Opportunity or Obstruction: The Legal Ramifications of Elections in Africa

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As in every country, elections (and the period of relative uncertainty immediately prior to any election) can present opportunities for investors and businesses operating in the jurisdiction, as well as potential for disruption. This is particularly true in developing countries, particularly many in Africa, where elections present an opportunity for economic change and growth but can also prove disruptive to businesses with a local presence.

In 2019, a number of significant elections occurred across the continent including Nigerian and South African general elections, and Algerian and Tunisian presidential elections. Looking forward into 2020, elections are expected in some of the largest African countries including Egyptian parliamentary elections, Ghanaian, Ethiopian, and Tanzanian general elections and presidential elections in Côte d'Ivoire, amongst others. Investors in these countries, domestic and foreign alike, will need to monitor and analyse the commercial and legal effects of these elections.

An important distinction to make is between the economic climate before and after elections as the two can differ radically, leading to differing legal considerations. This briefing is divided into two sections—the first examining pre-election effects, and the second examining the repercussions of the elections—to provide an idea of what may be expected as countries across Africa each prepare for upcoming elections or experience the effects of their most recent elections.

Pre-Election. Where there is uncertainty among stakeholders about the potential outcome of an upcoming national election, concerns about the nature and extent of future taxation regimes, fiscal policy, and monetary policy may result in decreased enthusiasm from the private sector for investment, particularly in relation to larger projects. Upcoming elections can have a similar chilling effect on certain public projects as governments allocate funds to electorally popular causes (regardless of the practical or financial implications of such spending) in a bid to bolster their re-election chances

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[1] This briefing was prepared before the Covid-19 pandemic resulted in lockdowns across the globe. The pandemic is having profound socio-economic effects across the globe. One of its potential effects is a postponement of elections due to be held across Africa in 2020.

with certain groups. The combined effect of these changes is often a reduction in commercial activity—in particular M&A and joint ventures, as well as a reduction in the availability of financing, especially in sectors where government approval or licensing is required. For example, it has been shown that, since its conversion to multipartyism in 1990, Kenya has had lower rates of GDP growth in election years versus non election years.

Furthermore, the legal and economic uncertainty and disruption can be exacerbated by events such as those surrounding the 2019 Nigerian election, which was delayed by one week only hours before it was scheduled to take place. The socio-economic effects of this unpredictability and delay—coupled with their potential negative social repercussions and civil unrest—add to the uncertainty.

Increased government spending, on the elections themselves and vote-generating policies, negatively influences commercial activity in other ways. Investors, both domestic and foreign, anticipate higher government borrowing and taxes to pay for the heightened spending, and—depending on the country—the elections themselves can be very expensive. For example, the Kenyan government allotted almost half a billion dollars for its 2017 presidential elections. The high government expenditure associated with African elections can depress investor confidence and, in doing so, reduce commercial activity as well as the ability for the relevant government to borrow at convenient rates to finance future investments. Additionally, foreign investors can find themselves scapegoated for social injustices prevalent in the host state. Such narratives prove popular amongst parties seeking to generate votes. This can depress investment activity until the outcome of the election is known and the anti-foreign investment policies revealed.

A number of commentators have highlighted statistics that suggest that elections also affect the probability of settlement of investor-state disputes. It has been shown that the probability of settlement decreases as the next election nears. This is something to keep in mind when negotiating an investor-state settlement close to election time, as governments fear the political consequences of settling with foreign investors and how any such settlement may be politicised by the opposition. Furthermore, this correlation has been observed even in non-democratic states too, as a settlement may still result in a negative swing in public opinion. To that end, settlement negotiations may be most effective if carried out some time prior to an election or if the settlement includes the ability for the relevant state to defer any announcement until after the elections have taken place.

Post-Election. Elections may have both positive and negative commercial and legal ramifications. Focussing on the positives, a smooth election usually results in increased certainty for foreign and local investors as well as for domestic businesses. Foreign direct investors tend to view elections as a "risk-reduction" event. Once a ruling party is established, and regulatory and policy directions are clear, the levels of commercial activity and the number of new projects usually increase. This in turn leads to a rise in M&A activity, public and private partnerships, and joint ventures—especially in industries such as telecommunications, energy and natural resource extraction, or financial services, all of which are highly regulated and/or where governmental licences are required to operate.

In addition, after elections, stable governments are better able to award public procurement contracts across a range of industry sectors. The United Nations Development Business online platform alone lists approximately $30 billion worth of public procurement contracts annually in Africa, demonstrating the economic value of these contracts. Many of these contracts would not be available for tender where a government is unstable or there is civil unrest following an election.

Unfortunately, post-election environments in Africa can also disrupt the investment outlook. *First*, one of the short-term problems following elections can be the call for recounts amidst questions of electoral legitimacy. In both Malawi, where the High Court ordered a recount, and the Democratic Republic of Congo, where multiple inter-governmental organisations called for a recount, the legitimacy of the elections was questioned. Regardless of whether the election result is overturned, as in the case of Malawi, or upheld, disruption to commercial activity, and the decreased attractiveness for investment, is unavoidable.

Relatedly, election-related violence can also disrupt investment—both pre-and post-election. Although electoral violence has decreased across the continent, it still remains a concern. The 2019 elections in Cote D'Ivoire were marred by violent activity; the same was true in Nigeria. A study in Kenya showed that the electoral violence in the 2007 presidential elections drove labour costs up by 70%. Evidence such as this shows the economic effect of threats of election-related violence and civil unrest and why it reduces appetite for investment (both domestic and foreign) and depresses commercial activity.

Second, the implementation of pre-election promises can also have a significant impact on the attractiveness of investment. The legal ramifications can have even broader effect on the country's corporate governance as many politicians make pre-election promises to root out corruption. If successful, often with the purpose of distancing themselves from the existing governing elite, they may initiate a flurry of white-collar investigations, local and sometimes also foreign. Famously, the last presidential election in Angola led to an investigation into the conduct of Isabel dos Santos, the chairwoman of Angola's state oil company, and daughter of the outgoing president. She has been accused of illegally transferring millions of dollars away from Sonangol accounts. The new president, Joao Lourenço, replaced dos Santos as part of his anti-corruption campaign and took similar action against her half-brother, José Filomeno dos Santos, who is now on trial for allegedly trying to move $500m out of the country during his time as head of Angola's sovereign wealth fund. Though these are high-profile examples, Angola's actions represent the type of investigations that can occur across Africa post-election, and they merit consideration, especially where a front-running party is vocal about taking action against alleged corruption in the incumbent government or by foreign actors. Such political initiatives are particularly important since countries undergoing political transition after elections—even if positive, such as from an authoritarian to a democratic regime—present new opportunities for corruption.

Moreover, as alluded to above, a new government may be elected on the promise of imposing new obstacles or taxes on foreign investors. Such protectionist policies can unify adverse public sentiment against foreign investment. Implementing those election promises will result in a depression of economic activity and usually disproportionally impacting certain sectors more highly populated by foreign investors such as telecoms and extractive industries.

Third, Another potential consequence of elections is the increased possibility of investor-state disputes arising from alleged expropriations. Although expropriations can occur as part of a change in policy by an incumbent government, they are significantly more likely to occur where there is a change in government (and an accompanying change in the treatment of foreign investors). Examples of high-profile investor-state disputes include a string of disputes in Tanzania including those involving Biwater Gauff, Sunlodges, and Acacia Mining. Investor-state disputes are not, however, limited to Tanzania or even sub-Saharan Africa as Algeria and Egypt have both been subject to a slew of investor-state disputes. Ultimately, expropriation actions are more likely where there has been a change of government, and this must be considered by foreign investors close to election time.

Conclusion. In summary, elections in Africa present a great opportunity for change but the uncertainty and volatility accompanying the elections can and often do change the investment climate. Fundamentally, it is crucial that all investors, domestic and foreign, are aware of the legal effects of elections so that they may plan with those in mind. In any event, such planning should include the incorporation of strong dispute resolution and other domestic protection provisions in contracts, and investment treaty planning at the time the investment is made.

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