Kluwer Arbitration Blog

ICCA Kigali 2025: Saving ISDS through Modernization – The AfCFTA Protocol on Investment as a Blueprint for Drafting of Investment Treaties

Samuel Kahura (Janssen Sanghavi & Associates) · Tuesday, May 27th, 2025

In recent years, the Investor-State Dispute Settlement ("ISDS") mechanism has attracted widespread criticism from countries, practitioners and academics, which has been the subject of a vast amount of literature. UNCITRAL through Working Group III has been working on possible reforms of ISDS since 2017. During its 51st Session, UNCITRAL Working Group III agreed that the secretariat would prepare a revised text of the draft provisions on procedural and cross-cutting issues. This blog advances the position that the Working Group, treaties such as the recent India-UK Free Trade Agreement and other similar negotiations can draw inspiration from the AfCFTA Protocol on Investment. The AfCFTA Protocol on Investment is an example of a modern treaty that can help overcome some of the problems associated with ISDS that are purely the cause of poorly drafted investment treaties. The fact that the rest of the world has something to learn from Africa highlights that it has taken the centre stage in the reform debate and has become the protagonist in the ISDS reform debate. The concise drafting of the Protocol on Investment to the Africa Continental Free Trade Area Agreement ("AfCFTA Protocol on Investment") is potentially one of the major contributions to the reform of ISDS.

Drafting Deficiencies and their Impact on ISDS

A close analysis of most of the problems associated with the ISDS system in its current state demonstrates that better drafting of the underlying investment treaties can help cure some of the defects of the ISDS system. Back in 2013, Rob Davies, then South Africa's Minister of trade and industry, was asked to justify South Africa's termination of bilateral investment agreements ("BITs"). He responded by saying that "South Africa's BITs are poorly drafted and exhibit a range of serious flaws." Similar sentiments were echoed in 2017 by then India's minister of commerce and industry in his address to the Rajya Sabha. He noted that the text of India's 1993 Model BIT contained provisions which were susceptible to broad and ambiguous interpretations by arbitral tribunals. These statements show that one of the perceived issues with investment treaties is poor drafting.

Poor drafting of investment treaties leads to several concerns. First, it leads to inconsistent interpretation. The use of vague and open-ended terms, such as fair and equitable treatment, creates

significant room for interpretative discretion by arbitral tribunals. Each tribunal may construe these provisions differently based on its composition and the arbitrator's interpretation philosophy.

Secondly, regulatory chill is ultimately a byproduct of poor drafting. When treaty language fails to clearly define standards or neglects to include explicit safeguards for legitimate public interest regulation, it creates room for broad interpretations. In response, States may avoid introducing or enforcing new regulations that could be construed as treaty breaches.

Thirdly, poorly drafted investment treaties often impose robust and enforceable obligations on host States while placing minimal or no corresponding duties on the investor. Investors are granted substantive protections; yet, they are rarely required by those treaties to comply with environmental, human rights or corporate social responsibility standards. This kind of asymmetry allows investors to challenge the conduct of the host State without them being held accountable for their misdeeds. The effect of this is corrosive on ISDS. It breeds a perception of bias towards investors and by extension culminates in legitimacy concerns about ISDS.

The AfCFTA Protocol on Investment as a Blueprint

The AfCFTA Protocol on Investment was adopted on 19 February 2023. Its objectives, outlined under Article 2, include providing a balanced, predictable and transparent continental legal and institutional framework for investment. Further, it aims at providing a sound legal framework for prevention, and settlement of disputes among investors and host states. Unlike most investment treaties that are overly skeletal, containing little details on the obligations and rights of the host State and the investor, the AfCFTA Protocol on Investment reflects a deliberate balance between investor protection, State's rights, and sustainable development.

The AfCFTA Protocol on Investment adopts a unique approach to drafting throughout. Firstly, to deal with the problem of inconsistency in interpretation of treaty standards, Articles 12 and 13 of the Protocol concisely outline the meaning and limits of the national treatment. Contrary to the approach of traditional BITs, for example the Kenya-Germany BIT, which merely states that neither Contracting Party shall subject investments in its territory owned or controlled by nationals or companies of the other Contracting Party to treatment less favorable than it accords to investments of its own nationals or companies or to investments of nationals or companies of any third state, the AfCFTA Protocol on Investment goes further. It enumerates the considerations to be taken in determining like circumstances. Further, Article 13 outlines the exceptions to national treatment. The difference that this brings is that, in the traditional BIT, it would be at the discretion of the arbitrator to fully determine what the obligation entails. The AfCFTA Protocol on Investment thus provides a criterion rather than relying on abstract tests.

Similarly, Articles 14 and 15 delineate the meaning and exceptions to the Most-Favoured Nation Treatment. Some tribunals also interpret the MFN clause to allow investors to invoke more favourable substantive protections found in treaties concluded between the host State and third States.

The AfCFTA Protocol on Investment forecloses this problem because it explicitly provides that treatment does not include dispute settlement procedures, including, but not limited to, those related to admissibility and jurisdiction, provided for in other treaties. Further, substantive obligations in other investment treaties, do not in themselves constitute treatment and cannot give

rise to a breach of the MFN treatment standard. An arbitrator applying the AfCFTA Protocol on Investment would thus not be at liberty to construe this obligation widely. This in essence means that different arbitral tribunals, however constituted, will arrive at the same conclusion more often than not when applying the AfCFTA Protocol. This detailed drafting of the provisions means that the possibility of inconsistent interpretation is reduced.

Secondly, to deal with regulatory chill, a byproduct of poor drafting and/or omission as aforementioned, Article 24 of the Protocol confers wide latitude to States to regulate and in turn take measures to ensure that investments are consistent with sustainable development goals (SDGs), environmental, health, climate, social and economic objectives of the State. Further, it clearly provides that the exercise of such right to regulate cannot give rise to a claim by an investor. Therefore, the Protocol appraises the right of the State to regulate which is a feature missing in most of the traditional investment treaties. This appraisal and the subsequent rejection of claims arising from exercise of the right to regulate effectively means that the tendency of investors to threaten bringing of arbitral claims is effectively curtailed.

Thirdly, as previously mentioned, the perception of bias towards investors arises from the fact that poorly drafted treaties confer a wide range of rights without imposing corresponding obligations. To cure this, Part V of the AfCFTA Protocol imposes stringent environmental protection, human rights and socio-political obligations on investors. The presence of these obligations means that a State can easily bring a counterclaim in arbitral proceedings, thereby operationalizing accountability on the side of the investor. The AfCFTA Protocol on Investment replaces omission with precision. In doing so, it makes clear how improved treaty drafting can help restore the balance between the host State and investor thus enhancing the integrity and credibility of the ISDS system.

Finally, a poorly drafted treaty increases the cost of arbitration. Vague or inconsistent language often leads to protracted proceedings over threshold issues. Moreover, poorly defined investor or State's rights and obligations invite broad and expansive claims. All this translates to higher legal fees and a disproportionate burden on host States. The cost of arbitration has been cited as one of the reasons States yearn to quit the system altogether. The AfCFTA Protocol indirectly cures this first through setting out with precision, as demonstrated above, most of the obligations. In turn this means that the claims will be narrow. For example, the caveat under Article 14 on the restriction on extension of MFN standard to other treaties cuts out potential proceedings involving jurisdiction based on the MFN clause which have formed a part of previous awards. Further, Article 46 of the AfCFTA Protocol on Investment makes it mandatory to first seek to settle the dispute amicably through consultations, negotiations, conciliation or mediation. If successful, it means that some disputes will not have to go to arbitration (if it is chosen as the mode of dispute resolution under the Annex which is yet to be agreed) thereby reducing the cost of settling disputes.

Conclusion

In conclusion, it is accepted that some of the criticism levelled against ISDS stems from inadequately drafted provisions in the underlying treaties. Arbitral tribunals interpreting such treaties therefore end up with inconsistent interpretations, which in turn prompt a regulatory chill by States. For far too long, the ISDS reform debate has been dominated by Global North voices and powerful alliances such as the European Union. Africa is often seen as a rule taker rather than

a rule maker in the debate. However, the AfCFTA Protocol on Investment asserts Africa's role as a protagonist in the reform debate. For ISDS to survive, investment treaties must evolve and the AfCFTA Protocol on Investment stands out as a blueprint for such evolution. If the rest of the world is serious about reforming ISDS, it would do well to follow Africa's lead.

Follow along and see all of *Kluwer Arbitration Blog*'s coverage of ICCA Kigali 2025 here.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Tuesday, May 27th, 2025 at 8:32 am and is filed under AfCFTA Investment Protocol, Africa, ICCA Kigali 2025, ISDS Reform
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.