

FOREIGN INVESTMENT IN AFRICA: GAINING DEVELOPMENT MOMENTUM

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Research project outline

According to several sources, including UNCTAD, the flow of foreign investment in Africa is expected to increase significantly in the next couple of years. The booming flow of foreign investment will concern not only natural resources, commodities and energy, but also the services sector - especially telecommunications and tourism - which offers large markets and huge business opportunities. This represents an unprecedented opportunity for Africa to foster its economic development, to reduce the gap with other continents, and to achieve the objectives indicated in the Millennium Declaration adopted by the United Nations General Assembly in 2000 and most importantly the promotion of sustainable development and the eradication of poverty.

Not surprisingly, the Millennium Declaration contains a unique section on the special needs of Africa in which member States have pledged “to take special measures to address the challenges of poverty eradication and sustainable development in Africa, including debt cancellation, improved market access, enhanced Official Development Assistance and increased flows of Foreign Direct Investment, as well as transfers of technology” (UNGA Res. 55/2, 18 September 2000, para 28).

It is widely accepted that foreign investment may play a pivotal role to improve overall productivity, enhance competitiveness and entrepreneurship, transfer knowledge and technology, create jobs, and ultimately eradicate poverty. The extent to which Africa States will benefit from this historical opportunity will depend to a large extent on their capacity to develop sound investment policies and to effectively translate these into international treaties, domestic legislation and contracts with foreign multinational companies.

The task is particularly complex given the fact that foreign investments have important implications not only for the promotion of economic growth, but also for the protection of the environment and human rights, the exercise of regulatory powers and the distribution of benefits.

Yet, there is ample evidence that several African governments and administrations lack the capacity, expertise and resources necessary to seize the opportunities offered by foreign investment and to deal with the related challenges. Some of them have neither sound investment policies, nor a clear understanding of investment-related instruments. The situation is aggravated by the general poor historical, social and legal data available in several parts of the African continent.

The aim of the project is twofold. On the one hand, it provides a systematic and comprehensive treatment of the network of international investment agreements in Africa and its evolution. Particular attention will be paid to the remarkable process of political and economic regional and sub-regional integration, which has already led to the adoption of increasingly sophisticated investment agreements and several initiatives for the settlement of the related disputes. From this perspective, the project examines the normative devices developed by States and regional organizations to enhance the sustainable development impact of international investment. Amongst the most promising developments one must mention the provisions (a) imposing upon potential investors the obligation to conduct an environmental and social impact assessment of the project (i.e. Article 12(1) ECOWAS Supplementary Act); (b) safeguarding the policy space of the host State or introducing specific or general exceptions (i.e. Article 14 SADC Protocol on Finance and Investment); (c) allowing the host State to offer preferential treatment to qualifying investments and investors (i.e. Article 7 SADC) or to least developed countries (Article 20 SADC); and (d) committing foreign investor to principles of corporate responsibility. The project further discusses the implications and consequences of these developments, and explores the possibility of bringing the obligations and commitments of foreign investors related to sustainable development within the scope of arbitration clauses, which will represent a true normative breakthrough.

On the other hand, the project examines the standards related to the treatment of foreign investment in Africa and compares them with similar experiences in other continents. This part of the project investigates to what extent the current legal framework responds to the needs and expectations of African States, taking into account their peculiar economic, social and political features. It further explores how these standards may evolve within the continent in order to fully exploit its economic potential without compromising on non-investment values.

The whole project has a clearly predominant, but not exclusive, academic dimension. It will benefit from interacting with African governments, organizations (including developing banks), and non-governmental organizations, whose practice and experience are central in understanding the challenges, perspectives and evolution of the protection of foreign investment in Africa. It is also susceptible to foster awareness and develop the capacities of African States with regard to the drafting, negotiation and conclusion of investment-related instruments, their implementation, and the settlement of the disputes.