AfCFTA, the Future Investment Protocol, and the Phasing-Out of Intra-African BITs

Kluwer Arbitration Blog
February 7, 2021

Arnaud Oulepo (University Cadi Ayyad)

Please refer to this post as: Arnaud Oulepo, 'AfCFTA, the Future Investment Protocol, and the Phasing-Out of Intra-African BITs', Kluwer Arbitration Blog, February 7 2021, http://arbitrationblog.kluwerarbitration.com/2021/02/07/afcfta-the-future-investment-protocol-and-the-phasing-out-of-intra-african-bits/

As Phase II negotiations of the African Continental Free Trade Area ("AfCFTA") have been delayed due to the COVID-19 pandemic, a draft legal text of the AfCFTA Investment Protocol ("Protocol") has not been submitted to the January 2021 Session of the Assembly, as originally expected. There are reasons to believe that with the recent start of trading under AfCFTA rules on January 1, 2021, Phase II negotiations will be positively sped up at best. According to insiders, the Protocol that will result from these negotiations is likely to be modelled on the Pan African Investment Code ("PAIC"), or at least embody some of the Code's key features. The Protocol will be an additional ingredient to the African spaghetti bowl of domestic investment laws/codes, regional investment-related instruments, and bilateral investment treaties (extra and intra-Africa). The co-existence of the Protocol and intra-African BITs might undermine the overall objective of harmonisation that is the focus for many African policymakers. The lessons learned from the European Union (EU) and intra-EU BITs has shown that increased integration creates a need for more harmonisation. This round of negotiation gives African States the opportunity to provide more predictability in the continental investment regime. This post proposes that African states should start with a clear phasing-out programme of existing intra-African BITs and the reasons for this approach are outlined below.

Oded Besserglik v Mozambique: A Reminder of the Status of Intra-Africa BITs

The *Besserglik* case can be described as a *cas d'école*, reminding investment arbitration actors of the importance of looking carefully to the conditions of entry into force of the BIT that they wish to rely on. In this case, the arbitral tribunal unanimously declared itself incompetent to hear the claims because the underlying instrument of consent – the Mozambique-South Africa BIT – was not in force, both States having failed to comply with their respective notification obligations as required by Article 12(1) of the BIT. Accordingly, the *Besserglik* case shed a light on the status of intra-African BITs. Some of these BITs were concluded back in the 1980s, 1990s, and are still awaiting ratification. Examples include the Tunisia-Mauritania BIT (1986), Tunisia-Mali BIT (1986), Egypt-Uganda BIT (1995) and Angola-São Tomé and Príncipe BIT (1995). Although Article 18 of the Vienna Convention on the Law of Treaties (VCLT) requires States not "to defeat the object and purpose of a treaty" prior to its entry into force, the importance of a valid consent to arbitration – as well as the limited claims that might be brought concerning inconsistency with Article 18 – makes difficult the invocation of this provision. To the best of this author's knowledge, no ISDS case to date has been brought on the basis of Article 18 of VCLT. According to UNCTAD IIA Navigator, out of 190 existing intra-African BITs, 130 are still not in force. Three main reasons, beyond the often-heard technical bureaucracy, may explain why African states have not set in motion the ratification process, or why these processes take so long.

Political agenda prioritised over economic diplomacy

A significant body of literature, particularly in the field of political science, links the conclusion of BITs to the existence of diplomatic relations between States, and describes investment treaties as a mean to consolidate those relations. Explaining why Ukraine was so eager to enter into a BIT with the United Kingdom in 1979, Lauge N. Poulsen declared "[…] BITs are often signed partly to promote foreign policy agendas […] or to tie in, diplomatic links between States". This explanation could be transposed to the African context, where one could question the real

intent of the State parties when signing intra-African BITs. Some of these countries probably did so with no motives of economic diplomacy at the time. In practice, BITs are often embedded in the large list of agreements government officials signed when on state visits.

The weak FDI flows between African States disincentivizes the ratification process

According to a recent study by the African Development Bank (AfDB), intra-Africa FDI from 2003 to 2017 was about USD 92.8 billion and allocated between four capital-exporting countries namely, Kenya (8%), Morocco (11%), Nigeria (9%), and South Africa (39%). Although encouraging, the study reminds us that intra-Africa FDI remains small, and confirmed the traditional axis of FDI which flows from North to South. When questioning the different treatment African States accord to intra-African BITs and those concluded with non-African parties, Gracious Avayiwoe, taking Ghana as a case study, suggests that the expected volume of FDI seems to be a determinant factor in the decision to ratify or not:

> *"One may find it quite puzzling why Ghana would eagerly conclude BITs and be unwilling to ratify them. As the majority of the unratified BITs are south-south – mostly intra-African – with the other contracting parties having same or weaker economic and political strength than Ghana, it could follow that the country attaches much importance to its north-south BITs – perhaps as a result of the envisioned investment volume that may arise therefrom – by ratifying them to the neglect of the south-south BITs."*

The impact of regional integration initiatives

The logic underlying the establishment of Regional Economic Communities (RECs), i.e., creation of a single market without discrimination, made redundant the need to maintain BITs between members of a same regional group, or even to ratify them because most RECs already provide instruments for investment protection with similar substantive rules.

Intra-African BITs: Rarely Invoked in ISDS

As a result of this lack of ratification, only 3 investment arbitration cases so far have been filed under intra-African BITs before ICSID, the world leading investment disputes resolution centre. These ICSID cases are now at different stages of the proceedings, with no significant prejudice should African States decide to implement a phasing-out plan:

- *Concluded*: Oded Besserglik v Mozambique (South Africa-Mozambique BIT);
- *Discontinued*: Courts (Indian Ocean) v Madagascar (Mauritius-Madagascar BIT); and
- *Pending*: LMTE Mauritius v Madagascar (Mauritius-Madagascar BIT).

The ICSID case figures should not overshadow that African States and investors also seek recourse before other fora, such as PCA or *ad hoc* arbitration under UNCITRAL Rules (for examples of cases filed under multilateral and regional agreements; see, e.g., *Kontinental Conseil Ingénierie v The Gabonese Republic*, filed under the OIC Investment Agreement; *Burmilla Trust and others v Lesotho*, filed under the SADC Investment Protocol).

A Roadmap for the Termination of Intra-African BITs

The question of intra-African BITs termination is not new as such; it has been discussed among African States at least since 2015 at the time of the negotiation of the PAIC. In contrast with the EU, where the termination of intra-EU BITs was motivated by their alleged breach of EU law, in the African context termination would be in support of harmonisation. There is currently no formal transfer of competence to the African Union or the RECs to conclude investment agreements on behalf of their member States.

The minutes of the Meeting of Experts on the consideration of the Pan African Investment Code held in Kampala (30 November – 2 December 2015) raised this issue for the first time: “it was observed that Member States may agree to replace intra-Africa BITs or investment chapters in intra-Africa trade agreements after a period determined by the Member States”.

In the same vein, Article 3(2) of PAIC reads as follows:

“*Notwithstanding paragraph 1, Member States may agree that this Code* [PAIC] *could be reviewed to become a binding instrument and to replace the intra-African bilateral investments treaties (BITs) or investment chapters in the intra-Africa trade agreements* ***after a period of time determined by the Member States* (1)** *or* ***after the termination period as set in the existing BITs and investment chapters in the trade agreements* (2)**” (emphasis added)

Option 1, that is “after a period of time determined by the Member States”, requires political will. It could be implemented by either (i) an African Union Declaration inviting States to proceed with the termination of intra-African BITs (whether in force or just signed) following the entry into force of the AfCFTA Investment Protocol; or (ii) an article contained in the Protocol itself urging States within a precise timeframe (e.g. 5 years) to dismantle existing intra-African BITs.

Recent news from the African Union suggests that African States may consider this option. During the 13th Extraordinary Session on the AfCFTA held on December 5, 2020, the African Union Ministers of Trade (AMOT) adopted a Draft Declaration on the Risk of Investor-State Dispute Settlement. According to insiders, the Draft Declaration provides for a mutual temporary suspension of ISDS provisions in BITs (although not yet public, discussions around the Declaration suggest that the suspension might apply to both intra and extra-African BITs), among other measures of mitigation to protect themselves against any claims for measures they could have taken in dealing with the pandemic. The Declaration is a significant impetus toward a broader complete phasing-out of intra-African BITs.

When considering Option 2, “*after the termination period as set in the existing BITs and investment chapters in the trade agreements*”, States might want to add in an “Intra-African BITs Termination Agreement” particular wording so as to exclude the effects of the “sunset clauses” contained particularly in BITs, which may extend the substantive provisions of the BITs for additional 5 or 10 years, just as the EU Member States did.

Concluding Remarks

What should be the role of the AfCFTA Investment Protocol in the pyramidal structure (domestic, regional, and continental) of investment regulation on the

continent? The question will be at the centre of the negotiation of the Protocol. For the sake of harmonisation and predictability, States should consider a phasing-out of intra-African BITs. A majority of them being unratified, and quite a few of them having been invoked in ISDS cases, African States are in much better position than their EU counterparts, should they want to proceed with this option. The last hurdle to face is a matter of *realpolitik*, whether major African capital-exporting countries would agree on terminating their intra-African BITs. As an example in the midst of the Ethiopian Tigray crisis, Egyptian investors which suffered from the conflict are reportedly considering suing Ethiopia under the Egypt-Ethiopia BIT, if an amicable solution is not found. The challenge is surmountable provided that the Protocol, once adopted, is ratified in a very short period of time by all signatory parties.