Evolving Legal Regimes and Incentives for Investment in Africa

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Introduction

- The Need for FDI
- Liberalization and Privatization
- Different legal, policy and administrative measures to attract FDI
- Law as a tool for protection and attracting FDI

The State of FDI Inflow in Africa

- In 2007, FDI inflows to Africa grew to 53 billion dollars, their highest level so far

- The leading 10 FDI host countries in Africa (South Africa, Egypt, Zambia, Botswana, Mozambique, Nigeria, etc) accounted for over 82% of the inflows. Nigeria was the largest recipient of FDI inflows in Africa, accounting for 16% of the region's FDI stock.
- Compared to the total world FDI inflows in 2007, Africa's 53 billion dollars is disappointingly very low. It is just about 3% of the world FDI inflows.
- Very Few high value FDIs.
- Single countries like China, UK, France Spain, and Malaysia have at different times attracted more FDI than the entire continent of Africa. In 2007, China attracted FDI worth 83, France 158, UK 224 and Spain 53.

The Investment Legal Regimes

- Investment Specific Legislation
- Bilateral Investment Treaties (BITs)
- Africa Model Law on Investment
- A host of other commercial laws e.g. Company Legislation, legislation governing Partnerships, Tax Legislation, Intellectual Property Rights Legislation, Labour Laws etc.

Investment Specific Legislation

- As a tool for attracting private investments including FDI, Investment Specific Legislation has been used since the colonial times but became more prominent after independence of most African states e.g. Ghana’s Pioneer Industries and Companies Act 1959 and the Private Investment Code of Ivory Coast 1959.
- At the moment, almost every African country has an investment specific legislation which provides the major legal framework for regulating, encouraging, promoting and attracting FDI.
- Examples include Kenya’s Investment Promotion Act 2004, Nigeria’s NIPC Act 1995, Uganda’s IC 1991, Tanzania’s IC 1990, Angola’s PIL 2003 and the Tax and Incentives Law 2003 etc.

Bilateral Investment Treaties

- Agreements btwn two countries for the encouragement, promotion and protection of investments by nationals and companies of one state in the state of the other
- BITs are increasingly becoming very important tools for attracting and protecting FDI in Africa. They are especially important where the host state's investment code is inadequate or vague.
- They usually contain terms that are more favorable to foreign investors than those that are found in national investment codes.
- As of 2006, Uganda had signed 11 BITs, Kenya 4, Tz 10 and Egypt 88. As of 2008, Nigeria had signed 22.

Common Features of Investment Legislation and BITs

- Most of the Investment Legislation and BITs share common discernible features, although in some cases there is a difference in emphasis.

Protection Against Expropriation/Nationalization

- For example Uganda's IC provides that the interest of a licensed investor may not be expropriated, except in accordance with the Constitution, and that compensation at fair market value should be paid within twelve months of any expropriation.
- The trend is to require that expropriation or nationalization can only occur in the national interest or for a public purpose and only after compensation at market value has been paid.

Standard of Treatment of Foreign Investors and their Investments

E.g. Article 12 of Angola's Private Investment Law 2003

- 1. Within the framework of Constitutional Law and of the principles that shape the country's judicial, political and economic order, the Angolan State ensures, irrespective of the capital's origin, a fair, non-discriminatory and impartial treatment of incorporated partnerships and companies and of corporate assets, guaranteeing them protection and security and not hindering, in any way, their management, maintenance and operation.

  2. Any discrimination vis-à-vis investors is strictly forbidden.

  3. Foreign investors are guaranteed the rights arising out of ownership on the resources they have invested, namely entitlement to freely dispose of them, under the same terms of those of a national investor.

Transfer of Funds

- E.g. Nigeria's NIPC Act makes reference to the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act of 1995 which grants any investor free importation and convertibility of foreign exchange and unconditional transfer of funds attributed to the investment (e.g. profits, dividends or the proceeds of sale of the investment) as long as such funds are the net of all taxes.

Establishment of Government Investment Agencies

- To to promote, manage and oversee FDI activities in the country. They usually act as one-stop centres for giving advice to the investors, screening the investments, approval and or issuance of relevant permits, certificates and licenses etc.
- Examples are UIA established by Uganda' IC 1991, KIA established by Kenya's Investment Promotion Act 2004 and Nigeria' NIPC established by the NIPC Act 1995.

Incentives and Benefits

These are varied but generally include:

- Tax holidays
- exemptions from payment of duties and other custom tarrifs on capital goods for the start-up and development of the investment operations,
- entitlements to work permits for expatriates
- entitlement to free/cheap land for investment
- benefits against double taxation etc.
- Government loans

NB-In many cases, there are screening requirements and minimum capital investment requirements for an investment to qualify for the incentives and benefits.

Dispute Settlement (To be discussed in detail by Chifundo)

- Usually there is provision for alternative dispute settlement. The trend is to provide for recourse to the ICSID for conciliation or arbitration for countries that are party to the ICSID Convention.

Towards a Model Law on Investment in Africa

- Adopted in December 2003 in Dakar, Senegal
- The major aim is encourage a regional and harmonized approach to the devt of legal regimes for Investment in African countries
- Expected benefits include reduction of the transaction costs associated with studying multiple investment regimes, stimulation of intra-continental investment by removing legal uncertainty across the board and increased collaboration and coordination

Concluding Observations

- As a tool for attracting FDI, law can only do too much.
- Although there is still room for improvement, a review of many African countries investment legislation and BITs shows that they adequately provide the necessary legal protection and incentives for FDI.
- In my view, notwithstanding a few issues with the different countries' investment legal frameworks, the major factors negatively affecting FDI inflow to African countries lie outside the legal investment climate.
- Individually and collectively, African countries need to deal with those challenges which create a negative image about the continent and discourage foreign investors. These range from poor and inadequate infrastructure to political instability, political turmoil, wars, corruption and bad governance among others.