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The Legal Nature of the Draft Pan-African Investment Code and its Relationship with International Investment Agreements

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Abstract:

The present Policy Brief examines the drafting and negotiating process of the draft Pan-African Investment Code (PAIC). It analyses different aspects of this process, particularly the legal nature of the PAIC and its relationship with other international investment agreements. It concludes that the specific objective of the Pan-African Investment Code is to elaborate a model which will serve as roadmap and strategy to guide AU Member States in the negotiation and development of "new generation" international investment agreements by Member States of the African Union.

Introduction

The Draft Pan-African Investment Code (PAIC) comes in the framework of The Commission of the African Union (AUC) and was mandated during the third Conference of African Ministers in charge of Integration (COMAI III) held in Abidjan, Côte d'lvoire, on 22-23 May 2008, "*to develop a comprehensive investment code for Africa with a view to promoting private sector participation*". The AUC was also requested by the ninth meeting of AU-RECs-ECA-AFDB Coordination Committee, held on 25 January 2012, in Addis Ababa, Ethiopia "*to carry out a study with a view to establishing a pan-African Investment Code*".[1]

This brief concluded that the specific objective of the African Investment Code is to elaborate a Pan-African Investment Code (PAIC) model, and develop a roadmap and strategy on how AU Member States can adopt this model to suit their respective interests.

This Code was developed in line with African attempts undertaken at the regional level to develop "new generation" international investment instruments, many of which are being negotiated or amended simultaneously among African countries and regional economic communities (RECs). These include among others, the PAIC; the COMESA-EAC-SADC Tripartite FTA; the Continental Free Trade Area (CFTA); the COMESA Common Investment Area (CCIA); the SADC Protocol on Finance and Investment; and the EAC model IIA. This is in addition to IIA reform efforts at the national level under way in a large number of African countries. Numerous countries are reviewing their IIA network and/or developing new IIA models and are also reviewing their national investment laws and regulations.[2]

Most important features of PAIC

The most important characteristic of the code is trying to find a balance between providing an effective and substantive protection for investors and investments, while preserving the right of the host State to maintain its public interests in achieving its goals in sustainable development. It also balances rights and obligations of States and investors in the context of investment protection and promotion.

To achieve this balance the approach taken was to draft the rules and general provisions first, where most of the provisions begin by stating the general objective rule or the general principle of the protection of investors and investments (such as rules prohibiting expropriation or nationalization, Most-Favored-Nation Treatment, National Treat-

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While the reform process of international investment protection treaties is evolving, it is still at a nascent stage. Systemic reforms that would safeguard the sovereign right to regulate and balance the rights and responsibilities of investors would require more concerted efforts on behalf of home and host states of investment in terms of reforming treaties and rethinking the system of dispute settlement.

Experiences of developing countries reveal that without such systemic reforms, developing countries' ability to use foreign direct investment for industrialization and development will be impaired.

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ment, Transfer of Funds). Then exceptions are placed to the rule or the general principle allowing host states to take special procedures and measures in case there is a public interest that requires the adoption of these procedures or measures in order to maintain, among others, national security, environmental and health standards, or other public interests.

This approach protects policy space of the host state to adopt necessary measures to protect the public interests in achieving their objectives on sustainable development.

The most important issues that have been addressed in PAIC

The code is composed of seven chapters and has 53 articles. The first chapter deals with the general provisions of the aim of the Code, its scope, as well as its relation with other international investment agreements and the most important concepts and definitions of the terms contained in the Code.

The other chapters of the Code deal with the following topics:

- Standards of treatment of investors and investments (Most-Favored-Nation Treatment, National Treatment), provisions and procedures of nationalization or expropriation (direct and indirect), determination of the value of compensation, in addition to Transfer of Funds and Exceptions to the transfer of funds (chapter 2)
- Development-related issues such as performance requirements, national list of scheduled investment sectors open for liberalization, and the right to host state inclusion in schedules attached to the Code in line with their development situation (chapter 3)
- Investor's obligations of national and internationally accepted standards of corporate, transparency and accounting practices, in addition to corporate social responsibility (chapter 4)
- Investment-related issues such as Intellectual Property Rights and Traditional Knowledge, Public and Private Partnerships, Competition Law and Policy, Transfer of Technology, Labor issues, Taxation, Environment, Cultural Diversity, and other issues related to investment (chapter 5)
- Dispute Settlement Mechanisms whether State-State or Investor-State (chapter 6)
- Procedural issues and institutional arrangements such as application structure, amendments and revisions, adoption and publication (chapter 7)[3]

Preapprehension

It should be noted that this brief will not address the substantive provisions of the rules contained in the Pan-African Investment Code, but it would be limited to shedding light on the most important problematics faced by the formulation and preparation of this code. These problematic issues can be divided as follows:

Firstly: The legal nature of the PAIC. There is a choice between drafting the PAIC in a binding international agreement's form, or as a model treaty. *Secondly*: The discussion on the relationship between the PAIC and other international investment agreements.

The legal nature of the PAIC

Determining the legal nature of the PAIC raised different opinions during the meetings of investment experts. Perhaps this was due in part to the term "Code", which caused confusion during the discussions, particularly on the question on whether the draft of the proposed instrument is a binding international agreement or a model law.

In fact, to determine the legal nature of PAIC, we should refer to the provisions and rules of international law contained in the 1969 Vienna Convention on the Law of Treaties, which defines an international agreement in Article 2.1: "*"Treaty" means an international agreement concluded between States in written form and governed by international law...and whatever its particular designation*".[4]

Under this text, it is clear that the Vienna Convention stipulated some conditions to consider an instrument as a binding international agreement and the most important conditions are that the instrument should:

1- include international legal rules;

2- be formulated in the form of a written agreement;

3- be signed among countries.

Based on that, it is clear that to consider an instrument as a binding international agreement, we have to check certain objective criteria and conditions in the legal text. Thus, we have to analyze the content of this document, the rules which it contains, and the formalities of signature and ratification to verify the compliance with international law in the PAIC. Based on the Vienna Convention (mentioned above, article 2.1), the initial draft of the PAIC shows us the following:

1-The drafting of PAIC reveals international legally binding rules about the protection and treatment of investment in African countries. It is an international standard which would bind the Member States that will ratify this legal document in accordance to the initial wording of Article 51 of the Code which stipulates in its first paragraph: "*This code shall enter into force upon its signature and ratification by, at least, fifteen (15) Member States.*"

2-This code was drafted in the form of a written agreement.

3-Article 51 provides for African Union States to sign and ratify the proposed Code for it to enter into force.

Hence, it's obvious that the PAIC in the light of the initial wording of the draft, was considered as a binding international agreement to be signed by the Member States, not as a model law according to the provisions of article 2.1 of the Vienna Convention on the Law of Treaties aforementioned.

The draft PAIC raised controversy about the way it was drafted. Wasn't it better to draft it in the form of model

rules (soft law)?

In fact, the choice between the two approaches requires first to recognize the effects that could arise in case of the formulation of the rules relating to the protection and treatment of investments took the form of binding international agreements:

• The first of these effects concerns the possibility to engage the international responsibility of the state party to the agreement if it violates any of the provisions of this legal instrument.

• The second effect is to restrict policy space available to the Member State for regulating investments, which operate on their territory, according to their public interests for achieving the SDGs. After signing this instrument, if formulated as a binding international agreement, Member States will not be able to amend national laws relating to investment in a manner contrary with the mandatory international rules contained in this instrument.

The gravity of this situation relates to the second article of PAIC which stipulates that it is extended to all investors and investments in the territory of the Member State regardless of whether these investors have the nationality of one of the Member States of the African Union, or holding other nationalities of countries which are not members of the African Union.

• In this context, we have to realize the difference between the regulation of the protection and treatment of investment rules under the domestic legislation of the State, and the formulation of these rules in the framework of a binding international agreement.

This difference lies in the ability of the state to amend its domestic legislation and laws without engaging in international responsibility. It may be difficult or impossible for the state to make such an amendment to rules formulated in a binding international agreement because it needs the agreement of the other state parties for this amendment, as Article 49.2, from the initial wording of the draft PAIC, states that "*any such amendment or revision shall be governed by the internal rules and procedures of the African Union Commission*".

Finally, the drafting of the PAIC in the form of a binding international agreement is contrary to the initial objectives that have been agreed within the African Union Commission in the preparation of this document, which confirmed that "*the specific objective of the study is to elaborate a Pan-African Investment Code (PAIC) model,...and develop a roadmap and strategy on how AU MS can adopt this model to suit their respective local situations*".

In view of these considerations, the last meeting of experts in Nairobi, Kenya which ended in 2016, concluded the re-drafting of the proposed PAIC in the form of model rules which will guide the Member States of the AU, and not in the form of a binding international instrument. Indeed, the Article 2.1 of the Code's final version provides that "*This Code shall apply as a guiding instrument to Member States as well as investors and their investments in the territory of Member States as defined by this Code*."

The relationship between the PAIC and IIAs

The international legal framework for investment in Africa, consisting of over 840 bilateral investment treaties (BITs) of which 155 are intra-African and a myriad of regional agreements, is in need of reform.[5]

Determining the relationship between the PAIC and other IIAs with African countries raised many discussions during the meeting of experts that was held from 28 to 29 September 2015, in Port Louis, Mauritius. It was unanimously observed that Article 3 in the draft text did not sufficiently address the relationship between this code and existing regional IIAs and BITs, hence the need to redraft it, taking into account other elements. Participants therefore came up with 2 different options that were submitted to the forthcoming PAIC Continental meeting in Kampala, Uganda, held from 30 November to 2 December 2015, as listed below:

Option 1: expressly provide that "this code shall replace the intra-African BITs or investment chapters in intra-African trade agreements after a period of time determined by the Member States or after the termination period as set in the existing BITs and investment chapters in the trade agreements."

Option 2: confirm that "nothing in this Code is intended to affect the rights and obligations of any Member State deriving from any existing investment agreement".

Discussions didn't continue during the Kampala meeting to promote one of the above options, and during the presentation of the subject to the expert meeting in Nairobi, that was held from 21 to 23 November 2016, the committee of experts concluded to recast the provisions of the PAIC in light of the agreement of the States to formulate the rules of PAIC as a guiding instrument and the formulation of article 3 in accordance with the following provisions and principles:

-The first paragraph emphasized that this code will not affect the rights and obligations of Member States deriving from any existing investment agreement.

- The second paragraph emphasized the inadmissibility of replacing bilateral investment agreements between African countries with this Code except in the case of Member States agreeing on the adoption of the proposed code as a binding international instrument.

-The third paragraph kept the provision for African countries to take into account, as far as possible, the provisions of this Code when entering into any new agreement with a third country in order to avoid any conflict between its present or future obligations under this Code and its obligations in another agreement.

-The fourth paragraph, which provided the precedence of the PAIC in case of a conflict between this Code and any intra-African BIT or regional investment arrangement, was deleted due to the lack of need under the consideration of the PAIC as a guiding instrument.

Concluding remarks

Although the PAIC did not give enough attention to the issue of establishing a mechanism to help African countries to adopt the model rules contained in this Code in the framework of international investment agreements, it has been proposed to establish a mechanism to provide assistance and technical support to African Union States to adopt the model rules of the PAIC when they enter into negotiation of new international investment agreements, whether bilaterally or multilaterally, or when they negotiate amendments to existing bilateral agreements which represent 840 bilateral investment treaties (BITs).

Considering that there are differences between the legal systems in African countries, as well as the existence of laws and legislation to regulate investment just in some African States, not in all of them, the text of the PAIC proposes African states to take a transitional period (between three to five years) to provide the necessary technical support to allow the integration of the African countries to the standard rules contained in the PAIC in their national investment related legislations and laws. By this means, the PAIC wants to remove the inconsistencies between its provisions and the national investment laws of the African countries.

Finally, to avoid possible overlap and multiplicity of reform efforts and negative effects on the multiplicity and complexity of international conventions that establish rules for regulating the treatment of investments on the territories of African states, there must be a higher level of coordination among African states to unite efforts and attempts in the development of international rules and provisions regulating treatment of investments. [6]

In this context, we should note the importance to formulate rules and provisions to regulate investments in the form of regional binding international agreements, taking into account the following issues:

• These rules and conditions will serve as state obligations for the African countries towards investors and investments, whether the investments concern African countries, or non-member states of the African Union.

• These rules and conditions, in case formulated in the form of a binding international convention, will be restrictive to African States when engaging in any negotiations of future international investment agreements (IIAs).

Endnotes:

[1] African Union, Consultative meeting for the Review of the Pan-African Investment Code, 30 November - 2 December 2015, Kampala, Uganda.

[2] UNCTAD, World Investment Report 2016, p. 112.

[3] United Nations, Economic and Social Council and the African Union, Draft Pan-African Investment Code, E/ECA/COE/35/18, AU/STC/FMEPI/ EXP/18(II), 26 March 2016.

[4] The Vienna Convention on the Law of Treaties, Art. 2(1). Retrieved from https://treaties.un.org/doc/Publication/UNTS/Volume 1155/volume-1155-I-18232-English.pdf.

[5] The full texts of BITs are available at UNCTAD's IIA database: http://investmentpolicyhub.unctad.org/IIA.

[6] H. El-Kady, "Towards a More Effective International Investment Policy Framework in Africa," *Transnational Dispute Management* Vol. 13 Issue 4 (October 2016). Available from www.transnational-dispute-management.com.

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