INVESTMENT PROTECTION IN SOUTHERN AFRICA

As the African continent continues to be a magnet for foreign investment, **WilmerHale**'s **John Pierce** and **Marija Scekic** expand on the investment protection mechanisms available to investors in the region, and ask if the scope of protection is reliable enough

According to the *World Investment Report 2014*, published by the United Nations Conference on Trade and Development (UNCTAD), foreign investment flows into Africa increased by over 4% in 2013, complemented by growing intra-African capital flows. The overall increase in foreign investment was mostly driven by investment in Southern Africa, where investment inflows almost doubled in 2013.

Increases in foreign investment in Southern Africa are likely to be followed by greater numbers of investment disputes. In turn, foreign investors considering investments in Africa are likely to carefully consider the available investment protection mechanisms prior to investing.

This article focuses on the investment protection mechanisms available to investors in certain Southern African countries, all of which are members of the Southern African Development Community (SADC): Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe (Southern African countries).

These mechanisms include bilateral investment treaties (BITs) as well as the investor protection procedures available within the SADC and the Common Market for East and Southern Africa (COMESA). Additional protections may also be established as part of the new Free Trade Area for COMESA, the East African Community (EAC) and the SADC which is currently under negotiation.

Bilateral Investment Treaties

The Southern African countries have entered into numerous BITs which provide a number of guarantees to foreign investors, including fair and equitable treatment and protection from nationalisation and expropriation. Perhaps, most importantly, BITs include investment protection mechanisms that allow the investors, whose rights under the BIT have been violated, to submit their claims to international arbitration, often under the auspices

of the **International Center for the Settlement of Investment Disputes** (ICSID), rather than resorting to local courts.

In total, the 15 Southern African countries have signed 258 BITs. While that number appears significant, 140 of those BITs (54% of the total) are either not in force or have been terminated, according to UNCTAD data on international investment agreements.

Most Southern African countries have signed and ratified the Washington Convention on the Settlement of Investment Disputes (ICSID Convention); Angola and South Africa are the exceptions. According to the ICSID caseload statistics 2015, 16% of all cases registered under the ICSID Convention and Additional Facility Rules involved countries from sub-Saharan Africa. It appears that the outcomes of ICSID arbitrations involving African countries are not substantially different from the outcome of investment disputes in other parts of the world. As other commentators have noted, this indicates that Africa is not more dangerous than any other region in the world when it comes to foreign investment.

The Southern African Development Community

The SADC, established in 1992, is an inter-governmental organisation whose aim is "to achieve development, peace and security, and economic growth, to alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa, and support the socially disadvantaged through regional integration". The SADC countries, pursuing their mutual objectives, have concluded 27 protocols, including the SADC Protocol on Finance and Investment (Investment Protocol).

The Investment Protocol, which entered into force in April 2010, prohibits nationalisation and expropriation of property, and guarantees fair and equitable treatment to investors. The Investment Protocol also provides that an investor and a state party may submit a dispute to international arbitration in one of three ways: arbitration before the SADC Tribunal, ICSID arbitration, and ad hoc arbitration under the UNCITRAL Arbitration Rules.

The SADC Tribunal was established in March 2003 and has jurisdiction over all disputes, and all applications referred to it in accordance with the SADC Treaty and Protocols, which relate to the interpretation and application of the SADC Treaty; the interpretation, application or validity of the protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community; and all matters specifically provided for in any other agreements that member states may conclude among themselves or within the community and which confer jurisdiction on the Tribunal. Under the SADC Tribunal Protocol, any natural or legal person has standing to bring claims against a SADC member state, including against its own state.

Prior to 2010, the SADC Tribunal had decided 21 cases and played an important role in the protection of investments and human rights in Southern Africa. In the wake of several judgments against Zimbabwe, however, the leaders of the SADC suspended the Tribunal at the 2010 SADC Summit of Heads of State and Government (SADC Summit). At the August 2012 SADC Summit, the SADC leadership decided to maintain the suspension of the SADC Tribunal and negotiate a new Tribunal Protocol that would limit the SADC Tribunal's jurisdiction to disputes between the member states (thus eliminating jurisdiction over human rights cases and investor-state disputes). This decision was widely viewed as a step back in the protection of investments, human rights and the rule of law in Southern Africa.

At the SADC Summit in August 2014, nine leaders of SADC states signed on to the new Tribunal Protocol. Before the Tribunal's jurisdiction can be changed, however, 10 of the SADC countries would

have to sign and ratify the new protocol. In an effort to preserve the Tribunal's power to hear human rights cases and cases brought by individuals, a petition has been initiated with the aim of dissuading the SADC states from ratifying the new Tribunal Protocol. In August 2015, the SADC leaders will meet at their annual Summit in Botswana to consider the future role of the SADC Tribunal.

Even without the SADC Tribunal, investors who have an 'admitted' investment in an SADC state may resort to arbitration under one of the two remaining dispute resolution mechanisms in the Investment Protocol, provided that they have complied with the requirement to exhaust local remedies and six months have passed since the SADC state was notified of the claim. Unlike most BITs, the Investment Protocol does not define an investor as a party that has made an investment in the territory of the other party, and therefore it appears to allow all investors (whether from an SADC country or from any other country) to bring claims against any SADC state (including their own) in an international arbitration.

The Common Market for East and Southern Africa (COMESA)

In addition to belonging to the SADC, some Southern African countries are also members of COMESA. These include the Democratic Republic of Congo, Madagascar, Malawi, Mauritius, Seychelles, Swaziland, Zambia and Zimbabwe. COMESA is an organisation of 19 African countries that have agreed to cooperate in developing their natural and human resources. COMESA has a wide-ranging series of objectives which include the promotion and protection of investments.

The COMESA investment protection regime arises under two different instruments: the COMESA Treaty and the Investment Agreement for the COMESA Common Investment Area (CCIA Agreement). Under the COMESA Treaty, member states are obliged, *inter alia*, to accord fair and equitable treatment to private investors, create a predictable, transparent and secure investment climate, and refrain from nationalising or expropriating private investments. The COMESA Treaty established the COMESA Court of Justice for the purpose of ensuring adherence to law in the interpretation and application of the Treaty. The court has jurisdiction over claims brought by individuals against a member state, but only upon exhaustion of local remedies in the national courts or tribunals of the member state.

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The CCIA Agreement is a comprehensive instrument that seeks to promote a stable investment environment, promote cross-border investments and protect investment. The CCIA Agreement offers a choice of dispute settlement mechanisms. A COMESA investor may submit its claim to the competent court of the member state in whose territory the investment has been made, to the COMESA Court of Justice under the COMESA Treaty, or to international arbitration under the ICSID Convention, the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or, provided both parties to the dispute agree, any other arbitration rules. The CCIA Agreement requires ratification by six member states and has not yet entered into force.

Free Trade Area for COMESA, EAC and the SADC

Negotiations for the establishment of the Free Trade Area for COMESA, the East African Community (EAC) and the SADC are currently underway. The Free Trade Area involves 26 countries with a combined population of over 527 million and combined GDP of USD 1.1 trillion. According to the 2014 COMESA Investment Report, the treaty for the Free Trade Area will include an investment chapter, setting out the treaty's scope of coverage as to investments and investors, the treaty's substantive standards of protection (e.g. national treatment, most-favoured-nation treatment, fair and equitable treatment, et cetera) and its procedural protections – specifically, investor-state dispute resolution mechanisms. Although the specific investment protection provisions will remain unknown until the treaty is signed, the treaty is likely to further enhance the protection of foreign investments in Southern Africa.

Conclusion

At least on paper, the Southern African countries have made progress in developing a strong basis for investment protection throughout the region. But important challenges remain. The majority of BITs that have been signed by Southern African countries have not been ratified or have already been terminated. Some of the countries with the fastest-growing economies in Southern Africa have yet to sign on to the ICSID Convention. And the leaders of the SADC have made the unfortunate decision to suspend the SADC Tribunal just as it was becoming an important force for the protection of individual rights. Potential investors will no doubt be watching closely to see the extent to which the Southern African countries are truly committed to establishing strong, reliable investment protections in the region. ■

About the authors

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