JONES DAY

JANUARY 2014

PROTECTING FOREIGN INVESTMENTS IN SUB-SAHARAN AFRICA: THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY AND ITS PROTOCOL ON FINANCE AND INVESTMENT

The economic output of Sub-Saharan Africa has been expanding at nearly twice the global rate.[1] This high level of growth makes the region a magnet for foreign investment, particularly with respect to infrastructure investments, energy production, and mining. The largest downside risks for foreign investment in these countries are political risks. For foreign investors, those risks must be managed with international legal protections.

Typically, investors will structure their investment to take advantage of bilateral investment treaties ("BITs"). These treaties provide substantive protections for foreign investors, like the guarantee of fair and equitable treatment, national treatment, and protections from expropriation. And, to remove sensitive disputes from the local courts, these treaties generally include a compulsory arbitration clause for the settlement of disputes that arise between the state and a foreign investor of another signatory state. There are presently

1 *Africa Pulse*, vol. 7 (The World Bank), Apr. 2013, *available at* http://www.worldbank.org/content/dam/Worldbank/document/Africa/Report/Africas-Pulse-brochure_Vol7.pdf.

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240 BITs in force between the 15 states of Southern Africa[2] and other states.[3]

For investors in the 15 states of Southern Africa, however, BITs are not the only source of international legal protection. Virtually all of these countries are members of the South African Development Community (the "SADC"). This regional entity principally aims to foster economic development and integration among the constituent states, but it is not merely concerned with stimulating intra-Community investment; the treaty governing the Community has provisions to stimulate inbound *foreign* investment as well. The SADC Protocol on Finance and Investment (the "Protocol"), which entered into force on April 16, 2010, contains international protections for foreign investors in the SADC that resemble those typically contained in BITs.[4] Most importantly, the Protocol provides foreign investors the ability to initiate binding international arbitration proceedings directly against member states, which may result in enforceable damages awards. Although arbitration proceedings have been invoked only sparingly in the three and a half years since the Protocol came into force, investor–state arbitration is an important tool to manage the political risks inherent in making major investments in this emerging region.

Below we explain that the Protocol is an extraordinary departure from typical BITs or multilateral investment treaties, which generally contain precise definitions of investors by reference to their nationality or place of incorporation or corporate seat. Unlike most (if not all) BITs, the Protocol allows affected investors in an SADC country, from *any other state*, to bring investment claims for breaches of its prohibition on nationalization and guarantee of fair and equitable treatment. Under the Protocol, investors have the right to submit a claim to binding international arbitration for *disputes related to admitted investments*, where *local remedies have been exhausted*, and at least *six months have passed* since the SADC member state was notified of the claim. As detailed below, recent political events have essentially reduced the choice of arbitral fora for such binding arbitration, under the Protocol, to ICSID and *ad hoc* arbitration under the UNCITRAL Arbitration Rules. Even then, if the host state resists ICSID arbitration, the investor must resort to *ad hoc* UNCITRAL arbitration.

Despite containing notable drawbacks, the Protocol thus provides important protections to foreign investors in SADC member states: It prohibits the nationalization of property or investments and guarantees fair and equitable treatment; it allows foreign investors to elevate their disputes with member states to the international plane and initiate arbitration under the ICSID or UNCITRAL Rules; and, crucially, it broadly provides these protections to *all* foreign investors, regardless of their nationality.

THE SADC TREATY

The SADC was established by treaty on August 17, 1992.[5] Article 4 outlines the basic principles of the Community and its member states, such as adherence to the "rule of law" and commitment to the "peaceful settlement of disputes." To meet these objectives, the treaty established a series of institutional mechanisms, including a permanent tribunal "to ensure adherence to and the proper interpretation of the provisions of [the] Treaty and subsidiary instruments and to adjudicate upon such disputes."[6] The treaty also stipulated that

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2 The countries comprising this region of "Southern Africa" are Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

3 For a complete list of BITs in force, *see* United Nations Conference on Trade and Development (UNCTAD), *Country-specific Lists of Bilateral Investment Treaties*, *available at* http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/Country-specific-Lists-of-BITs.aspx. It must be noted that over the past three years, South Africa undertook a review of its BITs and decided to refrain from entering into further BITs without a compelling political or economic reason, and to terminate existing BITs with the possibility to renegotiate on a new model. *See* Xavier Carim, "Lessons from South Africa's BITs Review," *Columbia FDI Perspectives*, No. 109, Nov. 25, 2013, *available at* http://www.vcc.columbia.edu/content/lessons-south-africa-s-bits-review. South Africa may terminate the BITs in force, but investments and instruments acquired prior to termination date will still be protected for a period of 10 to 15 years from that date, depending on the termination clause in a respective BIT agreement.

4 *See* "SADC Protocol on Finance and Investment," Aug. 18, 2006, *available at* http://www.sadc.int/documents-publications/show/1009. The Protocol was signed by the heads of state or government of the following states on August 18, 2006: Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

5 Declaration and Treaty of SADC, Feb. 28, 1998, *available at* http://www.sadc.int/documents-publications/show/Declaration___Treaty__of__SADC.pdf.

6 *Id.* art. 16.

the member states would sign various protocols necessary for "co-operation, which shall spell out the objectives and scope of, and institutional mechanisms for, co-operation and integration." One of these is the Protocol, which is designed to foster regional development and integration in the area of finance and investment.

COVERED INVESTMENTS UNDER THE PROTOCOL

The general objective of the Protocol is established in Article 3: "State Parties shall co-ordinate their investment regimes and cooperate to create *a favourable investment climate within the Region* as set out in Annex 1." The scope and substantive protections contained in Annex 1 resemble equivalent provisions often included in BITs, with a few important exceptions.

By way of an example, the definitions for "investor" and "investment" are less clearly defined than in typical BITs. In some ways, this renders the Protocol's application murky and potentially problematic, but in other ways it evinces legal protections that are purposefully broad. "Investment" is defined broadly as "the purchase, acquisition or establishment of productive and portfolio investment assets," including (but not limited to) moveable and immovable property, shares and stocks in companies, claims to money, specific performance, intellectual property, and conferred rights under law or contract (licensed rights).[7] The only limitation on covered "investor[s]" is that it must be "a person [legal or natural] that has been admitted to make or has made an investment."[8] Importantly, and unlike most (if not all) BITs, this definition does *not* limit protected investors to nationals or companies of the SADC member states. It is thus an extraordinary departure from typical BITs or multilateral investment treaties, which contain precise definitions of investors by reference to their nationality or place of incorporation or corporate seat.[9]

SUBSTANTIVE PROTECTIONS UNDER THE PROTOCOL

The main substantive protections are contained in Articles 5 and 6 of the Protocol, which respectively prohibit nationalization and guarantee fair and equitable treatment. Article 5 provides that "[i]nvestments shall not be nationalised or expropriated in the territory of any State Party except for a public purpose, under due process of law, on a non-discriminatory basis and subject to the payment of prompt, adequate and effective compensation." This roughly corresponds to the customary international law standard that member states may expropriate foreign property only if certain conditions are satisfied, notably the payment of fair compensation. Unlike typical BITs, however, Article 5 does not expressly cover "indirect expropriation" or measures "having effect equivalent to" or "tantamount to" nationalization.[10]

Article 6(1) more broadly promises "a favourable investment climate within the Region" by guaranteeing "fair and equitable treatment in the territory of any State Party." This provision offers the same guarantee as that found in modern BITs, in particular because Article 6(2) promises that the "fair and equitable treatment" standard applied to foreign investors under the Protocol "shall be no less favourable than that granted to investors of [a] third State."[11]

These substantive protections are qualified by Articles 7 and 14 of the Annex. Article 7 confirms that "State Parties may

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7 "SADC Protocol on Finance and Investment," *supra* note 4, annex 1 art. 1. The definition is qualified by an addition that allows any state party to exclude "short-term portfolio investments of a speculative nature or any sector sensitive to its development or which would have a negative effect on its economy," as long as the SADC Secretariat is notified that the state party has invoked this additional provision within three months (of the date of the Protocol).

8 *Id.*

9 *See*, e.g., "Treaty Between the Government of the United States of America and the Government of the People's Republic of the Congo Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Congo," art. 1, Aug. 12, 1994, S. TREATY DOC. NO. 102-1. *Available at* http://tcc.export.gov/Trade__Agreements/Bilateral__Investment__Treaties/index.asp ("(a) "company of a Party" means any kind of corporation, company, association, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned.").

10 *See*, e.g., "Treaty Between the United States of America and the Republic of Mozambique Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Mozam.," art. 3, Feb. 12, 1990, S. TREATY DOC. NO. 106-31. *Available at* http://tcc.export.gov/Trade__Agreements/Bilateral__Investment__Treaties/index.asp ("1. Neither party shall expropriate or nationalize a covered investment under the treaty either directly or indirectly through measures tantamount to expropriation or nationalization…").

11 Article 6(2) may be read as a Most-Favored Nation status clause.

in accordance with their respective domestic legislation grant preferential treatment to qualifying investments and investors in order to achieve national development objectives," and also that states "undertake to eventually harmonize their respective domestic policies and legislation within the spirit of non-discrimination as set out in Article 6." Article 14 states that "Nothing in this Annex shall be construed as preventing a State Party from exercising its right to regulate in the public interest and to adopt, maintain or enforce any measure that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns."

In another key departure from the typical international investment agreement, the Protocol includes provisions on investor conduct. Article 10 of the Annex imparts a "Corporate Responsibility" obligation on foreign investors to "abide by the laws, regulations, administrative guidelines and policies of the Host State." Article 13 also provides generally that member states recognize it is "inappropriate to encourage investment by relaxing domestic health, safety or environmental measures," and agree not to derogate from international obligations in this regard.

DISPUTE RESOLUTION UNDER THE PROTOCOL

Article 27 of the Protocol guarantees investors "the right of access to [local] courts, judicial and administrative tribunals, and other authorities competent under the laws of the Host State for redress of their grievances in relation to any matter concerning any investment."[12] Of course, such guarantees are rarely an effective remedy for investment disputes. The primary benefit of an investor–state arbitration is that it removes the dispute from the host state's domestic legal system, which may be biased against foreign investors, especially in cases challenging the conduct of the state itself. Furthermore, domestic courts often may not have the "legal expertise and experience to free themselves from the confines of their own domestic regimes so as to give proper attention and respect to international law."[13] This is precisely why investment treaty arbitration appeals to foreign investors who rightly may be concerned with the potential bias, inefficiency, or unfamiliarity of foreign courts.[14]

Likely for this reason, Article 28 entitles investors to refer disputes to binding international arbitration. According to that provision, "[d]isputes between an investor and a State Party concerning an obligation of the latter in relation to an admitted investment of the former, which have not been amicably settled, and after exhausting local remedies shall, after a period of six (6) months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes."[15] Thus investors have the right to submit a claim to arbitration for *disputes related to admitted investments*, where *local remedies have been exhausted*, and at least *six months have passed* since the SADC member state was notified of the claim.[16]

In terms of the available arbitration fora, Article 28(2) nominally gives the investor three options: (i) the SADC Tribunal; (ii) the International Centre for the Settlement of Investment Disputes ("ICSID") or the ICSID Additional Facility; or (iii) arbitration under the arbitration rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules"). Recent political events, however, have essentially reduced this choice of arbitral fora to ICSID and UNCITRAL. In May 2011, at an SADC Summit with heads of state and government,

12 By guaranteeing access to the local courts and administrative bodies, Article 27 is comparable to a prohibition of denial of justice for foreign investors.

13 Charles N. Brower & Lee A. Steven, *Who Then Should Judge?: Developing the International Rule of Law under NAFTA Chapter 11*, 2 Chi. J. Int'l L. 193, 196 (2001).

14 Andrea Kupfer Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations,* 20 Mich. J. Int'l L. 697, 717 (1998-1999).

15 SADC Protocol on Finance and Investment, *supra* note 4, Annex 1, art. 28.

16 Two terms related to these preconditions, "admitted investments" and "local remedies," are not clearly defined in the Treaty or the Protocol, which could present jurisdictional issues for foreign investors who want to institute an arbitral proceeding under the Protocol.

the SADC Tribunal was suspended.[17] In August 2012, another SADC Summit addressed the issue of the suspended SADC Tribunal and resolved that a new Tribunal should be negotiated and that its mandate should be confined to interpretation of the SADC treaty and protocols relating to disputes between member states. This would render the SADC Tribunal effectively useless as a tool for international investment arbitration.

Moreover, Article 28 allows states resisting arbitration to effectively limit the investor's choice of forum to only one option: an *ad hoc* arbitration under the UNCITRAL Rules. Article 28(3) provides that, in the absence of any agreement regarding the above listed fora within three months of the "notification of the claim," the parties are "bound to submit the dispute to arbitration under the [UNCITRAL] Arbitration Rules." Although Article 28(3) allows the parties to the dispute to "agree in writing to modify these Rules," it appears that an investor cannot select a forum other than UNCITRAL without the agreement of the respondent state.

A favorable award of damages under the ICSID or UNCITRAL rules may be enforceable against assets of the host state under the 1965 Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States[18] or the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[19]

CONCLUSION

Investing in SADC member states carries obvious risks. While it is best to draft contracts and agreements to take advantage of commercial arbitration options, existing BITs, and other multinational treaties in force, it is equally important to be aware of the overlapping protections and obligations provided by the SADC Protocol. Despite its drawbacks, the Protocol provides important protections to foreign investors in SADC member states: It prohibits the nationalization of property or investments and guarantees fair and equitable treatment for foreign investors; it allows foreign investors to elevate their disputes with member states to the international plane and initiate arbitration under the ICSID or UNCITRAL Rules; and it broadly provides these protections to all foreign investors, regardless of their nationality. Should a dispute arise with an SADC member state, the Protocol's available claims and remedies should be considered among the available options.

17 SADC Tribunal Homepage, http://www.sadc.int/about-sadc/sadc-institutions/tribun/. The suspension of the SADC Tribunal resulted from its first award against a member state in *Mike Campbell (Pvt) Ltd v. the Republic of Zimbabwe* (2/2007), [2008] SADCT 2, November 28, 2008, *available at* http://www.saflii.org/sa/cases/SADCT/2008/2.html. The award finding racial discrimination and unlawful land seizure against Zimbabwe was ignored by the state, which declared that the tribunal had no power and refused to recognize it as a legitimate body. *See* Sarah Hagar, *SADC Tribunal Struggles for Legitimacy*, Amnesty International, Sept. 3, 2009, *available at* http://blog.amnestyusa.org/justice/sadc-tribunal-struggles-for-legitimacy/. The fate of the SADC Tribunal is further illustrative of the legal instability of the region.

18 *See* "Convention on the Settlement of Investment Disputes Between States and Nationals of Other States," done at Washington D.C., Mar. 18, 1965. For status of current signatories, *see* ICSID, "List of Contracting States and Other Signatories of the Convention," *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main.

19 *See* "Convention on the Recognition and Enforcement of Foreign Arbitral Awards," done at New York, June 10, 1958. For status of current signatories, *see* United Nations Commission on International Trade Law website, UNCITRAL Texts and Status, International Commercial Arbitration & Conciliation, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

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