

COVID-19 and International Investment Dispute Resolution: Considerations for African governments

In response to the international public health emergency caused by the novel coronavirus (COVID-19) pandemic, there have been several calls for the support and protection of the most vulnerable countries and their populations. While heads of state and governments from African and G20 countries have expressed the need for debt relief as well as economic and health assistance packages¹, others have called for moratoriums on treaty-based arbitration claims by private entities against governments, and restrictions on arbitration claims related to government measures geared to confront the health, economic, and social challenges posed by COVID-19².

While all such initiatives may cause apprehension, especially among private sector actors who expect their economic interests to be preserved³, proposals to reduce governments' exposure to potential arbitration claims are particularly relevant where states are weakened in their ability to protect the lives of their citizens and contain the disease.

Nonetheless, it would not be surprising if certain measures adopted by governments to fight COVID-19 were the source of eventual disputes. Indeed, investors may challenge these measures using investor-state dispute settlement (ISDS) provisions found in most bilateral investment treaties. In particular, it is expected that future treaty-based claims will relate to fair and equitable treatment and indirect expropriation.

ISDS disputes often follow political, financial or economic instability. As a result, given the current environment, various stakeholders around the world have voiced concerns about possible ISDS disputes by foreign investors in reaction to state of emergency measures which may negatively impact the implementation of infrastructure-related public-private partnerships (PPPs), power generation projects, as well as mining, oil & gas, and other natural resources concessions. This unprecedented situation created by the COVID-19 pandemic requires dialogue between public and private sector parties to find amicable solutions to pending disputes.

In addition, the pandemic has also affected the normal conduct of arbitration proceedings. To claim suspension initiatives from development institutions, several arbitral institutions have played an important role in supporting parties and arbitral tribunals by postponing procedural deadlines and offering electronic means to carry out procedural acts.

1- World Bank and IMF support to G20 debt relief initiative for the world's poorest countries (May 1, 2020) available at <https://blogs.worldbank.org/voices/may-1-2020-end-week-update-debt-relief-worlds-poorest-countries>

2- CCSI Call for ISDS Moratorium During COVID-19 Crisis and Response (May 6, 2020) available at <http://ccsi.columbia.edu/2020/05/05/isds-moratorium-during-covid-19/>

3- www.aljazeera.com, "Private creditors reject blanket debt relief African nations" (May 15, 2020)

for the resolution of potential disputes. The challenges it faces will require a consolidation of procedures and tools under exceptional circumstances that, ultimately, will influence the evolution not only of domestic arbitration, but also of jurisdictional activities generally.

Among other objectives, the African Legal Support Facility (ALSF) aims to promote international commercial arbitration in Africa by means of the improvement of legislation in its Regional Member Countries (RMCs) and capacity building for African lawyers and legal experts in this area.

For more information regarding the work of the ALSF, please visit our website, www.aflsf.org.
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