The Africa-Caribbean Investment Treaty Network: The Status Quo and Three Options for Transformation

By:

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Though promising, trade and investment relations between African and Caribbean countries remain under-tapped. Indeed, according to UNCTAD's IIA Navigator, there are only twelve signed bilateral investment treaties (BITs) between Caribbean and African countries, of which only four are in force. Recently, however, there have been budding signals of interest on both sides of the Atlantic in deepening commercial relations. This article examines the current Africa-Caribbean investment treaty network and proposes three possible options for transforming Africa-Caribbean investment relations.

Overview of Africa-Caribbean BITs

The majority of Africa-Caribbean BITs were signed in the late 1990s and the early 2000s. Three Caribbean countries (Barbados, Cuba and Jamaica) account for the Caribbean region's concluded BITs with African countries (both mainland and insular). Those in force are the *Barbados-Mauritius* (signed in 2004 and in force since 2005), *Cuba-Mozambique* (signed in 2001 and in force since 2002), *Cuba-Cape Verde* (signed in 1997 and in force since 2003), and *Cuba-South Africa* (signed in 1995 and in force since 1997).

Those which have been signed but are not yet in force are: *Cuba-Uganda* (signed in 2002), *Cuba-Zambia* (signed in 2000), *Cuba-Ghana* (signed in 1999), *Cuba-Namibia* (signed in 1997), *Jamaica-Nigeria* (signed in 2002), *Jamaica-Zimbabwe* (signed in 1999) and *Egypt-Jamaica* (signed in 1999). A *Cuba-Algeria* BIT is under negotiation, according to the UNCTAD database.

As the texts of many of the Africa-Caribbean BITs are not available, what follows is a brief overview based on those which are in force and whose text is public.

Africa-Caribbean BITs adopt a broad asset-based definition of investment which includes a non-exhaustive, illustrative list of assets which are considered investments for the purposes of the Treaty. National Treatment and Most Favoured Nation treatment are provided for investors and their investments, subject to exceptions, for example, to treatment provided for under customs unions, FTAs and tax agreements. Investments of investors are also protected from unlawful expropriations, and investors are guaranteed the ability to transfer funds.

Typical of BITs of that era, they also include reference to the 'fair and equitable treatment' (FET) standard – a vague provision whose broad and varied interpretation by arbitral tribunals has cost many States dearly. In recent treaty practice internationally, many parties have either drafted the FET provision with more precise language; included interpretations, such as the binding interpretation done by the NAFTA Free Trade Commission in 2001; or have removed this provision altogether from their treaties.

The investment promotion provisions commit parties to encourage investors of

the other party to make investments into their territory and to admit such investments in accordance with their laws and regulations. They also agree to grant assistance in and provide facilities for obtaining visas, and work permits to nationals in connection with such investments.

The Africa-Caribbean BITs provide for Investor-State Dispute Settlement (ISDS) which allows an aggrieved investor to by-pass national courts and bring a claim directly against the host State before an international arbitration tribunal. There are no known ISDS disputes based on Africa-Caribbean BITs, but several African and Caribbean countries have had negative experiences under ISDS via BIT-based and contract-based disputes with investors from other treaty partners. Due to mounting disaffection internationally with ISDS, many recent international investment agreements (IIAs) either no longer include ISDS as an option for the settlement of disputes or severely limit its scope.

Current Africa-Caribbean BITs not 'fit for purpose'

Firstly, many of the Africa-Caribbean BITs have not been ratified. This may be because there has hitherto been little political will or commercial incentive to undertake the domestic ratification processes. This may change as the two regions look to deepen ties.

Secondly, international investment rule-making has changed significantly since the current Africa-Caribbean BITs were negotiated. Negative experiences with averse arbitral awards, as well as more focused international attention on sustainable development (including the SDGs), have spurred ISDS and other investment rule-making reform discussions in several international agencies, and at national and regional levels. Investment rule-making is increasingly concerned with promoting sustainable investment and rebalancing investors' protections with States' rights to regulate, *inter alia*, for environmental and public health reasons.

In both Africa and the Caribbean, reform work to harmonise and improve investment rule-making is on-going. With respect to Africa, the non-binding Pan-African Investment Code (PAIC) features many development-friendly provisions, including imposing rights and obligations on both investors and

States. Some African sub-regional groups also have investment arrangements. Additionally, an Investment Protocol is an expected outcome of Phase II of the Africa Continental Free Trade Agreement (AfCFTA). In the Caribbean, the CARICOM Secretariat is working on a Draft CARICOM Investment Code to encourage sustainable investment both within and into the CARICOM space as part of the efforts to consolidate the CARICOM Single Market and Economy (CSME).

The current Africa-Caribbean BITs predate these reform discussions and best practices, leaving those parties with significant legal exposure to investor suits and less policy space for regulation. Any future bilateral or bi-regional agreements negotiated between African and Caribbean countries should be informed by these newer international best practices for sustainable and development-friendly investment.

Options for improving Africa-Caribbean investment relations

As I see it, at least three possible options exist for transforming Africa-Caribbean investment relations:

1. *Revising and expanding the current network on a bilateral basis* – This would involve African and Caribbean countries continuing to negotiate BITs with each other bilaterally and possibly revising existing agreements to incorporate current best practices. This may be the most politically expedient approach, but it would also contribute to the fragmentation in investment treaty practice.
2. *An Africa-Caribbean Trade and Investment Framework Agreement* (TIFA) – this would be an important preliminary step. Such an agreement would provide for the establishment of a Joint Africa-Caribbean Trade and Investment Council and parties would agree to take steps to facilitate and promote trade and investment between them and to discuss any barriers to trade and investment. However, these agreements are generally best endeavor and stop short of making binding commitments.
3. *Negotiate an Africa-Caribbean FTA with a comprehensive investment chapter* – this would be ideal because it would provide for binding investment liberalization, protection and promotion between the two regions. But negotiations are unlikely to happen at this stage as both

regions are currently trying to consolidate their own regional processes through the AfCFTA in Africa and the CSME in CARICOM.

Option 2 – an Africa-Caribbean TIFA - may be the most feasible approach for now and could be used as a stepping stone for the negotiation of an Africa-Caribbean FTA in the future.

Regardless of whichever option is chosen, efforts to deepen Africa-Caribbean investment links are unlikely to bear fruit if there is not sustained interest and relationship-building between Africa and Caribbean investment promotion agencies, chambers of commerce and business to business and people to people contact. After all, it is not States but firms and people which trade. The negotiation of visa waiver agreements, mutual recognition agreements and air services agreements would facilitate business and recreational travel between the two regions. Additionally, a Joint Africa-Caribbean Business Council could be provided for under an Africa-Caribbean TIFA.

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