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The Sustainable Investment Facilitation Agreement Between the EU and Angola: A New Model for Investment Agreements?

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Early this year, the European Union ("EU") finalized the required internal procedures for the entry into force of the Sustainable Investment Facilitation Agreement concluded between the European Union and the Republic of Angola on 18 November 2022 ("SIFA" or the "Agreement").

This landmark agreement, the EU's first "sustainable investment facilitation agreement," could set a precedent for future EU agreements with other countries, particularly in Africa, aligning with the EU Commission's 2021 Trade Policy Review, which noted that the EU is the number one trading partner for Africa and underscored the importance of deepening engagement "with the African continent and African states" and fostering "closer economic integration of the two continents," notably in driving the green and digital transitions.

The following aspects of the SIFA are covered below in separate sub-sections: first, an account of the significance of this Agreement in the context of the trade relationship between Angola and the EU; second, an overview of the Agreement's scope of application; third, an analysis of its substantive provisions, with a particular focus on its Environmental, Social and Governance chapter; fourth, an analysis of the Agreement's dispute resolution procedures and the practical challenges that they raise; fifth, and finally, the conclusions to be drawn at this still early stage, which overall point to the SIFA being representative of a new age in investment agreements, where emphasis is placed on investment "facilitation," rather than on investment protection.

A Milestone for Sustainable Investment

The SIFA marks a significant shift in investment agreements, emphasizing sustainability and bilateral cooperation.

From Angola's perspective, this Agreement is to be viewed in the context of the country's objective to diversify its economy away from oil and gas and attract investment from the EU to other sectors, particularly agriculture, green energy, logistics, and critical materials. These policy objectives were already reflected in Angola's National Development Plan for 2018-2022, and were again reflected in the National Development Plan for 2023-2027. From the EU's perspective, it strengthens bilateral ties with Angola and heralds a new era of investment agreements that prioritize environmental, social, and governance ("ESG") standards and contain investment

facilitation measures, but exclude investor-state dispute settlement mechanisms.

Scope of Application

Differently from traditional investment agreements, the stated purpose of the SIFA is not only to foster foreign direct investment ("FDI") (Article 1), but also to do so in a manner that integrates environmental and labour standards, transparency, and corporate social responsibility.

The SIFA's scope of application is relatively narrow, applying only to measures adopted or maintained by the Parties affecting investments (Article 2). For this purpose, the notion of "measures" includes the passing of laws, regulations, and rules, as well as the adoption of procedures, decisions, or administrative actions, by any competent body, including central, regional, or local governments or authorities (Article 3(11) and (12)). It should also be clarified that the SIFA applies equally to EU investments in Angola and Angolan investments in the EU.

Substantive Provisions

In terms of substantive obligations, a few aspects are novel and specific to the SIFA.

First, the SIFA contains a most-favoured nation clause (a clause generally included in investment agreements with the purpose of ensuring that the investors of the States signing the agreement are treated by the State hosting their investment no less favourably than the investors of other countries). This protection does not, however, extend to the treatment afforded by international agreements that abolish substantially all barriers to investment or require the approximation of laws between the Parties (Article 4), an exclusion which was presumably meant to carve out the EU-UK Trade and Cooperation Agreement, that sets out preferential arrangements between the EU and the United Kingdom in many economic areas.

Second, the Agreement includes a set of 'procedural' obligations on Parties to enhance transparency and predictability in the application of measures. It mandates that measures of general application be administered in a reasonable, objective, and impartial manner (Article 6) and be published and made publicly available (Article 7). Additionally, it ensures that investors and other interested actors are given opportunities to comment on these measures (Articles 7 and 8). It requires States to have a website where the legal and regulatory framework on investments and the contact information of the relevant authorities is readily available (Article 9). Regarding authorization procedures, the SIFA requires the Parties to process applications objectively, impartially, and independently from undue influence, with clear, transparent criteria (Articles 19 and 21).

Overall, this focus on transparency is seen as crucial for building investor confidence and ensuring easy access to relevant local resources and information, as well as ensuring that regulatory changes do not come as unexpected shocks to the investment community.

Third, and importantly, the SIFA contains an entire chapter dedicated to ESG provisions with the stated objective of integrating sustainable development in the Parties' relationship and contributing to the achievement of the Sustainable Development Goals of the UN 2030 Agenda (Article 28(2)).

The SIFA further records the Parties' mutual recognition of the importance of combating climate change and states that each party shall implement the UNFCCC and the Paris Agreement (Article 32).

Article 29 provides that the Parties shall not reduce the level of protection afforded in their environmental or labour laws to encourage investment, but also, conversely, that Parties shall not use their respective environmental or labour laws as an arbitrary or unjustifiable form of discrimination or as a disguised restriction on international investment (Article 29).

This provision is similar to those adopted in other "Trade and Sustainable Development" chapters contained in preferential trade agreements concluded by the EU, and it has been the subject of discussion and criticism. Indeed, some argue that, rather than giving rise to a new substantive standard of protection under international investment law and establishing effectively enforceable obligations, provisions such as Article 29 will merely function as a reinforcement of the host State's right to regulate and be invoked by States as a defence against investors. Some argue that these provisions may be detrimental to investors while, simultaneously, not sufficiently ambitious towards States.

Overall, the ESG chapter contained in the SIFA follows closely the European Commission's Guide Model Clauses to guide Member States in their negotiation (or re-negotiation) of bilateral investment agreements and is in line with the EU Corporate Sustainability Due Diligence Directive, thus recognizing the importance of investors implementing due diligence mechanisms to identify and address adverse impacts in their operations and business relationships. It also provides that the Parties shall support the use of certain recognized instruments in this field, such as the UN Guiding Principles on Business and Human Rights, the UN Global Compact, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the OECD Guidelines for Multinational Enterprises of 2011 (Article 34).

Finally, it is worth mentioning that the SIFA does not contain some of the substantive protections that are common in traditional investment agreements, such as the "fair and equitable" standard of protection, or provisions on the expropriation of investments.

Indeed, the SIFA does not confer upon investors any substantive rights enforceable under the Agreement, and rather seeks to foster investment through the establishment of obligations upon States, to create a more transparent and reliable environment that individual investors will ultimately be attracted to and benefit from. The emphasis seems to be, as the Agreement's designation itself indicates, on investment "facilitation," rather than on investment protection.

This appears to be the new trend, as the India-European Free Trade Association Agreement signed on 10 March 2024 likewise does not contain any provisions granting fair and equitable treatment, national treatment, most-favoured nation treatment, or protection against unlawful expropriation.

It remains to be seen whether these provisions and the novel aspects on investment facilitation will have a concrete impact on the flow of investment between the EU and Angola. The EU and the United Nations Conference on Trade and Development ("UNCTAD") will be allocating €2.8 million to a joint regional programme set to help Angola implement the SIFA commitments.

"Problem-Solving Mechanisms" Over Dispute Settlement

Unlike traditional investment protection agreements, the SIFA does not contain any investor-State dispute settlement provisions and merely provides for dispute resolution procedures among States. Investors do not have any rights conferred directly by the SIFA that can be enforced directly against either the EU States or Angola through a mechanism provided therein.

This appears to be the new trend in the new wave of treaties, such as the India-European Free Trade Association Agreement, which likewise provides only for a State-to-State dispute settlement mechanism.

It is also noteworthy that the Parties appear to have departed from the traditional language of "dispute settlement" or "dispute resolution" to adopt a new terminology focusing on "problem-solving" or "problem resolution." It is unclear, however, whether this has any practical significance.

The SIFA merely provides that Parties shall endeavour to establish or maintain "appropriate mechanisms to resolve problems" that may arise from the application of any measure of general application and that such "problem-solving mechanisms" shall be easily accessible, time-bound, and transparent (Article 23).

At the "inter-State" level, the Agreement provides for different tiered methods of dispute avoidance and resolution, including first a round of good faith consultations, followed by ad hoc arbitration by a three-member tribunal if consultations fail. Differently from traditional instruments, however, arbitration appears unaccompanied by any reference to an arbitral institution or to a set of arbitration rules, which may give rise to practical difficulties where the arbitrators appointed by the Parties are unable to agree on a chairperson, a situation which Article 38 does not solve.

The SIFA appears to intend to regulate the exercise of jurisdictional powers of the arbitral tribunal by expressly requiring it to make an "objective assessment of the matter before it" but, naturally, this requirement does not add much to the inherent duties of an arbitral tribunal.

Interestingly, the SIFA provides that, if the request for arbitration is rejected by the party to which it was addressed, or if the "panel report" issued by the "arbitration panel" is not complied with, the party that requested the arbitration may "adopt measures within the scope of this Agreement that are proportionate to the failure to fulfil the specific obligations" (Article 38(4)). This provision, which is specific to the SIFA, raises various questions as its meaning and practical reach have not been tested and are, on their face, rather unclear.

Finally, SIFA also provides for mediation, but only subject to the Parties' agreement, which, again, adds little to what is already available under international law, irrespective of the SIFA.

Potential Impact and Future Implications

In summary, the SIFA marks a significant milestone in international investment law. Its focus on sustainability, transparency, and problem-solving represents a new approach that could influence the future of investment agreements worldwide.

While the vagueness of some provisions and the lack of a specific form of adjudication entitling

investors to enforce them may be perceived as insufficient by some investors, the SIFA nonetheless contains very detailed ESG provisions which set high standards and its implementation in Angola will be closely monitored by the EU and UNCTAD. As the SIFA comes into force, it will be closely watched by policymakers, investors, and scholars alike, all keen to see how this Agreement unfolds and impacts the investment protection landscape.

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