Investor-State Arbitration Meets Mediation: Is Mediation the Future of Investor-State Dispute Settlement in Africa?

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John Sabet (Sciences Po)

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Many see the Pan-African Investment Code (PAIC), a model instrument adopted by the African Union (AU) in 2015, as the first step toward the 'africanization' of international investment law. While several national and regional instruments on foreign investments had been adopted by African States and Regional Economic Communities (RECs) prior to the PAIC, the latter's unprecedented provisions and continental scope signaled a new level of integration with regard to the regulation of foreign investments in Africa.[fn]Makane Mbengue, Special issue: Africa and the reform of the international investment regime – an introduction, Journal of World Investment and Trade, 2017, 18(3), 371-378.[/fn] Among other innovative provisions – such as the inclusion of direct obligations on investors or the dismissal of equivocal protection standards such as Fair and Equitable Treatment –, the PAIC introduced alternative dispute resolution (ADR), including but not limited to mediation, as a mandatory step in solving investment disputes. Article 42 on Investor-State Dispute Settlement (ISDS) notably provides that 'pursuant to this Code, the investor and the Member State should initially seek to resolve the dispute within six months at the latest, through consultations and negotiations,

which may include the use of non-binding third-party mediation or other mechanisms'.[fn]Pan-African Investment Code, Article 42, Paragraph b.[/fn]

Building on the PAIC, the African Continental Free Trade Area (AfCFTA) Protocol on Investment is soon to be published. For the reasons discussed below, the Protocol may very well further promote the use of mediation alongside or instead of arbitration in the resolution of investor-State disputes in Africa.

A certain discontent with investment arbitration

It is no secret that some African States are relatively displeased with the traditional rules of international investment arbitration (not unlike other States found both in the Global North and Global South). However, at the continental level, a common viewpoint on investor-State arbitration is harder to discern. In this context, instrument such as the PAIC and the AfCFTA Protocol on Investment will potentially be key for extracting a common, African understanding of ISDS.

Continent-wide criticism of traditional investor-State arbitration rules and processes can be found, for one, in the AU's appreciation of the ICSID Proposal for Rules Amendment. In its comments, the AU notably raised the issue of representation. While a significant portion of ICSID cases involve an African State Party, the proportion of African arbitrators, conciliators and ad hoc committee members appointed in ICSID cases represented a mere 3 per cent of the overall number of appointments in 2018.

Beyond statistics, the issue of representation may underlie a more substantive issue: that of cross-cultural understanding. The latter has been discussed by African academics and practitioners as well as African institutions, such as the African Arbitration Association.

Furthermore, scholars have flagged issues such as sovereignty,[fn]Tom Mortimer & Chrispas Nyombi, Rebalancing International Investment Agreements in Favour of Host States, Wildy, Simmonds & Hill Publishing, 2018.[/fn] transparency,[fn]Chrispas Nyombi, A Case for a Regional Investment Court for Africa, North Carolina Journal of International Law, vol. 43, no. 3, Spring 2018, p. 66-109.[/fn] or (non-)inclusion of non-party stakeholders,[fn]Fola Adeleke, International Investment Law and Policy in Africa: Exploring a Human Rights Based

Approach to Investment Regulation and Dispute Settlement, Routledge, 2017, London, England.[/fn] as other concerns with regard to investment arbitration. It is interesting to gauge how mediation, as an alternative process, would fare with each of these issues.

A perceived propensity to solve disputes amicably

ICSID statistics reveal that arbitration cases that involve African States as respondents are interrupted at the parties' request more frequently than others. Given that settlements are one the main reasons for party-led interruptions, these statistics may indicate that African States have a relative preference for solving disputes amicably. Although the information available regarding the cause of these interruptions is insufficient to warrant such a conclusion, other empirical elements such as ICSID conciliation statistics point in the same direction.

Alongside arbitration, ICSID has been offering conciliation services since 1968. Of the 11 conciliation cases registered by the ICISD Secretariat, 9 have involved an African State.[fn]Marie-Andrée Ngwe, Marion Deligny Malchair, 'La propension des Etats africains à résoudre leurs litiges d'investissement à l'amiable', ICSID Review – Foreign Investment Law Journal, Volume 34, Issue 2, Spring 2019, Pages 388–410.[/fn] These comprise the only ICISD case where a *State* Party initiated a conciliation procedure, Republic of Equatorial Guinea v. CMS Energy Corporation. The conciliation procedure was initiated by the Republic of Equatorial Guinea in 2012. It lasted three years and resulted in the Conciliator closing the procedure without recording an agreement of the parties. However, no arbitration cases involving the parties were subsequently filed at ICSID, suggesting the parties may have been solved their dispute.[fn]Marie-Andrée Ngwe, Marion Deligny Malchair (cf. footnote vi).[/fn]

Several factors can explain these statistics. Certainly, technical considerations have a large influence. For instance, disputes arising from investments that are based on long-term contracts and/or from investments that involve the host State through direct or indirect financial participation are more prone to be settled.[fn]Ibid.[/fn]

Yet cultural considerations may also provide a part of the explanation. Discerning idiosyncrasies among legal cultures, Professor Taslim Olawale Elias, former

International Court of Justice President, observed that '*whereas African law strives consciously to reconcile the disputants in a lawsuit, English law often tends to limit itself to the bare resolution of the conflict by stopping at the mere apportionment of blame as between the disputants.*'[fn]Teslim O Elias, The Nature of African Customary Law (Manchester University Press 1956) 268–9. Cited in: Won Kidane, The Culture of Investment Arbitration: An African Perspective, ICSID Review – Foreign Investment Law Journal, Volume 34, Issue 2, Spring 2019, Pages 411–433.[/fn] It is remarkable how the observation in this sentence would hold if its terms were replaced by mediation and arbitration, respectively.

Hence, although more data and research are needed in order to reach full-fledged conclusions, indicators do suggest a relative preference among African States for amicable ISDS mechanisms. This is corroborated by a number of recent developments across the continent that unequivocally favor mediation alongside or instead of arbitration.

The first signs of a rising tide toward investor-State mediation

The mediation of international economic disputes, and investor-State mediation in particular, is still at the initial phase of its development. We shall therefore refrain in what follows from overclaiming the likely growth of investor-State mediation in Africa. We shall offer, rather, an empirical observation of the evolution witnessed on the ground.

Scrutiny reveals that, in recent years, several African States and RECs have amended their investor protection frameworks in order to make way for mediation. Perhaps most notably, the 2015 South African Protection of Investment Act, which came into force in July 2018, promotes mediation. It provides for mediation administered by the South African Department of Trade and Industry as the default dispute resolution mechanism under the Act, while arbitration is relegated to a secondary role via the double condition of a) exhaustion of domestic remedies and b) explicit case-based consent. Moreover, official policy documents show that South Africa has been pushing for this approach to be adopted in the Investment Protocol of the Tripartite Free Trade Area.

While South Africa has been one of the continent's most vocal critiques of traditional ISDS, other African States are also making substantial changes to their

national ISDS frameworks. For instance, the 2016 Namibian Investment Protection Act provides for either mediation or litigation before local courts. Likewise, the 2017 Egyptian Investment Law does not provide prior consent to international arbitration and emphasizes the amicable resolution of disputes. In a similar perspective, Gambia, Ghana, Ivory Coast, Mali, Mauritania, Morocco, Niger, Nigeria, Rwanda, Tanzania, Tunisia, and Togo, among others, have also adopted rules that favor investor-State mediation and/or limit opportunities for investment arbitration.[fn]Marie-Andrée Ngwe, Marion Deligny Malchair (cf. footnote vi).[/fn]

Furthermore, reforms favoring investor-State mediation far exceed national and regional legislations in Africa. At the continental level, beside the aforementioned PAIC and AfCFTA Protocol Investment, the OHADA Uniform Act on Mediation was adopted in November 2017. At the intercontinental level, recent developments in the Belt and Road Initiative (B&R) – for instance the creation of the B&R International Commercial Mediation Center – also appear to favor the resolution of investment disputes through investor-State mediation.[fn]Huiping Che, China's Innovative ISDS Mechanisms and Their Implications, in BRICS Approach to the Investment Treaty System, American Journal of International Law, Volume 1122018, pp. 207-211.[/fn]

Conclusion

All in all, although investor-State mediation is still at the initial phase of its development, several structural factors suggest that the use of mediation alongside or instead of arbitration in investor-State disputes in Africa will only grow in the future. The range and pace of this evolution will depend on stakeholders' capacity to solve outstanding issues, such as the transparency-confidentiality predicament and the responsibility of public agents representing the State in mediation processes.[fn]Catharine Titi & Katia Fach Gómez (Eds.), Mediation in International Commercial and Investment Disputes, Oxford University Press, July 2019.[/fn]

This post is part of a series on the relationship between investor-State arbitration and mediation. To see our full series of posts on this topic, click here