Evolving Legal Regimes & Incentives for Investments in Africa

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What is FDI?

- FDI occurs when foreign investors establish businesses inside a foreign country.
- There are three forms of FDI: (1) Greenfield investments, (2) cross-border merger and acquisition type of investment and (3) brownfield investments.

Three Types of FDI, defined

- **Greenfield investments** create new assets or facilities through new companies, ne w subsidiaries, or joint ventures where the foreign investor takes a controlling equity stake.
- The cross-border **merger and acquisition** type of investment occurs when a foreign company acquires the assets of an existing foreign company or enters into a merger agreement with the country to form a new legal entity.
- A **brownfield investment** occurs when foreign investors acquire an existing local company and completely replace all plant and equipment of the former company.

Conventional Appeal of FDI

- The popularity of FDI may be because it has the propensity to create other positive economic benefits by providing foreign exchange, employing citizens of the developing countries and stimulating general economic growth.
- A positive effect of FDI on developing countries is the international recognition gained as a result of their business interactions with developed countries.

Sub-Saharan Africa's challenge

- The standard diagnosis of sub-Saharan Africa is that it is suffering from a governance crisis. This is too simplistic. Many parts of Africa are well governed considering the income levels and extent of poverty, yet are caught in a poverty trap.

Sub-Saharan Africa’s challenge

- The region’s development challenges are much deeper than “governance”. Many countries require a big push in public investment to overcome the region’s high transport costs, generally small markets, low-productivity agriculture, adverse agroclimatic conditions, high disease burden, and slow diffusion of technology from abroad

MDGs and Economic Growth

- In order to achieve the Millennium Development Goals by 2015, Africa needs to grow at an annual rate of at least 7 per cent. While several countries have posted such growth rates since the mid-1990s, these results have been episodic,

EAC, SADC, COMESA plans

- The 15-member SADC plan a customs union in 2010 and of the 15, 12 members launched a free trade zone in August 2008.
- In November 2008, leaders from COMESA, the East African Community (EAC) and the Southern African Development Community (SADC) agreed in principle to create a unified free trade zone, customs union would create a single market of more than 525 million people

Natural Resource Deposits

- Current estimates indicate that the region has over 300 billion metric tons of phosphate, over 105 billion tons of iron ore deposits, over 60 billion tons of coal, over 170 billion cubic meters of natural gas, and over 200 billion metric tons of petroleum. The region has also abundant deposits of cobalt, copper, nickel, and uranium.

An attractive investment climate

- An ideal investment climate is structured in a manner that enables investment to yield high rates of return at low non-commercial risks.
- Of particular importance to attracting investment is political stability as well as an efficient legal regime that guarantees adequate investment protection. One aspect is a functional mechanism for investor-state dispute settlement.

Three Categories of factors

- ***Institutional, including national policy*** : national policies that foster political stability, encourage economic growth and structure financial and administrative institutions that facilitate foreign investment.
- ***Infrastructural aspects***: adequate physical facilities and human resources. E.g. road networks, power supply, water resources, telecoms facilities.
- ***Legal Aspects***: adequate legal mechanisms that regulate investment and provide machinery for efficient and effective settlement of investment disputes.

Some Examples of Legal Aspects

- Investment laws (codes)
- Establishment of commercial courts
- Bilateral Trade Agreements (BITs)
- Membership in *Multilateral Investment Guarantee Agency* (MIGA) and *International Centre for Settlement of Investment Disputes* (ICSID)

National Foreign Investment Codes (NFIC)

- Foreign ICs Typically contain:
  - Incentives to encourage foreign investment
  - Prescribes sector of the economy which are open to foreigners
  - Provides machinery for settlement of investment disputes
- *Degree of openness or restrictiveness dictated by national political and economic factors.*

Examples of NFIC provisions on Dispute Settlement

- Malawi

(Malawi Investment Promotion Act 1991)

- Despite providing for few restrictions and numerous incentives, makes no specific mention of any dispute settlement mechanism.

- makes specific reference to the Constitution and existing laws and regulations.

- the basis for investor to state dispute resolution not from the Code but from Investor-State Agreements, relevant BITs and/or Malawi’s membership in MIGA and ICSID.

NFIC Codes ...(continued)

- Mozambique

(Law of Investment, 1993)

- Specifically makes provision for investment protection and dispute resolution.
- First option is negotiation, then recourse to domestic courts; if matter cannot be resolved, then to international arbitration (ICSID or International Chamber of Commerce (ICC))

NFIC … (continued)

- South Africa

- Quite advanced, internationally equated only to Nigeria and Egypt.
- Not a member of ICSID but has arbitration legislation and a recognised arbitration centre: the Arbitration Foundation of South Africa (AFSA), whose awards are enforced under the New York Convention.
- AFSA awards subject to domestic contsraints such as the possibility of their being set aside by domestic courts.

ICSID general

- Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965
  - ICSID Convention
  - Washington Convention
- Entered into force 14 October 1966
  - Large international membership, including several "rogue states"
  - 143 members / 155 signatories

Membership

- Members
  - Currently, 40 African countries are members of ICSID – including those whose ratifications were instrumental in bringing the ICSID Convention into force: Benin, Burkina Faso, Central African Republic, Chad, Congo, Cote d'Ivoire, Gabon, Ghana, Madagascar, Malawi, Nigeria, Sierra Leone, Tunisia, and Uganda
- Non-Members
  - 13 African countries are not members of ICSID: Angola, Cape Verde, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Guinea Bissau, Ivory Coast, Libya, Namibia, Reunion, São Tomé and Principe, South Africa

Consent to ICSID

- Must be in writing
- Consent of both parties need not be in a single instrument
- Can be through any of the followig forms:

  - Domestic legislation

  - Investor-State Agreement (e.g Consession Agreements)

  - BIT

  - Direct consent to ICSID

Qualification

- Arbitration only available *if*
  - DISPUTE INVOLVES A STATE PARTY

    OR
  - A STATE DESIGNATED AGENCY
- Only investors of Member States can use ICSID Mechanism
- Public International Law of State Responsibility

ICSID & Africa

- An available forum for investors in Africa due to large African membership, as well as most BITs choice of forum
- Exclusive and final jurisdiction hence not susceptible to domestic courts interference.
- Awards enforceable in all member countries
- But does not provide substantive rules hence dependent on applicable law (BIT??) If no agreement of applicable law between the parties, will apply domestic Law and/or International Law

Other Options

- UNCITRAL
  - Mozambique (just as an example)
- Courts of host State (thru concession agreements and/or BITs)
  - Mozambique/USA 1998
- ICC
  - Mozambique

Samples of positive reforms in West Africa

- **Ghana**, continues to increase the efficiency of its public services. It cut bottlenecks in property registration, reducing delays from six months to one.
- Greater efficiency at the company registry and the environment agency cut the time for business start-up to 42 days.
- Changes in the port authority’s operations sped up imports, while new civil procedure rules and mandatory arbitration and mediation reduced the time needed to enforce contracts.

Samples of positive reforms in West Africa

- **Burkina Faso** introduced specialized commercial chambers in the general courts and lowered the cost of enforcing a judgment by cutting the related registration tax from 4 to 2 percent of the judgment amount.
- The cost of property registration was reduced to 12.2 percent of the property value.
- And a one-stop shop for company registration cut the time for business start-up to 18 days

Example of reforms in East Africa

- **Kenya**, launched an ambitious licensing reform program. So far the program has eliminated 110 business licenses and simplified eight others. The changes have streamlined business start-up and cut the time and cost of getting building permits.
- The program will eventually eliminate or simplify more than 900 more of the country's 1,300 licenses.
- Property registration is also faster, thanks to the introduction of competition among land valuers.
- And the country's private credit bureau now collects a wider range of data, improving credit history information for lenders

Positive reforms in Southern Africa

- **Mozambique** replaced legislation dating from 1888 with a new commercial code that introduces stricter corporate governance rules and strengthens the rights of minority shareholders.
- The new code also modernizes the business registration process, cutting provisional registration and making notaries optional.
- Start-up time for new firms fell by almost three months.
- Specialized judges for commercial cases should improve court efficiency.

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More improvements in Mauritius

- **Mauritius**, already the region's most business-friendly country, made it even easier to do business, in part by simplifying taxes.
- A three-year program is harmonizing the tax system and ultimately will create a single corporate tax rate with few tax credits or tax holidays.
- Other reforms reduced the property registration fee to 5 percent of the property value and simplified construction permitting. A central database now links the company registry with tax, social security, and local authorities—shortening business start-up to just one week.
- A new risk management system accelerated customs clearance for low-risk importers.
- And a new law will help creditors recover their debt faster in bankruptcy cases.

Conclusion

- Legal regimes in African countries vary but there are many ongoing positive reforms
- ICSID membership introduces a common feature into the varied regimes
- Investment in Africa guaranteed protection through recourse to ICSID arbitration
- Due to varied regimes, BIT protection a recommended form of investment protection.