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The BIT Footprints of Emerging Market Economies in Africa: What Do They Portend for ISDS?

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Introduction

In a 2015 publication Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration, the United Nations Economic Commission for Africa opined that for countries in Africa:

> "[o]pportunities for signing BITs with non-African partners have largely been exhausted because new southern partners such as China and India prefer other modalities for engaging with Africa."

However, a careful review of all publicly available bilateral investment treaties (BITs) concluded since 2014 suggests that when it comes to the BIT footprint of emerging market economies in Africa, the landscape is a bit more complicated. Although countries like India and South Africa are rethinking their approach to investment treaty making, others appear to be moving in the opposite direction. Indeed, a survey of recent BIT practice of countries like Turkey, the United Arab Emirates (UAE), and Brazil reveals a decidedly African orientation.

What about China? Although the pace of the conclusion of China-Africa BITs has slowed down, China has concluded more BITs with countries in Africa than most of Africa's traditional partners.[1)] The growing number of BITs between countries in Africa and emerging market economies raise questions about the role of emerging markets economies in international investment law rule-making and about future trends in investment treaty arbitration.

BITs Between African States and New Southern Partners: The Emerging Landscape

A review of the BITs that countries in Africa have concluded since 2014 suggests that countries like Turkey, Brazil, and the UAE are concluding BITs with countries in Africa at a significant rate. Overall, the record shows that:

- Since 2014, Turkey has concluded thirteen (13) BITs with countries in Africa (Chart # 1).
- Since 2014, the UAE has concluded fifteen (15) BITs with countries in Africa (Chart # 2).
- Since 2015, Brazil has concluded five Agreements on Cooperation and Facilitation of Investments (ACFI) with countries in Africa (Chart # 3). Indeed, Brazil's first and only "in-force" investment treaty is with an African nation – Angola (Chart # 3).
- China has not concluded a BIT with an African state since 2013. However, having concluded BITs with at least 32 countries in Africa, China ranks No. 2 (after Germany) in terms of the number of BITs with countries in Africa.
- Intra-African BITs are also increasing. For example, since 2014, Morocco has concluded BITs with seven (7) other countries in Africa.
- Although the South African government has terminated South Africa's BITs with at least eleven countries, South Africa's BITs with four African nations – Zimbabwe, Nigeria, Senegal, and Mauritius – were not terminated and remain in force. There are also about ten unratified BITs between South Africa and other countries in Africa.

Chart 1: Turkey-Africa BITs Since 2014

No.	**Short Title**	**Date of Signature**	**Date of Entry into Force**	**ISDS (?)**
1.	Zambia-Turkey BIT	28/07/2018	—	Yes
2.	Mali-Turkey BIT	02/03/2018	—	Yes
3.	Mauritania-Turkey BIT	28/02/2018	—	Yes
4.	Turkey-Tunisia BIT	27/12/2017	—	Yes
5.	Turkey-Chad BIT	26/12/2017	—	Yes
6.	Burundi-Turkey BIT	14/06/2017	—	Yes
7.	Turkey-Mozambique BIT	24/01/2017	—	Yes
8.	Rwanda-Turkey BIT	03/11/2016	—	Yes
9.	Somalia-Turkey BIT	01/06/2016	—	Yes
10.	Ghana-Turkey BIT	01/03/2016	—	Yes
11.	Cote d'Ivoire – Turkey BIT	29/02/2016	—	Yes
12.	Sudan-Turkey BIT	03/04/2014	—	Yes
13.	Kenya-Turkey BIT	08/04/2014	—	Yes

Source: Source: UNCTAD Investment Policy Hub – https://investmentpolicy.unctad.org/

Chart 2: UAE-Africa BITs Since 2014

No.	**Short Title**	**Date of Signature**	**Date of Entry into Force**	**ISDS (?)**
1.	Gambia-UAE BIT	15/07/2019	—	Yes
2.	UAE-Zimbabwe BIT	16/06/2018	—	Yes
3.	Mali-UAE BIT	06/03/2018	—	Yes

4.	Rwanda-UAE BIT	01/11/2017	—	Yes
5.	Uganda-UAE BIT	01/11/2017	—	Yes
6.	Angola-UAE BIT	05/04/2017	—	Yes
7.	Burundi-UAE BIT	06/02/2017	—	Yes
8.	Ethiopia-UAE BIT	03/12/2016	—	Yes
9.	Equatorial Guinea-UAE BIT	19/10/2016	—	Yes
10.	Nigeria-UAE BIT	18/01/2016	—	Yes
11.	Mauritania-UAE BIT	2015	12/04/2016	Yes
12.	Senegal-UAE BIT	22/10/2015	—	Yes
13.	Mauritius-UAE BIT	20/09/2015	28/12/2017	Yes
14.	Comoros-UAE BIT	26/03/2015	29/11/2017	Yes
15.	Kenya – UAE BIT	23/11/2014	05/06/2017	Yes

Source: UNCTAD Investment Policy Hub –https://investmentpolicy.unctad.org/

Chart 3: Brazil-Africa BIT Since 2014

No.	**Short Title**	**Date of Signature**	**Date of Ratification**	**ISDS (?)**
1.	Brazil-Morocco BIT	13/06/2019	—	No
2.	Brazil-Ethiopia BIT	11/04/2018	—	No
3.	Brazil-Malawi BIT	25/06/2015	—	No
4.	Brazil-Angola BIT	11/04/2015	11/10/2017	No
5.	Brazil-Mozambique BIT	30/03/2015	—	No

Source: UNCTAD Investment Policy Hub –https://investmentpolicy.unctad.org/

Emerging Market Economies, African States and ISDS: Key Questions

BITs between countries in Africa and emerging market economies outside the continent raise questions about the role of emerging economies in the development of international investment law and in investor-State dispute settlement (ISDS) in particular. For example:

- In their BITs, are emerging market economies merely conforming to the norms and standards established by developed countries or are they changing these norms in fundamental ways?
- In their recent BITs, are emerging market economies adopting a monolithic approach or are they carving their own respective paths?
- Given the reported crisis in ISDS, are emerging market economies omitting ISDS from their recent BITs and if so, what are they replacing it with?
- In their foray into Africa's FDI space, what role might ISDS play in managing the activities of emerging market economies in the continent?

Emerging Market Economies, African States and ISDS: Emerging Trends

A review of the BIT footprint of some emerging market economies in Africa reveals that regarding ISDS, although ISDS is still very popular, emerging market economies are not adopting a monolithic approach, but are carving their own respective paths. Overall, several conclusions can be drawn.

First, all recent BITs between Turkey, UAE, China and countries in Africa provide for ISDS.[2)]

Second, regarding Brazil, none of the five recent BITs between Brazil and countries in Africa provide for ISDS. For example, the Brazil-Malawi BIT does not provide for ISDS but rather creates a Joint Committee that is responsible for the administration of the agreement. One of the tasks of the Joint Committee is to:

> '[r]esolve any issues or disputes concerning Parties' investments in an amicable manner'.

Third, emerging market investors appear to welcome ISDS and are not shying away from utilizing ISDS. In their dealings with States in Africa, ISDS has been triggered by numerous investors including investors from South Africa (*e.g*. *AngloGold Ashanti (Ghana) Limited* v. *Republic of* Ghana*)*, UAE (*e.g*. *DP World v. Djibouti*) and Mauritius (*e.g*. *LTME Mauritius Limited and Madamobil Holdings Mauritius Limited v. Republic of Madagascar*.

Fourth, competition between emerging market economies for influence in Africa will intensify in the coming years and resort to dispute settlement mechanisms will likely increase as well. Already emerging market multinationals (EMNCs) are beginning to compete amongst themselves for lucrative contracts in Africa, as demonstrated by ongoing legal battles over who gets to control port terminals in Djibouti. The case of *D.P. World v. Djibouti* discussed here, pits Middle East port giant, DP World, against the government of Djibouti and a Chinese conglomerate, China Merchants Port Holdings Company. When Djibouti terminated a concession agreement with DP World to operate a port terminal, DP World filed claims with the London Court of International Arbitration. The same case is also playing out in Hong Kong's high court (discussed here and here).

Conclusion

The global corporate landscape is going through a fundamental transformation thanks to emerging market multinational companies ("EMNCs). According to a 2015 report Playing to win: The new global competition for corporate profits *("Playing to Win")***,** since 1990, emerging economies have launched more than 17,000 large companies. Moreover, by 2025, EMNCs will account for more than 45 percent of the Fortune 500. Significantly, EMNCs are not content with operating in their home markets but are going overseas.

According to Playing to win:

> "[i]n the past decade, the 50 largest firms from emerging economies have doubled their share of revenue from overseas activity from 19 percent to 40 percent."

In the Asian Development Outlook 2011: South-South Economic Links, the Asian Development Bank declared that:

> "prospects are bright for the South to promote growth and productivity by improving market-oriented links that facilitate the exchange of goods and services as well as capital investment flows and transfers of technology."

The increased role of emerging market partners in Africa was noted in the African Economic Outlook 2011: Africa and Its Emerging Partners.

The role of emerging market economies in the global economic system is shifting from that of capital-importers to that of both capital-importers and capital-exporters, and their interests (both defensive and offensive) are changing as well. The shifting and changing role of emerging market economies in the global economy raises important questions about the continued relevance of the fundamental principles that underpin the South-South Cooperation discourse such as the principles of respect for national sovereignty, independence, equality and equity, mutuality of benefit, mutual respect, and partnership.

These principles can be found in instruments such as the Joint Declaration of the Seventy-Seven Developing Countries (1964), the Buenos Aires Plan of Action for Promoting and Implementing Technical Cooperation among Developing Countries (1978); the Havana Declaration and the Programme of Action of the First South Summit (2000); and the Marrakech Framework for the Implementation of South-South Cooperation (2003).

Despite debates about crisis in investment treaty arbitration, most emerging market economies are concluding BITs that provide for ISDS and EMNCs appear to welcome ISDS. Significantly, recent BITs between emerging market economies and other developing countries tend to be modelled on traditional BITs and do not generally reflect core principles that underpin the South-South Cooperation agenda.

With the changing role of emerging market economies in the global economy and pressures from their own domestic constituencies, commitment to South-South cooperation is clearly waning. In the future, we are likely to see challenges to the notion of South-South cooperation, attempts to redefine and reimagine South-South cooperation principles, a gradual erosion of South-South cooperation agenda, as well as a weakening of the mechanisms for promoting South-South cooperation.

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uncover potential conflicts of interest.

References

?1 Uche Ewelukwa Ofodile, *China-Africa Bilateral Investment Treaties: A Critique*, 35(1) Michigan Journal of International Law 131 (2013).

?2 Uche Ewelukwa Ofodile, *Emerging Market Economies and International Investment Law: Turkey-Africa Bilateral Investment Treaties*, 52(4) Vanderbilt Journal of Transnational Law 949 – 1060 (2019).

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