The Case Against National Treatment in Africa

By:

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This analysis addresses the question whether it is constitutional and prudent for African states to agree to a treaty term such as national treatment, which limits their sovereign and constitutional powers to regulate in the public interest without having to account to foreign investors. The constitutions of many African states endorse the principle that sovereignty resides in the people. They require the powers of government to be exercised to advance the welfare of the people [*Constitution of the Republic of Cameroon* 1972, art 2(1); *Constitution of the Arab Republic of Egypt* 2014, art 4; *Constitution of the Republic of Ghana* 1992 art 1(1); *Constitution of the Republic of Kenya* 2010, preamble and art 10; *Constitution of the Federal Republic of Nigeria* 1999, s 14(1); and *Constitution of the Republic of South Africa* 1996, ss 1(a) and 7]. Foreign investors retain the citizenship of their home countries and have the right to repatriate their investment and returns. The second issue addressed is whether foreign investors are in *like circumstances* as domestic investors and must be entitled to national treatment.

The *national treatment* standard in investment treaties and national legislation requires covered foreign investors and investments to be treated no less favourably than domestic investors and investments are treated [*Agreement between the Government of Japan and the Government of the Republic of Kenya for the Promotion and Protection of Investment*, signed 28 August 2016, entered into force 14 September 2017, art 3; Ghana Investment Promotion Centre Act 2013 (Act 865) section 30(a); Protection of Investment Act 2015 (Act 22) (South Africa), section 8(1)]. In *Total SA v Argentina*, ICSID Case No ARB/04/1, Decision on Liability, 27 December 2010, paras 211-212] the Tribunal held that to prove breach of national treatment, the investor:

> (i) has to identify the local subject for comparison; (ii) has to prove that the claimant-investor is in like circumstances with the identified preferred national comparator(s); and (iii) must demonstrate that it received less favourable treatment in respect of its investment, as compared to the treatment granted to the specific local investor or the specific class of national comparators … Different treatment between foreign and national investors who are similarly situated or in like circumstances must be nationality driven.

Effectively, national treatment requires changes in existing laws and policies favouring domestic business entities or 'discriminating' against foreign investors, and prohibits prospective laws and policies that might be intended to address the specific situation of domestic businesses only (if there are foreign investors in like circumstances) [Jeswald Salacuse, *The Law of Investment Treaties* Oxford University Press, 2010, 246]. The national treatment standard limits the authority of African states to implement policies and measures as required for the benefit of citizens and places extra regulatory and resource burdens on the states by expanding their obligations towards citizens to include foreign investors.

National treatment essentially gives foreign investors *de facto* citizenship. In most parts of the *developed* world, (such as in Australia, New Zealand and United Kingdom), it takes years of residence to acquire citizenship by foreign nationals already living and working in these countries and contributing to their economies [*Australian Citizenship Act* 2007 (No. 20) ss 20 and 22; *Citizenship Act* 1977 (New Zealand, Public Act No 61) s 8(2); and *British Nationality Act*

1981 s 18 and Sch 1 para 1(2)]. Non-citizens are not accorded national treatment as long as they remain on temporary visas in these countries. Non-citizens in developed countries are not entitled to national health insurance coverage even though they contribute to the national economies in terms of labour and payment of taxes as citizens do and even though these countries proclaim the values of human rights, equality and non-discrimination. Differential treatment between nationals and non-nationals might be an inevitable incidence of municipal law. It is less clear why there should be an exception to this in the context of foreign investment. National treatment is an agenda of the developed world; preached selectively in relation to businesses, but not in relation to individual human beings who equally contribute to the development of the host state.

In the context of foreign investment, these same developed countries seek to limit the right of foreign investors so that they do not enjoy greater rights than available to their domestic investors. Thus, section 2102(b)(3) of the United States Trade Act 2002, 19 USC 3802, provides that "the principal negotiating objectives of the United States regarding foreign investment are to reduce or eliminate artificial or trade-distorting barriers to foreign investment, while ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States." This is the Calvo Doctrine in disguise.

National treatment allows foreign investors to circumvent African constitutional requirements on the acquisition of citizenship since in substance they get to enjoy the rights of citizenship without actually acquiring it. National constitutions in Africa require noncitizens to acquire citizenship in accordance with municipal legislation [*Constitution of Ghana* art 9(1) and *Constitution of Nigeria* ss 26 and 27]. As established above, African constitutions require governments to prioritise public policymaking and implementation in favour of their citizens. This is in the very nature of sovereignty because "a state's fundamental purpose is to safeguard the public interest of its citizens" [Jewald Salacuse, *The Law of Investment Treaties*, 2edn, Oxford University Press, 2015, 64]. National treatment essentially says this cannot be done unless a state extends measures intended to safeguard domestic businesses to foreign business entities. Preferential treatment of citizens can be done at the risk of

investment treaty claim of violation of national treatment.

No nation should take measures principally to disadvantage foreign business merely because of their foreign status. However, 'poor' African states must be free to design policies targeted at domestic businesses and citizens because the primary responsibilities of African states are owed to their citizens first. Moreover, it may be that the gains and costs to the national economy for extending the measures to foreign investors and investments cannot be measured. In fact, it has been argued that the "notion that states signing investment treaties has the effect of increasing foreign investment" and that foreign investment leads to development "is a plausible folk theory" [[Anthea Roberts and Taylor St. John, 'UNCITRAL and ISDS Reform: Plausible Folk Theories']. Thus, if national treatment would apply, it must be conditioned upon an assessment of its gains and costs. Comparative lessons could be drawn from national immigration and citizenship laws of the developed world where noncitizens are discriminated against because they must live and work for years before they become eligible to acquire citizenship and then become entitled to national treatment.

The prudence of agreeing to national treatment can also be assessed in relation to the right to repatriate investment and returns. Repatriation of profits can help foreign investors to service loans, buy equipment and pay for other services. A limitation or lack of the right to return capital and profits can defeat the purpose of making foreign investment [M Sornarajah, *The International Law on Foreign Investment*, 4edn, Cambridge University Press, 2017, 243]. Thus, foreign investors have the right to repatriate investment and returns[*Agreement between the Government of the Hellenic Republic and the Government of the Republic of South Africa on the Promotion and Reciprocal Protection of Investments*, signed 19 November 1998, entered into force 06 September 2001, art 6].

In contrast, domestic investors have nowhere else to repatriate their investment and returns. They would mostly reinvest or spend the same in their host-home country. Given that foreign investors assert the right of repatriation, they manifest an intention to remain part of and contribute to the development of their home countries. Accordingly, foreign investors are not in like

circumstances as domestic investors and must not be entitled to national treatment. An investor that reinvests in a host country, such as is naturally done by domestic investors, makes more tangible and sustained contribution to the development of that country than one that ships the investment and returns abroad. Foreign investors must choose then between national treatment and the right of repatriation. The right of repatriation justifies differential treatment of foreign businesses.

African businesses invest outside Africa. Arguably, Africa will benefit from national treatment because if its investors outside are entitled to national treatment. However, investors from “developed countries” are “the major players” in Africa [*World Investment Report 2019: Special Economic Zones*, United Nations, 2019, 38]. Africa’s investment outflows are disproportionately low when compared to investment inflows into Africa from the developed world. Low investment outflows means that Africa stands to benefit less from national treatment available to its investors outside the continent.

In conclusion, there is a constitutional and policy case against national treatment or, at least, to rethink its constitutionality and prudence in Africa.

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