

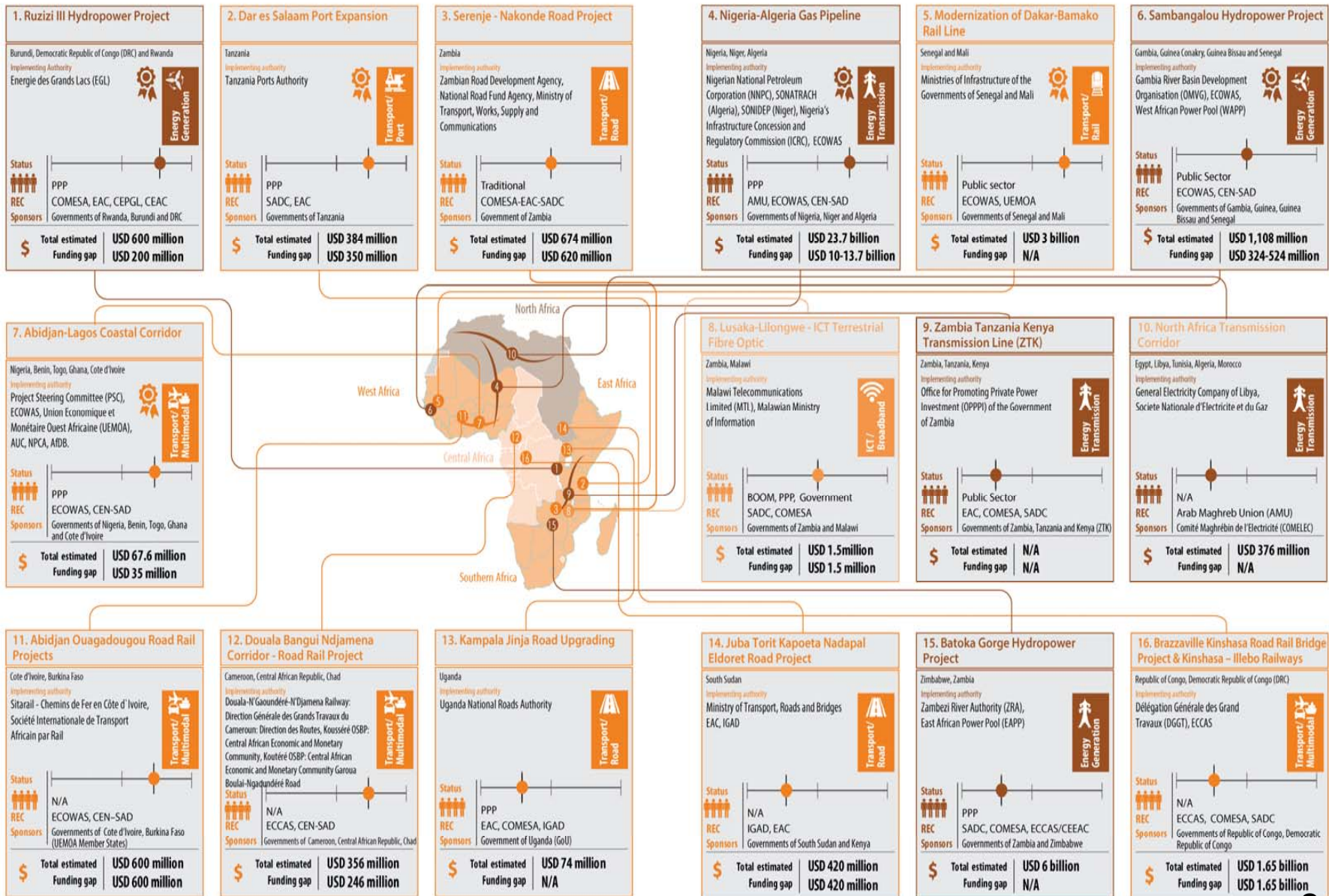
Unlocking private investment in infrastructure: The PIDA Model Law

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December 10-14 2017
Walvis Bay, Namibia

ECA Session , PIDA Week

DFS 16 PROJECTS



Affordable infrastructure projects that can utilize national and regional energy resources in a way that will benefit the

Private Investment Challenges

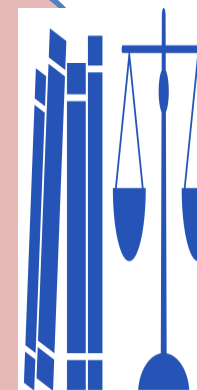
ECA/NEPAD Response

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

Specific risks associated with investment in transboundary infrastructure in Africa

Developed continent wide model law to enhance investment in transboundary infrastructure



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.

What do investors want? ECA's response



What investors want

1. Predictability and reliable local partnership
2. Respect for the rule of the game: “When policies drive an investor away, it is difficult to bring that investor back” – Dangote
3. Conducive regulatory environment
4. Respectable return on investment
5. Honest presentation of risks



Financing infrastructure projects in Africa

- The global infrastructure gap is estimated to amount to \$1-1.5 trillion annually in developing countries
- PIDA estimates that Africa needs up to \$93 billion annually until 2020 for both capital investment and maintenance
- \$360 billion is envisaged as requirement for the PIDA projects to be implemented through to 2040 (UN, AfDB, NEPAD Agency)
- By 2025, African countries will spend \$180 billion on infrastructure, an indication of governments' determination and confidence



If the PIDA is implemented...

- Africa will reduce electricity production costs by \$30 billion or \$850 billion through 2040.
- Access to power will rise from 39% (2009) to nearly 70% in 2040, providing access to an additional 800 million people.
- Transport efficiency gains will be about \$172 billion in the African Regional Transport Integration Network (ARTIN).
- Intra-African trade shares will double from the current 12 percent.
- More than 15 million new jobs will be created in construction, operations and maintenance.

Fallacies

Investment in transboundary infrastructure in Africa is beset by three giant fallacies:

1. Africa is too risky
2. There are too many divergent laws, policies and regulations
3. Investment opportunities are scarce



On risks

Safety Rank	Country Name	Average Rank	CPI2013	DB2014	FSI2014
183	Libya	165.7	172	187	138
184	Eritrea	166.7	160	184	156
185	Central African Republic	169.3	144	188	176
186	Haiti	170.0	163	177	170
187	Afghanistan	170.3	175	164	172
188	Democratic Republic of Congo	170.7	154	183	175
189	Guinea-Bissau	171.5	163	180	
190	Chad	175.0	163	189	173
191	Somalia	176.0	175		177
192	South Sudan	179.0	173	186	178



Indicators used: Corruption/rule of Law; Business Environment; Social and Political risk

Rankings used: Corruption perception index (TI); Ease of Doing Business (WB); Fragile State Index (Funds for Peace)

On Risks...

1. Apart from DRC, non of the “risky” countries in Africa is in the DFS 16. Risk=High returns.
2. In spite of “low risks” in developed countries, their markets and investments collapsed in 2008.
3. Error of aggregation (Can we lump CAR, Somalia and S. Sudan with S. Africa, Nigeria, Mauritius, Botswana?)



Unique challenges for Africa: Four recent key findings

1. Risk premium is higher for Africa : Due to perceived risk and cost of capital, internal rate of return for securing partners and investors is 16-20%; Other developing countries: 11-15%
2. Greater support required in Africa during project development (political support, risk mitigation, development institutions, incentives, etc)
3. Greater difficulty in securing qualified professionals. Difficulty to secure a qualified project developer is 7.6 versus 5.0 for Asia and 4.6 for Emerging Europe (on a scale of 1-10, where 10 is hardest).
4. Project developers in Africa face more challenging roles (securing off-take agreements, negotiating with Governments, securing risk mitigation, etc.)



Dealing with risks

1. Watch what Africans are doing (Are they investing or divesting?)
2. Watch what China is doing
3. Exploit the “wimp factor” of the competition.
4. Exploit poor state of infrastructure



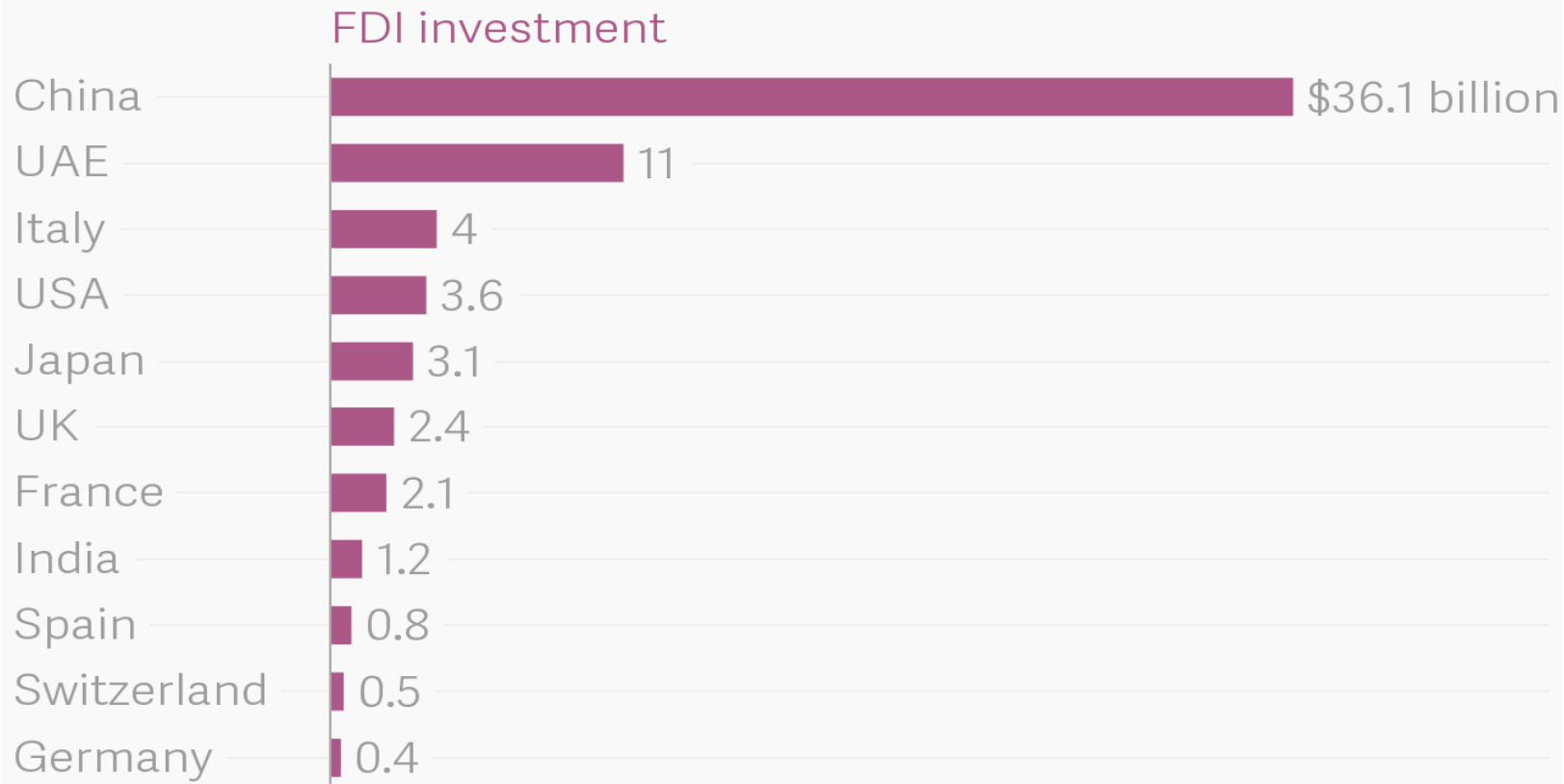
What Africa is doing...



- South Africa, Nigeria, Morocco, Kenya and Egypt, accounted for 58% of Africa's total FDI projects in 2016.
- By 2025, African countries will spend over \$180 billion on infrastructure.
- By 2025, Nigeria will spend \$77 billion on infrastructure, up from \$23 billion in 2013. (World Bank)
- By 2025, South Africa will spend \$60 billion on infrastructure, up from \$22 billion in 2012.
- Investment climate has improved in Africa through business-friendly reforms and democracy.
- High level political will exist: DFS 16, PIDA, Agenda 2063, 2030 Agenda, PICI.

Watch what China is doing

China was Africa's largest foreign investor in monetary terms in 2016



△ T L △ S | Data: Ernst & Young's Attractiveness Program Africa 2017



Source: Ernst & Young's Attractiveness Program Africa , 2017

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Watch what China is doing

- Foreign Direct Investment (FDI) from China to Africa grew sharply with a 106% rise in projects, according to Ernst & Young's Attractiveness Program Africa 2017.
- In comparison, FDI projects in Africa by the US and UK fell 5.2% and 46.8% respectively.



The Investment Case

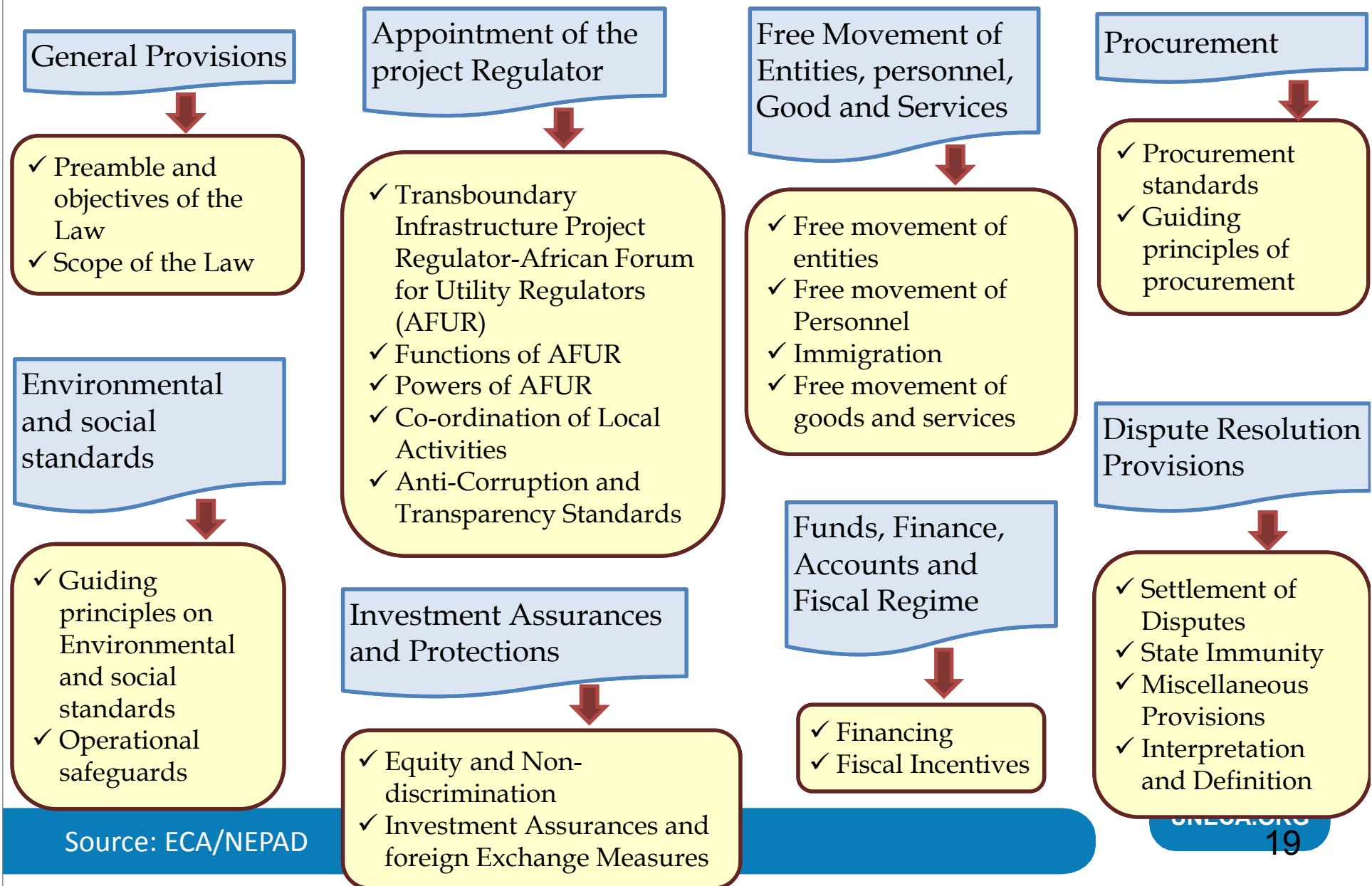
- Pension Funds are eager to increase investment in infrastructure in Africa (Eskom, second largest in South Africa will increase investment to 15%).
- Johannesburg Stock Exchange says “*infrastructure firms exhibit lower revenue volatility and higher payout ratios (dividends to revenue) than any other group of private or public firms*”
- There is now a **continental model law in Africa** which addresses concerns of foreign investors
- Comprehensive risk mapping of DSF 16



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.

A Model Law framework in 8 sections and 23 Articles



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.

Scope of the Law

- The Law applies to all TIPs which traverse country/countries or which is a participant, financier, sponsor, investor or promoter (Article 2).
- For the avoidance of doubt, the Law does not apply to:
 - (1) domestic infrastructure projects or
 - (2) transboundary infrastructure projects already covered by treaties to which a country is a contracting party or transboundary infrastructure projects covered by other agreements creating binding obligations on the country where such are inconsistent with this Law.

Selected Articles of the Model Law

Section 2 Article 6 : Coordination of Local Activities

(Countries) may designate a Ministry, Department or Agency or appoint a liaison officer to assist any Transboundary Infrastructure Project with respect to:

- (a) The steps, licenses, permits or other authorizations referred to in Art 5
- (b) Cooperation and exchange of information and available data relating to environmental standards referred to in Article 15(2) and
- (c) Local coordination between the Parties of Origin as well as coordination with (AFUR (the Project Regulator)

Article 7: Anti-Corruption and Transparency Standards

1. (AFUR) shall uphold the highest standards of Anti-Corruption and Transparency in carrying out its functions in accordance with the (African Union Convention on Preventing and Combatting Corruption and the UN Convention against Corruption...
2. Any person who takes any step, decision or executes any contract that is found to have been induced by bribery or corruption under Section 8 of this Law shall be guilty of a criminal offence under the Laws of (the country)
3. (AFUR) shall not directly or indirectly receive bribes, gifts or favours from, or give or offer to give bribes, gifts or favours in exchange for an award of a contract

Selected Articles of the Model Law

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 made be determined by [AFUR

Selected Articles from the Model

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),

Selected Articles of the Model Law

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.



THANK YOU!

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