TOWARDS IMPLEMENTING THE AFRICAN CONTINENTAL FREE TRADE AREA (AfCFTA) AGREEMENT: A FRAMEWORK TO ADDRESS BANKABILITY CONCERNS FOR AFRICAN INFRASTRUCTURE PROJECTS

By

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Introduction

The African Continental Free Trade Area (AfCFTA)agreement, which serves as the African Union (AU)'s most ambitious attempt at trade liberalization and integration in Africa, is set to create the largest free trade area in the world by connecting 1.3 billion people across 55 countries with a gross-domestic product of around US$3.4 trillion.[1]However, the absence of critical infrastructure has been identified as a significant impediment to revolutionizing intra-African trade.[2]It has been proven extensively that Africa's subsisting infrastructure deficit is not due toa lack of demand for infrastructure, nor a lack of interested investors; rather it is due to a lack of bankable projects to invest in, owing to an array of factors.[3]

This paper proceeds as follows –first, this paper begins by articulating the centrality of infrastructure development to a free trade area initiative. After which, this paper states why bankability concerns have stalled much-needed infrastructure development in Africa. This paper then concludes by proffering a framework to resolve the challenges of project bankability. Through the implementation of this framework, it is hoped that infrastructure investment activity will surge, producing quality infrastructure projects that will facilitate the actualization of the AfCFTA's objectives.

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1 Maryla Maliszewska et al., *The African Continental Free Trade Area*, World Bank Report (2020), https://www.worldbank.org/en/topic/trade/publication/the-african-continental-free-trade-area (last visited Mar 25, 2021).

2 Efam Dovi, *Infrastructure key to intra-African trade | Africa Renewal*, Africa Renewal (2018), https://www.un.org/africarenewal/magazine/august-november-2018/infrastructure-key-intra-african-trade (last visited Mar 25, 2021).

3 Africa Finance Corporation, *The Challenge of Bankable Projects – Africa Finance Corporation*, AFC, https://www.africafc.org/2020/03/16/the-challenge-of-bankable-projects/ (last visited Mar 25, 2021).

1.0. Infrastructure Development & the AfCFTA

The rationale behind the AfCFTA agreement stemmed from a desire to address the low-level of intra-African exports (c.17%) when compared to the significantly larger percentage of exports from Africa to other continents such as Asia (c.59%) and Europe (c.69%),owing to both tariff and non-tariff related barriers.[4] As a result, the AfCFTA agreement was entered into by the 55 member states of the AU to create a single market for the free movement of goods and services by eliminating 90% of trade tariffs and resolving non-tariff impediments to intra-continental trade.[5] This ambitious undertaking by the AU will require concerted effort and innovative solutions towards resolving the longstanding challenges to intra-African trade, chief amongst which is a dearth of infrastructure which increases production and trade costs, and fractures the supply chain.[6]

An examination of successful free trade area initiatives across the world reveals one common factor: an appreciable level of infrastructure development.[7]This is unsurprising, as efficient development in transport, energy, ICT, and customs infrastructure will significantly catalyze economic activity and lead to production efficiency.

Examining the foregoing proposition within the context of the successful China-ASEAN Free Trade Area (CAFTA), experts had previously opined that, despite the hitherto-recorded

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4 Caroline Kende-Robb, *6 reasons why Africa's new free trade area is a global game changer | World Economic Forum*, WORLD ECONOMIC FORUM (2021), https://www.weforum.org/agenda/2021/02/afcfta-africa-free-trade-global-game-changer/ (last visited Mar 25, 2021).

5 Trudi Hartzenberg, *The African Continental Free Trade Area Agreement – what is expected of LDCs in terms of trade liberalisation? By Trudi Hartzenberg, Executive Director, Trade Law Centre (tralac) and member of the Committee for Development Policy (CDP) | LDC Portal*, UNITED NATIONS LDC PORTAL , https://www.un.org/ldcportal/afcfta-what-is-expected-of-ldcs-in-terms-of-trade-liberalisation-by-trudi-hartzenberg/ (last visited Mar 25, 2021).

6 Dovi, *supra* note 2.

7 Kee-hung Lai et al., *Are trade and transport logistics activities mutually reinforcing? Some empirical evidences from ASEAN countries*, 4 J. SHIPP. TRADE 1–17 (2019), https://doi.org/10.1186/s41072-019-0041-x (last visited Mar 25, 2021).

successes of the CAFTA, its trade-creating effect could further be boosted by reducing costs through inter-country cooperation towards financing infrastructure projects, and lowering construction, maintenance and operating costs, towards maximizing the ensuing benefits related with improved productivity and trade capacity. As a result, over the past two decades, the increased cooperation on infrastructure development between developing East Asian countries has been a major factor in decreasing trade costs and stimulating intra-regional trade.[8]

Drawing on the lessons learned from other free trade agreements, it is evident that Africa's well-documented infrastructure deficit poses a fundamental challenge to the AfCFTA's success. Over the years, Sub-Saharan Africa& North Africa have consistently ranked poorly in virtually all dimensions of infrastructure performance,[9] giving rise to projections that around US$130-170 billion worth of annual investment is required to reduce the deficit.[10]This is so much so that experts have warned that, the "*AfCFTA must not be constrained by infrastructure deficits and the fragmentation of supply chains. The vast infrastructure gap in Africa, including transport and utilities infrastructure, must be urgently addressed so as not to restrict increased trade integration*."[11]

2.0. Bankability Concerns

Considering the substantial capital investment required to bridge Africa's infrastructure deficit, relative to the inadequate amount of public funding available to national governments to fund infrastructure projects, it was previously imagined that the solution to Africa's infrastructure dearth was simply – morefunding. However, with increasing private sector

8 Supachai Panitchpakdi, *CAFTA Forum: Maximizing China-ASEAN Free Trade Area Effect to Enhance Trade Cooperation | UNCTAD*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (2011), https://unctad.org/osgstatement/cafta-forum-maximizing-china-asean-free-trade-area-effect-enhance-trade-cooperation (last visited Mar 25, 2021).

9 CÉSAR CALDERÓN & CATALINA CANTÚ, *Infrastructure Development in Sub-Saharan Africa A Scorecard* (2018), http://www.worldbank.org/research. (last visited Mar 25, 2021).

10 Brookings, *Figures of the week: Africa's infrastructure needs are an investment opportunity*, https://www.brookings.edu/blog/africa-in-focus/2019/06/27/figures-of-the-week-africas-infrastructure-needs-are-an-investment-opportunity/ (last visited Mar 25, 2021).

11 Mukhisa Kituyi, *A step forward for continent if transport, utilities, capital and the right rules of commerce are put in place | UNCTAD*, UNCTAD (2019), https://unctad.org/news/step-forward-continent-if-transport-utilities-capital-and-right-rules-commerce-are-put-place (last visited Mar 25, 2021).

involvement in African infrastructure development (both through debt financing from multilaterals, pension & insurance funds, commercial banks etc.; and public-private partnerships), the crux of Africa's infrastructure quagmire has been revealed to be an insufficiency of bankable infrastructure projects and not merely insufficient funding.[12]A common phrase that has been used to describe this impasse is "*too much money chasing too few projects*".[13]

As it relates to project finance and infrastructure development, the term "bankability" is used to describe the extent to which a project can generate sufficient cashflows to meet the obligations created during capital outlay.[14] It has been described as "*a holistic assessment of a project's riskiness across dimensions of feasibility, viability, financial security, liquidity and value generation*."[15] From the standpoint of a financier, it is an expression of trust in debt services and the achievement of secure returns. As a minimum, this trust requires predictable and stable cash flows over the entire financing period.[16] Essentially, the question of bankability is as to whether, considering the economic, financial, technical, environmental, social, administrative, legislative and regulatory factors material to the execution of a project, the project is worth executing.[17]

3.0. While there are numerous reasons why a project may not be bankable, the elements of a bankable project can be considered under the following broad headings:

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12 James Leigland & Andrew Roberts, *The African Project Preparation Gap: Africans Address a Critical Limiting Factor in Infrastructure Investment*, PUBLIC PRIVATE INFRASTRUCTURE ADVISORY FACILITY - WORLD BANK (2007), https://www.eu-africa-infrastructure-tf.net/attachments/library/gridlines-the-african-project-preparation-gap.pdf (last visited Mar 26, 2021).

13 *Id.*

14 Alex & Fida Rana, *Preparing bankable infrastructure projects* (2018), https://blogs.worldbank.org/ppps/preparing-bankable-infrastructure-projects (last visited Mar 26, 2021).

15 *Id.*

16 Nina Hampl et al., *The Myth of Bankability - Definition and Management in the Context of Photovoltaic Project Financing in Germany*, SSRN ELECTRON. J. (2012), https://papers.ssrn.com/abstract=2067077 (last visited Mar 26, 2021).

17 Kieran Whyte, *Key Considerations in the Assessment of Project Bankability in Africa | Insight | Baker McKenzie*, BAKER MCKENZIE (2019), https://www.bakermckenzie.com/en/insight/publications/2019/09/key-considerations-project-bankability-africa (last visited Mar 26, 2021).

3.1. **Legal & Regulatory Environment**: Due to the typically long-term nature of project finance, investors and project sponsors will generally require a level of certainty and transparency in the legal and regulatory framework of the jurisdiction in which the project is to be financed. This will help to ensure the enforceability and sanctity of contracts (e.g., offtake & feedstock agreements), a reliable procedure for obtaining administrative consents & permits, and a trustworthy forum for any potential dispute resolution.[18]

3.2. **Project Specificity**: One of the areas wherein majority of African infrastructure project concepts fail, is in the project preparation stage.[19] In this sense, for a project to be bankable, sponsors and investors will require reliable feasibility studies, detailed technical studies, engineering designs, a business plan, a financial model, market studies, environmental & social impact assessments, as well as the necessary licenses and permits to construct and operate the project.[20]

3.3. **Project Financial Structure**: Considering the immense capital required to develop infrastructure projects, a significant bankability consideration is the means through which the project finance will be sourced and repaid. Lenders will seek to determine the best structure for advancing financing (usually through the creation of a project SPV), as well as the means through which such funds will be repaid throughout the project lifecycle, taking into consideration such factors as – debtservice cover ratio, debt-equity ratio, debt service reserve etc. This will be done with a view to ensuring minimalrisk and favorable returns.[21]

3.4. **Risk Allocation**: As a result of the attendant risks involved with project finance, an important bankability consideration is as to the allocation of project risks to

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18 Neil Cuthbert, *Dentons - Global Project Finance Risk Guide*, DENTONS GLOBAL PROJECT FINANCE RISK GUIDE (2015), https://www.dentons.com/en/insights/guides-reports-and-whitepapers/2015/november/30/global-project-finance-risk-guide (last visited Mar 30, 2021).

19 Kannan Lakmeeharan et al., *Solving Africa's infrastructure paradox | McKinsey*, MCKINSEY (2020), https://www.mckinsey.com/business-functions/operations/our-insights/solving-africas-infrastructure-paradox (last visited Mar 29, 2021).

20 Lade Araba, *African Countries Cannot Leapfrog to Industrialization - News - Convergence News | Convergence*, CONVERGENCE: BLENDING GLOBAL FINANCE (2021), https://www.convergence.finance/news-and-events/news/1AZ1HqJcwS1yLszYdenzpZ/view (last visited Mar 29, 2021).

21 Lei Zhu & David Kim Huat Chua, *Identifying critical bankability criteria for PPP projects: The case of China*, 2018 ADV. CIV. ENG. (2018).

parties best equipped to manage same.[22] In this light, designing an optimal risk-sharing protocol, especially at the project development phase, is indispensable in ensuring bankability.[23]

3.5. **Political & Economic Environment**: The political and economic viability of a project, specifically in relation to currency risk, nationalization, taxation, changes in administration, government guarantees, etc. are critical bankability factors for project investors.[24]

Africa's project bankability problem is best evidenced in that, despite a recorded increase in international investment appetite and funding, towards infrastructure on the continent, the majority of the projects envisaged never attain financial close, with a reported 80% of infrastructure projects failing at the feasibility/business plan stage.[25] Summarizing the point, it has been noted that, the lack of a reliable legal and regulatory enabling environment where governments are able to identify and plan for projects has led to a situation where investors are unable to find a deep and broad pipeline of bankable projects. Without a robust pipeline of structured and commercially viable projects, Africa will struggle to realize its industrialization aspirations, and as such, African countries must work towards creating a conducive policy environment to build this pipeline.[26]

4.0. FrameworkTowards Resolving Bankability Issues

Having understood the challenge of bankability and how it has thus far impeded African infrastructural development, this segment of the paper seeks to proffer a practical solution towards creating a pipeline of commercially viable projects to which readily available investor funds can be directed. Consequently, this will ensure a significant increase in

[22] World Bank, *Risk Allocation Bankability and Mitigation in Project Financed Transactions | Public Private Partnership*, PPP RISK ALLOCATION AND MITIGATION (2020), https://ppp.worldbank.org/public-private-partnership/financing/risk-allocation-mitigation (last visited Mar 30, 2021).

[23] Alex and Rana, *supra* note 14.

[24] Zhu and Chua, *supra* note 21.

[25] Lakmeeharan et al., *supra* note 19.

[26] Araba, *supra* note 20.

infrastructure investment activity over coming years to complement the continental free trade aspirations of the AfCFTA.[27]

Upon an assessment of the bankability criteria as set out in the preceding segment of this paper, this paper submits that any prospective solution to Africa's bankability problems must be multifaceted to take the following minimum considerations into account:financing, technical expertise, and political will.

Financing will be a key feature of any proposed solution because initial project conceptualization has been speculated to cost anywhere between 5%-10% of the total project cost, as this will include expenditure on conducting various studies, professional transaction expertise & advice, designs,etc.;[28]

Technical expertise is also key to any proposed solution because, beyond procuring the initial funding to pay for expert advice, projects are highly technical and unique, necessitating thorough sector and environment-specific experiencein order to structure a commercially viable project that will meet lender/investor minimum standards;[29]

Political will remains at the center of any bankability solution owing to the fact that, sufficient political commitment can provide a great deal of comfort to investors, especially concerning risks around nationalization, taxation, legal & regulatory regimes, guarantees, licenses & permits, etc.[30]

The solution proposed by this paper, is for African countries to leverage on the political gains already made by the AfCFTA agreement towards the institutionalization of project conceptualization & preparation,aimed at identifying and preparing projects that will support the AfCFTA's objectives. Using the Africa Finance Corporation as a case study of what is achievable,[31]the signatory states to the AfCFTA agreement can establish, as a mechanism towards supporting the implementation of the AfCFTA agreement, a multilateral agency with the singular mandate to identify and prepare strategic projects across the continent that will

27 Kituyi, *supra* note 11.

28 Africa Finance Corporation, *supra* note 3.

29 Lakmeeharan et al., *supra* note 19.

30 Zhu and Chua, *supra* note 21.

31 The Africa Finance Corporation is a multilateral development finance institution set up by an agreement amongst member states, with a private sector majority stake, with the mandate to bridge Africa's infrastructure deficit by investing in projects with developmental impact and positive return yields.

facilitate intra-continental trade, with the full support and backing of all signatorystates (the *Agency*).

Far from constituting yet another development finance institution, the Agency is to be established as an infrastructure development think tank comprising project finance experts whose singular objective will be to identify and prepare bankable projects across the African continent that will promote the trade integration goals of the AfCFTA agreement.The Agency will be equipped to fulfil this mandate of solving Africa's bankability issue in that it will possess the trifecta capacities earlier identified of – financing, technical expertise, and political will.

4.1.**Financing**: The financing for the Agency and its operations can be sourced at the initial stage by levying contributions from signatorystates and development finance institutions, in addition to accessing the numerous Project Preparation Facilities and Technical Assistance Funds already available on the continent.[32] In the long term, the Agency will be able to partly fund its own operations through dividends accruing from its retained equity in, and earnings from, projects it has prepared, which have been successfully developed.

4.2.**Technical Expertise**: Technical expertise can be assured by ensuring the Agency is led and comprised of qualified professionals with specific experience in African infrastructure project development, from conceptualization to full operationality.

4.3.**Political Will**: The political will to ensure the Agency's success will be encapsulated in the agreement establishing the Agency, which will be signed by all signatory states to the AfCFTA, acknowledging the continental importance of the Agency's mandate towards actualizing the AfCFTA's objectives and pledging to provide political support for the Agency's projects. In this light, projects developed by the Agency will be protected from the political and environmental whims and caprices of national governments, thereby providing additional comfort to investors.

[32] The Infrastructure Consortium for Africa, *Project Preparation Facilities Network (PPFN) - ICA*, https://www.icafrica.org/en/project-preparation/project-preparation-facilities-network-ppfn/ (last visited Apr 1, 2021).

5.0. In proposing the concept of "the Agency" as a key solution towards resolving Africa's lingering bankability issue, the author is not naive as to suggest that such a solution will be easy to implement. Naturally, there are key considerations which pose questions that must be satisfactorily answered for the objectives of the Agency to be actualized, and some of these are considered below.

5.1. **Establishment**: The Agency can be set up via multilateral treaty/establishment agreement which will be ratified by each member state in line with their domestic laws, thereby domesticating the treaty into local law.[33] The member states will also be expected to make initial financial commitments towards the Agency that will translate into the initial shareholding structure of the Agency.

5.2. **Independence from State Actors**: An important consideration around the Agency's functionality will inevitably be, the means through which the Agency will be kept independent of the influence of (any or some of) its memberstates in the execution of its mandate. In order to retain the confidence of its member states and stakeholders, and in order to remain effective, it must be evidenced that the Agency is free from external influence and this could be achieved through an optimum organizational structure, as well as keeping with international finance institution governance best practices. In line with the foregoing, what is proposed is a structure headed by:

5.2.1. **Board of Governors**: This board will be constituted by representatives of each signatory state to the AfCFTA agreement, possessing voting powers and charged with the primary oversight duty to ensure the Agency is discharging its mandate in accordance with the expectations of the AU Assembly.[34]

5.2.2. **Board of Directors**: The board of directors will comprise members (who are not on the board of governors)to be elected by the board of governors for a fixed term (which may or may not be renewable). The general duty of the board of directors

[33] Africa Finance Corporation, *Country Membership – Africa Finance Corporation*, https://www.africafc.org/investor-relations/country-membership/ (last visited Apr 11, 2021).

[34] Whitney Debevoise, *International Financial Institution Governance: The Role of Shareholders in: Good Governance and Modern International Financial Institutions*, GOOD GOVERNANCE AND MODERN INTERNATIONAL FINANCIAL INSTITUTIONS , https://brill.com/view/book/edcoll/9789004408326/BP000004.xml (last visited Apr 11, 2021).

shall be the conduct of the general operations of the Agency and the board of directors shall be headed by a president/CEO who will be periodically elected.[35]

5.3. **Decision-making & Project prioritization**:Likewise, in line with international finance institution governance best practices, it is expected that the board of directors, supported by the management of the Agency will be responsible for the Agency's decision-making and project prioritization. Additionally, to provide increased comfort to the Agency's member states, it is proposed that the Agency's management be mandated to outline its project development criteria, which will be pre-approved by the board of directors and the board of governors, against which each proposed project can be assessed. This will ensure that the projects undertaken to be developed by the Agency are objectively selected in line with laid down criteria towards delivering optimal impact on the continent.[36]

5.4. **Agency Accountability**: By virtue of the envisaged tiered corporate governance structure, the trail of accountability will naturally flow from the Agency's employees to its management, which management will in turn be accountable to a board of directors and finally, the board of directors will be accountable to its shareholders through the oversight powers of the board of governors.[37]

5.5. **Foreign Investment**: While profit-making is not to be the paramount objective of the Agency, coming second to developmental impact, there will inevitably arise the need to create routes through which foreign capital can be invested into the Agency. As contemplated in this segment, "foreign" investment could include investment from non-African countries, development finance institutions, sovereign wealth funds, pension funds etc. provided that such investments align with the requirements and goals set out by the Agency. Beyond the initial member states, it may be proposed that additional investors may not be entitled to representation on the Agency's board of governors, thereby creating two classes of shareholders within the Agency.

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35 AfDB, *Organisational Structure | African Development Bank - Building today, a better Africa tomorrow*, AFRICAN DEVELOPMENT BANK , https://www.afdb.org/en/about-us/organisational-structure (last visited Apr 11, 2021).

36 AFDB GROUP, *The African Development Bank Guidelines for Financial Management and Financial Analysis of Projects* (2006).

37 AfDB, *supra* note 35.

Conclusion

The successful establishment of the Agency and the actualization of its mandate will ensure the creation of a reliable pipeline of bankable infrastructure projects in Africa that can then be marketed to sponsors, financiers and investors, thereby addressing the problem of "*too much money chasing too few projects*".[38] In the short term, this will generate increased infrastructure investment activity on the continent and will create employment in African countriesright from the project development stage.

In the medium-long term, the development of these carefully selected and packaged projects will help to facilitate the efficient free-flow of goods and services across Africa, reducing production casts, boosting export capacity and reducing the cost of intra-African trading. Eventually, this will directly facilitate the achievement of the AfCFTA agreement's objectives and will deepen the economic integration and trading capacity of the African continent.[39]

[38] Leigland and Roberts, *supra* note 12.

[39] Prince Nwafuru, *AfCFTA: The underlying principles, objectives and benefits | Nairametrics*, NAIRAMETRICS (2021), https://nairametrics.com/2021/03/03/afcfta-the-underlying-principles-objectives-and-benefits/ (last visited Apr 5, 2021).

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