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Treaty Negotiations: African Countries Negotiate from a Point of Weakness

Rodwell Mupeta

Department of Law, Copperbelt University, Kitwe, Zambia
Email: mupeta2000@gmail.com

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Abstract

This paper analyzes the structural inequalities that constantly disadvantage African countries during international bilateral and multilateral negotiations. Moving beyond generic critiques of globalisation as has been observed by various scholars, this study deploys Dependency Theory and the political-economic forces driving state debt to identify three specific channels of exposure: historical path dependency, predatory legal mechanisms, and economic desperation. This paper will further examine three case studies, including the *piero foresti v. South Africa* investor, state dispute, Chad's resource-backed oil distress with Glencore, and the structural constraints of the African Continental Free Trade Area (AfCFTA), the paper demonstrates how sovereign agency is structurally compromised. Finally, the study presents a framework for cooperative trade diplomacy and systematic overhaul of existing treaties.

Keywords

Debt Asymmetry, Resource-Backed Loans, Multinational Cooperation

1. Introduction: The Fallacy of Sovereign Equality

Modern international jurisprudence relies on the myth of equal state sovereignty to legitimise itself, ignoring the reality that the world's legal and economic infrastructure is inherently lopsided and biased towards powerful states. African states consistently enter international negotiations burdened by historical dependencies and immediate macroeconomic pressures. Consequently, global frameworks governing trade integration, resource extraction, and foreign direct investment frequently codify structural asymmetries rather than fostering genuine, reciprocal cooperation.

2. Methodology and Case Selection

To examine the ways in which institutional frameworks and structural power im-

balance influence treaty negotiations, this paper uses qualitative approach. This paper does not review every negotiation of all vast treaties, this paper rather focuses on and traces specific institutional processes through three distinct case studies: private infrastructure financing, regional trade integration and investor-state-arbitration. These particular cases under study were chosen because they serve as vital junctions where international obligations collide with regulatory sovereignty, offering a broad representation of different geographic setups and economic sectors.

2.1. Theoretical Framework: Structuralism and Negotiating Leverage

In order to understand how African states are systematically disadvantaged, we must synthesize two core theoretical paradigms:

2.1.1. Dependency Theory

According to Walter Rodney and African underdevelopment, Europe's wealth and development we see today was financed by the extraction of African labour, resources and capital (Rodney, 1982). The author of this book shows how colonialism impoverished Africa as a result of colonial masters benefiting from its labour, resources and capital consequently leaving Africa lagging behind in terms of development. Africa has been relegated to the position of exporting raw materials to wealthy countries which are highly industrialised in return for importing expensive products from their own raw materials (Rodney, 1982).

2.1.2. The Political Economic of Debt Asymmetry

Building upon Cheryl Payer's foundational critiques and modern sovereign debt theory, a state's structural vulnerability increases in tandem with its immediate liquidity requirements (Payer, 1985). It is this vulnerability by the state which shortens its negotiating horizon ability whenever it faces its fiscal strain (Payer, 1985). In this case, a state will consider short-term capital inflows than prioritising long term sovereign strategies by granting external factors the leverage to extract sweeping legal concessions (Payer, 1985).

2.2. Case Studies in Structural Vulnerability: Case Study 1: The Regulatory Chilling Effect and the ISDS Trap

When there is a dispute between a state and an investor, the dispute will be dealt with using Bilateral Investment Treaties which have embedded clauses to deal with such disputes thereby bypassing or preventing domestic courts from adjudicating on such matters of internal interest. An investor will instead sue the sovereign state in international tribunals such as the International Centre for Settlement of Investment Disputes (ICSID).

In the case of *piero foresti v. South Africa* [2010], the South African government was sued by a group of investors from Italy and by a company called Finstone from Luxemburg. The dispute was in relation with the *Minerals and Petroleum*

Resources Development Act (*No.*8 *of* 2002), which required investors to give 26% equity ownership to Black South Africans to compensate inequalities that were orchestrated against them during apartheid-era. The investors claimed that there was "unlawful expropriation" as enshrined in the then *Italy-South Africa BIT* (1997) which was terminated on 16 March 2019 and the *Belgo-Luxemburg-South Africa BIT* (1998) which was terminated on 13 March 2013, in which both BITs were provisions for promotion and protection of investments from expropriation.

2.2.1. The Investors' Allegation

The dispute was initiated by investors from Italy and Luxemburg in 2007 who had a granite mining operation in South Africa. The investors who were claimants in this dispute, challenged the introduction of the Mineral and Petroleum Resource Development Act (MPRDA) and its associated mining Charter. The aim of the MPRDA was designed to remedy historical, apartheid-era systemic inequalities by divestment of a 26% equity to Black South Africans who suffered during the apartheid-era. The investors argued that this requirement amounted to unlawful expropriation of their mineral rights and shares, which violated the Fair and Equitable Treatment (FET) provisions embedded in South Africa's Bilateral Investment Treaties (BITs) (Jus Mundi, 2010).

2.2.2. The Tribunal's Procedural Disposition

In this dispute, there is something important worth noting, the ICSID Tribunal did not rule on the merits of the case. Meaning, the tribunal did not issue a judgment declaring the MPRDA or the Black Economic Empowerment (BEE) to be in violation of the international law (Jus Mundi, 2010). Instead, the dispute or case was discontinued by the claimant-Italian and Luxemburg investors. The parties entered into an out-of-court settlement Agreement in which the claimants agreed to a 5% equity transfer and payment of legal costs to South Africa (Jus Mundi, 2010).

2.2.3. Documented and Regulatory Responses

The *Foresti* litigation did not invalidate South Africa's legislative framework, instead it served as an example of a systemic regulatory overhaul rather than a localised regulatory chill. The state did not repeal or rescind the MPRDA; however, the exposure to a US$ 375 Million claim prompted a deep re-evaluation of its international investment architecture (ISDS, 2021).

- The *For*esti case acted as a catalyst which compelled the South African government to initiate a comprehensive review of first-generation BITs.
- Termination of bulk BITs with European nations.
- Rather than allowing international tribunals to govern investor protection, South Africa shifted to a domestic legislative framework which culminated in the passing of the Protection of Investment Act 2015, which aligned foreign investor protection with the Constitution of South Africa. While this case was settled without much costs or liabilities on Pretoria, it shows the predatory na-

ture of BITs with regards to the tribunals' willingness to adjudicate on the domestic civil rights legislation of a sovereign nation. This shows that the BITs in international commercial arbitration cannot be used to override Post-colonial injustices that were committed by colonisers in Africa.

3. Case Study 2: The Resource-Backed Loan (RBL) Trap and Private Commodity Traders

Countries which have poor liquidity but are resource-rich, turn to Resource-Backed Loans (RBL) or Resource-for-infrastructure Agreements in order to access capital from banks or private commodity traders (Guzura, 2025). In these agreements, African countries are disadvantaged because they pledge future yields of crude oil or unmined minerals as collateral for the capital obtained from rich banks (African Sovereign Debt Justice Network, 2024). According to the African Sovereign Debt Justice Network (2024), South Sudan had pledged its oil as collateral for 20 years as repayment to a UAE firm for the sum of US$12.9 Billion, a trend which was also spotted in Democratic Republic of Congo (DRC) and Angola (African Sovereign Debt Justice Network, 2024). Apart from pledging natural resources as collateral for Resource-Backed Loans, commodity traders negotiate lower prices of future crude oil as compared to the value fetched at international markets (African Sovereign Debt Justice Network, 2024). In other ways, poor African countries give commodity traders discounts when dealing with Resource-Backed Loans.

In the case *Chad v. Glencore*, the Chadian government was desperate to look for capital that could be used to finance its domestic expenditure and also acquire a stake in an oil project. As a result, the government of Chad entered into an agreement with Glencore, a private commodity trader to facilitate and grant a loan of US$ 1.4 Billion to the Chadian government, placing its future crude oil as collateral (Sheppard, 2018). However, after entering into an agreement, crude oil prices dropped drastically.

The loan terms were inherently rigid and asymmetric, hence, dropping of crude prices required that Chad's daily oil production be used to service the interest and principal of the Glencore debt at the expense of building Chad's national treasury (Sheppard, 2018). Efforts to cancel debt in the 2022 agreement failed because Glencore, the commodity trader, indicated that Chad did not need a debt relief when crude oil prices went up! (Bretton Woods Project, 2022). Glencore which held a huge portion of the oil-backed commercial debt, resisted any nominal write-down or "haircut" on the principal balance, instead, the tribunal of creditors opted for debt restructuring (Bretton Woods Project, 2022). Glencore Plc holds approximately one-third of US$ 3 billion of the total debt owed to its creditors (Bretton Woods Project, 2022).

3.1. Institutional and Technical Expertise Deficits

Usually, African countries lack capacity in terms of institutional and technical ex-

pertise when entering into Bilateral and Multilateral Agreements.

3.2. Disproportional Legal Representation

During negotiations of complex concessions with multinational entities, our friends (MNCs) field in legal representatives who are specialised in corporate or international law (Rinwigati, 2019). Conversely, state legal departments lack capacity to handle transactions of this nature either due to being understaffed or handling too many domestic litigations alongside complex transactional litigations (Rinwigati, 2019).

3.3. Information Asymmetry

Africa is endowed with natural resources such as oil and minerals. It is for this reason that developed countries conduct geographical and geological surveys in Africa primarily to assess what natural resources are available, plan for infrastructure and scientific or diplomatic cooperation (Arhin & Behuria, 2025).

Foreign countries routinely conduct geographical surveys and algorithmic pricing models, while African negotiators work on incomplete data regarding the commercial value of minerals or assets, they are licensing thereby creating a fundamental imbalance during concession agreements (United States Geological Survey, n.d.).

Multinational corporations leverage proprietary algorithmic modelling to stimulate thousands of fiscal scenarios, creating a stark analytical imbalance during state negotiations (Stiglitz, 2007). While host governments rely on static, historical commodity price averages to determine asset value, foreign investors utilize dynamic, risk-adjusted net present value (NPV) projections.

This digital divide significantly compromises the equity of bilateral treaties. Research conducted by Bos and Gupta (2018) indicates that when host nations lack the capacity to independently evaluate intricate financial forecast or model fluctuating tax impacts, they systematically underestimate their own bargaining positions. Unable to audit sophisticated corporate algorithms, government officials frequently concede to excessive tax incentives, sweeping stabilisation clauses, and binding international arbitration because they perceive the project risks to be artificially high. Consequently, the core challenge stems not from lack of geographical information, but from a profound institutional deficit in the digital and financial capabilities needed to convert that data into sovereign negotiating power.

4. Structural Realities of the AfCFTA

The launch of the African Continental Trade Area (AfCTA) came as a tool for continental collective bargaining though the AfCTA came with its own challenges. The key challenges include:

4.1. The Customs Union Deficit

Unlike the milestone achieved by the European Union, the AfCFTA only function as a free trade area. It does not function as a complete customs union. The AfCFTA

Secretariat cannot negotiate external trade pacts on behalf of its members-54 states because it lacks the mandate to do so.

4.2. Bilateral Fragmentation

Members of the AfCFTA are vulnerable when it comes to trade pact negotiations because they do not enter such negotiations tables as a team but as individuals. Hence, developed countries like the United States of America, China and the European Union circumvent the continental bloc and opt to enter into individual agreements with AfCFTA members.

4.3. The Legal Mechanism and Authorisation for Treaty Negotiations

In order to act as a unified bargaining bloc with external global powers or foreign countries such as the United States of America, China, or the European Union, the AfCFTA requires an explicit mandate and external competence delegated by its Member States (Woolffrey, 2021).

- *The Enabling Legal Instrument*: Member states are required to either implement a new Protocol to the AfCFTA Agreement or officially revise Article 19 regarding Associated Agreements. This legal mechanism must clearly specify that authority over designated sectors such as international investment, e-commerce, or preferential trade-transfers from individual national governments to the continental bloc.
- *The Nature of the Mandate* (*Exclusive vs. shared*): Member states must decide whether to grant the AfCFTA Secretariate exclusive competence (Meaning Member states cannot legally sign BITs as individuals and make trade deals with external partners) or shared competence (where individual members can act only if the bloc chooses not to). Here, the best option is to choose exclusive competence if the desired goals are to be achieved.
- *The Authorisation Process*:

1) Proposal: The AfCFTA Secretariate or Council of Ministers drafts a negotiating framework.

2) Authorisation: The AfCFTA Assembly of Heads of State and government, must issue a formal, binding decision authorising the Secretariate to open external negotiations.

3) Ratification: Once a collective external treaty is negotiated by the bloc, it does not automatically bind the continent. It must flow back down to individual Member states for national ratification in accordance with their respective constitutional requirements before entering into force.

5. Conclusion and Recommendations

African states must work together to move from a position of inherent weakness to one of equal negotiating strength (International Security Conference on Africa, 2026).

African states should revisit all older and outdated investment agreements which give foreign investors powers to sue host states whenever there are grievances with regards to use of natural resources and replace them with unified regional rules like the AfCFTA Protocol on Investment.

There should be an Institutional Pool of Legal Experts and Economists who should be available to advise delegates during complex negotiations. This can be achieved by establishing a well-resourced permanent body of experts.

Structuring the AfCFTA legal framework to mandate collective external negotiations, thereby legally constraining foreign investors to bloc-to-bloc engagement regarding critical transition minerals.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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Appendix

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