Beating the drums

A burst of reform sweeping through Africa could change the rhythm and pace of Indian and international investment in the region

Vandana Chatlani reports

The scope for profit and winning partnerships in countries in Africa is attracting Indian companies that have discovered pockets of opportunity for expansion in a variety of sectors. To cite some examples:

- Indian-owned Indorama Corporation, the world's largest producer of polyester and PET resin, is to set up a US$1.2 billion fertilizer plant in Nigeria through its subsidiary Indorama Eleme Fertilizer and Chemicals Limited Nigeria;
- Wipro has set up a strategic delivery centre in South Africa and aims to create 1,000 jobs;
- Videocon is seeking to auction a 20% stake in its natural gas project in the Rovuma Basin in Mozambique;
- Jindal Steel & Power is involved in the Chingodzi coal mining venture in Tete province in Mozambique;
- Essar's energy arm has acquired a 50% stake in Kenya Petroleum Refineries;
- Alok Industries has helped set up a cotton mill in the city of Bobo-Dioulasso in Burkina Faso.

Companies such as Fortis Healthcare, Mahindra & Mahindra, Ranbaxy and Cipla have also invested heavily in the region.

For companies investing in Africa, getting to grips with new and proposed legislation is crucial to ensuring the viability and future success of their ventures. While legal and regulatory issues vary across the continent and cannot be discussed in depth in this article, some of the key changes that could impact investors in the region are outlined below.

Competitive streaks

Several African countries have ramped up their competition law regimes in a bid to fuel their economies and encourage a diversity of products and business services for the consumer market. In some cases, the legislation may not be new but recent trends in implementation hold strong implications for business owners in the region.

South Africa, for example, enacted its competition law framework around 15 years ago, but has recently seen a growing emphasis on public interest in relation to mergers. The country's competition authorities have begun to more carefully assess how public interest issues will be affected by a potential transaction. According to Justin Balkin and Kirsty van den Berg at Edward Nathan Sonnenbergs, while determining whether a transaction will "substantially lessen or prevent competition", competition authorities are also "required to consider the effect which a proposed transaction will have on (i) a particular industrial sector or region, (ii) employment, (iii) the ability of small businesses or those controlled or owned by historically disadvantaged persons to become competitive, and (iv) the ability of national industries to compete in international markets".

Balkin and van den Berg go on to say that while South Africa's competition authorities may not be able to "usurp the government's role in determining industrial policy … the conditions imposed on merging entities are becoming more onerous". In the case of the merger between commodities trading company Glencore and Anglo-Swiss mining company Xstrata, the competition tribunal mandated the parties to reach an agreement with the trade unions before making any employees redundant. The Glencore-Xstrata deal offers valuable lessons for businesses that are exploring tie-ups with companies that have a large workforce.

Potential investors should also be aware of developments in the Common Market for Eastern and Southern Africa (COMESA), an organization that seeks to harmonize legal and economic policies across its 19 member states. The COMESA Competition Commission, a regional competition authority based in Malawi, "commenced operations on 14 January 2013 and their jurisdiction includes merger notifications, cartels, abuse of dominance and consumer protection for the COMESA region," says Pieter Steyn, a director at Werksmans in South Africa and chairman of LEX Africa, a network of law firms in 25 African countries. The members of COMESA are Burundi, Comoros, Democratic Republic of Congo, Djibouti, Eritrea, Ethiopia, Egypt, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

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Partner
Anjarwalla & Khanna

Sonal Sejpal, a partner at Anjarwalla & Khanna in Kenya, explains that where, in a merger, the acquiring company or the target company operates in two or more member states, the parties to the merger would have to notify the COMESA Competition Commission of the proposed merger. "The impact of this is huge," says Sejpal, "as notification will have to be given at a COMESA regional level rather than at the national level which was previously the case. We are yet to see how the COMESA Competition Commission and the Competition Authority of Kenya will liaise on the issue of merger notifications. Our national competition laws are yet to be aligned with the regulations and there are significant difficulties in harmonizing laws of all the COMESA member countries."

The fees payable for a COMESA merger filing can be extremely expensive. Sejpal says they are "the higher of 0.5% of the parties' combined turnover or combined assets in the COMESA region, capped at US$500,000". This is drastically higher than the US$20,000 required for a Form I filing and US$80,000 for a Form II filing in India.

Reining in returns: Mining and resources

Several jurisdictions across Africa are redesigning laws relating to mining, exploration and resources.

Nigeria's federal government, for instance, has introduced the Petroleum Industry Bill (PIB) in the national assembly. If passed into law, the bill, drafted by petroleum minister Diezani Alison-Madueke, will change the legal, commercial and regulatory landscape for the Nigerian oil and gas industry. Oladiran Ajayi, a senior associate at Templars, says the bill "seeks to divide the industry into different segments and creates regulatory bodies for each of them", while imposing "new obligations on participants in the industry such as obtaining the consent of the minister of petroleum resources for acquisition of a petroleum licence or lease".

The bill seeks to introduce a new tax and royalty regime to increase the government's revenue and redistribute it to benefit domestic companies and people locally. The bill also aims to simplify the legal framework and clarify the fiscal terms for foreign participation with the state-owned Nigerian National Petroleum Corporation.

The rationale behind these changes is to "introduce operational and fiscal guidelines for efficient management of revenue to enable Nigeria to retain a higher proportion of revenue accruing through oil industry", says Damilola Odetola at Olaniwun Ajayi in Lagos. The changes could impact existing petroleum agreements. "The PIB advocates reversal of provisions of prior agreements and contracts, introduces new fiscal regimes even for old petroleum sharing contracts and establishes guidelines for operations both in the downstream and the upstream sectors," says Odetola. "Current and prospective investors in the petroleum sector must take cognizance of the changes which the PIB proposes to make in the sector and the way these changes may impact on their operations."

Meanwhile, South Africa is expected to introduce major amendments to its mining regulations. Although "the governing party ruled out nationalization as a policy at its party congress in December 2012," says Steyn at Werksmans, "it is considering extra taxes, requiring beneficiation of minerals and statutory amendments which give certain discretionary powers to the mining minister".

Andre Visser, a partner at intellectual property firm Adams & Adams in Pretoria, says international investors should also be aware of the 2010 amendment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry. Visser says the charter grants the minister of mineral resources the power to make unilateral amendments to the charter and that "non-compliance with the charter is subject to the minister's power to cancel or suspend rights, permits or permissions granted to the holder of the rights, permits or permissions".

Neighbouring Mozambique has also introduced a bill to amend its mining laws with a view to providing greater security for Mozambican miners, increasing competitiveness and combating illicit and illegal mining activity. One proposed change would mean a shorter renewal period for exploration licences. While the initial period for a licence would still be five years, companies would only be permitted to renew their licences for a maximum of three years. Mozambique's minister of mineral resources, Esperanca Bias, was quoted in *AllAfrica.com* as saying: "We think that in eight years it is possible to move to the development phase, and consequently to the production phase."

The bill includes a taxation system that would apply when permits are traded between companies incorporated under Mozambique law and would also affect transactions abroad between foreign companies.

To the west, Burkina Faso is also reviewing its Mining Code to boost its economy, create employment and distribute profits from the industry in a more equitable manner. To achieve this, it is "increasing tax burdens for mining companies", writes Par Jonathan Vankempen, an associate at Emery Mukendi Wafana & Associates in New York. The draft of a new mining code "proposes to remove the preferential rate for tax on industrial and commercial profits and tax on revenues on tangible assets that holders of exploitation permits currently

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Senior Associate
Coulson Harney

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Adams & Adams

benefit [from] during the exploitation phase," he says. As he explains, it also plans to do away with certain tax exemptions under article 90 of the current Mining Code and proposes to set up a Mining Fund for Local Development. Companies holding exploitation permits and authorizations for quarrying exploitation would be required to pay 1% of their turnover into the fund, while the government would pay in 25% of the mining royalties it collects.

Other jurisdictions where mining laws are being re-evaluated and revised include Angola, the Democratic Republic of Congo and Mali.

Taxing times

Investors should also be aware of coming changes in the tax regimes of countries such as Kenya, Madagascar, Burkina Faso, Mauritania and Angola. In Kenya a new constitution adopted in 2010 is expected to bring about changes to existing statutes and judicial interpretations of the existing statutory and common law. "Following Kenya's elections held on 4 March some of these changes will include a bicameral house of parliament and a devolved as opposed to centralized government," says Amar Mehta, a senior associate in Nairobi at Coulson Harney, a member of the Bowman Gilfillan Africa Group. "These reforms will have significant impact at a local level when it comes to the payment of taxes, duties and levies as well as the need to obtain approvals at county level."

Proposed amendments to the Income Tax Act call for withholding tax on the transfer of any shares or property

Learning the ropes

Experts highlight key issues that may confront investors new to Africa

When Indian companies don't take local legal and financial advice very early on in the deal – this leads to misunderstandings and [potentially] protracted negotiations – **Paras Shah, partner, Hamilton Harrison & Mathews, Nairobi**

The Nigerian Oil and Gas Industry Content Development Act provides incentives for Nigerian indigenous companies (generally accepted to be companies registered in Nigeria with 51% equity in Nigerian hands), such as preferential status in contract bids. The act further prescribes the minimum level of materials and labour to be sourced locally for Nigerian oil and gas contracts. Such legislation does not dissuade investments as a general matter, but it increases the threshold for due diligence and may increase the cost of business – **Oladiran Ajayi, senior associate, Templars, Lagos**

Customs clearance, profit and investments repatriation should be worked out initially during import into Eritrea. Once agreed upon, there are no obstacles – **Berhane Gila Michael, senior counsel, Berhane Gila Michael & Associates, Asmara**

Sometimes there are difficulties in conducting a proper due diligence of public registries as it is not uncommon for important documents to go missing or records at the registries not being up to date – **Sonal Sejpal, partner, Anjarwalla & Khanna, Nairobi**

Repatriating capital may be an issue only where the proper channels are not followed in bringing capital into the country in the first instance. Capital is easily repatriated through an authorized dealer bank through which the investor procures a certificate of capital importation – **Oladiran Ajayi, senior associate, Templars, Lagos**

Mozambique has implemented protectionist measures on the labour market, implementing various restrictions on the hiring of foreign workers. Employers are obliged to hire Mozambican workers for technical and high level positions. Should reasons of public interest arise, the state may also reserve certain functions for Mozambicans – **Paula Duarte Rocha, partner, Mozambique Legal Circle, Maputo**

Trade unions can wield considerable influence and effectively stall a transaction … it is advisable to keep them informed of developments as they arise. Some collective agreements between unions and management may require the permission of those unions involved before a merger or an acquisition can be effected – **Oladiran Ajayi, senior associate, Templars, Lagos.**

for mining, prospecting and oil companies. Adds Mehta: "Capital gains tax (CGT) was suspended in 1985 to encourage more Kenyans to widen their investment avenues through active participation in the stock and property markets. There has recently been a renewed push to reintroduce CGT on specific sectors, namely mining and oil and gas and we wonder for how much longer this suspension will last."

Efforts towards regional integration could lead to a domino effect with tax changes in Kenya being reflected in the tax regimes of Uganda, Tanzania, Rwanda and Burundi, which are the other members of the East African Community (EAC), an economic trading bloc. "Plans are under way to have uniform tax codes for member countries of the EAC and also a need to apply for tax exemptions at a regional level rather than country level," says Philip Coulson, a partner at Coulson Harney in Nairobi.

In Madagascar the Finance Act, 2013, contains new provisions for persons or entities who are not residents in Madagascar "but who have real rights … and who do not live in Madagascar but who receive benefits or income from Madagascar," says Raphaël Jakoba, the managing partner at Madagascar Conseil International and former special counsel at the International Court of Arbitration of the International Chamber of Commerce. "Now, these people are subject to income tax and intermittent value-added tax," says Jakoba, who is also the former secretary general of the Center of Arbitration and Mediation of Madagascar.

Mauritania has crafted new tax provisions aimed at "attracting foreign investments; boosting research and hydrocarbon exploration; and easing the tax burden for small and medium companies that create at least 10 new and permanent jobs," says Ludovic Kabran, the executive director of Groupe Hélios Afrique-Exco. Another provision "creates a tax-free export zone for companies that export most of their products."

Angola is currently carrying out wide tax reforms and six new pieces of legislation, referred to as "legal diplomas", may be published this year: Corporate Income Tax Code, Tax on Income Derived from Work (individuals), General Tax Act, Invoicing Legal Regime, Tax Procedure Act, and Tax Execution Procedure. "Some tax diplomas – Stamp Duty, Capital Gains Tax, Consumption Tax and Real Estate Reform – have been published since 2011 and are already in force," says Miguel de Avillez Pereira, a partner at Abreu Advogados in Portugal.

Angola's corporate tax system "does not discriminate against foreign firms", say Odd-Helge Fjeldstad, Søren Kirk Jensen and Aslak Orre of Chr Michelsen Institute and Centro de Estudos e Investigação Científica in a report on tax reform in Angola. They argue that the key challenges for international investors have to do with "cumbersome procedures and regulations for business registration and tax payment – with corruption as a constant threat". They add that the process of obtaining licences and permits to undertake economic activities is complex and costly and that in such a situation "generous tax incentives to specific industries and sectors are likely to lead to large revenue losses and distorted competition".

The Indian corporate world's love affair with Mauritius has led to concerns recently about the alleged misuse of the double taxation avoidance agreement (DTAA) between Mauritius and India. The two countries have formed a joint working group to examine how the DTAA could be amended to prevent misuse of treaty provisions. Mauritius has also agreed to a tax information exchange agreement with India to assist with tax collection.

The Ministry of Finance and Economic Development in Mauritius issued a press communiqué on 5 March taking note of the measures announced by India's finance minister when the 2013-14 budget was presented to the Indian parliament on 28 February.

Another important legal issue concerns a proposed amendment to the Indian Income Tax Act, 1961. "This amendment would provide that the tax residency certificate (TRC) would constitute a necessary but not sufficient condition to be able to benefit under DTAAs," says Muhammad Uteem, the managing partner at Mauritius law firm Uteem Chambers. The amendment may give the

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[Nigeria's Anti-Casualisation Bill] may increase the cost of labour for [companies] by, for example, triggering the statutory requirement to provide pensions

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Indian tax authorities wide powers to question the TRC produced by a resident of the contracting state. "The Mauritian authorities have on their side reassured Indian investors that the TRC constitutes sufficient evidence for accepting the residence status," says Uteem. "The real status of the TRC will, however, be finalized on the conclusion of the DTAA."

Ripple effect

Legislative debate surrounding competition law, mining policies and taxation may dominate in some African countries but the reforms don't end there. Lawmakers are driving regulatory and legal development with a view to scrapping archaic rules and streamlining existing ones to facilitate trade and investment within the continent as well as outside it.

In South Africa, for example, a proposed Foreign Investment Bill deals with compensating foreign investors in the event of expropriation; phasing out bilateral investment treaties; and preserving the government's right to regulate in the public interest.

"The National Treasury of South Africa seeks to review the framework for cross-border direct investment in South Africa," says Visser at Adams & Adams. "The National Treasury has released a discussion document aimed at enhancing certainty for foreign investors and domestic companies while also providing transparent mechanisms for intervention to protect public interest where warranted."

Visser also points to the Protection of Information Bill and the Independent Systems and Market Operator Bill: the first seeks to regulate international transfers of personal information and "may impact foreign investments in the event that the execution of the investment involves the transfer of personal information between the two countries". The second would enable private investors to participate in South Africa's energy sector.

Legislative developments in Mozambique in 2012 include decrees on the production, distribution and sale of petroleum products and derivatives; public-private partnerships, large projects and business concessions; and simplified procedures for the licensing of certain economic activities. In addition, the Mozambican parliament has approved legislation on insolvency and restructuring to replace "a regime that was outdated and largely similar to the one introduced in the colonial era", says Paula Duarte Rocha, a partner at Mozambique Legal Circle in Maputo. "The Individual Income Tax and Corporate Income Tax are also under review."

Kenya is also modifying its Public Private Partnerships Act. This act "calls for a stringent competitive bidding process for any PPP projects," says Coulson at Coulson Harney.

"Kenya is undergoing significant legal reform," says Paras Shah, a partner at Hamilton Harrison & Mathews in Nairobi. "Indian companies should bear in mind overhauls of our company law, capital markets laws, oil and mining exploration laws, competition laws and land laws."

The amendments are intended to make the country's laws "more compatible with current global trends and an enabling investment environment," says Sejpal at Anjarwalla & Khanna. In addition to the laws Shah mentions, Sejpal says investors should watch for changes to Kenya's insolvency laws and the demutualization of securities exchanges and banking and payment systems.

Foreign investors looking at Nigeria would be wise to take note of the Anti-Casualisation Bill, which would prevent employers from maintaining temporary employment contracts for more than six months. After this period, the bill requires such contracts to be converted to permanent employment. "This bill may increase the cost of labour for [companies] by, for example, triggering the statutory requirement to provide pensions," says Ajayi at Templars.

Ochuko Odekuma, an associate solicitor at Femi Sunmonu & Associates *Qais Conrad Laureate* says foreign companies with shipping and maritime interests should take stock of the Coastal and Inland Shipping (Cabotage) Act 2003 and the guidelines on implementation issued in 2007. "Concession of the ports is underway," says Odekuma. "Consequently, the Ports and Harbour Bill [and] National Transport Commission Bill are before parliament."

Like Black Economic Empowerment in South Africa and Angolanization in Angola, the New Equitable Economic Empowerment Framework in Namibia seeks to establish local ownership and black economic empowerment rules, says Wolf Wohlers, a partner at Namibian law firm Lorentz Angula.

Empowering local communities is often cited as a way for foreign businesses to score brownie points in African jurisdictions. Indian-owned Sterling Global Oil Resources, which has celebrated the production of 1 million barrels of oil ahead of its bigger rivals such as Oil India and Essar, is one company that has forged local partnerships. "Sterling's parent, the Sandesara Group, has invested US$1.5 billion in Nigeria," says Ajayi at Templars. "It has a community programme and has attributed its success to community engagement. Its corporate social responsibility programme emphasizes the importance of working closely with the local communities to operate successfully in Nigeria."

As the Yoruba proverb goes: "What you give you get, 10 times over". ■