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The unfinished work of foreign investment protection in Africa

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In recent years, African states have taken several initiatives to increase the protection of and legal security offered to foreign investors. However, a lot of work is unfinished and some of it is even frustrated. Some examples.

1. Bilateral Investment Treaties

Bilateral investment treaties ('BITs') are critical to foreign investors considering investing in Africa. Such BITs grant foreign investors and their investments substantive protection, including the right to sue foreign governments if they can establish that they are nationals of one of the contracting states and have an 'investment' in the territory of the other contracting state.

To date, African states have entered into 767 BITs. This is the good news. The bad news, however, is that 338 of them, a staggering 44%, have not entered into force for lack of completing the ratification process.

Breaking down the BITs on the basis of the nationality of the counterparty, there is a substantial difference between the BITs signed with a non-African counterparty and those signed with an African one. Of the 622 BITs signed between an African and a non-African state, 64% are in force today and 36% are not. Of the 145 BITs signed between two African states, only 20% are in force and 80% are not.

These numbers suggest that, in general, non-African states ratify their BITs and make sure that the African counterparts do the same on their end. African states, on the contrary, seem to care far less about ratification and turning BITs into legally binding and enforceable commitments.

The situation is even more dramatic when the intra-African BITs are broken down geographically. Whereas most states in North and East Africa have ratified about 30% of their BITs, the Western, Central and Southern-Africa states have ratified less than 10% of their BITs with another African state.

II. Multilateral Investment Agreement

A frequently heard critique about the current generation of BITs, especially those concluded between developed and developing states, is that they cater only to the needs of the capital exporting state. These BITs would have the protection of the interests of the foreign investor as their sole stated objective, to the detriment of the host state's right to regulate and govern to further public interests, protect human rights and foster sustainable development.

It is against this background that the then nineteen member states of the Common Market for Eastern and Southern Africa (‘COMESA’) adopted in May 2007 a multilateral Investment Agreement for the COMESA Common Investment Area (‘CCIA Agreement’). The signing parties included Burundi, Comoros, DRC, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

The CCIA Agreement seeks to offer a new model of and approach to investor-state arbitration, taking the realities and sensitivities of developing African states far more into account than traditional BITs. For example, to qualify as a protected investor, criteria such as the amount of investment brought into the host state, the number of jobs created, its effect on the local community and the length of time the business has been in operation are examined. Also in terms of substantive rights, the CCIA Agreement departs from the ‘traditional’ BITs. For example, it provides for a degree of flexibility in the interpretation of the fair and equitable treatment standard based on the level of development of the host state.

Had the CCIA Agreement entered into force, it would have been an important new instrument in the protection of African companies investing in Africa and foreign controlled subsidiaries duly incorporated and operating out of Africa. However, it did not. The CCIA Agreement required the ratification by six states and six years after its signing this threshold has still not been met.

It is unlikely that this will change any time soon as the CCIA Agreement is not even mentioned anymore on the official website of COMESA. Therefore, this promising project appears to have been abandoned.

III. <u>SADC Tribunal</u>

Fifteen African states are members of the Southern African Development Community (SADC), established by the SADC Treaty in 1992. They include Angola, Botswana, DRC, Lesotho, Malawi, Madagascar, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

The SADC Tribunal is the judicial arm of this regional economic community. The SADC Tribunal has jurisdiction over disputes between natural or legal persons and a SADC member state in relation to the interpretation and application of the SADC Treaty. Article 4 of the SADC Treaty provides that SADC member states are required to act in accordance with ‘principles of human rights, democracy and the rule of law’.

As demonstrated in *Mike Campbell v. Zimbabwe* (Case No SADCT 2/07), the SADC Tribunal has jurisdiction over claims of expropriation of property in breach of the rule of law and of racial discrimination. In a decision of 28 November 2008, the Tribunal found the Government of Zimbabwe in breach of its treaty obligations and ordered it to protect the investments and pay the evicted farm owners a fair compensation.

Whereas this decision was hailed by the international community and perceived as an important precedent in the protection of investors in the region, it came as a shock to the SADC member states who subsequently suspended the activities of the SADC Tribunal until further notice. At this moment in time, there are no judges anymore and the SADC Tribunal is not receiving any new cases until a new Protocol on the SADC Tribunal has been adopted by the SADC members.

At the 32nd Session of the Summit of the Heads of State and Government of SADC, held on 17 and 18 August 2012, the member states rejected a report of their respective Attorney Generals on the subject matter and postponed their decision on a new Protocol for an undetermined period of time. It is, however, unlikely that any new Protocol, whenever it will be adopted, will grant jurisdiction to the SADC Tribunal to hear claims from individual investors.

IV. Other international courts

The African Court on Human and Peoples' Rights is an international court established to ensure protection of human and peoples' rights in Africa. It was established in June 1998 by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. To date, fifteen years later, only twenty-six states or just half of the fifty-one signatories have ratified the Protocol.

The African Court on Human and Peoples' Rights has jurisdiction over disputes concerning the interpretation and application of the African Charter on Human and Peoples' Rights. Article 14 of the Charter guarantees the right to property. It may only 'be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws'. Individual investors who would see their property forcefully expropriated by an African state, could therefore bring a claim before the African Court on Human and Peoples' Rights, but only to the extent that the latter has effectively ratified the above-mentioned Protocol.

In 1999, the then fifty-three African states established the African Union ('the AU') to accelerate the process of integration on the African continent. The principal judicial organ of the AU is the Court of Justice of the African Union, established by the 2003 Protocol of the Court of Justice of the African Union. The Protocol was ratified by only sixteen, or just over a quarter, of the member states.

Concerned over the growing number of AU institutions that the member states could not afford, the AU decided in 2008 to merge the African Court on Human and Peoples' Rights and the Court of Justice of the African Union and create the new African Court of Justice and Human Rights. This new Court was established by a 2008 Protocol which requires the ratification by fifteen member states so as to enter into force. To date, only three member states have ratified the 2008 Protocol, i.e. Burkina Faso, Libya and Mali. The African Court of Justice and Human Rights is therefore not in place yet.

V. Conclusion

African states are aware that foreign investors require legal protection and they have taken numerous initiatives to provide that protection. They have signed over 750 BITs, adopted a multilateral investment agreement within COMESA, set up an international tribunal within SADC and established another three international tribunals within the African Union. All of these instruments entitle investors, Africans and others, to bring proceedings, in one form or another, against the host state if they believe that their rights have been violated. This is at least the theory.

In practice, however, the picture is very different. 338 BITs, or 44 %, are not ratified and therefore not in force. The multilateral Investment Agreement appears to have disappeared completely. The SADC Tribunal was suspended as soon as the SADC member states realised its potential. The various Protocols establishing the international tribunals are ratified by only a minority of the African states, if at all.

If African states want to offer investors a better protection, both in their own interest and in the interest of the investor, and want to play a more significant role in the arena of international law, they can do so very quickly. They do not have to go back to the drawing board and start all over again. They can simply commit to what they have already agreed to, by ratifying a substantial part of the outstanding BITs and Protocols and by making the necessary funds and human resources available to equip the various tribunals that are waiting to take up their position.

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