Leveraging Natural Resources for Sustainable Development in Africa

By:

Oyeniyi Abe

July 30, 2019

Introduction

The challenges and opportunities for leveraging natural resources for sustainable development are as critical as ever. Africa needs investment and growth and, at the same time, it must guarantee sustainable development of these investments. With its massive deposit of oil, gas and mineral resources, Africa is the world's fastest-growing region for foreign direct investment. Over 25% of the world's global mineral reserves are in Africa. The huge investments in the extractive sector should, in principle, be a catalyst for economic growth, job opportunities, and development. Often, these investments have been a source of environmental degradation, socio-economic malaise and despair. Equatorial Guinea, for instance, is a classic example of the 'resource curse mystery in Africa. To leverage extractive resources for development, African countries are faced with legal, fiscal, implementation, infrastructure, regulatory and institutional challenges. This contribution addresses state and investor responsibility in the sustainable development of Africa's extractive sector. It highlights four responsibility indices that will guide states and investors in fostering a shared value approach to an inclusive and sustainable development of Africa’s extractive sector.

Legal and Regulatory Challenges

Africa’s extractive sector faces complex legal and regulatory challenges. The environmental impacts of extracting natural resources have impeded the sustainable development of the sector. In several states, resource extraction is coterminous with economic stagnation, lack of adequate capacity, including capital, skills and technology, and weak democracy. Poor governance, lack of accountability and transparency, inadequate legal protection of investors and investment rights, and inadequate judicial and quasi-judicial remedies for human rights victims have also impeded sustainable development of the sector. For instance, in Nigeria, oil accounts significantly for the government’s revenue, however, the impact of resource extraction has created environmental problems, weak institutions, conflicts, land displacements, and poor investment decisions. Interestingly, these challenges are surmountable. States must responsibly craft sustainable legal and regulatory reform to address some of the obstacles and bottlenecks, which investors in Africa’s extractive sector often encounter. Extant extractive sector laws and institutions must be reassessed and revitalised in line with global best practices. Nigeria, in particular, exemplifies how a country with weak resource governance is least likely to implement the rules it sets, yet the social and environmental costs of oil production in Nigeria have been extensive: gas flaring, pollution of air and drinking water, amongst others. Hence, states must craft legal and governance frameworks that incentivise investment potentials for investors. Improved technological know-how of technocrats, transparent fiscal and bidding process, respect for human rights are *sine qua non* to good governance, and important for responding to the resource conundrum and debilitating impacts of resource extraction in Africa.

To accentuate sustainable pathways, states must simplify corporate registration and licensing procedures; restructure tax policies and administration; and ensure independence of the judiciary. The creation of new laws and reform of outdated laws are the responsibility of host states. However, international investors must also streamline their internal organizations in a way that respects and conforms with local realities in their host states, especially with respect to providing green jobs or sustainable employment. These types of jobs that *inter alia* account for women's participation should be incorporated into the responsible operation of extractive projects, and societal investment projects.

Infrastructure Gaps

Providing the right investment climate can attract sustainable foreign investment in the continent. In an increasingly globalised world, it will be difficult for African states to leverage their geographical affluence to attract investors without adequate and functional extractive infrastructure – functioning rail systems, good roads, ports, modern pipelines, stable electricity and telecommunications facility – as a path to maximising the benefits of Africa's extractive resources for future generations. The failure of the state to provide infrastructure means that investors have to apportion budgets for generating their own electricity and water, which results in extra costs over and above that budgeted for extracting minerals and petroleum products. There is an urgent need for dynamic governance innovations and approaches to attract investors' participation and involvement in addressing these infrastructure gaps. Though complicated and sometimes controversial, states and investors must jointly build, operate and finance infrastructure systems ~ shared value infrastructure development. This public-private initiative allows states to facilitate the practical design of the infrastructure to safeguard collective usage. States can leverage extractive-related infrastructure to address these gaps, by aligning public interests with private goals, thus sharing responsibilities, risks and benefits of resource infrastructure. This can only be achieved under a just, equitable, and cost-effective structure. A combination of smart-mix of policies and fiscal incentives will heighten the development of infrastructures by investors.

Bilateral Investment Treaties (BITs) and Trade Policies

Investors must understand the ownership regime dominant in each African state, as well as the long term validity of exploration permits, and the rights and obligations that come with such licenses. It is the responsibility of investors to understand the extent of legislative powers on state owned enterprises, and the nature of tenure security guaranteed to potential investors. Investors must be fairly taxed and proceeds wisely invested. Where taxation is high, extraction projects will falter; in the same vein, where taxation is to too low, this hinders the state from carrying out its responsibilities.

While government's responsibility in harnessing extractive resources for sustainable development is fundamental in some aspects, investors must respect domestic dispute settlement systems. It is important that investors examine the scope and extent of rights and interests that are transferred to a right holder under the licenses and permits granted by African states to avoid legal risks.

Investors want certainty and this is juxtaposed against states' capacity to pursue public policy goals. Most International Investment Agreements favour investors and impinge the capacity of states to realise social objectives. Hence, there must be a balance between the interests of investors and government. While host states are responsible for the administration of extractive projects and compliance with legal requirements, investors are responsible for sustainable investment that do not infringe the rights of the host state to make responsible laws for its citizens. In 2007, Luxembourg and Italian investors brought a claim arguing that South Africa's affirmative action laws expropriated their mineral rights. The case was settled in 2010. Shortly after, South Africa initiated a review of its BITs. In the aftermath, South Africa terminated several of its BITs, claiming that such BITs 'pose risks and limitations on the ability of the government to pursue its constitutional-based transformation agenda'. The implication therefore is that foreign investors only get national treatment in South Africa and so are subject to same legal requirements as domestic firms.

Judicial Remedies

This section briefly discusses the criminal responsibility of non-state actors. In June 2014, the Summit of the African Union Heads of States and Government adopted the *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, (the Malabo Protocol). If ratified, the Protocol would expand the Court's jurisdiction to include adjudication of corporate crimes (under article 46 (c)), amongst other crimes. That the African continent is taking this pivotal step towards corporate criminal responsibility is not surprising, considering the difficulties in achieving sustainable development of extractive resources on the continent. Weak extractive resource governance as well as inability to turn resource projects into impactful development outcomes constitute sufficient reasons to establish a court to assume jurisdiction over the criminal excesses of private actors. The responsibility for addressing corporate criminal matters cannot rest solely on states in their domestic capacity and this is what makes the Protocol’s effort to establish the first regional criminal court important. When domestic laws are weak, regional justice systems become imperative. Ordinarily, a regional criminal court should complement national judicial systems. However, the recent Vedanta’s case has shown that it is difficult to successfully prosecute corporate actors locally, more so when the principal statute on corporate matters does not address corporate criminal responsibility for human rights violations. The scale of injustice, gravity of the offences and impact of the crimes on individuals and communities demand that a clear system of judicial recourse be established for matters of corporate criminal liability in Africa’s extractive sector. Extractive companies in Africa, therefore, have a responsibility to ensure that their activities positively impact host states.

Conclusion

This contribution has identified sustainable development challenges and opportunities in extractive resource industries that can be effectively managed through robust domestic legal frameworks, trade and investment frameworks and other principles. The various challenges bedeviling sustainable extractive extraction should gear states, in particular, and investors towards crafting and implementing comprehensive strategic policy interventions, including business policies and trade facilitation (through the AfCFTA, for example). State and investors have joint responsibility to enhance robust and dynamic legal and governance frameworks that simplify and incentivize investment opportunities for potential investors.

View online: Leveraging Natural Resources for Sustainable Development in Africa