Revolutionizing Investment Dispute Resolution in Africa: Towards a Balanced Multilateral Approach

By:

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In March 2018, African nations embarked on a historic journey to reshape their trade landscape through the African Continental Free Trade Area (AfCFTA). Originally scheduled for implementation in mid-2020, a pandemic-induced delay pushed the launch to January 2021. Aggregating over 1.2 billion people, the AfCFTA promises to create a massive market with a combined GDP of over $3 trillion. With 54 signatories and 47 countries ratifying the agreement, the AfCFTA aims to foster a pan-African free trade zone, enhance regional development prospects, and promote intra-African trade. Key mechanisms are progressively dismantling trade barriers and promoting investment.

In order to stimulate economic growth and lay the foundation for the African Economic Community, the AfCFTA encompasses protocols on trade in goods,

trade in services, investment, and dispute settlement. The Protocol on Investment (POI) was adopted by the heads of States in February 2023. This development sets the stage for a new era of collaboration and development, but a number of implementation steps must be taken, for instance there is no ISDS system set out, only a state-to-state dispute. The ISDS system is part of the current negotiations of the annex to the POI.

This blog post delves into the current state of investment dispute settlement (ISDS) mechanisms across Africa, the potential of the AfCFTA and its investment protocol to catalyse change, and the need for a balanced multilateral approach. Through collaboration, innovation, and a commitment to equity, Africa can create a new paradigm for investment dispute resolution that truly reflects the continent's values and aspirations.

The Current (and Past) Investment Dispute Landscape Across Africa

The AfCFTA Agreement acknowledges the importance of investment by incorporating a POI. The protocol's dispute resolution mechanism closely mirrors the WTO dispute resolution model, focusing on state-to-state disputes and emphasizing consultation as a primary means of resolution. This alignment with best practices within regional economic communities (RECs) like the West Africa Economic and Monetary Union and the East African Community suggests a pragmatic approach that builds upon existing advancements. In particular, the POI appears to have learned lessons from the failure of the Southern African Development Community (SADC) Tribunal. Established in 2002, the SADC Tribunal aimed to emulate the European Court of Justice, thus requiring the exhaustion of local remedies when adjudicating upon treaties —a well-known principle in international law. However, the tribunal's structure faltered with its first decision conflicting with a single nation's interests, as seen in the case of Campbell v Zimbabwe.

This landmark case saw white farmers, including Mr. Campbell, dispossessed of their land due to legislative changes in Zimbabwe. The tribunal ruled in favour of the farmers, but Zimbabwe chose to disregard the decision, effectively undermining the tribunal's authority. The tribunal's failure can be attributed to several factors, including a flawed legislative framework, unanimous voting requirements, and a lack of diplomatic engagement among SADC nations.

The subsequent shift away from Bilateral Investment Treaties (BITs) underscores the need for a refined approach to resolving investment disputes in Southern Africa. While BITs had enabled investor-state dispute resolution through arbitration, the failure of the SADC Tribunal highlighted the limitations of this mechanism. As the region looks to redefine its investment dispute resolution approach, the lessons learned from the SADC experience are invaluable.

A hierarchical approach to dispute resolution is crucial. Before engaging in international arbitration, parties must exhaust local remedies and alternative dispute resolution options. This sequence enhances investor-state cooperation, promotes amicable solutions, and fosters a balanced relationship between investors and host states.

Dispute resolution and courts in Southern African RECs

The AfCFTA is set up to use the RECs structures already in place as building blocks so that that the illegal framework and the institutions work with the legal infrastructure already in place and not against it. The POI set outs state to state dispute resolution and the negotiations will look to provide a way forward with ISDS although the format is not yet discernible.

It therefore apt to check the RECs and the courts set up. Two successful dispute resolution systems are the courts of Common Market of Southern Africa (COMESA) as well as the court of East Africa Community. However, only in one instance has a trade case come before the EAC court, British American Tobacco (U) LTD v The Attorney General of Uganda, and neither have adjudicated on an investment case. It is indeed surprising that these courts have been underutilised for trade and investment cases.

The third court was the SADC Tribunal that was established to ensure the adherence and interpretation of the SADC Treaty the Tribunal was effectively disbanded by the SADC Summit in 2012, after it ruled against the government of Zimbabwe in the above-referenced case involving the eviction of white farmers. The Summit decided to limit the jurisdiction of the Tribunal to disputes between member states, and to disband the existing judges and appoint new ones.

The above courts show a reluctance to utilise the court by companies at the COMESA and EAC courts and the dysfunction at the SADC tribunal. A dispute system must be present to ensure that African investors are treated the same as those outside of the continent. The form of such a system will be negotiated by the partis to the AfCFTA, it is important to set out how this delicate balancing act can be achieved by the negotiators.

The Potential of the AfCFTA

The African Continental Free Trade Area represents a transformative step towards economic integration and growth in Africa. However, the success of this ambitious endeavour arguably hinges on an equitable and effective investment dispute resolution system.

By reimagining ISDS mechanisms through a balanced multilateral approach—one that prioritizes policy space, community involvement, transparency, and alternative dispute resolution methods—African nations can pave the way for responsible investment, sustainable development, and harmonious regional cooperation.

As negotiations move forward on the annex to POI and implementation of the POI continues within the AfCFTA and international forums, the pursuit of a fair and efficient investment dispute resolution framework remains a pivotal goal for the continent's progress. The lessons learned from the collapse of the SADC Tribunal and the ongoing discussions at UNCITRAL's Working Group III provide valuable insights into building a system that serves the interests of investors, host states, and local communities alike.

Finally, keeping in mind the building blocks approach, it would be efficient and logical to use the current legal infrastructure and to create a southern African multilateral court to replace the SADC tribunal.

A Call for Balancing Rights and Duties

To address the shortcomings of traditional ISDS mechanisms, a reimagined approach is required—one that balances the rights of investors with the duties of host states. This fits in with the POI as it clearly tried to rebalance the right and duties of both the state and the investor as well protect policy space to

protect communities, employees and the environment. This approach encompasses five crucial elements:

1. Policy Space and Subject Matter: Establish clear, specific provisions for carving out policy space for host states, including environmental protection, labour regulations, and nascent industry support. By delineating the boundaries of policy space, the agreement can better accommodate the diverse needs of African nations.
2. Community Standing: Grant standing to communities directly affected by investors' actions, enabling them to participate in dispute resolution processes. This ensures a comprehensive perspective and promotes responsible investment practices that benefit local populations.
3. Transparency and Consultation: Mandate transparent processes for legislative changes, requiring host states to consult with stakeholders, including investors and affected communities, before implementing reforms. This approach fosters trust, minimizes disputes, and promotes sustainable development.
4. Exhaustion of Local Remedies: Prioritize local remedies, necessitating investors to engage in consultations, mediation, or litigation within the host state before accessing international arbitration. This sequence promotes dialogue, compromise, and amicable resolution.
5. Commercial Mediation: Embrace commercial mediation as an alternative dispute resolution method, drawing inspiration from the recently implemented Singapore Convention on Mediation. This approach encourages amicable settlements and preserves commercial relationships, while ensuring sustainable and long term investment.

Conclusion

A Multilateral Investment Court in Southern Africa could slot in with the other courts already in place. The rules that the annex to the POI will set down could address the concerns about the ISDS system, such as its lack of impartiality, consistency, transparency, coherence, and respect for the public interest and human rights. Indeed, a Multilateral Investment Court could be beneficial for Southern Africa; it could make the dispute settlement system more compatible with the sustainable development objectives and human rights obligations of the region.

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