Challenges for investors in Africa: Managing legal risks

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Introduction

- Africa’s opportunities
- Africa’s challenges / public & private sector
- Africa’s diversity
- Focus of presentation
  1. Legal and political risks for investors
  2. Minimizing risks:
     - Contractual provisions
     - Investment treaty protection
Some legal and political risks when investing in Africa

1. Legal and regulatory environment

Opacity, risk of unpredictable changes and of corruption

- Taxation
- Foreign ownership of local company /land
- Labour laws and regulations
- Licensing process / permit applications
- Custom clearance
Some legal and political risks when investing in Africa

2. Judicial system
   - Inefficiencies, delays
   - Risk of partiality and of corruption
   - Enforcement of court or arbitral decisions
Some legal and political risks when investing in Africa

3. Political and security risks
   - “Resource nationalism”
   - Unsettled boundaries / JDZs
   - Armed conflicts / political unrest
Minimizing risks when investing in Africa

1. Contractual provisions
   - Force majeure clauses
   - Flexible timeframes
   - Renegotiation clauses
   - Stabilisation clauses

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Minimizing risks when investing in Africa:

1. Contractual provisions

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- Dispute resolution clause
  - International arbitration vs local courts
  - International Arbitration Rules - UNCITRAL
  - Seat of the arbitration
  - Applicable law
Minimizing risks when investing in Africa

2. Investment treaty protection

- Based on Bilateral Investment Treaties (BITs)
- Direct investor-state dispute resolution
- ICSID v ad hoc arbitration (UNCITRAL)
- Contract claims & treaty claims
Minimizing risks when investing in Africa

2. Investment treaty protection (con’d)

- Protection
  - Most Favoured Nation (“MFN”) clause
  - Fair and equitable treatment
  - Full protection and security
  - Compensation for direct / indirect expropriation
  - Prohibition of discriminatory measures
  - Free transfer of funds
Minimizing risks when investing in Africa

2. Investment treaty protection (con’d)

- Selected issues
  - Nationality of investor
  - Choice of arbitration vs local courts
  - Legality of investment
  - Defences
Conclusion

- Assess legal, regulatory and political risks carefully
- Negotiate investment agreement to ensure proper allocation of key legal, regulatory and political risks
- Consider carefully dispute resolution clause and investment treaty protection potentially available
- Devise an early exit strategy
- Seek specialist advice – including local consultants
Thank you

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