Hegemony in Investor State Dispute Settlement: How African States Need to Approach Reforms

By:

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Introduction

It is not in dispute that Investor State Dispute Settlement (ISDS) sits at the lowest levels of confidence today than it has ever done since its inception. There has never been a time in history like today, when ISDS has come under so much criticism from almost all states in the world, targeting different angles; from the excessive powers of investors to institute the claims independently, to the constitution of arbitral tribunals and the lack of consistency and predictability of decisions, but also the huge sums of money awarded to investors as damages in these disputes. While there seems to be agreement that ISDS needs reform, the approach that should be adopted is what seems to be the question at hand. Are they to be incremental? Systemic or radical changes to get rid of the system?

This blogpost advances a theory of how African states must consider ISDS reform from a neutral viewpoint, and should avoid the misguided radical paradigm shifts that have become popular talk on the Continent, where everyone seems to be fighting for hegemony of the system rather than discussing a working formula.

Foreign Direct Investment (FDI) is a union of convenience

First, African states must acknowledge and accept that FDI is a union of convenience; each party is in it for their own self-interests and benefits. This includes how to safeguard their own interests should a dispute arise. States have to view FDI as a double edged sword. First as country that is receiving the capital and secondly as a country that will export capital through its investors. Unfortunately, more often than not, African states see themselves as the former and not the latter. Taking a look at the statics, since the first ICSID case which was against Morocco, almost five decades later, very few African investors have used the ICSID system as a method of dispute resolution and the same for other ISDS mechanisms. Is it because they do not believe in ISDS? I have never heard of clear answer on this issue.

Secondly, the difference in the output and the input to FDI is clearly tilted towards the latter. However, African states must start taking lessons from powers like the United States of America who have learnt hard lessons from the previous NAFTA agreement when they came in with an exporter's mentality. Africa is headed for greater heights and in a few years capital exportation could grow immensely among African states, and also to the outside world. Thus, Africa must think of their investors in any ISDS arrangement, and the mentality behind whatever dispute resolution system Africa states adopt, must be that of a balance of rights between investors and states, otherwise constant calls for reform will be inevitable every time the system fails to favour state positions.

The narrative and hypocrisy versus facts and perception

I first want to acknowledge the immense contribution by African states in the UNCITRAL working groups on ISDS reform. My attention has been drawn to two of them who seem to have a strong stand on this and are likely to have a lot of influence in drawing other African countries to their reasoning. The first is Mauritius, which is an important player in dispute settlement in Africa. The

second is South Africa, which is the most powerful economy in Africa. South Africa specifically seems to come from a backdrop of BRICS, together with Brazil.

Before African states get attracted to this idea of a total paradigm shift, they must understand that South Africa began a process of terminating its investment treaties and replaced such arrangements by passing the Protection of Investment Act 22 of 2015, which gives primacy to domestic remedies, including mediation and domestic courts. The Act allows South Africa to consent to international arbitration over an investment dispute, but this would be subject to exhaustion of domestic remedies and would also take place on a state-to-state basis. It is also well known that South Africa did not bat an eye-lid when it signed the protocol to suspend the SADC tribunal that was later declared unlawful by a court in Pretoria. This goes a long way to show the history of South Africa and the little trust she has in the ISDS system, thus she has always used every opportunity to undermine ISDS. Do the other countries believe in the same protectionism or this is something popular to their electorate?

Are African States misguided?

The question then is why several African states are against the current ISDS system? The answer is simple; it is one of perception. No one captures it more clearly than Anthea Roberts in her writing on the plausible ***folk theory*** as espoused by Terence Halliday, a professor of the sociology of global governance and a long-time observer of UNCITRAL. This theory refers to the way in which ‘vast enterprises of global regulation and law-making [often] proceed on weakly founded justificatory rhetorics’. What this means is that many rules and regulations are passed at the global level based on assertions that are not subject to empirical testing. Instead, negotiators and policy makers frequently rely on assertions that sound reasonable but remain unverified.

Looking at the views advanced by both Mauritius and South Africa at the UNCITRAL working group when challenged by Chile that it was very important for the working group to carry out work based on facts and not perceptions, true fears seem to come out. Their fears are cost and duration, but what is the comparator that they are actually using? Are they comparing it to international

adjudication processes in general or to a specific country domestic proceeding? Both South Africa and Mauritius suggest that perception is very important. In fact Mauritius went ahead to say that what ends up in the front of newspapers in their countries matters a lot to them, and the facts in any reform could not be the only factor. It is my personal view that this has nothing to do with a failed ISDS system, but trying to cure domestic political problems by blaming an international system.

Just as Anthea Roberts I wish to ask, in the absence of factual support, what makes these folk theories by some African states plausible? I am not saying they are necessarily wrong about the facts, it just isn't verified. It may be contrary to empirical evidence, it may not. Let me pose a few questions, purely for *arguendo* purposes, is there empirical evidence that a state to state dispute settlement system as advanced by South Africa would cure the cost concerns? Is it true that letting investors have powers to sue states directly gives them hegemony of the system, when we have a similar process with the international human rights courts which allow individuals to sue directly? Why is it that many states (particularly in Africa) do not litigate against each other in investment related-disputes and would this change if we moved to state to state investment dispute mechanisms?

As it stands all these concerns are just plausible folk theories and the revolutionary ideas by Brazil and South Africathat suggest "the best solution is simply throw it out of the window and use something different such as state to state dispute settlement" are also based on plausible folk theories. This cannot be the basis of trying to create a hegemony of ISDS in the developing world, and Africa in particular.

Proposals on the way forward

I begin by asking the question by Anthea Roberts, what makes something fly? In this case, what would be the best flight path for African states in the ISDS reforms? Be as it may, I admit we need to strengthen exhaustion of local remedies in the investment treaties, whether by negotiation or by local courts or ombudsman offices. My views is that first we must propose incremental reforms such as code of conduct for arbitrators, an early dismissal procedure and mechanisms for joint interpretations through renegotiation of the treaties

to include these provisions where they do not. States could also consider to adopt an opt-in multilateral treaty that applies retrospectively to existing treaties, as UNCITRAL did for the Mauritius Convention on Transparency.

Eventually I believe we will have to make systemic reforms. The establishment of the investment court as canvased in the first and supplemental CIDS reports would in my views solve most of the perception worries by the African states. Having an appellate mechanism of whichever form is one that would also go a long way to save the day. As Anthea Roberts opines, (and in my view correctly so), examining a suite of incremental and systemic reforms makes sense not only because it suits the current political climate, but also because these options run on different time lines and may be pursued in different ways (e.g. bilaterally or multilaterally) and in different fora (e.g. ICSID, the OECD or UNCTAD).

Conclusion

If Africa is genuinely interested in the reforms of ISDS then the words of the Kenyan delegation at the UNCITRAL working group must be our yards stick; the desired outcome will only be achieved when we begin to consider the substantive issues in an open, frank, free, and transparent manner, noting the need to fast track the conclusion of a holistic reform process of the ISDS. Perceptions and plausible folk theories aimed at nothing but creating hegemony in ISDS must be shunned. My crystal ball tells me that ISDS is here to stay, thus we must make no mistakes, but shape ISDS to suit our future interests.

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