

Legal security and promotion of foreign direct investment in Togo

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ABSTRACT: The new Togolese investment Code represents together a legal, fiscal and financial tool through which the State undertakes to renounce certain of its prerogatives for a given period in order to offer domestic and foreign investors favorable economic conditions for the establishment and operation of their activities. It offers a common law regime and various preferential investment incentives as well as legal guarantees to balance the development objectives of the State and the interests of economic operators.

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I. INTRODUCTION

Foreign direct investment (FDI) has become an essential means of financing the economy in the context of globalization (UNCTAD, 2016). However, this type of investment is realized "*selectively*" through the choices of location of multinational firms (HATEM, 2004). Indeed, it is easy to see that some countries or regions of the world receive more FDI than others. There is no single, unanimous definition of FDI (UNCTAD, 2011; MATRINGE, 2015). The OECD defines it as a type of transnational investment realized by an investor in order to establish a lasting interest in a business ("the direct investment enterprise") that is resident of another economy than that of the direct investor (OECD, 2008). Thus, before investing in a foreign country, the investor is generally, but not solely, interested in certain attractiveness factors (UNIDO, 2004; HATEM, 2004), such as the political and economic stability of the country, the level of development of its communication and telecommunication infrastructures, the quality of its human resources, the availability of natural resources, etc. Apart from these factors, which are often difficult to combine in one single country, especially in the case of a developing country, investors pay particular attention to the business climate and legal framework of investment. Generally, the regulation of investments in Togo is constituted of the bilateral investment agreements (BITs) concluded by this country and the provisions of domestic law, in particular the Investment Code and its implementing regulations. Since Togo has concluded few BITs, the rules set out in the Investment Code constitute the main "*international offer*" (DIENG, 1995) governing investors activities in Togo. The first investment code was set up by Act No. 65-10 of 21 July 1965, which has been reorganized several times in order to take account of the changing requirements of the country's economic situation both internally and internationally. The Investment Code is together a legal, fiscal and financial act through which the State undertakes to renounce certain of its prerogatives for a given period in order to offer domestic and foreign investors favorable economic conditions for the establishment and operation of their activities. The Togolese investment code of 1965 included a common law system and various preferential schemes. The common law regime was applicable to any investor regardless of the origin or value of its financial contribution and defined the rights, obligations and guarantees that are also granted to economic actors. Preferential schemes, on the other hand, were intended for investors who meet certain specified conditions while agreeing to comply with certain obligations and assume certain responsibilities.

This investment code of 1965 was slightly reworked in 1972 and reorganized in 1973 and 1985. The 1985 revision introduced dualistic legislation, with a "charter of Togolese enterprises" for the small and medium-sized enterprises and on the other hand an investment code applicable to large domestic and foreign companies. This dualist regime then underwent a major revision introduced by Law 89-22 of 31st October 1989. This law presented a completely new vision of the promotion of investments in Togo. Not only has it reunified the investment regime, thus placing foreign and domestic investors under a single regime, but it also has the distinctive feature of encouraging the private sector to play a greater role in the national economy. Indeed, the legal guarantees and the fiscal and customs advantages enacted by the 1989 law applied only to private enterprises (domestic and foreign), excluding national public enterprises. Law No. 89-22 of 31 October 1989 remained in force until 22 December 1996, when its application was suspended by Decree No. 96-162 / PR prohibiting the extension of Conventions, Agreements, Protocols, contracts and contracts involving customs or fiscal exemption clauses (WTO, 2012). This decree was adopted with a view to the establishment of a Community investment code of the West African Economic and Monetary Union (WAEMU), which was

supposed to replace the national codes applicable in the eight countries of the Union. However, as the WAEMU Community Code has not yet come into being, Togo has finally re-adopted a new investment code in 2012 promulgated by Law No. 2012-01 of 20 January 2012.

This new investment code establishes a liberal regime and simplified procedures for the admission of investments. This article highlights the provisions of the Code aimed at establishing a legal framework for investment security (CARREAU D. and JUILLARD P. (2013) (II), and enhancing their economic profitability (III).

II. LEGAL SECURITY OF INVESTMENTS

The new Togolese Code of Investment is an instrument of State policy on the attractiveness of investments. It offers a regulatory framework to ensure, without any surprise, the proper execution by the State and investors of their reciprocal obligations and to exclude, or at least reduce, uncertainty in the implementation of the rules of law relating to investment in the country. The guarantees offered to investors are both substantial (A) and procedural (B).

A. Substantial guarantees

An analysis of the evolution of Togo's investment codes shows that this West African country has always pursued the goal to provide investors with a balanced legal framework by guaranteeing standards of treatment of investments not less than those established by international investment rules (CAZALA, 2015; NOUVEL, 2015). These standards apply to any investment, regardless of the origin of the funds, the size of the investment and the regime under which it is made.

In regards to the treatment of investments, the new Togolese investment code ensures equal and non-discriminatory treatment between foreign investors and their national competitors. Equality of treatment is, according to the Code, equality before the laws and regulations of the country. According to the Article 3 of the Code, "*no enterprise duly established in the Togolese Republic shall be discriminated against in respect of laws and regulations governing its activities*". The Togolese State thus undertakes to ensure that in its conduct, whether by action or abstention, at the normative or merely material level, foreign investors are not disadvantaged in their legal condition, particularly as regards the acquisition of rights of any kind in connection property, concession and administrative authorization or participation in public procurement. For foreign investors, this equality of treatment goes also with the rule of national treatment. According to this rule, "*foreign investors receive the same treatment as Togolese natural or legal persons, subject to reciprocity and without prejudice to measures which may concern all foreign nationals or result from treaties or agreements of which the Togolese Republic is a party*" (Investment Code, Article 3 §2).

Concerning protection of investments, Togolese law recognizes and protects private property in all its aspects, elements and dismemberments, its transmission as well as the contracts to which it is subject. Private companies are thus guaranteed against any measure of nationalization, expropriation or requisition by the State throughout the national territory. Only measures of expropriation justified by public utility are allowed. These exceptional measures must be duly noted under the conditions provided by law and provide for a fair and prior compensation of the investor. The amount of the compensation is determined, "*according to the usual rules and practices of international law*" (Investment Code, Art.7 §2). Generally, international investment agreements specify that the amount of the indemnity must be calculated as from the date immediately preceding the expropriation and referring to "*the fair market value*" (DUPUY and RADI, 2015). The Togolese Code of Investment has the merit not only of referring to the international law of expropriation, but also of providing a clear method for assessing the value of compensation (i.e. expert).

In addition, the transfer of assets is free subject to compliance with exchange regulations. This freedom concerns dividends, proceeds of any kind arising out of the capital invested, proceeds of liquidation or realization of investment, wages and payments. Finally, to enhance the security of foreign investment, the Togolese State has acceded to the Seoul Convention establishing the Multilateral Investment Guarantee Agency (MIGA). The protection afforded by this Convention is recognized ex officio and without further procedures to any investment approved by the Togolese State in accordance with the provisions of the Investment Code. According to Article 5 of the aforementioned code, "*the authorization or the certificate given under the Code or the approval to the status of free zone or any other special economic regime is equivalent to approval of the investment for the granting of any security within the meaning of Article 15 of the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA), ratified by the Togolese Republic on the 22nd of December 1987*".

Investment guarantee mechanisms such as MIGA are particularly important for investors who operate in or with developing countries as these mechanisms enable investors to protect themselves against the risks that may arise from the insolvency of a debtor or the political risks that arise from arbitrary intervention of the host State. The use of an international guarantee system reflects the will of the Togolese government to strengthen

investor confidence in the reliability of government commitments. However, we must acknowledge that all these substantial guarantees of legal security of investments would only have an illusory interest if foreign investors did not have procedural safeguards enabling them to ensure that the public authorities respect their economic rights and interests.

B. The procedural safeguards

Investment protection instruments offer investors a variety of legal means and avenues allowing them to engage the international responsibility of the host State for their investment if it can be proved that the State has engaged in conduct prejudicial to the investor's interests. However, the protection regime in this area depends on the type of instrument on which the investor's claims are based. In sub-Saharan Africa, the normative practice of States in the area of investment arbitration varies. Some national laws or investment codes provide investors with unconditional access to arbitration, while others contain no offer of arbitration. Still others contain a conditional offer of arbitration, which is only operational if the investor has accepted it prior to the occurrence of the dispute, in particular at the time of the application for approval (BEN HAMIDA, 2012). In Togo, the previous investment regime under the 1989 code made access to international investment arbitration, including ICSID arbitration, conditional to a clear and prior expression of the investor's consent to make use of it. This consent should be expressed in the application for approval namely during the steps of admission of the investment. Otherwise, in the absence of this expression by the investor of his consent in the application for approval, ICSID arbitration in particular could not be guaranteed. Under such conditions, foreign investors should, in order to secure their investments in the country, be vigilant, particularly when preparing the application for approval. Article 5 of the 1989 Investment Code states that "*the consent of the parties to ICSID jurisdiction required by the instruments governing it shall be constituted in respect of the Togolese Republic by this Article and, as regards the person concerned, is expressed in the application for authorization*". Accordingly, "*failure to comply with the formal requirements laid down in the instrument expressing the offer [of arbitration] results in its lapsing and, consequently, the inability to accede to the arbitration granted in the Investment Code*" (BEN HAMIDA, 2012). The new investment code of 2012 has made a significant change on this point by granting investors an unconditional offer of arbitration that remains irrevocable and that the investor can accept at any time (BEN HAMIDA, 2003). Thereby the 8th article of the new Investment Code provides: "*any dispute between the enterprise or the investor and the State or States, or between States, concerning the interpretation or the application of this Code, which could not have resulted in a friendly settlement, may be submitted:*

- a) *to national ordinary courts*
- b) *to the Court of Arbitration of Togo (CATO);*
- c) *to the Court of Justice of the West African Economic and Monetary Union (WAEMU)*
- d) *to the Court of Justice of the Economic Community of West African States (ECOWAS)*
- e) *to the Common Court of Justice and Arbitration of the Organization for the Harmonization in Africa of Business Law (OHADA)*
- f) *to the International Center for the Settlement of Investment Disputes (ICSID)*
- g) *to any other arbitral proceedings of their choice or*
- h) *to any other arbitral proceedings of their choice or which would have been expressly provided for either in a contract under an arbitration clause or an arbitration agreement, or under the agreements and treaties relating to the protection of investors concluded between the Togolese Republic and the State of which the concerned natural or legal person is a national."*

It is interesting to give some details of the judicial and arbitral institutions referred to in the abovementioned provision: actually, the WAEMU Court of Justice and the ECOWAS Court are not arbitral institutions. Rather, they are two Community Courts charged with ensuring uniformity in the interpretation of Community law in their respective judicial systems, namely that of the WAEMU and that of ECOWAS. However, these two regional jurisdictions are not devoid of competence in investment arbitration. As for the Common Court of Justice and Arbitration of the OHADA (CCJA), it has a dual function. According to Article 14 (1) of the Treaty of OHADA, "*the Common Court of Justice and Arbitration shall ensure the common interpretation and application of the Treaty and the regulations adopted for its application, uniform acts and decisions*". Thus, the CCJA replaces the supreme national courts with regard to the ultimate interpretation of the law in matters governed by the law of OHADA. It is intended to rule on appeals in cassation against decisions of national courts, including arbitration proceedings. In addition to this jurisdiction, CCJA also hosts an arbitration center set up under Title 4 of the OHADA Treaty. This arbitration center administers arbitration proceedings in respect of any contractual dispute, "*either one of the parties has his domicile or habitual residence in one of the States Parties or the contract is performed or is to be performed in whole or in part in the territory of one or more States Parties*" (OHADA Treaty, art.21 (1)). Like international arbitration bodies such as ICSID, ICC or UNCITRAL, and contrary to the WAEMU and ECOWAS Courts, the CCJA has its own Arbitration Rules.

Under the said Rules, the CCJA is also (the sole) competent to render decisions on the arbitration awards rendered by arbitration tribunals under its auspices (NGWANZA, 2013; BOURDIN, 1999).

Apart from the search of legal security of investments, the Togolese investment code of 2012 is also characterized by the guarantee of a certain number of freedoms aimed at ensuring the neutrality of the administration in the management of private investment. It offers also an incentive policy designed to improve the return on investment and thereby increase the attractiveness of the country for foreign investment.

III. GUARANTEES RELATING TO THE MANAGEMENT AND PROFITABILITY OF INVESTMENT FIRMS

As mentioned above, these guarantees provided by the Investment Code ensure that investors have full control over the economic and management policy of their companies in Togolese territory (A) while giving them tax and customs exemptions in order to facilitate their establishment and to improve the return on investment (B).

A- The freedom of management of investment firms

The investment policies in the world over the last few decades are resolutely geared towards greater liberalization and promotion of investment. Despite this, it is not excluded that investors may have to contend with certain State measures designed to control the flow of investment entering their territories and result in a more or less masked intervention of the State in the management of investment firms. For example, the State may reserve the right to appoint one or more members of the board of directors of foreign companies established in its territory, to impose restrictions on the nationality of directors or to limit the number of foreigners holding positions and functions in the company. Other measures require that the State may hold a percentage in the capital of the investment firm. Such measures, without being arbitrary, nevertheless limit the freedom of the investor to organize his business and conduct his commercial and economic policy as he sees fit. Togo, like several other member states of the WAEMU, has introduced in its investment code an express provision that aims to provide investors with freedom in terms of organization and operation of their businesses. These provisions generally cover the choice of the form and methods of technical, industrial, commercial, legal, social and financial management of the investment firm. In Togo, company law is the one resulting from the Uniform Act of OHADA relating to commercial companies and the economic interest grouping. It offers investors the choice between several legal forms of commercial companies with each its specific legal and tax advantages. The freedom to organize and manage investment firms is enshrined in Article 6 of the Togolese Investment Code, which provides: “*any enterprise regularly established in the Togolese Republic freely determines its production and marketing policy, in compliance with the laws and regulations in force in the Togolese Republic. It carries out all acts of management in accordance with the rules and use of trade*”.

B- Incentives aimed at the increase of investment firms profitability

As regards the return on investment, there is no legal rule requiring States to guarantee the economic profitability of foreign investments made on their territory. Indeed, economic risk is part of the essence of the investment operation. It is therefore obvious that the State cannot be held responsible for poor management decisions taken by an investor (*MTD Equity Sdn. Bhd. and MTD Chile SA v. the Republic of Chile*, award, 25th May 2004, ICSID/ARB/01/7, § 167). However, in order to promote the establishment of new businesses in Togo, but also to allow existing ones to expand, diversify and modernize, and thus create new jobs, the Investment Code offers many financial, tax and customs benefits to improve the profitability of investments in the national territory. These benefits vary according to the location of the company. The Investment Code has thus subdivided Togo's territory into five (5) zones corresponding to the five administrative regions of the country, namely the Maritime Region; the Plateau Region; the Central Region; the Kara Region and the Savannah Region. Thus, depending on the area in which it is located, and in addition to other advantages granted according to its admission scheme, the company can benefit from a 30% reduction of the professional property tax for a period of three to nine consecutive years.

As regards the areas of activity for the privileges of the Investment Code, these advantages and privileges apply to all enterprises engaged in agricultural, industrial, commercial or craft activities. This does not apply to companies operating in the mining and hydrocarbons sector with the exception of hydrocarbon, gas, domestic, industrial or medical storage activities. These companies are governed by the 1996 mining code. Are not also eligible, banks, insurance and reinsurance undertakings, arms production companies and related military activities, as well as undertakings engaged in the following activities of trading, brokerage, storage of products other than plant, animal and fisheries, management of port and airport infrastructures.

Moreover, apart from the size of the investment, which must be greater than 50 million CFA francs, investors wishing to benefit from the tax and financial advantages offered by the Investment Code are obliged to reserve the majority of permanent jobs in priority to national workers. Among the advantages granted to investments, some constitute aid for settlement and exploitation and others are special, somewhat meritorious

advantages. Aid for settlement and exploitation consists of an exemption from indirect taxes, duties and taxes on imports (customs duties, value added tax, deduction for corporate income tax installments and of the personal income tax category of the Industrial and Commercial Profits). These exemptions concern new imported materials and equipment, as well as the first batch of spare parts accompanying them during the period of completion of the investment. Furthermore, companies whose investment program provides for an installation phase as defined in Article 33 (a) of the Code are exempt from the corporate income tax, the fixed minimum tax, the business tax, as well as the property tax during that period.

In addition to the profits associated with the investor's settlement system, other special advantages are granted depending on the area in which the investment is located and the nature of the activity carried out. Lastly, special advantages are granted to companies wishing to build their regional or international administrative headquarters in Togo. These companies are subject only to the payment of a flat-rate customs duty of 5% of the CIF (cost, insurance and freight) value on building and finishing materials and office furniture and equipment.

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