10 KEY QUESTIONS TO CONSIDER WHEN INVESTING IN AFRICA

Africa: a land of promise and peril. A continent ripe with opportunities and challenges. From a legal perspective, the second largest continent in the world can raise interesting issues due to its mosaic of legal systems at different stages of development.

While many refer to Africa as one place, it really is not. 54 countries make up for two or three regions, depending on how one views it (North, Sub-Saharan and Southern Africa) and 5 sub-regions (North, East, West, Central and Southern Africa). Further, there are up to 2,000 dialects spoken by a population of circa 1.2 billion which, according to the United Nations Department of Economic and Social Affairs (UNDESA), should grow to 2 billion by 2050.

While commercial, economic, financial, monetary, tax, political, regulatory, safety/security and other considerations will often take the spotlight in evaluating whether or not to proceed with a foreign investment, a number of basic legal questions should equally be considered before giving a project or transaction a green light.

Does the target country adhere to the rule of law?

There is no single definition of the rule of law. Some define it as the restriction of arbitrary exercise of power by subordinating it to well-defined and established laws. Others as the principle that all people and institutions should be subject, and accountable, to law that is fairly applied and enforced. The World Justice Project (WJP) cites four fundamentals[1]:

- **Accountability:** the government as well as private actors should be accountable under the law.
- **Just laws:** the laws should be clear, publicised, stable and just; they should be applied evenly and protect fundamental rights, including the security of persons and property and certain core human rights.
- **Open government:** the processes by which the laws are enacted, administered and enforced should be accessible, fair and efficient.
- **Accessible and impartial dispute resolution:** justice should be delivered by competent, ethical and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.

The question is: does the target country respect such fundamentals? The concept is not cliché and can be used in claims arising from arbitrary or unreasonable measures under bilateral or multilateral investment treaties. For instance, in the ELSI case[2], the International Court of Justice stated that "arbitrariness is not so much something opposed to a rule of law, as something opposed to 'the' rule of law" – "it is wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety".

What is the target country's legal system?

African legal systems are often mixed and can encompass rules and traditions borrowed from civil (including in some cases Roman-Dutch) law (e.g. Botswana, Eswatini, Lesotho, Namibia, South Africa, Zimbabwe), common law, customary law and Islamic (Shariah) law in a single jurisdiction (e.g. Somalia). Mono systems (based on only one legal tradition) are few (e.g. Angola, Benin, Central African Republic). To add to the complexity, not all legal systems of a given region or sub-region are the same. The carving out more often has to with historical backgrounds than geography.

While many will be familiar with civil, common and Islamic law, customary law can be more daunting. Yet it has been around since time immemorial. Customary law is essentially based on the aboriginal customs of traditional communities and varies amongst ethnic groups. It basically deals with personal statute, including civil rights, privacy, human dignity and the rights of the child. As such, it is arguably less

1 https://worldjusticeproject.org/about-us/overview/what-rule-law

2 Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy) [1989] ICJ Rep 15

relevant to international commerce, although modern times have seen a resurgence of interest in the way foreign investors deal with human and social rights. Sanctions for failing to observe the rules of customary law can range from reprimands to fines and ostracism.

The relevancy of customary law has diminished with the advent of foreign law and, nowadays, no African legal system is based on customary law alone.

Further, there are some initiatives aimed at harmonising codified rules of business law which have had tremendous success. To date, the Organization for the Harmonization of Business Law in Africa (abbreviated to OHADA based on its French name), which brings together 17 African countries, has produced several Uniform Acts which apply equally in all its Member States. Such Uniform Acts deal with general commercial law, securities law, cooperative societies law, contracts of carriage of goods by road, organisation and harmonisation of business accounting, arbitration law, insolvency law, simplified recovery procedures and measures of execution, accounting law and financial information, as well as the law of commercial companies and economic interest groups. Such harmonisation initiatives facilitate business.

Does the target country have a foreign investment law?

As part of its due diligence, a foreign investor should verify the local incentives and restrictions on foreign investment and, more importantly, the degree of protection afforded to foreign investments. Of particular relevance in this regard will be the target country's foreign investment law, if any.

Foreign investment laws typically deal with protection against expropriation, repatriation of profits and capital, tax and customs exemptions, holidays and similar concessions, relief from labour law provisions, licences and authorisations, and dispute resolution.

Not all foreign investment laws provide for an investor-State dispute resolution mechanism. Absent such mechanism, a foreign investor will normally have to claim before the host country's local courts, which can bring with it potential uncertainty regarding outcome. This is where bilateral investment treaties can come in handy.

Is there a BIT or IPPA between the home country and the target country?

A number of African countries are parties to bilateral investment treaties (BITs) or investment promotion and protection agreements (IPPAs). For instance, Switzerland is a party to such arrangements with 38 African States[3].

BITs/IPPAs aim to promote economic cooperation and favourable conditions for investment by investors of a contracting party in the territory of another contracting party. They generally provide that:

- a foreign investment must be accorded fair and equitable treatment and enjoy full (not always) protection and security;
- the host country may not treat a foreign investment less favourably than investments from local investors (national treatment) or third states (most favoured nation treatment), except where the host country and a third state are parties to a free trade area, customs union, common market or double tax treaty;
- a foreign investment must not be impaired with unreasonable or discriminatory measures;
- the host country must grant free transfers of payments relating to investments (e.g. returns, repayment of loans, proceeds of liquidation of investment) and transfers of currency in freely convertible currency; and
- a foreign investment must not be subjected, directly or indirectly, to any measures of expropriation, nationalisation or other measures having the same effect (e.g. creeping expropriation), except in limited cases, in the public interest, on a non-discriminatory basis, under a due process of law, and provided that prompt, effective and adequate compensation is paid.

A distinctive and paramount feature of some BITs/IPPAs will be an investor-State dispute resolution mechanism under which a foreign investor can force the host country to go to arbitration before the International Centre for the Settlement of Investment Disputes (ICSID) or ad-hoc arbitration under the United Nations Commission for International Trade Law (UNCITRAL) Arbitration Rules.

The astute foreign investor will look for exceptions to the above principles, including the exclusion of business sectors, currency transfers potentially being subject to the approval of repayment plans by the host country's central bank, and staggered transfers where there could be an effect on the host country's external payments.

Is the target country an ICSID Contracting State?

ICSID provides a neutral forum for the settlement of investment disputes outside a host country's local court system. It was established under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), which entered into force in 1966. It is part of and funded by the World Bank Group. To date, 49 African States are ICSID Contracting States[4]. Ethiopia, Guinea-Bissau and Namibia are mere signatories to the ICSID Convention, while Angola, Equatorial Guinea, Eritrea, Libya and South Africa are not ICSID Contracting States.

ICSID provides facilities for conciliation and arbitration. As a rule, ICSID jurisdiction extends to disputes arising from investments between contracting states and nationals of other contracting states, which the parties consent to submit to ICSID. Under ICSID's so-called Additional Facility Rules, a dispute can also be submitted to ICSID if a host country or the country where the foreign investor is based is a contracting state and the parties to the dispute agree to such submission.

Where no BIT, IPPA, multilateral investment treaty (e.g. Energy Charter Treaty) or free trade agreement (FTA) provides for ICSID jurisdiction, a foreign investor would be well advised to consider whether the

3 https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search

4 https://icsid.worldbank.org/about/member-states/database-of-member-states

parties can agree to such jurisdiction in the investment agreement (e.g. concession or project agreement).

Is the target country a member of MIGA?

In case of loss due to war, armed conflict, revolution or state of rebellion, a host country may, depending on the terms of the relevant BIT/IPPA, if any, only have to accord fair and equitable treatment, national treatment and/or most favoured nation treatment – not provide any compensation (e.g. Nigeria-Switzerland BIT). That is when private insurance coverage from export credit guarantee agencies or guarantees from the Multilateral Investment Guarantee Agency (MIGA) can come handy.

MIGA is a member of the World Bank Group. Its mandate is to promote cross-border investment in developing countries by providing guarantees (political risk insurance and credit enhancement) to investors and lenders. It complements national and regional investment guarantee programmes and private insurers of non-commercial risks. Risks covered include currency transfer restrictions, expropriation and similar measures, war and civil disturbance, and breach of contract by a contracting authority (although an investor must normally go to arbitration and obtain an award for damages that cannot be enforced, or demonstrate that it does not have access to a judicial or arbitral forum to determine its claim).

MIGA only provides guarantees, including coinsurance and reinsurance, against risks in investments originating from a member country and destined for another member (developing) country. Somalia having become a member of MIGA on 31 March 2020, all African countries are currently members of MIGA.

Is there an FTA between the home country and the target country?

FTAs can quickly become relevant where equipment or materials will have to be imported by a foreign investor and products exported from the host country. FTAs aim to liberalise trade in goods and/or services by establishing free trade areas and deal with tariff (customs duties) and non-tariff (import/export restrictions) barriers, national treatment, subsidies, anti-dumping and other disciplines of the World Trade Organization (WTO) Agreements.

FTAs can also afford protections on the investment front. For instance, the FTA between the European Free Trade Association (EFTA), which consists of Iceland, Liechtenstein, Norway and Switzerland, and the Southern African Customs Union (SACU), which consists of Botswana, Eswatini, Lesotho, Namibia and South Africa, provides that the parties shall not impair investments by unreasonable or discriminatory measures (refer to our comments under the heading dealing with the rule of law above). The EFTA-Egypt FTA provides that investments shall enjoy full protection and security and be afforded fair and equitable treatment. The EFTA-Tunisia FTA provides that the parties shall guarantee free movement of capital in convertibles currency.

However, the weakness in FTAs often lies in them not giving access to an investor-State dispute resolution mechanism (unlike many BITs).

Is the target country a WTO member?

The World Trade Organization (WTO) aims to reduce obstacles to international trade. Its guiding principles include the pursuit of open borders, non-discriminatory treatment (national treatment and most favoured nation treatment), and discouraging unfair practices (e.g. dumping, subsidies). The WTO Agreements go further than BITs and FTAs, but do not provide for investor-state arbitration.

WTO members recognise that investment measures can have trade-restrictive and distorting effects. In this respect, the Agreement on Trade-Related Investment Measures (TRIMS Agreement), which applies to trade in goods only, provides that no member shall apply any TRIM that is inconsistent with GATT Art. III (National Treatment) or XI (Quantitative Restrictions) (e.g. local content requirements). Such rules can prove useful to a foreign investor where a host country contemplates restrictions on foreign participation or preferences for local players or the procurement of supplies in the local market.

Most African countries are WTO members. Algeria, Comoros, Equatorial Guinea, Ethiopia, Libya, Sao Tome and Principe, Somalia, South-Sudan and Sudan have observer status only. Eritrea is not a WTO member.

Is the target country a party to the New York Convention?

Arbitration can prove an efficient means to settle cross-border disputes. It is generally quicker and in many cases less risky than proceedings before state courts. The parties are free to choose arbitrators who are experts in the field of the dispute and awards are confidential. One key consideration however is whether the winning party will be able to have the award recognised and enforced against the losing party.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention) seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and nondomestic arbitral awards. The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against. It obliges the Parties to the Convention to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require the courts of the Parties to the Convention to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal. The Convention entered into force on 7 June 1959.

The following 15 African countries are not currently parties to the New York Convention: Chad, Republic of the Congo, Equatorial Guinea, Eritrea, Eswatini, Gambia, Guinea-Bissau, Libya, Malawi, Namibia, Sierra Leone, Somalia, South Sudan, Tanzania and Togo.

What contractual framework will be required?

Foreign investments take different forms and often come with contractual packages involving a mix of consortium, concession, project, development, financing, guarantee, engineering, procurement, supply, construction, operation and maintenance (O&M), off-take, host government and other agreements, the implications of which must be ascertained before going forward with an investment.

Of particular relevance are government and sovereign guarantees. Will such guarantees be required and available to the foreign investor or its lenders?

Examples of government guarantees include:

- stand-by financing (e.g. if any shortfall in traffic volume, adverse exchange rates, etc.);
- long-term, off-take agreements (e.g. take-or-pay contracts);
- performance guarantees in case of default by public utility;
- subsidy support to cover difference between full commercial price and actual user charges; and
- loan guarantees (to guarantee lenders).

Examples of sovereign guarantees include:

- guarantees against adverse acts of government, i.e. political risk guarantees, including foreign exchange guarantees and guarantees against expropriation;
- guarantees against failure to perform by contracting authority, e.g. electric utility, including off-take guarantees, supply guarantees and general guarantees; and
- tax and custom exemptions, holidays and similar concessions.

Will contracts and administrative acts be enforceable against the host government? Are laws and regulations readily available and, if so, in which language?

In conclusion

The old adage that an ounce of prevention is worth a pound of cure applies when considering whether to make an investment. Proper due diligence and risk identification will go a long way in securing a sound investment, while naivety, lack of effective control over the investment, failure to secure an exit strategy, negligence, force majeure and sometimes sheer bad luck will adversely affect the bottom line.

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