Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues

No. 163 December 21, 2015

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Toward balanced Arab regional investment regulations

by

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The economic challenges that affected the business climate in the Arab region in the post-Arab Spring era have prompted many countries to revise their investment policies and regulations. The main objective of this revision was to attain a balance between maintaining attractiveness to foreign direct investment (FDI) on the one hand, while responding to demands for sustainable development and human rights on the other.

These balancing efforts include amendments of national legal frameworks regulating FDI. Examples of Arab countries that started these efforts include Jordan, Tunisia and Egypt. While the first issued its new investment code in 2014, the second drafted a new law in 2013 that still awaits ratification. As for Egypt, it has provided crucial amendments to the legislations related to investment, companies and taxation in March 2015.

However, similar success regarding the regional legal frameworks has been missing. In this respect, two regional experiences have posed substantial challenges for Arab states, either at the inter-Arab level or at the Euro-Mediterranean level.

At the first level, an attempt to amend the Unified Agreement on the Investment of Arab Capital in Arab States (“Agreement”)[1] has ended with the adoption of an imbalanced amended version.[2] Instead of adopting a new agreement that would reflect recent developments in international investment rulemaking, Arab countries have chosen to amend their timeworn Agreement through prioritizing investment protection over maintaining sufficient policy space for countries to regulate FDI. The primary reason behind this was a conflict of interests between a “pro-investment protection” group of capital exporting Gulf Cooperation Countries on one side, and a group of non-oil exporting Arab states that are “pro-regulatory flexibility” on the other.

At the Euro-Mediterranean level, the Agadir countries[3] are candidates to negotiate Deep and Comprehensive Free Trade Agreements (DCFTAs) of investment chapters with the European Union (EU). There are indications that these countries are likely to face similar challenges that could lead to additional imbalanced regional investment regulations. In particular:

- The negative impacts of the EU's negotiation approach, which rests mainly on imbalanced bilateral negotiations with its individual partners who lack comparable bargaining power.
- The experience of negotiating investment provisions in the Comprehensive Economic and Trade Agreement[4] between the EU and Canada.[5]
- The fear that future negotiations will not pay sufficient attention to the findings of the Trade Sustainability Impact Assessments that raised skepticism about the alleged positive impacts of DCFTAs on sustainable development.[6]
- The questions raised about the full implementation of the EU parliament's resolution adopted in April 2011; it advised the Commission to create balanced future international investment agreements (IIAs) that should avoid the shortcomings of the current European IIAs to achieve sustainable development.[7]

Against this background, the Arab countries should embark on negotiations for a new pan Arab IIA[8] that would balance the objectives of promotion and protection with the people's aspirations and the sovereign right of states to regulate investments to achieve their legitimate public policy objectives.

As for the negotiation of future DCFTAs, the Agadir countries should try to overcome the problem of bilateral negotiations through joint coordination to reach a common understanding of their objectives for trade and investment negotiations. This coordination effort could be achieved through regular regional meetings dealing with regional investment policies and regulations.

More generally, Arab governments should pursue a tridimensional approach to reform investment regulations and policies. Besides making the needed changes at the national level, they should create a regional institutional mechanism to coordinate investment policies. Also needed is an Arab regional platform to exchange experiences on IIAs and treaty-based claims. Finally, an effective regional investment dispute-settlement mechanism is required. At the international level, Arab countries should contribute to discussions on international investment policies and regulations within the concerned international organizations.

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[1] The original Agreement was signed in 1980, while the amended version was adopted in January 2013 and is still under ratification.

[2] *See* Hamed El-Kady, "The amendments to the 1980 Arab League investment agreement: implications on the right to regulate investment in Arab countries," *Transnational Dispute Management*, vol. 3 (2014).

[3] Members of the Arab-Mediterranean FTA "Agadir Agreement" include Egypt, Jordan, Morocco, and Tunisia.

[4] *See* European Commission, "Investment provisions in the EU-Canada free trade agreement (CETA)," September 26, 2014, available at http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf.

[5] The CETA draft shows the EU's intention to expand the scope of investment liberalization to broad categories of European investments and investors, despite its recognition of the right to regulate. In our perspective, Agadir countries could not count on CETA's experience in evaluating its prospected draft DCFTAs since the EU's IIA Model is still under development.

[6] *See* Trade Sustainability Impact Assessments in support of negotiations of DCFTAs between the EU and its partners available at http://ec.europa.eu/trade/policy/policy-making/analysis/sustainability-impact-assessments/assessments/.

[7] *See* "European parliament resolution of 6 April 2011 on the future European international investment policy," 2010/2203(INI), April 6, 2011.

[8] Such a new agreement should avoid duplication with the current Arab IIAs and the sub-regional agreements concluded under the auspices of the Council of Arab Economic Unity.

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