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ABOUT THE JOURNAL

KAMPALA INTERNATIONAL UNIVERSITY LAW JOURNAL is the official journal of the School of Law, Kampala International University. It is a peer-reviewed journal providing distinctive and insightful analysis of legal concepts, operation of legal institutions and relationships between law and other concepts. It is guided in the true academic spirit of objectivity and critical investigation of topical and contemporary issues resulting from the interface between law and society. The result is a high-quality account of in-depth assessment of the strengths and weaknesses of particular legal regimes with the view to introducing reforms. In furtherance of the requirements of advanced academic scholarship, the Journal places high premium on originality and contribution to knowledge, plain and conventional language, and full acknowledgment of sources of information among other things. It is superintended by a Board of respected academics, lawyers, and other legal professionals.

The Journal offers useful reference material to legal practitioners, international organisations, non-governmental organisations and the academia. It also provides multipurpose policy guide for the government.

The Journal is a biannual publication. Calls for articles and submission datelines are determined by the editorial board.

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Scope

Kampala International University Law Journal (KIULJ) is the official Journal of the School of Law, Kampala International University, Uganda. It is a peer-reviewed Journal providing an objective and industry focused analysis of national and international legal, policy and ethical issues. The Journal publishes well researched articles that are in sync with sound academic interrogation and professional experience on topical, legal, business, financial, investment, economic and policy issues and other sectors.

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FROM THE EDITORIAL SUITE

The primary objective of the **KAMPALA INTERNATIONAL UNIVERSITY LAW JOURNAL (KIULJ)** is to provide a platform for a robust intellectual discourse, through the publication of incisive and insightful articles and other contributions from a variety of scholars, jurists and practitioners across jurisdictions. The desire to accomplish this objective guides the choice of the materials being presented to the reading public in every edition. The peer review and editing processes of the papers that are finally selected for publication are equally influenced largely by the pursuit of this goal.

To this end, articles from seasoned scholars and practitioners in each edition address a wide spectrum of issues from different branches of the law, such as, International Criminal Law, Law of International Institutions, Environmental Law, Human Rights Law, Medical Law, Oil and Gas Law, Constitutional Law, Corporate Governance to mention but a few. You will, no doubt, find these scholarly works a worthy contribution to knowledge in their respective fields.

On behalf of the Editorial Board, I wish to appreciate all our reviewers, internal and external, for their constructive criticisms, comments and suggestions. These go a long way to enrich the quality of the papers published in this Journal. The various contributors who painstakingly addressed the observations and suggestions of the reviewers, thus facilitating the achievement of the purpose of the review process also deserve our commendation.

We also, with a grateful heart, acknowledge the interest our teeming readers have continued to show in the succeeding editions of the journal just as we assure them of our readiness to give them the best always. We equally thank our editorial consultants for their useful advice and comments that have contributed to the continuous improvement of the quality of the journal. Legal practitioners and scholars are hereby informed that contributions to our journal are received on a rolling basis. They should feel free to send in their manuscripts and ensure they comply with the submission guidelines as spelt out in the Call for Papers obtainable from the journal's website (www.kiulj.kiu.ac.ug). All contributions should be addressed to the Editor-in-Chief and forwarded to the email addresses supplied in this edition.

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A CRITIQUE OF EXTERNALLY DRIVEN MECHANISMS FOR ATTRACTING FOREIGN INVESTMENT IN WEST AFRICA

OLUGBEMI JAIYEBO, LLM *

Abstract

Creating an environment conducive for investment and enacting business-friendly legal and administrative frameworks are top priority issues in the ECOWAS region. Several regional, continental and international initiatives have been launched to reposition the global south to attract and retain foreign direct investment (FDI). This exerts pressure on host governments to provide a climate hospitable to foreign corporations. More than half of the active population in the ECOWAS region are engaged in the informal economic sector but the legal reforms to attract investments tend not to have 'informal economic actors' at its core. The United Nations Sustainable Development Goal (SDG) 16 has twelve targets among which is the enforcement of non-discriminatory laws and policies for sustainable development. This paper acknowledges the new governance theory that the State needs to engage and other actors to leverage its capacities and recognizes the shift from Official Development Assistance to Foreign Direct Investment. It utilizes the critical legal theory in critiquing implementation of the OECD Policy Framework for Investment and the World Bank Group's Ease of Doing Business in West Africa. It concludes that social equity and sustainable development are realizable only when domestic entrepreneurs are situated at the core of investment legal frameworks.

Keywords: Sustainable Development Goals, ECOWAS, Foreign Investment.

Introduction

Creating an environment conducive for investment is top priority for members of the Economic Community of West African States (ECOWAS). Both the United Nations Monterrey Consensus on Financing for Development[1] and the Doha Declaration on Financing for Development[2] were unequivocal on the requirement that developing countries create conducive environment for the private sector to

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[1]United Nations, Monterrey Consensus of the International Conference on Financing for Development A/CONF, 198/3 (2002) <http://www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf> accessed 11 September 2020.

[2]United Nations, Doha Declaration on Financing for Development: Outcome Document of the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus E/ESCWA/27/7 (2008) < http://www.un.org/esa/ffd/doha/documents/Doha_Declaration_FFD.pdf> accessed 20 September 2020.

thrive. It ought to be mentioned that the political reform programs and democratic processes witnessed in Africa in the 1990s were in part expected to create conducive environment for foreign investment and capital flow in the emerging democracies. ECOWAS countries have not hesitated to alter legal and administrative structures in order to attract and retain foreign direct investments.

Legislation and law reform are some of the tools that ECOWAS members have deployed in creating an investment-friendly environment amenable to donor countries and multilateral financial agencies. Law is not a neutral agency and law reform[3] is not value-free. Against the backdrop of Critical legal theory, this paper seeks to unveil the subtle partiality of the apparently impartial and rigid legal doctrines, hidden interests and class domination behind legal institutions and politics of laws[4] of investment in West Africa. The paper critiques the World Bank's Ease of Doing Business and the Organisation for Economic Co-operation and Development (OECD)'s Policy Framework for Investment (PFI) in West Africa. It concludes that the United Nations Sustainable Development Goal *(*SDG) 16 principle of inclusiveness needs to be deployed to the advantage of domestic entrepreneurs[5] in the emerging investment legal frameworks of the ECOWAS region.

Shrinking and Irregular Official Development Assistance

In 2014, Official Development Assistance (ODA) from member States of the Development Assistance Committee (DAC) of OECD was 0.29 per cent of the group's Gross National Income [GNI], which is substantially lower than the United Nations target of 0.7 per cent. Denmark, Luxembourg, Norway, Sweden and the United Kingdom exceeded the 0.7 per cent target. It is interesting to note that the United Arab Emirates, a country that is not a member of DAC, topped the list of ODA to GNI providers with a share of 1.17 per cent in 2014.[6]However, ODA from members of the OECD's Development Assistance Committee (DAC) rose to an all-time high of USD 161.2 billion in 2020, boosted by additional spending mobilised to help developing countries grappling with the COVID-19 crisis.[7]

With the inconsistent flows in Official Development Assistance (ODA) and donor countries advocating foreign direct investment as a viable development model, developing countries have had to commit to the reconstruction of legal and

[3]Law reform is taken to mean keeping under review all the law both statutory and otherwise with a view to its systematic development including in particular the modification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments, and generally, the simplification and modernization of the law.

[4]*Law as Politics: Reflections on the Critical Legal Studies Movement* >https://www.researchgate.net/publication/336445184_Law_as_Politics_Reflections_on_the_Critical_Legal_Studies_Movement> accessed 14 July 2021.

[5] Domestic entrepreneur is used primarily in reference to small and medium enterprises entrepreneurship.

[6]United Nations, *Africa Regional Report on the Sustainable Development Goals* ,UNECA, Addis Ababa (2015) 51.

[7]https://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/official-development-assistance.htm

administrative mechanisms conducive to foreign participation in their respective economies. Developing countries were not left to themselves in the legal reform processes and the construction of investment friendly environment. Multilateral financial agencies took the lead in prescribing frameworks, model policy requirements and best practices. Developing countries are therefore set up to compete among themselves for most compliant status and most desirable destination for foreign investment. The narrative usually begins with private sector development which of necessity includes domestic entrepreneurs but inevitably ends up being externally driven law reform for business and investment with foreign business as the primary target. These subtle processes reinforce the reasoning in Critical legal theory that the legal system is tilted in favour of the powerful persons and elites. The "haves" would dominate the institution building and agenda setting process of the State. They would internalize the "have-nots" in the process by regulating media, opinion process and fantasize the have-nots' perception about the so called liberal States.[8]

The World Bank's Ease of Doing Business

The World Bank's Ease of Doing Business assesses legal and regulatory barriers in navigating the following areas: starting a business, resolving insolvency, construction permits, getting electricity, trading across borders, enforcing contracts, protecting minority interests, registering property, getting credit, paying taxes and labor market regulations. The laws and regulations in these eleven areas determine the World Bank's annual ranking of countries on the ease of doing business in their respective jurisdictions. The World Bank has done the annual ranking since 2008.

A. Trading Across Borders

In the West African region, the World Bank records that Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Ghana, Guinea, Liberia, Mali, Senegal, The Gambia and Togo made trading across borders easier by further developing its electronic single-window system, reducing documents needed and reducing the time for border compliance for both export and import. Benin, Ghana, Nigeria, Côte d'Ivoire, Liberia and Sierra Leone reduced fees and time for export through improvements in port infrastructure.

The vast majority of intra-regional trade in the ECOWAS region is conducted across land borders. Hardly were any of the recorded reforms between 2008 and 2020 targeted towards easing business across land borders in the ECOWAS region. Virtually all the reform on trading across borders had to do with the sea ports and digitalization of processes at those ports. While it can be argued that ECOWAS has been working on freedom of movement of persons and goods since its establishment

[8] *Law as Politics: Reflections on the Critical Legal Studies Movement*< https://www.researchgate.net/publication/336445184_Law_as_Politics_Reflections_on_the_Critical_Legal_Studies_Movement> accessed 14 July 2021.

in 1975 and that the legal field has probably been covered with treaties and protocols, it cannot be denied that in terms of assuring ease of doing business across ECOWAS land borders much remains to be accomplished. Whatever gaps exist were not the targets of law reform under the World Bank's Ease of Doing Business.

B. Getting Credit

In assessing performance under 'getting credit,' Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo improved their credit reporting system by introducing regulations that govern the licensing and functioning of credit bureaus. Between 2015 and 2020 Burkina Faso, Cape Verde, Côte d'Ivoire, Mali, Niger, Senegal and Togo improved access to credit information by launching new credit bureaus or adopting new laws providing for the establishment of credit bureaus. These countries expanded coverage of the credit bureaus and began distributing data from utility companies. Nigeria was reported to have improved its credit information system in 2010 through a Central Bank guideline defining the licensing, operational and regulatory requirements for privately owned credit bureaus. Cape Verde, Ghana, Liberia, Nigeria, Sierra Leone and The Gambia strengthened access to credit by adopting the Security Interests in Moveable Property Act and new legislation implementing a functional secured transactions system and establishing a centralized notice based collateral registry. In 2012, Benin, Burkina Faso, Côte d'Ivoire, Guinea, Guinea Bissau, Liberia, Mali, Niger, Senegal and Togo improved access to credit through amendments to the OHADA (Organization for the Harmonization of Business Law in Africa) Uniform Act on Secured Transactions that broaden the range of assets that can be used as collateral (including future assets), extend the security interest to the proceeds of the original asset and introduce the possibility of out-of-court enforcement to the OHADA Uniform Act. Only Guinea made no changes to its laws on getting credit.

A preponderance of the new regulations made to getting credit were improved access to credit information and establishing credit bureaus. Having a reliable method of assessing debt portfolio of individuals and businesses and especially of guaranteeing recovery of loans and assets are critical to the inflow of foreign private capital. The 'getting credit' parameters have little or no relevance to 80% of indigenous enterprises in the sub-region. This segment of the population is in the rural and sub-urban communities that have no relationships with credit bureaus. If small and medium scale enterprises were at the core of the 'getting credit' reform agenda, the parameters measuring its attainment would have been different. One would have thought that getting credit would focus on providing the business community easier access to credit facilities rather than the focus on credit bureaus which are certainly of greater relevance to foreign interests than domestic entrepreneurs.

C. Getting Electricity and Labor Market Regulations

About half of ECOWAS have made changes to their regulations on getting electricity and labor market regulations. Under ‘getting electricity, The Gambia, Guinea, Liberia, Niger, Sierra Leone, Senegal and Togo improved the monitoring and regulation of power outages by beginning to record data for the annual system average interruption duration index (SAIDI) and system average interruption frequency index (SAIFI).

The content of Labor Market regulations under the World Bank’s Ease of Doing business admittedly appears worker-friendly. In 2017, Liberia shortened the workweek by increasing the mandatory number of weekly rest hours to 36 consecutive hours with Sunday designated as the weekly holiday and mandated a maximum of five overtime hours per week. Liberia also introduced paid annual leave entitlements to employees after one year of employment, extended the duration of paid maternity leave and mandated equal remuneration for work of equal value. In 2009 Cape Verde reduced the maximum duration of fixed-term contracts, increased paid annual leave, introduced a retraining or reassignment obligation and increased the notice period in cases of redundancy dismissals. In 2015 it introduced a minimum wage and in 2017 introduced unemployment insurance for workers with a contribution period of at least six months. In 2009 Burkina Faso eliminated restrictions on “weekly holiday” work and the employer's obligation to notify a third party before dismissing one redundant worker. The Gambia increased the notice period for redundancy dismissals in 2009 while Togo 2013 increased the wage premium for weekly holiday work and the severance payment in cases of redundancy dismissal.

D. Minority Investor Protections, Ease of Incorporating a Business and Insolvency

Benin, Burkina Faso, Côte d’Ivoire, Guinea, Guinea-Bissau, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo strengthened minority investor protections by introducing greater requirements for disclosure of related-party transactions to the board of directors and by making it possible for shareholders to inspect the documents pertaining to related-party transactions and to appoint auditors to conduct an inspection of such transactions. In 2015 The Gambia clarified the duties of directors and provided new venues and remedies for minority shareholders seeking redress for oppressive conduct.

All ECOWAS member countries have enacted one amendment or the other to ease the process of incorporating a business. In order to make starting a business easier, Benin, Burkina Faso, Cape Verde, Côte d’Ivoire, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo at various times reduced the time and cost needed to register a company or reduced the minimum capital requirement and/or created one-stop shops.

Nigeria, Ghana and The Gambia are the only countries in ECOWAS that have not made any changes to their laws on resolving insolvency while The Gambia and Guinea Bissau are the only two countries that have not made changes to their laws on obtaining construction permits. Only Guinea Bissau made no changes to its laws on trading across borders while all countries except The Gambia made changes to regulations on registering property. Ghana, Guinea and Guinea Bissau did not make changes to their laws on paying taxes. The Gambia, Guinea, Mali and Nigeria made no changes to the rules on enforcing contracts.

Similarity of reform across all the countries appears to be aimed at attaining uniformity in the sub-region. The fact that most of the countries were affecting the same types of reform about the same time reinforces the perception that the agenda is driven by external players. It does not appear organic or tailored to fit peculiar local circumstances. The nature of the amendments to existing laws and regulations bring to the fore the concern about putting domestic entrepreneurs at the fringes of commercial law reform in the ECOWAS region. It would appear that the primary goal of the externally driven reforms is to integrate commercial processes of the region into global operations. Small and medium scale businesses that constitute 65% of commerce in sub-Saharan Africa do not appear to be at the core World Bank's Ease of Doing Business reform agenda. A cursory look at the eleven factors and especially the parameters assessed for the World Bank ranking reveal that indigenous small and medium scale businesses are not at the core of the World Bank concern.

In Doing Business 2020, Togo and Nigeria were the two ECOWAS members ranked among the 10 top improvers whose economies implemented a total of 59 regulatory reforms in 2018/19, accounting for one-fifth of all the reforms recorded worldwide.[9]On August 27, 2020, The World Bank Group issued a statement that irregularities were reported regarding changes to the data in the Doing Business 2018 and Doing Business 2020 reports, published in October 2017 and 2019. The changes in the data were inconsistent with the Doing Business methodology. The WBG conducted a systematic review and assessment of data changes that occurred subsequent to the institutional data review process for the last five Doing Business reports. Consequently, the publication of the Doing Business report was suspended.[10] It would be interesting to know if the methodology violations and data breaches had anything to do with the desperation of government agencies to attain good ranking on the World Bank chart.

[9]World Bank, Doing Business 2020: Comparing Business Regulation in 190 economies (World Bank Group 2020 IBRD/WBG Washington DC) < https://www.doingbusiness.org/en/reports/global-reports/doing-business->accessed 25 September 2020.

[10]World Bank Group,Doing Business – Data Irregularities Statement (World Bank Group IBRD-IDA, Washington, August 27, 2020) available athttps://www.worldbank.org/en/news/statement/2020/08/27/doing-business---data-irregularities-statement accessed 25 September 2020.

The Policy Framework for Investment (PFI)

The Policy Framework for Investment (PFI)[11] was developed by an OECD Task Force that had participation from government officials of 60 OECD and non-OECD economies, Business, Labor and non-governmental organizations, the World Bank and other international organizations. The Task force held regional consultations in Africa, South America, South East Asia, South Asia, and South East Europe. The PFI was endorsed by OECD Council of Ministers in 2006 and reviewed in 2015 to among other things, support the post-2015 development agenda, finding financing for development solutions and implementing the Sustainable Development Goals. The PFI was predicated on the Monterrey Consensus which emphasized the responsibility of governments to create the right conditions for private investment to flourish. It represents the most comprehensive multilaterally-backed approach for improving investment conditions and overcoming "private investment deficit".

The PFI is not a set of rules or obligations imposed on governments, but a tool to help them identify the important issues that any government should consider if it wants to create an environment attractive to all investors and to enhance the development benefits of investment to society. It addresses eighty-two (82) questions to governments in ten (10) policy areas to help them design and implement good policy practices for attracting and maximizing the benefits of investment. The PFI is primarily directed to change of domestic policy in these critical areas. The Africa Investment Initiative, a joint project of the New Partnership for Africa's Development (NEPAD) and the OECD, uses the PFI as a basis for inspiring reform efforts in African countries. For example, the Federal Government of Nigeria in conjunction with NEPAD, engaged in an investment policy review exercise to align its investment laws, policies and strategies with the OECD Policy Framework for Investment (PFI) and even extended the process to the sub-national level with a special chapter on Lagos State.[12]

The PFI acknowledges that most investment is undertaken by domestic firms, but international investment can provide additional advantages beyond its contribution to the capital stock. It therefore posits that the quality of investment policies directly influences the decisions of all investors, be they small or large, domestic or foreign. The ten (10) policy areas have non-threatening titles and descriptions: investment policy; investment promotion and facilitation; trade; competition; tax; corporate governance; policies for promoting responsible business conduct; human resource

[11]Organisation for Economic Co-operation and Development (OECD) Policy Framework for Investment < http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/37408438.pdf >accessed 10 October 2020.

[12]Organisation for Economic Co-operation and Development (OECD), Investment Policy Reform in Nigeria (The Investment Policy Review of Nigeria, 21 May 2015) <http://www.oecd.org/countries/nigeria/nigeria-investment-policy.html <accessed 22 February 2021.

development; infrastructure and financial sector development; and public governance.

As benign as the tool appears, the outworking could have far reaching consequences. Take for instance land ownership and land registration that are components of the PFI investment policy. There are two questions under land tenure: Is land legislation clear and easily accessible to land users and is land management efficient and transparent? How is land rights allocated, administered and protected at national and sub-national levels? What steps have been taken to improve land tenure security for domestic and foreign, large and small land users? But there are eighteen (18) supplemental questions. If the issue of land tenure is situated within the context of the dominance of Canadian and European corporations in the ECOWAS extractive sector, then the scenario assumes a completely different outlook. It has been alleged that ECOWAS member States have individual mining policies and legislation that do not always offer in certain terms assurances of mining titles, security of tenure, tax incentives and other aspects considered vital by mining companies for the protection of their investments. Consequently, these uncertainties enhance the risk perceived by a foreign investor wishing to invest in the mining sector of these countries. As a result, the radical reform of the respective mining investment laws in the region is strongly needed to attract significant mining investment.[13]

Charting a New Course for Development

It is Government that is expected to establish rules and regulations within which the private sector will engage resources of the nation. But experience has shown that in the process of building capacity of government institutions, multilateral financial agencies Tele-guide the input and of necessity the product. It has been asserted that more than three-quarters of the people living in the world today have had their lives shaped by the experience of colonialism. Generally, the history of Homo sapiens has been heavily punctuated, directed and is still being redirected or influenced by imperialism (and neo-imperialism).[14] It is therefore not surprising that development goals of ECOWAS have not been fully realized through official development assistance or foreign direct investment.

The United Nations Sustainable Development Goal 16 has twelve targets among which are to promote the rule of law at the national and international levels and ensure equal access to justice for all; develop effective, accountable and transparent institutions at all levels, ensure responsive, inclusive, participatory and representative decision-making at all levels and to promote and enforce non-

[13] M. Brown, Recent Legal Developments in the Mining Sector of West African States, *News Mining Bulletin* (2010) <https://www.mayerbrown.com > accessed 13 January 2021.

[14] Ashcroft, Bill, Gareth Griffiths, and Helen Tiffin. The Empire Writes Back: Theory and practice in post-colonial literatures. London and New York: Routledge, 1989.

discriminatory laws and policies for sustainable development. The United Nations Global Compact advocates that business leadership can advance Goal 16 by reducing illicit financial and arms flows, strengthening the recovery and return of stolen assets and combating all forms or organized crime. Businesses should contribute to develop effective, accountable and transparent institutions at all levels and to substantially reduce corruption and bribery in all their forms.[15]

The themes of SDG16, peace, justice and strong institutions, are core to sustainable business — they are the foundation not only for business responsibilities, but also business success. The United Nations Global Compact Action Platform on Peace, Justice and Strong Institutions seeks to address the difficulty of understanding concretely how these concepts relate to a business's strategies, operations and relationships. Consistent with the spirit of the Ten Principles of the UN Global Compact and the UN Sustainable Development Goals — particularly Goal 16 — the Action Platform on Peace, Justice and Strong Institutions aims to provide global business standards in understanding, implementing and reporting on business engagement in these areas. The platform also seeks to provide a forum for businesses, civil society, investors, Governments and the UN to engage in meaningful dialogue that results in concrete action towards improving accountability, integrity and transparency within businesses and the countries in which they operate.[16]There must be a strengthening of the legal framework for the rule of law and the political will to hold domestic and multinational corporations accountable to the international development agenda.

Law as a Tool for Development in the ECOWAS Region

The new governance theory rests on the premise that the State by itself cannot do all that is required to meet most pressing societal challenges and needs to engage other actors to leverage its capacities. The goal at the Monterrey Conference was to eradicate poverty, achieve sustained economic growth and promote sustainable development as an advance to a fully inclusive and equitable global economic system. The Heads of States acknowledged that achieving the internationally agreed development goals, including those contained in the Millennium Declaration, demanded a new partnership between developed and developing countries. To this end there was a commitment to sound policies and among other things, a commitment to mobilizing domestic resources, attracting international flows, promoting international trade as engines for development.[17]

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[15] United Nations Global Compact (UNGC),Blueprint for Business Leadership on the SDGs (2017) < https://unglobalcompact.org < accessed 19 April, 2021.

[16] United Nations,Action Platform for Peace, Justice and Strong Institutions< https://sustainabledevelopment.un.org/ > accessed 18 April 2021.

[17]The final text of agreements and commitments adopted at the International Conference on Financing for Development MonterreyA_CONF.198/11 (Mexico, 18-22 March 2002) <https://www.un.org/en/development/desa >accessed 20 April 2021.

The Domestic Private sector

The role of the domestic private sector in development is well acknowledged and mention is frequently made of the need to bolster the African informal sector. The United Nations Secretary General's Advisory Panel on Development in Africa, in its dialogue with the representatives of the private sector in Africa, took notice that a dynamic domestic private sector is an important engine for growth and job creation in Africa. Therefore creating an enabling environment for private sector development must be accorded high priority for Africa to achieve sustained growth and accelerated development. Enhanced support for the development of the private sector in Africa by the international community and by African Governments remains an important priority. The task is all the more urgent because there is wide recognition that the private sector is a key stakeholder in the implementation of the New Partnership for the Development of Africa (NEPAD).[18]

Governments are usually urged to establish business rules and regulations that provide a level playing field for domestic and foreign businesses. Generally in international trade, foreigners strive to have the national treatment extended to them. Within the ECOWAS region the principle of national treatment is enshrined in Supplementary Protocol on the Code of Conduct for the Implementation of the Protocol on Free Movement of Persons, the Right of Residence and Establishment. The growing trend however is that as between domestic and foreign entrepreneurs, domestic entrepreneurs are less favored in comparison to foreign investors. Based on the past performance of the Cotonou Partnership Agreement (CPA), respondents see generally a positive contribution to human and social development, including poverty reduction, but opinions seem divided on the contribution towards sustainable and inclusive economic development.[19]

Development of domestic capacity in the ECOWAS region must be on the front burner. There has been considerable difficulty realizing sustainable development through big business alone. African leaders avow to the philosophy of African solutions to African problems but those solutions are dependent on external funding. It rings true today as ever before that he who pays the piper dictates the tune. Law is not a neutral agency law reform is not value-free. Law in the hands of external actors will serve the interest of foreign investors.

[18]United Nations General Assembly (UNGA), New Partnership for Africa's Development: Progress in Implementation and International Support,(United Nations A/61/138, 13 July 2006) This was submitted to Sixty-first session of the United Nations General Assembly: Item 61 (a) of the preliminary list Second Report of the Secretary-General's Advisory Panel on International Support < http://www1.uneca.org > accessed 25 March 2021.

[19]K. Niels and M. Furness et al, Towards a New Partnership Between the European Union and the African, Caribbean and Pacific Countries After 2020 – Summary report of the public consultation March 2016 <https://ec.europa.eu/europeaid > accessed 28 April 2021.

New Law for the Informal Sector

The size of the informal labor market varies from the estimated 4-6% in the high-income countries to over 50% in the low-income countries. It's size and role in the economy increases during economic downturns and periods of economic adjustment and transition.[20] Depending on where the conversation occurs, the informal sector, could also be known as the underground economy, black economy, shadow economy, or grey economy that is part of a country's economy but not recognized as normal income sources. People who work in the informal sector do not declare their income and pay no taxes on them. Within this context, the term includes illegal activities, such as drug pushing and smuggling, as well as legal work, such as cleaning car windshields at traffic lights or doing construction work. In 2012, the shadow economy in the United Kingdom was worth approximately £150 billion while total 'underground activity' in Canada was estimated at $42.4 billion, or 2.3% of GDP. 15 – 17% of the labour force in the state of California work in the informal economy, generating between $60 billion and $140 billion annually.[21]

To the World Bank Group, the informal sector plays an important and controversial role. It provides jobs and reduces unemployment and underemployment. It bolsters entrepreneurial activity, but at the detriment of state regulations compliance, particularly regarding tax and labor regulations. It helps alleviate poverty, but in many cases informal sector jobs are low-paid and the job security is poor.[22] A sizable body of literature sees informality as arising from poor regulation or other government failures. To the degree that this is the case, unusually high or increasing informality may be suggestive of poor policy regimes.[23]

Interpretation of the informal sector in the West is not necessarily universal and might not be directly applicable to developing countries. The understanding of the informal sector by multilateral financial agencies appears not to accurately represent the phenomenon in the way it plays out in the developing world. This misunderstanding and/or lack of understanding results in aggressive moves to amalgamate the informal sector into the formal sector rather than using law reform as a tool to create the appropriate legal space for the 'other economy'. Trade flourished in the West African region long before the advent of Europeans in the territory. Traditional methods of taxation and repayment of credit facilities have proven successful over the decades in traditional settings. Law reform should be

[20]World Bank, Striking A Better Balance – The World Bank Group and Extractive Industries: The Final Report of the Extractive Industries Review (World Bank Group Management Response, 17 September 2004) < http://documents.worldbank.org ac>cessed 25 April 2021.

[21]Market Business News (MBN),Informal sector – definition and meaning <http://marketbusinessnews.com/financial-glossary/informal-sector-definition-meaning > accessed 15 February 2021.

[22] 'World Bank (n 21)

[23] E.Guillermo and. P.William et al,Informality: Exit and Exclusion. The Informal Sector: What Is It, Why Do We Care, and How Do We Measure It? (Chapter 1 IBRD/World Bank 2007, Washington DC)< http://siteresources.worldbank.org > accessed 7 March 2021.

deployed to enhance these structures and expand traditional and rudimentary economies. Comforting to note, the Economic Community of West African States (ECOWAS), the New Partnership for Africa's Development (NEPAD) and the Spanish Fund have a collaborative project to address some of the major challenges faced by women involved in small and medium-scaled enterprises in agriculture sectors by providing business support services, developing women's entrepreneurial skills, access to market and finance as well as awareness of women empowerment and gender equality.[24]It is however important that the sub-region moves beyond stand-alone projects and intermittent intervention into a systemic integration of small and medium-scaled enterprises into the mainstream investment legal framework.

Repatriating Funds to Africa for Development

Illicit Financial Flows (IFF) from Africa across the three main categories: commercial, criminal, and corrupt activities are large and increasing. One set of data indicates an increase in IFFs from $20 billion in 2001 to $60 billion in 2010 while another puts the trend growth over 2002–2011 at 20.2 percent a year. The Secretary-General of the OECD conservatively put IFFs at three times the amount of official development assistance while Tax Justice Network at the other end of spectrum alleges that IFFs are 10 times the amount of aid received.[25] The West is the primary recipient of illicit financial flows from Africa. A 2013 study of the potential reduction in years required for 34 African countries to reach MDG 4 child mortality goal if IFFs were eliminated, as compared with current rates of progress in meeting those goals concluded that without IFFs, the Central African Republic would be able to reach the MDG indicators in 45 years compared with 218 years at current rates of progress; Mauritania, 19 years rather than 198 years; Swaziland, 27 years rather than 155 years; and the Republic of Congo, 10 years rather than 120 years. Their finding was that if IFFs had been arrested by the turn of the century, Africa would have reached MDG 4 by 2016.[26]

The arena of illicit financial flows is one of many examples of how well informed and courageous African nations can break away from domination and poverty. International trade is one of the vehicles for transmission of IFFs. African governments can deploy the law as the vehicle for transition from dependence on foreign aid. The urgency for this transition is depicted by the revelation of the Norwegian Commission on Tax Havens that some development agencies actually

[24]Rural Women in West Africa get a boost from a NEPAD-ECOWAS Spanish Fund < https://www.nepad.org/news/rural-women-west-africa-get-boost-nepad-ecowas-spanish-fund >accessed 21 February 2021.

[25]UNECA, Illicit Financial Flow Report of the High Level Panel on Illicit Financial Flows 2015 <https://www.uneca.org/ > accessed 10 February 2021. This was commissioned by the AU/ECA Conference of Ministers of Finance, Planning and Economic Development.

[26]B. O'Hare and I. Makuta et al, The Effect of Illicit Financial Flows on Time to Reach the Fourth Millennium Development Goal in Sub-Saharan Africa: A Quantitative Analysis. *Journal of the Royal Society of Medicine*(2013) < http://jrs.sagepub.com > accessed 29 April 2021.

make investments in financial secrecy jurisdictions.[27] As an urgent matter of policy, Attorneys General of African States must undertake a critical review of double-taxation agreements and tax incentives for multinational corporations. The Continental legal framework must be reviewed to check-mate corporations that have perfected the dubious art of transfer pricing, trade mis-invoicing and tax avoidance. There ought to be a decisive move from soft law to hard law in the relationship between African governments and multinational corporations that will demand a shift from voluntary compliance to mandatory reporting.

Conclusion

The need to attract FDI pressures governments to provide a climate more hospitable to foreign corporations—potentially altering patterns of domestic economic policy, and possibly even challenging the *de facto* sovereignty of the nation-state and the capacity for democratic governance.[28] Investors care about such things as the protection of personal property, few restrictions on capital mobility and trade openness. Perhaps, surprisingly, these are not correlated with the democracy variable. Investors value countries which guarantee these economic rights and where these rights are enforceable in courts.[29] In other words investors care more about how their rights and their investments can be best secured and not so much about the rights of the citizens or the human rights situation in the host country. Over the decades, the drive for foreign direct investment by developing nations created blind spots in their engagement with extractive industry operators. For most parts, African nations have enacted laws and regulations that tend to have a greater emphasis on providing reassurances to investors that their States are the preferred destination for foreign investment.

Law can also be made to serve the interest of domestic entrepreneurs if the lawmakers choose to use law as an instrument of development. Law reform for investment-friendly environment must not be a veiled reference for foreign dominated investment. There has to be a reconstitution of the economic space in ECOWAS and the construction of a new legal framework for what is commonly referred to as the informal sector. A new legal arrangement that accommodates, serves and benefits the needs of vast majority of ECOWAS entrepreneurs. Legal and administrative structures have been altered to attract and retain foreign direct investment. The same technique can be utilized to benefit and develop the domestic private sector and the informal sector in ECOWAS member countries. Attainment of sustainable development in the ECOWAS region requires member States to individually and collectively engage in systemic legal and administrative reforms

[27] 'UNECA (n 26).'
[28] N. Jensen, Democratic Governance and Multinational Corporations: Political Regimes and Inflows of Foreign Direct Investment International Organization *(2003)57(3) International Organisation* 587-616, at 587
[29] A. Mathur and K Singh, Foreign Direct Investment, Corruption and Democracy (2013) 45(8) *Applied Economics* 991–1002.

that serve and benefit the domestic private sector and especially the informal sector. Inclusion of domestic entrepreneurs in the emerging investment legal frameworks is a requirement of the United Nations SDG 16

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