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Investor Obligations: Africa Leads the Way

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Africa is in the vanguard of investor obligations in international investment law. As it prepares to seek a continental investment code for the second time, it finds itself at a crossroads. In tracing the emergence and trajectory of investment instruments toward the historic juncture to which Africa presently arrives, one glimpses the promise of a new economic equilibrium in investor-State dispute settlement. This post examines the development of investor obligations in African investment instruments. It first notes that investment arbitration was, at its time of genesis, undeniably reciprocal in orientation. Second, the post demonstrates that African instruments to date offer a groundbreaking path with respect to regulation of investor conduct. Third, the post suggests that Africa is, in consequence, eminently suited to achieve reciprocity of obligations in the forthcoming investment protocol of its Continental Free Trade Area.

Reciprocal Origins of Investor-State Dispute Settlement

The beginning of the tale is well known. Following an unraveling of world trade owing to the ravages of two World Wars punctuated by the dramatic contractions of a global pandemic and Great Depression, courageous merchants and investors embarked upon renewed global ventures. As an era of decolonization dawned, northern interests sought to elaborate a newly emergent international economic law, and their efforts to universalize legal standards safeguarding foreign capital culminated in the Abs-Shawcross Draft Convention on Investments Abroad of 1959. While that initiative would fail, what is hailed as the first investment treaty was concluded in that year between then-West Germany and Pakistan, ushering in a paradigm of bilateral instruments that largely endures to this day.

In the 1960s, States furthered the enterprise by establishing in the ICSID Convention a procedural framework for the hearing of investment claims, accompanied by a dedicated administering institution at the World Bank. The chosen mixed-claims model, earlier forged in the interwar period at the Permanent Court of Arbitration, sought to de-politicize investment disputes by supplanting the aggrieved investor's pursuit of espousal in diplomatic protection. Instead, the investor would be granted a direct right of action before a neutral international tribunal, an innovation deemed better suited to escape denial of justice or use of armed force.

Less often recalled is the intrinsically reciprocal vision of the Convention's framers. In their own words, the Convention "permits the institution of proceedings by host States as well as by investors," with its provisions being "equally adapted to the requirements of both cases." This truth

is evident on the face of the Convention itself, and African States were early and eager actors in its signing and ratification. In the very first treaty instrument to confer jurisdiction upon the Centre, the Netherlands and Indonesia in 1968 provided that "[t]he Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment, shall assent to any demand on the part of such national and any such national shall comply with any request of the former Contracting Party, to submit, for conciliation or arbitration, to [ICSID] any dispute that may arise in connection with the investment." Yet, "[t]he language referring to the national's compliance with a host state demand for arbitration quickly disappeared"[1] from similar provisions in successive generations of investment treaties.

Meanwhile, the *Institut de Droit International* has recorded by its latest resolution that "[b]oth the State and the investor are equally entitled to submit a claim in relation to an investment to a tribunal, subject to the terms of the instrument of consent, interpreted in accordance with the principle of the equality of the parties," this latter being "a fundamental element of the rule of law that ensures a fair system of adjudication" and, as such, "a general principle of law applicable to the procedure of international courts and tribunals."

Investor Obligations in African Treaties

African instruments offer a pioneering path to reclaim lost territory. Early traces of investor obligations may be found in the 1980 Unified Agreement for the Investment of Arab Capital in the Arab States and the 1981 Agreement on Promotion, Protection and Guarantee of Investments Among Member States of the Organization of the Islamic Conference, to which some half of the States party are African. Stepping into the twenty-first century, the 2006 Southern African Development Community Protocol on Finance and Investment requires investors to abide by the laws, regulations, administrative guidelines and policies of the host State. The 2007 Investment Agreement for the Common Market for Eastern and Southern Africa similarly requires investors to comply with all applicable domestic measures while expressly allowing for counterclaims by the host State, though it has never entered into force. A 2008 Supplementary Act of the Economic Community of West African States introduces elements including investors' obligations to conduct environmental and social impact assessments and to observe labor, human rights and corporate governance standards while expressly allowing the host State to raise a counterclaim or to initiate a unilateral claim opposable to the investor.

More recently, the 2016 Morocco-Nigeria bilateral investment treaty has garnered much attention in reaching beyond prior instruments to expressly include investors' post-establishment obligations such as maintenance of an environmental management system. The treaty has not yet entered into force. Lastly, the Pan African Investment Code (PAIC) (also of 2016) features numerous investor obligations, while also omitting guarantees of fair and equitable treatment or full protection and security. The text of the PAIC does not itself confer consent to arbitration and it is further declared non-binding, thus effectively assuming the role of a framework for further treaty-making.

The Investment Protocol of the African Continental Free Trade Area

Last year, the Agreement Establishing the African Continental Free Trade Area entered into force,

claiming its place amongst the most ambitious economic treaty projects of all time. Drafters and negotiators now turn their pens toward its anticipated investment protocol, which is envisioned to ultimately displace all intra-African instruments. In a recent joint report of the UN Economic Commission for Africa, the African Union, the African Development Bank and UNCTAD, this quartet of institutions has endorsed the adoption of investor obligations as one of four pillars of the protocol:

> "The international investment regime historically imposed obligations only on host States, not on private investors (Paulsson, 1995). However, as underscored by the PAIC, [international investment agreements] may serve as vehicles for investor rights and also for their obligations, which could rebalance the regime. Investor obligations can be a source for claims against transgressing investors and for counterclaims by defending States. The right to initiate proceeding may be bestowed upon the [host] State, its nationals or both (Amado, Kern and Rodriguez, 2017)."[2)]

In similar vein, the UNCITRAL Secretariat has recorded in a recent note that its Working Group III for Investor-State Dispute Settlement Reform "may wish to consider formulating provisions on investor obligations which would form the basis for a State's counterclaims," that such obligations "may relate to the protection of human rights and the environment, compliance with domestic law, measures against corruption and the promotion of sustainable development," and further that "[t]he Working Group may wish to consider whether the framework for counterclaims by respondent States could be expanded to allow for claims by third parties against investors."

It is ironic that the African States declined in the PAIC to mutually afford to each others' investors the privileges of protection and arbitral avenue so willingly opened to northern capital in generations prior. This phenomenon recalls the demise of the Abs-Shawcross and other multilateral initiatives. It is also a consequence of decline of the historical dichotomy between capital-exporting and capital-importing States, with sophisticated economies now doing both in uneven and varying degrees across the continent. The States thus face a dilemma of wishing to secure fundamental protections for their own investors abroad while also wishing to guard themselves against extravagant claims by foreign investors within their own territory, both being economically rational desires. Resultant tensions amongst States and between these two competing elements *within* States cause a sound solution to seem elusive, compounding the present confusion. The answer may lie precisely in crafting a calculated balance of investor rights and obligations, for only thus might one seek to square the circle of competing economic interests across and within the States, in greater accord with fundamental justice.

Conclusion

The optimal point of equilibrium (and the exit path from prevailing doctrinal confusion) might be found in allowing robust (but defined and delimited) investor protections while equally imposing countervailing investor obligations in international investment law. Africa offers a history that is made for this moment. It is uniquely situated to introduce such a model at a time when the world exigently seeks one, thereby heralding a return to the reciprocity that is arbitration's essence and propelling the progressive innovation of the mixed-claims model forward into a next generation.

Will Africa be the savior of investor-State dispute settlement?

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References

?1 Kenneth Vandevelde, *Bilateral Investment Treaties: History, Policy and Interpretation 458* (2010).

?2 The referenced works are Jan Paulsson, "Arbitration without Privity," *ICSID Review: Foreign Investment Law Journal* 10 (2) (1995) 232–257 and Jose Daniel Amado, Jackson Shaw Kern & Martin Doe Rodriguez, Arbitrating the Conduct of International Investors (2018).

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