THE TRANSFORMATION AND CHALLENGES IN THE EVOLVING FOREIGN INVESTMENT REGIME IN ANGOLA AND MOZAMBIQUE

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ABSTRACT

Angola and Mozambique are two African markets that have remained attractive for foreign investors, especially those seeking to invest in the exploration and exploitation of natural resources. Apart from the sectoral similarities attracting foreign investors, the legal regimes of these two markets have a common influence of Portuguese legal tradition arising out of their colonial past. This commonality makes it desirable to study the two jurisdictions' foreign investment regimes in order to develop a comparative perspective that could provide valuable insights. Such exercise can enable foreign investors to assess and identify similarities and differences in the legal treatment of their investments in the two markets and take necessary measures to counter potential legal challenges. The paper makes a close assessment of the legal environment and changes introduced in the foreign investment regimes of Angola and Mozambique in order to enable the identification of the key implications for foreign investors. The paper exposes the contrast between the two jurisdictions that is evidenced by the more recent momentum in Angolan initiatives to improve its foreign investment regime, distinct from the sustained evolution of the investment regime in Mozambique during the last three decades. The paper contributes to providing specific insights into the two comparable markets in order to enable the identification of how the respective national foreign investment law standards distinguish in the treatment and protection of foreign investments. Finally, the paper calls for the enhancement of intra-Lusophone investment cooperation and highlights the role of Macau SAR in the facilitation of investment relations with specific Lusophone host markets.

Key words: Investment Law, Angola, Mozambique, Implications for Foreign Investors, Lusophone Investment Relations.

I. INTRODUCTION

The legal regimes governing foreign investments in key African investment markets have continued to evolve over the past three decades to address the disparity in legal standards aimed at promoting and protecting inward investments. While some have made momentous changes, others have achieved only moderate improvements. Such diversity often calls for a closer assessment of foreign investment regimes of individual countries by potential foreign investors interested in investment opportunities those countries offer. Angola and Mozambique are two African markets that have remained attractive for foreign investors, especially those seeking to invest in the exploration and exploitation of natural resources. Apart from the sectoral similarities attracting foreign investors, the legal regimes of these two markets have a common influence of Portuguese legal tradition arising out of their colonial past. This commonality makes it desirable to study the two jurisdictions' foreign investment regimes in order to develop a comparative perspective that could provide valuable insights. Such exercise can enable foreign investors to assess and identify similarities and differences in the legal treatment of their investments in the two markets and take necessary measures to counter potential legal challenges. The paper makes a close assessment of the legal environment and changes introduced in the foreign investment regimes of Angola and Mozambique in order to enable the identification of the key implications for foreign investors. The paper exposes the contrast between the two jurisdictions that is evidenced by the more recent momentum in Angolan initiatives to improve its foreign investment regime, distinct from the sustained evolution of the investment regime in Mozambique during the last three decades.

The second part of the paper closely examines the newly reformed Angolan domestic law governing foreign investments in 2018 as well as its marked enhancement in undertaking relevant international obligations in 2017. The third part of the paper analyzes the sustained domestic law regime of Mozambique that was introduced in the 1990s and traces to the more recent position of Mozambique with regard to its international obligations and dispute settlement. The paper contributes to providing specific insights into the two comparable markets in order to identify how the respective national foreign investment law standards distinguish in the treatment and protection of foreign investments. The paper also provides the necessary framework for developing specific comparative law studies in the future involving the two regimes, which would be pertinent for not only these markets but also other Lusophone jurisdictions with are influenced by similar legal tradition.

II. RECENT IMPETUS IN DOMESTIC REGIME AND INTERNATIONAL OBLIGATIONS PERTAINING TO FOREIGN INVESTMENTS IN ANGOLA

In recent years, important changes have been witnessed in both domestic law as well as international obligations of Angola pertaining to foreign investments. The domestic law governing private investments including foreign investments was overhauled in 2018. The new Law no. 10/18 promulgated in June 2018 (hereinafter 'PIL 2018') is expected to have a profound impact on the legal environment governing private investments in Angola. A close assessment of its key features and potential implications for foreign investors will facilitate the formulation of effective legal strategies to promote and protect investment interests. Moreover, Angola's determination to enhance its legal environment governing foreign investments gained further momentum with Angola's ratification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (hereinafter 'New York Convention') in 2017. This move is widely hailed as a positive development for foreign investors as it provides certainty in the enforcement of investment awards much in lines with globally accepted standards. These developments

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in recent years should be assessed further to identify the positive elements enhancing the legal environment as well as the limitations that remain.

2.1 COMMON LEGAL FRAMEWORK BUT DISTINCT PROVISIONS

The distinct feature of the PIL 2018 prescribing the same set of legal standards for both the domestic and foreign investment is discernible at a cursory look[1]. Although this could generally extinguish concerns of the potentially unequal legal treatment of foreign investments by the domestic investment law regime[2], a closer introspection reveals certain limitations and a few differential provisions in the PIL 2018. Foreign investors should take note of those limitations and distinct provisions and assess the implications for their respective types and circumstances of investments. The major limitation of the PIL 2018 is that certain types of investments are excluded from its purview[3]. The provisions of the PIL 2018 that govern foreign investments distinct from domestic investments could be identified in several contexts. The comparison of the definitions of the nature of operations that are considered as domestic investments and foreign investments evidence some key differences, which could have distinct implications for foreign investors. At the very outset, it is important to note that the operations enlisted in the category of domestic investments are prescribed in the form of an inclusive list but such a list for foreign investment is a closed one. In addition, distinctions with regard to four specific items in the two lists are worth noting.

Firstly, with regard to the operations involving machinery and equipment, any acquisition of machinery and equipment is considered as domestic investment. However, the foreign investment operations in the same category require the introduction of technology and knowledge that should add value to the investment and face a pecuniary assessment. Secondly, in defining the operations involving the category of conversion of credits, while domestic investments could involve the conversion of credit resulting from any kind of contract, such conversions in foreign investment should result specifically from the implementation of supply contracts of machinery, equipment, and goods with the possibility of payments abroad[4]. Thirdly, operations of domestic investment could involve a total or partial taking, acquisition or assignment of commercial and industrial establishments, whereas foreign investments in such establishments could only be made through acquisitions only[5]. Finally, while the transfer of patented technologies and registered trademarks are recognized as part of the operations of domestic investment, there is a conspicuous absence of such categories in defining the operations of foreign investments[6].

Apart from the above additional requirements on foreign investments relating to the nature of their operations, the PIL 2018 also imposes a specific limitation on foreign investments with regard to the advances made for foreign investment operations. The advances made for foreign investment purposes by shareholders and associates are restricted to a maximum of 30% of the value of the investment carried out by the relevant incorporated company[7]. Next, with regard to the right to resort to credit, the PIL 2018 imposes a distinct restriction upon foreign investors. Access to domestic credit is permitted to foreign investors and companies with a majority of foreign investments but only after the full implementation of their respective investment projects[8]. However, such a restriction is not imposed on domestic investors.

2.2 THE SCOPE OF THE NEW LAW

The PIL 2018 governs private investments by domestic and foreign investors in forms of both direct and indirect investments. However, the operations classified as an indirect investment are restricted to fifty percent of the value of the total investment made. Private investments aimed at creation or continuation of economic activity with direct participation in its management in accordance with a respective social object is defined as direct investment[9]. Indirect investments are defined in precluding terms as investments made by private law companies that do not qualify as direct investments.

2.3 RIGHTS AND OBLIGATIONS

First, the right of property relating to the assets of the enterprise of private investors is protected and the right to use them freely without interference is guaranteed by the PIL 2018. Although the requisition or expropriation of such assets for public usage is possible, it is subjected to the terms of the Angolan constitution and law with a payment of fair compensation paid promptly. In addition, the law protects the professional, banking and commercial secrecy of private investors. The right to judicial access to defend the interest of investors with due legal process protection and safety is guaranteed. Resolution of investment disputes through alternative dispute resolution methods is recognized albeit subject to any means of dispute resolution prescribed by any special law governing the underlying investments[10].

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[1] The legal standards prescribed by the PIL 2018 applies to private investments originating domestically or from abroad, as well as those that are mixed in nature like joint venture investments.
[2] However, it should be noted that individual investors from different home countries (from where the foreign investor/investment originates) might have a distinct more favorable treatment, if the host state namely Angola has undertaken any international obligations to that effect. For example, compare individual BITs of Angola with specific countries like South Africa or France.
[3] The scope of the PIL 2018 is not extended to the investments in certain sectors like oil, which are subjected to the regulation of special laws. Similarly, the investments made by public domain companies with a dominant share of the capital held by the government are not governed by the PIL 2018.
[4] See Article 7 (1) (d) and Article 9 (1) (d) of PIL 2018.
[5] Compare Article 7 (1) (i) and (j) with Article 9 (1) (h) of PIL 2018.
[6] However, it is interesting to note a potential paradox relating to this category. Although, the enlisted operations of foreign investments in Article 9 (1) does not include transfer of patented technologies, the definition of 'indirect investments' by domestic or foreign private law companies in Article 3 (g) includes investments that comprehends patented technology.
[7] See Article 11 of PIL 2018.
[8] See Article 20 of PIL 2018.
[9] See Article 3(f) of PIL 2018.
[10] See Article 15 of PIL 2018 providing Jurisdictional Guarantees.

Various other allied rights of the investors protected by the PIL 2018 (subject to relevant restrictions and permissions) includes intellectual property rights, rights of land ownership including its fruition and domanial resources, right to import goods for the execution of the investment projects and right to export goods resulting or not from their manufacturing. The right to management of private companies is generally protected from public interference except in cases where such interference is permitted by the law. Similarly, permits and authorizations granted to the investments cannot be cancelled unless subjected to the relevant administrative or judicial process. Apart from the above rights, certain fiscal rights of investors are explicitly protected. For example, the right to the credit of both domestic and foreign private investors are recognized, albeit such a right for the latter is subjected to a distinct restriction discussed earlier in the paper[11]. In contrast, the right to repatriation abroad of certain proceeds resulting from the investments is recognized only for foreign investors.

The foreign investors are provided with the right to transfer abroad dividends resulting from the investments, proceeds of the liquidation of the invested enterprises, amounts received in compensation, royalties, and remuneration resulting from indirect investments, related to technology transfer. However, such a right to transfer can be exercised by foreign investors only after the completion of the execution of the relevant investment project. In addition, such transfers can be effected only with the proper approval of the competent authorities as well as completion of payment of taxes due and creation of mandatory reserves.

While recognizing different rights, the PIL 2018 imposes a set of general and specific duties upon the private investors[12]. The general duties pertain to non-interference in the internal affairs of the government as well as the duty to respect the Constitution and the laws of Angola. Specific duties span from honouring deadlines and commitments for the importation of capital and implementation of the investment project to obtaining various insurances to protect workers as well as shielding against claims of civil liability arising from damages caused to third parties and the environment. Other specific duties pertain to payment of taxes and contributions, the constitution of funds and reserves, and compliance with accounting regulations and specific norms resulting from environmental and labour legislation.

2.4 BENEFITS AND CONCESSIONS

The PIL 2018 grants various benefits and concessions for all private investments including reinvestment projects. Although such grants are automatic, they are granted only to activities exclusively resulting from the execution of the registered investment in question and subjected to the conditions of presenting tax returns of those special-purpose investment entities and complying with the relevant criteria prescribed by the PIL 2018. Benefits granted are mainly in the form of fiscal or financial characteristics[13]. Firstly, the PIL 2018 permits the granting of fiscal benefits in different heads or types of taxes. Moreover, different forms of tax benefits are recognized such as tax deductions, accelerated depreciation, tax reduction and exemptions, tax rate reductions, grants of time for tax payments, importation rights and other exceptional measures. The benefits in fiscal or customs forms, however, are not granted as a matter of rule and are characterized as exceptional benefits that could be offered for a limited time only[14].

Investors are provided financial benefits too in the form of access to credit using economic support programs of the executive like access to interest rate subsidy and provision of a public guarantee. In addition to the benefits, the PIL 2018 grants various concessions, which are mainly privileges of simplified and priority access to services rendered by the public administration. Concession includes the provision of swift access to public assets. Procedural simplification and swiftness relating to various essential and eventual records required for investment operations are also guaranteed as part of the concessions.

The benefits and concession discussed above are to be granted in consideration of specific factors namely the sectors of investment activities that are prioritized and areas specifically designated for development. Priority sectors are broadly defined to include market segments in which there exists a potential to replace imports or promote and diversify the economy using means like exports. The PIL 2019 provides an inclusive list of priority sectors that includes some prominent sectors like education, agriculture, health, textiles, clothing, footwear, hotel and tourism, construction and infrastructure development, telecommunication and IT, electric energy and sanitation. The PIL 2018 also designates four distinct areas consisting of different provinces and municipalities in Angola as specific areas of development.

Despite the array of various benefits and concessions granted as part of the PIL 2018, the foreign investors should be wary of certain caveats. Firstly, it is important to note that although the benefits are regarded as automatic they are subjected to certain conditions and compliance discussed earlier. Moreover, it should be clear that certain benefits are exceptional in nature and could only be enjoyed for a limited period. To enhance the chances and the utility of the benefits and concessions, foreign investors should systematically assess the benefits and risks of aligning their investments in prescribed priority sectors or in investing in the designated development areas.

Finally, in order to secure and sustain the benefits and concessions, the foreign investors should take into consideration the explicit economic and social goals, which the PIL aims to achieve in granting the said benefits and concessions. Notable goals in this regard include economic diversification and development of most deprived areas. Enhancement of national productive capacity using local raw materials and improvement of productive efficiency and competitiveness are also desired. An increase in value-added elements of manufactured goods, an increase in exports, and the reduction of imports are sought

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[11] See supra n.9.
[12] See Articles 17 and 18 of PIL 2018.
[13] See Article 23-25 of the PIL 2018.
[14] See Article 30 of the PIL 2018. The PIL mandates the extinction of benefits by the duration for which they are granted, which cannot in any case exceed a period of ten years. Benefits could also become extinct under other prescribed circumstances like the cancellation of registration of the underlying investment.

through the grant of benefits and concessions. Strengthening of national private companies through foreign partnerships and promotion of knowledge and technology transfer are included in the goals. The creation of new jobs and an increase in the professional qualification of the workforce are also part of the prescribed goals. The key remaining goals of the grant include the increase of foreign exchange funds and enhancement of stability in the balance of payments, enhancement of efficient supply in the domestic market as well as expansion and modernization of infrastructures. Due consideration to the above economic and social goals at all times and in every investment-operation is crucial for foreign investors to maintain good investment relations with the host Angolan market.

2.5 BIFURCATION OF REGIMES AND FREEDOM OF CHOICE

Private investments in the PIL 2018 could be made under two distinct sets of regimes namely the prior declaration regime or special regime. Investors' freedom of choice of either of the investment regimes is recognized by the new law. Investment under the former category could be initiated through the presentation of an investment proposal to the competent body of the Public Administration Office seeking registration of investment and grant of benefits. The key condition to partake in the regime of the prior declaration is the completion of the incorporation of the companies presenting the investment proposal. On the other hand, private investments under the special regime are those made in the priority sectors and development areas discussed earlier. Both the regimes are conferred with their own respective set of benefits, which should enable the foreign investors to exercise an informed choice. While both the regimes offer various fiscal benefits, a cursory comparison reveals a more limited level and duration of benefits in the prior declaration regime.

The fiscal benefits in the prior declaration regime are mainly in the form of rate reductions covering property transfer tax, industrial tax, capitals tax and stamp duty tax with the reduction pertaining to the last three types of taxes limited to a period of two years only[15]. The fiscal benefits in the special regime comprehend rate reductions in property transfer tax, urban building tax, industrial tax, and capital tax. In this regime, investments in different development areas are offered a different level of rate reductions and for different durations. These fiscal benefits are much higher, with some rates and duration as high as four times, in comparison with similar types of tax reductions in the prior declaration regime[16]. In addition, special-purpose investment entities in the special regime are also exempted from rates and emoluments payable for requested services involving the non-corporate public entity.

2.6 SPECIFIC CAVEATS

Foreign investors should also pay specific attention to various requirements of the PIL 2018 regarding the implementation of the investment projects. Firstly, the execution of the investment project within the deadline mentioned in the certificate of investment registration along with its execution and management in strict conformity with relevant legislation is mandated. The PIL forbids the application of the contributions from abroad to purposes other than those declared in the investment registration and any deviation from the registered object of the investment. Certain types of company changes including those involving importing of capitals and changing or widening of the object of the investment project should be subjected to registration with the competent bodies. Although the PIL 2018 recognizes the possibility of private investors employing qualified foreign workers, obligations to train local Angolan workers and gradually replace foreign works with the Angolan workers are imposed.

Finally, the PIL 2018 defines various infringements and prescribes related penalties. The use of resources obtained from abroad for purposes different from those declared and registered is one of the pertinent infringements to note. Invoicing that permits illicit exit of capitals or misrepresentation of relevant obligations, particularly those of fiscal in nature are designated as infringements under the new law. Lack of providing training to local workers or failure to substitute foreign workers with local ones are also categorized as infringements. Other pertinent infringements could arise due to lack of execution of investments within registered deadlines, lack of information transmitted to relevant fiscal bodies, falsification of goods or declarations, over-invoicing of the prices of imported machinery or equipment and the conducting of commercial activity outside the purview of the declared scope. The PIL prescribes various consequences for the infringements, which includes the imposition of fines and penalties, loss of benefits and concessions, cancelation of the investment registration as well as punishment under the penal law for infringement involving falsification of goods or declaration discussed earlier.

2.7 ENHANCEMENT AND LIMITATIONS IN INTERNATIONAL OBLIGATIONS PERTAINING TO INVESTMENT DISPUTE RESOLUTION

The limitations in the domestic legal regime governing foreign investments could be offset by international obligations is hope for international investors. Such international obligations could be classified into two segments namely the substantive legal standards governing investments and the norms pertaining to the settlement of investment disputes. Although, as in international trade regime there is no multilateral investment treaty regime prescribing substantive investment obligations, the protection of foreign investments is typically addressed within the purview of bilateral investment treaties (hereinafter 'BITs'). In contrast, in the frontier of investment dispute resolution, two multilateral treaty regimes provide the necessary guarantees for effective resolution of investment disputes and its enforcement. While the International Centre for the Settlement of Investment Disputes (hereinafter ICSID) regime offers a direct and comprehensive framework specialized in investment dispute resolution, the New York Convention provides the widely accepted set of international obligations for the enforcement of arbitral awards. However, in the case of Angola, the international obligations undertaken in both the said segments have been very limited.

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[15] See Article 38 of the PIL 2018.
[16] See Article 39 of the PIL 2018.

In case of substantive international obligations pertaining to foreign investments, Angola had only three BITs signed by the turn of the last century. Although this number has subsequently increased to fifteen, the BITs that have so far entered into force are only five[17]. It is relevant to note that the situation with regard to BITs signed by Angola with other Lusophone countries is also not different. Among the five Lusophone countries with which BITs have been signed, only two of them have entered into force. While the BITs signed with Cape Verde in 1997 and the more recent BIT signed with Brazil in 2015 have entered into force, the BITs signed with Portugal[18], Guinea Bissau, and Mozambique are yet to see the light of the day. The other three BITs, which are in force are those entered with Italy, Germany, and Russia respectively. This clearly reveals a finding that foreign investors from other jurisdictions seeking to invest in Angola will be governed by the domestic legal regime analysed earlier in the paper and hence must assess its key characteristics and its implications for their specific types of investment.

This then takes us to the second segment of international obligations relating to investment dispute resolution. In this segment, the position of Angola was particularly a concern until it made some improvements recently. Before 2017, Angola neither was a party to the ICSID Convention on Settlement of Investment Disputes (hereinafter 'ICSID Convention') nor bound by the obligations of the New York Convention. The fact that these two conventions have been widely accepted by a large number of countries created a strong perceivable disadvantage for Angola with regard to investment dispute settlement. Angola partially addresses this negative perception with the accession to the New York Convention in March 2017, which entered into force in June of the same year.

The accession is considered to have the potential to diminish legal uncertainties and legal risks associated with foreign investments in Angola[19]. This is because the investors could seek to arbitrate investment disputes abroad with the confidence that the resulting awards will be enforced in Angola in consonance with the New York Convention standards. Although Angolan domestic laws[20] have recognized arbitration as a possible means of dispute resolution there were obvious limitations that would have hindered foreign investors seeking international arbitration. Firstly, as Angola was not a party to the New York Convention, uncertainties as to the recognition and enforcement of arbitral awards rendered outside Angola were a major concern for foreign investors. Secondly, in certain fields of investments, Angolan domestic law like the Petroleum Activities Law 2004 mandated that any related arbitration proceedings should be seated domestically applying Angolan law and conducted in an official language only[21].

In the light of the above circumstance, the 2017 accession initiative of Angola should be seen as a major leap forward in boosting the foreign investor confidence, which is also further supported by the relevant provisions of the new PIL 2018 discussed earlier[22]. In spite of this major leap in undertaking relevant international obligations, which positively influences the legal environment governing foreign investments in Angola, the non-accession to the ICSID Convention or the lack of other related initiatives remains a major concern among foreign investors. Especially, in an era when the ICSID Convention has almost become the default standard for investment dispute settlement evidenced by its wider acceptance by many countries[23], the Angolan non-participation in the ICSID regime will continue to be perceived negatively. In addition to the obvious Angolan initiative to address the limitations relating to the enforcement of foreign arbitral awards, it is arguable that Angolan should take some measures to address the limitation with regard to the ICSID Convention. Although Angola is not yet a member state to the ICSID Convention, it may attempt to fill the void with increased reference to ICSID rules or the willingness to utilize the ICSID Additional Facility in its investment-related disputes.

III. LEGAL FRAMEWORK GOVERNING FOREIGN INVESTMENTS IN MOZAMBIQUE

Unlike the Angolan investment regime, which has been reformulated recently, the investment law governing foreign investments in Mozambique is still from the nineties. The major law governing private investments in Mozambique is the Investment Law 1993[24] (IL 1993). Although further Regulation of the Investment Law[25] has been enacted subsequently in 2009 (RIL 2009), the IL 1993 remains as the major legal framework governing private and foreign investments in Mozambique.

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[17] See UNCTAD, (2020). Investment Policy Hub-Angola Bilateral Investment Treaties, available online at https://investmentpolicy.unctad.org/international-investment-agreements/countries/5/angola (accessed on 17 January 2020).
[18] Especially Angola has signed two BITs with Portugal namely in 1997 as well as in 2008 and both of them have not entered into force. See ibid.
[19] Quentin Decleve, (2017). Angola becomes the 157th State Party to the New York Convention, *International Litigation Blog* available online at http://international-litigation-blog.com/angola-becomes-157th-state-party-new-york-convention/ (accessed on 15 January 2020).
[20] For example, Voluntary Arbitration Law of Angola (Law No.16/03, 2003) and Decree No. 4/06, 2006 have provided the basic legal framework for the conduct of arbitration and the creation of related institutional mechanism in Angola.
[21] Filipe Vaz Pinto, (2019). Angola: The Middle Eastern and African Arbitration Review 2019, *Global Arbitration Review* 11 April 2019 available online at https://globalarbitrationreview.com/insight/the-middle-eastern-and-african-arbitration-review-2019/1190108/angola (accessed online 12 January 2020).
[22] See above n.11.
[23] As of April 2019, the number of parties to the ICSID Convention stood at 154, in addition to another 9 countries that have signed and are expected to ratify the convention. This demonstrates that ICSID has almost attained acceptance status similar to that of New York Convention, which commanded a total number of 161 state parties as of December 16, 2019. See ICSID, (2019). List of Contracting States and other Signatories of the Convention, (Washington: International Center for Settlement of Investment Disputes, Washington), 12 April 2019 available online https://icsid.worldbank.org/en/Pages/icsiddocs/List-of-Member-States.aspx (accessed online on 27 December 2019) and UNCITRAL, (2020). Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards, available online https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 (accessed online on 3 January 2020).
[24] See Law no. 3/93 promulgated on 24 June 1993.
[25] See Decree no. 43/2009, 21 August 2009.

3.1 UNIFORM LEGAL STANDARDS AND SCOPE OF EQUAL TREATMENT

The IL 1993 aims to provide a uniform legal standard for governing both national and foreign investments[26] by providing relevant incentives and guarantees. However, strict compliance with the provisions of the IL 1993 and its relevant regulations is mandated for enjoying those incentives and guarantees. Nevertheless, the IL 1993 or incentives and guarantees it contains do not apply to prescribed investment activities in petroleum, gas and mineral resources extraction sectors. Similarly, public investments with the source of funding from state budgets or investments with an exclusive social character are exempted from the purview of IL 1993. IL 1993 enshrines equality of treatment for foreign investors with the same rights and duties that are applicable to nationals. However, certain types of investment projects of the nationals that may be provided with the special treatment and support by the government are not extended to foreign investors[27]. The IL 1993 explicitly upholds international investment obligations of Mozambique arising from international treaties and agreements and prevents the provisions of law from restricting any related guarantees and advantages conferred by such international instruments.

3.2 PERTINENT PRINCIPLES AND OBJECTIVES OF THE IL 1993

Domestic and foreign investors should pay special attention to the guiding principles of investment and investment objectives recognized in the IL 1993, both at the time of making the investments as well as during its subsequent operations. This is crucial to avoid any potential conflict with the spirit of the legislation that may potentially affect the success of the investment or its operations. IL 1993 expects the investments covered within its scope should be able to contribute to economic and social development that is sustainable and satisfy the principles of national economic policy and its objectives[28]. Investments governed by IL 1993 are mandated to pursue various specific objectives. Investments are expected to develop and improve economic infrastructure to support productive economic activities and promote development. Investments could contribute to national production capacity or capacity to render supportive services.

Training and development of local entrepreneurs and business partners along with the creation of local jobs and improvement of professional skills of the labour force are also recognized as objectives of the investment in IL 1993. Increase of exports and its diversification, reduction, and substitution of imports, render of productive services including those with the potential to generate foreign exchange, as well as other contributions that could improve the balance of payments and government revenue are some of the pertinent investment objectives, foreign investors should take special note. Finally, the objectives of promoting technological development, productivity and supply in domestic markets; and satisfying the basic and priority needs of the population are also recognized in IL 1993.

3.3 FIELD OF INVESTMENTS AND FORMS

IL 1993 governs direct and indirect investments made by both national and foreign investors. The definition of direct investments made by foreign investors comprehends all forms of capital contributions originating from abroad and used in the investment project in question for carrying out an economic activity. The said economic activity should be done under the auspices of a company registered and operated in Mozambique. The capital contributions should not only be valuable in monetary terms but also constitute own equity capital of the foreign investor or consist of resources at his own account and risk.

Direct investments made by nationals are defined with similar elements except the capital contributions need not originate from abroad. Two separate sets of forms of direct investments are prescribed for national and foreign investors respectively, which have comparable as well as distinct features[29]. The IL 1993 provides a single definition of indirect investment mainly emphasizing the absence of the exclusive direct participation of the investors in the investment projects in which various types of indirect investments have been made[30]. Finally, the private investments, in general, are freely permitted in areas in which relevant economic activities not reserved for the government or the public sector. The Council of Ministers is conferred with the power to define the economic activities that are reserved exclusively for the public sector and which could involve a public-private partnership.

3.4 INVESTMENT PROTECTION AND INCENTIVES

The IL 1993 imposes a broad obligation on the national government to guarantee various property rights related to the approved investments, which includes property on goods and industrial property rights. Although the law permits nationalization or expropriation of the investments under the substantial grounds of national interest or public health and order, they are circumscribed to situations of absolute necessity. Moreover, the affected investors are guaranteed with an entitlement of just and equitable compensation. However, the law does not allude to promptness in payment of compensation, but it prescribes specific timelines for the determination of the value of compensation.

The law authorizes the remittance of funds abroad on different heads including profits of eligible investments, royalties or remuneration payments of indirect investments related to technology transfer, amortization of international loans and their interest payments, certain prescribed compensation received for expropriation as well as invested and re-exportable foreign capital. Foreign investors are permitted to repatriate the total profits in each financial year. The transfer of funds abroad authorized under the law is however subject to certain conditions including the need to constitute and replenish legal reserve fund, payment of taxes, making necessary provisions to repay instalments and interest of loans obtained to make the investments

[26] See the object of IL 1993, Article 2 of the IL 1993.
[27] See Article 4 of the IL 1993.
[28] In addition, compliance with the provisions of IL 1993 as well as its regulations and other applicable laws also form part of the principles guiding the investments. See Article 6 of IL 1993.
[29] Compare Article 8 with Article 9 of IL 1993.
[30] See Article 1 (1) (0) and Article 10 of IL 1993.

and provide a relevant guarantee. Finally, the law also provides tax and customs incentives subjected to the requirement that certain conditions of the concession granted relating to the investments remain unchanged.

3.5 KEY REGULATIONS GOVERNING INVESTMENTS

The IL 1993 requires that direct investment should be financed by the equity capital of the investors. Non-interest bearing shareholders' loans and additional capital from the own resources of the investors satisfying certain conditions could also form part of direct investments. The IL 1993 permits companies with the participation of foreign direct investments to have access to domestic credit borrowing in equal terms with those of local companies. Investments generating foreign exchange are permitted to retain a proportion of their revenue in foreign currency accounts based on their respective foreign exchange requirements[31]. For other investments not within the scope of the above special arrangements, the allocation of foreign exchange could be made available in consideration of its economic interest and social importance.

In order to be entitled to benefits conferred by IL 1993, the eligible investments must seek approval of the competent authorities. Upon approval, the foreign investors should register the undertaking containing the foreign direct investment with the competent authority responsible for capital inflows monitoring within a stipulated period.[32]Failure of such registration may result in the non-recognition of the right of repatriation of profits or the right of remittance of re-exportable capital. Investors are permitted to transfer their position, rights and equity participation in the investments by submitting a request to that effect to the prescribed authority. Such a request should identify the terms of transfer and the relevant beneficiary. The beneficiary can enjoy the benefits provided by IL 1993 only if the relevant operation is approved, effected and registered.

In addition, indirect foreign investments also require previous confirmation by a prescribed authority and a subsequent registration. These two conditions are fundamental for any relevant foreign investment to qualify as an indirect investment. Interestingly, the IL 1993 imposes environmental protection obligations upon the investors. They are required to carry out and submit the results of the environmental impact assessment of their investment activities. Obligations to prevent and minimize negative effects on the environment are also imposed. Investors causing any pollution or contaminating activities affecting the environment or public health are required to comply with relevant restrictions, not only arising out of national law and regulation but also the international environmental law obligations of Mozambique.

Finally, IL 1993 also prescribes different modes of investment dispute settlement. Judicial means are ultimately suggested for any disputes relating to the interpretation and application of the provisions of IL 1993 after exhaustion of friendly means or negotiations to settle those disputes. Disputes between the state and foreign investors relating to the investment that could not be resolved using the above means could be settled through mutually agreed arbitration using the ICSID rules or the rules of ICSID Additional Facility or rules of ICC arbitration[33].

3.6 INTERNATIONAL OBLIGATIONS AND PRACTICE OF MOZAMBIQUE RELATING TO FOREIGN INVESTMENTS

Unlike Angola that has a limited undertaking of international obligations, Mozambique has a stronger footprint in both the segments of substantive as well as dispute resolution related international instruments. Firstly, in comparison with Angola, Mozambique has signed a higher number of BITs and have a higher number of them in force. According to UNCTAD, out of 27 BITs signed by Mozambique, 20 of them are in force and the prospects of three of the remaining BITs entering into force is quite high as they have only been signed in 2015. Although this is a considerably higher number of acceptance of substantive international obligations governing foreign investments, Mozambique's investment accord with other Lusophone countries reveals a limitation. Unlike Angola, which has entered into BITs with five other Lusophone countries, Mozambique had only one BIT with Portugal for a long time and only recently, it concluded BITs with Brazil and Angola respectively[34]. In spite of the limited intra-Lusophone investment accord of Mozambique, the scope of international obligations governing foreign investment in Mozambique is clearly better.

With regard to the second segment of international obligations pertaining to the settlement of investment disputes, Mozambique also fairs better than Angola. Firstly, Mozambique has become a party to the New York Convention almost two decades before Angola had joined the regime. Moreover, it is quite important to note that when Mozambique joined the New York Convention it was already a party to the ICSID Convention. Mozambique signed the ICSID Convention as early as 1995 and the same entered into force the very same year. This provided a major impetus to investor confidence about the potential for effective settlement and enforcement of investment disputes. Therefore, the subsequent accession of Mozambique to the New York Convention would not have made the same level of profound impact as we have discussed earlier in the case of Angola. However, the fact that Mozambique is a party to both the high standards of international obligations pertaining to investment dispute settlement has a potential for a stronger appeal to a range of international investors. In any case, Mozambique obligations under the ICSID certainly provides a comparative advantage in attracting foreign investors *viz a viz* Angola.

In this context, it also relevant to note that Mozambique's positive experience as a party to the ICSID Convention for nearly two and a half-decade should also be able to address some of the concerns Angola may have in undertaking obligations under the ICSID. The outcome of the more recent ICSID arbitration proceeding against Mozambique is a case in example, which should quell concerns of any potential resort to ICSID Mechanism for untenable claims by foreign investors. In the

[31] See Article 19 (1) of the IL 1993.
[32] Foreign investors are also required to register any subsequent capital imports with the same authority. See Article 22 (1) of the IL 1993.
[33] See Article 25 (2) (a), (b) and (c) of IL 1993.
[34] The Mozambique-Portugal BIT was signed in 1996 and entered into force in 1998. Whereas, Mozambique's BIT with Brazil and Angola were concluded only in 2015 and are yet to enter force.

arbitration proceedings initiated in *CMC v. Republic of Mozambique*[35], the ICSID Panel rendered the award in October 2019, whereby the claims against Mozambique raised by the foreign investors on the grounds of alleged violations of Italy-Mozambique BIT were rejected. Although Mozambique failed in its earlier attempt to challenge the jurisdiction of the ICSID Panel, in this case, the ultimate award favored the respondent state of Mozambique. This is a clear example of how the investor-state dispute settlement obligations arising under the ICSID need not be seen as a risk of exposing the host state to a forum that may always favour investor claims. The CMC award rendered in favour of Mozambique along with other similar awards rendered by ICSID panels dismissing untenable claims by foreign investors against any other member states of ICSID should be closely studied to ascertain the objectivity and investment dispute related professionalism of ICSID panels. Such an exercise would be able to quell the concerns of certain developing host states like Angola in acceding to the ICSID regime. Finally, it is also relevant to note that most of the African host states have already become a party to the ICSID Convention, which should also motivate Angola joining the ICSID.

IV. CONCLUDING REMARKS

The assessment of the legal environment governing foreign investment in the two jurisdictions carried out above reveals varying degrees of efforts in each jurisdiction. From a comparative perspective, the paper clearly reveals a more concerted effort by Mozambique to improve its legal environment on foreign investment than that of Angola. This is evident both in the domestic legal regime as well as in the international obligations undertaken. However, in both these frontiers, Angola has recently revived its efforts to improve the conditions with the introduction of a new domestic law governing foreign investment as well as undertaking some new international obligations. In spite of the positive elements, aspiring foreign investors seeking to invest in these two markets should take note of pertinent limitations and challenges arising in both jurisdictions and employ necessary precautionary measures to address them.

Firstly, with regard to Angola although it has introduced a new domestic law in 2018, the paper reveals some major limitations in the undertaking of the international obligations relating to foreign investments. Moreover, even with regard to the new legislative framework introduced in 2018, relevant limitations and challenges that remain should be identified and addressed. In this regard, some of the key findings and recommendations of the very recent Investment Policy Review on Angola carried out by UNCTAD are crucial[36]. Some of the key criticisms include the complexity in the entry and establishment of foreign direct investments, onerous operational regulations, the existence of restrictive business practices and lack of coordination and institutional capacity. Although the earlier analysis in this paper revealed some key strength of the PIL 2018 introduced in Angola, it is important to take note of a major concern expressed by the UNCTAD 2019 policy review regarding the limitations of the scope of the new law.

The UNCTAD review, although found that the PIL 2018 has removed several entry-level requirements for FDI and introduced other key improvements in the legal environment governing foreign investments, they were not extended to specific investment sectors. It is significant for the foreign investors to realize that the improvements offered by the PIL 2018 are not extended to specific investment sectors, where a range of restrictions to foreign direct investments continues to exist. Therefore, foreign investors should be wary of the limitations of the scope of the PIL 2019, when investing in a specific natural resources sector in Angola, which tends to be governed by specific restrictive sectoral legislation. Finally, the general caveat about the existence of additional *de facto* barriers to entry into Angolan investment markets is also worth to note in order to enable the development of relevant countermeasures and legal strategies by foreign investors.

Secondly, with regard to Mozambique, foreign investors should pay special attention to some of the caveats raised by UNCTAD in its last investment policy review[37]. The weaknesses relating to the investment regulatory framework in Mozambique were identified in investment rulemaking, taxation, employment of foreign and skilled workers, accessibility to land, licensing, Public-Private Partnerships (PPPs) and management of big projects, etc. Criticism was also mounted about lack of any special assistance to small and medium-size investments and lack of treatment in par with big investments. In addition, the recommendation made to improve the investment climate in Mozambique should also throw light on the areas where prospective investors should be wary of potential challenges. The pertinent recommendations include legal reforms and introduction of modern regulatory standards governing investments, improving licensing procedures and reforming attitudes of regulatory institutions to promote and facilitate investments, developing a regulatory framework to foster competition, reforming regulatory framework governing PPPs, etc.

It is clear that in spite of the early adoption of domestic and international legal standards governing investment in Mozambique, it still faces different shortcomings. Especially, the need for the introduction of a new domestic regulatory framework to address the shortcomings has been primarily recommended. Although the examination of the domestic law governing investments in Mozambique carried out in this paper revealed various strengths, it should be noted that the domestic regime has been introduced more than quarter of a century ago and it is time to consider introduction of a new modern regulatory framework governing investments in general and foreign investment in particular.

Before closing, it is important to note that the common denominator in the above two investment regimes examined in this paper is the legal tradition from which they have hailed. Both Angola and Mozambique have been influenced by the Portuguese legal tradition and the typical characteristics of their investment regimes influencing foreign investments should be assessed in the light of this historical influence. Acknowledgment of this relevance could be the motivation for China, the major trading nation in the world, to constitute a special the Permanent Ministerial Forum for Economic and Trade Co-operation between China and Portuguese-speaking Countries in Macau SAR (Forum Macau). Moreover, the common legal origin of the

[35] See *CMC Muratori Cementisti and others v Republic of Mozambique*, ICSID Case No. ARB/17/23, Award dated 24 October 2019.
[36] UNCTAD, (2019). *Investment Policy Review-Angola*, Geneva: United Nations, PP.1-86.
[37] UNCTAD, (2012). *Investment Policy Review-Mozambique*, Geneva: United Nations, PP.1-110.

Lusophone markets would pave way for individual host states within these markets to learn from the experience of each other in order to enable further improvement in the legal environment governing foreign investments. In particular, the possibility of enhancing investment cooperation and establishing bilateral investment obligations among Lusophone markets should provide invaluable experience for each of these jurisdictions before developing effective engagement and investment relations with other non-Lusophone markets.

In this context, the common origin of the Lusophone legal traditions also paves way for jurisdictions like Macau SAR to play a role of facilitator of economic and investment relations, which could serve well for foreign investors seeking to invest in Lusophone markets like Angola and Mozambique. The continued efforts of Macau SAR in enhancing its facilitative role including, for example, the new reforms introduced in Macau Arbitration law in 2019 could be utilized effectively by foreign investors as a forum to settle investment disputes with other Lusophone host states. Moreover, the initiatives to improve the Lusophone investment cooperation are also crucial in order to take advantage of not only the investment opportunities individual host markets offer to each other but also to gain from the common characteristics of the legal system that has the potential to facilitate friendly investment cooperation. In this regard, the limitations exposed in this paper like the limited investment accord of Mozambique with other Lusophone countries and the non-entry into force of the investment accords entered into by Angola with other Lusophone jurisdictions should be effectively addressed to promote intra-Lusophone markets' investment cooperation.

The close examination of the legal regimes governing foreign investment in the two specific Lusophone markets of Angola and Mozambique reveals similarities and some profound differences. However, the specific implications for foreign investors in these respective markets should be assessed considering the circumstances of each investment and based on the potential implications identified, relevant investment strategies should be formed. This is crucial to achieve effective compliance with the relevant investment regimes and fully avail the respective investment protection and incentives they offer. In addition to the characteristics of the respective investment regimes analysed in this paper, any relevant international investment obligations arising out of these host markets and the home market of a prospective investor should be systematically studied to determine the potential implications for specific investments. For example, Chinese investors seeking to invest in Mozambique should evaluate the findings relating to the IL 1993 of Mozambique in the light of the China-Mozambique BIT. Moreover, the comparative assessment of the two national investment regimes should enable China to seek the bridging of the gaps if any through bilateral negotiations with respective host markets or promote relevant agenda under the auspices of Forum Macau. A similar utility could be seen for other home states seeking to promote bilateral investments with these two significant African Lusophone host markets.

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