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(Review Article)

Assessing the impact of the constitution of Kenya 2010 on foreign direct investments: opportunities and challenges

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Abstract

The provisions of the 2010 Kenyan Constitution indirectly promotes Foreign Direct Investment (FDI). It outlines principles that creates favorable conditions for thriving of FDI in Kenya. This study focused on the Foreign Investment Protection Act, revised in 2022, which defines foreign nationals, foreign assets; outlines procedures for investment approval; and provides protections for foreign investors. Utilizing a qualitative approach, thi research incorporates document analysis of relevant legal texts, case studies comparing FDI trends before and after the constitution was adopted. The research findings indicated that FDI in Kenya is concentrated in sectors such as manufacturing, agriculture, services, and infrastructure, with significant inflows from countries like the United States, the United Kingdom, China, and India. The benefits accruing from FDI include job creation, technology transfer, and improved balance of payments. However, challenges such as corruption, regulatory uncertainty, infrastructure deficiencies, security concerns, and skill shortages undermine investor confidence. Initiatives the establishment of Special Economic Zones (SEZs) further enhance Kenya's appeal as an investment destination. Additionally, the government actively promotes public-private partnerships to foster collaboration between foreign investors and local enterprises. Based on the findings, the research recommends strengthening anti-corruption frameworks and enhancing transparency in procurement processes. Improving infrastructure, enhancing transport networks, and addressing security concerns are also essential to create a more attractive investment climate. By implementing these recommendations, Kenya can better position itself to attract and retain foreign direct investment, ultimately driving economic growth and development.

Keywords: Constitution; Foreign Direct Investment (FDI); Foreign investors; Technology; Local enterprises

1 Introduction

The Kenyan constitution does not explicitly mention Foreign direct investment but outlines principles of governance that sustain create conducive environment for sustainable development, equity and economic growth. Despite having no direct mention of Foreign investment in the constitution, there is an act of parliament in relation that subject. Additionally, foreign investors are protected by another legislation known as Investment Promotion Act which outline the procedures, incentives and protections for foreign investors in Kenya.

In 2022, the Foreign Investments Protection Act underwent revisions. It establishes the definition of foreign assets and who is considered a foreign national. The term "foreign assets" refers to any foreign currency, credits, rights, benefits, or property that can be acquired through the use of foreign credit, the expenditure of foreign currency, the exploitation of foreign rights, benefits, or property, or any profits from an investment made in an approved business by the holder of a certificate issued under section 3 in connection with that business.

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Any individual who is not a Kenyan citizen is referred to as a foreign national, including corporations that are not Kenyan-incorporated.

Foreign nationals who want to invest in Kenya can apply for and receive certificates proving that the business where the assets are to be deposited is a Kenyan-approved business. If the cabinet secretary were to use discretion and issue a certificate with the holder's name and the enterprise description on it. The foreign currency that has been invested or will be invested must also be included in the certificate. The total amount of capital signifying equity in Kenyan or pertinent foreign currency must be stated in the investment. Any loans made in Kenyan or other applicable currencies will be included in the certificate's other components.

Lastly, the investor shall be issued a certificate detailing specific period in which they shall be invested. If foreign investor intends to amend the certificate, the Act gives conditions to that effect. There are set criteria which a potential foreign investor must meet before grant of certificates on operation: the use of domestic raw materials; value addition to domestic goods; filling the information and technology gap; payment of tax revenue; improvement of foreign exchange; technology transfer; and any other factors that the Authority deems advantageous to Kenya.

If foreign assets approved are not brought into Kenya within the permitted time frame and invested within that time frame, the certificate will be considered cancelled. Transferring profits out of Kenya at the current exchange rate and in the authorized foreign currency is permitted for the certificate holder. The profits would incorporate any retained earnings from his foreign asset investment that have not been capitalized following taxes. Capital stipulated in the certificate as corresponding to and being considered to be the fixed amount of equity of the certificate holder in the enterprise may be transferred in addition to profits, provided that there is no additional amount added to the capital specified in the certificate to reflect any increase in the capital value. The principal and interest of any loan mentioned in the certificate can also be transferred.

Foreign Investment Protection Act outlawed compulsory acquisition of property of a foreign investor. It states thus "No approved enterprise or any property belonging thereto shall be compulsorily taken possession of, and no interest in or right over such enterprise or property shall be compulsorily acquired, except in accordance with the provisions concerning compulsory taking of possession and acquisition and the payment of full and prompt payment of compensation contained in section 75 of the Constitution and reproduced in the Schedule to this Act."

The Constitution prohibits depriving of property belonging to any person. The person here includes a national company, a foreign company and human person. Deprivation is conditionally allowed and necessary in the interests of town and country planning, public safety, public order, public morality, public health, or the development or use of any property in a way that advances the common good. The law stipulates that taking possession of or acquiring property requires the quick payment of full compensation if there is no legitimate reason to cause any difficulty that could affect anyone who has an ownership stake in or right over the property.

However, there are exceptions to deprivation/compulsory acquisition of property by the state. It is not a violation of rights of persons when property is seized to pay taxes or fees; as a penalty for breaking the law whether through civil actions or after being found guilty of a crime in Kenya; Related to leases, rentals, mortgages, or contracts; Following court orders in civil rights cases; When it's necessary because the property is dangerous or harmful to people, animals, or plants; Due to laws about time limits for legal actions; and For necessary examinations, investigations, trials, or for land improvements that the owner refused to carry out without a good reason. Similarly, it is allowed Taking property in cases like: Enemy property; Property of someone who has died, is mentally unfit, or is under 18, for the benefit of those entitled to it; Property of someone declared bankrupt, for the benefit of creditors and others entitled to it; Property under a trust, to pass it to the appointed trustees or as ordered by a court.

Kenya established an organization called the Kenya Investment Authority to advertise investment possibilities in Kenya both domestically and abroad. In addition to facilitating and managing investment sites, estates, or land along with related facilities on the sites, estates, or land, it also evaluates the investment environment and recommends to the government and others changes that would encourage and facilitate investment, such as modifications to licensing requirements; (e) designates agents in the country and abroad to perform specific tasks on its behalf, as it may deem necessary; Holders of Kenyan investment certificates are eligible to apply for three Class H, I, or J entry authorizations for shareholders, owners, or partners, as well as three Class A entrance permits for technical or management personnel.

Each permit is valid for two years and can be renewed or transferred. Permits cannot be issued to prohibited immigrants and must follow Kenyan laws. Dependants can also receive a dependant's pass and necessary re-entry permits. To obtain permits, applicants must apply, pay required fees, and provide security deposits. Initial entry permits for owners, shareholders, or partners do not require a fee. Existing permits from the time the investment certificate was granted count towards the total permits.

Objectives of the study

The purpose of this study was to evaluate specific provisions of the 2010 Kenyan Constitution that relate to foreign direct investment (FDI) and to assess how these provisions are intended to attract investors. By examining trends in FDI inflows to Kenya before and after the adoption of the Constitution, the study aimed to identify any significant changes that may have occurred. Additionally, the research sought to identify and analyze the opportunities created by the constitutional framework that enhance Kenya's appeal as an investment destination. It also investigated the legal and regulatory challenges that foreign investors currently encounter within this framework. Finally, the study provided recommendations for policy and legal reforms designed to address the identified challenges and further boost foreign direct investment in Kenya.

2 Methodology

Document analysis approach was used to analyse the text of the 2010 Kenyan constitution and related legal documents in relation to FDI. A review of the constitution and acts of parliament such as foreign investment Protection Act and legal precedents was done. Another approach was a case study before and after the adoption of the new constitution. Analysis of media interviews of foreign investors to investigate their perceptions regarding the effectiveness and challenges of FDI constitutional framework. Trend analysis will be conducted by documenting historical data and reports from government and international organizations to analyze FDI trends.

3 Discussion

The constitution has a framework for provisions related to property rights and economic policies. These are Articles 40 and 60 which protect the rights to property and land respectfully. Besides there are Foreign Investment Protection Act (CAP. 518) among others. Foreign Direct Investment (FDI) in Kenya is concentrated in sectors such as manufacturing, agriculture, services, and infrastructure, with significant inflows from countries like China, India, the United States and the United Kingdom. This investment creates job opportunities, technology transfer, and positively impacts the balance of payments by providing capital inflows and reducing reliance on external borrowing. However, investors face challenges including a complex regulatory environment and political instability thus undermining investor confidence. In response, the Kenyan government has implemented various policies to attract FDI, such creating investment promotion organizations, offering tax breaks, and making conducting business easier in general.

3.1. Opportunities

Kenya presents several opportunities for Foreign Direct Investment (FDI) across various sectors, driven by its strategic location, economic growth, and government initiatives. Reports indicate multiple key areas where foreign investors can engage effectively. One of the most significant opportunities lies in infrastructure development. The Kenyan government's commitment to improving infrastructure through initiatives like the "Big Four Agenda" offers substantial prospects in construction, energy, and transport sectors. Investments in roads, railways, and energy projects are particularly encouraged, providing a strong foundation for Socio-economic development and foreign businesses.

Another promising area is technology and innovation. Kenya is emerging as a tech hub in Africa, especially in the fields of fintech and mobile technology. The growth of digital platforms and startups creates opportunities for foreign investors to engage in technology transfer and innovation, tapping into a vibrant ecosystem that fosters creativity and entrepreneurship. In the realm of agribusiness, Kenya's agricultural base provides significant investment opportunities. This includes agro-processing, the export of agricultural products, and sustainable farming practices. With the increasing demand for food security and sustainability, this sector's attractiveness continues to grow, making it a focal point for foreign investment.

Tourism also offers substantial potential for FDI. With its rich cultural heritage and natural attractions, Kenya presents opportunities in tourism development, including eco-tourism, hotel investment, and travel services. The government actively promotes tourism as a major force behind economic expansion, appealing to foreign investors looking to capitalize on this sector. Furthermore, the push for manufacturing presents robust opportunities, particularly in consumer goods, textiles, and pharmaceuticals. The establishment of Special Economic Zones (SEZs) aims to attract manufacturers by providing favorable conditions, encouraging foreign companies to set up production facilities in Kenya.

As Kenya seeks to diversify its energy sources, there are significant opportunities in renewable energy projects. Investments in wind, solar, and geothermal energy align with global trends towards sustainable energy solutions, making this sector increasingly attractive for foreign investors. The financial services sector is also thriving, driven by a growing middle class and increased access to banking services. Opportunities exist in microfinance, insurance, and investment banking, with the regulatory environment becoming more favorable for foreign participation.

Finally, the government is actively seeking public-private partnerships (PPPs) to enhance service delivery and infrastructure development. This framework provides a collaborative investment approach, allowing foreign investors to partner with the government on various projects.

3.2. Challenges

Corruption and governance is a major bottleneck of FDI. Foreign investors are compelled to corrupt authorities in exchange for favors like expedited permission processing, which raises the cost of conducting business in Kenya. The investment ventures become less profitable and less attractive. Corruption creates unpredictable investment environment thus leading investors doubt or defers investments. Eroding trust in government institutions scares investors from committing more capital in a volatile business environment.

Regulatory uncertainty and complexity impact FDI in Kenya due to increased compliance costs. Potential Investors are deterred by exorbitant costs of which keep on increasing from time to time. Bureaucratic regulations and procedures create an avenue for informal payments and bribes. Logistical challenges such as bad transport networks hinder movement of equipment, raw materials and finished goods. Access to markets is slowed making harder for foreign companies to achieve their targets of production and distribution. High levels of terrorism, political instability and crimes scare potential investors over their safety concerns of their assets and personnel. Consequently, raising insurance premiums or denial of insurance coverage being perceived as high-risk. Limited talent or skills undermines workforce quality fit for foreign companies. Increased re-training costs on programs and upskill local employees can increase operational costs.

Recommendations

Strengthening anti-corruption frameworks and stricter laws to combat corruption. Enhancing transparency in procurement and building capacity of institutions for fighting corruption. Harnessing infrastructure, transport networks and business security is primary to promote foreign investments. Lastly, training and development of technological hubs, communication and electronic banking would promote knowledge and skills fitted for foreign investments.

4 Conclusion

The constitution of Kenya, 2010 and the Foreign Investment Protection Act, 2022 have created a favourable environment for foreign direct investment. Despite the potential benefits of FDI, such as technology transfer, and job creation, challenges such as infrastructure deficiencies, and corruption must be addressed to restore investors' confidence. Kenya has a potential to reposition itself as an attractive foreign investment destination if it addresses the challenges highlighted.

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