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Africa's New Economic Partnerships and Dispute Settlement

Victoria Sahani
Boston University School of Law

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AFRICA'S NEW ECONOMIC PARTNERSHIPS AND DISPUTE SETTLEMENT

This panel was convened at 11:00 a.m., Thursday, March 31, 2016, by its moderator Uche Ewelukwa of the University of Arkansas School of Law, who introduced the panelists: Victoria Shannon Sahani of Washington and Lee University School of Law; David H. Shinn of George Washington University School of Law; and Thomas R. Snider of Greenberg Traurig LLP.*

Remarks by David H. Shinn†

My remarks during the panel focused on the role of China, India, Brazil, and Turkey in Africa, emphasizing that emerging nations generally are playing an increasingly more important role. They provide alternative investment, aid, and even models for development. China and India are particularly interested in access to Africa's natural resources—Brazil and Turkey less so. China and India also have growing security interests in Africa. Turkey has demonstrated a security interest in northeast Africa, especially Somalia.

There is potential security competition between China and India in the Indian Ocean where both countries have been active in combating Somali piracy. This led to an expansion of the Chinese navy in the Indian Ocean. China is building a military facility in Djibouti to support its naval interests while India recently signed an agreement for a military base in the Seychelles. India has expressed concern about possible Chinese encirclement.

China is Africa's major trading partner but India may soon pass the United States and capture the second position. Turkey and Brazil are much smaller trading partners. China provides about $3 billion annually in foreign aid to Africa, as compared to $8 billion annually from the United States. Aid from Turkey, India, and Brazil is less than $1 billion each annually. None of these countries attach political strings to their aid, but China makes a point of publicizing this point while the others do not.

The numbers for foreign direct investment (FDI) are fuzzy for all four countries. China's official FDI figure understates the actual number as it leaves out flows from tax havens such as the British Virgin Islands and Hong Kong. The actual number is probably double the official figure, but still constitutes only about 5 percent of China's global FDI. India, Brazil, and Turkey have considerably less FDI in Africa.

China is making the biggest effort on expanding soft power in Africa. It offers numerous scholarships and its official news agency, Xinhua, is the largest news service in Africa. China Radio International and China Central Television are also active in Africa. India, Brazil, and Turkey are doing little in the media field but India and Turkey offer many scholarships. Most Turkish scholarships are to universities and many of them have gone to Somalis. Brazil has been less engaged but has a strong program in helping African countries to improve their agriculture.

Brazil's economy is performing poorly at the moment and its efforts in Africa have stagnated. Turkey is facing similar distractions but President Erdogan did recently visit four West African countries. India's economy is still strong and we can expect to see more engagement by India in Africa in the short-term.

* Ms. Ewelukwa did not contribute materials to the *Proceedings*.

† Adjunct Professor of International Affairs at The George Washington University.

Responding to a question, I noted that most African countries have a problem with corruption. China, India, Brazil, and Turkey also do not have the best records regarding corruption. When they engage in Africa, it is similar to pushing on an open door.

China is trying to improve its environmental record in both China and Africa, but its efforts in Africa so far are limited to voluntary guidelines for Chinese companies operating in Africa. While state-owned enterprises tend to heed the guidelines, some private companies do not.

The government of China has especially good relations with African governments. This gives Chinese companies, especially state-owned enterprises, engaged in Africa an advantage when disputes arise. For example, the director of roads in Ethiopia commented to me several years ago that China is building most of the roads in the country. When the government of Ethiopia has a problem with a Chinese company, it calls the Chinese ambassador and asks him to fix the matter; there is no need to go through the court system. As a former American ambassador to Ethiopia, I can assure you this approach would not work if an American company had a dispute with the Ethiopian government. The dispute would probably take years to resolve by a court of law.

There is a lot of mythology on the topic of land grabbing in Africa. I am not aware of any African country where foreigners can buy land. They can obtain long-term leases, sometimes up to ninety-nine years. Long-term leases do raise questions about forcing local people off of the land for the benefit of a foreign investor. This was an issue in the Gambela region of Ethiopia and has arisen in a number of other African countries.

Although most Chinese companies in Africa are private, the overwhelming dollar value of their contracts and investment is controlled by state-owned enterprises. The private companies tend to engage in small projects. The Indian, Brazilian, and Turkish companies are overwhelmingly private. This tends to have an impact on how disputes are resolved. The most common disputes concern labor issues and labor safety questions. There have also been disputes over the environmental impacts of foreign companies. In the case of China, most of the disputes are resolved informally before they ever reach a court.

THE DISPUTE SETTLEMENT ASPECTS OF AFRICA'S NEW ECONOMIC PARTNERSHIPS

By Thomas R. Snider[*]

My remarks will focus on the dispute settlement aspect of the panel's topic. I will discuss the proliferation of international arbitral institutions in Africa, make some remarks on the increasing proactive use of international arbitration by African states, and discuss South Africa's new investment law, which, among other things, does not provide for arbitration as a means of dispute settlement between foreign investors and the South African Government.

I. PROLIFERATION OF INTERNATIONAL ARBITRAL INSTITUTES IN AFRICA

There is a long and rich history of mutual cooperation between Africa and Asia with respect to dispute settlement mechanisms. Two long-established arbitral institutions—one in Africa, the Cairo Regional Centre for International Commercial Arbitration (CRCIC), and one in Asia, the Kuala Lumpur Regional Centre for Arbitration (KLRCA)—were established

[*] Shareholder at Greenberg Traurig LLP with a practice focused international arbitration and other forms of complex cross-border dispute resolution.

in the late 1970s under the auspices of the Asian-African Legal Consultative Organisation (AALCO), an international governmental organization formed initially to serve as an advisory board to member states on matters on international law. The CRCIC and the KLRCA were established pursuant to AALCO's decision taken at its Doha Session in 1978 to establish regional centers for international commercial arbitration in Asia and Africa.

More recently, the London Court of International Arbitration-Mauritius International Arbitration Centre was established in 2011 with a focus, at least in part, on international arbitrations involving Asian and African parties and has become one of the more established international arbitration centers in the region. Subsequently, in 2015, the China Africa Joint Arbitration Centre (CAJAC) was established to resolve commercial disputes between Chinese and African parties. The CAJAC is located in Johannesburg and reportedly has future plans to operate from China as well. The CAJAC is the result of an agreement between the Arbitration Foundation of Southern Africa (AFSA), Africa ADR (AFSA's external arm), the Association of Arbitrators of Southern Africa, and the Shanghai International Trade Arbitration Centre. The China Law Society is also supporting the endeavor and intends to promote the CAJAC to legal and business interests in China as the preferred mechanism for resolving Chinese-African commercial disputes.

More broadly, the number of international arbitral institutions on the continent is growing. In addition to those mentioned above, some of the key Africa-based international arbitral institutions include the Kigali International Arbitration Centre, the Nairobi International Arbitration Centre, the Lagos Court of Arbitration, and the Common Court of Justice and Arbitration in Abidjan, Côte d'Ivoire. Most recently, the Intergovernment Authority on Development is currently providing support to the Djibouti Chamber of Commerce in the establishment of an arbitral institute there.

These centers serve an important purpose in terms of helping to increase awareness of international arbitration on the continent; facilitating capacity building for lawyers, arbitrators, and judges; and providing a more local option for regional and international disputes. Many of these centers, however, are relatively new, and, anecdotally, their caseloads remain relatively small.

There are probably two main reasons for this. First, the life cycle of a commercial dispute can take three to five years to develop (i.e., the parties need to place an arbitration clause calling for dispute resolution at one of these centers into a contract, the parties need to commence their commercial relationship, disputes need time to arise, and negotiations need time to fail). Accordingly, it takes some time for the caseload in any arbitral institution to mature.

Second, parties may be wary about trying out new centers, which need to gain experience. Experience for arbitral institutes often comes first in the form of domestic—rather than international—arbitration, and the good news, anecdotally, is that many of these centers do have a solid, if not robust, domestic arbitration caseload.

But if one takes a step back and looks at other, more international arbitral institutions, one sees that the number of cases seated in Africa at these institutions is also quite small. Cases filed at the International Chamber of Commerce's International Court of Arbitration (ICC) in 2014 provide a good example.[1] There were 791 cases filed at the ICC in 2014 involving 2,222 parties. 163 of these parties were African parties (113 from sub-Saharan

[1] *See* International Chamber of Commerce, *ICC Dispute Resolution Bulletin: 2014 Statistics; Dispute Adjudication Boards Under FIDIC Contracts*, 2015.

Africa and fifty from North Africa). This was a record number for sub-Saharan Africa representing an 18 percent increase over the previous year.

However, only a handful of these cases were seated in Africa. Just four of the 791 cases filed with the ICC in 2014 were seated in North Africa—two in Morocco, one in Algeria, and one in Tunisia—and just four were seated in sub-Saharan Africa—two in Nigeria, one in South Africa, and one in Tanzania. By comparison, the top four seats of arbitration in ICC proceedings initiated in 2014 were France with ninety-four, the United Kingdom with eighty-six, Switzerland with eighty-two, and the United States with fifty-eight.

What is the reason for the low number of international arbitrations seated in Africa? The most likely explanation is that the hesitation to seat international arbitrations in Africa is symptomatic of a continued lack of confidence in many African judicial systems, i.e., a concern that African courts may not have the capacity to provide adequate supervisory jurisdiction over international arbitration cases or may be unduly interventionist. It may also be symptomatic of a need to bolster the legal infrastructure relating to international arbitration in some African countries, including, in particular, national arbitration laws.

II. Resort of African Governments to Arbitration

One notable trend that may be developing in relation to international arbitration in Africa is an increased willingness on the part of African parties—and particularly African governments—to resort to arbitration more proactively in the dispute resolution process than we have seen in the past.

A recent case suggestive of this approach is *Republic of Chad v. China National Petroleum Corporation*.[2] In August 2014, Chad announced that it was initiating an ICC arbitration against the China National Petroleum Corporation (CNPC), one of China's—and the world's—largest state-owned oil companies. Chad reportedly sought US$1.2 billion for environmental damages allegedly caused by the dumping of excess crude oil by CNPC in pits or ditches in Chad. As a result of the dumping, Chad reportedly cancelled CNPC's licenses to operate at five drilling sites, and, rather than resort to other dispute resolution mechanisms or waiting for CNPC to initiate arbitration, Chad initiated arbitration under the ICC clause in the licensing contracts. The move seems to have worked as Chad and CNPC reportedly reached a settlement in their dispute in October 2014—just over two months later—under which CNPC agreed to pay Chad US$400 million for the alleged dumping. The deal also reportedly involves Chad taking a 10 percent stake in CNPC's fields in addition to royalty payments.

Another example is *Republic of Djibouti v. DP World*, which involves a dispute stemming from the container terminal at the port in Djibouti.[3] In July 2014, Djibouti commenced an arbitration at the London Court of International Arbitration against Dubai-based DP World, the operator of the container terminal, alleging that the company secured the concession to operate the port through bribery. While the arbitration was ongoing, the UK High Court issued a ruling in March 2016 in a related proceeding in which the court concluded that DP World did not engage in unlawful conduct in relation to the concession.

While not all the details of these cases are known and it is dangerous to draw too many conclusions from one or two arbitrations, it is striking to see African states resorting to the

[2] *See Chad Says to Take CNPC to Paris Tribunal Over Oil Dumping*, Reuters (Aug. 10, 2014); *China's CNPC Agrees to Pay $400 mln to Settle Chad Dispute—Chad Minister*, Reuters (Oct. 27, 2014).

[3] *See* Asa Fitch, *Djibouti Files Arbitration Against DP World Over Alleged Corruption in Port Deal*, Wall Street J. (July 9, 2014); Paul Richardson & Jeremy Hodges, *DP World to Defend Djibouti Position After U.K. Court Ruling*, Bloomberg (Mar. 3, 2016).

offensive use of international arbitration in this manner. Moreover, the respondents in these cases are notable—a large Chinese-owned state entity and a formidable Dubai-based company. These cases may suggest some enhanced willingness among African states to embrace international arbitration for resolving disputes with foreign parties generally and Asian parties in particular.

III. South Africa's Phasing Out of Bilateral Investment Treaties and Passage of a New Investment Law

Observers of investor-state arbitration in Africa should keep their eyes on South Africa. Following the end of apartheid, South Africa, like many other developing states at the time, entered into several bilateral investment treaties (BITs). However, a marked change in South Africa's approach to the protection of foreign investment started in 2007 in response to the *Foresti* case.[4] In this case, foreign investors in South Africa's granite mining sector initiated an International Centre for Settlement of Investment Disputes Additional Facility arbitration under the South Africa-Italy and South Africa-Belgium-Luxembourg BITs challenging South Africa's Mineral and Petroleum Resources Development Act, which required foreign-owned mining companies to divest a percentage of their equity to historically disadvantaged South Africans at fair market value. The case thus raised concerns over whether the protections provided in BITs hindered the ability of the South African government to introduce legislation geared towards redressing negative social and economic effects caused by apartheid.

South Africa subsequently initiated a review of its BITs and BIT policies, which led to a decision to terminate several of its BITs and to let others expire between 2012 and 2014. Many of these BITs were with several key trading and investment partners, including Austria, Belgium and Luxembourg, Denmark, France, Germany, Netherlands, Spain, Switzerland, and the United Kingdom.

In place of its BITs, South Africa has passed legislation known as the Promotion and Protection of Investment Bill that will apply to domestic and foreign investors alike.[5] The bill was ratified by the South African parliament in November 2015 and signed by President Jacob Zuma in December 2015. It has not yet entered into law, but is expected to do so soon.

Under the Promotion and Protection of Investment Bill, foreign investors will no longer have recourse to international arbitration as they did under BITs. In addition, there is no fair and equitable treatment standard in the bill, and there is no provision for prompt, adequate, and effective compensation for expropriations.

The new law will likely be viewed as a negative development by many foreign investors in light of the more limited substantive protections and unavailability of investor-state arbitration. However, the new law will apply to all foreign investors investing in South Africa rather than merely those from a country that happens to have a BIT with South Africa. Accordingly, investors from countries such as the United States, which does not have a BIT with South Africa, will benefit from the new law.

While the suggestion could be made that South Africa's adoption of this approach may lead to reduced levels of foreign investment, that result is not clear. Indeed, other countries at a similar level of development as South Africa have adopted a similar approach. For

[4] Piero Foresti, Laura de Carli & Others v. Republic of South Africa, ICSID Case No. ARB(AF)/07/01.

[5] For a more detailed discussion of South Africa's new investment law, *see* Thomas R. Snider, *South Africa Adopts New Investment Law Following Phase Out of BITs*, PRACTICAL L. ARB. (2016).

example, Brazil does not have any BITs in force having adopted a policy decision that it can attract foreign investment without such treaties in place.

Third-Party Funding in Dispute Settlement in Africa

By Victoria Sahani[*]

My remarks will focus on third-party funding in dispute settlement in Africa. First, I will define third-party funding. Then, I will discuss a few African countries' experiences with third-party funding. Finally, I will discuss the views of some of African's economic partners regarding third-party funding, including China, Hong Kong, India, and Brazil.

What is Third-Party Funding?

Third-party funding—also known as litigation funding—is an arrangement in which a party involved in a litigation or arbitration matter seeks funding from an outside entity for its legal representation instead of financing its own legal representation. The outside entity—called a "third-party funder"—finances the party's legal representation in return for a profit. The third-party funder could be a bank, hedge fund, insurance company, or some other entity or individual. If the funded party is the plaintiff, then the funder contracts to receive a percentage or fraction of the proceeds from the case if the plaintiff wins. Unlike a loan, the funded plaintiff does not have to repay the funder if it loses the case or does not recover any money. If the funded party is the defendant, then the funder contracts to receive a predetermined payment from the defendant, similar to an insurance premium, and the agreement may include an extra payment to the funder if the defendant wins the case.

There are two major types of third-party funding: consumer and commercial. Consumer funding involves financing individuals involved in noncommercial disputes, which are usually (but not always) lower in dollar amount and cost than commercial disputes. Commercial funding typically involves financing businesses (and sometimes individuals) involved in commercial or economic disputes or disputes with a high dollar value or high cost to pursue. Third-party funding in the international economic law context arises in international commercial arbitration and investor-state arbitration under bilateral and multilateral investment treaties and free trade agreements. Funding of those disputes would fall within the commercial funding category, even if individuals are involved, given the high dollar values and high cost to pursue those claims.

African Countries' Experiences with Third-Party Funding

To date, it appears that very few African countries have had the opportunity to opine on third-party funding through their courts or legislatures. That does not necessarily mean that third-party funding is not happening in those countries; it just means that the courts or legislatures in those countries have not yet had the opportunity address it publicly. I have been able to find public information regarding third-party funding in three countries so far: South Africa, Botswana, and Ghana.

South Africa is the most advanced third-party funding jurisdiction in Africa. In South Africa, a third-party funding agreement is often referred to as a *pactum de quota litis*, which means "an agreement to share the proceeds of one or more lawsuits." Litigation funding

[*] Associate Professor of Law, Washington and Lee University School of Law.

has been allowed, theoretically, since the 1894 decision of the High Court in *Hugo & Möller N.O. v. Transvaal Loan, Finance and Mortgage Co*, 1894 (1) OR 336. In this case, the High Court ruled that a *pactum de quota litis* is not per se illegal, but that upholding such agreements is at the discretion of the court. A century later, in 1997, South Africa passed the Contingency Fees Act, which makes "no win, no fees" agreements legally enforceable in South Africa. In my research, I have generally seen that the availability of attorney contingency fee agreements or "no win, no fees" arrangements in a jurisdiction tends to slow the development of third-party funding in that jurisdiction, mainly because contingency fees can often serve the same market. Thus, third-party funding has not become prevalent in South Africa until recently.

There appears to be a handful of third-party funders based in South Africa. Litigation Funding SA, based in Johannesburg, appears to be the most prominent and the oldest funder based in South Africa. Other funders include, RM Capital in Hyde Park, Sandton, and the South African Litigation Funding Company (SALF). SALF's stated purpose is increasing access to justice for indigent litigants; thus it focuses solely on consumer funding.

The most famous third-party funding case in South Africa today is *PriceWaterhouseCoopers Inc. and Others v. National Potato Co-operative Ltd.*, 2004 (6) SA 66 (SCA), which is more commonly called the "Potato Case." The Potato Case was funded by IMF Australia, which was the largest funder in the world at that time and is based in Australia. In 2004, the Supreme Court of Appeal reiterated its 110-year-old precedent in the *Hugo & Möller* case that litigation funding agreements are not per se illegal or against public policy. The court also articulated a new precedent that the existence of a litigation funding agreement is not a basis for a defense in litigation. In 2009, the National Potato Cooperative sought to join IMF Australia as a party in order to be able to bring a cost order against IMF Australia at the end of the case. IMF unsuccessfully objected to joinder as a party, and the court joined it as a party in 2010 based on its reasoning that the funder is a co-owner of the claim. On March 4, 2015, in the case of *PriceWaterhouseCoopers Inc. & Others v. National Potato Co-operative Ltd. & Another* (451/12) [2014] ZASCA 2, the Supreme Court of Appeal issued a cost order against IMF, which appears to be the first time that a South African court has issued monetary sanctions directly against a third-party funder. I predict that the availability of cost liability against third-party funders operating in South Africa may be a deterrent against the growth of third-party funding in that country. However, many funders view paying cost orders on behalf of a losing funded party as a cost of doing business in countries that have a "loser pays" rule or "costs follow the event" rule. This rule is frequently applied in international arbitration as well.

In Botswana, third-party funding is allowed as a matter of contract law. Courts in Botswana do not issue cost orders against funders unless they are parties. Contingency fees are not allowed in Botswana; thus, it is likely that the third-party funding market could develop further in that country.

In Ghana, there are no commercial third-party funders yet, to my knowledge, but there has been at least one individual funder (a human being). There was a major commercial dispute regarding the acquisition of Spacefone in Ghana by mobile telecom giant MTN. Following a multimillion-dollar settlement in the main dispute, the case of *Jonah v. Kulendi & Kulendi* (2013–2014) arose, in which an individual third-party funder was involved. Sir Sam Jonah loaned $1 million to Richmond Aggrey with interest at LIBOR plus 5 percent from the sums to be received from the suit. Aggrey agreed in writing not to settle the case for less than $200 million, but he later settled for $54 million, in violation of the contract. Jonah

sued for breach of contract, joining as a party the law firm Kulendi & Kulendi, which was representing Aggrey. The Supreme Court of Ghana ruled that the funder could not maintain a claim against Kulendi, because it did not instruct or hire the lawyers and was not a party to the representation agreement between Aggrey and Kulendi. Although this is not a commercial funding situation in the traditional sense, it is still very interesting. I will be curious to see how Ghanaian courts handle commercial funding, if they encounter it in a case.

African Partner Countries' Views Regarding Third-Party Funding

Africa's new economic partners include China, Hong Kong, India, and Brazil. In China, third-party funding is not expressly prohibited, but there are no specific laws on the subject. Third-party funding is not very prevalent in China, however. Contingency fees are allowed in China, which may be slowing the growth of third-party funding.

In Hong Kong, the law prohibits third-party funding in domestic litigation, but the law regarding third-party funding in international arbitration is unclear at present. The Law Reform Commission of Hong Kong published in December 2016 the pending legislation entitled ''Arbitration and Mediation Legistation (Third Party Funding) (Amendment) bill 2016'' to revise its laws in order to expressly permit third-party funding in international arbitrations seated in Hong Kong.[1] In Singapore, the parliament voted in January 2017 to pass the ''Civil Law (Amendment) Bill — Third Party Funding for Arbitration and Related Proceedings'' aimed at revising its laws to permit third-party funding in large commercial disputes, such as international arbitration cases[2].

In India and Brazil, third-party funding is not expressly prohibited, but there are no laws specifically addressing the phenomenon. Thus, the status of third-party funding in India and Brazil is unclear.

[1] The full text of Hong Kong's Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 is available at: http://www.gld.gov.hk/egazette/pdf/20162052/es32016205213.pdf?cid=social_20170106_69214806&adbid=817404762849046528&adbpl=tw&adbpr=190964959%20.

[12] *See Key Bills Passed in Singapore, as Hong Kong Moves Toward Funding*, Glob. Arb. Rev. (Jan. 11, 2017), *at* 2017, http://globalarbitrationreview.com/article/1079959/key-bills-passed-in-singapore-as-hong-kong-moves-towards-funding.