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Article

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The Dilemma of Public–Private Partnerships as a Vehicle for the Provision of Regional Transport Infrastructure Development in Africa

Abstract: With regional economic integration (REI) as a major strategy for development, the African continent hosts a plethora of regional economic communities of varying ambition longevity and success. While in the 1970s, political-economic ideas built mainly on the "developmental state" informed the design of most of these agreements, the change in economic thought in the 1980s which ushered in the "neoliberal turn" has since influenced the design of most REI schemes in Africa, including the New Partnership for African Development. However, among other factors, inadequate transport infrastructure linking regions poses a major impediment to regional trade and development in Africa. The more so as most African governments are not able to meet up with the financial burden, pace and managerial capability for the efficient provision and management of regional transport infrastructure. The article explores the dilemma associated with the adoption of Public–Private Partnerships ("PPP") as a mechanism for the provision of regional transport infrastructure in Africa. While sourcing infrastructure provision through the PPP mechanism has significant advantages, it is however also embedded with a complex financial, contractual and legal process. First, it explores the theoretical assumptions which inform PPP based on ideologies within law and development debates. It argues that theoretically, PPPs are reflective of the neoliberal policy set. Against the trajectory of governance in Africa, it critically foregrounds insights that are derivable from an application of Path Dependency theory to the institutional change which comes with the planned adoption of PPP at the regional level. These insights are essential considerations for policy experts to

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bear in mind both while designing the regional institutional framework for PPP and during the implementation stage. Secondly, although most of the past initiatives for the provision of regional infrastructure have fallen short of their flamboyant development policy goals, the article argues that the recently initiated Programme for Infrastructure Development in Africa ("PIDA") provides a new hope for the future of infrastructure development in the continent. The article contends that PIDA offers a legitimate platform which with the requisite support of the regional economic initiatives can generate the enabling environment for the implementation of successful regional PPP infrastructure projects.

Keywords: African regional infrastructure, Public–Private Partnerships, regional economic integration and development

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1 Introduction

The quest for Africa to develop and attain its place in the global economic order cannot occur without a functional and modern infrastructure network. Failure to attend urgently to the infrastructure demand in Africa, both at the national, regional and continental level, suggests that the continent may yet slip further behind other developing countries[1] and also encounter further delays in its attempt to deepen integration both within the continent and the global economy. The successful integration of regional transport infrastructure in Africa is both a forerunner and facilitator of deeper economic integration. The transport networks of African states provide the foundation for effective and efficient regional trade and integration. This also impacts on the overall economic development of the connected regions and Africa at large.[2] The improvement

1 In this regard, a study found that "Africa's infrastructure networks increasingly lag behind those of other developing countries and are characterized by missing regional links and stagnant household access." See, V. Foster and C. Briceno-Garmendia (eds.), *Africa's Infrastructure: A Time for Transformation – Overview* (The World Bank, Infrastructure Consortium for Africa, 2010), p. 1, available at: <http://www.infrastructureafrica.org/system/files/AIATT_Consolidated_smaller.pdf>, accessed 10 June 2013. This study examines the state of Africa's infrastructure, the costs required for transforming it and the efficiency gains that will arise from bridging the continent's infrastructure gap.

2 S. Simuyemba, *Linking Africa through Regional Infrastructure* (African Development Bank Economic Research Paper No. 64, 2000), p. 5, available at: <http://www.afdb.org/fileadmin/

of the interconnection linking various economic hubs of the continent equally has the capacity to forestall some of the barriers associated with path-dependent development which inhibits the diversification and expansion of trade networks in the continent. Although as separate entities, nations are making efforts towards improving their infrastructure network deficit; however, with over 15 landlocked countries having inadequate transport infrastructure system, the process that will generate a significant transition in the economic sphere in Africa requires not a sporadic effort but a sustained national and regional effort. In the past decade, the significance of transport infrastructure as a vital component in the process of regional economic integration has gained increasing prominence in the discourse of regionalism and development in Africa. However, much appears to be left at the level of rhetoric, despite the emphatic declaration of the need for common regional physical infrastructure in the various treaties establishing Regional Economic Initiatives,[3] and the New Partnership for Africa's Development ("NEPAD") agenda.[4] Although this article is concerned primarily with road and rail transport infrastructure connecting various economic regions in Africa, the analysis remains relevant and applicable to other sectors.

Funding regional transport infrastructure projects however require a significant level of financial resources,[5] which most African states cannot provide by themselves. Already, in addition to their national financial burden, most African states continue to struggle to meet the financial commitments associated with their membership of

uploads/afdb/Documents/Publications/00157662-EN-ERP-64.PDF>; R. Ranganathan and V. Foster, *ECOWAS's Infrastructure: A Regional Perspective* (The World Bank, June 2011), available at: <http://www.infrastructureafrica.org/system/files/library/2012/02/REC%20ECOWAS.pdf>. On the nexus between trade and development, see, J. Stiglitz and A. Charlton, *Fair Trade for All: How Trade Can Promote Development* (Oxford: Oxford University Press, 2005).

3 Wherever used in this article, Regional Economic Initiatives refer principally to the eight (8) regional economic communities recognized by the African Union, to wit; East African Community ("EAC"), Economic Community of West African States ("ECOWAS"), South African Development Community ("SADC"); Common Market for Eastern and Southern Africa ("COMESA"), Economic Community of Central African States ("ECCAS"), Intergovernmental Authority on Development ("IAD"), Community of Sahel-Saharan States ("CEN-SAD"), and Arab Maghreb Union ("AMU").

4 For example, see, Chapter VII of ECOWAS Treaty of 1993–*Co-operation in Transport, Communications and Tourism*; and Chapter Fifteen of the EAC Treaty of 1999–*Co-operation in Infrastructure and Services*.

5 According to the ICA, "[t]o create a transport network that provides adequate regional, national, rural, and urban road connectivity complemented by adequate rail, port, and airport infrastructure will require significant spending [in the region of] $18 billion a year, half of which is related to maintenance." Foster and Briceno-Garmendia (2010), *supra* note 1, p. 56.

multiple regional economic initiatives. Surmounting the hurdle of infrastructure deficit in Africa requires innovative project finance mechanisms that will facilitate the provision of regional physical infrastructure with minimal financial burden on the member states and also devoid of conditions that are oppressive and could frustrate the delivery of the projects. In this regard, Public–Private Partnership ("PPP")[6] has been identified as a useful mechanism.[7] Going forward, accessing increased private financial investment through PPPs is one of the major ways that the regional schemes in Africa seek to promote infrastructure development.

The article explores what it refers to as the dilemma associated with the adoption of PPP as a mechanism for the provision of regional transport infrastructure in Africa. While sourcing infrastructure provision through the PPP mechanism has significant advantages, it is however also embedded with a complex financial, contractual and legal process. First, it explores the theoretical assumptions which inform PPP based on ideologies within law and development debates. It argues that theoretically PPPs are reflective of the neoliberal policy set. Against the trajectory of governance in Africa, it critically foregrounds insights that are derivable from an application of Path Dependency theory to the institutional change which comes with the planned adoption of PPP at the regional level. These insights are essential considerations for policy experts to bear in mind both while designing the regional institutional framework for PPP and during the implementation stage. Secondly, although most of the past

6 To the author's knowledge, there is no generally acceptable definition of PPP. See generally, the following articles with different takes on PPP in the transport sector: A. Estache, E. Juan and L. Trujillo, *Public-Private Partnerships in Transport* (World Bank, 2007), available at: <http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2007/12/12/000158349_20071212085739/Rendered/PDF/wps4436.pdf>, accessed 10 Jun 2013; C. Willoughby, *How Much Can Public Private Partnership Really Do for Urban Transport in Developing Countries?* 40 Research in Transportation Economics (2013), 34–55; B.G. Perez and J.W. March, *Public-Private Partnerships and the Development of Transport Infrastructure: Trends on Both Sides of the Atlantic* (United States Department of Transportation, 2006), available at: <http://financecommission.dot.gov/Documents/Background%20Documents/perez_banff_ppp_final.pdf>, accessed 10 June 2013; R. Fischer, *The Promise and Peril of Public-Private Partnerships: Lessons from the Chilean Experience* (International Growth Centre Working Paper 11/0483, June 2011); World Bank, *Toolkit for Public-Private Partnerships in Roads and Highways* (March 2009), available at: <http://www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/highwaystoolkit/index.html>, accessed 10 June 2013.

7 For example, see, NEPAD, *Revision of the African Union/NEPAD African Action Plan 2010-2015: Advancing Regional and Continental Integration Together through Shared Values – Abridged Report 2010–2012* (2011), available at: <http://www.nepad.org/system/files/AAP%20final%20web%20130111.pdf>, accessed 10 June 2013. This report identifies PPP as a principal financing strategy to accelerate programme and project implementation in Chapter 6: "Implementation of the Revised AAP [African Action Plan]."

initiatives for the provision of regional infrastructure have fallen short of their flamboyant development policy goals, the article argues that the recently initiated Programme for Infrastructure Development in Africa ("PIDA") provides a new hope for the future of infrastructure development in the continent. The article contends that PIDA offers a legitimate platform which with the requisite support of the regional economic initiatives can generate the enabling environment for the implementation of successful regional PPP infrastructure projects. However, this will only be possible with the appropriate regulatory and institutional framework.

2 Part I: law and development debates perspective on PPP

2.1 The theoretical underpinning of PPP

In any particular period, the dominant development ideologies have significant implications for how development is viewed as best pursued across different countries. Since the end of the Second World War, the design of development policy across the third world have seen a shift from the developmental state to the neoliberal agenda and "Post-Washington consensus" as the underlying dominant economic development ideas.[8] After a sustained period of non-activity in development economic thinking other than the critique of neoliberalism and co-existence of various heterodox economic development strategies, some law and development scholars are now talking of the possible emergence of a "New Developmental State"[9] phenomenon which is distinguishable from the old

8 It should be noted that other theories such as *dependency theory*, *structuralism*, and similar heterodox development ideas co-existed at the same time as the dominant ones discussed in this article. See generally, D.M. Trubek and A. Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006) for compelling discussions from various perspectives which maps the debates and ideas in law and development from the post-war period.

9 See, D.M. Trubek, H.A. Garcia, D.R. Coutinho and A. Santos (eds.), *Law and the New Developmental State, The Brazilian Experience in Latin American Context* (Cambridge: Cambridge University Press, 2013). The "Law and the New Developmental State (LANDS)" research project which was launched by Professor David M. Trubek in 2007.

"LANDS explore the changing role of the state in development today and the implications of such changes for the use of law and regulation as tools of economic and social policy. It rests on the premise that developing nations are exploring new ways that the state can and should developmental state and the Asian Developmental State.[10] It is important to reflect on these development ideologies because of the impact they have on how the states, and by extension regions, perceive of the way to provide infrastructure services. The ideologies pitch against each other policy sets which are at different ends.

The developmental state theory views the state as the driver and an active participant in the process of the state's economic growth and development. This theory gained significant reception amongst African states in the early years after independence up to the late 1970s. The development policy was characterized by such themes as dirigiste state planning, protection of national economies, modernization and industrialization amongst others. State-owned enterprises provided physical infrastructure and services directly to the citizenry. Smith and Trebilcock argue that a primary aim of the state-owned enterprises was "investment in infrastructure" and the "promotion of regional development within LDCs [less developed countries]."[11] Law in the context of the old developmental state was seen as an instrument by which state actors could shape the economy and was therefore interpreted to achieve the developmental purposes of the state.[12] By the late 1970s, however, it had become apparent that the developmental state ideal was not producing the needed development in Africa and the Third World at large. This strand of development thinking has been adjudged as, unsuccessful in Africa.[13] Smith and Trebilcock also observe that state-owned enterprises were not helpful in setting the stage for privatization as an alternative: – a policy set of the next dominant development orthodoxy.

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promote both growth and equity and that these efforts may go beyond the policies recommended by the "augmented Washington Consensus." See: LANDS website, available at: <http://www.law.wisc.edu/gls/lands.html>, accessed 10 June 2013.

10 See generally the following text on the latest thinking of scholars within the law development field: D. Kennedy and J. Stiglitz (eds.), *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century* (Oxford: Oxford University Press, 2013),

11 D. Andrew, C. Smith and M.J. Trebilcock, *State-Owned Enterprises in Less Developed Countries: Privatization and Alternative Reform Strategies*, 12 European Journal of Law and Economics, no. 3 (2001), 217–252, at 219.

12 D. Kennedy, "The 'Rule of Law', Political Choices, and Developmental Common Sense", in D.M. Trubek and A. Santos (eds.), *supra* note 8, pp. 95-173.

13 K. Olayode, *Reinventing the African State: Issues and Challenges for Building a Developmental State*, 8 African Journal of International Affairs, nos. 1&2 (2005), 23-43, at 25.

The emergence of neoliberalism as a development ideology is associated with the year 1980 and beyond in law and development debates. Unlike the developmental state, its policy-set privileges the micro-economic management of the economy and the economic growth of the society in the hands of private actors. The economy is imagined as a market in "which individual economic actors transact with one another, responding to price signals and thereby allocating resources to their most productive use."[14] Under this regime, the government's role is passive, limited to the provision of laws that enhance rather than distort market forces. In Africa, several changes occurred principally as a result of the conditions of loan from international organizations such as the World Bank. State-owned enterprises were deregulated to allow the participation of private actors in their economy especially through privatization of several state-owned enterprises, formalization,[15] standardization and the rule of law.[16] The structures of import substitution industrialization and other protectionist policies constructed under the developmental state were also dismantled in favour of open market. According to Trubek, "two cardinal aspects of robust neoliberalism are that everyone will benefit from greater global economic integration, and foreign investment and export-led growth are the best development strategies."[17] Law is seen as a framework that enhances the efficiency of the market order and a shield against distortionary intervention by the government. In propagating the liberalization of trade and promotion of market fundamentalism in Africa, it has been observed that neoliberalism presented the developmental state "as the millstone that hampered the quest for development in Africa, obstructing the free functioning of markets, consuming disproportionate share of investible resources … and stifling private initiative."[18] Although it has been largely critiqued, neoliberalism's hegemony as a development policy continued in the chastened form of "Washington Consensus." For example, the design of many regional trade agreements in Africa, from the

14 Kennedy (2006), *supra* note 12, p. 129.
15 H. De Soto, *The Mystery of Capital*: *Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000).
16 A. Santos, "The World Bank's Use of the 'Rule of Law' Promise in Economic Development", in D.M. Trubek and A. Santos (eds.), *supra* note 8, pp. 253-300.
17 D.M. Trubek, "The "Rule of Law" in Development Assistance: Past, Present, and Future", in D.M. Trubek and A. Santos (eds.), *supra* note 8, pp. 74-94, at 87.
18 Olayode (2005), *supra* note 13, pp. 27-28.

1990s including that of the NEPAD framework in 2002 was informed by neoliberalism.[19]

The origin of the participation of private sector in the provision of infrastructure at the international level occurred during the dominant years of neoliberalism.[20] PPPs should not interpreted as limited to the introduction of market mechanisms in the provision of infrastructure services, rather, in also

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19 M.O. Chibundu, "NEPAD and the Rebirth of Development Theory and Praxis", in Jeremy I. Levitt (ed.), *Africa: Mapping New Boundaries in International Law* (Oxford: Hart Publishing, 2008), pp. 257-295. Chibundu argues that the factor which united the African leaders towards the formation of the NEPAD "was their embrace of the neo-liberal order (embodied in what had become symbolically referred to as the 'Washington Consensus') …". In relation to the substance of the NEPAD agenda, he argues that "the 'framework' document follows in the line of the neo-liberal development theory …" pp. 259-260. See also, I. Taylor, *Globalization and Regionalization in Africa: Reactions to Attempts at Neo-Liberal Regionalism*, 10 Review of African Political Economy, no. 2 (2003), 310-330. For a critique of the NEPAD policy agenda, see, J.T. Gathii, *A Critical Appraisal of the NEPAD Agenda in Light of Africa's Place in the World Trade Regime in an Era of Market Centred Development*, 13 Transnational Law and Contemporary Problems, no. 1 (2003), 179-210; J.T. Gathii, *The Neoliberal Turn in Regional Trade Agreements*, 86 Washington Law Review, no. 3 (2011), 421-474.

20 In terms of evolution of PPPs, prior to year 2000, the United Kingdom distinguished between Private Finance Initiative ("PFI") and PPP. PFI was announced in 1992 by the then Chancellor with the aim of increasing the involvement of the private sector in the provision of public services. It was not until "2000, [that] the government published 'Public Private Partnerships – the Government's Approach' which defined PPP in three categories, to wit:

- the introduction of private sector ownership into state-owned businesses, using the full range of possible structures …, with sales of either a majority or a minority stake;
- the … (PFI) and other arrangements where the public sector contracts to purchase quality services on a long-term basis so as to take advantage of private sector management skills incentivised by having private finance at risk. This includes concessions and franchises, where a private sector partner takes on the responsibility for providing a public service, including maintaining, enhancing or constructing the necessary infrastructure; and
- selling government into wider markets and other partnership arrangements where private sector expertise and finance are used to exploit the commercial potential of government assets."

See, HM Treasury, *PFI: Meeting the Investment Challenge* (The Stationery Office, July, 2003b), p. 3, available at: <http://www.ppp.mg.gov.br/biblioteca/downloads/Meeting%20the%20Investment%20Challenge%20-%20Estudo%2002.pdf>, accessed 10 June 2013.

In the context on developing countries, it has been argued that they "became interested in toll financing during the 1980s, when economic and population growth led to increasing demand in infrastructure. In Mexico, President Salinas established a national highway building program that relied heavily on private toll financing [and] [i]n Indonesia, expected traffic growth and projections of high construction costs led the government to launch a joint venture private toll financing program to fund and manage toll projects." See, G. Fishbein and S. Babbar, *Private Financing of Toll Roads* (RMC Discussion Paper Series No. 117, December 1996), p. 3, available at: <http://siteresources.worldbank.org/INTGUARANTEES/Resources/Private_Financing_of_Toll_Roads.pdf>, accessed 10 June 2013.

involves the setting of common goals by both the public and private sectors aimed at harnessing the strengths of both sector. The diversity of PPP models we have today have all emerged as a result of the nestling environment which neoliberalism afforded to implement various projects across various countries and to learn from them in designing more responsive PPP schemes.[21]

Before moving on to the next section, it is important to highlight the role which PPPs play in the policy set of the earlier referenced "New Developmental State" phenomenon. Recent scholarship – in the Latin American context – suggests that there is a revitalized role for the public sector in the economic growth of a country which opposes the neoliberal order as it privileged the private over the public sector. The Asian Developmental State is seen as the harbinger of the "New Developmental State." To distinguish the "new developmental state" and the "Asian Developmental State" paradigms from neoliberalism, Trubek suggests that we should think of the "new developmental state" and "Asian Developmental State" as "involving more state intervention than neoliberalism but less intervention and more openness than might be found in the classic development states."[22] In other words, there is no dominance by either the public or private sector which is associated with the developmental state and neoliberal paradigms. The "new developmental state" phenomenon suggests that the full embracement of PPP by an economy is one of

21 For various approaches to categorizing PPPs, see, J. Delmon, *Understanding Options for Public-Private Partnerships in Infrastructure*, (The World Bank Policy Research Working Paper 5173, January 2010), accessed 10 June 2013, available at: <http://elibrary.worldbank.org/docserver/download/5173.pdf>?expires=1370910235&id=id&accname=guest&checksum=4B9B69B0C28A2171F73C6E400EDB005E.>

22 D.M. Trubek, *Developmental State and the Legal Order: Towards a New Political Economy of Development and Law* (October 2010), p. 15, available at: <http://www.law.wisc.edu/gls/documents/developmental_states_legal_order_2010_trubek.pdf>, accessed 10 June 2013. It is important to caution that the "New Developmental State *phenomenon*", as Trubek calls it, is not a *theory* that has been completely developed. Trubek provides an indicative list of policy benchmarks that will help determine if a state is turning towards such a paradigm: "… we should look to see to what extent there is: [1] primary reliance on the private sector as investor rather than direct state ownership; [2] acceptance of a major role for the state in steering investment, coordinating projects and providing information especially with multiple inputs and long term payoff; [3] extensive collaboration and communication between public and private sectors; [4] strong interest in exports and relative openness to imports; [5] direct attention to entrepreneurship, innovation, and new development rather than reliance on imported technology and know-how; promotion of productive' (rather than speculative) foreign direct investments; [6] emphasis on making private firms competitive rather than on shielding them from competition; [7] *privatization or public/private partnerships in provision of public services*; [8] promotion of domestic capital markets and the financial sector both to generate and to allocate resources; [9] attention to social protection including efforts to reduce inequality, maintain solidarity and protect against some of the costs of restructuring; and [10] welfare programs conditioned to recipients work or investment in their human capital." [Emphasis mine] *Ibid*, pp. 10-11.

the factors which are indicative of a move away from neoliberalism and supportive of a transition towards the "new developmental state." More specifically, the assumptions which inform new development economics suggest the need for a number of different institutional and policy regime such as:

> organized systems for public-private information sharing; co-operative public-private efforts to construct regulatory regimes that foster global competitiveness and domestic efficiency, [and the] … *use of public-private partnerships for major investments in infrastructure*, …[23] [emphasis mine]

Although, it would be interesting to inquire to what extent the new developmental state phenomenon can be sustained in relation to government policies and practices in Africa, this would require a contextual historical analysis of the peculiar trajectory of "the developmental state in Africa."[24] Such inquiry is however outside the purview of this article.

2.2 Insights from path dependency theory in law and development debates on the institutional framework for PPPS: forging new path through regional transport infrastructure

> [The] transportation systems and related infrastructure in Africa were conceived and constructed to meet the economic needs of the colonial powers and were not intended to support balanced economic growth to meet the demands and aspirations of African countries. This has given rise to what has often been termed, "Line of rail" economies. That is, concentrated development of infrastructure along major arteries normally dissecting the countries without linkages with the rest of the country [or continent].[25]

23 *Ibid*, p. 12

24 See generally, P. Meyns and C. Musamba (eds.), *The Developmental State in Africa: Problems and Prospects* (Institut für Entwicklung und Frieden, INEW-Report 101/2010), available at: <inef.uni-due.de/cms/files/report101.pdf>; P. Mbabazi and I. Taylor, *The Potentiality of "Developmental States" in Africa: Botswana and Uganda Compared* (Dakar: CODESRIA, 2005).

25 Simuyemba (2000), *supra* note 2, p. 5. The author notes that "[h]istorically, Africa's trade patterns have been outward looking – with the rest of the world, rather than inward looking – into the rest of Africa." He explains that the reasons include "the pattern of colonial exploitation, homogeneity of production with most African countries producing and trading in primary commodities … as well as high export concentration", p. 6.

This idea resonates with the concept of *Gate-keeper* developed by Frederick Cooper in postcolonial studies. Gate-keeping alludes to the tenacity of Africa leaders to hold on to techniques of governance that mirrors the development strategy of the colonial encounter. It connotes the development of institutional and infrastructural structures by the different colonial powers in Africa essentially in border towns where natural resources were exploited in the colony for export. Its application as a form of colonial legacy traverses the economic, political and social architecture of the African strata. This

In this section, I draw on the theory of *Path Dependence*[26] in law and development debates to foreground factors and institutional practices that may inhibit the successful implementation of a regional PPP regime. The utility of path dependence studies is inherent in the fact that it is largely backward looking and places emphasis on the past.[27] It "describes how the reinforcement of a given set of arrangements over

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resulted in uneven infrastructural development of the colony as the focus remained in areas where natural resources were exploited. Although the concept does not have to be negative, its negative impact as a colonial legacy in Africa is that whereas the economy of most African states could have diversified and looked at other possibilities for growth and development, the focus was thwarted and had been narrowed down to a monolithic one in most cases, often times with richness in natural resources such as oil. With the independence of African states, successive nationalist government have maintained the "gate" which provided the finance for governance. See, F. Cooper, *Africa since 1940: The Past of the Present* (Cambridge: Cambridge University Press, 2000), pp. 156-190. For an incisive legal account of the colonial impact on the demographics and geographical boundaries of Africa, see M. Mutua, *Why Redraw the Map of Africa*, 16 Michigan Journal of International Law, no. 4 (1994–1995), 1113-1176.

26 My discussion of this concept draws on the analysis of M.M. Prado and M.J. Trebilcock, *Path Dependence, Development and the Dynamics of Institutional Reforms*, 9 University of Toronto Law Journal, no. 3 (2009), 341-379. For them, "institutions" refer to "those bodes (formal and informal) charged by a society with making, administering, enforcing or adjudicating its laws or policies"; p. 349. Also see, A. Kay, *Path Dependency and the CAP*, 10 Journal of European Public Policy, no. 3 (2003), 405-420; P. Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 The American Political Science Review, no. 2 (2000), 252-267. Also see, O.k. Kofi, *The Institutional Transformation of the Economic Community of West African States*, (England: Ashgate Publishing, Hampshire, 2006) pp. 35-36. Kufuor synthesizes the essence of path dependency in the following words:

the concept of path dependence explains gradual institutional transformation: well-established and powerful lobbies refuse to accept change and seek to keep the organisation of a particular trajectory although this resistance does not necessarily lead the organisation towards efficiency or even social legitimacy. What makes resistance possible is the multifaceted set of restraints or institutions: the formal rules embedded in the organisation's hierarchy that are so costly to change. In addition measures aimed at institutional and organisational change must confront and try to overcome informal constraints that also have the ability probably greater than that of formal rules, to persist. Formal and informal constraints interact to shape organisation paths. Once in a given institutional path, an organisation's decision-makers and interests obtain advantage from the increasing returns to the institutional matrix, and, as a consequence institutions will endure notwithstanding whether they are efficient or inefficient and even if there is an alternative path for the organisation which is demonstrably more efficient.

27 Douglass North notes in this regard that, "[p]ath dependence means that history matters. We cannot understand today's choices … without tracing the incremental evolution of institutions." See, D.C. North, "The New Institutional Economics and Third World Development", in J. Harris, J. Hunter and C.M. Lewis (eds.), *The New Institutional Economics and Third World Development* (London: Routledge, 1995), p. 100. It has however been argued that path dependence can also be forward-looking, Prado and Trebilcock (2009), *supra* note 26, p. 353. For the purpose of this paper, I rely on the historical value which path dependence offers.

time raises the cost of changing them."[28] Prado and Trebilcock examined path dependence theory by focusing on three concepts in economics and political science – *self-reinforcing mechanisms, switching costs and critical junctures*. Although the context within which the authors discussed the article relates to international development assistance projects, the theoretical analysis could nonetheless be applied in probing the design of PPP framework. The authors identify three levels at which the implications of a path dependence perspective for institutional change may arise; to wit, *individual, institutional* and *social* levels. At the *individual* level, they contend that "the institutional structure inherited from the past may reflect a set of beliefs that are impervious to change either because the proposed changes run counter to that belief system or because the proposed alteration in institutions threatens the leaders and entrepreneurs of existing organizations." In relation to the *institutional* implication, they note that the architectural structure "that defines the performance of an economy comprises interdependent institutions; changing just one institution in an attempt to achieve the desired performance is always an incomplete and sometimes counter-productive activity." And finally, at the *social* level, they note that "a mix of formal institutions, informal institutions and their enforcement characteristics defines institutional performance; while the formal institutions may be altered by fiat, the informal institutions are not amenable to deliberate short-run change, and their enforcement characteristics are only very imperfectly subject to deliberate control."[29] They argue that particular importance should be placed on factors such as *self-reinforcing mechanisms, switching costs and institutional interdependencies* which are critical to the success of institutional reforms – whether during "normal" or "abnormal" times.[30]

28 Prado and Trebilcock (2009), *supra* note 26, p. 350.
29 *Ibid*, p. 354.
30 Some examples of "abnormal times" given by the authors which may privilege radical reforms include "times of economic collapse, major political crises or scandals, civil war [and] military invasion"; while "normal times" are instances of post-conflict societies. Whether in normal or abnormal times, the authors articulate four (4) mechanisms for dealing with switching costs. First, in terms of political economy considerations based on parties who benefit from the status quo, costs may be mitigated by reforms that enhances an opposing political constituency or that vested interests be bought-off in order to mute opposition; secondly, as to switching costs which arise from individual learning costs associated with adjusting to the new regime, programmed transition and state-sponsored public education system are proposed; thirdly, where it arises based on scarcity of financial and human resources required to implement the new institutional regime, they suggest seeking external financial and technical assistance; and lastly, where switching costs are a reflection of the deeply embedded cultural benefits or practices that resist change; the reforms may reflect traditional institutions where possible or implemented in a gradual manner which may lead to changes in cultural belief. *Ibid*, pp. 370-371.

At this point, one may ask: what is the implication of the foregoing on the adoption and design of a PPP framework in Africa. How could the PPP regime be designed in a way that accounts for the lessons of path dependency theory? Thinking about these type of questions become more fundamental if it is borne in mind that the new institutional reform and praxis being proposed is not going to be implemented on a *tabula rasa*. The introduction of PPP as a vehicle for the provision of regional transport infrastructure and services in Africa is being constructed on a complex historical set of institutional practices based on traditional means of procuring infrastructure. Trebilcok and Prado suggest two ways to avoid this: aiming for new reforms or one which is easily separable from the wider mutually reinforcing institutional matrix; *or*, to prioritize and sequence the reform of current interconnected and mutually reinforcing institutions in a time-sensitive manner while planning for future reforms.[31]

In an institutional reform context such as the adoption of a PPP regime as a means of providing regional infrastructure in Africa, the foregoing theoretical analysis sheds some light on a series of past and continuing factors that may have significant implications for the success of the implementation of the institutional and regulatory framework that will support PPP projects.

Because path dependence is backward looking, it helps to illuminate some of the self-reinforcing mechanisms and switching costs that may hinder the successful implementation of the PPP regime in infrastructure provision in Africa. The first insight relates to both institutions and individuals and the endemic issue of corruption which has been a major problem in virtually all of African states. Regional economic initiatives are not insulated from the scourge of corruption. For example, this may arise in procurement process for PPP partners when supposedly more powerful nations within the regions attempt to influence the process in favour of a bidder who they prefer for reasons that may not align with those of the other regional member states or even the vision of the organization as a group. This could also manifest from the point of view of states that prefer to entrench interest of past contractors under the old traditional procurement regime. Indeed, if the appropriate institutional checks are not enshrined during the design phase and followed by diligent implementation, a PPP regime has the capacity to favour clientele behaviour which will be inimical to securing funding and the requisite partnerships for the proposed projects. In this regard, a scholar argues that the complex nature of PPPs "offer far greater latitude for manipulations by foreign or local firms or government officials that are hard for the public and

31 *Ibid*, p. 368.

anti-corruption systems to spot."[32] Another insight relates to the switching cost that may arise from the lack of skilled multi-sectoral personnel with the requisite knowledge to complement the private sector in ensuring that the implementation process is effective and maximising the efficiency of the private sector. As the synergy which PPPs could generate in terms of success is critically dependent on the support provided by an appropriate regulatory and institutional framework, it is also expedient that the regional PPP team is properly staffed with well-trained personnel that will facilitate the adaptation process of the new regime. Potentially, the successful implementation of the PPP regime positions the regional economic initiatives to effectively harness the financing, innovation and efficiency of the private sector as a means for deepening the integration agenda of the continent.

2.3 Cross-border issues in designing PPPS for regional transport infrastructure project

Broadly speaking, the concept of PPP is commonly associated with a spectrum of possible relationships between public (usually the state) and private parties for the co-operative provision of infrastructure and services. It varies with regards to legal status, governance, management, policy-setting prerogatives, contributions and operational roles of the parties involved.[33]

Regionalizing transport infrastructure in Africa through PPP raises significantly complex cross-border issues beyond those involved in individual national projects. Hence, this makes them easily susceptible to failures if not properly designed and implemented. First, based on the fact that two (2) or more sovereign countries will usually be involved in such partnership, the political stakes and risk involved is graduated and requires a carefully orchestrated negotiation process and clear policy formulation to navigate this hurdle. Secondly, an elaborate legal and regulatory framework for sharing responsibilities, costs and benefits between the countries involved must also be developed and consented to by all the parties before commencing such projects. Thirdly, due to the fact that the countries involved are under-developed and already have a significant strain on their infrastructure, regionalizing the same requires a

32 P. Farlam, *Working Together: Assessing Public-Private Partnerships in Africa* (The South African Institute of International Affairs, NEPAD Policy Focus Series, February 2005), p. 38, available at: <http://www.oecd.org/daf/inv/investmentfordevelopment/34867724.pdf>, accessed 10 June 2013.

33 Delmon (2010), *supra* note 21.

significant commitment on the part of the countries to improve the state of their local infrastructure. Indeed, much of what would be characterized as regional transport infrastructure falls within the geographical boundaries of various countries. Lastly, in the absence of a unified framework, structuring the deal for the sponsors also becomes more complex due to the multiple sovereign states that are likely to be involved. Paying attention to foregoing becomes much more critical in the African context given the track-record of PPP at the national level which offers a mixed result with respect to success and implementation.[34] However, much encouragement can be taken by African countries from the successful examples of the Lekki Toll Road Concession[35] in Lagos State,

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34 In the Nigerian context, in 2005, the national government established the Infrastructure Concession Regulatory Commission ("Commission") pursuant to the provision of Section 20 of the Infrastructure Concession Regulatory Act ("ICRC Act"). The Commission is amongst others mandated to perform four major functions, which revolve around contract compliance and monitoring, efficient execution of contracts, compliance with the provisions of the ICRC Act, and such other functions as may be directed by the president of the Federal Republic of Nigeria or as are expedient for the performance of its aforementioned functions. Its strategic objective is to ensure the acceleration of investment in national infrastructure through private sector funding. The Commission is expected to leverage on PPPs as the key vehicle for facilitating the participation of the private sector. The Commission has developed a series of operational policy guidelines which will guide its operation in respect of the PPP projects in the pipeline. More information on the Commission and its activities is available at: <http://www.icrc.gov.ng>. For an online copy of the ICRC Act, see, the website of the National Assembly of Nigeria: <http// www.nassnig.org/nass/actssearch.php?search=2005&Submit=Search>.

However, prior to the establishment of the Commission, the Federal Government of Nigeria had awarded some concession contracts which were to be delivered under a PPP arrangement. Ironically, the projects which were in respect of road and airport projects were awarded to the same private party: Bi-Courtney Limited. The contract in respect of the 125 km road project which was awarded in May 2009 was terminated in 2012 for alleged serial breach of contract by the private party. See "Lagos-Ibadan Expressway: Nigeria Sacks Bi-Courtney", 19 November 2012, available at: <http://pmnewsnigeria.com/2012/11/19/lagos-ibadan-expressway-nigeria-sacks-bi-courtney/>, accessed 8 June 2013. Bi-Courtney however completed the local wing of the Murtala Mohammed Airport in Lagos, Nigeria. The plan completely transferred all development and operating risks to the private party specifically on a Design-Build-Operate-Transfer (DBOT) arrangement. The project comprises an Airport Terminal Building, a multi-storey car park and an apron over a land area of 20,000 m^2. The operational aspect of the project has been the subject of various litigation between the parties which makes question whether the government is ready for such arrangements. Or are they simply to be treated as teething issues from which lessons can be learnt for the future?

35 The Lagos State Government of Nigeria has set an example of a successful pioneering PPP project in the road sector which Phase 1 is currently in the operational phase. The Lekki Toll Road Project is mandated under a 30-year Concession Agreement for the upgrade, expansion and maintenance of approximately 50 km of the Lekki-Epe Expressway (Phase I), and construction of approximately 20 km of the Coastal Road (Phase II) on the Lekki Peninsular. The project

Nigeria and the N4 Toll Road from South Africa to Mozambique.[36] Although the Lekki Toll Road Project is a state project, within ECOWAS community, Lagos State represents one of the major commercial hubs with significant impact on trading activities in the region.

At the regional level, the N4 Toll Road represents a unique example of the political will for economic cooperation between countries within a region that hopes to deepen integration and enhance economic development through effective regional transport infrastructure. While not a perfect project, it is exemplary of how through a gradual expansion process, transport infrastructure can be effectively integrated within a region. Perhaps instead of involving four or more countries in a transaction, the maximum to start with should be three countries. This way, the rigours involved in negotiating the political, commercial and socio-economic issues and risks can be better managed. The likely failure of the project can also be minimized. The ideal pioneer roads must be routes that are economically viable and not too long to ensure a quick turnaround in terms of project investment returns.

In designing the PPP frameworks, local and peculiar conditions of the member states involved must be taken into consideration. PPP projects may not succeed for various reasons as no one project mirrors completely the challenges faced in a previous one. Each PPP project is unique on its own. It is important to note that the prior identification and determination of the party who bears the risks is fundamental in the design process for a regional transport PPP project, much like any PPP project indeed. The benefit of

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is designed to deliver essential road infrastructure and services along the Lekki Peninsular of Lagos. It is a PPP scheme, and uses the Design-Build-Operate-Transfer (DBOT) model of Infrastructure delivery. The Concession is for a period of 30 years, following which the assets will be transferred to Lagos State Government. The Project won three international awards in 2008 as the Africa Investor Transport Deal of the year; Euro-money International Africa PPP of the Year; and Reuters African Infrastructure Deal of the Year. See, Lekki Concession Company Ltd, available at: <http://www.lcc.com.ng/tolls.asp?pid=20>. Also see, The Lagos State Public Private Partnership Law, No. 11, 2011 which replaced the Lagos State Roads (Private Sector Participation) Authority Law, No 7, 2007.

36 For studies on the N4 Toll Road project, see, Public–Private Infrastructure Advisory Facility Toolkit for Public–Private Partnerships in Roads & Highways, *N4 Toll Road from South Africa to Mozambique* (March 2009), available at: <http://www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/highwaystoolkit/6/pdf-version/safricamozambique.pdf>, accessed 10 June 2013. Also see, Trans African Concessions, *About the N4 Toll Route*, available at: <http://www.tracn4.co.za/index.php?option=com_content&view=article&id=86&Itemid=54>, accessed 10 June 2013.

engaging in such a forward looking exercise is increased because of the various political interests that may be involved in the project. The principle that guides the sharing of risks in PPP projects is that risks are borne by the party best able to manage them. Accordingly, while some risks are shared by the parties, certain types of risks almost always remain either with the public or private party.[37]

The geographical and economic demography of most African states will also require an attentive negotiation of the various other issues that will arise as a result of the implementation of the transport projects. More specifically, some of these issues relate to the environmental impact of the projects. For example, where new road is being constructed issues involving land ownership and acquisition, right-of-way and compensation, likely loss or creation of jobs for indigenes, and associated litigation which may lead to delays in the project execution all need to be duly considered in a project that involves several countries within a regional economic initiative. In addition, socio-economic issues associated with the displacement and re-settlement on newly acquired land must also be flagged and engaged satisfactorily. Dealing with all these issues requires an elaborate legal regime that all the parties have agreed to prior to the commencement of the projects. While significant challenges lie ahead for the successful implementation of these types of projects, with adequate preparation and determination the hurdles and complexities which the projects might breed can be overcome for the greater good of all the parties.

3 Part II: probing the state of policy, regulatory and institutional framework for PPP in Africa

In this section, the article examines the ongoing effort by PIDA to design a policy, institutional and regulatory framework for sourcing regional infrastructure in Africa. Unlike the past, PIDA prioritizes the development of the institutional and regulatory framework as a condition precedent to sourcing support for projects via PPP.

37 D. Grimsey and M.K. Lewis, *Evaluating the Risks of Public Private Partnerships for Infrastructure Projects*, 20 International Journal of Project Management, no. 2 (2002), 107-118.

3.1 Overview of PIDA's policy framework for regional transport infrastructure in Africa

At different times, there has been various flagship programmes sponsored by organizations such as the African Union, African Development Bank ("AfDB") and NEPAD at the continental level that all share the need to re-conceptualise and improve the process for infrastructure delivery in Africa. The various regional economic initiatives have provisions which echo the need to cooperate in developing institutional common framework for the integration of physical infrastructures in the regions.[38] International organizations such as the World Bank have at other times either initiated[39] or co-sponsored[40] various

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38 At the regional level, there are various provisions in the establishing treaties of the organizations which recognize a role for the private sector in the provision of regional transport infrastructure amongst others. For example, see the following provision of the ECOWAS Community Treaty of 1993. Furthermore, Article 32(1) (Transport and Communication) provides that: "For the purpose of ensuring the harmonious integration of the physical infrastructures of Member States, … Member States shall: (a) *evolve common transport and communications policies, laws and regulations*; (b) develop an extensive network of all-weather highways within the Community, priority being given to the inter-State highways; (c) formulate plans for the improvement and integration of railway and road networks in the region; (d) ……." Article 32(2) however states that: "Member States also undertake to encourage the establishment and promotion of joint ventures and Community enterprises and the participation of the private sector in the areas of transport and communications." [Emphasis mine]

For the current state of policy strategy in relation to regional infrastructure in the East African Community, See Africon Ltd., *The East African Trade and Transport Facilitation Project: East African Transport Strategy and Regional Road Sector Development Program* (2011); Ioannis N. Kessides, *Regionalizing Infrastructure for Deepening Market Integration: The Case of East Africa* (World Bank Policy Research Working Paper, 2012).

See also, the COMESA-EAC-SADC Tripartite regional harmonisation and cooperation initiative which among other things has infrastructure development as one of its focal points. See, <http://www.eac.int/index.php?option=com_content&id=581&Itemid=201&limitstart=2>, accessed 10 June 2013.

39 See, World Bank, *Sub-Saharan Africa Transport Policy Program*, available at: <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/EXTAFRREGTOPTRA/EXTAFRSUBSAHTRA/0,menuPK:1513942~pagePK:64168427~piPK:64168435~theSitePK:1513930,00.html>, accessed 10 June 2013. The SSATP was launched in 1987 by a joint-initiative of the World Bank and the United Nations Economic Commission for Africa as an outcome of the first United Nations Transport and Communications Decade for Africa. It is described as "a unique partnership of 36 African countries, 8 regional economic communities, 3 African institutions, and many national and international development partners – all dedicated to ensuring that the transport sector fosters Africa's poverty reduction, pro-poor growth, and regional integration."

40 The World Bank co-sponsored the "Africa Infrastructure Country Diagnostics" ("AICD") programme in 2005. It is a knowledge based programme on Africa's Infrastructure which grew out of programmes on Africa's infrastructure which are geared towards improving physical infrastructure in the continent. While some are simply knowledge-based programmes, others exist to provide advisory and financial support for projects.

PIDA was launched in 2010 as a joint initiative of the African Union Commission ("AU"), the NEPAD Planning and Coordinating Agency and the AfDB.[41] PIDA merges previous efforts such as the NEPAD Short-Term Action Plan, the NEPAD Medium to Long-Term Strategic Framework and the AU Infrastructure Master Plans in a coherent manner aimed at improving the state of regional infrastructure in key areas in Africa. The table below shows the past effort that has been undertaken in relation to infrastructure development in the continent leading up to PIDA.

As part of PIDA's process for preparing a comprehensive policy framework for the continent, it has consulted widely and received input from the regional economic initiatives. This enhances the legitimacy accorded to the programme by the regional economic groups. It also plans to implement its projects based on the priority accorded to them by the regional economic initiatives. To achieve this, PIDA will engage an "extensively consultative and participative process in developing a strategic framework for regional and continental infrastructure development in Africa, on the basis of which programmes and projects can be prioritised in a consensual manner."[42] By drawing on lessons from South America, Asia and Europe, PIDA seeks to promote socio-economic development in Africa through improved access to integrated regional and continental infrastructure networks and services. PIDA plans to establish a uniform framework strategy for infrastructure development at the regional and continental level covering the four (4) key sectors of transport, energy, trans-boundary water

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the commitment by the G8 Summit at Gleneagles to substantially increase development assistance to Africa. AICD served as a vehicle for building consensus about the appropriate response to Africa's infrastructure problems. It precedes the formation of the ICA also in 2005.

The Infrastructure Consortium for Africa ("ICA") which was launched "to help improve the lives and economic well-being of Africa's people through encouraging, supporting and promoting increased investment in infrastructure in Africa, from both public and private sources." The ICA acts as a catalyst for private sector financing of infrastructure projects and programmes in Africa. For more information on ICA, see, <http://www.icafrica.org/en/about-ica/>, accessed 10 June 2013.

41 See generally, the PIDA website at <http://www.pidafrica.org/>. For the purpose of the discussion on PIDA, I have reviewed the following publications: (i) *PIDA General Terms of Reference*; (ii) *PIDA Concept Note*; (iii) *Inception Report*; (iv) *Africa Transport Outlook 2040*; and (iv) *Africa Infrastructure Outlook 2040*, all available at: <http://www.pidafrica.org/publication.html>, accessed 10 June 2013.

42 PIDA Concept Note, *Ibid*, p. 3.

Table 1: Policy framework for regional transport infrastructure in Africa.

Coordinating agency(ies)	Infrastructure development programme	Mandate and timeline
AU/NEPAD/ AfDB	Revision of the AU/NEPAD African Action Plan 2010-2015: Advancing Regional and Continental Integration through Shared Values (Abridged Report 2010–2012) AU/NEPAD African Action Plan 2010-2015: Advancing Regional and Continental Integration 2009	This abridged report presents the roadmap for the future of regional infrastructure development in Africa.
AU/NEPAD/ AfDB	Programme for Infrastructure Development in Africa (PIDA) 2010. PIDA is unique because it combines the previous NEPAD Short-Term Action Plan and the infrastructure component of the African Action Plan noted below.	PIDA's principal mandate is to: establish a strategic framework for the development of regional andcontinental infrastructure; establish an infrastructure investment programme (short, medium and long term) around priorities established and timelines provided by the Regional Economic Initiatives; and prepare an implementation strategy and a priority action plan.
NEPAD	NEPAD Infrastructure Project Preparation Facility (IPPF)	Fund set-up to assist proponents prepare high-quality infrastructure proposals and is managed by AfDB
NEPAD	Integrated Spatial Development Programme (SPD) "Development Corridors" 2006.	Focuses on promoting trade and investment facilitation in multi-country development corridors. The SPD's development goal is twofold: targeting economic growth based on existing transport corridors and ensuring a sustainable development process.
NEPAD	Short Term Action Plan (STAP) 2002 Medium to Long-Term Strategic Framework (MLTSF)	Proposed programmes and projects to develop infrastructure at the regional level in Africa. Followed the STAP; articulate policies and strategies outline priorities and contribute to the establishment of partnerships geared towards promoting economic integration and supporting the development of trade and commerce.

and information and communication technologies in order to boost trade, initiate growth and create job opportunities.[43]

PIDA also has the responsibility of preparing an implementation strategy, processes as well as a priority plan of action which will identify key infrastructure development programmes. In deciding the projects that will be supported by PIDA, some of the factors that will be taken into account are (i) the eligibility and readiness of the project; as it relates to its alignment with the objectives of the regional economic initiatives; *suitability for PPP*, risks attached to proposed implementation arrangements and implementation capacity and (ii) the development impact; i.e. how much does such project enhance regional integration of the region in terms of trade, access to market and other synergies?[44]

The above described focus of PIDA is noteworthy because it significantly moves away from some of the past and current projects in Africa by seeking greater interconnection between infrastructure development, trade and integration of the continent. In particular, there is a remarkable difference in the willingness to identify new routes across the regions by PIDA which distinguishes it from the path dependency attitude of erstwhile attempts at regionalizing infrastructure for development which merely maintained routes that were constructed during the colonial era. PIDA amongst others is mandated to recommend the required institutional arrangements, legal frameworks and the financing mechanisms for the implementation and monitoring of the programs. Although PIDA has suggested the use of PPP, it however recognizes that the absence of enabling legislation and regulations, a lack of local skills and a poor understanding of PPP risks allocation are all bottlenecks currently preventing many countries from fully unlocking private sector interest, particularly on regional infrastructure projects. This is an area that urgent attention needs to be devoted if it is not already in the pipeline given the time that has elapsed since the release of the PIDA 2010–2012 abridged report.

4 Conclusion

The ongoing review and re-design of institutional and regulatory architecture for administering current policies in an effective way is a critical factor to the

43 "Programme for Infrastructure Development in Africa to be Key feature of AU Summit", PIDA News (January 2012), available at: <http://www.pidafrica.org/news-events.html>.

44 PIDA, *Inception Report*, p. 15 available at: <http://www.pidafrica.org/Inception%20report%20Final%20Version%20GB.pdf>, accessed 10 June 2013.

success of a society. PIDA represents current effort at improving the state of infrastructure in Africa. The involvement and championing of the programme by the AfDB is encouraging because of its skill and experience. Where the institutional and regulatory framework for regional PPP projects is well designed, it limits the crisis situations that may arise in the future. While there is advantage in looking at how PPPs have been implemented in India, or even Chile with the most successful PPP in transport sector, in informing the strategies to pursue for PPP in Africa, the challenges of the various regions differ significantly from the African context. Other scholars have suggested frameworks which the author believes are very useful in guiding the design of the framework.[45] The point which this article advances is that in the design process, sufficient attention must be given to the local peculiarities of the African society in introducing PPP for regional projects as envisaged. In particular, factors such as political, economic, financial, social/cultural, environmental, technical and geographic have significant role to play in the institutional design and coordination of the PPP scheme. To realize the maximum regional benefits from PIDA's drive for regional infrastructure development, the continental and regional effort must necessarily be complemented with positive responses from the national governments to ensure that there is adequate linkage roads between the remote areas and the industrialised cities where much more reliable network of roads linking other countries are being proposed.

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References

Africon Ltd, *The East African Trade and Transport Facilitation Project: East African Transport Strategy and Regional Road Sector Development Program* (East African Community, 2011), available at, <http://www.eac.int/infrastructure/index.php?option=com_docman&task=cat_view&gid=79&Itemid=127>, accessed 10 June 2013.

Andrew, D., C. Smith, and M.J. Trebilcock, *State-Owned Enterprises in Less Developed Countries: Privatization and Alternative Reform Strategies*, 12 European Journal of Law and Economics, no. 3 (2001).

45 Simuyemba (2000), *supra* note 2, pp. 34-41 for an extremely useful roadmap which can be adopted by the regional economic initiatives.

Chibundu, M.O., “NEPAD and the Rebirth of Development Theory and Praxis”, in Jeremy I. Levitt (ed.), *Africa: Mapping New Boundaries in International Law* (Oxford: Hart Publishing, 2008).

Cooper, F., *Africa Since 1940: The Past of the Present* (Cambridge: Cambridge University Press, 2000).

Delmon, J., *Understanding Options for Public-Private Partnerships in Infrastructure* (The World Bank Policy Research Working Paper 5173, January 2010), available at: <http://elibrary.worldbank.org/docserver/download/5173.pdf?expires=1370910235&id=id&accname=guest&checksum=4B9B69B0C28A2171F73C6E400EDB005E>, accessed 10 June 2013.

De Soto, H., *The Mystery of Capital*: *Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000).

Economic Community of West African States Treaty of 1993, available at: <http://www.comm.ecowas.int/sec/index.php?id=treaty>.

Estache, A., E. Juan and L. Trujillo, *Public-Private Partnerships in Transport* (World Bank, 2007), available at: <http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2007/12/12/000158349_20071212085739/Rendered/PDF/wps4436.pdf>, accessed 10 Jun 2013.

Farlam, P., *Working Together: Assessing Public-Private Partnerships in Africa* (The South African Institute of International Affairs, NEPAD Policy Focus Series, February 2005), available at: <http://www.oecd.org/daf/inv/investmentfordevelopment/34867724.pdf>, accessed 10 June 2013.

Fischer, R., *The Promise and Peril of Public-Private Partnerships: Lessons from the Chilean Experience* (International Growth Centre Working Paper 11/0483, June 2011).

Fishbein, G. and S.Babbar, *Private Financing of Toll Roads* (RMC Discussion Paper Series No. 117, December 1996), available at: <http://siteresources.worldbank.org/INTGUARANTEES/Resources/Private_Financing_of_Toll_Roads.pdf>, accessed 10 June 2013.

Foster, v. and C. Briceno-Garmendia (eds.), *Africa’s Infrastructure: A Time for Transformation – Overview* (The World Bank, Infrastructure Consortium for Africa, 2010), available at: <http://www.infrastructureafrica.org/system/files/AIATT_Consolidated_smaller.pdf>.

Gathii, J.T., *A Critical Appraisal of the NEPAD Agenda in Light of Africa’s Place in the World Trade Regime in an Era of Market Centred Development*, 13 Transnational Law and Contemporary Problems, no. 1 (2003).

Gathii, J.T., *The Neoliberal Turn in Regional Trade Agreements*, 86 Washington Law Review, no. 3 (2011).

Grimsey, D. and M.K. Lewis, *Evaluating the Risks of Public Private Partnerships for Infrastructure Projects*, 20 International Journal of Project Management, no. 2 (2002).

HM Treasury, *PFI: Meeting the Investment Challenge* (The Stationery Office, July 2003b), available at: <http://www.ppp.mg.gov.br/biblioteca/downloads/Meeting%20the%20Investment%20Challenge%20-%20Estudo%2002.pdf>, accessed 10 June 2013.

ICA, available at: <http://www.icafrica.org/en/about-ica/>, accessed 10 June 2013.

ICRC, available at: <http://www.icrc.gov.ng>.

ICRC Act, available at: <http//www.nassnig.org/nass/actssearch.php?search=2005&Submit=Search>.

Kay, A., *Path Dependency and the CAP*, 10 Journal of European Public Policy, no. 3 (2003).

D. Kennedy and J. Stiglitz (eds.), *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century* (Oxford: Oxford University Press, 2013).

Kessides Ioannis, N., *Regionalizing Infrastructure for Deepening Market Integration: The Case of East Africa* (World Bank Policy Research Working Paper, 2012), available at, <http://

elibrary.worldbank.org/content/workingpaper/10.1596/1813-9450-6113>, accessed 10 June 2013.

Kofi, O.K., *The Institutional Transformation of the Economic Community of West African States* (England: Ashgate Publishing, Hampshire, 2006).

Lagos-Ibadan Expressway: Nigeria Sacks Bi-Courtney, (19 November 2012), available at: <http://pmnewsnigeria.com/2012/11/19/lagos-ibadan-expressway-nigeria-sacks-bi-courtney/>, accessed 8 June 2013.

Lekki Concession Company Ltd, available at: <http://www.lcc.com.ng/tolls.asp?pid=20>.

Mbabazi, P. and I.Taylor, *The Potentiality of "Developmental States" in Africa: Botswana and Uganda Compared* (Dakar: CODESRIA, 2005).

Meyns, P. and C. Musamba (eds.), *The Developmental State in Africa: Problems and Prospects* (Institut für Entwicklung und Frieden, INEW-Report 101/2010), available at: <inef.uni-due.de/cms/files/report101.pdf>.

Mutua, M., *Why Redraw the Map of Africa*, 16 Michigan Journal of International Law, no. 4 (1994–1995).

NEPAD, *Revision of the African Union/NEPAD African Action Plan 2010-2015: Advancing Regional and Continental Integration Together through Shared Values – Abridged Report 2010–2012* (2011), available at: <http://www.nepad.org/system/files/AAP%20final%20web%20130111.pdf>, accessed 10 June 2013.

North, D.C., "The New Institutional Economics and Third World Development", in J. Harris, J. Hunter and C.M. Lewis (eds.), *The New Institutional Economics and Third World Development* (London: Routledge, 1995).

Olayode, K., *Reinventing the African State: Issues and Challenges for Building a Developmental State*, 8 African Journal of International Affairs, nos. 1&2 (2005).

PIDA, available at: <http://www.pidafrica.org/>.

PIDA, *Inception Report*, available at: <http://www.pidafrica.org/Inception%20report%20Final%20Version%20GB.pdf>, accessed 10 June 2013.

Perez, B.G. and J.W. March, *Public-Private Partnerships and the Development of Transport Infrastructure: Trends on Both Sides of the Atlantic* (United States Department of Transportation, 2006), available at: <http://financecommission.dot.gov/Documents/Background%20Documents/perez_banff_ppp_final.pdf>, accessed 10 June 2013.

Pierson, P., *Increasing Returns, Path Dependence, and the Study of Politics*, 94 The American Political Science Review, no. 2 (2000).

Prado, M.M. and M.J. Trebilcock, *Path Dependence, Development and the Dynamics of Institutional Reforms*, 9 University of Toronto Law Journal, no. 3 (2009).

Programme for Infrastructure Development in Africa to be Key feature of AU Summit, PIDA News (January 2012), available at: <http://www.pidafrica.org/news-events.html>.

Public-Private Infrastructure Advisory Facility Toolkit for Public-Private Partnerships in Roads & Highways, *N4 Toll Road from South Africa to Mozambique* (March 2009) available at: <http://www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/highwaystoolkit/6/pdf-version/safricamozambique.pdf>, accessed 10 June 2013.

Ranganathan, R. and V. Foster, *ECOWAS's Infrastructure: A Regional Perspective* (The World Bank, June 2011), available at: <http://www.infrastructureafrica.org/system/files/library/2012/02/REC%20ECOWAS.pdf>.

Simuyemba, S., *Linking Africa through Regional Infrastructure* (African Development Bank Economic Research Paper No. 64, 2000), available at: <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/00157662-EN-ERP-64.PDF>.

Stiglitz, J. and A. Charlton, *Fair Trade for All: How Trade Can Promote Development* (Oxford: Oxford University Press, 2005).

Taylor, I., *Globalization and Regionalization in Africa: Reactions to Attempts at Neo-Liberal Regionalism*, 10 Review of African Political Economy, no. 2 (2003).

The COMESA-EAC-SADC Tripartite regional harmonisation and cooperation initiative, available at: <http://www.eac.int/index.php?option=com_content&id=581&Itemid=201&limitstart=2>, accessed 10 June 2013.

Trans African Concessions, *About the N4 Toll Route*, <http://www.tracn4.co.za/index.php?option=com_content&view=article&id=86&Itemid=54>, accessed 10 June 2013.

Trubek, D.M., *Developmental State and the Legal Order: Towards a New Political Economy of Development and Law* (October 2010), available at: <http://www.law.wisc.edu/gls/documents/developmental_states_legal_order_2010_trubek.pdf>, accessed 10 June 2013.

Trubek, D.M., H.A. Garcia, D.R.Coutinho and A.Santos (eds.), *Law and the New Developmental State*, *The Brazilian Experience in Latin American Context* (Cambridge: Cambridge University Press, 2013).

Trubek, D.M. and A. Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006).

Willoughby, E., *How Much Can Public Private Partnership Really Do for Urban Transport in Developing Countries?* 40 Research in Transportation Economics, no. 1 (2013).

World Bank, *Sub-Saharan Africa Transport Policy Program*, available at: <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/EXTAFRREGTOPTRA/EXTAFRSUBSAHTRA/0,menuPK:1513942~pagePK:64168427~piPK:64168435~theSitePK:1513930,00.html>, accessed 10 June 2013.

World Bank, *Toolkit for Public-Private Partnerships in Roads and Highways* (March 2009), available at: <http://www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/highways-toolkit/index.html>, accessed 10 June 2013.