

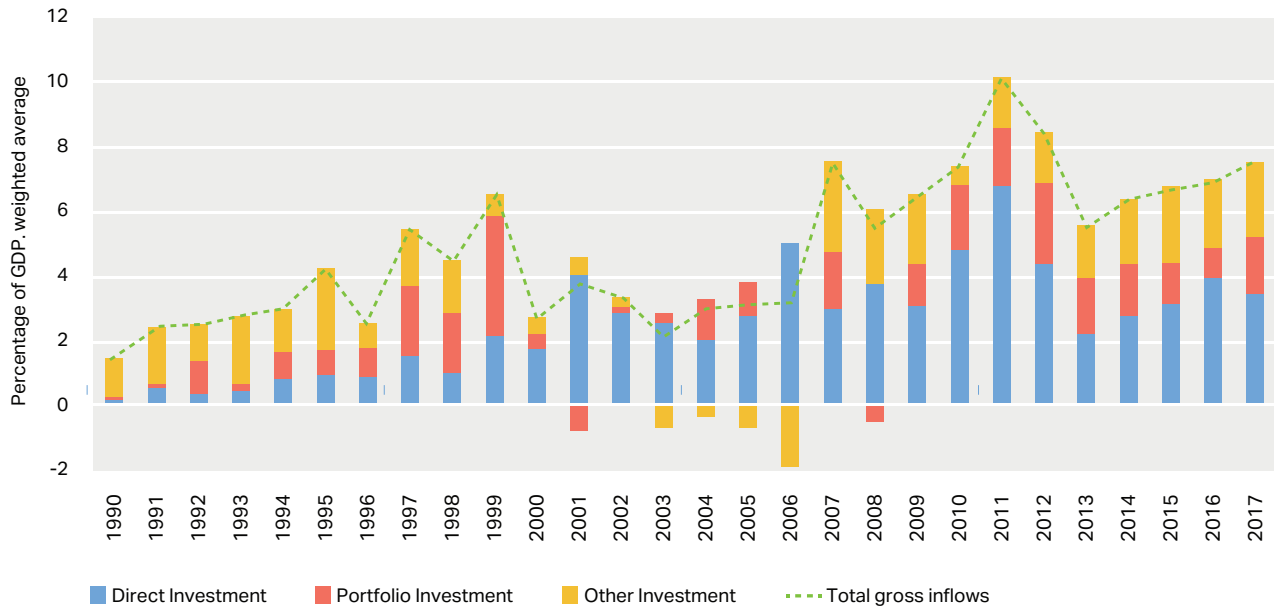
Towards or Away from Investment Treaty Arbitration in Africa?

By NAOMI TARAWALI



Developments in certain African jurisdictions have led some commentators to question the future of investment treaty arbitration as a means of resolving investment disputes with African states. This article explores the factors that might be driving the apparent ‘backlash’ against investment treaty arbitration from some states, and examines whether there is in fact an identifiable trend away from investment treaty arbitration across Africa. In conclusion, the article offers some observations on the way forward for investment treaty arbitration involving African parties.¹ Unless otherwise stated, ‘investment treaty arbitration’ is used to refer broadly to arbitration conducted pursuant to a bilateral or multilateral treaty that provides a direct investor-state dispute settlement mechanism (“**ISDS**”).

Evolution of Gross Capital Inflows to Sub-Saharan Africa



Source: International Monetary Fund Balance of Payments BPM 6.0.

Note: Aggregate figures represent GDP-weighted averages of the ratio of gross capital inflows to GDP across countries in Sub-Saharan Africa. GDP = gross domestic product.

Why the Apparent ‘Backlash’?

There are many, well-rehearsed criticisms of investment treaty arbitration that contribute to claims that it is a system of dispute resolution adverse to the interests of African states (and indeed, to the interests of other African participants in investment treaty arbitration). The inclusion of ISDS in investment treaties and trade agreements has become increasingly controversial globally, raising questions as to whether African states should continue to engage in investment treaty arbitration when (some) developed nations and entire regions appear to be abandoning the same.²

These criticisms all indicate that the current investment treaty arbitration frameworks may not appropriately balance the interests of its users, and demand reform. That said, upon closer analysis of some of these complaints, the position becomes less clear cut.

SOME OF THE CRITICISMS INCLUDE THE FOLLOWING:

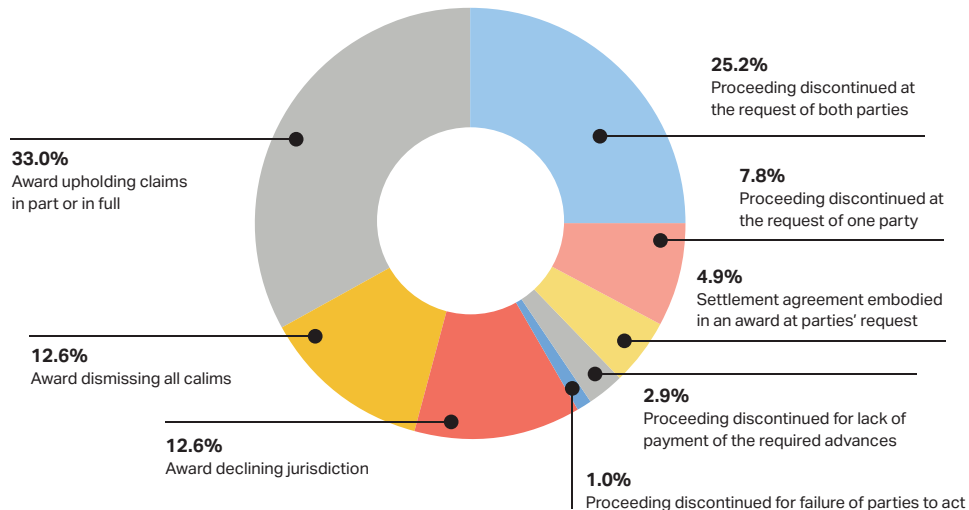
- **Uncertain benefit to host states** – Part of the historical rationale for investment treaties is that they benefit the host state by attracting foreign investment and by raising standards of governance not only for foreign investors but also for the host state overall. However, improvement of governance is inherently difficult to measure and as of yet, there is no clear empirical evidence that ISDS do in fact have this result.³ Furthermore, it is not clear that the existence of investment treaties necessarily increases foreign investment. Some studies have found that it does, but often subject to caveats that the impact of the existence of an investment treaty is difficult to measure and any increase may only be marginal.⁴
- **Interference** – There are criticisms that investment treaties and the related threat of investor claims pursuant to ISDS unduly interferes with the host state’s rights and ability to properly govern and regulate.

For example, a large award against a state in investment treaty arbitration, whilst unwelcome to the state party (whose budget is likely already subject to numerous pressing demands), does not necessarily reflect a bad or bias decision. The outcome would not necessarily have been any different were the dispute pursued in an alternative forum such as international

commercial arbitration or even in the national courts of the state. It is also not clear that African states fare worse than investors in terms of outcome of claims. In fact, according to ICSID's Special Focus Africa statistics (as at May 2017) only 33% of cases registered against African states resulted in an award that upheld (in full or in part) the investor's claim.⁷

The ICSID Caseload Statistics, Special Focus – Africa (May 2017), page 16

Chart 8a: Arbitration Proceedings under the ICSID Convention and Additional Facility Rules involving a State Party involving an African State – Tribunal Rulings, Settlement & Discontinuances



- **Costs and process** – Investment treaty arbitration can be a lengthy and expensive process, often involving international counsel and perhaps a seat in an inconvenient or unfamiliar jurisdiction.
- **Anti-state bias** – In terms of case outcome, there is at least a perception that investment treaty arbitration is biased against African states and overly favours the position of the investor.
- **Magnitude of awards** – Investment treaty claims are often for tens or hundreds of millions of U.S. dollars. A recent exceptional example is the circa. USD 9 billion award against Nigeria which is currently being challenged by Nigeria in U.S. and U.K. courts.⁵ Although this was in the context of a commercial rather than investment treaty arbitration, headlines like these perhaps contribute to the perception that engaging in international arbitration processes with investors invites the risk of 'mega-awards' against the state.

- **Public accountability and transparency** – Although some investment treaty arbitration proceedings are public, many are not and some only partially so. A frequently raised criticism of investment treaty arbitration is that matters of public importance relevant to governance of the state can be determined behind closed doors, by a privately appointed tribunal and at the behest (and perhaps to the benefit of) a single private foreign investor.
- **Lack of African representation** – Despite the rise of international arbitration references with a connection to Africa, there is a lack of proportionate representation of African participants in the administration of both investment treaty and commercial arbitration (as counsel, arbitrators and in terms of the seat of arbitration proceedings).⁶ This may be a factor dissuading African states and other stakeholders from continuing to engage in investment treaty arbitration.

A Pan-African Trend Away from Investment Treaty Arbitration?

Nevertheless, perhaps in response to the criticisms above, some African states have taken steps that move away from investment treaty arbitration such as terminating bilateral investment treaties (e.g., South Africa) and introducing legislation requiring foreign investment disputes to be resolved via different mechanisms. Regarding the latter, Tanzania's recent Public Private Partnership (Amendment) Act goes so far as to require foreign investors to resolve disputes in the domestic courts, prohibiting recourse to any international arbitration process (not only investment treaty arbitration).

Notwithstanding developments of this nature, it does not yet seem that there is a consistent move away from investment treaty arbitration across Africa. For every 'anti-arbitration' development there is a countervailing example of a state presenting itself as 'pro-arbitration' (e.g., Nigeria, Kenya, Egypt – notably, these examples include states that have been on the receiving end of some significant investor claims). On one hand, the 2012 SADC Model BIT states that the "preferred option" is to exclude ISDS because "several States are opting out or looking at opting out of investor-State mechanisms."⁸ On the other, the OHADA Arbitration Rules of the Common Court of Justice were specifically expanded in their most recent revision to include ISDS provisions, with the intention that this should become a more widely used mechanism enabling investor-state disputes to be administered in the region.⁹

OHADA Arbitration Rules	SADC 2012 Model BIT
<p>Article 2</p> <p>"...The Court may also administer proceedings based on an instrument related to an investment, in participation on investment code or a bilateral or multilateral investment treaty"</p>	<p>Article 29 Special Note</p> <p>"...the preferred option is not to include investor-State dispute settlement. Several States are opting out or looking at opting out of investor-State mechanisms, including Australia, South Africa and others..."</p>

Some Observations on the Way Forward

On the issue of investment treaty arbitration, it therefore seems that Africa is not speaking with one voice, so where to from here, and is it even appropriate to be seeking a 'pan-African' approach?

The criticisms discussed above suggest that there are significant flaws with the current investment treaty arbitration mechanisms and that they do not appropriately balance participants interests, particularly from the perspective of African participants. However, simply abandoning investment treaty arbitration will not necessarily result in a better outcome. So long as there is foreign investment, disputes will continue to arise and a more productive response might be for African stakeholders to engage with investment treaty arbitration and drive reform.

This is particularly so at a point in time where the nature of African stakeholders' participation in the investment arbitration process appears to be shifting for a number of reasons. Foreign investment into African states has grown dramatically over the past couple of decades, and Africa continues to attract significant investment.¹⁰ There is also an increased focus on fostering Africa-to-Africa investment as route to growth across the continent.¹¹ With this, there is

the expectation that African states should over time become increasingly capital exporting as well as capital importing nations. This impacts upon African states' interests and position as regards investment treaties and specifically ISDS.¹² Already there are indications that the use of ICSID procedures by African *investors* and the number of intra-African ICSID cases are increasing.¹³ Also although there is arguably a long way to go, the conversation has at least started regarding the participation and representation of Africans as counsel and arbitrators in investment treaty arbitration.

There are already some signs of innovation - to give but one example, the Nigeria-Morocco BIT (signed on December 3, 2016) has been hailed as progressive, including the obligations it imposes on the investor regarding environmental regulations and sustainability, as well as expressly preserving the host state's ability to regulate.

Conclusion

Against this background, rather than disengaging entirely with investment treaty arbitration as a mechanism for dispute resolution, African participants should be encouraged to engage and shape a system that is reflective and supportive of these developments and which better reflects the interests of African States and other participants. The investor protection

and ISDS provisions of the African Continental Free Trade Area (AfCFTA, which entered into force on April 2, 2019) are now to be negotiated during Phase II of the negotiations, scheduled for completion by June 2020. This presents a timely and significant opportunity for African stakeholders to begin transforming the shape of investment treaty arbitration across Africa, and the outcome of these negotiations will be observed with great interest. ■

1. The themes in this article were discussed by the author on a panel entitled 'Investment Arbitration Developments in Africa: We Are Awake But Are We Smelling the Coffee', (at the First Annual Arbitration Conference of the African Arbitration Association held in Kigali, Rwanda on April 3-4, 2019). The panelists included the author, Vlad Movshovich (partner, Webber Wentzel) and Tarek Badawy (partner, Shahid Law Firm), and was moderated by Shan Greer (consultant, Floissac Fleming Law).
2. For example, the EU.
3. See Sattorova, M. (2018). *Do Developing Countries Really Benefit from Investment Treaties? The impact of international investment law on national governance*. Accessed May 2, 2019 at <https://www.iisd.org/itm/2018/12/21/do-developing-countries-really-benefit-from-investment-treaties-the-impact-of-international-investment-law-on-national-governance-mavluda-sattorova/>.
4. See Bonnitche, J. (2017). *Assessing the Impacts of Investment Treaties: Overview of the evidence*, IISD Report. Accessed May 2, 2019 at <https://www.iisd.org/sites/default/files/publications/assessing-impacts-investment-treaties.pdf>.
5. The US\$ 9 billion figure is inclusive of interest. *Process and Industrial Developments Limited v The Ministry of Petroleum Resources of the Federal Republic of Nigeria*, Final Award dated January 31, 2017. Accessed May 2, 2019 at <https://pacer-documents.s3.amazonaws.com/36/194469/04516479471.pdf>.
6. See the SOAS Arbitration in Africa Survey (2018), *Domestic and International Arbitration: Perspectives from African Arbitration Practitioners*. Accessed May 2, 2019 at <https://eprints.soas.ac.uk/25741/1/SOAS%20Arbitration%20in%20Africa%20Survey%20Report%202018.pdf>.
7. See The ICSID Caseload Statistics, Special Focus – Africa (May 2017), page 16. Accessed May 2, 2019 at [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%20Africa%20\(English\)%20June%202017.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%20Africa%20(English)%20June%202017.pdf).
8. 2012 SADA Model BIT, Article 29 SPECIAL NOTE.
9. OHADA Arbitration Rules of the Common Court of Justice and Arbitration November 23, 2017, in force March 2018.
10. See e.g., World Bank 'Africa's Pulse, an analysis of issues shaping Africa's economic future' (October 2018, Volume 18), Figure 2.2 (Evolution of Gross Capital Inflows to Sub-Saharan Africa). Accessed May 2, 2019 at <http://documents.worldbank.org/curated/en/881211538485130572/pdf/130414-PUBLIC-WB-AfricasPulse-Fall2018-vol18-Web.pdf>.
11. See, e.g., *African Development Bank, Africa to Africa Investment, a First Look*.
12. See generally J-P Le Cannu. *Foundation and Innovation: The Participation of African States in the ICSID Dispute Resolution System*. ICSID Review, Vol. 33, No. 2 (2018), pp. 456-500.
13. *Ibid*. See also *Global Telecom Holding SAE v Canada*, ICSID Case No. ARB/16/16.



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Naomi currently serves as secretary to the Board of Africa International Legal Awareness ("AILA") and on certain sub-committees of the organisation.

Prior to qualifying as a solicitor, Naomi spent time living and working in West Africa (Nigeria) and East Africa (Kenya, Ethiopia) including at the Office of the Legal Counsel of the African Union working on public international law matters.