GAR Global Arbitration Review

Training African lawyers about investment protection

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As foreign direct investment in Africa continues to soar, a recent programme in London offered African government lawyers intensive training on investment protection, treaty drafting and treaty arbitration.

The week-long programme run by **Africa International Legal Awareness** saw recognised specialists in the field training government lawyers from Ghana, Gambia, Liberia, South Africa and Uganda. Best-represented was Egypt, which sent five members of the team responsible for defending investment treaty claims, the Egyptian State Lawsuits Authority.

Also on the course were a number of private practitioners who act for states, from FSB Law Consult in Accra and Hafez Law Firm in Cairo.

Opening the event, AILA's founding director **Rukia Baruti** – a lawyer and arbitrator originally from Tanzania – described how foreign direct investment became an important part of many African countries' development strategy following the decline in international lending to Africa in the 1980s and 1990s. Concluding bilateral investment treaties or investment agreements was a way to signal their economic stability to potential investors, she said. Over 400 BITs now exist between African and developed countries (out of 3,000 worldwide), typically providing for arbitration as a means to resolve disputes.

However, Baruti spoke of the imbalance that continues to exist between investors in Africa and the recipients of that investment. When concluding BITs, African governments' need for FDI puts them in a weak position, she explained, and they often lack the resources to develop specialist legal teams to defend treaty claims and influence the evolution of investment law.

Despite the plethora of claims against developing states, BITs – with their broad and imprecise terms – are largely interpreted and applied by tribunals of arbitrators from the developed world, mainly Europe and the US, she noted. A wave of new BITs with clearer terms has only increased the risk of conflicting interpretations.

"As receivers of foreign direct investment, the majority of investment claims are filed against developing countries. It is therefore imperative that they be able to participate competently in the arbitration process, as even a single successful investor claim can be potentially devastating to their already weak economies," Baruti said.

To reap the benefits of BITs, she said African countries "need to appreciate the consequences of concluding a BIT beyond the realisation of an economic objective and make a serious commitment to developing legal expertise in this area of law". Their current lack of legal expertise "undermines not just the intended benefits of FDI to developing countries but also the intended benefits of investment protection to investors of developed countries".

In an introductory session on the sources of international investment, **N Jansen Calamita**, the director of the investment treaty forum at the British Institute of International Comparative Law and a law professor at the University of Birmingham, cited **Jeffrey Sachs**, a former special adviser to UN Secretary General Kofi Annan, who wrote in his 2005 book T*he End of Poverty* that "high rates of foreign direct investment inflows have been associated with rapid economic growth".

Calamita also referred to UNCTAD's World Investment Report for 2011, which states that global inflows of FDI currently stand at US$1.2 trillion, over 50 per cent of which goes to developing economies. In 2010, four African countries – Angola, Egypt, Nigeria and Libya - enjoyed inflows of over US$3 billion, while the Democratic Republic of the Congo, the Republic of Congo, Ghana and Algeria received over US$2 billion and Sudan, South Africa, Tunisia, Morocco and Zambia over US$1 billion.

Some of these countries are also investing abroad. In 2011, Libya, Egypt and Angola were the source of between US$1 billion and US$2 billion of FDI. Nigeria and Morocco invested more than US$0.5 billion and South Africa, Zambia, Algeria, Senegal and Mauritius more than US$0.1 billion.

Calamita went on to analyse the drivers and different types of FDI. Investors in Africa may be seeking natural resources, new markets or strategic assets or to increase efficiency by relocating services to Africa, he said. He argued that a state engaged in investment treaty negotiations should place importance on treaty language – he contrasted the relatively detailed provisions on expropriation in North American and Asian treaties with "the open textured approach" of European treaties – and should offer guidance as to their intentions in the treaty preamble, which can be an important interpretative tool.

In a later session, **Luis Gonzalez Garcia**, a barrister at Matrix Chambers in London who has defended investment treaty claims against his native Mexico among other states, explained the importance of states giving responsibility for investment treaty claims to government lawyers trained in this area, even if they do not have the resources to create a team such as Egypt's.

He said that many states farm out the handling of claims to local and international law firms, however someone from within government must be involved for policy reasons. "Law firms tend to want to raise any arguments required to win the case so they can boost their reputations, but the state has to live with the consequences of those arguments," he explained. "For example, an external law team might be convinced it can win the case by arguing that a joint venture agreement is not an investment agreement, but for policy reasons – to ensure investors are not deterred in the future – government lawyers might consider it wise to restrain them."

Other reasons for having an in-house team are to keep the costs of defending the claim down and to ensure that the state learns the lessons of cases and how to treat investors in a way that will not give rise to claims in the future. "All states terminate concessions and expropriate investments, but there is a right way and wrong way of doing it," Gonzalez said. "Developing countries unfortunately tend to do it the wrong way; they need to learn the appropriate procedures and due process and how to avoid politicising the dispute."

Gonzalez said that, in Mexico, the team dedicated to defending investment claims grew out of the team responsible for negotiating trade and investment agreements. There needs to be close interaction between the negotiators and those applying the treaties in arbitrations, he said. He also emphasised the need for the lawyer or lawyers responsible for defending claims to have recognised authority within government so they can advise ministers against aggravating disputes with public statements and gain access to relevant documents and witnesses.

Daniel Gantungo, a participant from the Ugandan Ministry of Justice, says he found Gonzalez's advice "an eye-opener", revealing that that his government is seeking to "build capacity" in the way suggested.

The trainers were universally complimentary about the course and the level of knowledge of those attending. **Robert Volterra**, a partner at London boutique Volterra Fietta, told *GAR*: "This was a well-organised programme providing much-needed training; the focus and preparatory reading of the participants was truly impressive; their comments and questions were instructive to us all."

Anthony Sinclair of Allen & Overy said he was "thrilled" by the participants' level of interest and enthusiasm "driven by the emerging reality of new international investment law cases across the continent." He was particularly impressed by their understanding of how patterns of investment flow are changing and how the Chinese and Russians are structuring inward investment in Africa to ensure treaty protection in the event of a dispute.

Guglielmo Verdirame, a barrister at 20 Essex Street in London, said: "This was a terrific group with a real grasp of the issues in investment arbitration, of which many had first-hand experience. AILA was one of the best experiences I have had of teaching professionals."

Above all, lawyers agreed that the course met a real need. "On a political level, investment treaties are rightly seen as a tool to attract FDI but too often government lawyers don't spot the problems that they can create," explained **George Burn**, a partner at Salans in London. He noted that almost all African states have ratified the ICSID Convention and some 20 claims, out of 137

currently being heard at the centre, target Africa. “Hopefully the participants in this year’s event will spread their knowledge about how to approach such claims when they get home,” Burn said.

Counsel at the Permanent Court of Arbitration in The Hague **Lise Bosman**, who delivered the programme's final session on policy issues, added that she herself learnt from the participants. In particular, she said she was interested to hear first-hand accounts of South Africa’s review of its bilateral investment treaty policies, begun by the Department of Trade and Industry in the early 2000s and accelerated by the filing of the *Piero Foresti* claim against the state in 2007 under the ICSID Additional Facility rules (a case that eventually settled, with a costs order made in the state's favour).

“There seems to be some resistance in South Africa to signing the ICSID Convention, largely because it does not permit a review of an award on public policy grounds,” she told *GAR*.

AILA continues to seek sponsorship to cover the costs of running the course on an annual basis and of assisting African lawyers to attend. Volterra says: “No doubt law firms, quantum analysts, governments and other institutions are already competing with each other to be involved."

The course took place from 17 to 21 October and was hosted by a number of law firms in London. Photos are available **here**.

Some feedback from participants

“African governments are ill-equipped for BIT negotiations and defence of investment claims mainly due to lack of adequate personnel with the requisite knowledge in this area of international investment law. It is no wonder that African governments always look to foreign lawyers to advise them when negotiating these BITs and also to defend them when claims are brought against them. Ghana is no exception and I am grateful to AILA for organising such a programme. Being privileged to visit so many international law firms was the icing on the cake: Shearman & Sterling, Wilmer Hale, Hogan Lovells, Clifford Chance, Salans and Allen & Overy.”

***Francisca Boateng**, FSB Law Consulting in Accra*

"African Governments have difficulty in negotiating BITs and defending investment claims because of low bargaining power and institutional governance issues. The government of Uganda is trying to build capacity and has sent a number of officers to receive training in these issues at AILA and elsewhere.”

***Daniel Gantungo**, Ministry of Justice, Kampala*

"The training was useful and effectively delivered by lawyers well versed in international investment and arbitration matters. There isa big problem with the negotiation of investment treaties in Africa in the sense that negotiations are usually done by politicians who (in most cases) are not lawyers and pay insufficient attention to the legal implications. There is a need to train lawyers in the various ministries who will be involved in these negotiations at the early stages. This will help reduce the rising number of investor-state disputes that many African governments face."

***Serena Pam Da Seglah**, Attorney General’s Department, Accra*

“AILA is a well-organised, concise, condensed and effective training course."

Members of the Egyptian State Lawsuits Authority

“The South African attendees thoroughly enjoyed the engaging, well-presented course and dynamic mix of presenters."

***Rebecca Tee**, National Treasury, Pretoria*

Participants from Africa

Egypt

Haytham Ali and **Ryham Ragab** of Hafez Law Firm in Cairo

Mahmoud El Krashy, **Mohammed ElShiekh**, **Fatma Khalifa**, **Mohamed Khalef** and **Lela Kassem** from the Egyptian State Lawsuits Authority in Cairo

Gambia

Gibriel Bah of the Commonwealth Secretariat in St Vincent and the Grenadines

Ghana

Francisca Serwaa Boateng of FSB Law Consulting in Accra

Serina Pam De Seglah of the Attorney General's Department in Accra

Liberia

Oretha Snyder-Davis of the Ministry of Justice in Monrovia

South Africa

Danie Smit of the Island Group of Advocates in Pretoria

Sureiya Adam and **Kekeletso Mashigo** of the Department of Trade and Industry and **Rebecca Tee** of the National Treasury in Pretoria

Uganda

Sheila Ampeire and **Daniel Gantungo** of the Ministry of Justice in Kampala

Trainers

Rukia Baruti of AILA

N Jansen Calamita of BIICL and the University of Birmingham

Lise Bosman of the Permanent Court of Arbitration in The Hague

George Burn and **Barton Legum** of Salans in London and Paris

Steven Finizio of WilmerHale in London

Luis Gonzalez Garcia of Matrix Chambers in London

Anthony Sinclair, **Nina Elmi** and **Diogo Pereira** of Allen & Overy

Markus Burgstaller and **Julianne Hughes-Jennett** of Hogan Lovells in London

Guglielmo Verdirame of 20 Essex Street in London

Robert Volterra of Volterra Fietta in London

Other participants

Joanne Lawson and **Paul Scillion** of the Foreign and Commonwealth Office in London

Manish Aggarwal, **Alastair Campbell**, **Emilie Gonin**, **Lauren Lindsay**, **Gina Magel**, **James Osun-Sanmi** and **Mona Wright** of Allen & Overy in London

Ashique Rahman, **Jiries Saadeh** and **James Upcher** of Volterra Fietta in London

Alison Ross of *Global Arbitration Review* in London and **Adam Green** of *This is Africa, Financial Times*