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The African Continental Free Trade Area and Investor-State Arbitration: What Can Investors Expect and Why?

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The Agreement Establishing the African Continental Free Trade Area (AfCFTA Agreement) went into effect on May 30, 2019. The AfCFTA is the next step in a process set in motion in 1994 when the Treaty Establishing the African Economic Community (Abuja Treaty) entered into force. The Abuja Treaty put in place the framework for the establishment of an African Economic Community (AEC) and provided that the AEC was to be established gradually in six stages of variable duration. The plan includes the establishment of an African Continental Free Trade Area by 2018, a Continental Customs Union by 2019, an African Common Market by 2023, and the African Economic Community by 2028.

Should foreign investors expect an investor-State dispute settlement (ISDS) mechanism under the AfCFTA Agreement? The answer is 'yes', 'no' or 'maybe'. There are at least three reasons why investors can expect an ISDS system within the AfCFTA framework. Equally, there are at least three reasons why an ISDS mechanism may not be in the cards. One thing is sure; any ISDS mechanism developed under the AfCFTA framework is likely to be shaped by the legitimacy crisis in investment treaty arbitration and ongoing global debates about reform.

Three Reasons Why an ISDS Mechanism Could be Expected

There are at least three reasons why investors can expect an ISDS mechanism within the context of the AfCFTA: (i) the need for predictability; (ii) the fact that by and large many countries in Africa appear to favor ISDS; (iii) the poor regulatory frameworks of many AfCFTA Member States.

The Need for Predictability

Predictability is one of the bedrock principles of the AfCFTA. In the preamble to the AfCFTA Agreement, Member States affirm

> "*the need to establish clear, transparent, predictable and mutually-advantageous rules" to govern trade in goods and services and investment among State Parties.*

Among the specific objectives of the AfCFTA is to "*establish a mechanism for the settlement of disputes concerning their rights and obligations*".

Africa's Embrace of Investor-State Arbitration

Countries in Africa have long had a love-hate relationship with international investment arbitration. Suggesting an embrace of ISDS:

- Almost one third of the 153 countries that have ratified the ICSID Convention are in Africa.
- More than half of the countries in Africa have ratified the 1958 New York Convention;
- Collectively, African countries have signed hundreds of BITs that provide for ISDS; and
- African investors are beginning to utilize the ISDS system and are using it to assert rights against African States (*e.g. Oded Besserglik v. Republic of Mozambique*) and non-African States (*e.g. Global Telecom Holding SAE v. Canada*).

Weak Legal and Regulatory Environment

Weak regulatory and judicial systems may compel countries in Africa to opt for an ISDS mechanism. More than half of the countries in Africa are found in the bottom quartile of the World Bank Group's Doing Business 2019 rankings. Although some countries in the region have done remarkably well – Mauritius (#20) and Rwanda (#29) are in the top 50 and eight countries in Africa are in the top 100 – most countries in the region performed badly. Given weak regulatory environment, countries may see a need to use ISDS to reassure investors that they are open for business.

Three Reasons why an ISDS Mechanism Could be Rejected

Although there are many good reasons why investors can expect an ISDS mechanism within the AfCFTA's framework, there are three equally good reasons why an ISDS mechanism may not materialize.

Growing Number of ISDS Cases Against African States

A growing number of countries in Africa are just now facing their first (known) ISDS claim. Benin faced its first ISDS case in 2017, Mauritius in 2016, and Sudan in 2014. South Sudan gained its independence in 2011, and faced its first ISDS claim in 2012. ISDS claims have real financial implications for countries in Africa in terms of monetary awards, legal costs, and accrued interests. The approximately US $2 billion award of August 31, 2018, in the case of *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt* is one of the largest known investment treaty awards to have been issued by an ICSID tribunal.[1)]

Limited Participation of Africans and African Institutions in Investment Arbitration

The limited involvement of African arbitrators and African institutions in the ISDS ecosystem is a matter of great concern to many in Africa. According to The ICSID Caseload – Statistics (Issue 2019 – 2), although Sub-Saharan Africa contributes 15 percent of all ICSID cases by State Party involved, the region only accounts for 2 percent of arbitrators, conciliators and ad hoc Committee members appointed in ICSID cases. By contrast, Western Europe contributes 8 percent of all ICSID cases by State Party involved but account for a staggering 48 percent of arbitrators, conciliators and ad hoc committee members appointed in ICISID cases. North America (Canada, Mexico and U.S.) contributes 4 percent of all ICSID cases by State Party involved but account for 20 percent of arbitrators, conciliators and ad hoc committee members appointed in ICISID cases. The situation in other arbitral centers based outside Africa is not any better. Given the massive efforts that have gone into strengthening domestic and regional frameworks for arbitration in Africa and the emergence of reputable arbitral centers such as the Cairo Regional Centre for International Commercial Arbitration, the Mauritius International Arbitration Centre and the Kigali International Arbitration Center, many in Africa believe that the continued exclusion of a whole region from the global ISDS mechanisms is no longer warranted.

Growing Skepticism about the ISDS System

Deep scepticism about the ISDS mechanism is appearing in Africa. The idea of replacing the ISDS mechanism with something else is not completely off the table as far as some countries are concerned. With the entry into force, in 2018, of the Protection of Investment Act, 2015 (Act No. 22 of 2015), South Africa has now foreclosed future participation in international investment arbitration except in very limited circumstances. In August 2018, Tanzania tendered notice of its intention to terminate the Tanzania-Netherlands BIT and the termination became effective in April 2019. An ISDS provision is absent from some recent BITs involving African States such as the Brazil–Ethiopia BIT (2018) and the Brazil–Malawi BIT (2015). A ‘Special Note’ to Article 23 of the 2016 East African Community (EAC) Model Investment Treaty shows a preference for a ‘no ISDS’ framework. The Special Note reads:

> “[T]the preferred option is not to include investor-State dispute settlement. Several States are opting out or looking at opting out of investor-State mechanisms, including Australia, South Africa and others….”

Three Reasons to Expect a Reformed ISDS Mechanism under the AfCFTA

Should AfCFTA Member States opt for an ISDS mechanism, a reformed mechanism should be expected for three reasons: (i) the need to limit their exposure to ISDS; (iii) the need to safeguard domestic regulatory space; (iii) reform features are already beginning to appear in recent BITs involving African States as well as in some regional and continental policy instruments.

Need to Limit Exposure to ISDS

The idea of limiting access to ISDS by introducing an exhaustion of domestic remedies requirement is an option that AfCFTA Member States are likely to consider. The Draft Pan-African Investment Code of 2015 (Draft PAIC), a continental document that seeks to promote and protect investments that foster sustainable development, makes exhaustion of local remedies a precondition for accessing ISDS mechanism (Article 42(2)). Local litigation requirements are also found in the EAC Model Investment Treaty; Pursuant to Article 23.4., an investor may submit a claim to arbitration provided that the investor "*has first submitted a claim before the domestic courts of the Host State for the purpose of pursuing local remedies*".

Need to Safeguard the Right to Regulate and Promote Sustainable Development

Regarding the right to regulate and sustainable development, in the preamble to the AfCFTA Agreement, Member States explicitly recognized the importance of democracy, human rights, gender equality and the rule of law, for the development of international trade and economic cooperation and

> "*REAFFIRM[ED] the right of State Parties to regulate within their territories and the State Parties' flexibility to achieve legitimate policy objectives….*"

One of the objectives of the AfCFTA is to "*promote and attain sustainable and inclusive socio-economic development…*".

Need to Embrace International Best Practices

Reform features are already appearing in regional and continental policy instruments and in recent BITs involving countries in Africa. The South African Development Community Bilateral Investment Treaty Template contains many reform elements and addresses a host of novel issues. A strong preference for African arbitral institutions is found in the Draft Pan-African Investment Code which only provides for ISDS in

> '*any established African public or African private alternative dispute resolution center or the Permanent Court of Arbitration centers in Africa (or the African Union Court of Arbitration) or African regional court where applicable*' (Article 42(4)).

The Morocco-Nigeria BIT (2016) addresses relatively novel issues such as '*Impact Assessment*' (Article 14), '*Anti-Corruption*' (Article 17), '*Investor Liability*' (Article 20) and '*Right of State to Regulate*' (Article 23).

Conclusion

The task of negotiating AfCFTA's Investment Protocol and synchronizing action at four levels of policymaking – national, bilateral, regional and multilateral – is not likely to be easy. It is important that negotiators address the growing problem of multiple, inconsistent and overlapping investment protection standards in Africa. In negotiating the Investment Protocol, AfCFTA Member States must address the concerns of a growing number of UN human rights bodies regarding the operation of the ISDS system. In a March 2019 letter to the UNCITRAL Working Group III on Investor-State Dispute Settlement, seven independent United Nations human rights experts expressed concern that international investment agreements and their ISDS mechanism '*have often proved to be incompatible with international human rights law and the rule of law*'.

To the human rights experts, only '*a systemic structural change*' can address some of the perceived problems in the system including, the inherently asymmetric nature of the ISDS system, lack of investors' human rights obligations, exorbitant costs associated with the ISDS proceedings, and extremely high amount of arbitral awards that lead to undue restrictions of States' fiscal space and undermine their ability to regulate economic activities. To the human rights experts, current reform proposals were

> '*limited in scope and nature*' and '*[c]an only offer superficial solutions to symptoms of the fundamental flaws in the ISDS system*'.

References

?1 *See* also, *ConocoPhillips v. Venezuela*, ICSID Case No ARB/07/30, *Tethyan Copper v. Pakistan*, ICSID Case No ARB/12/1, and *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*.

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