Common goals transparent paths: this time for Africa
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1. Introduction

Africa consists of heterogeneous Countries, ranging from LDCs to almost developed economies. Notwithstanding these discrepancies, the Continent has recently called for playing a more interactive role at global trade scale.

To this end, there has been interesting developments signalling a reawaken of the African international fervour, among which three States joining the Mauritius Convention (Congo, Gabon and Madagascar) the first application of UNCITRAL Rules on Transparency in an investor-State arbitration involving Guinea; the accessions of Angola and Djibouti to the New York Convention; the 2016 ICCA Congress – just to mention the most significant ones.

Against this background, this paper will argue that several adjustments, among which the implementation of transparency, are urgently needed in order to enhance the development of a robust investment policy framework.

To reach this goal, this research paper envisages the establishment of a coordination centre, seating in Italy and coordinated by UNCITRAL, in charge of providing technical assistance to States with respect to international commercial transactions. Due its geographical proximity to Africa, Italy is best placed to engage in coordination activities with international and regional organizations active in trade law reform projects in the

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region and States, at the same time developing tailored strategies for dissemination of UNCITRAL texts in the region, also through workshops and seminars.

This paper will proceed as follows. Part 2 will contextualize the issue by providing a brief overview of the investment landscape. Part 3 focuses on the African investment policy frameworks, highlighting some positive developments already in place (section 3.1), but also considering the main problems (section 3.2).

In the light of this, part 4 will deal with the establishment of an UNICTRAL-led coordination centre, seated in Italy. This centre is expected to provide assistance to African countries to gain better integration in the global economic system, particularly through the setting of a well-developed investment policy.

2. Preliminary remarks on the investment landscape

According to the UNCTAD definition: “a State contract is a binding legal instrument entered into between a foreign company and a State”. State contracts typically involve an ‘investment’ made by a foreign party in the host State. They do not need to be concluded with the State itself, but may also be concluded with a State-owned company. Many such contracts are related to foreign direct investment and take the form of licences or concession agreements whereby the host country authorizes the foreign investor to explore natural resources such as oil, gas, coal and others.

Investment agreements are complex legal tools which require the correct balancing of host country benefits against the risk of disputes that may arise in connection with the Agreement, or relating to the interpretation, application or enforcement of the Agreement. That is the reason why drafting these agreements requires particular attention. Controversial challenges may be not readily apparent during the negotiating phase. However, improperly drafted provisions may trigger thorny dispute resolution

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procedures, which is something that in turn poses further concerns on State legal expertise to handle such situations.

Investment agreements contain several fundamental components which have been elaborated and developed throughout the jurisprudential and systematic evolution. States hold authority to set the conditions under which investments are admitted, and which protection guarantees should be granted accordingly.

In some fields, such as the oil industry, where contracts are concluded for a long period and involve substantial investment on the part of the private party, practice has developed to submit the contract to a dual layered choice of law provision integrating the reference to international law to the choice of the law of the host State. Such approaches might raise several questions as to the validity and the interaction between different sources of international law. Additional challenges may arise when the domestic law of the host State appear to be not enough comprehensive, or too restrictive to investors, thus leading their investments towards other States. Due to the particular object of the contract, Parties may have no other choice than subject their agreement to the domestic law of the host State, notwithstanding the fact that some contractual issues should be ruled by international customary law and/or international treaties.

In these cases there is a risk that a modification of the legal regime by the State may negatively impact the contract, and culminated, at worst, in a dispute. Against this potential risks, investors often claimed for so-called 'stabilization' clauses, with a view to ensuring that the long term project in which large investment is made will be insulated from changes in the legal environment. It is clear that the inclusion of such mechanisms on one side, and the creation of a friendly investment environment through domestic legislations on the other are tools not so easily manageable by States.

Generally, investment agreements offer several options to solve disputes.

‘Soft’ instruments, such as mediation and other non-adjudicatory ADR mechanisms, are ‘preliminary’ tools which may serve to help parties to find a common settlement ground, thus preventing disputes from being exacerbated. In case of lasting disagreement between parties, investment treaties offer a last resort option: the ISDS system. The Investor-State Dispute Settlement is a neutral forum, more efficient than national systems, that allows States and investors to directly fill a claim before the arbitral tribunal. Such tribunals consist either of one or three members. In the former case the Parties should jointly agree
on the arbitrator to be appointed. In the latter case, each disputing party has the authority to appoint one arbitrator. The two appointed arbitrators are then in charge of the appointment of the chair of the tribunal. In case of parties’ disagreement such selection may be delegated to a third appointing authority, such as the ICSID secretariat, or the Secretary-General of the PCA.

States also are free to indicate which rules should govern the arbitral procedure –namely the ICSID Rules, UNCITRAL, etc. This approach grants parties the possibility to best design the process to suit the dispute settlement. However, such freedom risk turning out counterproductive if the chosen rules and arbitrators do not best serve the dispute resolution at stake. The inappropriate choice of a forum to solve a dispute, along with inefficient selection of arbitrators have the potential to generate disastrous consequences in the dispute proceeding.

### 3. Africa Investment Policy Frameworks

Natural resources, such as oil, gas, ores or other raw materials have been the main driving forces to attract foreign investors, resulting in an overall inflows of $54 billion and a total of 840 signed BITs by African Countries. These investments in turn, have led some States –mostly sub-Saharan economies– towards slowly transitions to industrial activities or service-related activities. Conversely, some other Countries have invested in infrastructures with the help of international funders in order to improve the living conditions of their populations, among the poorest in the world.5 These discrepancies aside, globally Africa seems ready to reach major development aspirations in the broader context of a global and continental economic development agenda.6 Conversely, the African continent internally displays different levels of

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4 UNCTAD International Investment Agreements Database.
institutional development and respect for the rule of law, thus making some States less attractive - or at least more problematic - to investors.

While some States have sought to put forwards several adjustments to create a more investor-friendly environment, at the same time preserving their economic development, others still lie behind. It is to these aspects that the following sections will be dedicated.

3.1. Developments

Arbitration and alternative dispute-settlement processes were not introduced to Africa by the colonial administrations. They were already part of African “machinery of government and judicial processes”. These traditions notwithstanding, in most Countries formal efforts to regulate arbitration began during the colonial period, with major influence on legal structure coming from the United Kingdom and France.

So far, several African States have enacted their own arbitration law, in addition to some States’ alignments with the UNCITRAL Model Law on International Commercial Arbitration or with the Organisation for the Harmonisation of Business Law in Africa (OHADA).

In line with the abovementioned approaches, African international arbitration or arbitrations involving African parties are on the rise also because some African courts

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9 Egypt, Kenya, Madagascar, Mauritius, Nigeria, Rwanda, Tunisia, Uganda, Zambia e Zimbabwe.
10 OHADA members are: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Cote d’Ivoire, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Republic of Congo, Senegal, and Togo.
have recognised the benefits of referring disputes to arbitration. Cases in point are those of Uganda and Kenya, in which courts have explicitly encourage resort to arbitration.\textsuperscript{11} In addition to this, several African States are signatories to the New York Convention on the Recognition and Enforcement of arbitral awards or other similar instruments.

\textbf{3.2. Problems}

In some jurisdictions, litigation is still problematic due to a lack of awareness by local judges on international business, and also because of insufficient appreciation on the handling of complex international transactions.\textsuperscript{12} In Nigeria for instance, litigation can take up to ten years to progress through the courts.\textsuperscript{13} Angola, which has been one of the Countries where foreign companies invested more over the past 20 years, recently introduced exchange control regulations that unavoidably hamper the development of a strong investment policy. Specifically, among the restrictions on foreign ownership, according to the Angola local authorities:

\begin{quote}
It is mandatory for sectors like oil and gas (exploitation) to involve an Angolan company or individual. The Angolan company or individual must hold at least 51\% of the share capital. In addition, Law No. 14/2015 of 11 August 2015 establishes that foreign investors that intend to invest in certain economic sectors (such as energy and water, tourism, public transportation, IT, among others) must enter into a partnership with Angolan citizens or companies, which must attribute, at least, 35\% of the share capital or effective participation in the management to the Angolan partners.

Employers are subject to the "Angolanisation" policy according to which Angolan citizens should be preferably hired over foreign citizens. Angolan law expressly states that employers can only employ non-resident foreign employees if their
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\textsuperscript{11} Carlevaris, Diawara, Ogunseitan (n 8).
\textsuperscript{12} Stephanie Brabant, John Ogilvie and Paula Hodges, ‘Dispute resolution in Africa: the philosophy of risk’, Practical Law for Companies (26 September 2013).
\textsuperscript{13} Ibid.
\end{flushleft}
staff (when of more than five employees) is composed of at least 70% Angolan employees.14

In addition to this, African countries do not display sufficient control over the transparency issue. Whilst only a few States provide for some forms of disclosure on internal procedures, the matter is not thoroughly addressed especially if one considers that in some Countries there is no provision insuring confidentiality between business partners either.

At procedural level, arbitration has been increasingly recognised as a legitimate and neutral means of resolving commercial disputes. Following this trend, the basic structure for arbitration have progressively been implemented in several jurisdictions. However, Africans still do not seem akin to litigate at home when given a chance or to appoint African arbitrators.

Despite the interest voiced for arbitration, and the increasing expertise of African arbitrators, there is a tendency to favour European arbitrators with the more likely assumption that they are better qualified than ‘home-grown’ talent.15 This is also due to the fact that African arbitral centres are still in their earliest stages, and have yet to develop a sizeable caseload capable to overcome users’ reticence to utilise their centres.16

Furthermore, the deficit of communication among the organs of the State involved in international arbitration often resulted in delays, and even failures, of the State in question in participating the arbitral process.17

Another controversial challenge that need to be addressed is national courts’ interference. In some Countries, national courts are still afforded opportunities to interact with the

14 Vitor Marques da Cruz, ‘Investing in Angola’ Practical Law for Companies (2016)
17 Carleveris, Diawara, Ogunsietan (n 8).
arbitral process by virtue of their national arbitration legislation. In spite of the fact that some Countries –i.e. Mauritius, Kenya, Botswana, and Nigeria – have proactively circumscribed interference and recourse to national courts, the perception that officials may try to influence outcomes remains and impacts negatively on investor confidence.

4. Why a UNCITRAL Centre in Italy?

As it clearly emerged from the previous sections, the existing problems outweigh the ongoing developments. This implies that further coordination and implementation of these matters is urgently needed because, unless crucial attention is paid to the legal and institutional foundations of the Africa investment policy frameworks and commitments, the black Continent risk still being marginalised.

In practice, however, the needed investment reform is rarely a political priority for African States, since other more urgent political, social, and economic concerns prevail. Furthermore, this reform is a complex and time consuming task that demands coordination at all levels of government, and expertise to align existing commitments with national and regional development strategies.

In this sense, the coordination centre envisaged by this research is expected to be ‘super partes’ and highly qualify. The centre composition should comprise qualified arbitrators, practitioners, experts as well as African governmental representatives.

Among its tasks, the Centre should be moulded on and inspired by the existing UNCITRAL Regional Centre for Asia and the Pacific. Specifically, among other tasks, the Centre is expected to:

(a) provide a detailed profile for each Country;

(b) map out the existing agreements, monitor their timeframes for potential amendments, renegotiations or terminations;

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18 Ibid.
19 Ibid.
(c) make harmonised and coordinated efforts aimed at consolidating and modernising the African investment treaty network;
(d) enhance international trade and development in the African Region by promoting certainty in international commercial transactions through the dissemination of international trade norms and standards, in particular those elaborated by UNCITRAL
(e) provide bilateral and multilateral technical assistance to States with respect to the adoption and uniform interpretation of UNCITRAL texts through workshops and seminars;
(f) engage in coordination activities with international and regional organizations active in trade law reform projects in the region; and (d) function as a channel of communication between States in the region and UNCITRAL;
(g) have the authority to enhance capacity building, through increased training of arbitrators and local experts, along with organisation and coordination of existing institutions and organisations;
(h) contribute to the development of a qualified roster of potential arbitrators within and outside the regions by providing them with intensive and coordinated training on law and practice;
(i) recognize the need for training and development for counsel and arbitrators around the continent.\textsuperscript{21}

A more challenging task the Centre would face is the inadequacy ad heterogeneity of legal and institutional frameworks of African Countries.
It seems clear that instead of a one-size-fits-all approach, the Centre should elaborate more specific action plans tailored to tackle the most urgent needs of each States.
The Centre is not expected to work in isolation, but it will benefit of the existing network of regional organisations to lead African Countries towards more integration at trade and investment levels.

\textsuperscript{21} Africanisation of International Arbitration, Andrea Carlevaris, Diamana Diawara & Tunde Ogunseitan, TDM Vol. 13, Issue 4 (October 2016)
5. Concluding remarks

Despite a growing African commitment to the rule of law, and adherence to stable legal regulatory frameworks, an overwhelming majority of Africa-focused investments tend to be subject to foreign law influences.

To reverse this trend, and sustainably re-localise trade and investment developments in Africa, concerted action by different stakeholders is required. Specifically, the heterogeneity of African States, and the resulting diversity of their weaknesses and strengths, needs tailor-made approaches.

To this end, it seems that the proposed Centre could serve as an efficient coordinator among African States, concretely leading them towards sustainable development.

It goes without saying that this research-project is at its preliminary phase. Being happy to further elaborate on the issue if deemed necessary by UNCITRAL, the project has to be deeply explored, and thoroughly designed.