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Is Africa Finally Confronting Its Challenges On Investment Treaty Arbitration?

Rukia Baruti (Africa International Legal Awareness (AILA)) · Friday, November 4th, 2011

Challenges are opportunities in disguise. Despite the global economic slowdown which has significantly affected developed economies, Africa, particularly Sub-Saharan Africa, has apparently shown good signs of economic expansion. According to the International Monetary Fund World Economic Outlook of September 2011, the region's economy is expected to expand by up to 5¾ per cent in 2012 owing to its use of macroeconomic policies. This has in turn increased the volume of foreign direct investment (FDI) inflows. With the increase of FDI, it is inevitable that disputes will arise. It is therefore an opportune time for the region to return to its long-standing responsibilities for developing expertise and building capacity in investment treaty law and arbitration. The obvious challenges that Africa faces in this respect include the provision of extensive training to enhance capacity, adoption of modern arbitration legislation, existence of arbitration-friendly courts, and the establishment of local arbitral institutions.

African countries, like most developing countries, have always considered FDI to be an important part of their development strategy, and international investment agreements, mostly bilateral investment treaties (BITs) with a developed country have been seen as an important means for African countries to signal their economic stability in order to attract foreign investors. However, African countries have needed to appreciate the consequences of concluding a BIT beyond the realisation of an economic objective, by prioritising capacity building and legal expertise in investment treaty law and arbitration.

There are currently over 2500 BITs worldwide, making it the most popular form of international agreement for attracting and protecting FDI. Approximately 400 of these are concluded between an African country and a developed country. With the increase in FDI, the number of BITs concluded by African countries will continue to rise.

Regrettably, a common feature of the earlier BIT model was the extremely broad and imprecise provisions, which resulted in conflicting interpretations. Over time, states have been renegotiating and entering into a newer BIT model in which we see the use of clearer language and more precise terms in provisions.

However, most countries that are parties to the newer BIT model are also still parties to a number of the older model, thereby increasing the risk of conflicting interpretations. Arbitral tribunals (mostly from developed countries) continue to interpret and apply the disputed provisions. In doing this, they are contributing to the development of investment treaty law.

Investment treaty law is a complex area with multiple sources and is in a constant state of evolution. Due to its specialised nature, expertise in this field has generally been limited to a small group of lawyers and arbitrators, based mainly in Europe and the United State. African states have usually relied on foreign lawyers to mount an effective defence to investment treaty claims.

The lack of expertise in this area is due to the fact that local law firms in Africa do not have access to sources of legal authority or the breadth of exposure to investment treaty arbitration cases and professional contacts that their western counterparts have. Apart from the occasional training seminars organised for developing countries by organisations such as UNCTAD, training in this area barely exists in Africa, and resources to invest in extensive training abroad remain scarce.

While the adoption of modern arbitration legislation based on the UNCITRAL Model Law across Africa has increased over the years, only six African states in Sub-Saharan Africa have adopted laws based on the UNCITRAL Model Law. The majority of African states have signed and ratified both the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention).

In November 2008, Mauritius passed a new International Arbitration Act based on the UNCITRAL Model Law, and has a specific focus on investment arbitration. Similarly, in 2010 Nigeria reviewed its Arbitration and Conciliation Act of 2004 (ACA) in a move to become a more arbitration friendly venue. Although the ACA is not based on the UNCITRAL Model Law, the arbitration rules attached to it are. Under its National Investment Promotion Act, any foreign investor who registers under the ACA is automatically entitled to bring treaty arbitration under the ICSID.

Whereas South Africa is the richest state in Sub-Saharan Africa, it is not considered to be arbitration-friendly. It is yet to implement recommendations made in 1998 by the South African Law Commission for the application of the UNICITRAL Model Law. South Africa is also not a party to the ICSID Convention, although it has ratified the New York Convention.

As far as arbitration-friendly courts are concerned, Nigerian courts have made an increasing contribution to the development of arbitration in the region. Cases such as the M.V. Lupex v. N.O.C. (2003) 15 NWLR (Part 844) 469 in which the Supreme Court held that it was an abuse of court process for the respondent to institute fresh proceedings in Nigeria while arbitration proceedings where pending in London, demonstrate support for arbitration by the Nigerian courts.

Equally, the adoption of the Mauritius International Arbitration Act is designed to ensure that local courts are supportive of arbitration, as the Act includes specific provisions for the robust and swift determination of interlocutory issues. The Act also has provisions that support the doctrine of competence-competence in order to avoid the need for local courts to decide jurisdictional issues. Further, the Act makes provision for all appointments and a number of administrative functions to be carried out by the Permanent Court of Arbitration (PCA), thereby separating the arbitral process from the local courts.

Finally, as far as arbitral institutions are concerned, African states have been content to use the internationally renowned arbitral institutions of the ICSID, PCA, International Chamber of Commerce (ICC) and London Court of International Arbitration (LCIA) (hereinafter the "Big Four"), although the ICC and the LCIA are rarely used for the resolution of investment disputes.

Despite the fact that the Big Four may have African nationals on their panels, arbitral appointments are usually limited to a close-knit group of people.

Arbitral institutions such as the Cairo Regional Centre for International Commercial Arbitration (CRCICA) and the Lagos Regional Centre for International Commercial Arbitration (LRCICA) are well-recognised within their region but there are currently no arbitral institutions in Africa that are prominent enough to compete with the Big Four.

There have undoubtedly been a few attempts by African states to establish regional arbitral institutions for determining cross-border disputes within the Sub-Saharan region. Indeed, new institutions are being launched across Sub-Saharan Africa with more frequency, with the most recent being the Kigali International Arbitration Centre (KIAC) which is expected to become operational in early 2012, if not sooner.

Amongst other things, the KIAC aims to offer dispute resolution services in a range of fields including investment and trade. The KIAC also intends to provide training to lawyers and other specialists to build local capacity. Rwanda’s Minister of Justice and Attorney-General, Tharcisse Karugarama, hopes that the KIAC will be an international centre for other countries in Africa and beyond to seek arbitration.

Additionally, as we have seen above, Mauritius has taken bold steps to establish itself as a regional centre for resolving international disputes including commercial and investment disputes in Africa. In December 2010 it hosted a major conference on arbitration along with the Big Four and two other arbitral bodies, ICCA and UNCITRAL. When the Mauritius government introduced its new arbitration legislation in 2008, it also signed a host country agreement with the PCA. The PCA has since set up a regional branch in Mauritius.

In July 2011, the Mauritian government and the LCIA launched LCIA-MIAC, a new centre to administer international arbitrations relating to Africa and beyond.

The setting up of regional branches in Mauritius both by the PCA and the LCIA signifies the importance placed on the steps taken by Mauritius to establish itself as the regional centre for the resolution of international arbitration disputes. This bodes well for Mauritius, as the combined expertise of the PCA and the LCIA professionals will, within time, be imparted to local lawyers.

In light of the above, it appears that Africa has taken some major steps to promote arbitration within the region. However, it still has a long way to go in combating the lack of expertise, as the absence of local training and scarce resources to invest in extensive training abroad remains an impediment to Africa’s ability to address effectively the challenge of developing expertise and building capacity in investment treaty law and arbitration.

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