

Why Cross-Border Infrastructure Projects in Africa Live or Die on Legal Design

Seven enabling conditions for bankable regional projects — and the real Sub-Saharan African projects that prove why each one matters.

At a recent panel discussion, we discussed what it actually takes to finance cross-border industrial infrastructure in this region. One of the questions we were asked was deceptively simple: what regulatory and legal conditions need to be in place before a regional project can attract serious commercial investment?

The honest answer is that almost every stalled or over-budget cross-border project on the continent can be traced back to one of a handful of predictable legal gaps. Here are seven of them, each with a real project behind it.

1. Harmonised concession and PPP laws

The Nacala Corridor rail line moves Malawian and Mozambican cargo to the port of Nacala along what looks like a single continuous track. In law, it's run under two separate national concessions - CDN in Mozambique and CEAR in Malawi. Each are governed by its own country's concession regime. Same steel, same trains, two different legal frameworks for risk allocation, tariffs and termination. Almost every cross-border corridor in the region faces some version of this. When concession terms on either side of a border don't line up, you don't have one bankable project.

Takeaway: *A cross-border project is substantially harder to bank where the legal regime in each host country allocates risk in a materially different way. There needs to be a clear and consistent allocation of risk running through the contractual arrangements in every country involved.*

2. Cross-border dispute resolution

The Lesotho Highlands Water Project is an example of cross border dispute resolution mechanisms serving the purpose for which they were drafted. Contractors from five countries built the Katse Dam under a FIDIC contract, with disputes referred to ICC arbitration seated in London and decided by an international panel. When a currency-of-payment dispute eventually reached the House of Lords in 2005, it travelled through a clean, internationally recognised process rather than a fight over which country's courts even had jurisdiction.

Takeaway: *Reliable dispute resolution requires that all relevant states involved in the cross-border project have acceded to recognised arbitration frameworks such as the New York Convention, as well as access to a designated regional forum for infrastructure disputes*

3. Tax and customs alignment

The Chirundu One-Stop Border Post between Zambia and Zimbabwe is often held up as a regional success story, and rightly so — it cut truck clearance times from three days to three hours, saving an estimated USD 60 million a year in queuing costs. But look closer and the underlying Zambian and Zimbabwean duty rates, penalties and offence definitions never actually converged.

Takeaway: *Harmonised treatment of withholding tax, capital allowances, and VAT/customs is essential, especially on construction plant and equipment crossing borders so that one physical asset isn't taxed inconsistently at each border.*

4. Exchange control and convertibility

When Zimbabwe reintroduced its own currency in February 2019, foreign-currency balances held by companies operating there were converted overnight to local currency at an artificial 1:1 rate, while those same companies' obligations to foreign shareholders stayed denominated in US dollars. Old Mutual alone ended up with USD 84.3 million in dividends and guarantee obligations trapped by that mismatch, registered as "legacy debt" under the Reserve Bank of Zimbabwe's blocked funds framework. By November 2021, Zimbabwe's total blocked funds stood at roughly USD 3.3 billion of which USD 2.5 billion was private sector money. Years later, some of it still hasn't been released in convertible form. For example, Old Mutual's share is being settled in non-convertible preference shares rather than cash.

Takeaway: *Enabling legislation must permit cross-border capital flows, offshore debt servicing, and hard-currency repatriation of returns, since corridor projects will typically be financed outside any single country's currency regime.*

5. Regional investment protection

Italian and Belgian/Luxembourg investors holding South African mining interests brought an ICSID claim in 2007 under South Africa's bilateral investment treaties with Italy and the Belgium-Luxembourg Economic Union, arguing that the equity-divestiture requirements in the Mineral and Petroleum Resources Development Act (which made the continuation of mining rights conditional upon transferring an ownership interest to historically disadvantaged South Africans) amounted to indirect expropriation and breached fair and equitable-treatment protections. The claim sought roughly USD 375 million in damages. Rather than proceeding to a final award, the parties settled in August 2010 before any ruling on the merits, allowing the investors to avoid the forced divestiture outcome they had challenged. The case cut both ways for investment protection in the region: it showed a Bilateral Investment Treaty (BIT) can genuinely constrain how a state applies its own domestic law to an existing investment, but it also alarmed the South African government enough that it subsequently terminated most of its old-generation BITs and replaced investor protection with its own Protection of Investment Act, which took effect in 2018 and offers materially weaker guarantees than the treaties it replaced. A strong BIT provides a real shield right up until the state on the other side decides the shield itself is the problem.

Takeaway: *Investment protection is needed at a regional level for a cross-border project to be bankable. If wrapped under a single regional instrument, provisions guaranteeing against expropriation and ensuring the free transfer/repatriation of capital and returns give investors one multilateral reference point instead of relying on domestic regimes with differing levels of protection.*

6. Regulatory and permitting alignment

The Kazungula Bridge across the Zambezi, linking Botswana and Zambia, shows what alignment done well looks like. A bridge is an unforgiving structure for this purpose: it is one continuous span, so if either country's approach to roads standards or environmental authorisations lags behind the other's, the whole crossing is unusable no matter how complete its own half is. Botswana and Zambia signed a memorandum of understanding as early as 2006, and rather than running two separate national approval and construction timetables, set up a Joint Steering Committee chaired by the SADC Secretariat's Executive Secretary specifically to keep both countries' design, construction and regulatory processes moving in step. Construction ran from 2014 to completion in 2021; the USD 259 million project, funded by both governments alongside the African Development Bank and Japan's JICA, was commissioned on a single day, 10 May 2021, as one integrated crossing complete with a one-stop border post on both banks.

Takeaway: *Aligning timelines for environmental, land, and sector approvals prevents a situation where a project is cleared in one jurisdiction while stalled in the next.*

7. Consistent government support instruments

The 678km West African Gas Pipeline carries Nigerian gas to power plants in Ghana, Togo and Benin, with Nigeria's national oil company, Ghana's Volta River Authority, and the two smaller national gas companies each holding a stake in the operating company, WAPCo. The credit support behind each government's obligations, however, was never comparable. Ghana's payment obligations were backed by a World Bank IDA partial risk guarantee of USD 50 million and a MIGA political risk guarantee of USD 75 million, giving lenders multilaterally guaranteed comfort on the offtake side. Nigeria's upstream obligation of supplying the gas carried no equivalent instrument. Lenders could price Ghana's side of the project with real confidence, while Nigeria's supply commitments remained the weak link, and the pipeline has been dogged for years by gas-delivery shortfalls no downstream guarantee could fix.

Takeaway: *There needs to be a shared legal basis for sovereign support tools such as guarantees and availability payments, so that DFIs and commercial lenders can price comparable credit support regardless of which member state a given project segment sits in*

The bottom line

These considerations are not theoretical drafting niceties. Each of the seven elements is a practical determinant of whether a regional project becomes bankable or remains stranded. If Africa's regional economic communities such as SADC intend to deliver viable cross-border infrastructure, the legal architecture must be built from the outset, integrated with the technical and economic workstreams and not appended as a late-stage compliance exercise.

Claire Barclay advises on infrastructure, project finance and regional development transactions at InfraLaw.