Improving Treaty Protection for International Infrastructure Projects Through Strategic Investment Restructuring
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Introduction

International Infrastructure Projects ('IIPs') are *sui generis*[1]. They are generally large[2], highly regulated, risk adverse[3], cross-border investment-based and long-term projects which tend to entail contractual partnerships between international private investors ('IPIs') and host states. Frequently, they are undertaken via - Public Private Partnerships ('PPP'). As with general contracts, it is imperative that the rights, obligations, protections, dispute mechanisms enforceable by parties are unambiguously stated in the IIP contracts.

However, as commonly seen in IIPs, there is a possibility of a non-contractual counterparty (host states) interfering with the rights of the IPI.[4] The international protections and remedies offered to IPIs and dispute mechanisms utilized where such breach arises, are commonly contained in International Investment Agreements ('IIAs'). The oddity of this legal regime is that the IPI is subjected to a legal regime constituting of an agreement without participation in negotiation of the agreement. This essay addresses, whether there is a need for reform and lessons which may be learnt in the context of the African Continental Free Trade Agreement (AfCFTA).

Strategic Investment Restructuring as a tool for Protection of IPIs

The proliferation of IIAs offers widespread protection[5] and liberalization of IIPs. Nonetheless, there exists no uniform treaty or IIA adopted worldwide concerning investment law to ensure that all IIPs are protected. A major ground rule for the enjoyment of the benefits of the international investment law regime is that the investor must be a national of a party to the IIA. Consequently, a national of a country without an IIA cannot rely on protection under International Investment Law and is restricted to domestic protections arising from its IIP contract.[6]

To ensure maximum protection under International Investment Law, IPIs have turned to investment restructuring. Investment restructuring is known by various terminologies including 'treaty shopping'[7], 'protection shopping', 'nationality planning', 'corporate restructuring',

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[1] Unique in nature
[2] Global investment in the infrastructure sector is on the rise, increasing at an average annual growth rate of 2.9 per cent, and with the global need for infrastructure investment reported to be likely to reach $94 trillion by 2040.Global Infrastructure Outlook: Infrastructure investment needs 50 countries, 7 sectors to 2040, Oxford Economics, 2017.
[3] The nature and importance of such projects means that they are prone to political interference, unpredictable government policy or simply impacted by general economic instability. Erin Miller Rankin, Sami Tannous and Matei Purice, 'Construction Disputes in Investment Treaty Arbitration' Global Arbitration Review's Guide to Construction Arbitration September 2017 <https://globalarbitrationreview.com/chapter/1145223/construction-disputes-in-investment-treaty-arbitration> accessed on 11 June 2019.
[4] Infrastructure Projects constitute the following percentages of ICSID Caseload comprising construction (14%), Water, Sanitation & Flood Protection (2%), Electric Power & Other Energy (20%) and Transportation (5%). See: The ICSID Caseload - Statistics (Issue 2019-1).
[5] These include non-expropriation without consideration[5], fair and equitable treatment[5], full and protection and security, non-discrimination, observation of obligations and a right to bring investor-state resolution mechanisms (ISDS) amongst others.
[6] Customary International Law is applicable to investment but its content is limited anddisputed.Thus the bilateral treaty is an agreement between two sovereign states, usually between a capital exporter and an importer of capital. See Kenneth J. Vandevelde, investmentliberalization and Economic Development. The Role of Bilateral Investment Treaties, 36 Colum. J. Transnat'l L. 501,523 (1998).
[7]The negative connotation attached to treaty shopping activities may be due to the association with the debatable problem in international tax law where corporate structures are established in "tax havens" with the sole purpose of gaining advantages from more favourable tax treaties. Baumgartner Jorun, Treaty Shopping in International Investment Law (Oxford University Press 2016) 7–9

‘treaty abuse’[8] dependent on the position of the party. Investment restructuring is where an IIP structures its IIP to enjoy the nationality of a particular country to enjoy the favorable protections included in its IIAs with the host country where its investments are or will be made.[9] It is a mitigating strategy to ensure protection against adverse risk which may arise with IIPs by securing access to international jurisdiction.[10]

Commentators such as Skinner, Miles and Lustrell used the terms “back end” and “front end” to describe the two methods of restructuring. Where an IPI restructures its investment by changing the nationality of the vehicle of the investment where it faces imminent threat by the host state or even where a dispute has arisen, this is categorized as “back end restructuring”. Whereas if an IPI structures its IIPs from the conception of the project to enjoy protections of an IIA it is referred to as “front end structuring” of an investment.[11] Each of these means of restructuring may be pursued by an IPI or national of a host state in an effort to internationalize its business within its host state and vest it with international jurisdiction.

The ability to strategically restructure investments including IIPs within the International Investment Law regime raised controversy. Corporate restructuring is in accordance with objectives of the international investment law regime to provide investors with security and protection of their investment in the host country. The ability of IPIs to restructure to bring equilibrium to the legal regime through its ability to customize its investment to gain as much investment protection as possible from the existing IIAs. [12]

The benefits of corporate structuring cannot be enjoyed without ensuring that the restructuring is seen as valid. From the decisions of ISDS tribunals in the legitimacy of restructuring, decisions in favour of the investor upon restructuring, are more occurrent in instances where IPIs follow the front-end approach.[13] The back-end approach has failed severally before ISDS tribunals.[14]

The strategic restructuring of IIPs are not without its negatives. Various arguments are raised on the lack of reciprocity, lack of consent and domestic free riders which fault the system and the need for reform.[15] Nonetheless, each of these negatives bear a feature in the International Investment Law Regime even without strategic restructuring. A typical example is the Dutch

[8] The term ‘treaty shopping’ can be used interchangeably with ‘corporate nationality planning’ in this context. This controversial practice occurs in many other fields besides investment protection, predominantly in relation to the more heavily explored issue of tax avoidance. Investment Treaty Shopping is unique, however, in that issues of jurisdiction are generally decided by arbitral tribunals. For an alternate definition, see Utku Topcan, ‘Abuse of Right to Access ICSID Arbitration’ (2014) 29(3) ICSID Rev 627; Johanna Puukka ‘Treaty Shopping in International Investment Law: Setting Limits on Corporate Restructuring to Gain Access to Investment Protection’ May 2018 <https://helda.helsinki.fi/bitstream/handle/10138/235888/Thesis%20Puukka%20Johanna.pdf?Sequence=2&isallowed=y> accessed on 11 June 2019.

[9] United Nations Conference on Trade and Development,'Investor–State Disputes Arising from Investment Treaties: A Review' in UNCTAD Series on International Investment Policies for Development (United Nations Publication, 2005) 21–22

[10] See Gabriel Bottini, Protection of Essential Interests in the BIT Era, in INVESTMENTTREATY ARBITRATION AND INTERNATIONAL LAW 145 (TJ Grierson Weiler ed., 2008).

[11] Chaisse Julien,'The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration'[2015]11(2)Hastings Business Law Journal 22; ;Skinner Matthew, Miles Cameron and Luttrell Sam,'Access and advantage in investor-state arbitration: The law and practice of treaty shopping'[2010]3(3)Journal of World Energy Law & Business 265–266.

[12] Von Moltke Konrad, Discrimination and Non-Discrimination in Foreign Direct Investment(OECD Publishing 2002) 3. Concretely this is done in the form of adherence to the principles of national treatment and most-favoured nation treatment. Despite the efforts, inequalities do exists. Treaty shopping practice can be seen as investor's response to fix these inequalities by themselves

[13] See Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Jurisdiction (21 October 2005) where the tribunal recognised that a nationality of a corporate shareholder could "migrate" from the Cayman Islands to Luxembourg.

[14] Such as Phoenix Action Ltd v. Czech Republic. Here,the tribunal found that the practice of this belated corporate restructuring in order to gain better treaty benefits was a "breach of the fundamental caveat of good faith". See Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award (15April 2009)

[15] Chaisse Julien,'The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration'[2015]11(2) Hastings Business Law Journal 22; John Lee, ‘Resolving Concerns of Treaty Shopping in International Investment Arbitration’ [2015] Journal of International Dispute Settlement 6, 355-379.

Model Bilateral Investment Treaty ('BIT') and Nigeria - Morocco BIT[16] whereby states have begun to use tighter drafting to limit corporate restructuring.

Lessons to be learnt in relation to the AfCFTA

African countries must be tactical in drafting of the investment chapter of the AfCFTA[17] to ensure that despite the benefits that treaty shopping provides for investors, it does not erode the benefits of the AfCFTA. The European Union could serve as a case study for the AfCFTA. The Court of Justice of the European Union (CJEU) in its decision on *Achmea v. Solvakia*[18] declared that ISDS provisions of intra-EU BITs are incompatible with EU law. Although ISDS tribunals have failed to adhere to the decision, this is a lesson for the AfCFTA. There might be a need to terminate various BIT's to ensure that investors do not rely on the BIT's to gain more protection than agreed upon and provided for in AfCFTA. It would definitely be a balancing act for States to ensure that it protects itself from treaty shopping where non-reciprocal and unexpected claims are raised.

Conclusion

Countries may adopt several investment restructuring options to take control, manage and mitigate the treaty protection availed to International Infrastructure projects in a number of ways. This may include ensuring the investment on Infrastructure Project qualifies for protection under the Treaty. It is necessary to set up the standard which infrastructure project investment qualifies as investments in that Treaty. Also, Improving transparency and predictability of investment measures through streamlining and speeding up administrative processes and requirements. This can be achieved through appropriate regulatory reforms which provide transparency and necessary coordination to give confidence and guarantee appropriate protection of investments. Finally, adopting international dispute resolution measures to guarantee predictability of the no State intervention in dispute resolution between Investor and State.

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[16] Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria signed at Abuja on 3rd December 2016.

[17] The African Continental Free Trade Area Agreement (AfCFTA) was endorsed on March 21, 2018 by 44 African countries which came into force on 30 May 2019.

[18] Slowakische Republik v Achmea BV, Court of Justice of the European Union, Judgment in Case C-284/16 (6 March 2018). Available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-03/cp180026en.pdf (accessed 11 June 2019)