Investment Arbitration in the African Continent

Fernando Aguilar de Carvalho
Litigation and International Arbitration

Victoria García Verón
Litigation and International Arbitration

The African continent has experienced steady growth in foreign direct investment ('FDI') over the last decade. According to data from the IMF and United Nations ('UN'), the influx of global FDI projects has grown steadily since 2000 and reached its peak in 2015, at USD 46.281 billion. According to the UN Economic Commission for Africa, of the 15 fastest-growing economies in the world, 10 are in Africa. The economic growth of the continent has averaged 4 to 6 percent over the last decade.

Increasing foreign investment and trade in Africa has inevitably resulted in a correlative increase in international disputes involving African parties. In 2017, the number of International Chamber of Commerce ('ICC') arbitrations (87) and the number of parties (153) from Sub-Saharan Africa reached peak figures, representing a growth rate of 35.9 percent for cases and 40.4 percent for parties as compared with 2016. The number of arbitrators from African nations in ICC cases also rose. The perceived need for and increasing importance of alternative dispute resolution in the continent also prompted the International Court of Arbitration of the ICC to establish, on 19 July 2018, a dedicated Africa Commission.

Foreign investment is found predominantly in the traditional industries related to natural resources and infrastructure, although there has also been a sharp increase in Chinese private-sector investment, particularly in manufacturing. Given the prevalence of government-owned major projects in Africa, the availability of investment arbitration as an avenue for dispute resolution has become decisive in determining where to allocate investments in the continent.

Investment arbitration allows a foreign investor to seek remedies against a state for breaches of protections granted under a bilateral or multilateral treaty; it is particularly relevant in cases of unlawful state interference. Although the situation of arbitration varies for each African state, a number of trends that are relevant for dispute resolution can be observed across the region.

To a significant extent, legal systems throughout the African continent are based on either common law or the codified civil law systems of former colonial powers. Islamic law and customary law can also be very influential in some jurisdictions. The recognition that legal balkanization and judicial insecurity were key impediments to the economic development of the continent has given rise to projects for the creation of transnational laws. That is the mission of the Organization for the Harmonization of Business Law in Africa ('OHADA'), which aims to unify the various legal frameworks in order to guarantee cross-border legal and judicial certainty to investors.

As from the entry into force of the OHADA Treaty in September of 1995, the activities of the organization, with the support of its 17 Member States and international partners, has resulted in a production of common rules governing various areas of business life in Member States, such as general commercial law, securities law, cooperative societies law, contracts of carriage of goods by road, organization and harmonization

Dispute settlement provisions in the BITs in force have brought Africa into an increasing number of cases involving private investors

of business accounting, arbitration law, insolvency law, simplified recovery procedures and measures of execution, and the law of commercial companies and economic interest groups.

In the context of investor-state disputes, investors have faced difficulties when (i) bringing claims and (ii) attempting to enforce awards against African States rendered under either the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention') or the Arbitration Rules of the United Nations Commission on International Trade Law ('UNCITRAL Rules').

In terms of ICSID arbitration, as of the date of this article, there are 153 states that have ratified the ICSID Convention, including the vast majority of African countries except South Africa, Libya, Eritrea, and Equatorial Guinea. Other African states, such as Guinea-Bissau, Ethiopia, and Namibia, have signed the ICSID Convention but not ratified it.

Article 25(1) of the ICSID Convention states that its jurisdiction extends to any legal dispute arising directly out of an investment between a contracting state, or any constituent subdivision or agency of a contracting state, and a national of another contracting state, if the parties to the dispute consent, in writing, to submit to the ICSID Centre. Thus, the fact that several African states have ratified the ICSID Convention does not suffice to initiate an ICSID arbitration. In addition, the parties to the dispute must have consented to submit it to ICSID arbitration.

Furthermore, as it is widely recognized, the ICSID Convention does not provide for any substantive standards of protection for foreign investors (and, in fact, neither do the UNCITRAL Rules), which is the role of bilateral investment treaties ('BITs') and other investment agreements. BITs grant foreign investors substantive protections, including the right to sue foreign governments if they can establish that they are nationals of a contracting state and have an investment in the territory of another contracting state.

Yet, although African states have to date entered into more than 850 BITs, a significant number have not entered into force, mainly due to a failure to complete the ratification process. Breaking down the existing African BITs (those where one of the parties is African) on the basis of the nationality of the counterparty, there is a substantial difference between the BITs signed with a non-African counterparty and those signed with an African one. Around 157 BITs are intra-African and 696 are signed with the rest of the world. Of the 696 BITs signed between an African and a non-African state, roughly one third are not in force; in turn, of the 157 BITs signed between two African states, more than two thirds are not in force.

Furthermore, there are relatively few BITs currently binding on African states that give consent to international arbitration. Thus, investors of many nationalities have no possibility of initiating investor-state arbitrations against multiple African host states as there is no BIT giving consent to arbitral jurisdiction. Nonetheless, dispute settlement provisions in the BITs in force have brought Africa into an increasing number of cases involving private investors. A study of 111 publicly-known cases involving an African state between 1972 and 2014 shows that among the 68 concluded cases, an award has been rendered in 36 cases, the arbitration has settled in 20 others, and in the remaining 12 the case has been discontinued. ICSID has dealt with—or is dealing with—a vast majority of the cases (107) and tribunals established under the UNCITRAL Rules are only handling a handful (3).[1] Other rules African parties resort to include the arbitration rules of the Unified Agreement for the Investment of Arab Capital in the Arab States and other venues include the Southern African Development Community Tribunal and the OHADA Arbitration Centre.

An alternative, popular choice for international investors in Africa is the Dubai International Finance Centre. One of the key attractions of Dubai for parties contracting in Africa is the availability of enforcement under the Riyadh Arab Agreement for Judicial Cooperation ('RAAJC'), as eight out of the 20 RAAJC member states are African countries. These countries are Algeria, Djibouti, Lybia, Mauritania, Morocco, Somalia, Sudan, and Tunisia.

Compared with states elsewhere in the world, enforcing awards against African states may involve specific hurdles such as the defence of sovereign immunity from execution. This defence is expressly preserved in Article 55 of the ICSID Convention, despite its strong provisions on recognition and enforcement of awards in Article 54. In addition, 38 African states are parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), including Angola since last year.[2] Again, however, although the New York Convention is widely regarded as an effective tool for purposes of recognition and enforcement of arbitral awards, it does not prevent states from invoking their immunity from execution whenever applicable.

Regardless of these hurdles, African states are aware that foreign investors require legal protection and understand that effective protection mechanisms may be an important factor to attract foreign investment. Thus, the road ahead for investment arbitration in Africa appears promising. Indeed, it has become increasingly important to keep an eye on investment arbitration in Africa as the world's economy continues to interlink and treaties promoting international investment are found with increasing frequency on the agendas of African leaders.

1 United Nations Economic Commission for Africa, "Investment Policies and Bilateral Investment Treaties in Africa" (Addis Ababa, 2016), page 24.

2 See Issue 2 (2018) of the Investment Arbitration Outlook. See online at http://fr.zone-secure.net/18320/473892/#page=10

New Leadership in the Asian Trade and Investment Space

As the United States ('U.S.') is in the process of withdrawing from or renegotiating trade deals providing for investor-state dispute settlement ('ISDS') provisions—such as the Transatlantic Trade and Investment Partnership, the Trans-Pacific Partnership Agreement ('TPP') and even the North American Trade Agreement ('NAFTA')—other nations are moving to fill the leadership vacuum.

On 17 July 2017, Shinzo Abe, Japan's Prime Minister, signed the Economic Partnership Agreement ('EPA'), a free trade deal between Japan and the European Union that effectively creates the largest economic area in the globe, about a third of global GDP.

An early display of leadership by Japan came after the the U.S. withdrew from the TPP—a regional trade and investment agreement signed on 5 October 2015 by twelve Pacific Rim nations—just after taking office in January 2017, as it spearheaded the signing of another similar deal between itself and the remaining ten original TPP nations. The deal is now called the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ('CPTPP'). Ratification, which is more straightforward than under the TPP (it only requires notification of completion of the applicable domestic legal procedures by six signatory parties), is expected in 2019.

Despite rumours that the new text has lost relevance, the CPTPP has maintained most of the original TPP language. Two thirds of CPTPP's 30 chapters remain untouched. Modifications have been made by using the original TPP as a base and suspending certain provisions, which at the same time may be reinstated at a later date. The suspended provisions need not be implemented domestically at this point for the CPTPP to come into force.

Chapter 9 of the CPTPP still contains ISDS provisions, which allow foreign investors to pursue remedies against a CPTPP state for breaches of investment provisions and limited aspects of Chapter 11 on financial services. Yet the CPTPP also still safeguards states' ability to regulate in the public interest in areas such as health, labour rights, and the environment. The CPTPP confirms that (i) government action that is inconsistent with an investor's expectations, or (ii) government decisions not to issue/ renew subsidies or grants, will not in and of themselves lead to a breach of the investment protection standards.

As compared to the TPP, one relevant modification to Chapter 9 of the CPTPP consists of removing from the definition of investment the terms '*investment agreement*' and '*investment authorisation*'. However, these concepts represent only a small portion of the types of investment that are covered under the CPTPP. The remaining modifications consist of removing the references to the two eliminated terms throughout the chapter.

Nonetheless, it is true that ISDS under the CPTPP has lost some of its scope in terms of the countries covered. For example, New Zealand signed reciprocal side letters with Australia, Brunei Darussalam, Malaysia, Peru, and Vietnam, with the effect that compulsory ISDS will not apply between New Zealand and these countries.

URÍA MENÉNDEZ

One relevant modification to Chapter 9 of the CPTPP consists of removing from the definition of investment the terms '*investment agreement*' and '*investment authorisation*'

On a different note, Japan is also spearheading, together with China, the effort to conclude the Regional Comprehensive Economic Partnership ('RCEP'), another mega-regional economic agreement under negotiation since 2013. RCEP parties include, aside from China and Japan, the ten Member States of the Association of South-East Asian Nations ('ASEAN') and South Korea, India, New Zealand and Australia. All six non-ASEAN signatory parties have existing trade agreements with ASEAN. The 16 RCEP members account for just under a third of global GDP and half of the world's population.

The 23rd round of negotiations for the RCEP were held in Bangkok between 17 and 27 July 2017. At the time of writing, we are unable to report on the result of the negotiations. However, since past negotiations have been confidential, and despite the understanding that the agreement would cover, among others, investment and ISDS, not much information is likely to become public.

A third trade and investment initiative in the region is the Free Trade Area of the Asia-Pacific ('FTAAP'), composed of 21 Pacific Rim states that are part of the Asia-Pacific Economic Cooperation ('APEC'). Yet another mega-trade agreement effort initiated by the U.S. at an APEC Meeting in Vietnam in 2006, it has since received continued support by states involved in the initiative. However, perhaps due to the TPP and RCEP efforts, the FTAAP never took shape. Now, in the midst of America's apparent loss of interest in promoting trade and investment agreements, the FTAAP may become an opportunity, perhaps for both China and Japan, to unify at least some of the initiatives in this field, possibly reigniting U.S. interest. Some have suggested that a future FTAAP could even subsume the RCEP and the CPTPP.