The Relevance of the Draft Pan African Investment Code (PAIC) in Light of the Formation of the African Continental Free Trade Area

By:

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The regulation of foreign investments in Africa is in a state of flux, mainly due to the regional integration efforts spearheaded by Treaty for the Establishment of the African Economic Community (AEC). A recent milestone towards the formation of the AEC is the conclusion of the African Continental Free Trade Area (AfCFTA) Agreement on 21 March 2018. The AfCFTA is relevant because it will have an investment protocol, which is being negotiated and is expected to be finalised during 2020. This protocol is on a collision course with the recently issued Pan African Investment Code (PAIC). The objective of the PAIC is to promote, facilitate and protect investments that foster the sustainable development of each member state. The PAIC is an investment treaty template

and not a legally binding instrument. However, provision is made for African Union (AU) member states to adopt it as a binding instrument to replace intra-African bilateral investment treaties (BITs) or investment chapters in intra-African trade agreements. The application of this provision will be complicated in practice because BITs typically have survival clauses in terms whereof the provisions of a BIT will remain in effect for a period of time after their termination. For example, the South Africa-Mozambique BIT has a survival period of ten years. Furthermore, by singling-out intra-Africa investment for reduced protection, the PAIC creates two standards of treatment of foreign investors, one for intra-African investors and one for investors from outside Africa. Taking the South Africa-Mozambique BIT as an example, an investor covered by this BIT currently has access to international arbitration, while the PAIC does not provide such guaranteed access to international arbitration.

This is further complicated by the fact that PAIC applies to all investors irrespective of their nationality. The debate regarding the suitability of the PAIC to foster the harmonisation of the foreign Investment regime in Africa therefore raises the question, at what level and by means of which legal instrument should foreign Investment in Africa be regulated? In Africa, foreign investments are regulated by host state laws, by Regional Economic Communities (RECs), treaties as well as under investment contracts. The PAIC by contrast seeks to regulate foreign investments at continental level. There are different views with regard to what the ideal level at which foreign investments should be regulated, national, sub-regional or REC, or continental. Mbengue opines that the PAIC is the right instrument for this task. Paez is also argues that foreign investments should be regulated by a continental treaty. Denters and Gazzini argue that foreign Investments are better regulated at the sub-regional or REC level. Kidane argues that the PAIC as it stands is not suited for the regulation of foreign investments, and that the current version must be redrafted. He also notes that the PAIC's relevance will be impacted by the coming into force of the AfCFTA. I dealt with this issue elsewhere. The proposal I make therein is that in view of the harmonisation theme of African regional integration, foreign investments must be regulated at continental level by means of the AfCFTA investment protocol, which is currently under negotiation. The PAIC has various challenges.

With regard to the resolution of investor-state disputes, the PAIC lacks a harmonized approach because it defers to host states to resolve disputes according to their own laws. This may promote competition among host states whereby some states may market themselves as safer and better investment destinations. Secondly, the PAIC is a not legally binding. Thirdly, the PAIC relies on member states to conclude BITS that will adopt its provisions. In this regard the PAIC risks being ignored like the SADC Model Bilateral Treaty Template. Fourth, by seeking to regulate intra-Africa investment, the PAIC creates a system of different treatment for intra-African investors versus investors from outside Africa. This risks treaty shopping particularly by African investors seeking to locate themselves in non-Africa jurisdictions so that they can procure favourable investment treaty protection. The advent of the AfCFTA investment protocol renders the PAIC worthless, and presents an opportunity for the African Union, (AU), to rectify the situation. The AU's focus should be to design the AfCFTA investment protocol as an instrument that will treat all investors equally, and that will also foster harmonisation at continental level from the top down. My argument is still valid although my solution will not resolve questions such as divergent policies and views with regard to whether investor state disputes should be referred to arbitration or litigation. Central to this issue is that African states have different levels of the rule of law. This means that under circumstances where the rule of law is poor, obliging investors to refer disputes to the courts of a host state riks denial of justice. A potential solution to this challenge, and one which the AfCFTA Investment protocol can apply, is to create a rule of law scoreboard to gauge the rule of law in member states. The author proposed the African Justice Scoreboard (AJS) for this purpose. The AJS will be a treaty-based gateway that will determine whether an investor-state dispute must be referred to the the courts of a host state, or to another forum. By incorporating the AJS in the AfCFTA investment protocol, the AU will create predictability, and avoid the lack of consensus on investor-state dispute resolution that is evident in the PAIC and that potentially awaits the AfCFTA investment protocol.

Conclusion

The PAIC is not aligned to the direction being taken by AfCFTA, which will usher a continent-wide free trade area and a single regulatory regime for foreign investment. The AfCFTA investment protocol will significantly reduce any value

that the PAIC was meant to offer, however limited. However, the PAIC may have some relevance if the AfCFTA investment protocol allows member states to continue to conclude intra-Africa BITs. But even such an opening will not mean that member states will include the PAIC's provisions, as the SADC Model Bilateral Treaty Template experience shows. Furthermore, allowing member states to conclude intra-Africa BITs will not cure the PAIC's challenges as discussed above.

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