

Djibouti Signs the ICSID Convention: The Big Question is Why?

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On April 12, 2019, the Republic of Djibouti (“Djibouti”) signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention” or “Convention”). To date, the Convention has been signed by 163 countries and ratified by 154 countries.

Why is Djibouti signing the ICSID Convention at a time when a good number of countries are reevaluating their participation in the investor-State dispute settlement (ISDS) system and a few have actually denounced the ICSID Convention?^[fn] For example, see ICSID News Release, “Bolivia Submits a Notice under Article 71 of the ICSID Convention,” (May 16, 2007), available [here](#). See also, Sullivan & Cromwell LLP., *Venezuela Withdraws From ICSID*, January 27, 2012, available [here](#).^[/fn] There are two plausible explanations for Djibouti’s recent move. On its face, Djibouti’s decision to sign the ICSID Convention may simply be part of a broader strategy to create a more enabling business environment in the country. However, Djibouti’s decision to sign the ICSID Convention may be connected with the country’s on-going legal battles with DP World, a Dubai-based and Dubai-government controlled global port operator. These battles are playing out in the London Court of International Arbitration (“LCIA”) and in the court rooms of a few other jurisdictions around the world. These two explanations are elaborated on in this post in turn.

As noted, joining the ICSID may simply be part of on-going efforts by the Government of Djibouti to foster a more conducive business environment in the country. It is not hard to understand why the Government of Djibouti might be trying to create a more enabling business environment in Djibouti. Djibouti ranks 99 out of 190 on the World Bank Group's *Doing Business 2019*^[fn]World Bank Group, *Doing Business 2019* (2019), available here^[fn], and is one of the most improved economy in Africa having moved up 55 places from 154 in 2018 to 99 in 2019. However, on the "Enforcing Contract" benchmark, Djibouti ranks a very dismal 140 out of 190; hence, the need for continued reform efforts.

"Joining ICSID is part of a series of actions that the government of Djibouti has undertaken to transform the business and investment environment in Djibouti, create employment opportunities for youth and women, and to boost economic growth in the country", Mr. Ilyas Moussa Dawaleh, Djibouti's Minister of Economy and Finance is quoted as saying.^[fn]ICSID, ICSID News Release: *Djibouti Signs the ICSID Convention*, April 11, 2019.^[fn] "Today's signature of the ICSID Convention underscores Djibouti's commitment to creating an environment in which private investment serves as a catalyst for growth and job creation", Meg Kinnear, ICSID Secretary-General said during the signing ceremony.^[fn]ICSID, ICSID News Release: *Djibouti Signs the ICSID Convention*, April 11, 2019.^[fn]

Quite apart from the desire to create a more enabling business environment in Djibouti, the decision to sign the ICSID Convention may be related to on-going legal battles over who gets to control Djibouti's port terminals. The legal battles pits **DP World** against the Government of Djibouti, Port de Djibouti SA (Djibouti's state-owned port company), Doraleh Container Terminal SA (a joint venture company in which Djibouti and DP World held shares), and even a Chinese conglomerate (China Merchants Port Holdings Company Ltd of Hong Kong). The battles stem from a concession agreement between DP World and the Djibouti government. When in February 2018, the Government of Djibouti seized control of the Doraleh Container Terminal SA, DP World filed claims with the **LCIA**. On 31 July 2018, an arbitral tribunal ruled that Djibouti could not terminate **DP World's** Doraleh Container Terminal's concession agreement. In April 2019, a London court ordered Djibouti to pay approximately \$530 million in compensation and unpaid royalties. Significantly, Djibouti refused to participate in the arbitral process and was not represented in the case.^[fn]*Press Release: Djibouti Does Not Recognize The Arbitral Award Rendered By The London International Arbitral Court*, August 3,

2018.[/fn] Djibouti also refused to recognize the arbitral award which, according to the Government, “consists in qualifying the law of a sovereign State as illegal.”[fn]“London court rules DP World Djibouti contract ‘valid and binding’ – Dubai government”, Reuters, Aug. 2, 2018.[/fn] “We are not concerned by what the London Arbitral Tribunal has said, we have never lodged a complaint with this court and the judgement it has rendered does not concern us”, Aboubaker Omar Hadi, the Chairman of Djibouti Ports and Free Zones is quoted as saying.[fn]“London court rules DP World Djibouti contract ‘valid and binding’ – Dubai government,” Reuters, Aug. 2, 2018.[/fn]

Ignoring a decision of an arbitral tribunal can be risky business for any but especially small developing country in dire need for foreign capital and keen to attract foreign investors. Such a move inevitably raises questions about the quality of a country’s regulatory environment. Already the Dubai Government and DP World are calling attention to regulatory climate in Djibouti. “DP World will continue to pursue all legal means to defend its rights as a shareholder and concessionaire in Doraleh Container Terminal in the face of Djibouti’s blatant disregard for the rule of law and respect for commercial contracts”, the Government of Dubai said in August 2018 after an LCIA tribunal ruled in favor of DP World. “Investors across the world must think twice about investing in Djibouti and reassess any agreements they may have with a government that has no respect for legal agreements and changes them at will without agreement or consent”, a DP World spokesperson said in a press release in 2018. Given its legal battles with DP World, the Government of Djibouti may see joining the ICSID as a way to reassure foreign investors that Djibouti is still open for business even while it continues to defy the decisions of LCIA tribunals; an interesting strategy to say the least.

Djibouti’s recent moves, on the one hand choosing to ignore the decisions of LCIA tribunals and on the other hand signing the ICSID Convention, underscores the love-hate relationship between many African States and the ISDS system.[fn]See generally, Uche Ewelukwa Ofodile, *Africa and the System of Investor-State Dispute Settlement: To Reject or Not to Reject?*, *Transnational Dispute Management*, Vol. 1 (2014).[/fn] Although many countries in the region have expressed dissatisfaction with the ISDS system, very few have adopted a coherent and consistent response to perceived problems in the system. What is more, very few are taking reasonable steps to limit exposure to the system and only a handful are engaged in on-going

discussions regarding the future of the ISDS system and possible pathways for reform.^[fn]See also, Uche Ewelukwa Ofodile, *Africa and International Arbitration: From Accommodation and Acceptance to Active Engagement in Dealing with Diversity in International Arbitration* (L. Barrington, and R. Rana eds.; *Transnational Dispute Management* (2015)).^[/fn] If and when Djibouti ratifies the Convention, it will become the forty-sixth country in Africa to do so. The last African country to sign and ratify the Convention was South Sudan in 2012.

By signing the ICSID Convention, Djibouti joins three other countries in Africa that have signed but not ratified the treaty: Ethiopia, Guinea Bissau, and Namibia.