International Investment Law and Policy in Africa in the Context of the Pan-African Investment Code

By:

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At the heart of the phenomenon of economic globalization, characterized largely by the opening of domestic markets to international economic transactions, and criticized by some as weakening domestic regulations, one finds international investments. International investments, which transform international companies into global players and through which productions facilities are relocated abroad, are today one of the most powerful vectors of economic integration. The global governance of international investment revolves around the adoption by states of common rules to facilitate and secure foreign direct investments (FDIs) and assets of foreign firms. International investment regime consists of a tangle of more than 3000 international investment agreements (IIAs) dominated by old-generation bilateral investment treaties (BITs). BITs are increasingly becoming the legal point of reference for national investment legislative processes, especially, as Adeleke rightly points out in his book, against the backdrop of the global backlash against multilateral treaties.

While international trade has undergone significant structural changes recently, particularly with the proliferation of new generation of free trade agreements (FTAs), the debate on the consequences of IIAs for sustainable development continues to widen and intensify. In effect, while there has been fundamental changes in the international investment landscape in terms of players (now comprising state-owned enterprises and sovereign wealth funds) and FDI direction (with emerging economies now being, not only recipients, but increasingly home states), governments are also now adopting industrial policies and development strategies that contrast with their erstwhile hands-off approach to economic development. In their effort to balance between the quality and quantity of investments, governments are introducing social and environmental regulations (where they were absent) or reinforcing existing ones. Consequently, what has been described by the UNCTAD as a 'new generation of investment policies' is emerging. This new trend of investment policies places inclusive growth and sustainable development at the core of governments' efforts not only to attract but also to benefit from investments.

Recognizing this need to protect foreign investment while promoting sustainable development within the African continent, African Union (AU) Member States decided in 2008 to embark on an ambitious common investment code project called the Pan-African Investment Code (PAIC), whose draft was finalized in December 2016. Designed with the Sustainable Development Goals (SDG) in mind, the PAIC reflects a continent-wide consensus to shape international investment law, and the need to address 'the fragmented approach to investment regulation in Africa through BITs as well as the various regional investment agreements developed by economic communities (RECs)' (Adeleke, p. 7). While aiming to offset the balance of power between foreign investors and host states, this legal instrument is also a ground breaking text that contains provisions to protect the environment and human rights. This is the context in which Fola Adeleke's exploration of a 'human rights based approach to investment regulation and dispute settlement' in investment law and policy in Africa falls. However, before understanding the link that Adeleke makes between his proposal to promote sustainable development and human rights through investment treaties (pp.

110-128), and how the PAIC could mark a departure from previous BIT practices under which these concerns were lacking, it is opportune to understand how the author's ideas unfold throughout the book.

One objective of Adeleke's book is to 'assess' the existing African countries' frameworks with a view to equip them with the appropriate tools to attract investment as they are engaged on the path of the reform of their respective investment regimes (p. 17). From the premise that the current investor-state dispute settlement (ISDS), afflicted by many flaws that range from increasing costs, the almost 'exclusive focus on payment of damages' as well as the 'difficulty in managing disputes with varying sources of public law issues', has failed African countries (pp. 46-73), Adeleke offers alternatives. These alternatives, which the author confesses are far from perfect (p. 109), would address states' objectives to attract investment while at the same time depoliticizing investment disputes, advancing the rule of law, and providing remedies to investors (p. 18). To that end, Adeleke proposes four main alternative dispute resolution mechanisms, namely (1) the strengthening of domestic legal systems, (2) the offering of political risk insurance to lessen the need to arbitrate investment claims, (3) inter-state dispute settlement *à la* World Trade Organization (WTO), and (4) regional human rights courts in settling investor-state disputes (pp. 74-109). As mentioned, one reason for Adeleke's contention that ISDS has done a disservice to African countries are the broad interpretations that go beyond the actual scope of investor protections under BITs, which encroaches on states' policy space by arbitral institutions. Consequently, the author seeks to explore ways in which BITs could be redrafted and interpreted in a way that promotes sustainable development and ensures that investors are held accountable for human rights issues. This is precisely where the author's enterprise meets the works undertaken under the PAIC engaged on the path to modernize investment law regime in Africa.

The PAIC is part of the trend toward the 'Africanization' of international investment law in the current context of reform of the international investment regime. Some key features are worth mentioning. Championing sustainable development as already alluded to, the PAIC dedicates itself to protect an investment only when it fosters sustainable development in AU Member States and in particular in the territory of the host states (PAIC, Article 1). Any international lawyer would appreciate the value of such a 'rather unusual' treaty provision that states its objectives, particularly at the time of treaty interpretation. Not only does the PAIC reformulate the traditional investments treaties languages, but it also introduces African-specific provisions tailored for the continent needs, and totally omits/excludes controversial investment standards (like the fair and equitable treatment). The novelty here lies in the balance of rights and obligations between the investors and contracting state parties. Unlike traditional IIAs, the PAIC imposes obligations on investors, by calling them to respect (1) national and internationally recognized standards of corporate governance (Article 19); (2) socio-political obligations (including, but not limited to, sociocultural values and labour rights) (Article 20); (3) refrain from bribery (Article 21); (4) corporate social responsibilities (which includes contribution to the economic, social and environmental progress with a view to achieving sustainable development of host States) (Article 22); (5) obligations as to the use of natural resources (e.g. by avoiding void land grabbing practices) (Article 23) and (6) business ethics and human rights (e.g. by supporting and respecting the protection of internationally recognized human rights) (Article 24).

While it is true that Africa will not cease overnight to attract FDIs, especially as its natural resources remain relentlessly coveted, the challenge of the PAIC is to ensure that newly admitted investments promote the broadest interest and meet the needs of African societies and economies while preserving the environment. Future FDI in Africa will be assessed against these standards. One core message of international investment law reform in Africa through the PAIC is that it somehow advises African countries to halt from continuing to sign BITs, which for one are inconsistent with regional investment agreements, and instead concentrate on building a concerted approach to investment treaty with third States. The boon of such approach lies in that it would eventually transfer the bargaining powers to African countries that for long have been rule takers. For Mbengue and Schacherer, the PAIC has not only built awareness among AU Members of 'the broader implications of foreign investment for their sustainable development', but more importantly, 'endow[ed] Africa with a voice in the international debate on the future and reform of the international investment regime'. This is because the SDGs advocated in the PAIC places this instrument as a potential model for IIA reforms outside African boundaries, thus positioning

African countries as international investment law rule makers. However, one regret can be formulated.

The PAIC was initially conceived by experts as a ‘binding’ instrument to replace existing BITs, a situation that carries its own legal ramification for host states under existing BITs, including being considered by investors as actionable international wrong like the case of *Swissbourgh v Lesotho*) (see Adeleke, pp. 138-141). Yet, the political decision makers finally opted for a non-binding ‘guiding instrument’, which, *in fine*, may continue to exacerbate the fragmentation that the PAIC set out to guard against. Despite losing its (binding) treaty character, the PAIC is ready to be used, in a bid to avoid duplication of efforts, as a reference framework document in the ongoing negotiations of the African Continental Free Trade Area (AfCFTA) investment protocol.