Cote-d'Ivoire Investment Code Amendments: Regaining Control over Investment Dispute Settlement

Kluwer Arbitration Blog
May 20, 2020

Arnaud Oulepo (University Cadi Ayyad)

Please refer to this post as: Arnaud Oulepo, 'Cote-d'Ivoire Investment Code Amendments: Regaining Control over Investment Dispute Settlement', Kluwer Arbitration Blog, May 20 2020, http://arbitrationblog.kluwerarbitration.com/2020/05/20/cote-divoire-investment-code-amendments-regaining-control-over-investment-dispute-settlement/

In less than a decade, the Republic of Côte-d'Ivoire enacted two investment laws (2012 and 2018). The latter one recently amended, reflects the best practices the country has learned from its previous investor-states disputes. On December 18, 2019 the Council of Ministers introduced some amendments to the 2018 Investment Code related *inter alia* to VAT exemption, financial incentives subject to local content criterion among others, but most importantly to reaffirm Côte-d'Ivoire's commitment to respect the different treaties (BITs) it entered into, while establishing the Court of Arbitration of Côte-d'Ivoire as the competent body for resolving Investor-State disputes. These latest developments can be read as Côte-d'Ivoire's efforts to regain control over its international investment law policy, and the implementation of a Pan African objective consistent with the emergence and promotion of domestic or regional African-based dispute resolution centres.

The 2012 Investment Code 'not a wonder of clarity'

The case *Societé Resort Invest Company Abidjan, Stanislas Citerici, Gerard Bot v.*

The Republic of Côte-d'Ivoire, while pending, is the one which set in motion the changes to the investment law this post addresses. Indeed in this case, there was a discussion among the members of the tribunal as to how the State consent (Article 20, 2012 Investment Code) to ICSID arbitration should be interpreted. For the majority in its *Decision on Jurisdiction*, the consent to ICSID arbitration contained in Article 20 of the 2012 Investment Code could not be interpreted as requiring investors to elect in advance in the "dossier d'agrement" (translated as investment approval file) their preferred *forum* for dispute resolution (either local court or ICSID arbitration). Such interpretation according to the tribunal would be an "injustice" to investors, as the "dossier d'agrement" itself did not mention any disputes resolution mechanism (*See* para.139-140, *Decision on Jurisdiction*). Recognizing that investors are to be shielded from legal uncertainty notably a misinterpretation of Article 20, the tribunal made the following recommendation (*See* para.157, *Decision on Jurisdiction*):

> *As this is reported to be the first ICSID arbitration arising on the basis of the 2012 Code, it may be that the Côte d'Ivoire has not yet had the occasion to revisit the text of Article 20 since its promulgation. If the Côte d'Ivoire, upon receipt of the Tribunal's decision, maintains its disagreement with the majority of the Tribunal's analysis, then its remedy can be swift and straightforward: it can introduce amendments to Article 20 of the 2012 Code and to its model "demande d'agrément" with the effect that prospective investors will be in no doubt as to manner in which they are to convey their consent to ICSID arbitration.*

The recommendation prompted the enactment of the 2018 Investment Code which in terms of dispute resolution seemingly closed the way to international arbitration and went beyond the tribunal suggestions. It is worth reminding that Article 20 of the 2012 Investment Code provided for arbitration under ICSID Convention. The 2018 Investment Code removed the offer to arbitrate pursuant to ICSID Convention, and provided for amicable settlement of the dispute to be conducted under the UNCITRAL Conciliation Rules within a year (article 50). In case of failure to reach an agreement, the parties may bring their dispute before the Common Court of Justice and Arbitration (CCJA) of OHADA Members States. After the infamous *Getma v Guinea*, OHADA launched significant initiatives to be a viable alternative for the resolution of international investment disputes. The latest OHADA Arbitration Rules (2017) is proof of this ambition.

The Amended 2018 Investment Code: A Nationalist Approach

Of importance among the changes brought to the 2018 Investment Code is the dispute resolution provision which is narrower than the previous one. Through these amendments, Cote-d'Ivoire seems to adopt a nationalist approach towards dispute resolution mechanism.

The new Article 50 of the 2018 Investment Code still provides for the amicable settlement of any disputes between an investor and the State within a period which should be no longer than twelve months (Paragraph 2 and 4). Contrary to the old version, it does not mention any rules of procedures (e.g. UNCITRAL Conciliation Rules) under which the amicable settlement should be conducted.

The reading of Paragraphs 4 and 5 suggest that parties may choose to submit their dispute either to the competent Ivorian domestic jurisdiction or to an arbitration procedure administered by the Court of Arbitration of Côte-d'Ivoire. This nationalist approach is also evidenced by the fact that the OHADA Common Court of Justice and Arbitration does not appear among the choice of *forum*. A fork in the road provision in the same paragraph prevents investors from pursuing parallel proceedings.

Following the suggestion made by the tribunal in *Societé Resort Invest Company Abidjan, Stanislas Citerici, Gerard Bot v. The Republic of Côte-d'Ivoire*, paragraph 5 requires investor to hand over to the agency in charge of investment promotion the selection of his preferred dispute resolution mechanism. Among the substantive rules of investment promotion Article 25 recognizes the State' powers to implement measures favoring local entrepreneurship. Such measures should not prevent it from respecting its obligations to provide a national treatment as mentioned in the different international investment treaties it entered into.

The wording in the amended version of the 2018 Investment Code is unclear in that the recourse to the Court of Arbitration of Côte-d'Ivoire is optional or mandatory.

Established in 1997 with the support of the State, the Court of Arbitration of Côte-d'Ivoire has no public track-record in resolving investment disputes. Nevertheless, its selection as the competent body to resolve future investment disputes, express

the desire of Côte-d'Ivoire, and in some instance African countries, to promote domestic arbitration centres as an alternative to traditional foreign arbitration centres. This is what we term "the Pan African Arbitration Approach".

This approach refers to the recent trend that African investment-related disputes should be resolved by African arbitral institutions. Indeed with the regionalization of arbitration centres in African States, practitioners and academics have called upon to promote these institutions.

The Pan African Code of Investment encourages parties to solve their disputes through an African public or African private dispute resolution centre (Article 42.1(d)). Article 54(2) of ECOWAS Common Code of Investment (2018) advises States and investors to consider using 'regional and national alternatives dispute settlement mechanisms'. At the national level, some States like Egypt are following the same path and may look at establishing an 'Eqyptian Arbitration and Mediation Centre' (Article 91, Investment Law No. 72 of 2017) in the near future.

The amendments to the Investment Code go hand in hand with the review of Côte-d'Ivoire's international investment law policy.

Côte-d'Ivoire's initiatives towards a national policy of international investment law

Côte-d'Ivoire does not want to be aside of the global agenda of international investment law and international arbitration reform. From 9-11 April 2019 in Abidjan, a training in the field of investment agreement negotiation and implementation for at least 35 government representatives was led by IISD (International Institute for Sustainable Development). Two eminent African experts, Prof. Makane M'Bengue (Geneva Graduate Institute) and Dr. Suzy Nikiema (International Institute for Sustainable Development) chaired the training.

According to the General Director of Economy at Ministry of Economy and Finance, the training was a preliminary step towards a more global investment policy reform. Indeed, in his own words, some bilateral investment treaties signed and ratified by Côte-d'Ivoire are clearly outdated; one-sided agreements which no longer conform with country development goals. Through this training, Côte-d'Ivoire seems to adopt a proactive action towards investment arbitration and

international investment law.

On the international and regional level, the country is very active in the UNCITRAL Working Group III.

In the same vein, at the request of Côte-d'Ivoire UNCTAD conducted a review of its investment policy from February 2019 to November 30, 2019. The report released this year suggests at the medium term more clarification about Côte-d'Ivoire's consent to arbitration and conciliation. In the long term, the report recommends the abrogation of the investment code which is said to be unnecessary, the adoption of an investment treaty model, the review and cost-benefits analysis of all the BITs concluded, and finally the enhancement of the BITs negotiators skills.

The views expressed herein are those of the author alone and should not be regarded as representative of, or binding upon ICSID where the author is currently pursuing an internship, UNCTAD, The Ministry of Economy and Finance of the Republic of Côte-d'Ivoire, or any institution to which the author is affiliated. All the references mentioned in this article are in the public domain.