AfCFTA Investment Protocol Negotiations and the Case of Namibia: A Call for Regional Regulatory Harmonization vis-à-vis Investment Policy in Africa

By:

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Introduction

There is a growing tendency among States to defy, terminate and/or replace their international investment agreements with domestic laws as a reclamation of national sovereignty *vis-à-vis* international institutions. Thus, international investment law and its reform needs to be informed by research into domestic systems of governance in order to conceptualize better how regional and international law principles are implemented alongside and through the use of domestic legal instruments, but also in order to reform policies within the international investment law or national law **context**[1]. Against this backdrop,

this paper seeks to probe whether the investment law arrangements in Namibia are effectively a demonstrative illumination of an unsustainable investment regime aimed at reclaiming sovereignty and isolationist guises in the face of a need for African regional investment law and policy harmonization.

A Namibian Contextual Overview

Namibia is located on the south-western coast of the African continent. After over four decades of its valiant struggle against apartheid South African rule, it gained independence in 1990. Since then, Namibia has welcomed foreign investment and provided a strong foundation of stable, democratic governance and good infrastructure to build businesses. The Namibian Government prioritizes attracting more domestic and foreign investment to stimulate economic growth, combat unemployment, and diversify the economy. The investment climate in Namibia is thus considerably **positive**[2].

Despite global economic disruptions caused by the COVID-19 pandemic, Namibia has maintained political stability and continues to offer key advantages for inward Foreign Direct Investment (FDI), including a favourable macroeconomic environment, an independent judicial system, protection of property and contractual rights, good quality of physical and ICT infrastructure, and easy access to South Africa. Namibia has also upgraded its transportation infrastructure to facilitate investment and completed the expansion of the Walvis Bay Port in 2019-21. Challenges to FDI in Namibia include its relatively small domestic market, high transport costs, relatively high energy prices, and a limited skilled labour pool. A recent corruption scandal in the fishing sector that resulted in the arrests of ministers and business leaders and cost Namibia billions has also strained public trust and negatively impacted the national environment for **FDI**[3]. As a post-apartheid country with one of the highest rates of inequality globally, Namibia continues to look for ways to address historic economic imbalances.

Domestic Regulatory Climate

The Foreign Investments Act (FIA)[4] currently governs FDI in Namibia. It guarantees equal treatment for foreign investors and Namibian firms, including the possibility of fair compensation in the event of expropriation, international arbitration of disputes between investors and the government, the right to

remit profits, and access to foreign exchange. Investment and tax incentives are also available for the manufacturing sector.

In August 2016, Namibia promulgated and gazetted the Namibia Investment Promotion Act (NIPA)[5]. However, this Act has not been enforced due to substantive legal concerns raised by the private sector. Therefore, the FIA remains the guiding legislation on investment in Namibia. The foremost criticisms advanced against the NIPA are two-fold. Firstly, the discretionary power given to the Minister to reserve categories exclusively for certain categories of investors in terms of section 8 is unsolicited. Although this could give the Minister the ability to ensure local Namibian participation in the market and therefore enhance the growth of the Namibian economy, the possibility of abuse or manipulation is evident, as the powers could be used to completely reserve certain business sectors for the State or exclude foreign investors from investing in specific business activities or economic sectors. The Minister's ability to introduce incentives and conditions could furthermore open the doors for potential corruption.

Secondly, the introduction of an approval and registration regime as set out in section 11 of NIPA is undesirable. This is because the administrative burden placed on the Minister to approve the registration of new investments personally could result in delayed approvals. This may dissuade foreign investors from embarking on what could well be a burdensome process and encourage them instead to place their investments in another country. The Minister's wide discretionary powers in approving and registering investments also create an investment regime that could depend on the incumbent Minister's personal style, preferences, intentions and whims.

Namibia, AfCFTA and Unrealistic Regional Regulatory Pursuits

The inadequacies of the Namibian investment law model are telling of the progressive need for regulatory harmonization within the African regional investment context. Not only that, but the Namibian saga also grossly detracts from a key general objective of the AfCFTA – i.e. to contribute towards the movement of capital and natural persons and facilitate investments. For purposes of fulfilment and realization, this objective is condensed into a specific objective in Article 4 aimed at enabling State Parties to cooperate on

investment, intellectual property rights, and competition policy. Nevertheless, with wide discretionary powers pertaining to law-making and policy implementation in the national context, it is difficult to fathom how the objectives of Article 4 stand to be realized in the absence of consolidated investment policy constructs within Namibia and the wider African region[6].

Towards realizing the objectives of Article 4, at the 13th Extra Ordinary Session of the AU Assembly held virtually in Johannesburg on 5 December 2020, negotiations to adopt the Phase II Protocols covering investment, intellectual property rights and competition policy were launched. Phase III negotiations are expected to be completed by 31 December 2021.

Despite these developments, it is still not clear how regulatory harmonization, regional value chains and sustainable development will be promoted under these Protocols. Questions of whether they will be synchronized with the Protocols of Phase I and the Regional Economic Communities (RECs) activities need to be answered.

As far as one can see, the aim behind the AfCFTA Phase II Protocols appears to be limited to cooperation. It entails that State Parties will retain control over essential aspects of policymaking and implementation. This is in accordance with the Preamble to the AfCFTA Protocol on Trade in services which recognizes "*the right of State Parties to regulate in pursuit of national policy objectives, and to introduce new regulations….in order to meet legitimate national policy objectives, including competitiveness, consumer protection and overall sustainable development….".* However, it is not a realistic approach for advancing continental integration. If domestic control is paramount, the Phase II negotiations will have rather limited outcomes.

A looming reality is that the pursuit of only cooperation on investment policies and laws may result in a fragmented outcome where sovereign State Parties will determine how an AfCFTA Investment Protocol will be implemented. As evidenced in the above, they will want to retain national policy space and powers over investments and related matters[7].

Conclusion

From the foregoing, it is eminent that there exists a dire need for harmonized and complementary investment law enactments within the African region. However, as is testament through a case analysis of the local legal culture in Namibia, it is regrettably clear that State Parties are endowed with wide discretionary powers pertaining to law making and policy implementation in the national context. Moreover, the specific objective of the AfCFTA, as adumbrated in Article 4, is solely aimed at enabling State Parties to cooperate on investment, intellectual property rights and competition policy. This objective does in no way exhibit a quest to realize investment law harmonization in the African Region. In fact, the Preamble to the AfCFTA Protocol on Trade in services which recognizes the right of State Parties to regulate in pursuit of national policy objectives, and to introduce new regulations, to inter alia, meet legitimate national policy objectives thumbs any such quest as it advocates for the concentration of investment law-making powers in the hands of individual State Parties.

Recommendation

It is submitted that a more realistic approach to dealing with these critical issues within the African investment law milieu is to adopt a balancing exercise aimed at consolidating investment law and policy in Africa. This is to be done by lessening the over-concentration of discretionary law-making powers in the hands of individual State Parties without subjugating and/or abdicating the sovereign rights and discretion powers inherent in State Parties to enact their own laws in accordance with their own beneficial interests in the domestic context.

References

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