The Significance of the Eccentricity of the Draft Pan-African Investment Code

By:

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Currently, the international law on foreign investment is undergoing a modification. In particular, the traditional approach of using Bilateral Investment Treaties (BITs) and regional investment agreements (as the key sources of international investment law) exclusively for protecting investors, not for imposing obligations on them, has come into question more than ever.

Similarly, the International Centre for Settlement of Investment Disputes (ICSID) arbitration-dominated investor-state dispute settlement (ISDS) framework has been increasingly censured, predominantly by host states of investment, such as African and Latin American states. In its World Investment Report 2013, the United Nations Conference on Trade and Development summarized the major criticisms against the prevalent ISDS system as the lack of legitimacy and transparency, inconsistency of arbitral awards, lack of trust in arbitrators'

independence and impartiality, absence of an effective system of review of arbitral awards and expensiveness of the process. Consequently, a number of changes are proposed to the ISDS system.

The Draft Pan-African Investment Code (PAIC) is also a part of the effort to shape the extant international investment law in the African context. The PAIC is a non-binding instrument that is intended to serve as a guiding instrument for the Member States of the African Union and investors in Africa. Yet, it must be noted that the PAIC allows the Member States to agree to make it binding to supplant the existing intra-African BITs or investment chapters of intra-African trade agreements. It was prepared under the auspices of the African Union Commission, but it has not yet been officially adopted. The objective of the PAIC is to "promote, facilitate and protect investments that foster the sustainable development of each Member State, and in particular, the Member State where the investment is located." Therefore, at the heart of the PAIC is the achievement of sustainable development through investments.

The PAIC contains several provisions on promoting, protecting and regulating investments, many of which are eccentric. It expressly recognizes a host state's right to regulate investments (including through incorporating exceptions to the national and most-favored-nation treatments) and intentionally omits the controversial fair and equitable standard of treatment. The other important and unique aspect of the PAIC is its imposition of extensive obligations on investors, which represents a departure from the conventional role of BITs and regional investment agreements. The PAIC requires investors to adhere to national and international corporate governance standards, to comply with socio-political obligations (mainly, respecting socio-cultural values and non-interference in internal political affairs of host states), to refrain from bribery and other unlawful acts, to abide by host states' laws and discharge their corporate social responsibilities, not to exploit natural resources to the detriment of host states and to respect human rights (including the rights of local communities). Besides, it obliges Member States and investors to take measures to protect traditional knowledge, the environment, consumers' interests and to respect workers' rights as well as to ensure the transfer of technology from investors to host states. Regarding ISDS, the PAIC provides that investor-state disputes that could not be amicably resolved, subject to parties' agreement, the applicable

law and exhaustion of local remedies, should be settled through arbitration exclusively in African public or private arbitration institutions.

Opinions are divided on whether the PAIC can benefit African states. On the one hand, Mbengue argues that the PAIC is appropriate for Africa because it balances the rights of investors and the regulatory power of African host states. On the other hand, Kidane and Ngobeni argue that the PAIC, if it is adopted as legally-binding, will result in, among others, unfavorable treatment of African investors vis-à-vis non-African investors, since the PAIC does not contain some rules that are commonly included in BITs between African and non-African states to protect investors, such as arbitration under the ICSID and the fair and equitable treatment standard.

Without losing sight of the gaps in the PAIC, it is submitted that, even though it is not yet officially adopted as a binding instrument (given the uncertainty surrounding its official adoption), the PAIC can be important for African states. Primarily, as envisaged in its Article 2 (1), it can serve as a guideline for preparing model BITs as well as negotiating BITs with African and non-African states. It can also be useful in the ongoing negotiation for the Investment Protocol of the Agreement Establishing the African Continental Free Trade Area and regional investment agreements in Africa.

Moreover, it can be of paramount importance in devising policies and adopting investment regulations at national level. The innovative provisions of the PAIC convey the message that African states should take a comprehensive approach to regulating foreign investments. In other words, PAIC's approach of mainstreaming interests that are not commonly associated with investment in international investment law, such as consumer's interests, rights of local communities, competition, and protection of traditional knowledge, can be utilized for adopting corresponding national investment regulations so as to attain sustainable development. Hence, if there is political will on the part of African states (due to the PAIC's non-binding nature), the PAIC can be a valuable instrument not only for negotiating and signing BITs and regional investment agreements but also for taking regulatory actions at national level.

Aside from states, investors can also use the PAIC as it currently stands in order

to plan and execute investments in Africa. Indeed, this is envisioned in the PAIC itself, but it is mostly neglected in policy debates with respect to the PAIC. Investors can utilize the PAIC as soft law in order to align their investments to the development objectives of host states in Africa. This means it can be used similarly as the OECD Guidelines for Multinational Enterprises.

Yet, it is worth noting that the existence of BITs, other investment agreements and national regulations in line with the PAIC are indispensable, but insufficient, to ensure that investments in Africa help attain the broad objective of sustainable development. As such, on top such regulatory legal frameworks, the governments of African states should put in place transparent, accountable and strong regulatory bodies.

Thus, African governments and investors can take lessons from the peculiar approach of the PAIC if they have the will and resolve to do so.

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