
ACHIEVING THE 2030 AGENDA AND AGENDA 2063: THE RULE OF LAW AS A DRIVER OF AFRICA'S SUSTAINABLE DEVELOPMENT

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Investing in the rule of law for economic development BACKGROUND PAPER

OBJECTIVE

This session will explore the opportunities and challenges in African countries to develop legal, judicial, institutional and governance capacity to encourage economic development and investment, including in Least Developed Countries (LDCs). A particular focus of this session will be on judicial and alternative mechanisms to resolve commercial disputes and measures to create a level playing field for all economic actors. The session will also discuss land rights, with a special emphasis on women's economic empowerment.

CONTEXT

At the turn of the century many parts of the African continent were experiencing high economic growth. While high growth continues in countries like Kenya (6.4%) and Ethiopia (7.3%)¹, the global economic slowdown in more recent years, especially in Africa's most important trading partners for raw materials, has negatively impacted on government revenue and investment in a number of African countries. Many countries in the continent are struggling with development challenges ranging from high unemployment, poverty and inequality to commodity dependence, lack of economic transformation and low integration of the continent in the global economy, among others.²

The Sustainable Development Goals (SDGs) of the 2030 Agenda as well as Agenda 2063 of the African Union seek to promote a prosperous Africa based on structural economic transformation, including sustainable resources use, production and consumption patterns. In order to achieve these ambitious goals, countries in Africa will need to further harness and vitalize the national drivers of their economies, mobilize domestic resources, accelerate and deepen economical structural reforms, enhance industrialization, and promote responsible entrepreneurship, creativity and innovation.

DISCUSSION

It is widely recognized that economic development cannot be achieved without effective institutions, respect for the rule of law and protection of human rights. Aspiration 3 and goal 4 under aspiration 1 of Agenda 2063 as well as SDG 16 of the 2030 Agenda both point to the rule of law and access to justice as drivers and outcomes of sustainable development.

¹ UNECA Economic Report on Africa 2016

² UNCTAD- Development and Growth in Africa Report 2014; unctad.org/en/PublicationsLibrary/aldcafrica2014_en.pdf

Weak justice institutions and poor governance increase the risk and cost of doing business.³ They have a direct negative impact on the trust and confidence of investors.⁴ Red tape, corruption and weak justice institutions increase uncertainty in decision-making processes that affects the profitability of doing business. Such distortions not only impact on individual business operations, but also lead to suboptimal outcomes in economic development as a whole⁵. To stimulate entrepreneurship and investment, governments therefore need to create institutions that are transparent and deliver services efficiently and predictably.

Foreign direct investment (FDI) holds the potential to significantly help African countries, particularly Least Developed Countries (LDCs), to diversify, reduce their dependence on commodities and promote new activities in the manufacturing and services sectors with higher local value-addition, decent job creation and a deeper integration of local firms in international value-chains. Such changes would make a crucial contribution to poverty eradication and sustainable development.

One of the great paradoxes of development is that investment does not go to those countries that need it most. The standard explanation is that the risks and the costs of doing business in these countries are too high. However, the experience of countries that do receive foreign investment shows that such risks and costs can be largely mitigated through legal reforms and effective institutions.

According to the World Bank Doing Business Report 2015, Sub-Saharan Africa alone accounted for about 30% of the regulatory reforms making it easier to do business in 2014/15. Among the 10 economies showing the most notable improvement in performance on the Doing Business indicators were 5 countries from Sub-Saharan Africa: Uganda, Kenya, Mauritania, Senegal and Benin.

While investors need to have confidence in the state's capacity to manage commercial disputes, the state itself needs to have the knowledge and skills to negotiate contracts and settle disputes that are in the best interest of their own people. FDI contracts for example, though among the most important means to generate funds to drive economic growth and development in LDCs, are often poorly negotiated and do not yield the expected advantages for the host country. It leads frequently to loss of public revenue, natural resource degradation and depletion, environmental or safety hazards, and protests by local communities. Creating the right capacity to negotiate such contracts properly and ensure their enforcement is a priority for many LDCs.⁶

The World Bank Doing Business Report shows that the efficiency of courts continues to vary greatly around the world and even more in Africa. Enforcing a contract through the courts, for example, can take less than 10 months in Rwanda but more than 2 years in Benin. The cost of litigation ranges from 14% of the value of the claim in Tanzania to more than 80% in Burkina Faso and Zimbabwe. In Mozambique, the cost can exceed the value in dispute.

³ World Bank Doing Business Report 2016: <http://www.doingbusiness.org/reports/global-reports/doing-business-2016>; Ibrahim Index of African Governance 2015: <http://mo.ibrahim.foundation/iig/>; UNECA Governance Report IV, Measuring Corruption in Africa, The International Dimension Matters: <http://www.uneca.org/publications/african-governance-report-iv>

⁴ UNCTAD- Development and Growth in Africa Report 2014; unctad.org/en/PublicationsLibrary/aldcafrica2014_en.pdf

⁵ UNCTAD- Development and Growth in Africa Report 2014, page 49; unctad.org/en/PublicationsLibrary/aldcafrica2014_en.pdf

⁶ See initiative announced by Government of Italy and IDLO at the Meeting on Mid Term Review of Istanbul Programme of Action, Antalya, 27 May 2016: <http://www.idlo.int/news/highlights/supporting-ldcs-their-path-towards-graduation>

These figures clearly show that in a number of countries litigation in court is not a viable option to resolve commercial disputes. While the introduction of commercial courts or sections and the availability of Alternative Dispute Resolution (ADR) may not necessarily be appropriate for all African countries, there is evidence to suggest that countries with an integrated system of courts and ADR tend to have more reliable adjudication of claims, benefiting the parties involved and the economy as a whole.

World Bank data shows that in the 16 Sub-Saharan African economies that have introduced commercial courts or sections over the past ten years - Benin, Burkina Faso, Cameroon, Côte d'Ivoire, Ghana, Guinea-Bissau, Lesotho, Liberia, Malawi, Mauritius, Mozambique, Rwanda, Senegal, the Seychelles, Sierra Leone and Togo - the average time to resolve the standardized case measured by the Doing Business Report was reduced by about 2.5 months.

ADR is a tool that can assist courts in resolving disputes in a timely, cost-effective and transparent way by helping to reduce case backlogs and bottlenecks caused by complex formal procedures or inadequate court resources. To foster business - especially for micro, small and medium sized MSME - a number of countries have created small claim courts, generally as part of the formal justice system, with simplified procedures for resolving smaller claims with costs and procedures that are more realistic and proportionate to the size of the dispute.

Agriculture, the largest sector of practically all African economies, is particularly vulnerable to poor governance and weak legal and judicial protection. Pervasive tenure security and inefficient land markets prevent many countries in the continent from realizing their full agricultural potential and achieving national food security. Women, who represent the highest workforce in this sector, are discriminated and hampered by insecure land rights. In many African countries land tenure systems *de facto* deny women their rights to land even in cases where laws and policies provide for gender equality. Customary legal systems, dominated by men, favor property rights of men or kinship groups, limiting the ability of women to claim or inherit land.

In countries struggling with high volumes of land disputes, the situation can lead to serious insecurity and violence. At the same time, a wave of economic liberalization is increasing large commercial investments in land, excluding or depriving small land holders and vulnerable groups or pushing on to marginal land. Avenues here are, firstly, reliable and cost efficient land tenure registration, combined with affordable access to legal services and trustworthy land administration; and secondly, fair, transparent and gender-sensitive, time and cost efficient litigation and dispute resolution mechanisms.

GUIDING QUESTIONS

1. What are the key challenges to economic development and what rule of law measures are needed to overcome them?
2. What opportunities have the 2030 Agenda for Sustainable Development and Agenda 2063 created for supporting economic development through the rule of law?
3. What progress is being made to build enabling legal frameworks for sustainable development in line with the SDGs and Agenda 2063?
4. What are the main lessons learned from good practice to improve the resolution of commercial and investment disputes?
5. What legal assistance or services do LDCs and other African countries require to enhance FDI?

6. How can land rights for small holders and women be best preserved? What lessons can be learned from good practice?
7. How can rule of law foster transparency and accountability to enhance economic opportunity in Africa?

Background documents

- World Bank Doing Business Report 2016: <http://www.doingbusiness.org/reports/global-reports/doing-business-2016>
- The World Bank: New Directions in Justice Reform: <http://documents.worldbank.org/curated/en/2012/05/16706679/world-bank-new-directions-justice-reform-companion-piece-updated-strategy-implementation-plan-strengthening-governance-tackling-corruption>
- Ibrahim Index of African Governance 2015: <http://mo.ibrahim.foundation/iiag/>
- UNECA Governance Report IV, Measuring Corruption in Africa, The International Dimension Matters: <http://www.uneca.org/publications/african-governance-report-iv>
- Africa Progress Panel Report 2013: <http://www.africaprogresspanel.org/publications/policy-papers/africa-progress-report-2013/>
- UNCTAD- Development and Growth in Africa Report 2014: http://unctad.org/en/PublicationsLibrary/aldcafrica2014_en.pdf
- Doing justice to sustainable development: Integrating the rule of law into the post-2015 development agenda. IDLO, 2014. <http://www.idlo.int/publications/doing-justice-sustainable-development>

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