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The Africanisation of Rule-Making in International Investment Arbitration

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For AfricArb

The evolution of foreign direct investment in the African continent

The African continent has been an important recipient of foreign investment for many decades, with a significant rise in such investment being witnessed in the last 15 years. The economic growth, the limitation of regulatory barriers and importantly the high rates of return have rendered many African countries very attractive investment destinations, including from new economic powers such as China, whereas intra-African foreign investment is also on the rise.

These developments are reflected in the legal framework for the protection of foreign investment in the African continent. African States have always played a key role in the development of the investment protection and investor-State dispute resolution system. In recent years, however, and in parallel with the development of intra-African foreign direct investment, African countries have taken a more active role in the rule-making process of international investment law, notably at the regional and at the continental levels, searching to strike a new balance between promotion and protection of international investments on the one hand, and safeguarding public policy objectives on the other. African States adapt international investment rules to their context, needs and realities and at the same time are pioneers in standard-setting activity in international investment protection.

The AfricArb Launching Conference in Paris

The development of new investment protection standards in the African continent was discussed at the inaugural conference of AfricArb, a non-profit organisation of young practitioners sharing a common interest in arbitration in Africa [1)].

The conference, “Arbitration in Africa: Quo Vadis?”, was held in Paris on 14 June 2018. Professor Makane Mbengue from the University of Geneva raised the question of the “Africanisation” of investment arbitration, through the development of a new generation of investment protection instruments. Other speakers also discussed points relating to the development of new norms of investment protection. Professor Emilia Onyema focused on the need to respect local legal traditions when promulgating relevant rules as well as when selecting arbitrators in investment disputes, Dr. Mohamed Abdel Wahab referred to South Africa’s 2015 Protection of Investment Act

and to the recent Morocco-Nigeria BIT, which contain a series of novel provisions, aiming at combining investment protection and safeguarding public policy goals. Finally, Dr. Marie-Andrée Ngwe discussed recent reforms to the OHADA arbitration system, which now provides an additional platform for the resolution of investment disputes.

A live video-recording of the AfricArb conference can be found at AfricArb's Facebook page.

The MultiLayered Regulation of Investment Protection in Africa

The new norms of foreign investment protection are developed within a multi-layered system of protection:

– at the national level, investment codes adopted by African countries;

– at the bilateral level, BITs concluded between African countries and other countries, whether African or not;

– at the regional level, investment rules and model investment treaties enacted by the different regional economic communities in Africa; and

– at the continental level, the Pan-African Investment Code, adopted as a model instrument.

National and Bilateral Level: Recent Steps Towards a Paradigm Shift

Until recently, there has been no substantial effort towards modernization or innovation at the national level, where almost all of the current investment codes of African countries follow the classic model of protection of international investments. The 2015 South African Protection of Investment Act is an exception, as it provides for a significantly limited protection of foreign investment and puts emphasis on policy objectives of the State. For example, the investors are awarded "fair administrative treatment" (rather than fair and equitable treatment (FET)), physical protection and security and national treatment, for the assessment of which environmental considerations and rights of local communities are also to be taken into account. Disputes are to be resolved by national courts or by mediation, whereas the State may enter into arbitration agreements subject to the exhaustion of local remedies.

Similarly, the majority of BITs concluded by African countries contain no specificity and afford the classic standards of protection contained in BITs signed in the last 40 years. The notable exception is the BIT signed in 2016 between Nigeria and Morocco (the BIT has been ratified by Morocco and awaits ratification by Nigeria). It focuses not only on the protection but also on the facilitation of foreign investment. It establishes a Joint Committee which monitors the application of the treaty and facilitates prevention and settlement of disputes. Finally, the BIT imposes a wide range of obligations to investors, relating for example to the protection of human rights and the environment, and the respect of corporate social responsibility standards.

An effervescent regulation at the regional level

At the regional level, an intense activity in the elaboration of new rules can be observed. In the words of Professor Mbengue: "*Now we can talk about the "African exception" in investment law and the 'Africanisation' of the international investment law*".

Notable regional initiatives are the following:

– the member States of the Common Market for Eastern and Southern Africa (COMESA) adopted the COMESA Common Investment Area in 2007 (CCIA), which was the first investment agreement in Africa that attempted to limit the scope of protected investments (for example by protecting only substantial economic activity in the host country), to "rationalize" the standard State obligations towards foreign investors, and at the same time that aimed at preserving the interests of local communities;

– the Economic Community of the Western African States (ECOWAS) adopted the Supplementary Act on Common Investment Rules for the Community in 2008, which imposed a series of obligations on investors while limiting the "standard" investment protections (for instance no direct access to international arbitration);

– the Southern Africa Development Community (SADC) adopted in 2012 a Model Bilateral Investment Treaty, which is meant to contribute to the harmonisation of the investment regimes in the region and to the harmonisation with the Pan-African Investment Code (see below). The Model BIT goes beyond the protection of foreign investment and stresses that investment must contribute to the sustainable development of the host country, recommends avoiding the inclusion of the FET standard (even if reduced to the customary minimum standard of treatment of aliens) and suggests an alternative "fair administrative treatment";

– the East African Community (EAC), COMESA and SADC launched in 2015 the Tripartite Free Trade Area (TFTA). The parties are preparing the negotiation of Phase II, which includes the adoption of rules on cross-border investment.

Continental Level: Where the Future Lies

It is obvious that the foreign investment promotion and protection in Africa, even though fostering ground-breaking initiatives, is also a complex system, marked by fragmented and often overlapping regulations, that may be contradictory, and constitute a challenge for investors.
In this context, the African Union, which aims at enhancing the political and socio-economic development of its member States, launched in 2008 the elaboration of the Pan-African Investment Code (PAIC).

Adopted in 2015, it reflects the trend of "Africanisation" of international investment law. It forms part of the new generation of investment promotion and protection instruments calling for a balance between the rights and obligations of investors and States. Notable features of the PAIC are the following:

– providing for the possibility for African States to replace intra-African BITs or regional investment instruments with the PAIC;

– focusing on facilitation of foreign investment, and not only its protection. Importantly, investments which are granted protection are those which will foster long-term sustainable development and will meet the needs of African societies;

– providing new obligations for investors (due diligence, human rights protection, corporate social responsibility and sustainable use of natural resources);

– limiting investment protection standard (notably omitting the classic FET standard of investment protection); and

– providing for the States' possibility to submit counterclaims in arbitration proceedings.

No consensus has been reached for the adoption of the PAIC, which instead of a binding document applies as a source of inspiration and a model that the African States may turn to when updating their national legislations or concluding international investment treaties. However, the PAIC presents the major advantage of being addressed to all African States, and thus promoting the harmonisation of investment protection in the African continent.

A future – and most welcome – step in the direction of the modernisation of investment protection and at the same time its harmonisation is the negotiation of an investment protection chapter in the recently concluded Continental Free Trade Area. Hopefully, major developments lie ahead!

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References

?1 The group’s founding members are Guillaume Areou of Reed Smith; Sylvie Bebohi of APAA; Diamana Diawara of the ICC International Court of Arbitration; Capucine du Pac de Marsoulies and Martin Tavaut of Jeantet; Clément Fouchard of Linklaters; Thomas Kendra of Hogan Lovells; Tsegaye Laurendeau of Shearman & Sterling; Athina Papaefstratiou Fouchard and Wesley Pydiamah of Eversheds Sutherland; Andrea Lapunzina Veronelli of DLA Piper; Paul-Jean Le Cannu of ICSID; John Picarel Pechdimaldjian of CMS Francis Lefebvre Avocats; Julie Spinelli of Derains & Gharavi and Gregory Travaini of Herbert Smith Freehills. Coming from different backgrounds (private practice, arbitral institutions, academics) they are based in several jurisdictions

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