21st century investment protection: Africa's innovations in investment law reform

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The United Nations Economic Commission for Africa recently observed that Africa is in the eye of a triple storm.[1] First, climate change has provoked cyclones, heavy snowfalls, desert locusts and more that are currently costing the continent more than 5 per cent of its GDP (some US$335bn) annually. Second, the Covid-19 pandemic will require most African countries to set aside more than 25 per cent of government expenditure to obtain vaccines and strengthen health-care systems, despite the considerable resilience the continent has shown against the pandemic. Third, on the economic front, Africa is facing its first recession in 25 years because of the pandemic's global economic repercussions.

African states will inevitably see foreign direct investment as a powerful tool to help weather the triple storm and to rebuild in its wake.[2] The investment treaties that African states have concluded – and will conclude – are thus of critical importance. As exemplified by Spain's experience of defending itself against approximately 40 arbitrations, arising from its effort to attract renewable energy investment, even laudable intentions to promote a green recovery could lead to a slew of costly investment arbitrations for states.

This article considers recent innovations by African states in concluding bilateral and regional investment treaties.[3] These developments are emblematic of the reforms states all over the world are undertaking in response to the criticisms that have been leveled against investor-state dispute settlement (ISDS) mechanisms.[4] They also appear to reflect a particular goal by African states to rebalance the equilibrium of investment treaties that have long seemed to protect foreign investment at an excessively high cost to African states. Having signed some of the very first bilateral investment treaties (BITs) to come into existence over sixty years ago, and having been forced to defend themselves against numerous arbitration claims arising from them, African states are well placed to inform investment law reform. Their various innovations have the potential to enable states to regain control in their relationships with investors, and to better align their goals of attracting foreign investment with their interest in promoting sustainable development.[5] The breadth of these reforms across the continent and their influence globally has led some commentators to refer to the 'Africanisation' of international investment law.[6]

This article addresses reforms to limit the availability of international arbitration for the resolution of investment disputes. It then describes innovations to protect the right of states to regulate in the public's interest, and highlights reforms clarifying and limiting the scope of substantive legal protection available to investors. Finally, it describes strategies to hold investors accountable by increasing their obligations under investment treaties and establishing means to enforce the obligations.

Limitation of the offer to resolve disputes through international arbitration

Some states have determined that their interests in attracting foreign investment while fulfilling other public objectives are best served by limiting their consent to international arbitration. South Africa, for example, has terminated many of its BITs and enacted the Protection of Investment Act of 2015,[7] which excludes the possibility of investor-state arbitration. Instead, disputes between investors and South Africa are resolved by mediation or through normal national courts and administrative bodies. Subject to the exhaustion of domestic remedies, South Africa may consent to international arbitration under the Protection of Investment Act, but such arbitration is conducted between South Africa and the home state of the applicable investor, not directly with the investor.[8]

Other African states have sought to limit their consent to international arbitration in more modest ways. The 2012 Cameroon–Turkey BIT, for instance, excludes the following from the scope of international arbitral review:

- disputes arising out of investments that represent less than 10 per cent of a company;
- investment activities which have not acquired necessary approvals; and
- investments concerning real estate rights.[9]

Similarly, the 2018 Common Investment Code of the Economic Community for West African States (ECOWAS) expressly limits the availability of investment protection to investments that contribute significantly to the host state's economic development, among other requirements.[10]

Moreover, the investment agreement adopted by the Common Market for Eastern and Southern Africa (COMESA) requires investors to both exhaust local remedies and attempt to resolve their disputes with host sates through mediation prior to enjoying the right to resolve their disputes through international arbitration.[11]

Explicit preservation of the host state's right to regulate

A major criticism of the ISDS system is its perceived potential to impair the right of states to regulate in the public interest. Pursuant to this view, investment claims challenging bona fide regulatory conduct that has negatively affected the bottom line of investors wrongfully dissuade states from regulating to protect the public interest.

Several African states have responded to this threat by negotiating treaties that expressly preserve their right to regulate. The 2016 Nigeria–Morocco BIT,[12] for example, includes a dedicated article on the right to regulate establishing that 'the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives.'[13]

The article further provides that 'a Host State's pursuit of its rights to regulate shall be understood as embodied within a balance of the rights and obligations of Investors and Investments and Host States,' and 'for greater certainty, non-discriminatory measures taken by a State Party to comply with its international obligations under other treaties shall not constitute a breach of this Agreement.'

Other African BITs have similar provisions.[14] The 2019 Hungary–Cape Verde BIT, for instance, establishes that:

'The provisions of this Agreement shall not affect the right of the Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity.'[15]

It further protects the state parties' right to modify their laws, even where such changes may frustrate investor's expectations.

Clarifications and limitations of substantive legal protections

African states have also sought to clarify and limit the substantive legal protections offered under their bilateral and regional investment treaties. The fair and equitable treatment (FET) standard has been of particular concern, given the perception that some arbitral tribunals have interpreted the standard in an excessively broad manner that has permitted greater protection for investors than that intended by state parties to investment treaties. Some investment treaty templates, such as the African Union's 2016 Pan-African Investment Code and the ECOWAS 2018 Common Investment, exclude FET altogether. Others, such as COMESA's Revised Investment Agreement, provide investors with protection against a state's failure to grant circumscribed 'fair judicial and administrative treatment,' instead of FET.[16]

Other instruments, such as the 2012 Model BIT of the Southern African Development Community (SADC) restrict the standard by stipulating that for an investor to claim an FET breach, it must demonstrate 'an act or actions by the government that are an outrage, in bad faith, a wilful neglect of duty or an insufficiency so far short of international standards that every reasonable and impartial person would readily recognise its insufficiency.'[17]

In the same vein, the Congo–Morocco BIT equates the FET standard to the minimum standard under customary international law in order to leave no doubt as to the state parties' intent to apply a high threshold for the investor to show an FET breach.[18] Other treaties, such as the 2017 Rwanda–United Arab Emirates BIT, provide a list of measures that are capable of constituting a violation of the FET obligation, including:

- denial of justice in criminal, civil or administrative proceedings;
- fundamental breach of due process in juridical proceedings;
- targeted discrimination on manifestly wrongful grounds; and
- abusive treatment.[19]

African states have also sought to expressly limit the scope of protection offered to investors against indirect expropriation. The 2018 Singapore–Rwanda BIT, for example, establishes that 'non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations.'[20]

The most favoured nation (MFN) standard has also found itself curtailed in various investment instruments. The SADC Model BIT excludes it altogether to avoid 'unintended multilateralization',[21] while the Brazil–Morocco BIT expressly prevents investors from using it to import more favourable dispute resolution mechanisms from other treaties.[22]

Finally, African states have offered clarifications on the application of the national treatment standard. The Brazil–Ethiopia BIT, for instance, indicates that the determination of whether a host state has accorded foreign investors treatment equal to that accorded to its own investors 'depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the bases of legitimate public welfare objectives.'[23]

Prescription and enforcement of investor obligations

African states have also sought to address the asymmetries of the current ISDS system by expressly defining investor obligations and establishing means of enforcing them. The 2012 SADC Model BIT, for example, establishes a broad array of obligations for investors along with the rights that it grants them. Several articles of the Model BIT define obligations of investors in relation to:

- corruption;
- compliance with domestic law;
- provision of information;
- environmental and social impact assessments;
- environmental management and improvement;
- minimum standards for human rights, environment and labour; and
- corporate governance standards.[24]

In addition to defining these investor obligations, the SADC Model BIT expressly grants states the right to enforce the obligations through counterclaims:

‘A Host State may initiate a counterclaim against the Investor before any tribunal established pursuant to this Agreement for damages or other relief resulting from an alleged breach of the Agreement.’[25]

The COMESA Revised Investment Agreement similarly establishes a broad array of investor obligations, as well as the ability of states to present counterclaims in relation to them.[26]

Conclusion

The reform of the investment law regime is well underway in Africa, It is visible in the modernised and better-balanced provisions of recently concluded BITs and regional investment instruments. Although many of the innovations discussed above are contained in treaties that are yet to be ratified, they demonstrate the intentions of many African states to attract and protect foreign investment in a way that advances their broader public interests. States on the continent and abroad will benefit from careful consideration of the innovations that are best suited for their particular needs as they embark on the arduous task of rebuilding their economies in the wake of the triple crises that have stymied them.

The African Continental Free Trade Area agreement (AfCFTA) will offer a historical opportunity for African states to dramatically increase investment with each other, and thereby enable them to address environmental, health and economic challenges. It will be important for those negotiating the Investment Protocol of AfCFTA to take investment treaty innovations into account, to ensure that investment protection established under the agreement is fit for purpose given the myriad challenges of the 21st century.

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[1], ‘Building Forward for an African Green Economy’, (United Nations Economic Commission for Africa, May 2021), 1, see https://repository.uneca.org/bitstream/handle/10855/43948/b11990399.pdf?sequence=7&isAllowed=y.

[2] Makane Moïse Mbengue, ‘Africa’s Voice in the Formation, Shaping and Redesign of International Investment Law’ (2019), 34, ICSID Review, 473.

[3] African countries have concluded over 860 BITs, of which 160 are intra-African treaties. This represents around 28 percent of the BIT universe.

[4] As of 1 January 2020, the total number of publicly known ISDS claims had reached 1,023; see World Investment Report (2020) (UNCTAD, 2020) 110. The rapid increase of investment disputes has resulted in mounting criticism against the system. Critics also argue that the regime unduly restricts host state regulatory policy space, cannot guarantee arbitrators’ independence

and impartiality, fails to ensure consistency between decisions, lacks transparency and leads to excessively lengthy and expensive proceedings. Malcolm Langford, Michele Potestà, Gabrielle Kaufmann-Kohler, and Daniel Behn, 'UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions: An Introduction', (2020) The Journal of World Investment & Trade, 2-3.

[5] Makane Mbengue and Stefanie Schacherer, 'IIAs in Africa' in J Chaisse and L Choukroune (eds), Handbook of Investment Law, Springer, 2019; Talkmore Chidede, 'The Right to Regulate in Africa's International Investment Law Regime' (2019), 20 Oregon Review International, 437; Abdulqawi Yusuf, 'Balancing Rights and Obligations of States and Investors: Challenges Facing LDCs', Lecture at Cornell University (23 October 2017).

[6] Makane Mbengue and Stephanie Schacherer, 'The "Africanization" of International Investment Law' (2017), 18 The Journal of World Investment and Trade, 414; Makane Moïse Mbengue, 'Africa's Voice in the Formation, Shaping and Redesign of International Investment Law', (2019) 34 ICSID Review, 455–81; Olabisi D Akinkugbe, 'Reverse Contributors? African State Parties, ICSID and the Development of International Investment Law' (2019), 34 ICSID Review - Foreign Investment Law Journal, 434–54.

[7] Investment Promotion and Protection Bill (2015), Act No 22 of 2015, Official Gazette, No 39514.

[8] Other states have similarly excluded ISDS or terminated their BITs. See, for instance, the 2018 United States–Mexico–Canada Agreement, which eliminates ISDS between the US and Canada, or the decision of the Member States of the European Union to terminate their intra-EU BITs in line with the Achmea judgment. By the end of 2019, the number of terminated investment treaties, including BITS and FTAs, had reached 349, a figure bound to increase in the coming years. See UNCTAD's World Investment Report 2020, 106.

[9] Cameroon–Turkey BIT. See also Burkina Faso–Canada BIT (2015), Canada–Côte d'Ivoire BIT (2014); Canada–Guinea BIT (2015), India–Mozambique BIT (2009).

[10] ECOWAS Common Investment Code, Art 1.

[11] Revised Investment Agreement for the COMESA Common Investment Area, arts. 34-46, see /www.comesa.int/wp-content/uploads/2020/10/English-Revised-Investment-agreement-for-the-CCIA-28.09.17-FINAL-after-Adoption-for-signing.pdf, accessed 4 November 2021. See also Morocco–Nigeria BIT (2016); China–Côte d'Ivoire (2002); Cameroon–Turkey; Egypt–Switzerland BIT (2010).

[12] Morocco–Nigeria BIT (2016) (awaits ratification by Nigeria).

[13] Art 23.

[14] Other BITs that contain a provision on state's right to regulate with specific reference to safeguarding public health, the environment and labour include: Japan–Morocco BIT; Burkina

Faso–Turkey BIT; Cabo Verde–Hungary BIT; and Burundi–Turkey BIT. Other BITs reflect these concerns in substantive provisions which stipulate that the encouragement of investment should not lead to a relaxation of health, safety, environmental and labour standards, see eg Japan–Morocco BIT, art. 19; Burkina Faso–Turkey BIT, art. 5; Cabo Verde–Hungary, art. 2; Brazil–Ethiopia BIT, art. 16; Mali–UAE BIT, art. 18; Mali–Turkey BIT, art. 5; Rwanda–UAE BIT, art. 9; 2018 Singapore-Rwanda BIT (Annex I).

[15] 2019 Hungary-Cape Verde BIT.

[16] The Revised Investment Agreement for the COMESA Common Investment Area, art. 14.

[17] SADC Model BIT, Art 5.

[18] Congo–Morocco BIT 2018, see also Mali–Turkey BIT 2018; Mauritania–Turkey BIT 2018; Cabo Verde–Hungary BIT

[19] Rwanda–UAE BIT, Art 4.

[20] The 2018 Singapore–Rwanda BIT, (Annex I).

[21] SADC Model BIT, commentary, Art 4.6

[22] Brazil–Morocco BIT, art. 5. See also Burkina Faso–Turkey BIT, art. 4; Cabo Verde–Hungary BIT, art.4; Congo–Morocco BIT, art. 3; Brazil–Ethiopia BIT, art. 6; Mali–Turkey BIT, art. 4. Japan–Morocco BIT, art. 3;

[23] Brazil–Ethiopia BIT, art. 5. See also SADC Model BIT, art. 4 (specifying various factors that should be considered in considering whether a foreign investment is in 'like circumstances' with a domestic one).

[24] SADC Model BIT, Arts 10-16.

[25] SADC Model BIT, Art 19.2.

[26] Revised Investment Agreement for the COMESA Common Investment Area, Art 36(7).