

Kluwer Arbitration Blog

Multilateral Investment Treaties? A View from China

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The rise of China as a major economic and political actor is one of the defining features of the twentieth-first century. Much of China's growing power comes from its ever-expanding economy. In order to expand its blossoming economy, China needs to tap into new markets. In an age of intense market integration and economic competition, China's global resources quest is changing geopolitics around the world. Even though Chinese investment is currently spread around the world, we can identify three regions or blocks where this trend is especially noticeable: Africa, the Portuguese-speaking world, and Latin America.

China's interest in Africa is especially self-evident. Starting in the late 90s, China's presence in the continent experienced a phenomenal expansion. The country is becoming a major player in Sub-Saharan Africa, having replaced the European Union and the United States as Africa's major trading partner. The Chinese government has also identified the Portuguese-Speaking world as a strategic group for investment and cooperation. The Lusophone world represents a vast marketplace, especially if one takes into account that most Portuguese-speaking countries are developing economies well-suited for acquiring low-cost Chinese goods; and that some of them (namely Brazil, Angola, and Mozambique) are growing rapidly and thus represent a chance for additional expansion. China and Brazil have one of the most prosperous alliances in the developing world at present. Brazil is China's most important partner in Latin America and Brazil's top trading partner. China's presence grows ever larger in Latin America. China is now the largest trading partner and creditor of several Latin American countries and the regions' second largest investor.

With the progress of its economic reform, participation in international co-operation platforms has become one of China's key interests. Beijing's diplomacy has become more 'creative', and its new attitude labelled as a 'charm offensive'. One of the defining features of this new policy is the creation of multilateral platforms. China has identified three strategic blocks and is approaching them not only on a bilateral level, but also on a multilateral level. Chinese interest in Africa, Portuguese-speaking countries, and Latin America follows a similar pattern, with China actively promoting the creation of multilateral organizations designed to promote trade and investment between the Member States. In order to strengthen economic cooperation and development between China and Africa, in 2000 China created the Forum on China-Africa Cooperation (FOCAC). The Forum is a multilateral platform for exchange and cooperation between China and African countries that have formal diplomatic relationships with China, covering various aspects of politics, trade, and economy. Three years later China established the Forum for Economic and Trade Cooperation between China and Portuguese-Speaking Countries, known as 'Macau Forum'.

The Forum is a multilateral organisation composed by China and Lusophone countries, targeting at encouraging mutual development by augmenting cooperation and promoting trade relations between its members and conceiving and executing common projects in several fields. China is creating a similar dialogue mechanism with Latin America. A cooperation forum between China and the Community of Latin American and Caribbean States (CELAC), the China-CELAC Forum, was founded in Brasilia last July.

I previously discussed how to make use of the similarities between countries, legal cultures, and languages so as to facilitate international dispute resolution ('Commercial Arbitration between China and the Portuguese-Speaking World', Kluwer Law International, 2014). Trade and investment cannot be promoted and strengthened without the support of an effective international legal framework. The creation of regional blocks and multilateral platforms to boost economic exchange depends, sooner or later, on the creation and maintenance of effective mechanisms of dispute resolution. The idea put forward by the Macau Forum in 2010 of promoting Macau as a centre for arbitration of commercial disputes between enterprises from China and Portuguese-speaking countries is an example of how arbitration may play an important role in China's economic policy. China is approaching the Lusophone countries (including Brazil) as a block through the Macau Forum. The China-CELAC Forum seems to follow the same pattern. Significantly, Brazil, an emerging economy which is a member of the BRICS, like China, is a member of both CELAC and the Macau Forum.

Arbitration is a key component in many trade and investment treaties. The question is knowing whether it would be possible to move from Bilateral Investment Treaties to Multilateral Investment Treaties. Multilateral Investment Treaties would be a development of the traditional structure of Bilateral Treaties. The idea would be to take advantage of the similarities between jurisdictions as regards their legal systems, cultures, or languages, so as to design common legal frameworks that hopefully would reduce some of the problems associated with the atomistic, bilateral approach. Would the creation of a Multilateral Investment Treaty be useful to reduce the costs associated with language diversity and the existence of different domestic legal frameworks? Would this multilateral approach be feasible? To what extent would it reduce the perils associated with investment in such diverse countries? Would this approach be useful as regards Chinese investment in Portuguese-speaking countries, in Africa, or in Latin America? Would it be possible to design a Multilateral Investment Treaty between nations that have so much in common, but still so many differences between them? Are these multilateral platforms the right forum to achieve such a demanding and ambitious purpose? And would the potential creation of a specific arbitral institution, under the aegis of such a forum, specialized in dealing with these disputes, facilitate their resolution?

Investment treaty arbitration is not exactly the most consensual topic these days. A much discussed article published in the Economist last month entitled '[The arbitration game](#)' argues that governments are souring on treaties to protect foreign investors. According to this piece the implementation of the idea of encouraging foreign investment by protecting investors from discrimination or expropriation – which was the cornerstone of investment treaties – has been disastrous, and is becoming so controversial that it threatens to ruin trade deals the European Union is negotiating with both America and Canada. The article goes on to affirm that scholars are increasingly questioning whether investor-state dispute settlement delivers the benefits it is supposed to, in the form of increased foreign investment, mentioning the example of Brazil, which continues to receive lots of foreign investment, despite its long-standing refusal to sign any treaty with a mechanism of this sort.

Furthermore, some countries, namely in Latin America, have historically rejected international mechanisms to resolve disputes with foreign investors. Despite its numerous advantages, some Latin American States have resisted investment arbitration. Specifically, Bolivia, Ecuador and Venezuela withdrew from the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. International treaties for the promotion and protection of foreign investment have also been under intense scrutiny by certain Latin American countries. However, the attitude toward investment arbitration in Latin America has been evolving. Most Latin American countries adopted legal changes aimed at promoting free markets. At the same time, they gradually changed their policies with respect to investment protection and international arbitration. As part of this process, most Latin American countries ratified the ICSID Convention. Investment treaty protection and arbitration involving Latin America have taken on new relevance as foreign investment across the region increases, especially coming from China.

I think it is possible to draw a parallel between China's approach to the Portuguese-speaking world, Africa, and Latin America. China seems interested in approaching different countries as a block, benefiting from their similarities to implement common strategies, and trying to reduce costs associated with the bilateral approach. I also think that it makes sense to at least question whether it is possible to devise multilateral mechanisms of dispute settlement as regards commercial disputes and investor-state disputes. In the last years the number of investor-state proceeding cases has increased sharply, but many oppose this model. Mechanisms for the resolution of investment disputes are becoming quite controversial and difficult to negotiate. This underlines the importance of thinking of a new model, or at least rethinking the existent one.

The development of international trade and investment depends largely upon the success of intercultural communication between parties from different countries, with diverse legal and cultural backgrounds. As economic correlations continue to expand and become more intense, these legal relationships also become correspondingly more complex. If the settlement of disputes and the enforcement of claims arising from economic transactions and foreign investment are uncertain and time-consuming, it can only hamper international economic co-operation and the smooth development of markets. The creation and development of appropriate dispute settlement mechanisms must necessarily accompany the creation and development of trade and investment. In addition to using a body of international law, international organisations and multilateral platforms such as the Macau Forum and the China-CELAC Forum may use alternative methods of dispute resolution to create a framework for cooperation and interstate relations. At present, the large number of bilateral and regional agreements including some investment protection indicates the need for a multilateral agreement with broader coverage as well as a simplified and standardized set of rules. The content of a Multilateral Investment Treaty is relatively easy to outline because of numerous, rather similar Bilateral Investment Treaties and investment chapters in Free Trade Agreements.

The creation of a specialized institution to administer arbitration proceedings regarding disputes between China and the other members of these organizations could be one of the major benefits from a multilateral approach. One important aspect that can be witnessed in the last years has to do with a much greater specialization in arbitration. This means that certain arbitral institutions specialise in certain industries or businesses. Following on this concept of specialisation, such an arbitral institution would specialise in China-related arbitration. China, Africa, and Latin America are strengthening their relationship. The market is getting bigger while the world is getting smaller and closer. While the 'flattening' of the world affords unimaginable business opportunities, it also presents new challenges. In order to thrive in this flattened world, investors and states must be

willing to undertake innovative approaches so as to create environments for success in the global markets.


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