First Impressions on the First Negotiations for the First-Ever EU Sustainable Investment Facilitation Agreement

By:

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The investment facilitation agreement that the European Union (EU) and Angola are currently negotiating really tastes like vintage wine in a fresh glass. You wonder whether the wine's real value lies in its flavor, the vineyard where its grapes had been grown, the number of stars of the restaurant where it is being served, or the manner in which the sommelier pours it for you. Similarly, when the EU and Angola announced the first round of the first-ever 'Sustainable Investment Facilitation Agreement', development experts must have asked themselves, like I did, which aspect of this Agreement will induce many foreign firms to plough their capital into the resource-rich Southwestern African nation.

Announced on Tuesday June 22nd, the first round of negotiations between the EU and the Republic Angola aims to promote "sustainable and responsible investment". The EU Executive Vice-President and Commissioner for Trade, Valdis Dombrovskis, touted the envisaged Agreement as a "new form of investment agreement".

For a government yearning for good news after the economy slid in 2020 in its worst recession on record, this announcement and these negotiations come as a blessed relief. The Angolan economy started to contract in 2013 and has plunged into recession since 2016, falling in the process from its position as Africa's sixth largest economy in 2017 to being the 10th largest economy in 2021. In particular, Angola has become a net loser of foreign direct investments (FDIs) since 2016, when the oil-rich country registered a net loss of 180 million US dollars in FDI. Fortunately, the 'Directives' issued on May 10th, 2021, by the EU Council to guide their delegates in their negotiations with their Angolan counterparts instruct the delegates to take into account "the specific development challenges faced by Angola".

But how does this future Sustainable Investment Facilitation Agreement ('SIFA' or 'Agreement') compare with the major types of bilateral investment agreements? Will this new investment form magnetize more FDIs than its alternatives? Most importantly, which ingredients of this investment form give it its unique flavor and superior quality?

The Goals of the Future Agreement

To determine whether the EU-Angola Sustainable Investment Facilitation Agreement will out-perform other investment agreement types, one first needs to ascertain its objectives. According to Dombrovskis, the EU-Angola Agreement will promote sustainable and responsible investment, which will "diversify and improve the resilience of our economies and support our climate and energy transformations."

The objectives of the Agreement also appear in Negotiating Directives. These Directives declare that the EU-Angola Agreement should aim to "create an attractive, transparent and predictable investment climate to facilitate, enhance and stimulate mutually beneficial sustainable investments." Furthermore, the EU Negotiating Directives affirm that, as its "the overall objective", the SIFA should seek to "improve the investment climate and facilitate the mobilization and retention of investment, especially for micro-small-and medium-sized enterprises”.

In sum, the EU-Angola Agreement, if adopted, will strive to improve the investment climate in Angola to make it easier for Angola to attract and retain sustainable investments, especially for small and medium enterprises (SMEs).

Sustainable Investment

The kernel, the tannin of the SIFA model seems to flow from the whole idea of ‘sustainable investment’. While reviewing the literature on this grand idea, also known as ‘(socially) responsible investment’, ‘impact investment’, or ‘ethical investment’, Talan and Sharma (2019: 1) defined ‘sustainable investment’ as “the integration of environmental, social, and governance (ESG) factors in investment decision-making.” ESG integration represents the second largest sustainable investment strategy globally and the largest in the United States, Oceania, and Asia (*id*: 10). The idea became popular in the past two decades, although it actually dates back to the 18th century (*id*: 1). It emerged as a possible way to resolve investment issues impacting society and the ecology by holding financial markets to account for those impacts (*ibid*).

The ESG factors that characterize sustainable investment animate the EU Negotiating Directives. To promote environmental and societal factors, these Directives propose that the EU-Angola Agreement should contain rules encouraging the parties to enforce international standards on labor and the environment; corporate social responsibility, and community and social impact (CSR/RBC). They also propose rules urging the parties to observe due diligence in supply chains and implement key international treaties and principles to prevent and combat money laundering, terrorism financing, tax fraud, and tax evasion.

In addition, to uphold good governance standards, the EU Negotiating Directives recommend rules on procedures and processes, transparency on payment fees, domestic inter-agency coordination, and mechanisms to establish a single window and an ombudsperson.

SIFA vs Bilateral Investment Treaties

The concept of sustainable investment sets the SIFA apart from other bilateral treaties, but how does the SIFA fare vis-à-vis the traditional bilateral investment treaty (BIT)? Both the SIPA and BITs shield foreign investors from political risks by stabilizing the laws and practices of the host country. Specifically, the EU Negotiating Directives aspire to improve Angola's investment climate and "facilitate the mobilization and retention of investment" (i.e., to realize its overall objective) by relying on the principle of stability.

The stabilization objective of the contemplated EU-Angola Agreement implies that, like BITs, the SIFA may come under scathing attack for hindering domestic policies aimed at fostering sustainable development. In 2010 in *Foresti*, foreign mining firms dragged the South African government before the International Centre for Settlement of Investment Disputes (ICSID) in Washington DC, arguing that South Africa's Black Economic Empowerment (BEE) policies violated the terms of its BITs with several European countries. Although it settled this matter out of court for an undisclosed amount, the South African government, angered by this experience, promulgated in 2015 the Protection of Investment Act. This new FDI law phases out BITs and affirms South Africa's right to regulate its society, including the economy.

Interestingly, the EU Negotiating Directives also provide that the EU-Angola Agreement should ensure the right conditions that are conducive for sustainable investments "while preserving the ability of host countries to regulate the activity of investors in their respective territories". This provision signals that, if foreign investors brought a *Foresti*-like case before ICSID, the arbitral tribunal would probably resolve the dispute in Angola's favor. On balance, however, this provision reveals, more than anything else, the underlying tension between the SIFA's BIT-like stability objective and the host countries' right to regulate.

Lourenço's Liberalism Versus Dos Santos's Statism

The biggest challenge facing the EU-Angola SIFA will not stem from its theoretical elegance, but from its practical effectiveness. The EU Negotiating Directives confirm the right of host countries to regulate the activities of foreign investors, but this right has not enabled host countries in Africa to attract more FDIs.

Indeed, the EU Negotiating Directives are not the first law or legal instrument to provide for such rights, to little effect. After South Africa in 2015, Namibia passed the Namibia Investment Promotion Act 6 of 2016 and the African Union adopted the Draft Pan-African Investment Code in 2016. Yet neither the Pan-African Investment Code nor its domestic versions (i.e., the South African and Namibian investment laws) ameliorated the patterns of capital inflows into the continent. On the contrary, World Bank data show that net FDI inflows have dropped in South Africa since 2013 and nearly collapsed in Namibia since 2015.

Angola has been here before. Almost two decades ago, after the Civil War ended, President José Eduardo dos Santos approached the International Monetary Fund (IMF), the Paris Club, and Western donors, but failed to obtain from them the capital he needed to rebuild Angola. Then, entered China. In 2004, the Asian giant and Angola implemented a state-to-state model that differed sharply from the neoliberal model that then prevailed in international foreign investment law. That resources-for-infrastructure model, dubbed 'the Angola model', pumped several billions of US dollars into the Angolan economy and into major construction projects over the country.

Like his predecessor in the early 2000s, today President João Lourenço is courting Western capital. However, unlike President dos Santos, President Lourenço seems to pull his country in a neoliberal, market-led direction. The ongoing EU-Angola SIFA negotiations take place after President Lourenço decided to privatize 190 state-owned enterprises in a process that – some Angolans complain – favors foreign investors at the expense of local investors. The IMF and German Chancellor Angela Merkel praised President Lourenço's reform agenda, including his spectacular anti-corruption campaign and the large-scale privatization of state-owned companies. In similar vein, the EU Negotiating Directives for the EU-Angola Agreement emphasize "micro-small-and-medium-sized enterprises".

The EU-Angola SIFA Misdiagnosed the Problem

The kleptocracy that marred the dos Santos's regime may have blinded President Lourenço to the efficacy of the state-to-state model that his predecessor employed. The neoliberalism that inspires the envisaged EU-Angola Agreement assumes that Angola does not receive as much FDIs or sustainable investments as it wants because, as a market, Angola does not operate efficiently. Accordingly, the EU Council strives, through its Negotiating Directives, to “improve” and “create an attractive, transparent and predictable climate”. And, even though the SIFA does not exactly correspond to what IEL lawyers identify as a neoliberal instrument, the sustainable investment theory that drives it does accommodate neoliberalism (see, for example, Young, 1992).

The neoliberal assumptions behind the EU-Angola Agreement negotiations do not not notice that Angola receives relatively little FDIs, not so much because its domestic market works inefficiently, but primarily because foreign capital markets have failed. Most African countries suffer from their geography. Capital inflows to Africa respond less sensitively to upgraded infrastructure, higher rates of return on investment, and greater economic openness than similar reforms in other developing regions (Johnson, 2010: 927). In concrete terms, this means that, if Burkina Faso in West Africa and El Salvador in Central America adopt the same measure to improve the ease of doing business, Burkina Faso will most likely attract less investments than El Salvador. The problem of geography results from the stereotypes surrounding Africa and its peoples, some of these stereotypes being rooted in centuries of anti-Black racism, discrimination, and marginalization.

Resource-for-infrastructure contracts succeeded because the involvement of both the home state (i.e., China) as investors and the host state (i.e., Angola) as joint-venture partners allowed the FDIs channeled through this state-to-state model to transcend the negative stereotypes and ill-informed perceptions that would have otherwise precluded those investments. That is why the rules, proposed in the Negotiating Directives, that encourage the EU and Angola to reinforce their cooperation on “ways to facilitate investment and ensure the implementation of the Agreement” may prove the most effective part of the Agreement.

By contrast, the model embraced by President Lourenço does not enlist the home state as a foreign investor; instead it deploys the host state as an entity that builds and maintains a stable environment for foreign firms to invest in the host country. This model will not increase FDI or sustainable investment in Africa because the so-called ‘market’ or the private sector that it subsumes is not a neutral, disinterested, and unbiased player. The market typically comprises multinationals run by rich, older White men who often do not have enough information about the continent or who harbor jaundiced views of Africans. With such a model, the best-laid investment facilitation agreement will open up the economy of the host state, but it will not manage to bring in substantial FDIs, at least not as much as a typical R4I contract would do.

Cheers!

It is undeniably too early to give a final verdict on the EU Sustainable Investment Facilitation Agreement. Likewise, President Lourenço deserves the benefit of the doubt; he too must be given a chance to innovate for the good of the great nation that he leads.

Still, the first signs lead me to believe that the chief virtue of the SIFA emanates from its form, not from its substance. In other words, if the EU-Angola Agreement smells and tastes like vintage wine, it is not because it feels full-bodied, it is because the person who describes and serves it (i.e., the EU) is a master sommelier.

But who cares about those details? The next presidential elections will take place next year, and the news of EU-Angola SIFA negotiations is music to President Lourenço's ears, desperate to reverse the fortunes of Angola's shrinking economy before the next ballot. In this context, the mere announcement of these negotiations adds to his electoral platform. As the announcement of the first round of negotiations grabs the headlines, the President and his advisors can swirl, smell, sip, feel, and drink their fresh glasses. Cheers!

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