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Botswana and the SADC-AFSA Alliance Charter: A Case for Robust Regional Arbitration Centres

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Following last year's surprising change of government in Botswana, one of the largest diamond mining countries, investors in the country's natural resources sector could see an increase in the risks impacting their projects. Botswana's economy has been experiencing a slowdown – growth decreased from 5.5% in 2022 to 1% in 2024. In addition, the newly-elected president ran an ambitious social spending and job creation programme, including adding up to 500,000 jobs in the next five years. The prospect of increased public spending combined with slowing economic growth could result in the government looking for additional revenue. The change of government in Botswana provides an opportunity to reflect on the foreign investment landscape in the Southern African region.

Resource Nationalism

In countries rich in natural resources, but traditionally poorer in capital and technological know-how, foreign investments play an important role in monetising the available natural resources. However, once the project is up and running, the balance of power between the host country and the foreign investor changes in favour of the former. Especially in times of political change, economic downturn or surging commodity prices, host countries are incentivised to pursue measures that yield an increased rate of return compared to what was originally envisioned in the investment agreement. Such measures include, but are not limited to, additional taxes, levies and an increased share of free-carry equity interest in the project for the host nation.

Over the last 10 years, examples of resource nationalism can be found in, the Democratic Republic of Congo, Zambia, and Tanzania. While Botswana could follow suit in the current environment, we do not expect that it will.

In light of the above, it is worthwhile to consider what protections investors in Botswana and in the wider region have at their disposal.

Bilateral Investment Treaties ("BITs") and Multilateral Investment Treaties

BITs offer the benefit of relative standardisation when it comes to the level and type of protection

afforded to foreign investors in the host country, including fair and equitable treatment and non-expropriation rights provisions. Fair and equitable treatment concerns the conduct of the host state towards the investor. This provision requires that the state acts in a just and predictable way, and with due respect to procedural fairness and investor's legitimate expectations. Another staple investor protection provision is the right against expropriation. Although there is no consistent definition of 'expropriation' across BITs, the wording generally covers direct and indirect action by the state resulting in taking property from the investor. Relevant to this definition are also notions of compensation and public interest. Another feature of BITs which is deemed favourable to the investors is the umbrella clause. Often drafted broadly, it is seen as a catch-all clause enabling action against the host state. The practical implication of this provision is that any investor-state contractual breach could be pursued under the treaty through arbitration even if the contract stipulates that the local courts have exclusive jurisdiction to hear disputes between the parties. This is one of the areas of diverging approaches of tribunals where each case turns on its facts.

The usual mechanism to settle investment disputes contained in BITs is through the World Bank's International Centre for the Settlement of Investment Disputes ("ICSID") or other fora for international arbitration. Additionally, where the host country has ratified the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), there is a relatively straightforward path to enforcing arbitration awards against the sovereign states.

Shifting Away From Settling Investment Disputes in International Arbitration Centres to Regional Arbitration Centres

The robust protections offered by the BITs (particularly first and second generation) are often seen by the African governments as detrimental to their national economic interest. For example, many governments in Africa view investor-state dispute settlement mechanism as favouring foreign investors and being disadvantageous to African states. Botswana's reluctance to enter into new BITs illustrates this phenomenon. According to the UN data, since 1997, Botswana signed 10 BITs and only 2 of these are currently in force. Botswana has also not signed a new BIT since 2011.

At the same time, the last three decades saw an uptick in Botswana's accession to Multilateral Investment Treaties ("MIT"). These instruments are designed to increase regional, rather than international, trade. As a result, investors need to be compliant with the definition of 'investor' in the given MIT. Typically, this requires citizenship or being a legal entity incorporated in the signatory state of MIT. Among MITs signed by Botswana is the 1992 Southern African Development Community Treaty and the corresponding Investment Protocol (the "SADC Treaty Protocol"), which came into effect in 2010.

In its initial form, the SADC Treaty Protocol offered similar protective measures to the standard investment disputes settlement mechanism in BITs – a measure potentially designed to placate foreign investors often wary of using the local courts system to resolve complicated disputes concerning sizable investment projects. However, the final version of the SADC Treaty Protocol currently in force does not include such provisions. Effectively, there is no recourse to international investment arbitration under the SADC Treaty. Instead, we see a push to regionalise arbitration within the SADC area whilst adopting many of the best international practices.

South Africa is leading the way in building its arbitration capabilities with the Arbitration Foundation of South Africa ("AFSA") at the forefront of this effort. The aspiration to become the main regional arbitration centre was further boosted when the representatives of 10 of the 16 members of SADC signed the SADC-AFSA Alliance Charter. As of 9 April 2024, the signatory states include Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Tanzania, Zambia, and Zimbabwe. Under the agreement, AFSA rules will be applied across the signatory states. Further, a separate division at AFSA was created to conduct SADC arbitrations.

AFSA Arbitration Framework and Judicial Attitude Towards Arbitration in South Africa

To further enhance its position as a regional arbitration hub, in 2017, South Africa enacted the International Arbitration Act 15 of 2017 (the "IAA 2017"), which modernised and strengthened the arbitration framework in the country. As stipulated by the IAA 2017, the domestic courts will not intervene in arbitration proceedings except in limited circumstances set out in the act itself. Granting of interim protection measures by the courts is also constricted. The legislation incorporates the UNCITRAL Model Law on International Commercial Arbitration of 1985 (2006 Revision) and re-introduces the New York Convention. In broad terms, this brings the legislative framework underpinning arbitration in South Africa in line with the international standards. This trajectory was further reaffirmed by the implementation of the revised AFSA International Arbitration Rules of 2021 which adopted some of the best practices from the leading international arbitration centres. To name a few, the changes cover institutional and procedural points, such as the emergency arbitration procedure, early dismissal procedure, introduction of virtual hearings and the power to decide disputes based on documents only.

The judicial attitude towards arbitration is also crucial. Several domestic cases exemplify the judicial support that international arbitration enjoys in South Africa. Of note are the cases in the High Court of South Africa which underscore the principles of party autonomy, judicial non-intervention, and arbitration award enforcement.

Choosing South Africa as the seat of arbitration also offers significant savings on conducting a case in comparison to flying large legal teams to arbitration hubs such as London, Paris, Singapore, or New York. If needed, the domestic teams can always be reinforced by foreign counsel as the associated cost of that is lower. In addition, AFSA plans to set up arbitration centres in each signatory state of the SADC-AFSA Alliance Charter to adjudicate the disputes locally, including in Botswana. Those centres would be governed by the same set of rules.

Arbitration in Botswana and the Wider SADC Region – Concluding Remarks

The reforms are yielding results – as of April 2024, there were 145 cases managed by AFSA. This is a marked increase from less than 30 cases around the time when the IAA 2017 was introduced. In addition, approximately 70% of the cases involve parties in the SADC region. As BITs are phased out across the region, only the sunset clauses will offer protection to the existing foreign investors for a limited period. To compensate for that, cross-border investments in the SADC region have gained a boost in the form of the SADC-AFSA Alliance Charter that extends the reach of AFSA, which is now a growing and increasingly sophisticated arbitration centre governed by a modern and impartial set of rules.

Arbitration under the auspices of AFSA is also protected by robust domestic South African laws and the judiciary positively disposed towards arbitration. For non-SADC investors, the alternative route to access AFSA arbitration is by including an appropriate contractual arbitration clause.

Botswana is a signatory of the SADC-AFSA Alliance Charter which, in the absence of other investor protections, offers access to a reliable regional arbitration centre. This is positive news because the Arbitration Act in Botswana dates back to 1959 and does not currently incorporate the UNCITRAL Model Law on International Commercial Arbitration of 1985 (2006 Revision). On the upside, the courts in Botswana are friendly towards arbitration which, combined with the SADC-AFSA Alliance Charter, may further incentivise Botswana's judiciary to promptly enforce any arbitration awards. The alternative route to accessing investor treaty protection is by going through the two BITs in force that Botswana is a party to – with Germany and Switzerland.

Building effective dispute resolution mechanisms is a way for Botswana to strengthen its institutions and the rule of law and increase regional and foreign direct investments in key sectors such as mining and tourism. In particular, the last being important if the new government's job creation program is to succeed.

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