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Investing in Africa

A guide to mitigating risk

Foreign direct investment (FDI) is crucial to economic growth and development across Africa. In recognition of this, African states are increasingly seeking to adapt their political, legal and regulatory regimes to attract such investment. But how robust are the protections being offered, and are investors aware of the risks that remain?

Naturally, business environments – and the concomitant risks they pose to investors – vary greatly across Africa's 54 states. Consequently, it is imperative that foreign investors identify and assess the specific risks involved in investing in a given state, and pay proper consideration to the protection of their investment. This is particularly important where no underlying contractual relationship exists between the foreign investor and the local government.

While domestic legislation can sometimes provide foreign investors with effective rights and remedies, more often bilateral investment treaties (BITs) will be of greater use. These are powerful tools to manage and mitigate investors' risks, providing protection from actions by the host state that are unfairly prejudicial to investors. The real 'teeth' of BITs, however, lies in the fact that they commonly provide for the resolution of disputes between investors and host states by means of international arbitration, including under the auspices of the World Bank's ICSID[1] Rules and/or *ad hoc* arbitration under the UNCITRAL[2] Rules. International arbitration insulates the investor from the domestic courts of the host state, which can be hostile towards such claims. It also results in a final, binding award. States will typically comply with the award rendered; however, where a state resists enforcement, the ICSID Convention and New York Convention[3] provide a regime for the recognition and enforcement of awards in contracting states.

This guide provides a snapshot assessment of the investment environment in 11 key jurisdictions in Africa that attract significant foreign investment and which have signed over 400 BITs between them. For each jurisdiction, we specifically look at:

- the local investment law, and the incentives and protections afforded investors therein;
- the local arbitration law, and the attitude of the local courts to arbitration;
- the BITs to which the state is party;
- relevant international arbitration conventions; and
- the types of disputes that have arisen between investors and the state.[4]

We also look to two important regional organisations and the protections and incentives they offer investors.

This guide is not intended to serve as a substitute for seeking legal advice where necessary. Should you require further information or advice, including on how to structure investments in Africa in order to attract the protection of the investment treaties discussed in this briefing, please contact us. Our details are set out at the end of this document.

1 International Centre for Settlement of Investment Disputes.

2 United Nations Commission on International Trade Law.

3 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention).

4 The information provided in this brochure is based on publicly available resources as at the date of publication. In respect of investment treaty coverage, the information is based on data available from the UNCTAD Database of Bilateral Investment Treaties (http://investmentpolicyhub.unctad.org). We note that there are other public sources available, for example the ICSID Database of Bilateral Investment Treaties, that also identify BIT coverage. Should you wish to invest in any given jurisdiction, we advise that you first verify which BITs are currently in force, and we would be glad to assist you in this regard.

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Algeria[5]

Algeria is the largest country on the African continent and among its top five producers of oil and gas.

Introduction

Algeria is the continent's largest country. It has vast oil and gas reserves, which account for two-thirds of its exports, and is among the top five producers of oil and gas in Africa. Recently, it has sought to diversify its economy and improve its business climate generally. Efforts include the introduction of a new investment code in 2016 that, albeit limited in scope, is designed to encourage and facilitate investment, with specific benefits to be provided to the industry, agriculture and tourism sectors.

Even so, there is a long-standing perception of commercial risk to foreign investors in Algeria, and the threat of terrorism remains very real. To date, an import licensing and quota system, a lack of free trade zones and protectionist policies have discouraged FDI. It remains to be seen whether the implementation of the new investment law will herald a new era of investment in Algeria.

Investment law

Algeria's new investment code introduces incentives for investors who have registered their investments with the National Agency of Investment Development (ANDI with its acronym in French).[6] However, investments equal to or exceeding 5bn dinars (approximately $45m) must first obtain authorisation from the National Council of Investments. It also provides for a raft of tax exemptions including on imported goods and services intended for investment projects, on property needed for an investment project, and on company profits arising out of investment projects. The state undertakes to finance infrastructure required for any investment project, in whole or in part.

Certain measures set out in the code, however, maintain or strengthen the state's position vis-à-vis qualifying foreign investors. For example, where a share transfer abroad triggers an indirect transfer of shares in Algerian companies, the state has a right of first refusal over the shares. In this regard, the requirement that at least 51 per cent of an Algerian company must be owned by a national resident shareholder has been transferred from the old investment code to the 2016 Finance Act.[7] It applies to all economic activities for the production of goods or services.

The code does not contain any independent basis for disputes between investors and states to be resolved by arbitration. Instead, it provides that all disputes between a qualifying investor and the state shall be submitted to national courts, except where a bilateral or multilateral investment treaty or an agreement between the investor and the state provides for *ad hoc* arbitration.

The energy sector is regulated by separate legislation.[8] This similarly contains a requirement that oil exploration and production contracts must provide for the national oil company's participation in the contract at a minimum level of 51 per cent.

5 The authors are grateful for the contributions of their colleagues at Bennani & Associés to the following section.

6 Law No 16-09 of 3 August 2016.

7 Law No 15-18 of 30 December 2015.

8 Law No 05-07 of 28 April 2005.

Arbitration law

The law governing arbitration proceedings is set out in the Code of Civil and Administrative Procedure.[9] This provides that international arbitral awards rendered in Algeria (ie with a seat in Algeria) can be challenged within one month of issuance. A foreign arbitration award (ie with a seat outside Algeria) cannot be appealed before the local courts, although an order granting enforcement can be.

Any person, including a state-owned entity, may agree to resolve a dispute before an arbitral tribunal. The state itself (and its territorial subdivisions) may only have recourse to arbitration if so provided in a BIT or a procurement contract.

Although not premised on the UNCITRAL Model Law,[10] the local law does reflect modern arbitral practice. For instance, a judge will lack competence to settle the subject matter of a dispute if arbitration is pending, or if a party brings the arbitration agreement to their attention.

The Algerian courts are generally supportive of arbitration and the enforcement of arbitral awards, upholding the principle of non-interference by local courts and domestic tribunals. However, Algeria will only apply the New York Convention to enforce awards made in the territory of another New York Convention contracting state and where the relationship between the parties is considered to be 'commercial' under Algerian law.

The local arbitral institution is the Centre for Conciliation, Mediation and Arbitration, which sits within the Algerian Chamber of Commerce and Industry.

'The Algerian courts are generally supportive of arbitration and the enforcement of arbitral awards, upholding the principle of non-interference by local courts and domestic tribunals.'

9 Law No 2008-09 of 25 February 2008.

10 The UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006 was designed to assist states in reforming and modernising their laws on arbitral procedure to reflect modern international commercial practice.

Bilateral investment treaty coverage

Algeria is a signatory to 48 BITs, of which those with the following 29 states are in force: Argentina, Austria, Bahrain, the Belgium–Luxembourg Economic Union, Bulgaria, China, Denmark, Egypt, Ethiopia, Finland, France, Germany, Greece, Iran, Italy, Jordan, Kuwait, Mali, Mozambique, the Netherlands, Oman, Portugal, Romania, Serbia, South Korea, Spain, Sweden, Switzerland and the United Arab Emirates. Free trade agreements are also in place with the European Union and the Arab League, as is a Trade and Investment Framework Agreement with the US.

'Algeria is a signatory to 48 bilateral investment treaties.'

International arbitration conventions

In addition to the BITs listed above, Algeria is party to, but has not yet ratified, the multilateral Organisation of the Islamic Conference (OIC) Agreement,[11] Article 17 of which contains an offer by each contracting party to arbitrate disputes with investors of another member state. No nationality requirement is imposed on owners of a corporate entity, such that a subsidiary of a parent company of a non-contracting party will be protected, provided that it holds the nationality of a contracting party.

Algeria is also party to, but again has not yet ratified, the Arab Investment Agreement,[12] which affords 'Arab investors' (as defined therein) access to international arbitration pursuant to the arbitration rules of the Arab Investment Court.

The ICSID Convention was ratified by Algeria on 22 March 1996 and the New York Convention on 8 May 1989.

11 The Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference was approved and opened for signature on 1–5 June 1980. It entered into force on 23 September 1986. The following 27 member states have ratified the OIC Agreement: Burkina Faso, Cameroon, Egypt, Gabon, Gambia, Guinea, Indonesia, Iran, Jordan, Kuwait, Lebanon, Libya, Mali, Morocco, Oman, Pakistan, Palestine, Qatar, Saudi Arabia, Senegal, Somalia, Sudan, Syria, Tunisia, Turkey, Uganda and the United Arab Emirates.

12 The Unified Agreement for the Investment of Arab Capital in the Arab States (the Arab Investment Agreement) was signed in Amman, Jordan, on 26 November 1980. It entered into force on 7 September 1981. The following 20 member states have ratified the Arab Investment Agreement: Algeria, Bahrain, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libyan Arab Jamahiriya, Mauritania, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates and Yemen. The Arab Investment Agreement has been signed but not ratified by Algeria and the Comoros.

Investor-state disputes

Algeria and its national oil and gas company, Sonatrach, have been (or remain) party to 18 investor-state disputes to date. Sonatrach has faced six claims from investors and has instigated a further four against investors. A number of these disputes relate to Algeria's imposition of a windfall profits tax in 2007. One tribunal rejected claims brought by Spain's Repsol and its Korean partners in relation to the tax, finding that Sonatrach was required by Algerian law to collect it.[13] Four other cases settled.[14]

> 'Algeria's national oil and gas company, Sonatrach, has faced six claims from investors and has instigated a further four against investors.'

Of the seven investor-state cases that have resulted in the issuance of an award on liability, investors have prevailed just twice. One of those two awards was the subject of unsuccessful set-aside proceedings instigated by Sonatrach before the English courts.[15]

> 'Of the seven investor-state cases brought against Algeria, investors have prevailed just twice.'

13 'Sonatrach defeats ICC claim over windfall profits tax', *Global Arbitration Review*, 19 October 2016 (http://globalarbitrationreview.com/article/1069588/sonatrach-defeats-icc-claim-over-windfall-profits-tax).

14 'Anadarko and Maersk settle with Sonatrach', *Global Arbitration Review*, 15 March 2012 (http://globalarbitrationreview.com/article/1031201/anadarko-and-maersk-settle-with-sonatrach); 'Maersk Oil settles Algerian tax claims', Maersk Oil, 9 March 2012 (http://www.maerskoil.com/media/newsroom/pages/maerskoilsettlesalgeriantaxclaims.aspx); 'Total and Sonatrach to drop ICC claims', *Global Arbitration Review*, 8 May 2017 (http://globalarbitrationreview.com/article/1141140/total-and-sonatrach-to-drop-icc-claims?utm_source=Law%20Business%20Research&utm_medium=email&utm_campaign=8272549_GAR%20Headlines%2008%2F05%2F2017&dm_i=1KSF,4XB51,NNBXS1,IORL9,1).

15 'Sonatrach fails to overturn Statoil award', *Global Arbitration Review*, 3 April 2014 (http://globalarbitrationreview.com/article/1033292/sonatrach-fails-to-overturn-statoil-award).

CASE STUDY

Imposing retroactive windfall profits tax

Algeria's measures against investors in the energy sector follow the lead of measures taken by certain oil-dependent countries in Latin America, particularly Ecuador.

The most obvious example of this was Algeria's introduction of a windfall profits tax, with a sliding rate of 5–50 per cent on oil revenues earned by international oil companies. The tax was retroactive, being specifically introduced in order to apply to oil allocations in existing production sharing contracts (PSCs) that the government acknowledged 'did not really have a way to capture... windfall profits'. Perhaps unsurprisingly, Algeria became embroiled in a series of arbitrations launched by foreign investors as a result. For instance, in February 2009, Anadarko, together with joint venture partner Maersk, commenced UNCITRAL arbitration proceedings against the state-owned oil company, Sonatrach, alleging that the new tax breached the stabilisation clause in its PSC and thus the state oil company had to bear the additional tax burden. Anadarko and Maersk sought some $11bn in compensation. This was followed several months later by a claim brought by Maersk against Algeria before an ICSID tribunal under the Netherland–Algeria BIT, seeking $3.6bn, in relation to the same underlying dispute. After proceeding to final hearings in both arbitrations, the parties settled the dispute in March 2012.

Egypt[16]

Since the Arab Spring, Egypt has experienced a period of sustained political unrest, although it has recently sought to create a more favourable investment environment.

Introduction

Egypt is the second largest African economy (after Nigeria) with a strong service and industrial sector. The production of petroleum and petroleum products accounts for approximately 7 per cent of GDP. However, since the Arab Spring in 2011, Egypt has experienced a period of sustained political unrest. But, as with other countries in the region, it has recently demonstrated a desire to create more favourable investment conditions.

Initiatives to promote foreign investment in the Egyptian market and attract foreign capital include the creation of a special economic zone along the Suez Canal, through which more than 8 per cent of global trade passes every year. Companies operating within the zone are entitled to (i) 100 per cent foreign ownership; (ii) 100 per cent foreign control of import/export activities; (iii) imports exempt from customs duties and sales tax; (iv) customs duties on exports to Egypt on imported components only, not the final product; and (v) fast-track visa services.

Notwithstanding this, and recent reforms to the country's foreign investment law introducing further incentives for investors (discussed below), Egypt retains a reputation for being a burdensome and bureaucratic country in which to invest, and there is currently a debate as to the net value of the generous tax exemptions in the Suez Canal special economic zone, which may yet be abolished.

Investment law

In 2015, Egypt's foreign investment law was revised.[17] Amendments include a reduction in sales tax and customs tax on machinery and equipment and non-tax incentives in targeted sectors, including agriculture, energy, logistics and transport.

The amendments also shield company executives from criminal prosecution for violations committed by the company – a welcome move for foreign investors.

Other initiatives beneficial to foreign investors include the establishment of the General Authority for Investment as a 'one-stop shop', streamlining the process by which investors procure the necessary licences to conduct their business in Egypt.

The previous law provided that disputes may be settled in a manner agreed upon by the parties including arbitration, with reference being made both to the dispute resolution provisions of Egypt's BITs and to ICSID arbitration.[18] However, in a bid to reduce the country's exposure to the possibility of investor-state arbitration, the new investment law identifies three out-of-court forums to amicably resolve disputes; there is now no reference in the law to the resolution of disputes by arbitration. Resorting to these forums, nonetheless, does not preclude the possibility of arbitration where a contract or IT provides for same.

In December 2016, another draft investment law was released by the Ministry of Investment, following discussions with investors calling for additional reforms. The draft introduces further incentives to foreign investors including treatment on an equal footing with local investors, and an increase in the number of foreign employees permitted.

'There is now no reference in Egypt's investment law to the resolution of disputes by arbitration.'

16 The authors are grateful for the contributions of their colleagues at Shahid Law to the following section.

17 Law No 8/1997, as amended by Presidential Decree No 117/2015 of 12 March 2015.

18 Article 7, Law No 8/1997.

Arbitration law

Egyptian arbitration law is based on the UNCITRAL Model Law.[19] The Egyptian law omits certain provisions contained in the Model Law however, including those concerning the arbitral tribunal's authority to grant interim measures (a matter that must first be agreed explicitly by the parties under Egyptian law).

The local courts are generally supportive of arbitration, and foreign awards are readily enforceable in practice. The arbitration law specifically provides that the courts must refuse to consider court actions commenced in violation of arbitration agreements.

The local arbitral institution, the Cairo Regional Centre for International Commercial Arbitration (CRCICA), is one of the most respected and well-established arbitration institutions on the African continent.

Bilateral investment treaty coverage

Egypt is a signatory to 100 BITs, more than any other African state, of which those with the following 73 states are in force: Albania, Algeria, Argentina, Armenia, Australia, Austria, Bahrain, Belarus, the Belgium–Luxembourg Economic Union, Bosnia and Herzegovina, Bulgaria, Canada, China, Comoros, Croatia, Cyprus, the Czech Republic, Denmark, Ethiopia, Finland, France, Germany, Greece, Hungary, Iceland, India, Italy, Japan, Jordan, Kazakhstan, Kuwait, Latvia, Lebanon, Libya, Malawi, Malaysia, Mali, Malta, Mauritius, Mongolia, Morocco, the Netherlands, North Korea, Oman, Palestine, Poland, Portugal, Qatar, Romania, Russia, Serbia, Singapore, Slovakia, Slovenia, Somalia, South Korea, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syria, Thailand, Tunisia, Turkey, Turkmenistan, Ukraine, the United Arab Emirates, the United Kingdom, the United States, Uzbekistan, Vietnam and Yemen.

The first wave of BITs that Egypt entered into was inconsistent in the protections offered, and criticised internally for being too investor-friendly. In 2007, Egypt adopted a new model BIT. This was in turn subject to a review procedure in 2013, and a further revised model BIT has been produced that contains some key amendments such as the exclusion of certain sectors from the national treatment standard including agribusiness and energy and mining.

The majority of BITs provide for ICSID arbitration of disputes between an investor and the state with the 2007 generation of BITs providing for amicable settlement as a prerequisite to international arbitration. The 2007 model BIT also states that claims must be commenced within five years of the date on which the investor became aware – or should have become aware – of the breach.

'Egypt is a signatory to 100 bilateral investment treaties, more than any other African state.'

19 Law No 27 of 1994.

International arbitration conventions

In addition to the BITs listed above, Egypt, like Algeria, is party to the multilateral OIC Agreement and the Arab Investment Agreement (for which see page 7).

The New York Convention was ratified by Egypt on 7 June 1959 and the ICSID Convention was ratified on 2 June 1972.

Investor-state disputes

Egypt and its state-owned entities have been (or remain) party to 35 investor-state disputes to date, making it one of the most frequently arbitrated-against states in the world. These disputes have concerned a variety of sectors including construction, multimedia broadcasting, oil and gas, textiles, tourism and waste management.

In the *Wena Hotels* case, one of the earliest, a tribunal found that an expropriation had taken place since Egypt had allowed Egyptian Hotels Company, which was wholly owned by the Egyptian government, to seize and possess two hotels leased, operated and managed by the investor. Egypt paid the amount due under the original award voluntarily, although according to Wena, Egypt subsequently tried to discredit it in the marketplace.[20]

The actions of the Egyptian government in the wake of the Arab Spring have led to further investor-state disputes. For example, four separate arbitration proceedings have been brought in relation to the country's alleged failure to protect the so-called 'Peace Pipeline' running under the Mediterranean Sea from Egypt to Israel (see 'Failure to protect investments' on pages 14–15).

Seven cases have proceeded to an award on liability in favour of the investor, in respect of three of which Egypt brought ICSID annulment proceedings. In a fourth case heard before CRCICA, the award was set aside by the Cairo Court of Appeal. Subsequently, applications to enforce the award in England and in France were unsuccessful.[21]

'Egypt is one of the most frequently arbitrated-against states in the world.'

20 'ICSID tribunal issues first decision ''interpreting'' a prior award', *Lexology*, 1 February 2007 (http://www.lexology.com/library/detail.aspx?g=95ae0a5e-7359-4103-a549-5b9500d86409).

21 'Cairo center award in favour of investor against Egypt suffers another enforcement setback', *IAReporter*, 24 February 2015 (http://www.iareporter.com/articles/cairo-center-award-in-favor-of-investor-against-egypt-suffers-another-enforcement-setback/).

Failure to protect investments

Egypt and its state-owned oil and gas companies have been party to one of the most complex disputes on the African continent, entailing four parallel arbitrations under different arbitral rules (ICSID, UNCITRAL, ICC and CRCICA), with different seats and different governing laws, brought by East Mediterranean Gas SAE (EMG) and its shareholders.

The dispute concerns a deal struck between Israel and Egypt in 2005, by which Egypt agreed to export gas to Israeli customers through EMG, which built a pipeline under the Mediterranean Sea to transport the gas from the Egyptian to the Israeli natural gas grid (the 'Peace Pipeline', so called because it was part of the agreement that was intended to prevent another war from breaking out between Egypt and Israel).

As part of the agreement, Egypt's state-owned entities signed a gas supply agreement with EMG and a tripartite agreement with EMG and state-owned Israel Electric Corporation (EMG's main downstream customer). After the onset of the Arab Spring in 2011, the pipeline was attacked by militants repeatedly and gas flow was consequently disrupted. Following 13 separate pipeline attacks and a brewing dispute over a lack of gas supply, Egypt's state-owned entities sought to terminate the gas supply agreement in April 2012. EMG and its shareholders argued in the different arbitrations that Egypt and its state-owned entities failed to adequately protect and repair in a timely manner the pipeline system, and that their termination attempt amounted to a repudiation of their gas supply commitments. In 2015, the ICC tribunal ordered Egypt's state-owned entities to pay over $2bn in damages for the repudiation of the tripartite agreement. In 2016, the ICSID tribunal found that Egypt had violated the US–Egypt BIT by failing to protect the pipeline and that the repudiation of the gas supply agreement was 'tantamount to expropriation'; an award on damages is pending. In 2017, the CRCICA tribunal issued an award confirming that the Egyptian state-owned entities had repudiated the gas supply agreement with EMG; an award on damages is pending. The UNCITRAL tribunal has yet to render its award. The outstanding damages claims exceed $3bn.

Ethiopia[22]

FDI growth has been rising steadily in Ethiopia since 2012, even when it declined elsewhere in Africa.

Introduction

Ethiopia is one of Africa's fastest growing economies, experiencing double-digit growth since 2005 that has primarily been underpinned by public sector-led development.[23]

In 2010, the government introduced five-year Growth and Transformation Plans (GTP) to increase industrial development. The first GTP resulted in the construction of 71,000 km of new roads, and 2,395 km of new railway track linking Addis Ababa with Djibouti. The construction of a new railway system that aims to improve intercity links within Ethiopia is underway.

Under the second phase of the scheme, covering 2016–2020, the government has pledged to continue to invest in infrastructure, improve transportation networks for domestic power generation, and introduce further measures to attract FDI. The country aims to reach middle-income status by 2025.[24]

Thanks to Ethiopia's own improvements to its infrastructure, it has attracted unprecedented levels of FDI in recent years, most notably from China. However, investors from other economies are increasingly investing in Ethiopia's agro-processing, tourism and manufacturing sectors. In 2016, Ethiopia experienced 45.8 per cent growth in investment flows, making it the fifth largest recipient of FDI in Africa.[25]

Challenges to investors include administrative delays, foreign exchange shortages, and a highly regulated banking sector.

Investment law

The 2012 Investment Proclamation is the principal instrument that governs the FDI regime in Ethiopia.[26] It introduced a number of incentives for foreign investors, for instance the establishment of industrial development zones, tax incentives and exemptions from customs duty. It also raised the minimum capital investment to $200,000 for wholly owned foreign investments and to $150,000 for joint investments with domestic investors. The same investment incentives are available to domestic and foreign investors alike.

The 2012 Investment Proclamation does not provide for any specific means of dispute resolution for investors with claims to bring against the state. Accordingly, all such disputes must be heard before the local courts.

22 The authors are grateful for the contributions of their colleagues at Mehrteab Leul & Associates to the following section.

23 'Economic Outlook 2016', Africa Development Bank (https://www.afdb.org/en/countries/east- africa/ethiopia/ethiopia-economic4outlook/).

24 'The Story Behind the Numbers', Ethiopia Economic Outlook, Deloitte 2016 (https://www2.deloitte.com/content/dam/Deloitte/et/Documents/tax/Economic%20Outlook%202016%20ET.pdf).

25 'Investment and the Digital Economy', World Investment Report 2017 (http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf).

26 Investment Proclamation No 769/2012, as amended by the Investment (Amendment) Proclamation No 849/2014.

Arbitration law

Ethiopian arbitration law is set out in the Civil Code[27] of 1960 and the Civil Procedure Code of 1965.[28] These do not reflect the later UNCITRAL Model Law (first introduced in 1985). For the most part, the legislation does not distinguish between domestic arbitration and international arbitration. It is therefore unclear which provisions apply to international arbitration.

The grounds for setting aside an award under Ethiopian law are broader than the grounds under the UNCITRAL Model Law. Most crucially, an award can be set aside if it is inconsistent, uncertain or ambiguous or is wrong in law or fact. As such, investors who are party to an international arbitration seated in Ethiopia may have concerns regarding the finality of an international award. Notwithstanding this, Ethiopia's arbitration regime generally enjoys freedom from local court intervention.

Ethiopia is not yet a party to the New York Convention. This may prove problematic for foreign investors if an award is rendered against Ethiopian entities that do not hold assets abroad. Ratification of the New York Convention is reportedly under consideration.

The Addis Ababa Chamber of Commerce & Sectorial Associations Arbitration Institute (AACCSA AI), established in 2002, is the main arbitral institution in Ethiopia for local arbitral proceedings. Its main role is to provide arbitration and other alternative dispute resolution (ADR) mechanisms to clients that are parties to commercial disputes. The services offered by the AACCSA AI include: facilitating the settlement of commercial disputes; providing mediation and conciliation services; conducting studies on arbitration and ADR procedures; and drafting and reviewing contracts. In addition to the AACCSA AI, arbitration services are also provided through the Arbitration Centre of Bahir Dar University.

Bilateral investment treaty coverage

Ethiopia is a signatory to 32 BITs, of which those with the following 21 states are in force: Algeria, Austria, China, Denmark, Egypt, Finland, France, Germany, Iran, Israel, Italy, Kuwait, Libya, Malaysia, the Netherlands, Sudan, Sweden, Switzerland, Tunisia, Turkey and Yemen. Several more BITs are reportedly in the process of being negotiated, including ones with the United States and Brazil.

International arbitration conventions

Despite participating in the drafting of the ICSID Convention, and being one of its first signatories, Ethiopia has not yet ratified the instrument. As discussed above, Ethiopia is also yet to ratify the New York Convention.

'Ethiopia is not yet a party to the New York Convention.'

Investor-state disputes

Ethiopia and its state-owned entities have been (or remain) party to seven investor-state disputes, four of which concern the infrastructure sector. In both cases in which the investor prevailed on liability, the state challenged enforcement of the award in the local courts. In one instance, enforcement of an award rendered in France was denied because it was impermissible without an agreement between the two states.[29] In the second instance, Ethiopia challenged the award on the grounds that the contract had been obtained through fraudulent means. Enforcement has been stayed pending a review of the existence of fraud.[30]

'Unusually, an arbitral award can be set aside in Ethiopia if it is wrong in law or fact.'

27 Civil Code of the Empire of Ethiopia, Proclamation No 165 of 1960.

28 Civil Procedure Code of the Empire of Ethiopia, Decree No 53 of 1965.

29 'Ethiopia prevailed in face of foreign investor's attempt to use investment treaty to sue over ICC arbitral award', *IAReporter*, 4 March 2012 (http://www.iareporter.com/articles/ethiopia-prevailed-in-face-of-foreign-investors-attempt-to-use-investment-treaty-to-sue-over-icc-arbitral-award/).

30 'Ethiopian court hears challenge to PCA award', *Global Arbitration Review*, 7 June 2016 (http://globalarbitrationreview.com/article/1036388/ethiopian-court-hears-challenge-to-pca-award).

Ghana[31]

Ghana is a gateway for trade and investment in West Africa.

Introduction

Ghana is often considered a gateway for trade and investment in West Africa. While agriculture still provides employment for more than half of Ghanaians and accounts for almost one-quarter of GDP, Ghana's industrial base is relatively advanced compared to other African countries and its most important service sectors include trade, transport and storage, and real estate. Ghana's economic growth has been fuelled by the burgeoning oil industry; however, the recent oil price crash reduced Ghana's oil revenues by half in 2015.

Ghana is a member of several regional trading blocs, including the Economic Community of West African States (ECOWAS). This organisation allows for the free movement of goods and people across its 15 member states, constituting a market of some 250 million people.

Compared to some of its regional counterparts, Ghana boasts relative political stability and a recent history of strong economic growth, not least as a result of its abundant natural resources. However, the contribution of the extractive sector to state revenues is relatively small, and oil production only began in 2011.

Challenges to investors include delays in the implementation and enforcement of the legislation and policies designed to promote investment, complex and protracted land acquisition and registration procedures, and local ownership requirements in certain sectors.

Investment law

Ghana enacted new investment legislation in 2013, the Ghana Investment Promotion Centre Act (GIPCA),[32] to cement its reputation as a stable environment in which to do business, and to establish the eponymous government agency. The legislation's aim is to facilitate foreign investment and provide qualifying investors with common protections, including enjoyment of the same rights as Ghanaian citizens and the free transfer of funds. Specific provision is made for the registration and renewal of technology transfer agreements.

The investment law provides an independent basis for disputes between investors and the state to be resolved by arbitration where amicable settlement is not reached within six months, in accordance with the UNCITRAL Rules, or within the framework of any applicable bilateral or multilateral investment treaty, or in accordance with any other national or international machinery for the settlement of investment disputes agreed by the parties.

With the exception of enterprises that are registered as free zone entities, the GIPCA applies to all investments regardless of the percentage of foreign shareholding.

'Ghana boasts relative political stability and a recent history of strong economic growth.'

31 The authors are grateful for the contributions of their colleagues at Bentsi-Enchill, Letsa & Ankomah to the following section.

32 Act No 865 of 2013.

Arbitration law

Ghana's Alternative Dispute Resolution Act of 2010[33] provides for arbitration, mediation and 'customary arbitration', which refers to a traditional dispute resolution system. The provisions on arbitration are largely based on the UNCITRAL Model Law.

The legislation provides for the establishment of the Alternative Dispute Resolution Centre to facilitate the administration of arbitration and mediation proceedings. However, the principal arbitration centre is the Ghana Arbitration Centre, which was established in recognition of the fact that a viable, fair and expeditious dispute resolution system is key to inspiring the confidence of prospective investors.

The highest courts in the country have largely demonstrated support for arbitration and have taken a dim view of court interference in arbitral proceedings. However, under the 2010 Act certain matters are not arbitrable, namely matters that relate to (i) national or public interest; (ii) environmental matters; (iii) the enforcement and interpretation of the Constitution; and (iv) any other matter that by law cannot be settled by an alternative dispute resolution method. The type of matter that is likely to be captured by this final category remains to be seen.

Bilateral investment treaty coverage

Ghana is a signatory to 27 BITs, of which those with the following eight states are in force: China, Denmark, Germany, Malaysia, the Netherlands, Serbia, Switzerland and the United Kingdom.

'The Ghana Arbitration Centre was established in recognition of the fact that a strong dispute resolution system is key to inspiring investment.'

33 Act No 798 of 2010.

International arbitration conventions

The ICSID Convention was ratified by Ghana on 14 October 1966 and the New York Convention was ratified on 8 July 1968.

Ghana is a signatory to the ECOWAS Energy Protocol.[34] This instrument aims to promote co-operation within the ECOWAS community in the energy sector, with a view to securing more energy trade within the region and more foreign investment. Parties to the Energy Protocol agree not to discriminate against investors from contracting states or expropriate their assets, except in limited circumstances and with compensation. It also provides for arbitration under the auspices of a number of arbitral institutions (including ICSID arbitration) in the event of a dispute, provided both the host country and the country of the investor are signatories to the ICSID Convention. At the time of publication, however, the Energy Protocol has not yet been ratified by Ghana.

Investor-state disputes

Ghana has been (or remains) party to eight investor-state disputes to date, four of which concern the energy and natural resources sector. In *Balkan Energy*, a tribunal awarded the investor just \$12m of the \$3bn it had claimed in relation to Ghana's alleged failure to lay power lines that were necessary in order for the investor to perform its obligations under the parties' contract. The High Court in Accra had ordered a stay of the arbitral proceedings on the grounds that the arbitral tribunal did not have jurisdiction to rule on the interpretation of the Ghanaian Constitution, but the tribunal did not consider itself bound by the High Court's decision.[35]

34 ECOWAS Energy Protocol A/P4/1/03.

35 'Panel rejects bulk of Ghana power claim', *Global Arbitration Review*, 4 April 2014 (http://globalarbitrationreview.com/article/1033297/panel-rejects-bulk-of-ghana-power-claim).

Kenya

The agricultural, industrial and transport sectors are central to Kenya, an investment hub within East Africa.

Introduction

Kenya's economy is largely based on the agricultural sector, with the industrial and transport sectors also representing a sizeable portion of economic activity. The state's attraction as an investment hub in the African market has largely been based on the country being a portal to the East African Community, a common market that includes Burundi, Rwanda, South Sudan, Tanzania and Uganda. A base in Kenya also allows for easier access to Ethiopia and the Democratic Republic of the Congo.

In recent years, the Kenyan government has invested heavily in infrastructure, and introduced a raft of legislation designed to improve the investment environment, including a new Companies Act and a Business Registration Services Bill, with revisions to the laws governing the petroleum and mining sectors in progress.

One significant change has been the drive to digitise services to facilitate the process of conducting business in Kenya. Kenya's growing middle class, availability of skilled labour and sophisticated financial and telecommunications sectors have also contributed to developing the investment climate.

However, ongoing threats to Kenya's economic stability include delays, corruption, red tape and a lack of transparency. There is also a real risk of terrorism and crime.

'Kenya's growing middle class, availability of skilled labour and sophisticated financial and telecommunications sectors have contributed to developing the investment climate.'

Investment law

Kenya's Investment Promotion Act of 2004[36] provides for a number of initiatives to encourage foreign investment. These include the introduction of an investment certificate regime that enables both local and foreign investors to obtain the necessary permits and licences more easily. The law also established the Kenya Investment Authority, a statutory body that has devised a sophisticated investment services programme and investment blueprint which aims to make Kenya a newly industrialised, middle-income country by 2030. In addition, the law created a National Investment Council that monitors investments in Kenya with a view to advising the government and liaising between it and the private sector.

Under the investment law, investors with investments that are beneficial to Kenya and worth at least $100,000 are entitled to investment certificates, with which they can apply for licences for the operation of their business enterprises.

The investment law does not provide an independent basis for the resolution of disputes by international arbitration. Decisions of the Kenya Investment Authority to grant or revoke a licence may be submitted to a panel for adjudication. Resolution of all other disputes related to investment is not covered by the Investment Promotion Act, in practice requiring their submission to the Kenyan courts unless an investor is protected by a treaty, convention or contract.

The Special Economic Zones Act of 2015[37] further serves to demonstrate Kenya's commitment to attracting more FDI. This law permits the establishment of specific geographical areas in which licensed entities will benefit from certain tax exemptions.

36 Act No 6 of 2004.

37 Act No 16 of 2015.

Arbitration law

Notwithstanding the lack of provision for arbitration in the investment law, the 2010 Constitution of Kenya recognises arbitration as an important form of dispute resolution. It provides that, in the exercise of their judicial powers, Kenyan courts or tribunals shall encourage and use alternative forms of conflict resolution including reconciliation, mediation and arbitration as well as traditional dispute resolution mechanisms.

The 1995 Arbitration Act[38] is the primary piece of legislation that governs arbitration and largely reflects the UNCITRAL Model Law. The Nairobi Centre for International Arbitration (NCIA) Act of 2013 has established a regional centre for international commercial arbitration, as has a local branch of the Chartered Institute of Arbitrators.

The NCIA's functions include administering arbitrations and organising international training events for arbitration practitioners. The NCIA is expected to enhance Kenya's standing as a regional arbitration hub.

Given the constitutional commitment to arbitration and the backlog of cases to be heard before the local courts, those courts will generally not interfere with arbitral proceedings and awards unless it is shown that there will be an injustice if they fail to interfere.

Kenya will only apply the New York Convention to enforce awards made in the territory of another New York Convention contracting state.

Bilateral investment treaty coverage

Kenya is a signatory to 17 BITs, of which those with the following six states are in force: France, Germany, Italy, the Netherlands, Switzerland and the United Kingdom.

International arbitration conventions

The ICSID Convention was ratified by Kenya on 2 February 1967 and the New York Convention on 11 May 1989.

Investor-state disputes

Kenya has been (or remains) party to four investor-state disputes to date, three in the energy and natural resources sector. Only one dispute has resulted in the issuance of an award, namely *World Duty Free*. In this case, the tribunal found that the investor had paid an illegal bribe to the president of Kenya in order to procure the investment contract. Consequently, the claims arising under that contract could not be upheld as a matter of international public policy.[39]

'Given the backlog of cases to be heard before the local courts, those courts will generally not interfere with arbitral proceedings.'

38 Arbitration Act 1995 (as amended in 2009), Act No 4 of 1995.

39 'Kenya wins World Duty Free', *Global Arbitration Review*, 4 April 2014 (http://globalarbitrationreview.com/article/1028215/kenya-wins-world-duty-free).

Madagascar[40]

Madagascar plans to auction more than 250 oil exploration blocks in coming years.

Introduction

The island of Madagascar is a country of significant natural resources. In addition to substantial mineral deposits, which have driven Madagascar's recent economic growth, the state plans to auction more than 250 oil exploration blocks in the coming years.

Although the state has expressed an enthusiasm for attracting foreign investment, and Madagascar's legislative framework does not discriminate against foreign investors, persistent corruption and a weak, overburdened judicial system lessen investor confidence in the country. Poor infrastructure and the frequent targeting of foreign companies by the tax authorities do little to alleviate this uncertain investment climate.

Investment law

The focus of the Madagascar Investment Law of 2007[41] is the protection of property rights. Investors are free to own up to 100 per cent of the shares of the company through which business activities are conducted. A foreign investor may therefore establish a wholly owned Malagasy company. The legislation provides that foreign and Malagasy investors are treated equally; however, foreign companies are often subject to nuisance suits regarding tax assessments and labour law violations.

The Malagasy investment law contains an independent basis for disputes between investors and states to be resolved by arbitration, either in accordance with applicable BITs or alternatively by arbitration under the auspices of ICSID. An investor may submit its dispute to the state's competent courts but there is no requirement to do so.

Arbitration law

Madagascar's arbitration law,[42] which is incorporated into the country's Civil Procedure Code, draws on the UNCITRAL Model Law, although it has not yet been updated to reflect the 2006 amendments to the Model Law. Parties to a dispute are free to choose any arbitral institution, including the Arbitration and Mediation Centre of Madagascar (CAMM with its acronym in French), to resolve their dispute. However, in practice, arbitration is limited in Madagascar and very few disputes have been referred to CAMM, with private parties generally preferring to resolve disputes by way of international arbitration.

Madagascar will only apply the New York Convention to enforce awards made in the territory of another New York Convention contracting state and where the relationship between the parties is considered to be 'commercial' under Madagascan law.

40 The authors are grateful for the contributions of their colleagues at John W Ffooks & Co to the following section.

41 Law No 2007-036 of 2007.

42 Law No 98-019 of 2 December 1999, as amended by Law No 2001-022 of 9 April 2003.

Bilateral investment treaty coverage

Madagascar is a signatory to nine BITs, of which those with the following eight states are in force: the Belgium–Luxembourg Economic Union, China, France, Germany, Mauritius, Norway, Sweden and Switzerland.

International arbitration conventions

The New York Convention was ratified by Madagascar on 14 October 1962 and the ICSID Convention on 14 October 1966.

Madagascar is a member of the Southern African Development Community. This is discussed in greater detail on pages 58–59.

Investor-state disputes

Madagascar has been (or remains) party to six investor-state disputes to date. Two of these disputes involved Seditex, a German textiles company, and were brought under the ICSID Conciliation Rules;[43] one case settled and the other resulted in the production of a report by the ICSID Conciliation Commission.

In another case, an arbitral tribunal found that Madagascar's Attorney-General had unjustifiably interfered in local court proceedings to which the investors and a state-owned entity were party, constituting a breach of the state's fair and equitable treatment obligations. In set-aside proceedings brought by Madagascar, the Paris Court of Appeal found that the arbitral tribunal had substituted the investors' demands for compensation for its own ruling, thereby breaching the parties' right to a fair hearing.[44] Following the set-aside proceedings, the French Court of Cassation dismissed the investors' appeal to reinstate the award.[45] The investors subsequently filed a second investment treaty claim against Madagascar.[46]

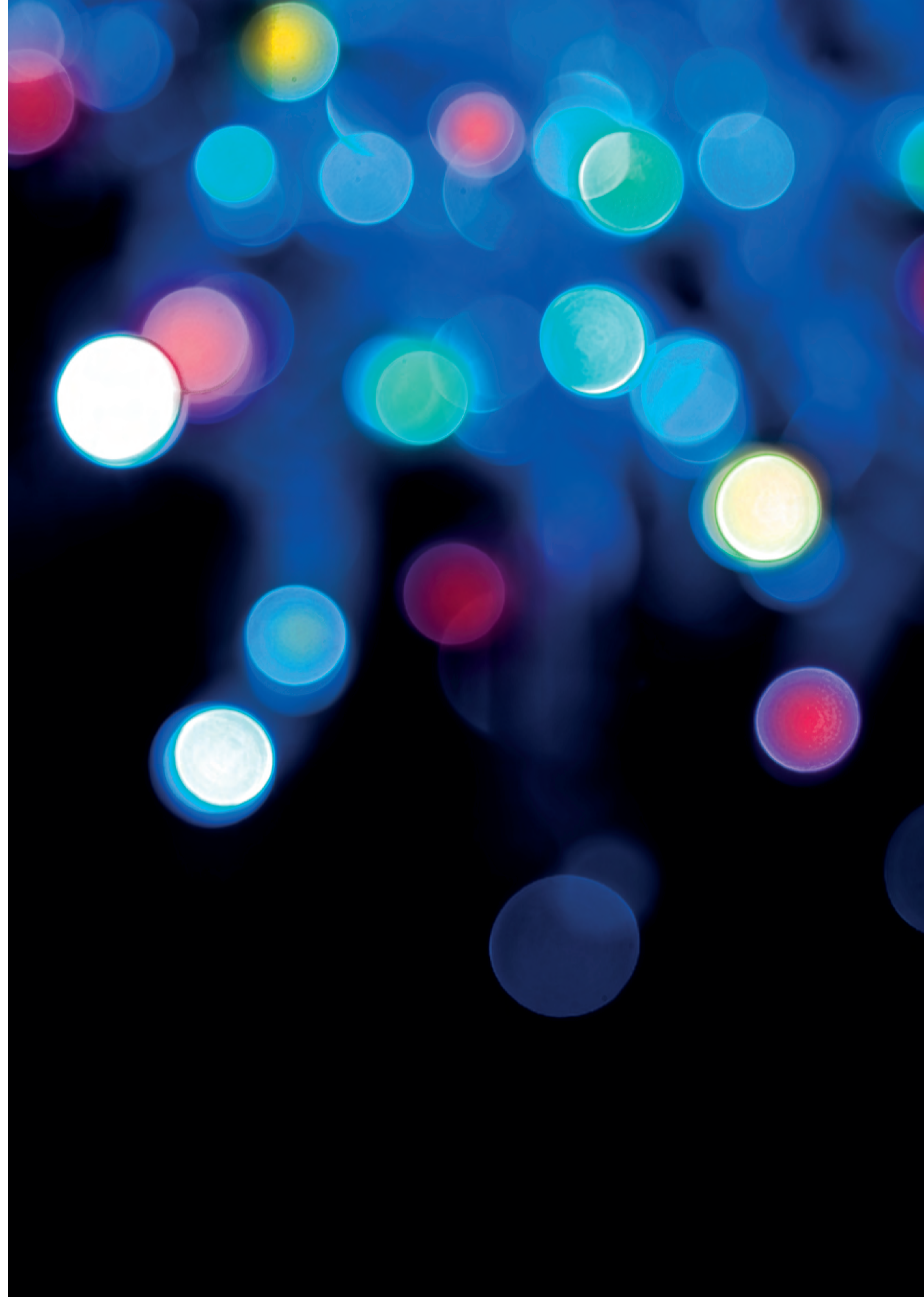
'An arbitral tribunal found that Madagascar's Attorney-General had unjustifiably interfered in local court proceedings between an investor and a state-owned entity. The tribunal's award was set aside however.'

43 ICSID Conciliation is a non-adversarial dispute resolution process whereby a Conciliation Commission will assess evidence and then make non-binding recommendations to the parties in the form of a written report.

44 'Paris court strikes down previously confidential BIT award rendered against Madagascar by sole arbitrator Bart Legum', *IAReporter*, 28 March 2016 (http://www.iareporter.com/articles/paris-court-strikes-down-previously-confidential-bit-award-rendered-against-madagascar-by-sole-arbitrator-bart-legum/).

45 'France's top court refuses to reinstate Madagascar award', *Global Arbitration Review*, 13 June 2017 (http://globalarbitrationreview.com/article/1142829/frances-top-court-refuses-to-reinstate-madagascar-award).

46 'Trio of new ICSID claims against African and Lat Am states', *Global Arbitration Review*, 15 June 2017 (http://globalarbitrationreview.com/article/1142968/trio-of-new-icsid-claims-against-african-and-lat-am states?utm_source=Law%20Business%20Research&utm_medium=email&utm_campaign=8397556_GAR%20Headlines%2015%2F06%2F2017&dm_i=1KSF,4ZZLG,PR2ML8,J1NKN,1).



Morocco[47]

Morocco's dynamic economy is driven by the manufacturing and mining sectors.

Introduction

Morocco's economy is dominated by the service industry, in addition to a strong manufacturing and mining sector. Morocco boasts a dynamic business environment, with the number of days it takes to register a business nearly half that of neighbouring countries. The country's political stability, reliable infrastructure and strategic location – facing at once north Africa, the Middle East and Europe – also explain the 11 per cent rise in FDI in the country between 2010 and 2015 and why it is rapidly becoming a regional manufacturing and export base for international companies. Morocco has long considered foreign investment as crucial to its economic development. To that end, it introduced an investment charter in 1995 that guaranteed investors the free transfer of income generated by their investments and the free transfer of income from the sale or liquidation of their investments.[48] In 2016, a revised charter was introduced, as set out below.

The state has devised and implemented specific initiatives to further attract foreign investment in recent years. Casablanca Finance City is an economic and financial hub that seeks to encourage financial companies, professional service providers and multinationals to Casablanca from where they can launch further south. The country's Industrial Acceleration Plan identifies incentives that target specific industries, such as the automotive sector and renewable energy sector, with a view to stimulating growth and enhancing competition.

Investment law

In 2016, a new draft investment law was proposed to parliament.[49] This consolidates various existing trade and investment promotion bodies under the auspices of a new centralised investment agency, the Moroccan Investment Development Agency. The draft law incorporates a convertibility system for foreign investors, guaranteeing free repatriation of invested capital and free transfer of profits (subject to certain limitations) and provides for the creation of more 'free zones' devoted to different sectors in which investors can benefit from a raft of financial and fiscal incentives.

At the time of writing, however, the 1995 investment law remains in force.[50] This contains a number of provisions designed to encourage investment by introducing various tax benefits to investors. Critically, the 1995 law does not contain any provision regarding the resolution of disputes between investors and the state. Thus investors will only have access to international arbitration where they can benefit from BITs or other treaties, conventions or contracts where international arbitration is foreseen. As the new investment law has not been published, it is not yet apparent what dispute resolution provisions it contains.

Investments in the hydrocarbon and mining sectors are governed by separate legislation,[51] which identifies the terms applicable to public–private partnerships in those fields (including tax incentives). The renewable energy sector is similarly governed by separate legislation.[52]

'Morocco's investment law does not provide investors with access to international arbitration.'

47 The authors are grateful for the contributions of their colleagues at Bennani & Associés to the following section.

48 Law No 18-95 of 3 October 1995.

49 Draft Law No 60-16 of 2016.

50 Law No 18-95 of 3 October 1995.

51 Law No 21-90 and Decree No 1-91-118 of 1 April 1992, as amended by Law No 27-99 and Decree No 1-99-340 of 15 February 2000, published in the official bulletin on 16 March 2000; Law No 33-13 of 1 July 2015 and Decree No 1-15-76, published in the official bulletin on 6 August 2015.

52 Law No 13-09 and Decree No 2-10-578 of 11 April 2011, amended by Law No 58-15 and Decree No 1-16-3 of 12 January 2016.

Arbitration law

Moroccan arbitration law is set out in its Civil Procedure Code, the provisions of which largely track the UNCITRAL Model Law.[53] Certain matters, however, are not arbitrable, including disputes related to unilateral acts or authorisations of the state (eg import licences), unless the consequence of such acts or authorisations entails monetary damages (with the exception of tax matters).

The rising popularity of arbitration in Morocco is partly a reflection of a lack of public trust in the domestic judicial system. There are presently four arbitral institutions in Morocco, the principal of which is the Moroccan Court of Arbitration of the International Chamber of Commerce of Morocco.

Although the local courts face accusations of inefficiency and a lack of transparency, Morocco is pro-arbitration and courts recognise foreign awards if they are not contrary to Moroccan or international public policy. However, Morocco will only apply the New York Convention to enforce awards made in the territory of another New York Convention contracting state.

Bilateral investment treaty coverage

Morocco is a signatory to 68 BITs, of which those with the following 51 states are in force: Argentina, Austria, Bahrain, the Belgium–Luxembourg Economic Union, Bulgaria, Burkina Faso, China, the Czech Republic, Denmark, the Dominican Republic, Egypt, El Salvador, Estonia, Finland, France, Gabon, Gambia, Germany, Greece, Hungary, India, Indonesia, Iran, Italy, Jordan, Kuwait, Lebanon, Libya, Macedonia, Malaysia, Mali, Mauritania, the Netherlands, Oman, Poland, Portugal, Qatar, Romania, Slovakia, South Korea, Spain, Sudan, Sweden, Switzerland, Syria, Tunisia, Turkey, Ukraine, the United Arab Emirates, the United Kingdom and the United States.

International arbitration conventions

In addition to the BITs listed above, Morocco is party to the multilateral OIC Agreement (in relation to which see page 7).

The New York Convention was ratified by Morocco on 7 June 1959 and the ICSID Convention on 10 June 1967.

Investor-state disputes

Morocco has been party to four investor-state disputes to date, three in the transport sector and one in the tourism sector.

Of the four cases, the state prevailed in one and the parties settled in two. In the fourth case, *Salini*, the investor prevailed in its claim relating to the construction of a highway. However, Morocco resisted enforcement of the award in Morocco and the US. The Moroccan courts held that the award was enforceable, with the exception of that portion of it that granted the investors a tax rebate. An appeal before the chief appellate courts is pending, although the US courts enforced the award in its entirety, ruling that it was not bound by the findings of the Moroccan courts where the underlying dispute was contractual rather than arising out of another state's tax judgment.[54]

'Morocco is a signatory to 68 bilateral investment treaties.'

53 Law No 08-05 of 2007 on Arbitration.

54 'Morocco tax rebate award enforced in US', *Global Arbitration Review*, 13 February 2017 (http://globalarbitrationreview.com/article/1081319/morocco-tax-rebate-award-enforced-in-us).

Nigeria[55]

Nigeria, the most populous country in Africa, has attracted significant foreign investment in the banking, retail and telecommunications sectors.

Introduction

Nigeria has the largest population and GDP in Africa. A large low-cost labour pool, a growing middle class and vast oil reserves (second only to Libya) have all attracted significant foreign investment. Traditionally, much foreign investment has been in the onshore energy sector, but increasingly offshore crude oil and natural gas production as well as the banking, retail and telecommunications sectors are receiving greater foreign investment attention. Oil and gas accounts for about 35 per cent of GDP, and petroleum exports revenue represents over 90 per cent of total exports revenue.

Prior to the 1980s, Nigeria had a very restrictive foreign investment regime, with significant trade restrictions and capital controls. This was born of a postcolonial desire to limit foreign economic dependence and encourage local economic development. However, an increasingly liberalised approach to FDI in the 1980s and 1990s culminated in the enactment of the Nigerian Investment Promotion Commission Act 1995, followed by the introduction of provisions concerning foreign investment in a variety of other sector-specific legislation.

In 2016, security, corruption, government red tape and a scarcity of foreign exchange were identified as the main challenges facing investors in Nigeria.[56]

Investment law

The 1995 investment promotion legislation[57] permits foreign investors to engage in any sector of the Nigerian economy, with limited exceptions such as arms and ammunition production, and provides a broad range of investment protections and tax incentives, including an initial three-year tax 'holiday' for businesses in certain pioneer industries, reduced taxation of investors from countries with which Nigeria has a double tax treaty, and tax credits on investments in research and development.

However, certain restrictions apply in the energy sector, where only local companies can provide specified services in the oil and gas sector. They must also be considered first in the award of oil sites or oil field licences. In the shipping industry, the extent to which foreign-owned vessels can engage in the carriage of people or cargo, or trade within Nigeria's territorial waters is limited.

The dispute resolution provisions of the investment law do not contain any independent basis for disputes between investors and states to be resolved by arbitration. However, if amicable settlement is not successful then the dispute can be submitted to arbitration, where available, in accordance with applicable BITs or any other national or international dispute resolution mechanism agreed by the parties. Where there is disagreement between the investor and the state as to the method of dispute settlement to be adopted, the ICSID Rules shall apply.

55 The authors are grateful for the contributions of their colleagues at Templars to the following section.

56 'What the Nigerian economy needs to attract investment', *The Financial Times*, 27 November 2016 (https://www.ft.com/content/6f4f8f6c-923e-11e6-a72e-b428cb934b78).

57 Nigerian Investment Promotion Commission Act, No 16 of 1995.

Arbitration law

As Nigeria is a federation, each of its 36 states can enact its own arbitral laws. In practice, however, most of the states have either expressly or impliedly adopted the Arbitration and Conciliation Act of 2004, which is modelled on the old UNCITRAL Model Law of 1985[58] with a few notable differences including a provision for the stay of court proceedings pending arbitration. The local law also expressly provides for the application of the New York Convention to awards. However, Nigeria will only apply the New York Convention to enforce awards made in the territory of another New York Convention contracting state and where the relationship between the parties is considered to be 'commercial' under Nigerian law. Plans to update Nigeria's arbitration act, including a fast-track process for arbitrations in the courts, are under way.

There are a number of arbitral institutions in Nigeria, of which the Lagos Court of Arbitration is perhaps the most widely used at present. Others include the Nigerian Institute of Chartered Arbitrators, and the Regional Centre for International Commercial Arbitration – Lagos. In 2016, the Lagos Chamber of Commerce International Arbitration Centre opened, reflecting a growing awareness that arbitration is an important, independent, alternative mechanism for efficient dispute resolution. *Ad hoc* arbitrations and arbitrations under other sets of institutional rules are also seated in Nigeria. Although a handful of local court decisions have undermined the arbitral process, and endemic delay in the Nigerian court system continues to be a problem, recently the Nigerian courts have intervened in a manner that supported the arbitration proceedings in question. This demonstrates a favourable attitude towards the enforcement of foreign arbitral awards outside of the context of high-value, highly politicised disputes with state-owned entities.

Bilateral investment treaty coverage

Nigeria is a signatory to 29 BITs, of which those with the following 15 states are in force: China, Finland, France, Germany, Italy, the Netherlands, Romania, Serbia, South Africa, South Korea, Spain, Sweden, Switzerland, Taiwan and the United Kingdom.

Nigeria has no BIT with the US. Instead, bilateral trade between Nigeria and the US is governed by agreements such as the Trade Investment Framework Agreement. Nigeria is also a member of ECOWAS (in relation to which see page 21).

International arbitration conventions

In addition to the BITs listed above, Nigeria is party to, but has not yet ratified, the multilateral OIC Agreement (in relation to which see page 7).

The New York Convention and ICSID Convention were ratified by Nigeria on 15 June 1970 and 14 October 1966, respectively.

'Endemic delay in the Nigerian court system continues to be a problem.'

Investor-state disputes

Nigeria and its state-owned entity, the Nigerian National Petroleum Corporation (NNPC), have been (or remain) party to 15 investor-state disputes to date, 12 of which have been in the oil and gas sector. This includes a claim brought successfully by Shell and Esso for breach of an oil production sharing contract in relation to a dispute concerning allocation of oil and the submission of erroneous tax documentation. In 2013, a tribunal rendered an award in favour of the investors in the sum of $1.4bn. However, the NNPC has resisted enforcement in the Nigerian courts.[59]

'Nigeria and/or the Nigerian National Petroleum Corporation have been party to 15 investor-state disputes.'

Of the 10 disputes in which the investor(s) prevailed, Nigeria has resisted enforcement of the arbitral award in at least six, including in the above-mentioned case brought by Shell and Esso.

'Of the 10 disputes in which the investor prevailed, Nigeria has resisted enforcement of the arbitral award in at least six.'

58 UNCITRAL Model Law on International Commercial Arbitration adopted by the UN General Assembly on 21 June 1985, UN Doc A/40/17 Annex 1.

59 'Shell takes Nigerian oil award to New York', *Global Arbitration Review*, 27 May 2016 (http://globalarbitrationreview.com/article/1036367/shell-takes-nigerian-oil-award-to-new-york).

Shifting the goalposts on contracts

Having one of the most developed oil industries in Africa means that Nigeria also has one of the longest histories of investor-state disputes in the energy sector on the continent.

At the crux of most of those disputes have been the periodic efforts by the Nigerian state to increase its share of profits arising out of the country's oil resources beyond the initial bargains struck. For instance, a dispute arose between a consortium of subsidiaries of ExxonMobil and Shell, on the one hand, and the state, on the other, regarding the re-interpretation of oil entitlement provisions in the parties' production sharing contract (PSC). Tensions came to a head in late 2007, when the state-owned NNPC announced that its entitlement model showed that the consortium had overlifted some $415.7m of crude oil, and that the NNPC would recover all outstanding taxes, royalties and profit oil due on an accelerated basis. NNPC then proceeded unilaterally to lift cargoes of crude oil by way of 'accelerated recovery'. In July 2009, the consortium filed arbitration proceedings against NNPC. In October 2011, the arbitral tribunal found, *inter alia*, that NNPC's lifting of oil in accordance with its own determinations was a breach of the PSC. The award ordered NNPC to pay the consortium damages of just under $2bn plus interest. In 2012, the award was subsequently set aside by the High Court in Abuja on the basis that tax matters were not arbitrable under Nigerian law. In July 2016, the Court of Appeal upheld the High Court's decision that the lifting dispute was non-arbitrable as it relates to tax. US enforcement proceedings remain pending.

South Africa

South Africa has long attracted foreign investment in the banking, manufacturing, mining, real estate, telecommunications and tourism sectors.

Introduction

South Africa has one of the most advanced economies on the African continent. It boasts modern infrastructure, an independent judiciary and close links to the sub-Saharan markets. It has long attracted foreign investment in the banking, manufacturing, mining, real estate, telecommunications and tourism sectors.

However, pervasive crime, corruption and security issues, alongside slow economic growth and limited privatisation prospects, create concerns for foreign investors. This is compounded by uncertainties surrounding black economic empowerment policy and a shift in governmental policy regulating foreign investment in recently enacted laws. A new draft international arbitration bill is currently awaiting approval. Despite the creation of special economic zones with tax incentives to attract foreign investment, the South African government is evidently seeking to retain control over key sectors of the economy.

Investment law

In December 2015, the president of South Africa gave his assent to a foreign investment law but this is not, at the time of writing, in force.

The new investment law was designed to replace a plethora of BITs, following a BIT claim brought by a group of Italian investors (and a Luxembourg corporation that they owned) who alleged that local black economic empowerment legislation expropriated indirect interests they held in the South African granite-quarrying sector.[60]

Although the dispute was ultimately settled amicably, leading to the discontinuance of the arbitration proceedings, it nonetheless prompted a change in approach to foreign investment protection in South Africa. The new investment law is intended to codify the more limited protections South Africa now chooses to afford investors, replacing the protections previously afforded under its BITs.

The law requires disputes in respect of actions taken by the state that affect a foreign investor's investment to be dealt with by mediation in the first instance, although the investor is not precluded from approaching any competent South African court, independent tribunal or statutory body to resolve the dispute. The government 'may consent' to international arbitration subject to the exhaustion of domestic remedies. Somewhat controversially, any such arbitration proceedings will not be between the investor and South Africa but between the investor's home state and South Africa.

A draft expropriation law, introduced in 2015, provides for the compulsory purchase of land in the public interest, subject to 'just and equitable compensation'.[61] This has caused some consternation among investors and political opposition alike. However, the bill has not yet been signed by President Zuma.

'A new investment law was introduced in 2015 after a group of Italian investors alleged that local black economic empowerment legislation expropriated indirect interests they held in the South African granite-quarrying sector.'

60 *Piero Foresti, Laura de Carli & Others v The Republic of South Africa* (ICSID Case No ARB(AF)/07/01) Award, 4 August 2010.

61 'South Africa passes land expropriations bill', Al Jazeera, 27 May 2016 (http://www.aljazeera.com/news/2016/05/south-africa-passes-controversial-land-ownership-law-160527033515636.html).

Arbitration law

Legislation dating back to 1965[62] currently governs arbitrations conducted in South Africa. However, the National Assembly has been presented with a new arbitration bill that would bring South African law in line with the UNCITRAL Model Law, and update the 1977 legislation on the recognition and enforcement of foreign awards.

The principal local arbitration institution is the Arbitration Foundation of Southern Africa. This institution offers its own commercial arbitration rules alongside expedited rules for less complex disputes. In 2015, the China–Africa Joint Arbitration Centre opened. This is dedicated to the resolution of commercial disputes between African and Chinese parties. Other institutions include the Chartered Institute of Arbitrators, South Africa; the Commission for Conciliation, Mediation and Arbitration; and Tokiso Dispute Settlement, a company that offers mediation, conciliation and arbitration services.

In practice, the local courts are supportive of arbitration, and foreign arbitral awards are readily enforced. Foreign awards are regulated and enforced under separate legislation to the local arbitration law.[63]

Bilateral investment treaty coverage

When South Africa became a democracy in 1994, it entered into BITs with a number of its trading partners, including Germany, the United Kingdom and the Netherlands. As mentioned above, South Africa has recently sought to revise the protections it offers to foreign investors by introducing a new investment law and by terminating or renegotiating existing BITs (although under the 'sunset' provisions of those BITs, investments that already benefited from their protections would continue to do so for a certain period).

However, the status of those BITs that South Africa has purported to terminate is unclear at present, following the Pretoria High Court's ruling, in February 2017, that the national executive cannot lawfully terminate international agreements without consulting parliament.[64] While the case will undoubtedly be appealed, it nonetheless creates a precedent for the argument that the unilateral termination of the BITs by the Department of Trade and Industry was unconstitutional and therefore invalid.

South Africa is a signatory to 40 BITs, of which those with the following 14 states are, subject to the observations made above, currently in force: Argentina, China, Cuba, Finland, Greece, Iran, Italy, Mauritius, Nigeria, Russia, Senegal, South Korea, Sweden and Zimbabwe.

'The new investment law provides that arbitration proceedings will take place between the investor's home state and South Africa.'

International arbitration conventions

The New York Convention was ratified by South Africa on 1 August 1976. South Africa is not party to the ICSID Convention.

South Africa is also party to the Southern African Development Community. This is discussed in greater detail on pages 58–59.

Investor-state disputes

South Africa has been party to a single investor-state dispute to date (see 'Introducing social policy to the detriment of investors' on pages 46–47). This claim, mentioned above, was brought pursuant to the ICSID Facility Rules (which permit arbitration of disputes between an investor and a non-ICSID member state). The claimants, investors in the granite-quarrying sector, alleged that the requirement to sell equity in their investments in compliance with the 2004 mining law and black empowerment regulations constituted an expropriation. The case ended in a settlement, with the tribunal ordering the claimant to contribute to the state's costs.[65]

'The legal status of South Africa's bilateral investment treaties is unclear at present.'

62 Arbitration Act 42 of 1965.

63 Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977.

64 *Democratic Alliance v Minister of International Relations and Cooperation and Others* (Council for the Advancement of the South African Constitution Intervening) (83145/2016) [2017] ZAGPPHC 53 (22 February 2017).

65 'Discontinuance of bilateral investment treaty claim leave some questions unresolved for South Africa; future shape of BIT program still up in the air', *IAReporter*, 28 August 2010 (http://www.iareporter.com/articles/20100830_5).

Introducing social policy to the detriment of investors

The structure of the mining industry in South Africa – a relic of the country's history of colonialism and apartheid – is a highly politicised issue.

Over the past two decades, one of the most high-profile changes to the industry has been the introduction of 'indigenisation' or 'local content' policy. In order to address apartheid-era inequality, the state looked to increase the participation of blacks and other historically disadvantaged groups in the mining industry, primarily through black economic empowerment (BEE) legislation and regulations. In 2004, the state enacted the first wave of BEE amendments aimed at promoting equitable access to the nation's mineral resources to all the people of South Africa, particularly 'historically disadvantaged South Africans' (HDSA), and requiring that all mining companies achieve 26 per cent HDSA ownership of mining assets by 2014. In 2006, a group of Italian investors, and a Luxembourg corporation that they owned, commenced international arbitration against the government alleging that the amendments expropriated indirect interests they held in the South African granite-quarrying sector and otherwise violated BITs between South Africa and, respectively, Italy and Belgo-Luxembourg. The claimants complained, *inter alia*, that the requirement to sell equity to comply with HDSA ownership requirements constituted an expropriation of their investments, in breach of South Africa's investment treaty obligations. They thus claimed $375m in compensation. After receiving partial relief in respect of their claims, the parties sought the discontinuance of the arbitration.

Tanzania

Tanzania's economy, dominated by agriculture, construction, manufacturing and mining, has experienced sustained economic growth since the late 1990s.

Introduction

Tanzania's economy is dominated by agriculture, construction, manufacturing and mining, with the country's recent GDP growth (7 per cent in 2015) largely being driven by increased public consumption and strong growth in telecommunications, construction and the service sectors. Tanzania has experienced sustained economic growth of 6 to 7 per cent since the late 1990s. Specific initiatives to attract foreign investment and facilitate private sector growth include an official privatisation programme of state-run companies and the creation of special economic zones and export processing zones.

The investment environment is hampered, however, by concerns over corruption in government procurement, privatisation, taxation, customs clearance and the judiciary. In addition, Tanzania imposes local content requirements in certain sectors and restrictions on land ownership, and opportunities in the tourism sector are constrained by poor infrastructure. Slow decision-making and a suspicion of foreign investment have been identified as a legacy of the country's socialist period from 1962 to 1985 under President Nyerere.

A government initiative launched in 2013 aims to restructure and develop the investment climate by clarifying investors' rights and obligations in a single investment code, increasing land tenure security for agricultural investors and encouraging public–private partnerships.

Investment law

The 1997 investment law[66] provides a broad range of general protections for foreign investors as well as creating an investment centre that facilitates investment and offers incentives for projects with a minimum investment cost of $500,000. These are offered to joint ventures with Tanzanian citizens as well as wholly owned foreign projects. Incentives include reductions in or exemptions from import tariffs, investment allowances and VAT exemptions.

Tanzania has enacted separate legislation for investment in the mining and petroleum sectors, export processing and special economic zones.

The dispute resolution mechanisms of the investment law provide for the amicable settlement of disputes in the first instance. If negotiations fail, the dispute may be submitted to arbitration in accordance with any of the following, as may be agreed by the parties: (i) the arbitration law of Tanzania; (ii) ICSID arbitration; or (iii) within the framework of any bilateral or multilateral agreement on investment protection to which the government and the country of the investor are parties. The requirement of party agreement means that the legislation does not provide an independent basis for arbitration.

'A suspicion of foreign investment has been identified as a legacy of the country's socialist period.'

66 Tanzania Investment Act 1997.

Arbitration law

Tanzania's arbitration law of 2002 does not reflect the UNCITRAL model law.[67] For instance, Tanzania's arbitration law mandates that disputes be resolved by a single arbitrator who must be impartial but not independent. The tribunal need not determine its own jurisdiction under domestic law before a party may appeal to the local court to rule on a plea that the tribunal has no jurisdiction. Foreign awards are recognised as binding under the Geneva Convention of 1923.

There are two principal arbitration institutions in Tanzania: the Tanzania Institute of Arbitrators and the National Construction Council. Both maintain their own set of arbitral rules and the rules of the latter are not limited to construction disputes. However, the majority of arbitration proceedings in Tanzania have taken place under the rules of international institutions.

The Tanzanian courts are generally unwilling to interfere once an arbitral tribunal is constituted, and will stay proceedings that are brought in breach of an arbitration agreement. That said, Tanzania's stance vis-à-vis arbitration has been called into question following a 2014 case where the High Court ordered parties not to enforce or comply with an ICSID tribunal's decision, as discussed in greater detail below.

Tanzania will only apply the New York Convention to enforce awards made in the territory of another New York Convention contracting state.

Bilateral investment treaty coverage

Tanzania is a signatory to 19 BITs, of which those with the following 11 states are in force: Canada, China, Denmark, Finland, Germany, Italy, Mauritius, the Netherlands, Sweden, Switzerland and the United Kingdom.

There is no BIT between Tanzania and the US, although as a signatory to the East African Community (EAC), Tanzania is part of a common market that includes Burundi, Rwanda, South Sudan, Tanzania and Uganda. The EAC signed a Trade and Investment Framework Agreement with the US in 2008.

International arbitration conventions

The New York Convention was ratified by Tanzania on 11 January 1965 and the ICSID Convention on 17 June 1992.

Tanzania is also party to the Southern African Development Community. This is discussed in greater detail on pages 58–59.

67 Arbitration Act Cap 15 RE 2002.

Investor-state disputes

Tanzania and its state-owned entities have been (or remain) party to five investor-state disputes to date, of which four have involved the electric power and energy sector. The investor prevailed in one of the four disputes, the other three either are pending or have been discontinued.

In the *Biwater* case, Tanzania terminated its contract with a water service contractor for its alleged failure to meet certain contractual performance guarantees. The tribunal declared that the Tanzanian government had violated the terms of its BIT with the UK.[68] Another case concerned the enforcement of a debt under a power purchase agreement for an electricity plant in Dar es Salaam. In 2014, an arbitral tribunal granted the investors declaratory relief. However, the Tanzanian High Court, in a clear breach of Tanzania's obligations under the ICSID Convention, *ex-parte* ordered both parties to refrain from enforcing the award.[69] In 2016, the arbitral tribunal awarded the investor compensation after finding that the state had withheld material facts from the arbitration.[70]

'Tanzania and its state-owned entities have been party to four investor-state disputes in the electric power and energy sector.'

68 'Biwater-Tanzania arbitration', Business and Human Rights Resource Centre (https://business-humanrights.org/en/biwater-tanzania-arbitration).

69 'Tanzanian Courts Injunct ICSID Proceedings', HSF Notes, 6 May 2014 (http://hsfnotes.com/arbitration/2014/05/06/tanzanian-courts-injunct-icsid-proceedings/).

70 'ICSID panel has second thoughts in Tanzanian case', *Global Arbitration Review*, 26 September 2016 (http://globalarbitrationreview.com/article/1068795/icsid-panel-has-second-thoughts-in-tanzanian-case).

Uganda

Uganda's economy has seen marked growth in the oil and gas sector, although 60 per cent of its oil-rich areas remain unexplored.

Introduction

Uganda's economy has expanded steadily over the past decade with marked growth in the construction, oil and gas, and telecommunications sectors. The economy is highly dependent on agriculture and natural resources. To date, 60 per cent of the oil-rich areas remain unexplored, and the government has plans to award further exploration licences.

Foreign ownership of investments is largely unrestricted. Uganda has also created free trade zones and privatisation programmes to further encourage foreign investors.

In declaring '*kisanja hakuna mchezo*' ('the period for joking around is over'), President Yoweri Museveni of Uganda has indicated that his fifth term in office (2016–2021) will be characterised by a no-nonsense approach to corruption in order to cultivate a more investor-friendly business environment.

However, concerns over judicial enforcement of the law, alleged corruption and mismanagement in Uganda's government, along with poor infrastructure, remain the largest obstacle to investment growth. Arbitrary changes in tax legislation, the targeting of foreign investors with controversial tax assessments and slow bureaucracy do little to ease these concerns.

Investment law

Uganda's investment law of 1991[71] provides for unrestricted foreign ownership of investments and partnerships with Ugandan nationals, except in the lease or ownership of land for crop or animal production. The investment law offers incentives to foreign investors that include exemptions from import duties and sales tax.

The investment law created the Ugandan Investment Authority, with the aim of simplifying investment procedure. Under this law, an investment licence is now a prerequisite for foreign investors in Uganda. An investment licence is required for all foreign investors in order for them to be able to make the necessary arrangements for establishing business enterprises in Uganda. Obtaining a licence to invest requires an investment commitment of $100,000 over three years.

The dispute resolution mechanisms of the investment law provide for the amicable settlement of disputes in the first instance. If negotiations fail, the dispute may be submitted to arbitration in accordance with any of the following, as may be agreed by the parties: (i) the ICSID Rules; (ii) within the framework of any bilateral or multilateral agreement on investment protection to which the government and the country of the investor are parties; or (iii) any other international machinery for the settlement of investment disputes. The requirement of party agreement means that the legislation does not provide an independent basis for arbitration.

'In declaring '*kisanja hakuna mchezo*' ('the period for joking around is over'), President Yoweri Museveni of Uganda has indicated that his fifth term in office (2016–2021) will be characterised by a no-nonsense approach to corruption in order to cultivate a more investor-friendly business environment.'

71 Investment Code Act, Cap 92 of 1991.

Arbitration law

Uganda's arbitration law largely reflects the UNCITRAL Model Law.[72] Discrepancies include a specific provision to apply to the court for interim measures and a provision setting out grounds for setting aside an award in addition to those set out in the UNCITRAL Model Law, including fraud, corruption, undue means and partiality on the part of one or more of the arbitrators. The arbitration law also provides for a mandatory stay of court proceedings where a contract contains an arbitration clause.

Uganda's arbitration law establishes the Centre for Arbitration and Dispute Resolution in Uganda and its accompanying arbitration rules.

In practice, the local courts are supportive of arbitration. The Magistrates Courts and High Court of Uganda are capable of both enforcing awards and staying court proceedings until the commencement of arbitration. However, Uganda will only apply the New York Convention to enforce awards made in the territory of another New York Convention contracting state.

Bilateral investment treaty coverage

Uganda is a signatory to 14 BITs, of which those with the following six states are in force: Denmark, France, Germany, the Netherlands, Switzerland and the United Kingdom.

As a signatory to the East African Community (EAC), Uganda is part of a common market that includes Burundi, Rwanda, South Sudan, Tanzania and Uganda. The EAC signed a Trade and Investment Framework Agreement with the US in 2008.

International arbitration conventions

In addition to the BITs listed above, Uganda is party to the multilateral OIC Agreement (for which see page 7).

The New York Convention was ratified by Uganda on 12 May 1992 and the ICSID Convention on 14 October 1966.

Investor-state disputes

Uganda has been (or remains) party to four investor-state disputes to date, all of which have involved the mining, and oil and gas sectors. The state prevailed in one case, which concerned the state's application of capital gains tax to the sale by Heritage of two oil blocks in the Lake Albert region; the tribunal held that the tax had to be paid despite the transaction having taken place in the Channel Islands.[73] The proceedings in the other three cases have been discontinued or are pending.

'Uganda's investment law does not provide an independent basis for arbitration.'

CASE STUDY

Creative taxation tactics

Uganda has been embroiled in a number of disputes over the terms of contracts that it entered into in order to attract foreign investment into its fledgling oil sector at the exploration stage.

For example, Heritage Oil brought a claim against the Ugandan Revenue Authority (URA) in relation to the former's $1.5bn disposal of its interests to Tullow in 2010. The URA sought to charge capital gains tax of more than $400m on the transaction on the basis that it involved the transfer of assets in Uganda. Heritage challenged the taxability of its transaction before the Ugandan Tax Appeals Tribunal, arguing that the sale took place outside Uganda. However, in November 2011, the Ugandan Tax Appeals Tribunal upheld the URA's assessment as a matter of Ugandan law.

Heritage continued to challenge the tax charge in London-seated UNCITRAL proceedings commenced under its contracts, alleging that the transaction was not taxable under Ugandan law and such taxation was in breach of stabilisation provisions in those contracts. In April 2013, the tribunal issued a decision declining jurisdiction over the underlying matters of Ugandan tax and, in February 2015, an award on the merits of the remaining contractual claims in which it dismissed Heritage's claim.

72 Arbitration and Conciliation Act 2000.

73 'Uganda wins tax dispute with Heritage', *Global Arbitration Review*, 2 March 2015 (http://globalarbitrationreview.com/article/1034261/uganda-wins-tax-dispute-with-heritage).

Regional conventions

There are a number of regional investment conventions to which various African states are party. We focus in this section on two conventions of particular importance that have generated a number of interesting arbitration cases, namely the Southern African Development Community (SADC) and the Organization for the Harmonization of Business Law in Africa (OHADA).

SADC

SADC aims to foster growth and integration amongst its member states.

The Southern African Development Community

Introduction

The Southern African Development Community (SADC) is an intergovernmental organisation established in 1992 by the SADC Treaty that aims to foster growth and integration amongst its member states,[74] namely Angola, Botswana, the Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. The SADC Treaty created a tribunal to adjudicate disputes arising under the Treaty (the SADC Tribunal).

Legal instrument

The SADC Finance and Investment Protocol (the Protocol) was signed on 18 August 2006 and entered into force on 16 April 2010 upon ratification by two-thirds of all of the SADC member states.[75] It was designed to harmonise investment policies and enhance trade to achieve sustainable economic development in the member states.

The substantive protections that the Protocol affords to qualifying investors in the SADC member states are similar to those found in many BITs. ‘Qualifying investor’ means a person who has been admitted to make an investment and is not limited to investors hailing from SADC member states. The protections include:

- no nationalisation or expropriation without just and effective compensation (Article 5);[76]
- fair and equitable treatment (Article 6(1)); and
- treatment no less favourable than that granted to similar investors from other states (Article 6(2)).

In 2016, the SADC member states agreed to introduce extensive changes to the Protocol, although these are yet to be adopted.[77] The most crucial changes include the removal of (i) the fair and equitable treatment standard; and (ii) the dispute resolution mechanism that currently provides an independent basis for arbitration. In addition, the protections will be diminished in the following ways:

- only investors from SADC member states qualify;
- a new definition of qualifying investment means that a narrower class of investments is covered; and
- compensation for expropriation is subject to certain caveats.

It is not clear how existing investments will be treated upon the ratification of the revised Protocol. For the time being, the original Protocol remains in force.

‘In 2016, the SADC member states agreed to reduce the standard of protections available to investors.’

Dispute resolution mechanism

Article 27 of the Protocol affords qualifying investors access to courts, judicial and administrative tribunals, and other authorities competent under the laws of the host member state. Article 28 currently provides an independent basis for international arbitration after a six-month cooling-off period where a dispute has arisen that relates to an admitted investment, and local remedies have been exhausted. The investor and the host member state may agree to resolution by the SADC Tribunal, an ICSID tribunal or an UNCITRAL tribunal. In practice, however, only the last two options are at present available to investors for reasons explained below.

The revised (but yet to be adopted) text of the Protocol only provides for dispute resolution between state parties before a new permanent tribunal.

Notable disputes

There has been only one publicly known arbitration brought under the Protocol to date: *Swissborough Diamond Mines (Pty) Limited and others v Lesotho*, in which Lesotho was found liable for thwarting the investors’ access to justice in relation to a dispute concerning the expropriation of mining rights. Other claims have been brought under the SADC Treaty (as opposed to the Protocol), including *Campbell and Others v Zimbabwe*, which related to the compulsory acquisition of agricultural lands. Zimbabwe’s challenge of the final award led to the effective suspension of the SADC Tribunal (hence this no longer representing a viable dispute resolution forum).[78]

Recent developments

In 2015, SADC entered into a Tripartite Free Trade Agreement with the East African Community and the Common Market for Eastern and Southern Africa[79], and plans are under way to create a single free trade area spanning the entire continent.[80] The aim of this agreement is to increase commerce, stimulate growth and create employment.[81] A conference was hosted by the African Union and United Nations in December 2016 to facilitate negotiations and signature of this agreement by mid-2018.

‘Plans are underway to create a single free trade area spanning the entire African continent.’

74 SADC overview http://www.sadc.int/about-sadc/overview/.

75 The SADC Finance and Investment Protocol is one of 26 protocols designed to achieve the objectives of the SADC Treaty.

76 In contrast to most BITs, there is no reference to indirect nationalisation or expropriation.

77 The new text will only come into force once it has been adopted by three-quarters of those member states that are party to the Protocol. As observed on page 44, the new text may not come into force in South Africa until parliament has approved it.

78 ‘Zimbabwe Hitting the Arbitration Headlines’, Kluwer Arbitration Blog, 20 August 2010 (http://globalarbitrationreview.com/insight/the-middle-eastern-and-african-arbitration-review-2017/1139890/developments-in-african-arbitration).

79 This is a free trade area with 20 member states.

80 Continental Free Trade Area.

81 ‘Africa looks to boost growth and jobs with free-trade area’, *The Financial Times*, 1 December 2016 (https://www.ft.com/content/aed540f6-b713-11e6-ba85-95d1533d9a62?desktop=true&%3BsegmentId=7c8f09b9-9b61-4fbb-9430-9208a9e233c8).

OHADA

OHADA's aim is to harmonise commercial law among its member states and increase trade and investment in the OHADA region.

The Organization for the Harmonization of Business Law in Africa

Introduction

The Organization for the Harmonization of Business Law in Africa (OHADA with its acronym in French) is an intergovernmental organisation, established by a treaty first signed in 1993 (the OHADA Treaty). There are currently 17 OHADA member states, namely Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, the Democratic Republic of the Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Ivory Coast, Mali, Niger, Republic of the Congo, Senegal and Togo.

The OHADA Treaty's purpose is, as its name suggests, to harmonise commercial law among its member states, increase trade and investment in the OHADA region, and enhance confidence in international arbitration in the region.

The organisation comprises a number of institutions including the Common Court of Justice and Arbitration (CCJA), which (i) plays an advisory role upon requests from member states, the Council of Ministers or national courts on matters relating to OHADA; (ii) is the final court of appeal for the national courts of member states; and (iii) administers arbitration proceedings under OHADA's own rules of arbitration (the CCJA Rules).

Arbitration under the CCJA Rules is available where either contractual party resides in an OHADA member state or where the contract is to be executed at least partially in the OHADA region and where the parties have designated the CCJA as the institution that will oversee the dispute.

Legal instruments

OHADA has issued nine Uniform Acts seeking to promote legal and judicial certainty in its member states in areas such as arbitration, general commercial law and insolvency law. The Uniform Acts are legally binding and take precedence over each member state's national law.[82]

Dispute resolution mechanism

The Uniform Act on Arbitration (UAA), which applies to any arbitration seated in an OHADA member state, contains *ad hoc* principle-based provisions around which the parties can contract. However, certain provisions are not flexible, such as those concerning the conditions for the recognition and enforcement of arbitral awards. The UAA thus provides investors with an alternative to institutional arbitration under the CCJA Rules or indeed under the rules of other institutions such as the ICC[83] or the LCIA[84].

Twelve OHADA member states are party to the New York Convention[85] and 15 are party to the ICSID Convention[86].

'There are currently 17 OHADA member states.'

'OHADA has issued nine Uniform Acts, which take precedence over each member state's national laws.'

82 Article 10, Treaty on the Harmonisation of Business Law in Africa.

83 International Court of Arbitration of the International Chamber of Commerce.

84 London Court of International Arbitration.

85 Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, the Democratic Republic of the Congo, Gabon, Guinea, Ivory Coast, Mali, Niger and Senegal.

86 Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, the Democratic Republic of the Congo, Gabon, Guinea, Ivory Coast, Mali, Niger, Republic of the Congo, Senegal and Togo.

Notable disputes

In 2014, a tribunal constituted under the CCJA Rules rendered an award against Guinea for the wrongful termination of a port and railway concession contract that it had entered into with French company Getma International. Guinea applied to set aside the award before the CCJA on the grounds that the tribunal had entered into a separate fee agreement with the parties to the arbitration in breach of the CCJA Rules. In 2015, the CCJA decided that the tribunal had indeed acted in breach of the CCJA Rules and annulled the award. In 2016, a US district court refused to confirm and enforce the award, noting that it only had a narrow discretion to enforce an annulled award under the New York Convention.[87]

The 2015 CCJA decision was widely condemned; while the fee agreement may have been a breach of the CCJA Rules, many commentators saw the annulment of the award as excessive. More broadly, any perception of the CCJA's state bias may well discourage investors from turning to arbitration under the CCJA Rules or even from choosing a seat of arbitration in the OHADA zone. However, the CCJA does not systematically adopt a pro-state approach. For example, in August 2016, the CCJA confirmed a $46m award against Niger in a contractual dispute over the production of electronic and biometric passports. On 27 September 2016, a US federal judge confirmed the award.[88]

Recent developments

In June 2016, the ICC and OHADA signed a partnership agreement seeking to enhance co-operation between the two organisations and to promote, professionalise and standardise the practice of arbitration. In October 2016, a similar Cooperation Agreement was signed by OHADA and UNCITRAL. This illustrates the efforts undertaken to accelerate the modernisation of OHADA's dispute settlement system.

In July 2016, a financial mismanagement audit led OHADA to suspend the president of the CCJA as well as the general manager of OHADA's Regional School of Magistracy (ERSUMA). That investigations were initiated against these individuals demonstrates a willingness of the CCJA to restore confidence in the legitimacy of its proceedings where necessary. The general manager was subsequently found guilty of embezzlement and mismanagement of funds and records, and was removed from his position. In December 2016, the president of the CCJA was replaced by another judge, but remains one of the 12 active judges of the CCJA.[89]

While the OHADA system may have suffered some bad press in recent years, it undoubtedly offers preferable dispute resolution options to local courts. Where possible, however, investors may be better advised to refer their disputes to more established arbitral institutions such as the ICC. All eyes are now on OHADA to see whether criticism from the arbitration community will materialise into concrete policy and organisational changes, something the partnership agreements with the ICC and UNCITRAL may potentially address in due course.

'OHADA dispute resolution is undoubtedly preferable to local courts but the system remains open to criticism.'

87 'West African set-aside decision not against US public policy, says court', *Global Arbitration Review*, 10 June 2016 (http://globalarbitrationreview.com/article/1036396/west-african-set-aside-decision-not-against-us-public-policy-says-court).

88 'West African court confirms award against Niger', *Global Arbitration Review*, 31 August 2016 (http://globalarbitrationreview.com/article/1067748/west-african-court-confirms-award-against-niger).

89 'Developments in African arbitration', *Global Arbitration Review*, 21 April 2017 (http://globalarbitrationreview.com/insight/the-middle-eastern-and-african-arbitration-review-2017/1139890/developments-in-african-arbitration).

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