Africanisation of International Investment Law: Prospects and Challenges

By:

Oladapo Fabusuyi

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Introduction

The goal of the current initiatives to 'Africanise' international investment law (IIL) seek to increase foreign investment in Africa as a means of achieving sustainable development (SD). The pursuit of SD in African states is accentuated by the current economic, social and environmental challenges bedevilling the continent.[1] The word 'Africanised' or 'africanisation' literally means to make something African.[2] In the context of this essay, it means to make international investment law (IIL) look African or better still reflect Africa's interests. The regional investment instruments produced by different African regional economic communities (RECS) and the African Union (AU) Pan-African Investment Code point to Africanised investment and trade regimes. The common features in these instruments include linking the objective of investment promotion and protection to sustainable development; and the inclusion of provisions on investor's obligations. These provisions are rare in Bilateral Investment Treaty practice. Notwithstanding, majority of the international investment agreements that are in force are largely westernised—Europe and North America—in perspectives. This essay considers some of Africa's sub-regional investment instruments and the continental initiative—Pan African Investment Code—that point to an Africanised IIL. The prospects and challenges with these instruments are also discussed below.

Regional Investment instruments

The goal of the thirteen RECs in Africa established by African states, usually in the same region is to foster political and economic integration.[3] Part of their economic integration strategy includes the establishment of common markets and the dismantling of tariff and non-tariff barriers to trade. In furtherance of these objectives, the different African RECs have negotiated one or more regional investment agreements.[4] The following is a consideration of three of these sub-regional instruments.

Investment Agreement for the COMESA Common Investment Area (2007) (CCIA) The objective of CCIA is to increase foreign direct investment (FDI) inflows, which contributes to the achievement of SD, in COMESA member-states.[5] CCIA only covers foreign investors with substantial business in the COMESA home state.[6] This provision reduces the incidence of treaty shopping by so-called 'mailbox' or 'shell companies'. Significantly, the CCIA joins the debate on fair and equitable treatment (FET) standards. It states that FET is not a single international standard.[7] Thus, acknowledging different levels of FET treatments because of different levels of development among member states. The CCIA balances investment protection with the interest of member-states by permitting States to regulate in the interest of national security, health and environment.[8]

ECOWAS Community Rules on Investment (ECI) (2008) The primary objective of ECI is to promote SD in the ECOWAS sub-region.[9] The expropriation clause of ECI allows Host States spread the payment of compensation over a period of three years when it is significantly burdensome to pay at once.[10] Under the ECI, investor's obligations are in two parts—pre-establishment obligations and post-establishment obligations.[11] The pre-establishment obligations require investors to conduct environmental and social impact assessments prior to making their investments.[12] Investors are to apply precautionary principle in the conduct of these assessments. The post-establishment obligations relate to the duties to uphold human rights obligations, social obligations, labour standards and environmental obligations.[13]

Southern African Development Community (SADC) Model BIT 2012 The aim of the SADC Model BIT is to promote investments that support SD.[14] It deliberately excludes most-favoured-nation treatment (MFN). The SADC Model BIT expressly recognises the right of Host States to regulate for SD.[15] Furthermore, SADC Model BIT introduces the use of experts in arbitral proceedings.[16] This provision is likely to add to the already high cost of investment arbitration proceedings.[17]

The foregoing considered regional instruments if well implemented can potentially benefit member-states and stimulate domestic and foreign investments.[18] Specifically, they can help address the problem of lack of markets.

Continental Developments – Draft Pan African Investment Code (PAIC)

PAIC is a draft investment instrument produced by the AU, to be applied throughout the continent. According to *Mbengue and Schacherer*, PAIC represents Africa's 'consensus on the shaping of international investment law.' [19]The primary objective of PAIC is the achievement of SD among African states.[20] PAIC contains typical IIL standards such as MFN, national treatment, expropriation, and funds transfer but excludes FET.[21] PAIC has a chapter on investor's obligations.[22] It mandates investors to respect the rights of local populations in the use of natural resources.[23] PAIC adopts a case-by-case consent to arbitration rather than the usual advanced consent to arbitration. However, resort to arbitration under PAIC is subject to the applicable Host State law.[24] Thus, PAIC precludes Investors from initiating investor-state arbitration where the Host State law does not provide for arbitration.

Challenges

There are four challenges to an Africanised IIL identified here. Firstly, many African countries have not conducted a review of their bilateral investment treaties (BITs). For all African States to effectively contribute towards an Africanised investment regime, a comprehensive review of all existing BITs (including the level of FDI inflows and the resulting investor-state disputes cases) is crucial. Without a comprehensive review, inconsistencies will remain. Secondly, poor perception poses a challenge to an Africanised IIL. Negative perceptions and negative inferences for instance undermines the choice of Africa as an arbitration seat.[25] Whereas poor perception of Africa's investment climate remains, the fact that Mauritius and Rwanda rank high in the World Bank's Ease of Dong Business 2019 is a good rejoinder to the poor perception narrative.

Thirdly, inadequate infrastructure poses a huge problem to the Africanisation of IIL. African states need to cooperate with one another to address this problem. The Nigerian-Morocco collaboration to build a US$20 billion worth gas pipeline is a good model. Lastly, the development of an Africanised IIL jurisprudence requires the involvement of more African arbitrators in investment disputes involving African states. Established investment arbitration institutions, such as ICSID, not only need to focus on gender diversity, racial diversity too is important.

Conclusion

A coordinated African voice on FDI would likely enhance the continent's global competitiveness, prevent destructive competition among countries, help strengthen Africa's position in investment agreements, and ultimately result in increased FDI flows to the continent.[26]

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[1] M.M. Mbengue and S. Schacherer, 'The Africanization of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18 *Journal of World Trade and Investment* 420.

[2] Oxford Dictionary of English (OUP 2015). See also: P. Prinsloo, 'Being an African: Some Queer Remarks from the Margins.' in Michael Kearney (ed), *From*

Conflict to Recognition: Moving Multiculturalism Forward (Rodopi 2012).

[3] For a detailed list of the 13 RECs, see: Mbengue and Schacherer, footnote 1, 417.

[4] Ibid 418.

[5] See: 2007 Investment Agreement for the COMESA Common Investment Area (CCIA), preamble and article 2

[6] The criteria for determining substantial business are set out in Article 1(4) iii.

[7] CCIA, article 14 (3).

[8] CCIA, article 22. Cf. CCIA, article 20 (8).

[9] ECI, article 3.

[10] ECI, article 8 (5)

[11] See: ECI, chapter III.

[12] ECI, Article 12

[13] ECI, Article 14.

[14] SADC Model BIT, article 1.

[15] SADC Model BIT, article 20.1.

[16] SADC Model BIT, article 29.

[17] See: The Cost of Investment Arbitration: UNCITRAL, ICSID Proceedings and Third-Party Funding. Available at: <https://www.acerislaw.com/cost-investment-arbitration-uncitral-icsid-proceedings-third-party-funding/> accessed 20 May 2019.

[18] Mbengue and Schacherer, footnote 1, 418.

[19] Ibid 415.

[20] PAIC, preamble and article 1.

[21] PAIC, articles 7, 9, 11 and 15

[22] PAIC, chapter 4—articles 19 - 21.

[23] PAIC, art 23.

[24] PAIC art 42 (3)

[25] R. Soopramaniem and S. Soopramaniem, ‘Spotlight on Africa: Problems of Legitimacy and Inclusivity in International Arbitration’ 2016 13(4) *Transnational Dispute Management* 12

[26] U.E. Ofodile, ‘Africa and the System of Investor-State Dispute Settlement: To Reject or Not to Reject?’ (2014) 11(1) *Transnational Dispute Management* 30.