International Investment Agreements (IIAs) and Sustainable Development: Are the African Reform Approaches a Possible Way out of the Global IIA Crisis?

By:

Gudrun Zagel

October 31, 2019

Introduction: The uneasy relationship between international investment law and sustainable development

The 2015 UN Sustainable Development Goals (UNSDGs) prominently support that foreign investment and sustainable development mutually reinforce each other. Yet, while foreign investment has always played an important role for African economic development, it frequently has not contributed to, but, rather harmed the sustainable development of African host states, as Shell in Nigeria (here and here) or the cobalt exploitation in DR Congo (here and here) exemplify. Subject to criticism are, in particular, the more than 900

International Investment Agreements (IIAs) that African states have concluded with home states of foreign investors to promote foreign investment.

While IIAs provide for substantive standards of protection for foreign investors that are enforceable through investor-state dispute settlement (ISDS), IIAs are problematic for sustainable development, as they permit foreign investors to challenge host state regulatory measures to implement environmental, social, labour and other sustainability policies. A number of infamous African investment cases demonstrate this concern. For example, in Biwater Gauff v Tanzania, a British investor sued Tanzania for terminating a contract on water and sewage services for the city of Daressalam that was not properly performed by the investor and jeopardised the supply for the population. This and other cases (e.g. Veolia v Egypt, or Cortec Mining v Kenia) have triggered debates on the adverse impacts of IIAs on sustainable development. Opponents argue that traditional IIAs merely focus on the protection of the rights of foreign investors, but are silent on sustainable development and related non-economic policies of host states. Furthermore, IIAs are criticised for their unbalanced content, as they specify investor rights and host state obligations, but not investor obligations or host states rights, both of which are required to implement the UNSDGs. As the typically lean provisions in traditional IIAs give arbitral tribunals a wide scope of interpretation that has resulted in development-friendly awards (e.g. here and here) as well as in awards that entirely disregard the effects on sustainable development policies (here and here), host states hardly can predict whether and to what extent arbitral tribunals will accept sustainable development policies or rather require host states to compensate foreign investors for the adverse impacts of such measures on their investment.

African IIA reform approaches

While the criticism on IIAs has induced a severe IIA crisis outside Africa, like the TTP, CETA or TTIP show, African states continue to rely on IIAs as an instrument to regulate foreign investment (see blog posts by Regis Simo and Faith Tigere). To prevent negative impacts on their sustainable development policies, African states have shifted the focus of IIAs from the protection of foreign investment to the promotion of sustainable foreign investment and have aimed at better

balancing the investors' interests in protecting their property and the host states' interests in maintaining the regulatory sovereignty to pursue their sustainable development policies. Representative examples include the BIT Morocco-Nigeria (2016), the Draft Pan-African Investment Code (2016) (PAIC), the ECOWAS Supplementary Act on Foreign Investments (2008), (ECOWAS-SA) or the SADC Protocol on Finance and Investment (2006). Whereas some reform elements, such as the reformulation of the expropriation or fair and equitable treaty clauses, also exist outside Africa, African IIAs enshrine some innovative features that have hardly been used or even noticed outside the African continent, but maybe worthwhile to be considered with a view to overcoming the global IIA crisis.

Systemic integration of sustainable development

Many modern African IIAs contain not only a sweeping reference to sustainable development in the preamble, but systematically integrate sustainable development in the IIA provisions. They define the meaning and scope of sustainable development by referring to the relevant international environmental, labour and human rights standards that host states have accepted (,e.g. arts 34 and 37 PAIC, arts 13 and 15 BIT Morocco-Nigeria, art 21 ECOWAS-SA) to guide arbitral tribunals as to which standard should be applied when interpreting the IIA provisions. Furthermore, they directly integrate sustainable development in substantive IIA provisions, e.g. art 1(3) BIT Morocco Nigeria establishes that only investments contributing to the sustainable development of the host state are protected under the IIA. In addition, modern African IIAs not only establish the host states' right but even an express obligation to implement sustainable development policies (e.g. art 21 ECOWAS-SA, art 15 BIT Morocco-Nigeria). Finally, they clarify the relationship of sustainable development to the expropriation and fair and equitable treatment standards to prevent that host state regulatory measures are challenged under these provisions (e.g. art 8(2) BIT Morocco-Nigeria, art 11(3) PAIC). In sum, these elements clearly shift the purpose of IIAs to the promotion of sustainable foreign investment by providing clear guidance to arbitrators as to the permissibility and scope of sustainable development policies.

Investor obligations

Investor obligations are a specific feature of modern African IIAs that not only contributes to better balance the rights and obligations of host states and investors but also constitutes an essential element for realising sustainable development that complements the host states efforts to implement the UNSDGs. Many African IIAs contain comprehensive chapters on investor obligations with detailed environmental, social and labour standards, and prohibitions against engaging in corrupt practices or money laundering (e.g. arts 11-18 ECOWAS-SA, arts 19-24 PAIC). To make investor obligations effective, African IIAs provide for the jurisdiction of either host state or home state to enforce investor obligations in national courts (e.g. art 20 BIT Morocco-Nigeria, art 17 ECOWAS-SA) and/or regulate the role of investor conduct in arbitral proceedings (e.g. art 18 ECOWAS-SA). Overall, the provisions on investor obligations constitute a viable possibility to guide arbitral tribunals on how to consider the conduct of investors in realising the sustainable development policies of host states. A side effect is that they provide bilateral rules for the conduct of TNCs and their enforceability, a subject that could so far not be agreed upon in a multilateral binding treaty (see here and the related blog post by Ibironke T Odumosu-Ayanu).

ISDS Reform

Modern African IIAs use various approaches to reform the ISDS system that does not only address the general criticism in the ISDS system but also contribute to mitigating the adverse effects of ISDS on sustainable development. For instance, the BIT Morocco-Nigeria replaces the traditional ISDS with a comprehensive system of dispute prevention and management. It establishes a treaty committee composed by both contracting parties to negotiate investment disputes (arts 4 and 26 BIT Morocco-Nigeria). This procedure facilitates a solution to the dispute that duly considers sustainable development aspects in the interest of both parties. If a settlement is not possible at this stage, ISDS is still possible. Other African IIAs amend the ISDS rules with the effect of saving resources. For instance, art 43 PAIC and art 18(3) ECOWAS-SA introduce counterclaims that allow host states to raise sustainable development aspects of a case and contribute to saving costs through merging proceedings. Finally, art 12(2) PAIC, art 18 ECOWAS-SA regulate the calculation of damages in detail and specify how host state interests and investor conduct

relating to sustainable development aspects shall be considered to mitigate or offset compensation. Overall, the reformed ISDS rules ensure that sustainable development aspects are duly considered by arbitral tribunals in their awards, but also support the sustainable development policies of host states indirectly through saving costs and resources – resources that can better be used to implement sustainable development projects.

Prospects and Challenges of African IIA Reform

The novel elements in African IIAs are promising approaches to shift the focus of IIAs from investment protection to sustainable foreign investment. They do not only comprehensively integrate sustainable development into the substantive and procedural obligations of IIAs, but also make IIAs an instrument with well-balanced rights and obligations for investors and host states alike. As such, they might also constitute a useful input in the global discussion on IIA and ISDS reform.

A major challenge to the African IIA reforms that may jeopardise Africa's potential influence on the world-wide IIA reforms is that none of the reformed instruments has been tested in arbitral practice yet, as most of them do not constitute binding treaty law. For instance, the highly praised BIT Morocco-Nigeria has not yet been ratified, and the ambitious PAIC has ultimately only been adopted as a recommendation. Creating binding instruments is, however, the requirement for making them applicable in ISDS proceedings and to shape arbitral practice in the direction of sustainable development.

Another problem is that despite numerous ambitious modern IIAs, the African IIA landscape is entirely inconsistent. Not only is there still a large number of traditional IIAs, but also the IIA negotiating practice of African states does not reflect a consistent pattern of reform, as the example of the recently concluded IIAs of Morocco and Nigeria reveals. This lack of consistent practice weakens the persuasiveness of the progressive African IIA reform approaches. The development of a national or regional model IIA, or even the conclusion of a regional IIA replacing national IIAs, as the PAIC originally envisaged, would be a useful step to strengthen the visibility of the African positions.

A common African position could also facilitate a strong African influence in the

international IIA and ISDS reform discussions that are paralysed by diametrically opposed positions of the different players. A prerequisite is to coordinate and put into effect the African reforms in African REIOs – ideally through the AU-, and to speak with one voice in international for a such as the UNCITRAL Working Group III. While the US, EU, and China are caught up in trade wars, this could be an opportunity for Africa to become a rule-maker rather than a rule-taker in making international investment law more sustainable - an opportunity that should be used

View online: International Investment Agreements (IIAs) and Sustainable Development: Are the African Reform Approaches a Possible Way out of the Global IIA Crisis?

Provided by Afronomicslaw