The time is now for continental unity in African dispute settlement

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Africa is on the cusp of what could be a break in a decades-long cycle of poverty and economic shortcomings. Whether this cycle will be broken depends on the ability of African nations to put in place policies that attract and protect foreign and intra-African investment. These policies must demonstrate to investors that the rule of law will be upheld; that equitable, local dispute settlement is possible; and that potential gains will be greater than the risks involved. The enactment of the African Continental Free Trade Agreement (AfCFTA) was a huge step in the right direction. This agreement lays a solid foundation for increased intra-African trade in both goods and services and looks to build on the collective strengths of African nations and African citizens.

As AfCFTA comes into full force and effect, one of the most pressing issues is for African nations to provide clear guidance as to which dispute settlement mechanisms are to be used under the agreement. While Africa finds itself at the forefront of a bright economic future, state parties to the AfCFTA must provide more comprehensive guidance as to how the agreement will be implemented for it to be truly effective. The dispute settlement mechanism detailed for the agreement must strike the right balance between state and investor interests, ensuring that Africa is an attractive place for investment, including intra-African investment, while at the same time protecting the ability of African nations to promote sustainable development, using regulations that defend the public interest.

As will be demonstrated in this article, establishing a permanent dispute settlement tribunal is advisable to build confidence in processes. Before presenting this argument in detail, this article will provide a general overview of the current landscape of dispute settlement on the continent, including governing laws and tribunals. It will then provide a brief summary of the envisioned dispute settlement under AfCFTA to highlight where there is room for improvement.

Current landscape of dispute settlement in Africa

Before considering what could and should exist, it is important to first understand what does exist on the continent. The following is a brief overview of the existing laws, tribunals and dispute settlement mechanisms used in Africa.

Laws

In Africa, foreign investments are regulated by host state laws, Regional Economic Communities (RECs), multinational and bilateral treaties and investment agreements. Navigating the pool of differing regulations can prove challenging and lead to confusion or frustration for foreign investors. The domestic investment laws in many countries are relatively weak and were traditionally molded to the needs of foreign investors. Moving away from
this, some African countries have recently enacted domestic investment laws aimed at better protecting domestic interests. In 2017, for example, Egypt passed a new investment law focusing primarily on improving the quality rather than the quantity of foreign investment. In general, this new law helped streamline processes, making Egypt more attractive to foreign investors. South Africa’s recent investment law reform arguably went further than all others in protecting domestic interests. In 2015, the country ended its Bilateral Investment Treaties (BITs) with Austria, Belgium, Luxembourg, Denmark, France, Germany, the Netherlands, Spain, Switzerland and the UK and issued the Protection of Investment Act of 2015. This Act allows the country to balance its own interests with those of investors, allowing it to maintain its sovereign rights. It would come as no surprise if other countries followed suit and began enacting their own, new domestic investment laws.

Regardless of the strength of domestic laws, BITs remain the leading governing law for investment-related matters. As of 2016, African nations had 853 BITs (157 intra-African and 696 with the rest of the world). The intent of African nations in entering into BITs appears, in most cases, to indicate to the developed country counterparty that the country is open to foreign investment and intends to protect investment in their country. The relationship in developing country/developed country BITs can be seen as more one directional than in those between two developed countries, given that there is an implied – albeit not typically expressed – understanding that the main purpose of the agreement is to increase investment into a developing nation, rather than to and from both nations. The implications of this perception have arguably hindered greater economic growth in Africa by restricting African nations’ ability to issue domestic laws that run contrary to BITs. African governments have expressed frustration about the limitations BITs impose on their sovereignty. African states that enter into BITs with developed nations limit their ability to freely regulate areas that may affect investment, and more often than not submit themselves to the will of international arbitral bodies (as discussed below).

Africa is also home to several Regional Economic Communities (RECs), each of which has its own Regional Investment Agreement (RIAs). RIAs govern investments in each of the member parties to each respective REC and not only affect investments, but also often have an effect on finance and taxation matters at both national and regional levels. RIAs in Africa generally cover the same issues addressed in BITs and, at the same time, harmonize the national investment policies of their Member States. An important note on RIAs is that they are only binding by and between nationals from the countries that are party to them. That said, Member States have certain obligations derived from their participation in RECs that may limit or otherwise affect their interaction with a foreign investor of any nationality entering their jurisdiction.

Finally, most African nations have signed up to some of the world’s largest, most notable multilateral agreements involving international investment. These agreements include, among others, the World Trade Organization (WTO) Agreement on Trade-Related Measures (TRIMs); the WTO General Agreement on Trade in Services (GATS); the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA Convention); the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States; and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. While arguably having a more limited impact on investment, these international agreements must also be considered when understanding the complex web of laws on the continent.

Tribunals

When there is no specific law on the books dictating otherwise, local disputes are resolved in local courts. Everyday business in a country, for both locals and foreigners, is governed by local law. Every country on the continent has local, domestic courts that resolve business-related disputes in the same way they resolve disputes between citizens. The size and capacity of these courts ranges dramatically from country to country. So too does the knowledge of local judges regarding business-related matters. In those countries where there is an authoritarian government, the independence of the judiciary is most certainly at question. In other, more established democracies, there are robust court systems, which can have a strong influence over business practices within the country.

One of the key benefits of using domestic courts, from the perspective of African nations, is the tremendous understanding of local context that these courts inherently have. There is also an indisputable affordability and convenience to these courts in the eyes of African nations and local investors. As business flourishes on the continent, it is presumed that local courts will also develop their understanding of business-related matters and their repository of business law precedent. That said, inept domestic courts have proven to frustrate even local
investors. Foreign investors, particularly non-African investors, in most cases, will outright reject local courts. More often than not, multinational corporations, when negotiating transactions on the continent, will insist that disputes be brought outside the respective country, most typically out of the continent as a whole, to neutral international dispute settlement bodies.

The most used dispute settlement forum, particularly when non-African investors are party to an agreement, is international investment arbitration. Most bilateral investment agreements between African and non-African countries (as well as intra-Africa agreements) include international arbitration provisions that allow for investment disputes to be brought before an international arbitral tribunal. International arbitration allows a contracting party to bring a claim against the national of another contracting party, which does not allow domestic investors to bring a claim under this system. The purpose of establishing this type of system is three-fold and includes:

- attracting foreign investment, by allowing for a direct means of enforcement of international disputes on the part of international investors;
- de-politicizing disputes; and
- allowing foreign investors an alternative to domestic courts.

Finally, between international arbitration and domestic courts, there are regional arbitration tribunals and regional courts. By way of example, the Organization for the Harmonization of African Business Law (OHADA), in addition to creating a set of uniform laws applicable to 16 Member States, also established a Common Court of Justice and Arbitration (CCJA). This court of 13 judges provides advice on proposed uniform Acts and serves as a court of cassation. This court is seen as superior to national courts in matters pertaining to the Uniform Acts and allows cases to be presented by either party or a national judge. This court is however still building its reputation and legitimacy to a point where it can trusted as much as more established centers like the ICC and ICSID, but it is making strides in the right direction. Other regional bodies include the Kigali International Arbitration Centre (KIAC), Mauritius’s several arbitral institutions and the still relatively new arbitration systems in Ghana and Kenya. These centers are attracting the attention of other African nations, who have in some cases begun to consider African dispute settlement bodies when choosing the forum for resolving their conflicts.

**Dispute settlement under the AfCFTA**

On May 30, 2019, the AfCFTA officially entered into force. This enactment marks a historical opportunity for the African continent and a chance for African nations to put in place a sound dispute settlement system that is more equitable and better meets the development objectives of the continent than the more ad hoc system that has been used to date. According to the United Nations Economic Commission for Africa, the AfCFTA will cover a market of 1.2 billion people and a GDP of USD2.5 trillion. The massive economic integration of 52 countries has been predicted to generate as much as USD35 billion in increased trade between African countries. Above all, the AfCFTA will allow African nations to capitalize and build on their collective strengths, by breaking down barriers to the movement of goods, services, people, capital and ideas. This alone is expected to increase the bargaining powers of African nations. At the same time, the agreement is likely to encourage foreign entry into the continent by creating a more attractive single market. This enormous economic potential, however, must be supported by strong dispute settlement.

The AfCFTA includes a Protocol on the Rules and Procedures on the Settlement of Disputes (the Protocol), which closely reflects the current dispute settlement mechanisms of the World Trade Organization. The Protocol provides for the establishment of a Dispute Settlement Body (DSB) that will have the power to establish Dispute Settlement Panels and an Appellate Body. At the same time, the Protocol provides that the parties may, by mutual agreement, refer disputes to arbitration, bypassing the DSB. However, the Protocol does not give details of either the DSB or the arbitration option, including where and under what rules disputes will be settled using either of these mechanisms. The African Union has made clear that the Protocol is to be further developed by Member States, now that the agreement is enacted. This leaves several questions unanswered, but also presents an opportunity for Africa to shape its own future in investment arbitration. To do so, however, the continent must move swiftly to consider what possibilities exist for dispute settlement under the AfCFTA.

**The way forward: the need for a continental tribunal**

Taking collectively the strengths and weaknesses of each of the governing laws and each dispute settlement forum...
in Africa, there is a strong argument that the African Union should establish a permanent tribunal for investment
dispute resolution, located on the continent. First and foremost, at this pivotal moment in its history, Africa must
demonstrate that it is able to create an amicable environment for investment that will push the continent forward in
its development objectives. To do this, when further negotiating the Dispute Resolution Protocol, the AfCFTA
Member States must create a forum that will allow for equitable dispute resolution that takes into consideration the
needs of states as much as private investors.

A forum located on the African continent with knowledge and experience of the local context within which disputes
arise will be crucial in gaining the support of African nations. Having the tribunal in Africa would also reduce costs
for African governments. To foster accessibility, the African Union could create various satellite courts of the
continental tribunal, allowing cases to be heard in a mutually agreed upon, convenient location for the parties. At
the same time, there should be one primary seat where the permanent staff and judges of the court are located on
a regular basis. On a continent as big as Africa, geography is crucial in assuring equitable treatment of parties.
Moreover, it is essential that the tribunal be located in a stable, democratically strong country where it is less likely
to be affected by conflict or turmoil. Satellite offices will be essential in assuring this equitability; however, it
will also be necessary for the continent to carefully select where the principal seat of the tribunal is located.

In developing this continental court, the African Union should also take care to make sure the voices of all African
nations are heard. Africa is a continent of 54 different countries, all at varying levels of economic development
and each with its own needs. African Member States must consider this when drafting the rules for procedure for
this court. Just as African nations do not want the desires of wealthy investors to overshadow their own needs, nor
do smaller, less-developed countries want their voices to be silenced by larger, stronger economies. If the
continent is to develop collectively, then all countries must have an equal footing when it comes to dispute
settlement. Equitable representation in the tribunal must be a top priority.

Judges at this African court should be from different countries across the continent and should have the business
knowledge that foreign investors would expect of a tribunal of this stature. This diversity of judges from varying
countries would help reduce the bias and corruption concerns that exist with local courts. It will also mean smaller
countries are treated equally when in conflict against larger, wealthier countries. Moreover, foreign investors have
historically expressed concern that African courts are not familiar with business transactions and this has
discouraged them from using local or regional courts. In developing a continental tribunal, it is important to
recognize that there are plenty of African nationals with the capacity to consider complex investment disputes that
could serve on a continental court, from even the smallest countries with small economies. Using local human
resources is better used to meet local needs.

Perhaps the greatest benefit of having a continental tribunal will be the contextual awareness that is added by
having local judges who are familiar with the most pressing issues on the African continent. African-bred judges will
have greater concern for the impact investments are having on the continent. African judges will be more likely to
consider the social, environmental and labor consequences of investments. This will give them a unique
perspective on the reasoning behind why states may take certain policy decisions and allow them to balance that
reasoning with investors’ interests. This will in turn serve the purpose of balancing Africa’s sustainable development
goals with investment decisions. With this in mind, judges should be carefully selected from each of the AfCFTA
Member States. As is provided in the Articles of the current Dispute Settlement Protocol for the DSB process,
judges hearing a given case should not be from either of the countries party to the dispute.

As has also been suggested under the Dispute Settlement Protocol, the continental tribunal should have an appeals
process which allows parties to challenge decisions based on law or evident misinterpretation of facts. States have
long complained of the finality of arbitration decisions rendered by party-selected arbitrators, without any
higher-level reconsideration. An appeals process using tenured judges would diminish this concern and build
consistency. Again, this appellate tribunal should have clearly defined procedures and directives, defined through
the negotiation process of the AfCFTA.

The new AfCFTA dispute settlement system should be primarily focused on the needs of African countries, rather
than being built around the desires of foreign investors. The African Union must do better to protect the interests of
all its Member States, and must do so through creating a stronger, more equitable dispute settlement mechanism.
As Africa moves forward with the implementation of the AfCFTA, it is essential that dispute settlement be at the
forefront of discussions. Investors will be looking at how well their rights are protected under the new agreement when deciding how aggressively to move into the continent and, at the same time, governments will be more likely to buy into the agreement if it allows for greater protection of their rights than existing mechanisms.

*DLA Piper Africa is a Swiss verein whose members are comprised of independent law firms in Africa working with DLA Piper.*

3Ibid. See also South Africa Protection of Investment Act of 2015.
4Ibid.
6Ibid.
8Talkmore Chidede, “The Right to Regulate in Africa’s International Investment Law Regime,” University of Oregon, accessed June 29, 2020. The African RECs include: the Common Market for Eastern and Southern Africa (COMESA), which has enacted the Investment Agreement for the COMESA Common Investment Area; the Southern African Development Community (SADC), whose governing investment law is its Finance and Investment Protocol, as well as the SADC Model BIT; the Economic Community of West African States (ECOWAS), which has adopted the Supplementary Act adoption Community Rules on Investment and the Modalities for their Implementation with ECOWAS; and the East African Community (EAC) and its Model Investment Code.
10This includes reciprocal exchange of guarantees and rights of foreign investors, as well as expropriation and most-favored nation.
14Ibid. Fifty-three African nations are currently party to the MIGA Convention, which “provides risk insurance to foreign investors against political risks such as expropriation, transfer restriction, breach of contract, non-honoring of financial obligations, as well as war, terrorism and civil disturbance.”
15Ibid.
16The most commonly selected international tribunals include the International Chamber of Commerce (ICC) and the International Centre for Settlement of Investment Disputes (ICSID). The United Nations Commission on International Trade Law’s (UNCITRAL) Rules of Arbitration are commonly used to govern arbitrations not heard by these two Courts, which both have their own rules and procedures. Other notable international arbitration tribunals include the London Court of International Arbitration (LCIA), the International Centre for Dispute Resolution (ICDR), the Hong Kong International Arbitration Centre (HKIAC), and the Singapore International Arbitration Centre (SIAC).
17Ibid.
18Ibid.
19Fagbayibo, Babatunde, “Towards the harmonisation of laws in Africa, is OHADA the way to Go?” The Comparative and International Law Journal of Southern Africa (November 2009) accessed June 29,
2020.
20United Nations Economic Commission for Africa, “Africa Continental Fee Trade Area – Questions and
21Nigeria has not yet signed the AfCFTA, meaning Africa’s largest economy is not yet part of the
Agreement.
22Warford, Luke, “Africa is Moving Toward a Massive and Important Free Trade Agreement” The
23Golubski, Christina, “Africa in the News: AfCFTA enters into force,” Brookings Institute (June 1, 2019)
25These bodies are to be comprised of experts in both law and international trade and who are
independent from local governments. See “Africa Continental Free Trade Area” Freshfields Bruckhaus
26Ibid.