International Comparative Legal Guides (ICLG), *op. cit.*

<sup>244</sup> See International Comparative Legal Guides (ICLG), *op. cit.*

Nuclear Development (ONR);<sup>245</sup> National Audit Office (NAO);<sup>246</sup> the Office of Budget Responsibility (OBR);<sup>247</sup> and the Office of National Statistics (ONS).<sup>248</sup>

### **4.3 Project Finance in South Africa**

From the early 1990s, project finance activities have increased in South Africa by incorporating mechanisms such as private finance initiatives (PFI), BOT (build-operate-transfer) projects, co-generation projects, in building bridges and roads, mine developments, development of mineral processing plants, oil and gas field developments, pipelines, cable television and cellular telephone projects, as well as satellite projects.

The PFI, similarly to UK jurisdiction, is relevant in South Africa whereby the private sector is responsible for financing projects through concession such as DCMF (design, construct, maintain and finance), prison concessions and DBFO (design, build, finance and operate), and road concessions. Further, privatisation and deregulation led to new projects which require financing.

Thus, much of the SA Government's impressive capital infrastructure investment drive is being financed by the Government and the larger state-owned enterprises (Transnet, Eskom, ACSA,

---

<sup>245</sup> Established under the Energy Act, 2013, the ONR is responsible for regulating the nuclear power industry and all projects underneath.

<sup>246</sup> The NAO is Established under the National Audit Act, 1983 to replace the Exchequer and Audit Department, the NAO is responsible for scrutinising public spending on behalf of Parliament, and has a specific private finance division that has produced over 80 reports (since 1997) assessing activities including PFIs and PPPs, privatisations and acquisitions. See [www.nao.org.uk/our\\_work\\_by\\_sector/private\\_finance1.aspx](http://www.nao.org.uk/our_work_by_sector/private_finance1.aspx)

<sup>247</sup> It is an independent body which examines and reports on the sustainability of the public finances to Parliament. It is established under the Budget Responsibility and National Audit Act, 2011, which sets out its functions and broad governance structure.

<sup>248</sup> The office collects data on the balance sheet impact of PPP contracts in the UK and uses the data for compiling national accounts which feeds Eurostat calculations of public debt and the Office of Budget Responsibility's estimates of fiscal sustainability. See [www.statistics.gov.uk/hub/index.html](http://www.statistics.gov.uk/hub/index.html)

TCTA), although a sizeable portion has also been funded by the private sector in the form of public private partnerships (PPP).<sup>249</sup>

South Africa has also been a forerunner of PPPs, embracing, for example, the use of toll roads to upgrade and maintain the national road systems as early as 1997,<sup>250</sup> and building the first two private prisons in South Africa in 2000-01.<sup>251</sup> Since then, there has been a downturn in PPP projects, outside of the highly successful renewable energy program, but renewed fiscal pressures may see closer cooperation with private funders and operators.<sup>252</sup>

Project finance in South Africa generally exhibits the following characteristics: (a) Long-term tenders, to match the underlying concession contract with government; (b) Limited recourse, meaning that the lender takes on the project risk; (c) Involvement of more than one bank, owing to the large amounts of debt; and (d) Very high gearing as infrastructure is a low-risk asset class, and there is usually no or very limited market risk being taken by the funders. This results in lower shareholder equity requirements.<sup>253</sup>

As most of project finance deals in South Africa are completed through PPP which involves building and operating of the project, one of the most current deals in the PPP is the Gautrain Rapid Rail Link connecting Johannesburg, Pretoria and OR Tambo International Airport<sup>254</sup> and

---

<sup>249</sup> South Africa - Project Financing, (6/15/2016), [www.export.gov/article?id=South-Africa-project-financing](http://www.export.gov/article?id=South-Africa-project-financing)

<sup>250</sup> The South African Cabinet, in 1997, approved the appointment of an inter-departmental task team to develop a package of Policy, Legislative and Institutional reforms to create an enabling environment for PPPs

<sup>251</sup> In due regard of servicing and repaying debt over periods of twenty (20) to thirty (30) years

<sup>252</sup> National or provincial governments will generally publish tenders, requiring consortia to respond to PPP-type projects, which is different from normal infrastructure tenders in which all the funding is privately raised. The concessionaire will usually be required to build and operate the infrastructure for an extended period of time, taking the risks and rewards that go along with such an endeavour.

<sup>253</sup> export.gov, *South Africa – Project Financing*, (6/15/2016), [www.export.gov/article?id=South-Africa-project-financing](http://www.export.gov/article?id=South-Africa-project-financing)

<sup>254</sup> export.gov, *op. cit.*

with a value of R25 billion.<sup>255</sup> Thus, through PPPs, public and commercial interests look to banks to fund infrastructure development.<sup>256</sup>

Being well advanced than other African countries in terms of regulatory environment, financing availability, precedents, and the capacity of the public and private sectors to get deals done, South Africa is faced with one major hindering factor – Xenophobia – among other relevant factors such as risk management, asset management and optimisation and upfront planning.<sup>257</sup>

Xenophobia in South Africa creates hostile conditions of investment as one of the influencing factors is having conducive environment for investment including peace and tranquillity. Since 1994, and recently (February 24<sup>th</sup> 2017) a large scale and officially sanctioned anti-immigrant protest was organised and held in Pretoria.<sup>258</sup>

#### **4.3.1 Legal Regime of Project Finance in South Africa**

Project finance transactions in South Africa are generally regulated by the Public Finance Management Act, No. 1 of 1999 as amended, and Treasury Regulation for departments, trading entities, constitutional institutions and public entities (henceforth referred as ‘Treasury Regulation’) (especially Regulation 16 – deals on PPP).<sup>259</sup>

---

<sup>255</sup> National Treasury PPP Unit, *Introducing Public Private Partnerships in South Africa*, (October 2007), pg. 25, [www.ppp.gov.za/Documents/Final%20Intro%20to%20PPP%20in%20SA%2021%2009%2007.pdf](http://www.ppp.gov.za/Documents/Final%20Intro%20to%20PPP%20in%20SA%2021%2009%2007.pdf)

<sup>256</sup> Webber Wentzel, *Investing in South Africa: Charting the Legal Landscape with Webber Wentzel*, 2015/2016, p. 102,

[www.investingsouthafrica.co.za/downloads/en/Webber\\_Wentzel\\_Investing\\_in\\_South\\_Africa\\_complete.pdf](http://www.investingsouthafrica.co.za/downloads/en/Webber_Wentzel_Investing_in_South_Africa_complete.pdf)

<sup>257</sup> PWC, *Capital Projects and Infrastructure in East Africa, Southern Africa and West Africa: Trends, challenges and future outlook*, November 2014, p. 29

<sup>258</sup> Madia, Tshidi (2017-02-24), “Political parties condemn xenophobic violence”, News23; See also Press, Associated (2017-02-24), “South African police use force to disperse anti-immigration protesters”, The Guardian, ISSN 0261-3077, Retrieved 2017-02-25

<sup>259</sup> Treasury Regulation 2005 Gazette No. 27388 dated March 2005

The Municipal Finance Management Act, No. 56 of 2003,<sup>260</sup> also regulate project finance transactions to all municipalities and municipal entities, and national and provincial organs of state, to the extent of their financial dealings with municipalities.<sup>261</sup>

#### **4.3.1.1 The Public Finance Management Act (PFMA), Act No. 1 of 1999 and Treasury Regulation**

The PFMA approach to financial management focuses on outputs and responsibilities and is a cornerstone of government's strategy to improve financial management in the public sector.

Government is increasingly focusing its efforts on outputs and outcomes, wanting to ensure that, in spending taxpayers' money, it produces the intended result.<sup>262</sup> The PFMA makes the heads of departments (the accounting officers)<sup>263</sup> of national and provincial departments and the CEOs or boards of schedule 3 public entities (the accounting authorities)<sup>264</sup> responsible for implementation.<sup>265</sup> They are directly accountable to Parliament or the provincial legislature for the effective and efficient management of their budgets to achieve their public mandates. These responsible officials need constantly to evaluate value-for-money choices, hence, a PPP choice for the delivery of a public service, or to achieve a public good, warrants such investigation.<sup>266</sup>

By its nature, a PPP entails: (a) targeted public spending, principally on outputs to agreed standards; (b) leveraging private sector finance and efficiencies; and (c) allocating risks to the

---

<sup>260</sup> The Municipal Finance Management Act, 2003, is amended by Municipal Fiscal Powers and Functions Act 12 of 2007 from 7 September 2007: section 20, 28, 43, 168; and also amended by the Promotion of Local Government Affairs Act 91 of 1983 from 1 July 2005

<sup>261</sup> Preamble of the Municipal Finance Management Act, No. 56 of 2003

<sup>262</sup> Preamble of the PFMA

<sup>263</sup> Section 36 *Ibid*

<sup>264</sup> Section 49 *Ibid*

<sup>265</sup> Chapter 5 of the PFMA

<sup>266</sup> National Treasury, *PPP Manual Module 1: South African Regulations for PPPs*, issued as National Treasury PPP Practice Note Number 02 of 2004, pg. 2, [www.gtac.gov.za/Publications/Module%2001.pdf](http://www.gtac.gov.za/Publications/Module%2001.pdf)

party best able to manage them. As a mechanism of delivery, a PPP is firmly in line with the intent of the PFMA.<sup>267</sup>

The PFMA through *section 76(4) (g)* empowers the National Treasury to enact Treasury Regulation to govern PPP in South Africa. Treasury Regulation 16 defines ‘public-private partnership’ or ‘PPP’ to mean:

a commercial transaction between an institution and a private party in terms of which the private party (a) either performs an institutional function on behalf of the institution for the duration of the PPP agreement; and/or (b) acquires the use of state property for its own commercial purposes for the duration of the PPP agreement; (c) assumes substantial financial, technical and operational risk in connection with the performance of the institutional function and/or use of state property; and (d) receive a benefit for performing the institutional function or by utilising state property, either by way of: (i) consideration to be paid by the institution which derives from a revenue fund or, where the institution is a government business enterprise, from the revenues of such institution; (ii) charges or fees to be collected by the private party from users or customers of a service provided to them; or (iii) a combination of such consideration and such charges or fees.<sup>268</sup>

From the definition of Treasury Regulation 16, it postulates two types of PPPs in South Africa: where the private party performs an institutional function; and where the private party obtains the usage of national property for its own commercial purposes; or a hybrid of these types.<sup>269</sup>

Read together with the PFMA,<sup>270</sup> the Act promotes the objective of good financial management in order to maximise service delivery through the effective use of the limited resources.

However, the generic framework does not provide any specifics on PPPs. Rather, this is dealt

---

<sup>267</sup> *Ibid*

<sup>268</sup> Regulation 16.1 of the Treasury Regulation

<sup>269</sup> National Treasury PPP Unit, *Introducing Public Private Partnerships in South Africa*, (October 2007), pg. 8, [www.ppp.gov.za/Documents/Final%20Intro%20to%20PPP%20in%20SA%2021%2009%2007.pdf](http://www.ppp.gov.za/Documents/Final%20Intro%20to%20PPP%20in%20SA%2021%2009%2007.pdf)

<sup>270</sup> Act No. 1 of 1999



with in the Treasury Regulation 16 which defines the various steps required obtaining approval for a PPP project<sup>271</sup> and management of PPP agreement.<sup>272</sup>

*Section 51(1)* of the PFMA provides the general rule that an entity acting as a sponsor must do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective hence preventing public entities from irregular expenditure and financial misconduct.<sup>273</sup>

Nonetheless, notification in advance to the National Treasury and a written approval from the relevant minister is required, in terms of *section 54* of the PFMA, for a public entity that plans to enter into any transaction.

Chapter 8 of the PFMA must also be borne in mind when deciding to fund the project through *capital contribution by the Institution* as legal restrictions on holding of shares by government entities in companies in which the private sector also hold shares must be taken into considerations. Supplementary, tax implications of this funding structure should be carefully considered, particularly in relation to value-added tax (VAT).<sup>274</sup>

## **4.3.2 Regulatory Regime of Project Finance in South Africa**

### **4.3.2.1 Legal Certainty**

However yet to have a specific legislation on project finance, several changes/amendments have been made to its key legislations, namely, Companies Act, No. 71 of 2008, (and its

---

<sup>271</sup> Regulation 16.3, 16.4, 16.5 of the Treasury Regulation

<sup>272</sup> Regulation 16.6, 16.7, 16.8, 16.9 *Ibid*

<sup>273</sup> National Treasury, *Guidelines on Fruitless and Wasteful Expenditure: Office of the Accountant-General*, (May 2014), pg. 2,

[www.treasury.gov.za/legislation/pfma/guidelines/Guideline%20on%20Fruitless%20and%20Wasteful%20Expenditure%2027%20May%202014.pdf](http://www.treasury.gov.za/legislation/pfma/guidelines/Guideline%20on%20Fruitless%20and%20Wasteful%20Expenditure%2027%20May%202014.pdf)

<sup>274</sup> National Treasury, *Standardised Public-Private Partnership Provisions*: First Issue, 11 March 2004, pg. 7-8

regulation),<sup>275</sup> at which since its commencement in 2011, the Act has been amended twice;<sup>276</sup> the Public Finance Management Act (PFMA), No. 1 of 1999, which has been amended 15 times in its life time by its own and other laws;<sup>277</sup> as well as the Income Tax Act, No. 58 of 1962 which has been amended in 107 times.<sup>278</sup>

Such extreme changes calls for certainty of laws in South Africa. Continuous changes in laws and/or regulations may creep projects<sup>279</sup> and deprive investors with a favourable environment of investment.

Nevertheless, South Africans (natural personnel and project entities) are free to choose domestic or foreign law as the governing law of the project and financing document.<sup>280</sup> Further, South Africa offers a range of dispute settlement mechanisms from adjudication<sup>281</sup> to alternative dispute resolution mechanisms – which mainly includes conciliation, mediation and arbitration in the commercial world.

With regard to alternative dispute resolution, especially, arbitration, the Arbitration Act, No. 42 of 1965 does not distinguish between domestic and international arbitration, and applies in

---

<sup>275</sup> Companies Act Regulations, 2011

<sup>276</sup> It is amended by Financial Markets Act, No. 19 of 2012 from 3 June 2013 – section 1, 5, 69, 116; and, amended by Companies Amendment Act, No. 3 of 2011; amends Close Corporations Act, No. 69 of 1984.

<sup>277</sup> The PFMA has been amended by the Financial Management of Parliament Act, No. 10 of 2009 from 21 April 2009 - section 3 and 13; amended by South African Express Act, No. 34 of 2007 from 1 Feb 2008; amended by Broadband Infraco Act, No. 33 of 2007 from 1 Feb 2008; amended by Public Service Amendment Act, No. 30 of 2007 from 1 April 2008 - section 1; amended by South African Airways Act, No. 5 of 2007, from 13 July 2009 – schedule 2; amended by Public Audit Act from 20 December 2004 - section 58 to 62; amended by Judicial Officers (Amendment of Conditions of Service) Amendment Act, No. 28 of 2003, from 1 November 2003 – schedule 5; amended by Local Government: Municipal Systems Amendment Act, No. 32 of 2000, from 1 March 2001 – schedule 4; amended by Public Finance Management Amendment Act, No. 29 of 1999; amends Exchequer Act (previous short title: Exchequer and Audit Act) No. 66 of 1975; amends Railways and Harbours Acts Amendment Act, No. 67 of 1980; amends Railways and Harbours Acts Amendment Act, No.29 of 1981; amends Legal Succession to the South African Transport Services Act, No. 9 of 1989; amends Finance Act, No. 120 of 1991; and amends Finance Act, No.41 of 1994.

<sup>278</sup> South African Government, *Income Tax Act 58 of 1962*, [www.gov.za/documents/income-tax-act-29-may-1962-0000](http://www.gov.za/documents/income-tax-act-29-may-1962-0000)

<sup>279</sup> John Dewar, *opt cit.*, pg. 13

<sup>280</sup> Calyb Soekoe, Eric le Grange, Innes Du Preez and Kim Eichorn, *Getting the Deal Through Project Finance – South Africa*, (12 September 2016), [gettingthedealthrough.com/area/32/jurisdiction/2/project-finance-south-africa/](http://gettingthedealthrough.com/area/32/jurisdiction/2/project-finance-south-africa/)

<sup>281</sup> This is the traditional court system

all proceedings. However, South Africa recognise and enforces foreign arbitral awards through the Recognition and Enforcement of Foreign Arbitral Awards Act, No. 40 of 1977, which follows the accession of the New York Convention in 1976 by South Africa, and provides for the manner at which the foreign arbitral award can be enforced and not enforced.<sup>282</sup>

This infers that, with a range of fora and mechanisms of resolving disputes in South Africa, legal disputes resulting from documentation and even implementation of the project can be easily sorted both domestically and internationally.

### ***Taxation***

Taxation in South Africa is mainly regulated by the Income Tax Act, No. 58 of 1962, (hereinafter referred as “ITA”). One of the recent significance of the ITA in project finance transactions is when the South African Revenue Service (SARS) issued Binding Private Ruling 228 (“BPR 228”) which dealt with the issue of whether a project company becomes an operating company for the purpose of *section 8EA of the ITA*.<sup>283</sup> However the decision of the BPR 228 confirmed that the project company is not an operating company, yet, the relevance of *section 8EA* of the ITA is reflected in the conducts of the project finance transactions which was introduced in order to strengthen the anti-avoidance rules where the dividends in respect of the share issues were guaranteed by third parties.<sup>284</sup>

Nonetheless, tax in South Africa is also made to entities involved in the transaction. This includes both partnerships, companies and join venture. South African companies are levied at

---

<sup>282</sup> See Section 4(1)(b) of the Recognition and Enforcement of Foreign Arbitral Awards Act, No. 40 of 1977

<sup>283</sup> Mansoor Parker, *SARS issues important tax ruling for renewable energy financing structures*, (27 April 2016), [www.ensafrica.com/news/SARS-issues-important-tax-ruling-for-renewable-energy-financing-structures?Id=2179&STitle=tax%20ENSight](http://www.ensafrica.com/news/SARS-issues-important-tax-ruling-for-renewable-energy-financing-structures?Id=2179&STitle=tax%20ENSight)

<sup>284</sup> *Ibid*

28% of their taxable income, however, small business corporations (SBC) can be levied tax rate of 7% of taxable income above R75 750 to 28% of taxable income above R550 000.<sup>285</sup>

A partnership in the ITA is not a 'person' but is for VAT purposes. *Section 66(15)* of ITA provides to the effect that where persons carrying on any business in partnership must make a joint return as partners in respect of such business, together with such particulars as may from time to time be prescribed, and each partner shall be separately and individually liable for the rendering of the joint return.

*Section 77(7)* is to the effect that separate assessments shall be made upon partners. Further, as partners are bound by the conduit principle,<sup>286</sup> each person carrying in any trade or business in a partnership shall be deemed to do so.<sup>287</sup>

### ***Corporate Governance***

With Companies Act, No. 71 of 2008, being a fundamental law providing the system of rules, practices and processes by which a company is directed and controlled,<sup>288</sup> together with the guidance of the King Code IV, lessons can be drawn on aspects such as shareholders' rights and their involvement in a project finance transaction, stakeholders' rights as well as the ownership and level of compliance in relation to the projects financed to date.<sup>289</sup>

---

<sup>285</sup> SARS, Companies, Trusts and Small Business Corporations (SBC), last updated 22/02/2017 at 2:10 p.m., [www.sars.gov.za/Tax-Rates/Income-Tax/Pages/Companies-Trusts-and-Small-Business-Corporations.aspx](http://www.sars.gov.za/Tax-Rates/Income-Tax/Pages/Companies-Trusts-and-Small-Business-Corporations.aspx)

<sup>286</sup> Conduit principle refers to taxation doctrine that all income earned by sole-proprietorships and partnerships must be passed-through the accounts of their owners or partners as their personal income, and must reported on their personal tax returns. See BD Dictionary, *Conduit Principle*, [www.businessdictionary.com/definition/conduit-principle.html](http://www.businessdictionary.com/definition/conduit-principle.html)

<sup>287</sup> Section 24H of the Act

<sup>288</sup> Preamble of the Act

<sup>289</sup> Yasser Yaqub, *Lessons from Projects Financed to Date*, in Project Finance: NewsWire, CHADBOURNE & PARKE LLP, (December 2013), pg. 24

*Ownership:* A developer of a project must ensure that a shareholding and voting rights for black people and local community (30% and 5% respectively) are followed.<sup>290</sup> Correspondingly, economic interests to be held by black people and local communities should also be met.<sup>291</sup>

These obligations are enforced through the Broad-Based Black Economic Empowerment Act (BBBEE) at which, as its accreditation is not obligatory, the accredited entities are the ones that are entitled to do business with the South African government or state-owned entities. This creates biasness against project finance market as, in most instances, the involvement of BBBEE entities and local communities do not have the funds to make any capital contributions to the project company.

*Level of compliance:* Apart from ownership concerns, a project company must also ensure that it has a monitoring and compliance system in place to fulfil its many economic development obligations.<sup>292</sup>

Failure to comply can lead to significant penalties such as termination of concession agreement as a result of accumulation of termination points (nine (9) points in any consecutive 12 months period) from non-compliance.<sup>293</sup>

Still, significant challenges emanate from the economic development obligations in South Africa regardless of its rationale of redressing the socio-economic disparity among South Africa's racial groups.<sup>294</sup>

---

<sup>290</sup> Yasser Yaqub, *op. cit.*, at pg. 25

<sup>291</sup> *Ibid*

<sup>292</sup> *Ibid* at pg. 28

<sup>293</sup> *Ibid*

<sup>294</sup> *Ibid*

## ***Regulation and authorisation***

Likewise to the UK and Tanzania, generally, commercial project finance transactions between private parties may not require any government approvals; however, the relevance of any government department to a project is largely dependent on whether a party to the transaction is a government department or where the project relates to a natural resource or other regulated industry in South Africa, government approvals may be required, even if only indirectly.<sup>295</sup> The specifics of each transaction therefore need to be considered in order to determine if any governmental approvals are required.<sup>296</sup>

Government departments relevant to project finance in South Africa include: the Department of Trade and Industry (DTI);<sup>297</sup> the Department of Environmental Affairs (DoEA);<sup>298</sup> the Department of Transport (DoT); the Department of Water Affairs and Sanitation (DWS); the Department of Mineral Resources (DMR); the Department of Finance (DoF) (National Treasury);<sup>299</sup> the Department of Energy (with National Energy Regulator of South Africa (NERSA) the electricity, oil and gas regulator); and the Department of Agriculture, Forestry and Fisheries.

---

<sup>295</sup> Eric le Grange and Kerryn Anderson, *Project Finance 2014: South Africa*, (15 October 2013), [www.ensafrica.com/news/Project-Finance-2014-South-Africa?Id=1192&STitle=Project%20finance%20ENSight](http://www.ensafrica.com/news/Project-Finance-2014-South-Africa?Id=1192&STitle=Project%20finance%20ENSight)

<sup>296</sup> *Ibid*

<sup>297</sup> It is a federation of agencies encompassing a number of subordinate agencies such as National Empowerment Fund (established under the National Empowerment Fund Act, No. 105 of 1998), Export Credit Insurance Corporation (ECIC – established under the National Credit Act, No. 34 of 2005), Companies Tribunal, National Credit Regulator, National Regulator for Compulsory Specifications (NRCS), is mainly responsible for commercial policy and industrial policy through promoting economic development, Black Economic Empowerment (made under the Broad-Based Economic Empowerment Amendment Act – section 13B(1)), implementing commercial law, promoting and regulating international trade and consumer protection (through Consumer Protection Act, No. 68 of 2008)

<sup>298</sup> In respect to project finance, the DEA is responsible at a national level for environmental authorisations and waste management licenses where environmental impact assessments (EIAs) must be undertaken.

<sup>299</sup> It is held by the Ministry of Finance who is the political head of specialised public sector organisations in the areas of finance, economics and accounting. See South African Government, *Finance*, [www.gov.za/about-sa/finance%20](http://www.gov.za/about-sa/finance%20)

In those projects instituted as PPPs, PPP Unit is responsible in regulating and authorising activities related within the transaction. Further, among other things, PPP Unit through the Treasury Regulation 16 oversee the PPP processes, its agreements and parties responsible in the transaction. PPP Unit is found under the National Treasury which is the custodian of the South Africa's financial resources, accountable to the nation to discharge its responsibilities professionally, with the aim of promoting growth and prosperity for all.<sup>300</sup>

#### **4.4 Comparative analysis of Project Finance in Tanzania, UK and South Africa**

Project finance, a tool, not an outcome itself, a comparative study is made hereunder between Tanzania, UK and South Africa in order to outlook the efficiency of project finance structures, contractual regulation and the role of each state in facilitation of fluent and effective project finance mechanisms.

##### **4.4.1 Project Finance Structures**

UK, South Africa, and Tanzania, recognise similar project finance structures whereby SPVs can be incorporated through a company, partnership or a joint venture. However, simplicity and flexibility for establishing the said entities differs in such jurisdictions.

In essence, it is easier to establish a company in South Africa than Tanzania where, under the new Companies Act, 2008, cumbersome procedures such as the use of Articles of Association, Memorandum of Association, promoters and reservation of names have been discarded and simplified allowing a member to establish a company within a short period of time, also by buying a shelf company. Nevertheless, online registration of an entity is recognised in both UK

---

<sup>300</sup> South African Government, *Finance*, [www.gov.za/about-sa/finance%20](http://www.gov.za/about-sa/finance%20)

and South Africa. Difficulties are recognised in Tanzania where, still, tradition means of paper based registration is recognised and there is no use of Shelf Company.

Further, cost of time in registering a company is one of the hindering factor in Tanzania where a company can be register in a span of five working days<sup>301</sup> while in UK and South Africa, company registration takes a span of 24 hours.<sup>302</sup>

#### **4.4.2 Contractual Regulation (and Security)**

##### ***UK***

Negotiation has been much easier as contract terms are lessened in the UK. Regardless of replacement of standardised contracts with the PF2 User Guide, no change is made in the general public sector.

As the contract and control structure of a PFI establishes the legal and operational relationships between the principal and the promoter or sponsor,<sup>303</sup> the PPP contracts used in PFI projects in England is based on the Standardisation of PFI Contract (SoPC) – a standard form contract developed by Partnerships UK and HM Treasury. The current version (version 4) was issued in March 2007 and provides standard wording to be used by public sector bodies when drafting PFI contracts. Application of SoPC4 has been mandatory for all PFI projects in England and Wales since May 2007.<sup>304</sup>

Derogations from SoPC4, or approved sector-specific contracts (example health, education), are only made in exceptional circumstances on project-specific grounds and must be approved,

---

<sup>301</sup> Business Registration and Licensing Agency (BRELA), [www.brela.go.tz/](http://www.brela.go.tz/)

<sup>302</sup> GOV.UK, [www.gov.uk/limited-company-formation/register-your-company](http://www.gov.uk/limited-company-formation/register-your-company)

<sup>303</sup> Frederik Pretorius *et al*, *op. cit.*, p. 231

<sup>304</sup> European PPP Expertise Centre (EPEC), *PPP Units and Related Institutional Framework*, (June 2012), p. 24 [www.eib.org/epec/resources/publications/epec\\_uk\\_england\\_public\\_en.pdf](http://www.eib.org/epec/resources/publications/epec_uk_england_public_en.pdf)



either by a sector-specific body or by IUK's Assurance team. SoPC4 also includes guidance on the key issues that arise in PFI projects, in order to promote the achievement of commercially balanced contracts and deliver best *value for money* (VfM).<sup>305</sup>

Standardisation has generally been considered to provide a major benefit by allowing for a wide dissemination of information on permitted risk allocations, based on familiarity and market acceptance. The rigour of the derogation regime has had the effect that PFI projects procured to date in England have been based on relatively uniform PPP contracts.<sup>306</sup>

### ***South Africa***

Unlike UK, South Africa doesn't have standardised form of contract in project financing deals/transactions. However, it is argued that South Africa Renewable Energy Independent Power Producer Procurement Program (REIPPP) has benefited South Africa's sophisticated capital market, which offered long-term project finance.<sup>307</sup>

Further, unlike many other project finance transactions in Africa which involve the use of English Law (where English law is typically the governing law for cross-border contracts), security documentation for South African projects is governed by the South African law, which in many instances, present issues to lenders who are used to English law structure of security documentation.

Such securities, recognised in South African jurisdiction that can be granted over movable and immovable property (including intangible assets) include: pledges of moveable, tangible

---

<sup>305</sup> European PPP Expertise Centre (EPEC), *op. cit.*

<sup>306</sup> *Ibid*

<sup>307</sup> Anton Eberhard *et al*, South Africa's Renewable Energy IPP Procurement Program: Success Factors and Lessons, Public-Private Infrastructure Advisory Facility (PPIAF), Washington D.C., USA, May 2014, p. 2, [www.gsb.uct.ac.za/files/ppiafreport.pdf](http://www.gsb.uct.ac.za/files/ppiafreport.pdf)

property; notarial mortgage bonds over moveable property; mortgage bonds registered over immovable property; cession of personal rights; judicial pledge; tacit hypothecs; and lien.

With the lack of legislation that governs the role of security in South Africa, it is a common practice in respect of power and infrastructure projects that involves the creation of SPV (or debtor guarantor<sup>308</sup>) for the handling of the security to be created.

Further, the guarantee and indemnity agreement (GIA), and the inter-creditor agreement are the main two documents that govern the contractual relationship between the debt guarantor and the lenders, in South Africa. However, each sponsor is required to enter into limited guarantees and pledge agreement (LGPA) with the debt guarantor which forms the limited recourse to the sponsors bolstering the security held by the debt guarantor.

### ***Tanzania***

Tanzanian laws, as well as private international laws, allows for a party to enter in contract(s) and choose the law applicable in the aforesaid as well as the forum which will determine their rights as well as the perfection of security in the event of default. *Section 28* of the Law of Contract Act<sup>309</sup> is to the effect that ‘except for matters referred to arbitral tribunals, contracts which restrict absolutely the parties from enforcing their rights by usual legal proceedings in the ordinary Tanzanian tribunals are void’.

As each project give rise to its own risks, security or collateral concepts plays an integral part in project finance in Tanzania. In order to ensure repayment from borrowers, lenders do ensure that the sum advanced is secured by some form of securities as security guarantees the safety of the advance, suitability of the purpose of the advance and profitability of the project.

---

<sup>308</sup> Set up as a ring-fenced entity, it is typically a proprietary limited company (private company) whose directors are responsible for the management of the debt guarantor and are appointed with the approval of the lenders [www.chadbourne.com/SouthAfricaLessonsFromProjectsFinancedToDateREFIT\\_projectfinance](http://www.chadbourne.com/SouthAfricaLessonsFromProjectsFinancedToDateREFIT_projectfinance)

<sup>309</sup> Cap. 345, R.E. 2002

Four main types of consensual security, in Tanzania, are recognised: *mortgage*,<sup>310</sup> *charge*,<sup>311</sup> *pledge*<sup>312</sup> and *[consensual] lien*.<sup>313</sup> Such coverage ensure the ‘perfection of security’ in several projects undertaken (and to be undertaken) at which creditors (especially secured creditors) are favoured and enforced by the lender in a contractual arrangement to satisfy its claims prior to the satisfaction claims raised by the unsecured parties against the borrower.

#### 4.4.3 Role of Host Country

The major aspect to be taken into consideration in the domestic legal framework is *the general quality of law – whether an appropriately regulated legal environment exists in the host country*. Nonetheless, there is a varying quality of host country legal systems including commercial laws, labour laws, property acquisition laws, environmental laws, land laws, corporate governance laws, customs and industry as well as tax regime/issues and authorisation/permits regarding a particular project. Political risk, however, is not unlikely to be left out when dealing with long-term financing (in this regard is project finance) as expropriation and change of law are likely to be found.

---

<sup>310</sup> Whether legal mortgage (It is created by execution of a deed (deed of transfer) or equitable mortgage (It is created by delivering to the lender the documents of title relating to the borrower’s land provided there is intention to treat the land as a security) it is created over a right of occupancy or lease (*section 2* of the Land Act as amended in 2004) for the purpose of acquiring, improving or constructing a residential property and is secured by the acquired, improved or constructed residential property. (*Regulation 2* of the Mortgage Financing Regulations – 2009)

<sup>311</sup> Charge can be created over a property (*section 97(1)* of Companies Act, 2002 – provides for registrable charges) or land (*section 112(5)* of the Land Act, 1999)

<sup>312</sup> Under *section 128* of the Law of Contract Act [Cap. 345, R.E. 2002], the provision is to the effect as it provides certainty for (secured) creditors in the event that a borrower in a project finance transaction fails to refund the loan, hence a common practice, in Tanzania. Also, borrowers tend to pledge shares to lenders, at which, share pledge remains equitable until the transfer of shares has been registered.

<sup>313</sup> Recognised under *section 123* of the Law of Contract Act [Cap. 345, R.E. 2002] and *section 113(5)* of the Land Act, 1999, read together with *section 64(1)* of the Land Registration Act, a creditor in a project finance deal is able to exercise the power of sale upon obtaining an order from the courts authorising the sale in the event of a default.

The general philosophy dictates that the ultimate goal of regulation is to achieve a high degree of economic efficiency and consumer protection in the economy.<sup>314</sup> The test to be addressed in order to examine the effectiveness of the Regulatory regimes are (i) efficiency-related principles; (ii) stability-related principles; (iii) conflict-conciliatory principles; (iv) regulatory-structure principles; and (v) general principles.<sup>315</sup>

With regard to this analysis, *regulatory-structure principles*<sup>316</sup> shall be taken into consideration and aid in making a comparative analysis of the regulation of project finance in Tanzania, UK and South Africa. Supplementary, information on the relevant governmental organs saddled with the responsibility of administering projects in obtaining license, approvals, permits, the quality of public administration, transparency of the system, local regulation and system of dispute settlement<sup>317</sup> has to be observed in this perspective.

## **UK**

With a range of enabling legislations in the UK, the EU procurement laws are applicable to project companies developing public-sector projects which fall within the scope of the rules and exceed certain financial values. The aforementioned laws apply to contracts awarded by central governments, local authorities or other public-sector bodies.<sup>318</sup>

Unless for specific statutory regimes in place for certain industries (including nuclear industry, banking, media, financial services and defence), generally, there are no restrictions on foreign investing in UK companies. However, there has been no political risk guarantees recently as

---

<sup>314</sup> Hans Falkena *et al*, *Financial Regulation in South Africa*, (SA Financial Sector Forum, South Africa, 2<sup>nd</sup> Edition, 2001), p.2 ,

[www2.resbank.co.za/internet/publication.nsf/ladv/e8d79424f5a87ca542256b52005ca2b3/\\$file/fregch1.pdf](http://www2.resbank.co.za/internet/publication.nsf/ladv/e8d79424f5a87ca542256b52005ca2b3/$file/fregch1.pdf)

<sup>315</sup> *Ibid* p. 3

<sup>316</sup> Regulatory-structure principle encompass a functional as well as an institutional approach to regulation; the co-ordination of regulation by different authorities and agencies in order to achieve consistency; and a presumption in favour of a small number of regulatory agencies. (See Hans Falkena *et al*, p. 7)

<sup>317</sup> Adetutu T. Oluwaseyi, *Key Legal and Commercial Issues Arising In International Project Finance*, (April 9, 2016), [www.linkedin.com/pulse/key-legal-commercial-issues-arising-international-adetutu-oluwaseyi](http://www.linkedin.com/pulse/key-legal-commercial-issues-arising-international-adetutu-oluwaseyi)

<sup>318</sup> [www.iclg.co.uk/practice-areas/project-finance/project-finance-2016/england-and-wales#chaptercontent4](http://www.iclg.co.uk/practice-areas/project-finance/project-finance-2016/england-and-wales#chaptercontent4)

lenders require direct agreements<sup>319</sup> with governmental authorities if the project is a PPP or PFI.

UK does not provide tax incentives preferentially or specifically to foreign investors or creditors, conversely, specific incentives are afforded to foreign investors in relation to the construction and operation of projects and businesses in specified locations. Likewise, there is no requirement for a license nor there is any general bar on foreign ownership of private-sector land.

Further, a withholding tax of twenty per cent (20%) at the basic rate of income tax is imposed on any payment of yearly interest arising in the UK.<sup>320</sup> As referred above, still, a UK company paying yearly interest on a debt security will generally have an obligation to deduct 20% of such interest and account for this withheld amount to the UK tax authorities.<sup>321</sup>

As the exact nature of the project determines which regulatory bodies and/or UK Government agencies will have authority over the project, a number of bodies in respect of development related to typical project sectors. Institutions such as local authorities, national infrastructure planning, environment agency, health and safety executive (HSE), marine management organisation, and the like, have been established having an overarching function in respect of development related to the typical project sectors.

A joint participation from both national and multinational institutions have bolstered UKs regulatory environment to the extent that, as noted in para 4.2.2 above, UK banks' liquidity increasing due to the fluidity and functionality of project finance regulators. Regulators such

---

<sup>319</sup> They are commonly entered into by lenders with key project contract counterparties in all types of UK-based projects.

<sup>320</sup> Deloitte, *op. cit.*, p. 20,

<sup>321</sup> U.K. Tax Laws and Tax System: U.K. Tax Rates 2013-14, April 2013, [www.worldwide-tax.com/uk/uk\\_taxes\\_rates.asp](http://www.worldwide-tax.com/uk/uk_taxes_rates.asp)

the Ministers and the Office of Budget Responsibility who projects and supervise the implementation of different projects and finance mechanisms.

### *South Africa*

Few laws recognise project financing tool/mechanism in South Africa.<sup>322</sup> However, typically, projects in South Africa are governed by South African law. To the extent that there is any security in a foreign jurisdiction, security documents in relation thereto will be governed by the law of that jurisdiction. If there are foreign lenders in a deal, laws of different jurisdictions can govern the financing agreements.<sup>323</sup>

Unlike Tanzania, a foreign company is not restricted having ownership in a South African project company. However, the requirements of a specific project or tender under which the project company will operate (as the case may be), may place certain foreign ownership restrictions on the project company and require that the project company is held, to some extent, by South African citizens.

Generally, South Africa seeks and aims at creating an attractive climate for investment hence developing the regulatory framework that is favourable to an investor. In this regard, it is important to mention *Section 217(2)* of the Constitution of the Republic of South Africa which permits the allocation of preference for historically disadvantaged persons in the public procurement context.<sup>324</sup>

---

<sup>322</sup> Such as the Public Finance Management Act, No. 1 of 1999

<sup>323</sup> Eric le Grange, Noma Modise, Kim Eichorn and Innes Du Preez, *Getting the Deal Through – Project Finance: South Africa*, Law Business Research Ltd., UK, 2016, p. 182

<sup>324</sup> The provision – *section 217* of the Constitution of the Republic of South Africa – spearhead the effectiveness of project finance transaction through having a public procurement mechanisms in driving innovation and investment sector. The provision states:

1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is hi]-: equitable, transparent. Competitive and cost-effective.

2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for- (a) categories of preference in the allocation of contracts;

Worthwhile to mention is the government's Broad-Based Economic Empowerment (B-BEE) Policy.<sup>325</sup> It is defined in the Broad-Based Black Economic Empowerment Act, 2003, as 'the empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies [...]'. The importance of this is that the participation of B-BBEE companies in South African project companies is often a requirement.

Nevertheless, South Africa impose a withholding tax on dividends at a rate of 15%. A withholding tax is also exerted on interest at the same rate as from 1 March 2015.

With a string of bodies regulating in its own respective sector in South Africa, although they do not directly influence the details of their underlying contracts and arrangements, are important in defining the rules of the game and ultimately shaping the enabling environment for project finance.

As it is essential to have transparent, fair and accountable regulators that produce credible and predictable regulatory decisions, the independence of regulators, at some point, in South Africa may be compromised by overreaching and competing government agencies. However, through good policies, several departments (like the Department of Energy) in relation to private sector and large state-owned enterprises boosts the regulatory environment of project finance in South Africa.

---

and (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination

3) National legislation must prescribe a framework within which the policy referred to in subsection (3) must be implemented

<sup>325</sup> This implies, for the renewable procurement, any developer setting up a project company must ensure that 30% shareholding and voting rights for black people with 5% shareholding and voting rights for local communities is typically organized. Although B-BBEE accreditation is not obligatory, only B-BBEE accredited entities are entitled to do business with the South African government or state-owned entities.

## *Tanzania*

Foreign persons and companies are not restricted in owning a project, generally, thus most businesses in Tanzania remain open to foreign investors. However, in some areas, for example, insurance, telecommunications and broadcasting as well as shipping agencies, restrictions are imposed to include: shareholding restrictions; stock exchange participation and land ownership.

Land ownership restriction is provided by the Land Act where foreigners are denied the right to hold land in a form of occupancy save only for projects registered under the TIC where foreigners where restriction is lifted for the purposes of investment only.<sup>326</sup>

Nonetheless, the Capital Markets and Securities (Foreign Investors) Regulations, 2003, sets out the limit of aggregate to be held by a foreign investor. Such restrictions, among other things, stresses that government securities are excluded from purchase by foreign investors and they (foreign investors) are allowed to purchase up to a maximum of 60% of the shares floated at DSE<sup>327</sup>.

Further, payment of dividends and repatriation of capital to foreign investors are unrestricted. Dividends paid by companies listed on the Dar es Salaam Stock Exchange (DSE) are subject to a withholding tax of 5% while to those of non-listed companies is 10%. A withholding tax of 10% applies also on interest payments, in Tanzania.

In assurance of investment environment in Tanzania on project finance, no obligation for a project company to repatriate foreign earnings is exerted. The same accounts to foreign currency accounts which may be maintained locally, and the approval of the Bank of Tanzania must be sorted by resident companies prior to opening a bank account abroad.

---

<sup>326</sup> This includes a minimum fixed direct investment of at least US\$500,000 in order for a foreigner (or foreign entity) to qualify for and obtain the certificate of incentives from TIC

<sup>327</sup> The remaining 40% of the shares floated must be reserved to Tanzanian investors



Notable in Chapter Three above, TIC, SPZA, EPZA and the Ministry of Finance and Economic Planning are bodies with the general authority in any of projects in Tanzania.

The effect of Public Procurement Regulatory Authority is observed especially when there are various projects which have been stalled because of failure to comply with the Public Procurement Act, 2004. Thus, guidance is to be sought from the authority on procurement requirements relevant to a particular project before concluding any contract with any public entity.

Poor implementation and functionality of the bodies is one of the hindering factor towards effective project finance regulation to the extent that Tanzania contributes less than a billion US dollar investment in project finance, save for PPP projects. (See Chapter Two above).

#### **4.5 Conclusion**

Clear policy statements, competent and enabled institutions that can identify and manage projects, efficient oversight procedures as well as proper legal frameworks are the indicators for developing a sound (project) financing mechanisms, regardless of having different economic and legal backgrounds.

In conjecture of other factors such as firm political commitment, stakeholder dialogue and a number of other factors are important contributing factors for the promotion of project finance (especially PPP/PFI where it is recognised in both of three jurisdictions – Tanzania, UK and South Africa).

Some features appear to be common in both Tanzania, UK and South Africa's legal and regulatory framework such as no restrictions on foreign companies investing in the respective jurisdictions. Similarity occurs where both opted for PPP and ensuring security/collaterals in their contractual arrangements.

As Tanzania opted for PPP as a possible alternative/type of long-term project financing, like in many other countries (especially SADC countries in sub-Saharan countries), improving the supply of long-term project financing in the economy is inevitable where it will require increasing the capacity of banking sector to transform a predominantly short-term funding base into long-term financing for the private sector and establishing capital markets that can channel the increasing amounts of long-term savings from pension funds and insurance into long-term investments.<sup>328</sup>

However, both Tanzania and South Africa tend to create a better environment that encourages foreign investment than it is in the UK. This expressed in the tax incentives awarded by both Tanzania and South Africa unlike the UK.

Despite of poor functionality and implementation of the laws and regulations of project finance transactions in Tanzania and South Africa, both countries (Tanzania and South Africa) intend to widen their investment portfolio to cater much larger investment schemes, hence lessons from the UK.

---

<sup>328</sup> This comes as a result of poor contribution of housing finance in the economy, in Tanzania, which is equivalent to one (1) percent of GDP – a significant difference from other developing countries such as South Africa, Namibia, Chile and Malaysia where housing finance accounts for 15 to 21 percent of GDP.

## **Chapter Five: CONCLUSION AND RECOMMENDATION**

### **5.1 Conclusion**

For a developing market such as Tanzania, project finance holds out the hope that a well-structured, economically viable project will attract long-term financing even if the project dwarfs its sponsors' own resources or entails risks they are unable to bear alone. With such a mechanism for sharing the costs, risks, and rewards of a project among a number of unrelated parties, a privatization or infrastructure improvement program will have a greater chance of raising the volume of funds it requires.

Further, with the prospects for economic growth increasing, in Tanzania, project financing is likely to increase and it is likely the growth of new productive investment picks up with the perception of risk remaining high and investors could be expected to turn to structuring techniques to help alleviate these risks.

The need to have a good project finance regime is established as it essential for the country to attract investors (both local and foreign), the same when Tanzania had a strong corporate finance and corporate governance as well as capital markets regime. Long-term project finance is a new model/tool of development that Tanzania isn't supposed to look over. Without a strong legal and regulatory project finance regime, no investor will be ready to take the risk of investing capital in a country whose legal regime is not protecting to his interests. As Nyaki points out in her dissertation, the existence of both strong legal and voluntary rules is one of the important factors that any investor examines before investing in any country.<sup>329</sup>

The importance of project finance as a financial mechanism, should also be revitalized as the country is transforming into a middle-income country where sectors of energy and requires

---

<sup>329</sup> Judith V. Nyaki, A Critical Analysis of Tanzanian Corporate Governance Regulation and Its Impact on Foreign Investment, University of Western Cape, 15 May 2013, p. 86

extensive investing. Areas including banking, real estate, planning, construction, renewable energy schemes (such as wind, solar, biomass, waste and hydro technologies, as well as geothermal energy), infrastructure at large, not disregarding corporate activities and the prospects of nuclear energy (due to the continuing exploration and discovery of uranium in southern Tanzania<sup>330 331</sup>).

The main purpose of this dissertation is to analyse the legal and regulatory framework of project finance in Tanzania. A legal and regulatory framework of project finance does exist but improvements are inevitable.

After a close look and comparison with the UK and South Africa jurisdiction three major aspects were taken into consideration when making a comparative analysis: contractual arrangements and perfection of security; the domestic legal framework and the role of the host country; and regulation.

### *Contractual Structure*

Both jurisdictions recognise the need of a strong contractual framework when dealing with project finance as noted in Chapter Two above that project finance is all about contractual relationship.

UK through their standard form contracts (SoPC) are made by public sector body, a respective project, in governing both private and public entities when entering into a project finance

---

<sup>330</sup> In July 2009, the former Minister for Energy and Minerals, William Ngeleja, reported that there are approximately 53.9 million pounds of uranium oxide deposits in Tanzania. In April 2013, the Tanzanian government issued the first Uranium Mining License to Russian uranium mining company, AtomRedMetZoloto (ARMZ), for Mkuju River Project. In December 2014, Metal Tiger (LON:MTR) and Kibo Mining signed a Memorandum of Understanding (MoU) for a joint venture to develop the Tanzania uranium portfolio, followed by a GBP 150,000 equity investment from Metal Tiger to acquire a 3.67% interest in Kibo's issued share capital.

<sup>331</sup> [www.tanzaniainvest.com/?s=uranium](http://www.tanzaniainvest.com/?s=uranium); See also INVERSTORINTERL, *Uranium in Tanzania – The Next Big Thing?*, Published April 19, 2016, [investorintel.com/sectors/uranium-energy/uranium-energy-intel/uranium-tanzania-next-big-thing/](http://investorintel.com/sectors/uranium-energy/uranium-energy-intel/uranium-tanzania-next-big-thing/)

transaction, something of which South Africa and Tanzania lack but the recognition of documentation and perfection of security are well implemented.

Lenders in both jurisdiction are guaranteed with the return of their investments at the point when the project has been complete or in the essence where there is a failure which hindered its completion.

Despite of lack of standardised contracts in both Tanzania and South Africa, efforts are noticed in other Sub-Saharan Africa especially in West Africa where one of the priority considerations is contracts and procurement.<sup>332</sup>

#### *Domestic Legal Framework and the Role of Host Country*

The legal environment in both jurisdictions depends on the level of political risk they face. Currently the BREXIT in UK and xenophobic attacks in South Africa places the countries in crucial political risks of losing their current (and future) investments if they persist. Something almost similar to Tanzania where they enjoyed a string of years of peacefulness, maintaining the current political tranquillity is important.

Bearing in mind that political tranquillity without good investment regimes will not suffice the growth of economy. Good investment regimes involves also the need to allow foreigners to own land for development something of which both jurisdictions allow; as well as better tax structure and regimes.

Xenophobic attacks in South Africa are yet to be resolved regardless of the Broad-Based Black Economic Empowerment Act of 2003 – however not directly linked to the attacks – the

---

<sup>332</sup> PWC, Capital projects and infrastructure in East Africa, Southern Africa and West Africa: Trends, Challenges and Future Outlook, November 2014, p. 29

government of South Africa need to redress the situation in order to influence better environment for project finance investment mechanism, both domestically and internationally.

It suffices to point out that, having deep roots of economy, UK is far more ahead than Tanzania and South Africa with better investment conditions than either of the jurisdictions in this analysis. However, both Tanzania and South Africa are pushing forward for attaining perfection of investment areas and project finance as a mechanism of finance and investment.

### *Regulation*

Several bodies have been established in both jurisdictions governing and regulating project finance. Conversely in South Africa there are no general bodies for approval/regulation of project finance like in Tanzania (where there is Tanzania Investment Centre and the like) and in the UK.

Through regulatory-structure principle where it integrates functional and institutional approach to regulation, PPP/PFI bodies have been established with the emphasis of promoting project finance in the purview of public-private partnership. However, there are no specific bodies dealing with the general project finance mechanism.

## **5.2 Recommendations**

### 1. Legislative recommendation

With both the UK and South Africa lacking concrete legislative framework on regulating project finance transactions – likewise in Tanzania, Tanzania should legislate a provision, law or regulation on project finance governing all affairs related within such as issues of taxation, relationship among participants, contractual framework as well as the means at which the project will be structured, that is whether private, public or partnership – PPP.

In essence, as many projects (and investments) are highly undertaken in Tanzania, strong and effective legal framework is important to the extent that will influence other sectors such as banking and financial sector, insurance sector, industrialization and social welfare of Tanzanians and investors (in the return of their investments).

Further, it is clear that project finance does not only encompass the legal aspect are but also construction and engineering, economy and finance, and the like, hence a specific law is inevitable.

2. As experienced in the UK and despite being revised, Tanzania should adopt standardisation of contracts which has generally allowed a wide dissemination of information on permitted risk allocations based on familiarity and market acceptance. This will enable both public and private sector to have a robust regime which does not only depend on the perfection of security to materialise and enforce the contract but also to evade dependence on PPP as the main form of contractual arrangements in project finance.
3. Specific regulatory bodies on project finance has to be established and not basing on the side of PPP/PFI in regulating projects. Without diminishing the role of PPP bodies in Tanzania, project finance is immense to the extent that without specified regulation, private projects and/or public projects (in evasion of PPP projects) can be hard to regulate.
4. Expanding the function of TIC to cover project finance mechanism if recommendation 4 above will seem costly in operation. In essence, as the TIC is the major regulatory body dealing with investment in Tanzania, then, as part of investment, projects may be well regulated in the TIC.

## BIBLIOGRAPHY:

### *Books and Articles*

1. Ahmed, Priscilla A. & Fang, Xinghai, *Project Finance in Developing Countries: Lessons of Experience No. 7*, International Finance Corporation (IFC), Washington D.C., U.S.A., 1999
2. Alhouy, Yves & Bousha, Reda, “*The Impact of IPPs in Developing Countries – Out of the Crisis and into the Future*,” PUBLIC POLICY FOR THE PRIVATE SECTOR WORLD BANK NOTE NO. 162 (Dec. 1998)
3. Axil Consulting The Cross Sector Advisory, PPP Country Paper Tanzania, Submitted to SADC-DFRC 3P NETWORK Public-Private-Partnership Working Group, 2013, [www.sadcpppnetwork.org/wp-content/uploads/2015/02/tanzania\\_27012014.pdf](http://www.sadcpppnetwork.org/wp-content/uploads/2015/02/tanzania_27012014.pdf)
4. Basel Committee on Banking Supervision, *International Convergence of Capital Measurement and Capital Standards – A Revised Framework Comprehensive Version*, Bank of International Settlements, Basel, Switzerland, June 2006
5. Clyde & Co, Public private partnerships in Tanzania: the new regime explained, Project & Construction, (September 2013), [www.inhousecommunity.com/wp-content/uploads/2016/07/CC\\_1008\\_PPPs\\_in\\_Tanzania\\_Sep\\_2013.pdf](http://www.inhousecommunity.com/wp-content/uploads/2016/07/CC_1008_PPPs_in_Tanzania_Sep_2013.pdf)
6. David Gardner and James Wright - HSBC, Project Finance, [www.hsbcnet.com/gbm/attachments/products-services/financing/project-finance.pdf](http://www.hsbcnet.com/gbm/attachments/products-services/financing/project-finance.pdf)
7. Dewar, John, *International Project Finance: Law and Practice*, (Oxford University Press, United States, 2011)
8. Dornel, Arnaud, *Project Finance for Infrastructure in Africa*, The World Bank, 2014, [www.imf.org/external/np/seminars/eng/2014/CMR/pdf/Dornel\\_ENG.pdf](http://www.imf.org/external/np/seminars/eng/2014/CMR/pdf/Dornel_ENG.pdf)
9. Eberhard, Anton, *et al*, *South Africa’s Renewable Energy IPP Procurement Program: Success Factors and Lessons*, Public-Private Infrastructure Advisory Facility (PPIAF), Washington D.C., USA, May 2014, [www.gsb.uct.ac.za/files/ppiafreport.pdf](http://www.gsb.uct.ac.za/files/ppiafreport.pdf)
10. Eric le Grange, Noma Modise, Kim Eichorn and Innes Du Preez, *Getting the Deal Through – Project Finance: South Africa*, Law Business Research Ltd., UK, 2016
11. Falkena, Hans *et al*, *Financial Regulation in South Africa*, (SA Financial Sector Forum, South Africa, 2<sup>nd</sup> Edition, 2001), [www2.resbank.co.za/internet/publication.nsf/ladv/e8d79424f5a87ca542256b52005ca2b3/\\$file/fregch1.pdf](http://www2.resbank.co.za/internet/publication.nsf/ladv/e8d79424f5a87ca542256b52005ca2b3/$file/fregch1.pdf)
12. Fight, A., *Introduction to Project Finance*, Butterworth-Heinemann Publications, Great Britain, 2006
13. Finnerty, John, D., *Project Financing: Asset-Based Financial Engineering*, (John Wiley & Sons Inc., New Jersey, USA, 2<sup>nd</sup> Edition, 2007)
14. Fletcher, Philip, *Rules of Negotiating Project Finance Deals*, International Finance Law Review (IFLR), November, 2005
15. Fletcher, Philip & Pendleton, Andrew, *International Project Finance*, The Projects and Construction Review, Law Business Research Ltd, 2<sup>nd</sup> Edition, June 2012
16. HM Treasury, *A new approach to public private partnerships*, December 2012



17. Haskell, Charles T., *Advanced Modelling for Project: For Negotiations and Analysis*, (Euromoney Books, London, UK, 2005)
18. Hoffman, Scott, L., *The Law and Business of International Project Finance*, Kluwer Law International, Netherlands, 2<sup>nd</sup> Edition, 2001
19. Gatti, Stefano, *Project Finance in Theory and Practice: Designing, Structuring, and Financing Private and Public Projects*, Academic Press Publications, UK, 2008
20. Getting the Deal Through Project Finance 2016, Law Business Research Ltd, UK, 2016
21. Malloy, Michael, P., *International Project Finance: Risk Analysis and Regulatory Concerns*, 18 *Transnat'l Law*, 89, 2004
22. Moody's Investors Service, Default and Recovery Rates for Project Finance Bank Loans, 1983-2011, Feb. 4. 2013,  
[cib.natixis.com/flushdoc.aspx?filename=Default and Recovery Rates for Project Finance Bank Loans 1983 2011 Moodys.pdf](http://cib.natixis.com/flushdoc.aspx?filename=Default%20and%20Recovery%20Rates%20for%20Project%20Finance%20Bank%20Loans%201983%202011%20Moody's.pdf)
23. National Treasury, *PPP Manual Module 1: South African Regulations for PPPs*, issued as National Treasury PPP Practice Note Number 02 of 2004,  
[www.gtac.gov.za/Publications/Module%2001.pdf](http://www.gtac.gov.za/Publications/Module%2001.pdf)
24. National Treasury: PPP Unit, *Introducing Public Private Partnerships in South Africa*, October 2007,  
[www.ppp.gov.za/Documents/Final%20Intro%20to%20PPP%20in%20SA%2021%2009%2007.pdf](http://www.ppp.gov.za/Documents/Final%20Intro%20to%20PPP%20in%20SA%2021%2009%2007.pdf)
25. Nevitt, Peter K., & Fabozzi, Frank J., *Project Financing*, (Euromoney Institutional Investor PLC, London, UK, 7<sup>th</sup> Edition, 2000)
26. Oluwaseyi, Adetutu T., *Key Legal and Commercial Issues Arising In International Project Finance*, (April 9, 2016), [www.linkedin.com/pulse/key-legal-commercial-issues-arising-international-adetutu-oluwaseyi](http://www.linkedin.com/pulse/key-legal-commercial-issues-arising-international-adetutu-oluwaseyi)
27. Penrose, James F., *Special-Purpose Entities in Project Finance Transactions*, 2J OF PROJECT FINANCE, 59, 1996
28. Pretorius, Frederick, *et al*, *Project Finance For Construction & Infrastructure: Principles and Case Studies*, (Blackwell Publishing, UK, 2008)
29. PWC, *Africa gearing up – Future prospects in Africa for the transportation & logistics industry*, (South Africa, 2013), [www.pwc.co.za/en/assets/pdf/africa-gearing-up.pdf](http://www.pwc.co.za/en/assets/pdf/africa-gearing-up.pdf)
30. PWC, *Capital Projects And Infrastructure In East Africa, Southern Africa And West Africa: Trends, Challenges And Future Outlook*, (November 2014),  
[www.pwc.co.za/en/assets/pdf/capital-projects-and-infrastructure.pdf](http://www.pwc.co.za/en/assets/pdf/capital-projects-and-infrastructure.pdf)
31. Qizilbash, Anis, PUBLIC-PRIVATE PARTNERSHIPS AND THE VALUE OF THE PROCESS: THE CASE OF SUB-SAHARAN AFRICA, *International Public Management Review (IPMR)*, 2011
32. Sara Møller Tof, *Project Finance and Political Risk: An empirical study of the relationship between project finance and political risk*, Aarhus School of Business, Aarhus University, August 2008
33. Sorge, Marco, *The Nature Of Credit Risk In Project Finance*, *BIS Quarterly Review* (Bank for International Settlements, Basel), December 2004

34. Spaić, Aneta, *Legal Aspects of Mitigating Risks In Project Finance: Mitigating Commercial and Political Risks in Project Finance*, (Podgorica, Fakulet, 2<sup>nd</sup> Edition, 2009)
35. Tinsley, CR, 'Introduction and glossary,' in *Practical Introduction to Project Finance: practical case studies*, 1996, Euromoney Books
36. Tinsley, Richard, *Advanced Project Financing: Structured Risks*, Euromoney Institutional Investor PLC, UK, 2<sup>nd</sup> Edition, 2014
37. Vinter, G.D., *Project Finance: A Legal Guide*, 3<sup>rd</sup> Edition, Sweet & Maxwell, London, 2004
38. Webber Wentzel, *Investing in South Africa: Charting the Legal Landscape with Webber Wentzel*, 2015/2016,  
[www.investinginsouthafrica.co.za/downloads/en/Webber Wentzel Investing in South Africa complete.pdf](http://www.investinginsouthafrica.co.za/downloads/en/Webber_Wentzel_Investing_in_South_Africa_complete.pdf)
39. Yescombe, E.R, *Principles of Project Finance*, (Yescombe Consulting Ltd, UK, 2002)

### ***Journals and Reports***

1. CMSA Annual Report 2014-2015, [www.cmsa-tz.org/CMSA\\_Annual\\_Report\\_2014-2015.pdf](http://www.cmsa-tz.org/CMSA_Annual_Report_2014-2015.pdf)
2. Corielli, F., Gatti, S. & Steffanoni, A., *Risk Shifting Through Nonfinancial Contracts: Effects on Loan Spreads and Capital Structure of Project Finance Deals*, *Journal of Money Credit and Banking*, Vol. 42, No. 7, October 2010
3. European PPP Expertise Centre (EPEC), *PPP Units and Related Institutional Framework*, June 2012, [www.eib.org/epec/resources/publications/epec\\_uk\\_england\\_public\\_en.pdf](http://www.eib.org/epec/resources/publications/epec_uk_england_public_en.pdf)
4. *International Financial Law Review (IFLR)*, 2017 Project Finance Report, Published 9 December 2016, [www.iflr.com/Article/3646259/2017-Project-Finance-Report-Tanzania.html](http://www.iflr.com/Article/3646259/2017-Project-Finance-Report-Tanzania.html)
5. IRENA, *Financial Mechanisms and Investment Framework for Renewables in Developing Countries*, December 2012, [irena.org/Finance RE Developing Countries.pdf](http://irena.org/Finance_RE_Developing_Countries.pdf)
6. Kavishe, Neema & Min An (2016), *Challenges for Implementing Public Private Partnership in Housing Projects in Dar es Salaam City, Tanzania*, In: P W Chan and C J Neilson (Eds.) *Proceedings of the 32nd Annual ARCOM Conference*, 5-7 September 2016, Manchester, UK, Association of Researchers in Construction Management, Vol. 2:938
7. Kusiluka, Moses (PhD), *Opportunities and Challenges of East African Property Markets for Foreign Investors with Emphasis on Tanzania*, Presented at SAIBPP Convention 4-6 November 2015, Durban South Africa: *Advancing Property Practitioners Beyond Borders*,  
[saibpp.co.za/wp-content/uploads/2015/01/Access%20to%20land%20in%20Tanzania.pdf](http://saibpp.co.za/wp-content/uploads/2015/01/Access%20to%20land%20in%20Tanzania.pdf)
8. Makovše, Dejan & Veryard, Daniel, *The Regulatory Asset Base and Project Finance Models: An Analysis of Incentives for Efficiency*, Discussion Paper 2016-1, International

- Transport Forum, Paris, France, February 2016, [www.itf-oecd.org/sites/default/files/dp\\_2016-01\\_makovsek\\_and\\_veryard.pdf](http://www.itf-oecd.org/sites/default/files/dp_2016-01_makovsek_and_veryard.pdf)
9. Nyaki, Judith, V., *A Critical Analysis of Tanzanian Corporate Governance Regulation and Its Impact on Foreign Investment*, University of Western Cape, 15 May 2013
  10. OECD, “Overview of progress and policy challenges in Tanzania,” in *OECD Investment Policy Reviews: Tanzania 2013*, (OECD Publishing, 2013), [www.oecd.org/daf/inv/investment-policy/IPR-Tanzania-2013-Overview-Progress-Policy-Challenges.pdf](http://www.oecd.org/daf/inv/investment-policy/IPR-Tanzania-2013-Overview-Progress-Policy-Challenges.pdf)
  11. OECD Journal: Financial Market Trends, *Financing Infrastructure – International Trends* by Raffaele Della Croce and Stefano Gatti, Vol. 1, 2014, [www.oecd.org/finance/Financing-infrastructure-international-trends2014.pdf](http://www.oecd.org/finance/Financing-infrastructure-international-trends2014.pdf)
  12. Prof Josephat Itika, Dr Oswald Mashindano & Dr Flora Kessy, *SUCCESS AND CONSTRAINTS FOR IMPROVING PUBLIC PRIVATE PARTNERSHIP IN HEALTH SERVICES DELIVERY IN TANZANIA*, ESRF Discussion Paper No. 36, Dar es Salaam Tanzania
  13. Sandford, Mark, *Local government in England: capital finance*, House of Commons Library, Briefing Paper Number 05797, 27 June 2016
  14. South Africa Year Book, 2014/2015, Mineral Resources, [www.gcis.gov.za/sites/www.gcis.gov.za/files/MineralResources.pdf](http://www.gcis.gov.za/sites/www.gcis.gov.za/files/MineralResources.pdf)
  15. South Africa Year Book 2014/15, Water and Sanitation, [www.gcis.gov.za/sites/www.gcis.gov.za/files/docs/resourcecentre/WATER%20AND%20SANITATION2015.pdf](http://www.gcis.gov.za/sites/www.gcis.gov.za/files/docs/resourcecentre/WATER%20AND%20SANITATION2015.pdf)
  16. Tanzania Investment Report 2013: Foreign Private Investment
  17. US Department of State, Tanzania Investment Climate Statement, June 2015
  18. Yona, Lucky & Inanga, Eno L., *Financial Sector Reforms in Bank Regulations and Supervision and its Impact on Banking Competitiveness and Economic Efficiency of Commercial Banks in Tanzania*, Research Journal of Finance and Accounting, Vol. 5, No. 4, 2014

### **Internet Sources**

1. AllAfrica, *Tanzania: Financing Gas Projects – Current Status, Future Direction*, by Paul Kibuuka, (24 April 2016), [allafrica.com/stories/201604260181.html](http://allafrica.com/stories/201604260181.html)
2. Eric le Grange and Kerryn Anderson, *Project Finance 2014: South Africa*, (15 October 2013), [www.ensafrica.com/news/Project-Finance-2014-South-Africa?Id=1192&STitle=Project%20finance%20ENSight](http://www.ensafrica.com/news/Project-Finance-2014-South-Africa?Id=1192&STitle=Project%20finance%20ENSight)
3. Helmet News, *Tanzania: Dar es Salaam Flyover Construction Scheduled For October*, (July 27 2016), [helmetnews.com/2016/07/27/tanzania-dar-es-salaam-flyover-construction-scheduled-october/](http://helmetnews.com/2016/07/27/tanzania-dar-es-salaam-flyover-construction-scheduled-october/)
4. International Comparative Legal Guides (ICLG), *England & Wales: Project Finance 2016*, (07/04/2016), [www.iclg.co.uk/practice-areas/project-finance/project-finance-2016/england-and-wales#chaptercontent2](http://www.iclg.co.uk/practice-areas/project-finance/project-finance-2016/england-and-wales#chaptercontent2)

5. INVERSTORINTERL, *Uranium in Tanzania – The Next Big Thing?*, (April 19, 2016), [investorintel.com/sectors/uranium-energy/uranium-energy-intel/uranium-tanzania-next-big-thing/](http://investorintel.com/sectors/uranium-energy/uranium-energy-intel/uranium-tanzania-next-big-thing/)
6. Krista Van Winkelhof, *Company Law Reforms in Tanzania: The Companies Act 2002*, (July 24, 2013), [lawworldwide.com/company-law-reforms-in-tanzania/](http://lawworldwide.com/company-law-reforms-in-tanzania/)
7. Mansoor Parker, *SARS issues important tax ruling for renewable energy financing structures*, (27 April 2016), [www.ensafrica.com/news/SARS-issues-important-tax-ruling-for-renewable-energy-financing-structures?Id=2179&STitle=tax%20ENSight](http://www.ensafrica.com/news/SARS-issues-important-tax-ruling-for-renewable-energy-financing-structures?Id=2179&STitle=tax%20ENSight)
8. Mario Mansour, *Fiscal Stability Clauses*, pg. 2, [www.academia.edu/20489971/Mansour\\_04 - Fiscal Stability Clauses-unpublished](http://www.academia.edu/20489971/Mansour_04_-_Fiscal_Stability_Clauses-unpublished)
9. National Social Security Fund, Kigamboni Bridge, [www.nssf.or.tz/index.php/investments/kigamboni-bridge](http://www.nssf.or.tz/index.php/investments/kigamboni-bridge)
10. Paul Kibuuka, *Financing Tanzanian Infrastructure: Options, Challenges and Prospects*, (March 25, 2016), [www.linkedin.com/pulse/financing-tanzanian-infrastructure-options-challenges-paul-kibuuka](http://www.linkedin.com/pulse/financing-tanzanian-infrastructure-options-challenges-paul-kibuuka)
11. Robert Mecky, *The Companies Act and A Single Shareholder Company: An Appraisal, 2013*, [meckyrobert.blogspot.com/2013/04/the-companies-act-and-singles.html?view=sidebar](http://meckyrobert.blogspot.com/2013/04/the-companies-act-and-singles.html?view=sidebar)
12. South Africa - Project Financing, (6/15/2016), [www.export.gov/article?id=South-Africa-project-financing](http://www.export.gov/article?id=South-Africa-project-financing)
13. Tanzania Transport – Tanzania Inaugurate Nyerere Bridge Linking Dar es Salaam to Kigamboni, (April 22, 2016), [www.tanzaniainvest.com/transport/tanzania-inaugurate-nyerere-bridge-linking-dar-es-salaam-to-kigamboni](http://www.tanzaniainvest.com/transport/tanzania-inaugurate-nyerere-bridge-linking-dar-es-salaam-to-kigamboni)
14. Wind Energy, (Feb. 29, 2016) [analysis.windenergyupdate.com/emerging-markets/south-african-projects-must-tackle-forex-risks-national-growth-slows](http://analysis.windenergyupdate.com/emerging-markets/south-african-projects-must-tackle-forex-risks-national-growth-slows)
15. Zitto Na Demokrasia, *'Who is the Middle Class? Who is the Middle Class in Tanzania'*, (08/07/2013), [zittokabwe.wordpress.com/2013/07/08/who-is-the-middle-class-who-is-the-middle-class-in-tanzania/](http://zittokabwe.wordpress.com/2013/07/08/who-is-the-middle-class-who-is-the-middle-class-in-tanzania/)