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The Pan-African Investment Code: a good first step, but more is needed[*]

by

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In 2008, the African Union (AU) member states, through their ministers in charge of integration, decided to develop a Pan African Investment Code (Code) whose objective would be to foster cross-border investment flows in Africa. Under the leadership of the AU Commission, the first draft of the Code was released in 2015. It has since then been subject to several rounds of experts' review and consultation meetings. The last consultation meeting gathered AU members' experts in Nairobi, Kenya, in November 2016. It resulted in a recommendation to submit the Code's amended version for adoption by the African Ministers of Economy, Finance and Integration.

The decision to develop the Code was welcomed by African experts and policy-makers as an opportunity to contribute to Africa's industrial and structural transformation through a binding instrument that would effectively restore the balance between investors' rights and host states' obligations, take into account countries' sustainable development objectives, streamline the investor-state dispute-settlement system (ISDS), and, finally, overcome issues with the fragmentation of the international investment regime, due to the multiplicity of investment treaties and the diverse interpretative practice of arbitral tribunals.

Taking stock of the progress achieved so far in negotiating the Code, it is disappointing to note that the original ambition to have a binding instrument replacing the existing intra-African investment agreements has been abandoned[1] in favor of a "guiding text."[2] The choice of a soft law instrument will exacerbate the fragmentation of the investment law regime in Africa and, hence, impair one of the Code's core objectives. It will also reduce the effectiveness of numerous substantive provisions of the current text, including provisions:

- establishing the right of host country governments to regulate admitted investments and to adopt measures concerning preserving the environment, international peace and security, national security interests, and promoting national development (including through performance requirements and local content);

- limiting the application of most-favored-nation treatment (MFN) and national treatment obligations to investors and investments "in like circumstances" and granting host governments the right to derogate from these obligations to preserve public interests (e.g., environment, security);
- imposing certain obligations on investors, including to comply with corporate governance standards, to adhere to socio-political obligations, to refrain from bribery, to adhere to corporate social responsibility standards, to use natural resources in a responsible manner, and to comply with business ethics and human rights;
- regulating state contracts, public-private partnerships, labor issues, human resources development, and those promoting technology transfer, clean technologies and environmental and consumer protection;
- relating to ISDS that give host country governments the discretion to implement ISDS,[3] thereby offering a middle ground solution to African states that are either pro-ISDS or anti-ISDS.

Furthermore, the benefits of not including the controversial fair-and-equitable-treatment provision in the Code, on the one hand, and excluding dispute-settlement procedures from the scope of the MFN clause, on the other hand, will now be limited in the absence of a binding text. Indeed, as the Code loses its treaty character, there is no guarantee that these provisions will not be re-introduced in new bilateral investment treaties negotiated by African countries.

It is clear, under these circumstances, that the Code will not keep its original promises. Nevertheless, it certainly remains a useful instrument for African investment policy-making. As many binding regional instruments are currently under negotiation, including the SADC-COMESA-EAC Tripartite Free Trade Agreement and the Continental Free Trade Agreement, which both contain investment chapters, the Code can serve as a useful capacity-building instrument. It can, indeed, provide guidance to the negotiators of these agreements, in support of the continent's structural transformation objectives.[4] Having said that, to put the Code into context and clarify its purpose, it will probably be necessary to rename it as "Pan-African Guiding Principles on Investor-State Relations."

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[1] A binding instrument was contemplated in Article 3.2 of the 2016 version of the Code; *see* United Nations Economic Commission for Africa (ECA) and AU document No. E/ECA/COE/35/18 AU/STC/FMEPI/EXP/18(II), March 26, 2016, http://repository.uneca.org/handle/10855/23009.

[2] A non-binding instrument is contemplated in the revised Article 3 of the 2017 version; *see* ECA-AU Document No. E/ECA/CM/50/1AU/STC/FMEPI/MIN/1(III), February 8, 2017, https://au.int/web/en/newsevents/20170323/2017-AU-ECA-Conference-of-Ministers-Senegal-March-23-28. The Code was supposed to be adopted during the 2017 ECA-AU joint Conference of Ministers, March 23-28, 2017; but the meeting was adjourned due to disagreements among member states on the participation of the Sahrawi Arab Democratic Republic.

[3] Article 42.1 of the 2017 draft Code states: "Member States *may*, in line with their domestic policies, agree to utilize ISDS mechanism. *In the event that the ISDS mechanism is agreed upon*, the process below shall apply[…]" (emphasis added).

[4] In fact, the AU member states experts' meeting held on November 21-23, 2016 clearly recommended "to use the Pan-African Investment Code as a reference framework document in the negotiation of the CFTA investment chapter". *See* "Meeting of Member States Experts on the consideration of the Pan African Investment Code[…]," ECA-AU DocumentNo. E/ECA/CM/50/1AU/STC/FMEPI/MIN/1(III), February 8, 2017, https://au.int/web/en/newsevents/20170323/2017-AU-ECA-Conference-of-Ministers-Senegal-March-23-28.

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