

Some Lessons on Investment for Consideration by Algeria

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1. Introduction

- There are 3 main economic theories on foreign investment: the classical theory (good), the dependency theory (bad) and the middle path (regulation + openness).
- Foreign Investment was initially governed by customary international law and host states were supposed to treat investment in accordance with an international minimum standard, the principle of state sovereignty etc.
- However, customary international law rules lacked detail and clarity and provided low level of protection of investors and investments.
- During the 19th century, international consensus on the standard of treatment which should be accorded to foreign investors started to breakdown and countries resorted to some bilateral agreements
- Customary international law on investment protection was later supplemented by Treaties of Friendship, Commerce and Navigation (FCNs).
- Attempts to come up with multilateral investment treaty also failed (protection v policy space).

2. Era of Bilateral Investment Treaties (BITs)

- From 1959 to 1990, a total number of 365 BITs were signed.
- By 2000, there were a cumulative 1939 BITs and there were 2495 BITs by 2005.
- By the end of 2014, there were 3268 international investment agreements, and 2860 of which were BITs.
- Currently, BITs in excess of 3000.
- Post 2003 to date, revision and termination of BITs.

Key features of BITs

- **The preamble** reflects the parties' intentions and objectives when concluding an agreement.
- **The scope of BITs which includes** a definition clause that defines concepts such as 'investment', 'nationals', 'investor', 'territory', duration and termination.
- **Obligations of the host state under BITs**, which includes the following: fair and equitable treatment; full protection and security; most favoured nation treatment; national treatment, repatriation of profits; performance requirements; expropriation and compensation.
- **Dispute settlement clauses-especially investor-state dispute settlements provisions.**
- Most BITs do not contain investor obligations.

Definition of Investment

- Most BITs take a broad, open ended approach to defining what constitute an investment (e.g. United Kingdom and Northern Ireland-SA BIT).
- “investment” means every kind of asset and in particular, though not exclusively, includes:
 - (a) *Movable and immovable property and any other property rights such as mortgages, liens or pledge;*
 - (b) *Shares in and debentures of a company and any other form of participation in a company;*
 - (c) *Claims to money or to any payments under contract having a financial value;*
 - (d) *Intellectual property rights, goodwill, technical processes and know-how;*
 - (e) *Business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.*

- An ‘enterprise-based’ model defines the protected investment in terms of the business organization of the investment through an enterprise.
- Under this model, investments are usually defined as “enterprises”, that is, investments related to the ownership or control of an enterprise.
- It usually limits the protection afforded to a foreign direct investment made by a foreign owned or controlled company or other type of enterprise.
- There are only few BITs which adopt the ‘enterprise-based’ model.
- Pan-African Investment Code provides that enterprise or company” means any entity duly constituted or otherwise incorporated, under the applicable laws and regulations of a Member State provided that it maintains **substantial business** activity in the Member State in which it is located.
- Substantial business activity requires an overall examination, on a case-by-case basis, of all the circumstances, including, inter alia: (i) the amount of investment to be brought into the host State, (ii) the number of jobs to be created , (iii) its effect on the local community , and (iv) the length of time the business has been in operation.

SADC Model BIT 2012

- **Investment** means an enterprise within the territory of one State Party established, acquired or expanded by an investor of the other State Party, including through the constitution, maintenance or acquisition of a juridical person or the acquisition of shares, debentures or other ownership instruments of such an enterprise, provided that the enterprise is established or acquired in accordance with the laws of the Host State[; and registered][approved][recognized] in accordance with the legal requirements of the Host State].
- An enterprise may possess assets such as *shares, stocks, debentures, debt security, loans to an enterprise, movable or immovable property and other property rights such as mortgages, liens or pledges, claims to money or to any performance under contract having a financial value, copyrights, know-how, goodwill and industrial property rights such as patents, trademarks, industrial designs and trade names, to the extent they are recognized under the law of the Host State, rights conferred by law or under contract, including licences to cultivate, extract or exploit natural resources*

For greater certainty, Investment does not include:

- 1. Debt securities issued by a government or loans to a government
- 2. Portfolio investments
- 3. Claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or the extension of credit in connection with a commercial transaction, or any other claims to money that do not involve the kind of interests set out in subparagraphs above.

Fair and Equitable Treatment (FET)

- FET provision is found in most BITs and other international investment agreements and is a rule of international law.
- The FET principle may be violated even if the foreign investor receives the same treatment as investors of the host state nationality.
- There are two approaches to the relationship between FET and customary international law. The traditional view considers the FET as part of the international minimum standards, whilst the modern view identifies FET as an independent standard which may have reached a customary character.
- The standard has been applied in areas like transparency, stability and the protection of the investor's legitimate expectations; compliance with contractual obligations; due process and freedom from coercion and harassment.
- The FET standard may be violated on administrative matters

Example from SADC

- The SADC Model BIT included, with reservations, a clause on fair and equitable treatment on the basis that the clause is a broad clause that is open to interpretation as has been evidenced in arbitral decisions. The SADC Model BIT sets out two options for dealing with the issue.
 1. Propose a clause on fair and equitable treatment which accords such treatment in line with customary international law.
 2. Provide fair administrative treatment in the place of fair and equitable treatment.
- However, others prefer to clarify what is meant by the phrase 'fair and equitable treatment'.
- The 2016 SADC Finance and Investment Protocol no longer contains a clause on fair and equitable treatment.

Full Protection and Security

- The standard is commonly expressed as ‘full protection and security’. However, other treaties have different formulations which include ‘full legal protection’, ‘protection’ and ‘full and complete protection and safety’
- A typical full protection and security standard is as follows:

“Investments of nationals or companies of each Contracting Party shall be accorded full and equitable treatment and full protection and security in the territory of the other Contracting Party.”
- Some tribunals restricted the application of the standard to physical security others have expanded it to legal and commercial security.
- It appears that the majority of decisions favour an expansive interpretation rather than a narrow one which is restricted to physical security only.

- ▶ With respect to the full protection and security clauses, cases indicate that the standard of liability is not absolute liability. Rather, the standard is one of 'due diligence,' that is, a reasonable degree of vigilance.
- ▶ One of the contentious issues relating to the full protection and security, is whether the level of due diligence which is expected should depend on the host State's development and stability
- ▶ As a way to militate against being held liable even without many resources, a state may indicate in a BIT that it would only be liable under the full protection and security provision to the extent of resources available to the state.
- ▶ A potential approach would follow s9 of the South African Protection of Investment Act which accords such protection pursuant to the "minimum standards of customary international law and subject to available resources and capacity".

Most Favoured Nation (MFN)

- The purpose of the MFN clause is to ensure that the relevant parties to a treaty treat each other in a manner which is as favourable as they treat third parties.
- The essence of MFN is that whenever one contracting party agrees on more favourable terms with a third party, the other contracting party (to the first treaty) will benefit from the new, more favourable terms.
- Not only can they import substantive provisions but also procedural ones, such as dispute settlement provisions. (*Siemens v Argentina* ICSID Case No. ARB/02/8).
- An investor whose rights are governed by one BIT with an MFN provision, can search the universe of BITs the host countries is party to, identify more favourable clauses and protections in those other treaties, and use the MFN provision to replace or supplement the protections the basic treaty would have provided the investor.

Example from SADC

- The SADC Model BIT excluded the MFN treatment as they argued that it does not fall squarely in the context of BITs as it has the unintended effect of multilateralisation.
- The Drafting Committee of the SADC Model BIT noted that ‘the MFN provision has been very broadly, and on several occasions unexpectedly, interpreted in arbitrations, making it unpredictable in practice’.

National Treatment.

- ▶ The essence of the national treatment provision is that foreign investors should not be treated less favourably as compared to the local investors who are in like circumstances.
- ▶ This clause prohibits discrimination of foreign investors and the favouring of national investors when enacting and applying its rules and regulations and thus ensuring that the foreign investor is accorded the same treatment as nationals
- ▶ The foreign investor should demonstrate that it is in a like situation or a like situation or like circumstances as more favourably treated local investor.
- ▶ When applying the national treatment provision, the first stage is to determine whether the domestic investors are placed in a comparable setting.
- ▶ Where the answer is in the affirmative, the second stage is to determine whether the treatment accorded to the foreign investor is at least as favourable as the treatment accorded to domestic investors.

Example from SADC

- The SADC Model BIT provides for the right to pursue developmental goals and countries can grant preferential treatment in terms of the domestic laws to any enterprise so as to achieve national or subnational developmental goal (e.g. creation of local entrepreneurs, increases in employment levels, the development of human resource capacity and training, the creation of new technologies and the generation of new research).
- The SADC Model BIT provides that countries may take measures necessary to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups prior to the signing of BITs.
- South Africa opted to cast a wider net on possible exceptions to NT: (a) taxation provision under international agreements or domestic laws; (b) government procurement processes; (c) subsidies or grants provided by an organ of state; (d) any law or measure that promotes the interests of persons historically disadvantaged on the basis of race, gender and disability; (e) any law or practice whose purpose is to improve cultural heritage and practices and promote indigenous knowledge and biological resources; and (f) any special advantages accorded by development finance institutions to small to medium enterprises in the Republic.

Repatriation of Profits

- The protection of the right to repatriate profits is an integral part of the BITs.
- Some treaties contain absolute statements protecting the right to repatriate profits.
- A BIT may allow for the free transfer of investment made without delay into or out of its territory.
- This may include, *inter alia*, profits, dividends, capital gains, interest, royalty payment, loan repayment.

Expropriation and Compensation

- Under international law, states have the sovereign right to expropriate any property within their territorial jurisdiction.
- However, in order for an expropriation to be lawful certain conditions must be fulfilled.
- The expropriation must be non-discriminatory, for a public purpose, under due process of the law and accompanied by compensation.
- The rules governing expropriation have remained among the most contested issues of international law. Hull rule (prompt, adequate and effective compensation vs appropriate compensation.
- Currently, the focus of debates has shifted from the standard of compensation for expropriation to drawing the line between expropriation and non-compensable regulatory measures.
- This is due to the proliferation of BITs and increased state intervention in national economies where a wide range of regulatory measures can potentially fall within the category of indirect expropriation.

- Thus, under international investment law expropriation can be direct where the taking of property by the state, either through legislative or administrative action, involves the transfer of legal title and physical possession.
- Under customary international law, states have the sovereign right to regulate in the public interest in areas affecting public order, public health, national security, human rights, public morals and the environment without having to pay compensation.
- The amount of compensation that a government might be required to pay for an indirect expropriation can affect a country's domestic policy agenda.
- There have been several incidents where foreign investors have prevented or deterred governments from taking action by threatening them with possible lawsuits for breach of investment treaties.
- In other instances host states have been forced to abandon legitimate public policies in order to curtail arbitral proceedings.

Examples from South Africa

- South Africa was accused of breaching provisions under the Italian and Luxemburg BITs when it was trying to implement its Black Economic Empowerment (BEE) policy through its Mineral and Petroleum Resources Development Act.
- It was also accused of indirectly expropriating the claimant's shares and violating the claimant's FET and NT obligations under these BITs.

3. New approach to Investment

- The previous section has discussed numerous obligations which are saddled on the host state by BITs.
- On the contrary, investors do not have corresponding obligations thereby making these treaties one-sided.
- South Africa has terminated some of BITs and also served notices to more BITs . However, some of these BITs remain in force for a further 10 -15 years as a result of survival clauses in these BITs. States have cited the 'restriction of national policy space' as a key challenge to the existing BITs.
- However, the modern trend is to have BITs which include some obligations on the part of investors.
- Such obligations include: environmental protection; respect of labour rights; abstaining from corrupt practices; observation of domestic law and provision of information to the host state

Examples

- Article 12 of the US Model BIT, 2012, deals with investment and the environment.
- The Southern African Development Community (SADC) developed a Model BIT in 2012. Articles 13, 14, and 15 of the SADC Model BIT, 2012, deal with investment and the environment.
- The **SADC Model BIT, 2012** impose a duty on investors and their investments to respect human rights in the workplace, in the community and in the host state. It also requires investors and their investments to comply with core labour standards which are enshrined in the ILO Declaration on Fundamental Principles and Rights of Work and calls upon investors and their investments to comply with international labour obligations binding on the host state or the home state, whichever obligations are higher.
- Article 22 requires that the parties should not lower labour standards in order to attract or maintain investments.

Corruption

► Similarly, Article 10 of the **SADC Model BIT, 2012** provides as follows:

10.1. Investors and their Investments shall not, prior to the establishment of an Investment or afterwards, offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a public official of the Host State, or a member of an official's family or business associate or other person in close proximity to an official, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, in order to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relation to an Investment.

10.2. Investors and their Investments shall not be complicit in any act described in Paragraph 10.1, including incitement, aiding and abetting, and conspiracy to commit or authorization of such acts.

Provision of Information

- An investor should be required to provide accurate information to the host state.
- Some investors may be fraudulent or may misrepresent to the host state in order to be allowed to invest.
- The SADC Model BIT, 2012, provides some guidance on how to incorporate such a provision.

Dispute Settlement

- Most BITs provide for both investor-State arbitration and State to State dispute settlement mechanism. Some provides for arbitration with arbitrators from third state has diplomatic relations with both contracting parties.
- Others specify the seat of arbitration like The Hague, Netherlands, unless otherwise agreed by the parties. However, there are some BITs which have excluded arbitration as a way resolving state to state disputes.
- The relevant institutions include the International Centre for Settlement of Investment Disputes (ICSID)
- Criticism against investor-state dispute settlement non-transparent proceedings, hardly predictable outcomes, inappropriate interferences with democratic policy choices in host states, and considerable financial risks, the tribunal members are lawyers who have also acted for investors in other cases.

- Given these multiple disadvantages of ISDS, there is a need to examine the alternatives to investor-State dispute settlement, including State-to-State dispute resolution, as well as alternative dispute resolution and dispute prevention policies with a view to omitting ISDS from investment treaties.
- There are two divergent views approaches to ISDS. On one hand, some argue that that the ISDS should be abandoned in BITs and be replaced with some alternatives.
- Article 26 of Annex 1 of the 2016 SADC FIP makes a radical and dramatic drift and states that investors can only access local courts and tribunals, while State Parties must approach the SADC Tribunal for state-state arbitration.
- In South Africa, s 13 of the PIA deals with dispute resolution and provides for mediation, or access to local courts and tribunals. The government may however consent to international arbitration (state-state) after the exhaustion of all local remedies.

4. Recommendations

UNCTAD has identified 5 five reform objectives and their respective areas. These are as follows:

1. Reforms whose objective is to safeguard the right to regulate.

These are concerned with revising the formulation of standards of treatment of investments. Such standards include the fair and equitable treatment, indirect expropriation, most favoured nation treatment as well as general and specific exceptions.

2. Reforms which deal with the dispute settlement mechanisms. These include exclusion of disputes in a particular sector or industry; exclusion of disputes in a particular regulatory area or relating to specific obligations; limitation periods; exhaustion of local remedies; excluding MFN on Investor-state dispute settlement mechanisms, as well use of countermeasures by host states.

3. Reforms which deal with the promotion and facilitation of investment. This deals with measures which promote both inward and outward investment as well as the promotion of sustainable development.

4. Reforms which ensure responsible investment. These include environment protection, compliance with domestic laws and corporate social responsibility.

5. Reforms which enhance systemic consistency. These include consistency in IIAs and domestic investment law and other policies as well as different IIAs within a country's network.

5. Afreximbank support on Investment

- **Intra-African Investment Finance.** Afreximbank provides Financing to promote Foreign Direct Investment or African Direct Investment. It supports setting up and/or expansion of businesses by an entity from one African country in another African country. It also supports acquisitions, joint ventures, businesses under concession agreements, non-equity modes of investment e.g. franchising, licensing and contract manufacturing.
- **Intra-African Investment Guarantee.** Afreximbank provides Guarantees that cover Foreign/ African Direct Investments. The purpose is to protect investors against risk events that may impair their investment rights or earnings. These include transfer restrictions, expropriation or nationalization of the firm in which the investment is made and other specified government actions that may hinder the investors from normal operation, repatriation of profits etc.
- **The Intra-African Trade Fair** (\$32.6b in 2018),
- **Country-Africa investment promotion programmes,**
- **Twining** especially from intra-African trade champions,
- **Study on African Direct Investment,**
- Supporting the AfCFTA on the negotiation of an **Investment Protocol** including establishment of the continental agency for promotion of investment within the continent.

6. Conclusion

- Algeria needs to review its investment laws taking into account developments in some African countries and regions as well as global developments.
- More effort should be placed on promoting intra-African investments and the Bank has a range of instruments to support intra-African investments. Once Algeria finalises its membership to Afreximbank, it will have access to these instruments as well as other financial, advisory and trade and market information services that we are providing to other 51 African countries.
- Algeria should also participate effectively in the negotiations on the Protocol on Investment.

Thank You