

Unlocking private investment in infrastructure: The PIDA Model Law

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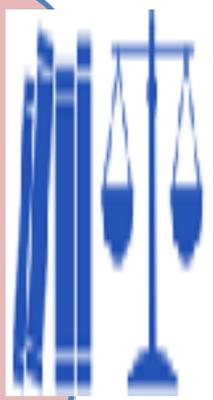
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Development

There are many challenges facing investment in transboundary infrastructure in Africa, but the two challenges that have emerged from experts and potential investors are:

Plethora of policies, laws and regulations which inhibit private sector investment and curb its enthusiasm

Developed continent wide model law to enhance investment in transboundary infrastructure



Specific risks associated with investment in transboundary infrastructure in Africa

Comprehensive study of risks that pertain to investment in transboundary infrastructure in Africa.



The Investment Challenge

- For PIDA, \$360 billion by 2040
- For PIDA PAP (51 Priority Action Plan projects), \$68 billion per year up to 2020. 95% of this sum will be on transport.
- African Governments spend about \$45 billion annually on infrastructure. 2/3 of that on maintenance.
- The \$48 billion remainder can be reduced by \$17 billion if we rehabilitate existing infrastructure, target better subsidies and improve budget execution.
- Private sector investment is crucial
- The PIDA model law can unlock private investment.

The PIDA Model Law

- Pursuant to the Assembly of the African Union Decision (Assembly/AU/Dec.563 (XXIV))
- Aim is to implement and accelerate the Dakar Agenda for Action, in particular, private sector investment of the DFS Projects and to promote industrialisation of the African continent through the development of transboundary infrastructure.

Objectives of the Law

- Facilitate private sector investment and financing in Transboundary Infrastructure Projects;
- Ensure transparency, efficiency, accountability and sustainability of Transboundary Infrastructure Projects;
- Harmonise cross-border regulation of Transboundary Infrastructure Projects; and
- Promote intra-African trade and open domestic markets to international trade.

A Model Law framework in 8 sections and 23 Articles

General Provisions

- ✓ Preamble and objectives of the Law
- ✓ Scope of the Law

Appointment of the project Regulator

- ✓ Transboundary Infrastructure Project Regulator-African Forum for Utility Regulators (AFUR)
- ✓ Functions of AFUR
- ✓ Powers of AFUR
- ✓ Co-ordination of Local Activities
- ✓ Anti-Corruption and Transparency Standards

Free Movement of Entities, personnel, Good and Services

- ✓ Free movement of entities
- ✓ Free movement of Personnel
- ✓ Immigration
- ✓ Free movement of goods and services

Procurement

- ✓ Procurement standards
- ✓ Guiding principles of procurement

Environmental and social standards

- ✓ Guiding principles on Environmental and social standards
- ✓ Operational safeguards

Investment Assurances and Protections

- ✓ Equity and Non-discrimination
- ✓ Investment Assurances and foreign Exchange Measures

Funds, Finance, Accounts and Fiscal Regime

- ✓ Financing
- ✓ Fiscal Incentives

Dispute Resolution Provisions

- ✓ Settlement of Disputes
- ✓ State Immunity
- ✓ Miscellaneous Provisions
- ✓ Interpretation and Definition

Section 3 Article 8 : Free Movement of Entities, Personnel, Goods and Services

(1) Any entity registered, incorporated or permitted to carry on business under the laws of any African Country may participate in Transboundary Infrastructure Projects.

(2) Nothing in this Act shall prohibit foreign participation (by way of share ownership, creditor relationship, capital contribution or otherwise) in entities carrying on Transboundary Infrastructure Projects.

4) Any entity registered, incorporated or permitted to carry on business under this [Law] shall be exempt from complying with any national legislation on the establishment of businesses provided that such entity is registered for tax purposes in an African Country

Article 9: Free movement of Personnel

2. Notwithstanding anything contained in this [Law], the local content requirements contained herewith shall not apply to employment of senior management including, but without limitation, the finance director, managing director and other senior executive personnel charged with day-to-day management responsibilities of the Project Vehicle.

3. A Non-[insert name of country] national engaged, employed, hired or contracted by the Project Vehicle, for the purpose of carrying out Transboundary Infrastructure Projects, shall be guaranteed a right to enter, reside and work in [insert name of country] in accordance with the relevant laws of [insert name of country].

Selected Articles of the Model Law

Article 10: Immigration

1. The Government of [insert name of country] shall not unreasonably deny entry visa for any personnel or officer of [AFUR], working on a Transboundary Infrastructure Project.
2. The Government of [insert name of country] shall not unreasonably deny entry visa, expatriate quotas, etc. for any Project Worker, working on a Transboundary Infrastructure Project.
3. The Government of [insert name of country] shall not unreasonably deny entry visa, for public officers from Ministries, Departments, Agencies of Parties of Origin that have supervisory, regulatory, administrative oversight in relation to a Transboundary Infrastructure Project on official visit duty to [insert name of country].

Article 11: Free Movement of Goods and Services

1. The Project Vehicle and its sub-contractors shall be exempt from payment of import duties, taxes and all other duties, levies, or charges and other taxes of similar nature, in respect of Goods necessary for use in Transboundary Infrastructure Projects.
2. No export duties, taxes or other duties, levies, charges or impost of a similar nature shall be payable or imposed on the export of Goods used by the Project Vehicle in another African Country hosting or co-hosting the Transboundary Infrastructure Project

Selected Articles of the Model Law

Article 12: Procurement Standards

In the award of procurement contracts and Concessions, [AFUR] shall adopt procurement standards and guidelines as set out in the United Nations Commission on International Trade (UNCITRAL) Model Procurement standards, as may be amended from time to time, and which is herein incorporated by reference and set out in Schedule C to this Law.

Article 13: Guiding Principles on Procurement

1. In carrying out its functions..., [AFUR] shall have regard to the following principles:

- a. maximise economy and efficiency in procurement processes;
- b. foster and encourage participation in procurement processes by suppliers and contractors having regard to the preferential order set out in Article 9(1);
- c. promote fair competition among suppliers, contractors and concessionaires for the supply of the subject matter of the procurement;
- d. promote the integrity of, and fairness and public confidence in, the procurement process; and
- e. achieve transparency and disclosure in the procedures relating to procurement in accordance with the World Bank Framework for Disclosure in Public Private Partnerships or such other framework as may be determined by [AFUR]

Article 16 (i): Equality and non-discrimination

National Treatment: The Government shall accord to investment by the project vehicle and /or investors, treatment not less favourable than that accorded to the investment and associated activities of its own nationals...”

Most-favoured-nation Treatment: The Government shall not subject investments by the Project Vehicle and/or Investors to treatment less favourable than that accorded to the Investments of nationals or entities of another country engaged in similar transboundary infrastructure projects, howsoever, including establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of Investments.

Article 17 (2): Protection and Security of Investment

“The Government shall not directly or indirectly, by law or otherwise expropriate, nationalise or take similar measures tantamount to expropriation or nationalization...”(except):

If it serves as a public good; made on a non-discriminatory basis; is in accordance with due process of the law and procedure and upon payment of prompt, adequate and effective compensation.

Selected Articles of the Model Law

Article 18: Financing

The Government of [insert name of country] shall provide credit guarantees to the Project Vehicle provided that:

- a. other Parties of Origin provide guarantees to representatives of their participation in the project;
- b. the guarantee is within the government's overall fiscal strategy;
- c. meets the government's debt sustainability plan; and
- d. does not exceed the aggregate projected net revenue of the underlining project over the life of the obligation guarantee

Article 19: Fiscal Regime

1. All Transboundary Infrastructure Projects shall be subject to the tax regime determined and agreed by the Parties of Origin or the Parties of Origin and the Investors.

2. The taxation and revenue allocation formula shall also be in accordance with the agreement amongst the Parties of Origin.

3. No customs duties shall be applied otherwise than in accordance with the provisions under Article 11: Free Movement of Goods and Services) of this Law.

4. The Project Vehicle must keep account of its books and report in accordance with the International Financial Reporting Standards (IFRS).

Selected Articles of the Model Law

SECTION 8 -Article 20: Settlement of Disputes

1. Where there is a dispute arising from or connected with or relating to this Law between [insert name of country] and the Project Vehicle or [insert name of country] and Investor, the parties concerned shall use good faith effort to reach an amicable settlement.

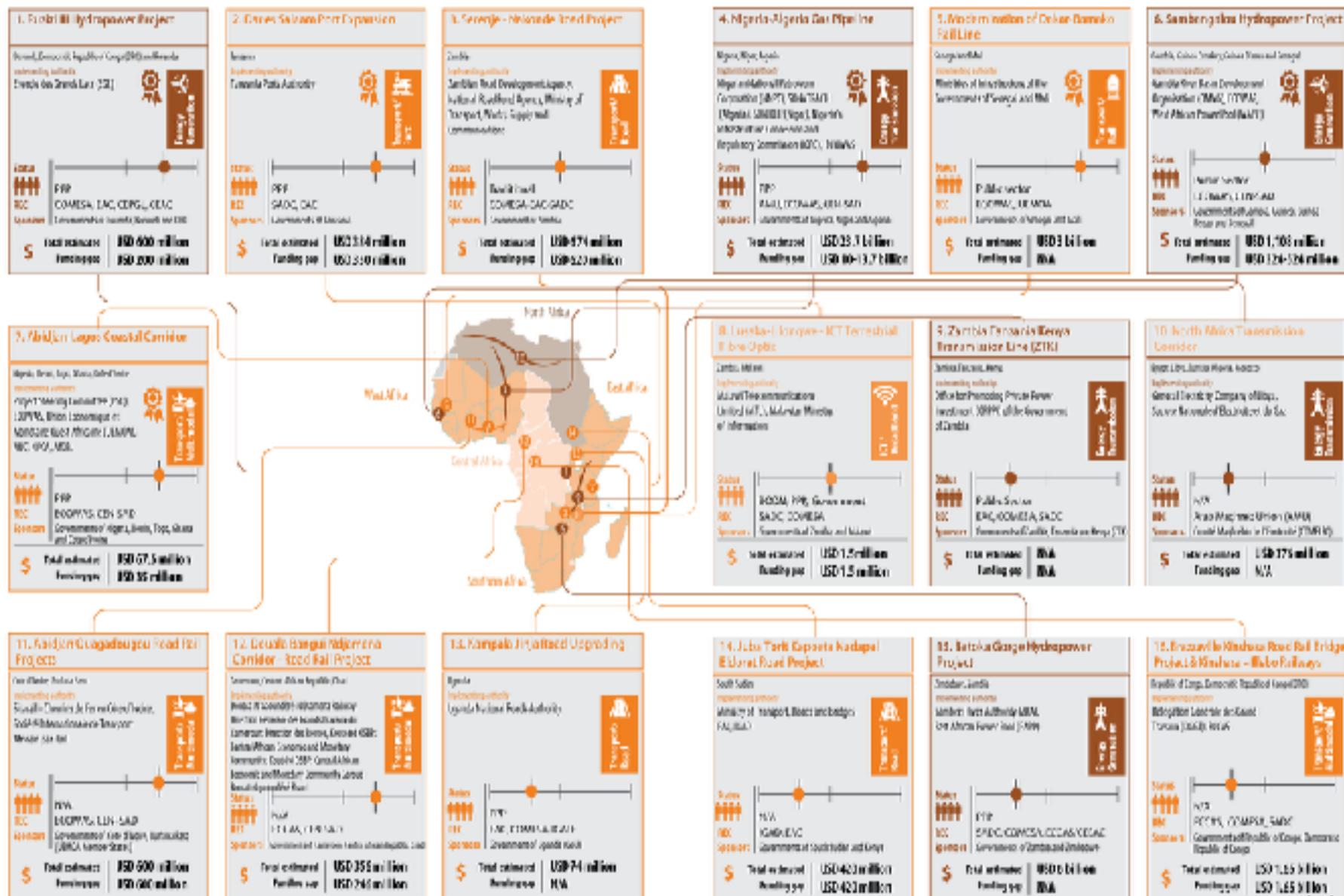
2. Any dispute arising from or connected with or relating to a Transboundary Infrastructure Project between the [insert name

of country] and the Project Vehicle or between the [insert name of country] and the Investor that is not amicably resolved within [90] days from the date of receipt of the written declaration of dispute by the respondent, shall be submitted to international arbitration in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL Arbitration Rules),

Article 20: Settlement of Disputes

5. The Claimant shall appoint one arbitrator and the Respondent shall appoint the second arbitrator and the two arbitrators shall jointly appoint a third arbitrator, who shall preside over the arbitral tribunal. In the event that the arbitrators appointed by the Claimant and Respondent are unable to agree on a third arbitrator, the General Counsel of the African Union Commission shall appoint the third arbitrator.

DFS 16 PROJECTS





THANK YOU!

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