Updating the investment-related provisions of the ACP-EU Cotonou Agreement: issues to consider

By:

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With over 100 countries involved, the revision of the ACP-EU Partnership Agreement, signed in Cotonou on 23 June 2000 is an extremely important endeavor that presents immense opportunities to all the parties and that requires careful negotiations. The Agreement will expire in 2020 and the parties are currently negotiating a new framework that is expected to reflect today's socio-economic opportunities, challenges and concerns. This contribution looks at some of the strategic elements to consider when updating or amending investment-related provisions of the ACP-EU Partnership Agreement.

1. ***Changing international investment policy landscape***

The international investment policy landscape has changed drastically since the year 2000. The revision of the investment-related provisions in the Cotonou Agreement is bound to reflect the global emergence of a new generation of investment policies that places sustainable development and inclusive growth as one of its core objectives. This is in line with both the ACP negotiating mandate which includes the overarching objective of developing investment policies that promote investment for inclusive growth and sustainable development and the EU negotiating directive which emphasizes the importance of sustainable and responsible investment for the creation of more and better jobs.

There are also broader, more global considerations that need to be considered. Several developing countries are increasingly investing abroad including in EU countries, global trade and investment tensions are disrupting existing relationships, and mega-regional trade deals are proliferating in all continents and risk leaving behind non-participating third parties. It is in this dynamic global context that ACP and EU negotiators have an opportunity to conclude a modern and balanced agreement that considers the different level of economic development of the parties and their socio-economic specificities for the benefit of all parties.

2. ***New EU competencies on investment***

When the Cotonou agreement was signed in the year 2000, the EU did not have the competence to negotiate investment treaties (as a block) with third countries. Individual EU countries would do so on a bilateral basis in the form of bilateral investment treaties (BITs) with third parties. Today, and since the entry into force of the Lisbon Treaty (2009), foreign direct investment (FDI) falls within the common commercial policy of the EU. Individual EU countries can still negotiate investment treaties with third countries but would first need an authorization from the European Commission. Today, there are over 280 BITs between individual EU countries and ACP countries mostly concluded more than 15 years ago.

Revisiting these agreements is an important task, as most do not reflect the latest trends in investment rulemaking (e.g. they include broadly formulated substantive obligations and expansive investor-State dispute settlement mechanisms. Careful consideration will be needed to determine whether they are fully in line with the new EU investment policy or the interests of ACP countries. Subsequent to the new investment policy, the EU negotiated trade agreements with third countries that include substantive investment provisions. But this did not happen systematically. EU approaches to investment in trade agreements with third parties varies from one treaty to the other. For example, the EU agreements with Iraq (2012); Colombia, Peru and Ecuador (2012); Ukraine (2014); SADC (2016); and Armenia (2017) did not include investment protection provisions, while the agreements with Canada (2016) and with Singapore (2018) did. Some of the treaties that did not include investment protection, included investment liberalization commitments (e.g. Japan (2018)), while others offered a review mechanism allowing the parties in the future to negotiate investment protection and investor-to-state dispute settlement procedures (e.g. Ukraine (2014)).

3. ***Changing dynamics of ACP countries' investment policymaking***

Since the year 2000, a number of key developing countries (including ACP countries) have "graduated" from being "investment treaty takers" to becoming "investment treaty makers". This trend can be witnessed most clearly in Africa with the inclusion of innovative provisions in the Pan-African Investment Code (2016); the SADC Investment Protocol (2016) and several BITs involving African countries (e.g. the Morocco-Nigeria BIT (2016)). This is in addition to ongoing the forthcoming negotiations of Phase 2 on the Investment Protocol of the AfCFTA. In all these instruments African negotiators have included or are considering the inclusion of innovative provisions that did not exist in the year 2000 and that aim for the most part at ensuring responsible investment and maintaining the right of host countries to regulate in the public interest.

4. ***The way forward***

A full-fledged investment protection chapter does not seem to be the most feasible or desirable approach at this stage. This is because of both practical reasons (the tight deadline to complete the negotiations); and policy reasons (there are over 100 countries involved with striking differences in their levels of economic development and investment policy orientation). While a full-investment chapter would help to quantitively consolidate the investment framework between ACP countries and EU countries by potentially replacing over 280 BITs in place between individual EU countries and ACP countries, it would, on the one hand, create over 1800[2]new investment protection treaty relationships between the 79 ACP countries and the 27 EU countries. This would require careful negotiations and lengthy consultations to asses the desirability and feasibility of such an approach for all the parties in line with each countries' national development strategy. Instead, the parties could focus on amending and updating the existing investment-related provisions in the Cotonou Agreement in light of the changing global investment landscape. This would entail a careful examination of the existing provisions, identifying which provisions are still relevant, and which need to be replaced or amended. For example, Article 78 on investment protection, as well as Chapter 5 of Annex II encouraging and providing guidance for EU countries and ACP countries to conclude BITs would have to be revised in line with the new EU investment policy.

Special attention could be given to provisions relating to capacity building and technical assistance to support development-oriented investment policy reforms, human resources development, and to provisions on the promotion and facilitation of responsible investment that contributes to sustainable development objectives. The Parties could also address the existing old 280 BITs between ACP and EU countries, by way of recognizing their existence and agreeing in the future to revisit their status. It could also be feasible to introduce general non-binding investment principles between the parties aiming at (e.g. ensuring coherence in investment policymaking; developing an open and conducive policy environment for investment; and aligning investment protection, promotion and facilitation policies with sustainable development goals).

Various modern instruments exist that strike a balance between maintaining an open and conducive business environment and the right of host states to regulate for sustainable development objectives. One such instrument is the Joint ACP-UNCTAD Guiding Principles for Investment Policymaking, developed to guide ACP countries in the formulation of investment policies. Finally, and for greater certainty, the parties could include clear relationship management clauses in the new agreement to establish a hierarchy between the new agreement and the existing Economic Partnership Agreements (EPAs) concluded by the EU with various Regional Economic Communities (RECs) that have ACP countries as members. The revision of the investment provisions of the Cotonou agreement presents great opportunities for both the EU and the ACP to reflect the rapid developments in investment policymaking that occurred in the last 20 years and to strengthen further the emerging global understanding that modern investment rulemaking places sustainable development and inclusive growth on the same footing as investment liberalization and protection. It is equally important to clearly define, from the outset, the approach to be taken on investment, and to avoid all-encompassing general provisions that may be open to broad interpretation or provisions that may represent disguised commitments with unintended consequences and to focus rather on specific provisions of common interest that can be operationalized and monitored clearly and transparently for the benefit of all ACP and EU countries.

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[2]The number of treaty relationship is the number of relationships between all the parties that will be created by a single treaty.