Guest blog: Global warming and the “Africanisation” of International Investment Law?

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With the 6th edition of ICC Africa Conference on International Arbitration currently underway in Lagos, Rumbidzai Maweni, an associate in Foley Hoag’s international litigation and arbitration department, looks at why African States should increasingly incorporate environmental provisions in their international investment agreements (IIAs).

In August 2021, the United Nation’s Intergovernmental Panel on Climate Change published a report on climate change based on more than 14,000 studies developed by scientists around the world.[1] Issuing a “code red for humanity”, the report makes clear that global warming will only intensify over the course of the next 30 years.

This threat is particularly acute for the African continent. The World Meteorological Organization’s *State of the Climate in Africa 2019* report indicates that increasing temperature and sea levels, changing precipitation patterns and more extreme weather are threatening human health, safety, food, and water security on the continent.[2] Now more than ever African States must ensure that the promotion of foreign direct investment through the conclusion of international investment agreements (IIAs) does not undermine environmental protection measures or exacerbate the impending climate crisis. Thus, African States are increasingly incorporating environmental provisions in their IIAs. The breadth of these reforms across the continent, and their influence globally has led some commentators to refer to the “Africanisation” of international investment law. [3]

One example is the 2012 Model BIT of the Southern African Development Community (SADC), which was among the first to impose obligations and responsibilities on *investors* as opposed to just States, expressly “seeking an overall balance of the rights and obligations among the State Parties, the investors, and the investments” under the agreement. The 2012 Model BIT includes numerous articles that impose obligations on investors concerning the environment, human rights, and corruption. Subsequently, in December 2016, Nigeria and Morocco concluded a BIT that included many of the environmental obligations for investors proposed by the SADC Model BIT and the ECOWAS Supplementary Act on Investments. Article 14 of the Morocco-Nigeria BIT, for example, establishes that:

> *[I]nvestors or the investment shall comply with environmental assessment screening and assessment processes applicable to their proposed investments prior to their establishment, as required by the laws of the host state for such an investment or the laws of the home state for such an investment, whichever is more rigorous in relation to the investment in question.* [4]

It also requires investors to "*apply the precautionary principle to their environmental impact assessment and to decisions taken in relation to a proposed investment*."[5]

Moreover, "*investors and investments shall not manage or operate the investments in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are Parties*".

Another common environmental provision is the general exception clause—clauses that generally state that nothing in the agreement shall be construed as limiting a State's right to enact or apply legislation for the protection of the environment. Examples of such clauses are common in BITs concluded by Madagascar, Mali, Morocco, and Tanzania.[6] Non-derogation clauses are also common in BITs concluded by Nigeria and Tanzania. These clauses specifically state that the IIA must not be interpreted as allowing for derogation or waiver of compliance with environmental standards.

Other African States have introduced exceptions or clarifications in their IIAs for substantive legal protections, like the FET standard, indirect expropriation, and the national treatment standard. Provisions that state that environmental measures will not be considered unfavorable treatment in violation of the FET standard enhance a State's ability to enact environmental measures without the risk of arbitration. Morocco has incorporated such an FET exclusion in a number of its IIAs. For example, the Morocco-Estonia BIT provides that "[*m]easures that have to be taken by either Contracting Party for reasons of public security, order or public health or protection of environment shall not be deemed as a less favourable treatment*."[7]

Similarly, provisions that state that *bona fide* measures taken to protect the environment do not constitute indirect expropriation are becoming increasingly common in African IIAs, particularly in IIAs concluded by Burkina Faso and Nigeria. ***[8]***

Some African States also have provisions clarifying the application of the national treatment standard. The Brazil–Ethiopia BIT, for example, indicates that the determination of whether a host state has accorded foreign investors treatment equal to that accorded to its own investors "*depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the bases of legitimate public welfare objectives*".[9]

African States could further improve alignment of their IIAs with environmental goals by introducting procedural provisions. One possibility would be to expressly limit the protections granted by an IIA to those investors that comply with their environmental obligations. Provisions of this nature would facilitate a State's challenge of jurisdiction of an arbitral tribunal to hear claims instituted by investors that violate their environmental

obligations.[10] Another would be for IIAs to expressly allow respondent States to bring counterclaims against investors for not complying with their environmental obligations. [11]

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[1] Intergovernmental Panel on Climate Change, Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change. Cambridge University Press (2021), https://www.ipcc.ch/report/sixth-assessment-report-working-group-i/ (last accessed 27 January 2022).

[2] World Meteorological Organization, "State of the Climate in Africa 2019" (October 2020), https://library.wmo.int/index.php?lvl=notice_display&id=21778#.YDnf3GhKio (last accessed 27 January 2022).

[3] Makane Mbengue & Stephanie Schacherer, "The 'Africanization' of International Investment Law", 18 J. World Trade Inv. 414 (2017); Makane Moïse Mbengue, "Africa's Voice in the Formation, Shaping and Redesign of International Investment Law", 34 ICSID Rev. 455–81 (2019); Olabisi D Akinkugbe, "Reverse Contributors? African State Parties, ICSID and the Development of International Investment Law", 34 ICSID Rev. – Foreign Inv. L.J. 434–54 (2019).

[4] Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, 3 December 2016 (not yet in force) ("Morocco-Nigeria BIT"), Art. 14(1).

[5] Morocco-Nigeria BIT, Art. 14(3)

[6] Agreement between the Belgium-Luxembourg Economic Union and the Republic of Madagascar for the Promotion and the Reciprocal Protection of Investments 29 September 2005 (entered into force 29 November 2008); Agreement Between the Government of the Republic of Madagascar and the Government of the Republic of China

for the Promotion and the Reciprocal Protection of Investments, 21 November 2005 (entered into force 1 July 2007); Agreement Between the Government of the Republic of Mauritius and the Government of the Republic of Madagascar, 6 April 2004 (entered into force 29 December 2005); Agreement Between the Government of the Republic of Madagascar and the Government of the Republic of South Africa for the Promotion and the Reciprocal Protection of Investments, 13 December 2006 (not yet in force); Canada-Mali BIT; Agreement Between the Government of the Republic of Mali and the Government of the Republic of Gabon on the Promotion and the Reciprocal Protection of Investments, 25 March 2005 (not yet in force); Agreement Between the Government of the Republic of Mali and the Government of the Republic of Senegal concerning the Promotion and the Reciprocal Protection of Investments, 12 April 2005 (not yet in force); Agreement Between the Government of the Republic of Turkey and the Government of the Republic of Mali Concerning the Reciprocal Promotion and Protection of Investments, 2 March 2018 (not yet in force); Agreement of Cooperation and Facilitation between the Kingdom of Morocco and the Federal Republic of Brazil, 13 June 2019 (not yet in force); Morocco-Congo BIT; Agreement Between the Government of the Kingdom of Morocco and the Government of the Dominican Republic on the Promotion and the Reciprocal Protection of Investments, 23 May 2002 (entered into force 4 January 2007); Agreement Between the Government of the Kingdom of Morocco and the Government of the Republic of El Salvador on the Promotion and the Reciprocal Protection of Investments, 21 April 1999 (entered into force 11 April 2002); Agreement Between the Government of the Kingdom of Morocco and the Government of the Socialist of Vietnam on the Promotion and Protection of Investments, 15 June 2012 (not yet in force); Tanzania-Canada BIT; Agreement Between the Government of the People's Republic of China and the Government of the United Republic of Tanzania Concerning the Promotion and Reciprocal Protection of Investments, 24 March 2013 (entered into force 17 April 2014); Agreement Between the Government of the Republic of Turkey and the Government of the United Republic of Tanzania Concerning the Reciprocal Promotion and Protection of Investments, 11 March 2011 (entered into force 3 January 2017).

[7] Agreement between the Government of the Republic of Estonia and the Government of the Kingdom of Morocco for the reciprocal promotion and protection of investments, 25 September 2009 (entered into force 4 November 2011), Art. 2(5). *See also* The Government of the Republic of Macedonia and the Government of the Kingdom of Morocco and the Reciprocal Promotion and Protection of Investments, 11 May 2010 (entered into force 15 October 2012); Agreement Between the Government of the Kingdom of Morocco and the Government of the Republic of Mali Regarding the Encouragement of the Protection Reciprocals of Investments, 21 February 2014 (entered into force 2 March 2016); Morocco-Nigeria BIT; Agreement Between the Government of the Republic of Rwanda and the Government Kingdom of Morocco on Reciprocal Promotion and Protection of Investments, 19 October 2016 (not yet in force); Agreement Between the Republic of Serbia and the Kingdom of Morocco on the Reciprocal Promotion and Protection of Investments, 6 June 2013 (not yet in force).

[8] Agreement for the Promotion the Protection of Investments Between the Republic of Austria and The Federal Republic of Nigeria, 8 April 2013 (not yet in force), Art. 7(4) ("Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation"). *See also*, Burkina Faso-Canada BIT; Agreement Between the Government of Burkina Faso and the Government of the Republic of Singapore on the Promotion and Protection of Investments, 27 August 2014 (not yet in force); Agreement Between the Government of the Republic of Turkey and the Government of Burkina Faso Concerning the Reciprocal Promotion and Protection of Investments, 11 April 2019 (not yet in force); Nigeria-Canada BIT; Investment Promotion and Protection Agreement Between the Government of the Federal Republic of Nigeria and the Government of the Republic of Singapore, 4 November 2016 (not yet in force).

[9] Agreement Between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation, 11 April 2018 (not yet in force), art. 5. *See also* SADC Model BIT, art. 4 (specifying various factors that should be considered in considering whether a foreign investment is in "like circumstances" with a domestic one).

[10] *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya* (ICSID Case No. ARB/15/29), Award, 22 October 2018, para. 365 (wherein Kenya successfully argued that the tribunal lacked jurisdiction because of the claimant's failure to obtain an environmental impact assessment and fulfil other environmental obligations required for its operations).

[11] *See* Treaty Establishing the Common Market for Eastern and Southern Africa ("COMESA"), 23 May 2007 (not yet in force), Art. 36.7 ("A Member State against whom a claim is brought by a COMESA investor or its investment under this Article, may assert as a defence, counterclaim, right of set off or other similar claim, that the COMESA investor or its investment bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages.").