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The Right to Regulate in the EU-Angola Sustainable Investment Agreement: What Lessons for Investment Protection?

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The EU-Angola Sustainable Investment Facilitation Agreement ("SIFA" or the "Agreement") aims at *facilitating* sustainable investments. Contrary to traditional investment treaties, it does not include substantive protection standards nor investor-State dispute settlement mechanisms. Rather, it seeks to enhance the regulatory landscape of the Parties to make it more investor-friendly.

In this post, I wish to focus on how the Agreement addresses the right to regulate of the Parties. I will begin by analysing how it defines and limits the right to regulate. Then I will point to channels of cross-fertilization between these rules and the regulatory powers doctrine in international investment protection law. Ultimately, I contend that the EU-Angola SIFA is relevant to better understand the right to regulate in investment arbitration.

The Right to Regulate in the EU-Angola SIFA

The EU-Angola SIFA emphasizes the right to regulate of the Parties in several provisions:

- Article 2 affirms the Parties' right to regulate, in particular for purposes of protecting the public health and the environment, or of mitigating climate change.
- Article 29 stresses each Party's autonomy to determine its sustainable development policies and priorities, to establish the levels of domestic environmental and labour protection, as well as to adopt or modify its laws and policies.
- Article 47 includes a list of "*general exceptions*" to ensure that the adoption or enforcement of measures related to public interests are not barred by the Agreement.

In the investment protection realm, we have come to know the right to regulate as a means to calibrate (or even exclude) liability towards foreign investors. For example, the police powers doctrine attempts to wholly or partially circumvent the protections afforded to investors by BITs. The right to regulate is thus used reactively to bar private claims against the State.

However, in an agreement – such as the EU-Angola SIFA – in which the purpose is investment facilitation (without any kind of investor-State dispute settlement), the right to regulate assumes a different flavour: (i) it is not meant to be invoked by the State against private parties (given that

any dispute will be settled between the Parties themselves); (ii) it aims at circumscribing and limiting the State's regulatory powers, to make them consistent with the purpose of the Agreement of promoting sustainable investment.

For example, Article 29 clarifies that the "*right to regulate*" ought to be exercised: (i) in a way consistent with each Party's commitments to the internationally recognized standards and other agreements (no. 1); and (ii) to ensure the provision and encouragement of high levels of environmental and labor protection, even commanding (on a "*strive*"-basis) the improvement of such levels (no. 2). Accordingly, the Parties are forbidden from weakening or reducing the levels of protection granted by environmental and labour laws, as well as from waiving or derogating from their environmental or labour laws, with the sole purpose of promoting investment (no. 5). Moreover, the Parties are also forbidden from acting or omitting actions that contribute to a failure in the effective enforcement of environmental or labour laws (no. 6).

In sum, to a certain extent, the right to regulate in the context of investment facilitation can be characterized as a *duty* to regulate or not to regulate for certain purposes (*i.e.*, a duty to improve and enforce environmental and labour standards, or a duty not to regulate to lower current standards). Contrary to the investment protection context (that focuses on a certain regulatory action), the *failure to exercise the right to regulate* might emerge as a relevant breach of the EU-Angola SIFA.

Is There a Right (and Wrong) Way to Exercise the Right to Regulate?

The EU-Angola SIFA is interesting also for another reason: it puts forward a *right* and *wrong* way to exercise the right to regulate vis-à-vis foreign investors.

This is noteworthy for at least two reasons: (i) most (if not all) BITs have tended to neglect express safeguards concerning the regulatory sovereignty of States; and (ii) the Agreement puts forward several obligations and/or constraints on the regulatory or lawmaking procedure itself.

This means that the EU-Angola SIFA highlights the normative constraints that should accompany a legitimate exercise of the right to regulate. A concept of *due process* in lawmaking emerges. It could be said, in Lon Fuller's terms, that these constraints delineate the *morality* of investment legislation and regulation.

Inclusion of Investors in the Lawmaking Procedure

The Agreement includes a chapter dedicated to "*transparency and predictability*" in the enaction and application of investment legislation and regulation. These rules match many legal standards of administrative action found in European constitutions.

Article 6 provides that measures of general application are to be "*administered in a reasonable, objective and impartial manner*". This makes it clear that for the Parties there is no *absolute* right to regulate. On the contrary, the latter should always be grounded on, and be assessed against, normative standards. Ultimately, such standards will allow for a distinction between a *lawful* and an *unlawful* exercise of the right to regulate.

These lawmaking standards can be divided as follows:

1. Advance publication of proposals for laws and regulations of general application, as well as of documents providing sufficient details about such proposals, to enable investors to assess the extent to which their interests might be affected (Article 8, no. 1). This extends ideally to rulemaking by administrative bodies (Article 8, no. 2).
2. Participation of investors in the lawmaking process by way of "*reasonable*" (and non-discriminatory) opportunities to comment on the above-mentioned proposals and/or documents (Article 8, no. 3). This is a welcoming tribute to corollaries of discursive or dialogical democracy.
3. Due consideration by the official bodies of those comments (Article 8, no. 4).
4. Affordance of a "*reasonable time*" between the enaction of a law and regulation and its date of application (Article 8, no. 6), presumably to allow investors to adapt when and to the extent necessary.

Ex Ante *Impact Assessments and* Ex Post *Reviews*

Another important lawmaking standard that is "*encouraged*" relates to conducting both *ex ante* and *ex post* reviews of measures of general application.

Article 25 (no. 2) underlines the importance of conducting "*an [*ex ante*] impact assessment of major measures of general application*" falling within the Agreement. And Article 26 (no. 1) extends the same rationale to the post-enaction phase by encouraging each Party to perform an *ex post* review to determine whether the implemented measures should be modified, streamlined, expanded or repealed. In this kind of exercise, consideration for "*stakeholder feedback*" is viewed as desirable (Article 26, no. 3).

The Morality of Rulemaking

Fundamentally, the Agreement posits that "*the Parties recognise the importance of an effective, consistent, transparent and predictable regulatory framework for investment*" (Article 25, no. 1).

This is a statement of paramount importance. It highlights the Parties' view on *how* their regulatory power ought to be exercised: effectively, consistently, transparently and predictably. In connection with the aspects indicated above, this could perhaps be described as the embodiment of a *morality of rulemaking* (a regulatory fair and equitable treatment ("FET")) in the understanding of the Parties.

Commentators and future practice are left to densify the meaning of the provision, in particular the scope and implications of being bound to regulate consistently, transparently and predictably.

It is at this stage that some cross-fertilization between such rules within the framework of investment facilitation and the evolving case law on the principle of fair and equitable treatment in investment protection might emerge.

Cross-fertilization Between the Rules of Investment Facilitation and the Interpretation of Investment Protection Standards?

The EU-Angola SIFA clarifies that it does not "*create or modify rules on the protection of established investors in the territories of the Parties, or of their investments, or on investor-state dispute settlement*" (Article 2, no. 3).

However, it is unavoidable to think of some cross-fertilization between investment facilitation and investment protection standards (particularly FET). Indeed, the investment facilitation rules may:

1. contribute to densifying the content of the FET principle pursuant to investment protection treaties;
2. legitimize some of its current interpretations and applications by arbitral tribunals.

The first level focuses on a yet under-theorized dimension of the FET principle: what relevance and weight shall be ascribed to the lawmaking procedure concretely followed by the State in the enaction of general regulatory measures that adversely impacted investors.

Generally accepted rulemaking (best) practices – such as those enumerated in the EU-Angola SIFA – could enrich the normative content of FET when determining the reasonableness and/or proportionality of a general regulatory measure.

The second level underlines certain coincidences between the investment facilitation rules and the typical obligations arising out of the FET protection standard. The fact that the EU and Angola point to an exercise of regulatory power that is *consistent*, *transparent* and *predictable* can be matched with (and therefore legitimize) arbitral declinations of the FET principle. For example, it could be argued that *consistent* and *predictable* lawmaking or rulemaking is what arbitral tribunals demand when they require sufficient stability in the investment regulatory framework, especially in terms of avoiding fundamental changes in the regulatory landscape. Similarly, predictability is not ensured when the host State breaches specific representations or commitments made to investors, thereby affecting the latter's legitimate expectations.

Concluding Remarks

Even if not a direct source for the interpretation of investment protection standards, I argue that the EU-Angola SIFA reveals the Parties' view on what constitutes a fair exercise of the right to regulate. Contrary to the absolutization of the right to regulate, the agreement clarifies that lawmaking powers must respect certain limits and normative standards. These might have a more procedural nature (such as early consultation, notice and comment procedures, or *ex ante* impact assessments) or a more substantive character aligned with legal certainty and security (consistency, transparency and predictability).

As such, the EU-Angola SIFA might either open new ways of reading the FET principle in regard to general regulatory measures or legitimize the current arbitral case law on the issue. Whatever the case may be, these several provisions of the Agreement demonstrate something undeniable: the right to regulate is not understood as unbound – there is a right (and a wrong) way to regulate.

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