Oded Besserglik v. Republic of Mozambique, or when a victory is ‘pyrrhic’

By:

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The Award in *Oded Besserglik v. Republic of Mozambique*, one of the very few publicly known intra African treaty-based investment arbitration cases, was issued 29th October 2019. The case started when in March 2014, a South African national (Mr. Besserglik) filed an application, before the International Center for the Settlement of Investment Disputes (ICSID), against the Mozambique (the Respondent) on the grounds that his shares and interests in a joint fishing venture with some Mozambican State-owned enterprises, as well as his vessels, were unlawfully and fraudulently appropriated by the Respondent. This arbitration was initiated under the ICSID Additional Facility Rules and the claimant argued (alleged) about a violation of the Agreement Between the Government of the Republic of South Africa and the Government of the Republic of Mozambique for the Promotion and Reciprocal Protection of Investments, signed on May 6, 1997 (the BIT).

As a dispute between an investor and a State, both from the Southern African Development Community (SADC), this dispute could have also been resolved under the Annex 1 of the SADC Protocol on Finance and Investment of 2006. Article 27 of this Protocol gives investors the right of access to local courts and tribunals for "redress of their grievances in relation to any matter concerning any investment". More importantly, and according to its Article 28, a dispute which has not been settled amicably, can be submitted to international arbitration. This can only be done after the exhaustion of local remedies and, at least, six months after the notification of the claim to the Member State. By international arbitration, this Protocol refers to SADC tribunal, to ICSID and to arbitration under UNCITRAL Arbitration Rules. However, and given the suspension of the SADC Tribunal, at that time, and also the non-enforcement of some of its decisions by some SADC member States, it is easy to understand why the claimant decided to bring the case before an international institution.

In its October 2019 Award, the Tribunal declined jurisdiction arguing that the BIT never entered into force. In other words, this case should have never lasted so long. The tribunal's management of the case has been criticized as well as the conduct of some participants such as the claimant's counsel who did not behave ethically (see here and here).

This blog post will be focused on the Respondent's legal strategy. It discusses the issues it raises as well as exploring some ways to address them. If the arbitrators finally agreed with Mozambique's argument that this legal instrument never entered into force, the late raising of this jurisdictional objection costed nearly US$ 2 millions to this State. This amount is important for such a small State: US$ 2 millions is approximatively 2% of the financial assistance given to this country by the International Monetary Fund (IMF) in the wake of the cyclone Idai, last year. Owing to the scarcity of its resources, this victory can be described as a pyrrhic victory, i.e., a victory that comes at the expense of heavy costs.

The legal strategy of this State is puzzling: why wait for so long before raising the argument that the BIT never entered into force? The Government of Mozambique had had many opportunities to raise this important argument: firstly, when the Minister of Fisheries wrote to the Secretary-General raising

several objections (paras 11, 14); secondly, after the constitution of the Tribunal arbitral, when the Respondent filled the Counter-Memorial on Jurisdiction and Liability (para 26); thirdly, when the Respondent filled the response to Claimant's document production request (para 28); fourthly, when the Rejoinder on Jurisdiction and Liability was submitted (para 33); fifthly, when transmitting its rebuttal witness evidence (para 49). Finally, this argument was raised in the Motion to Dismiss of 20 June 2017, almost 36 months after the registration of the request and its notification to parties. When preparing Mozambique's defence, its legal counsel should have checked the validity of this international treaty. Even if the Minister of Fisheries of Mozambique wrote twice to the ICSID's Secretary-General, it is worth noting that this State did not appoint a government agent but rather was represented by outside counsel and a local law firm.

In my opinion, the response to this interrogation lies in the legal capacity of this small State to efficiently manage this case. This issue is not new. In fact, the ability of developing countries to 'fully' participate in international economic law has been widely discussed. In the context of WTO, the Advisory Centre on WTO Law (ACWL) has been established to solve this problem. Before investment tribunals, some of these countries have not been able to properly manage their cases. In the CDC case, for example, the tribunal found that the republic of Seychelles' counter-memorial, which was represented by its Attorney General, "did not comply with the directions given by the Tribunal at its first session in that it was not accompanied by written statements of witnesses and expert reports on which the Republic intended to rely" (para 26).

In the current context of ISDS reforms, this issue was raised by many States including the government of Mali, according to which, "African States find themselves involved in arbitral proceedings, often without being sufficiently prepared, given the lack of a strategy document for negotiations, with only limited expertise in complex legal issues" Submission from the Government of Mali. In response, the UNCITRAL Working Group III has included the establishment of an Advisory Center on Investment Law (ACIL) among the five initial reform topics identified at the New York session in April 2019.

If a consensus has been reached on the necessity of having such a Center in

investment law, its scope and missions are still being discussed (see here and here). In this area of international law, legal capacity challenges vary from the negotiation of investment agreements to the management of investment disputes, going through the management of the concluded treaties and the dispute prevention or pre-dispute management (see here). I think that priority should be given to capacity-building services notably the training of government officials in the implementation and the management of treaties and the early management of investment cases.

In the drafting and the negotiation of investment agreements, African States have been described as rules-takers rather than rules-makers. This is becoming less true in the light of the recent attempts to africanize international investment law notably with the adoption of the Pan African Investment Code. Even if some scholars have argued that this Code does not provide with an African solution to an African problem, I think this is a step in the right direction towards the modernization and the harmonization of investment rules in Africa and the forthcoming negotiations for the AfCFTA protocol on investment will provide an opportunity to correct some of the PAIC's perceived inconsistencies. Under these circumstances, I think the future ACIL should not include this aspect (assistance in the negotiation of investment treaties) in its services since, in addition, some organizations are already offering technical assistance in this respect (see here).

However, these countries are still struggling with the domestic implementation of obligations arising from these treaties. In fact, given the number of BITs they are signing (almost a quarter of the total number of BITs), African countries may find themselves in the middle of particularly 'complex webs' of treaty obligations, whose management and implementation are hampered by the lack of a specific agency dedicated to that purpose. That is why I think of one the main (if not the most important) tasks of ACIL should be to help in building African States officials' legal expertise. This expertise will help to ensure coherence in the States' actions and ensure that all the national authorities are updated with regard to government's obligations in international investment law, as discussed here and here. In the present case, the management of investment agreements by the Respondent was clearly at issue since a letter to the Secretary General or to the Tribunal, regarding the status of this BIT, would

have brought these proceedings to an end. Responding to the Tribunal, which wanted to know the reason of its late objection, the Respondent pleaded ignorance and provided justifications based on external factors: information found on ICSID website, Claimant's attitude, alleged equivocal position of South Africa (para 250). This is surprising given that Mozambique, as one of the two signatories' parties of the BIT at issue, could have examined its own records and notice that this BIT did not enter into force. Consequently, this Tribunal found that this litigant State "cannot be absolved of the responsibility for the unnecessary continuation of these proceedings" and "is not entitled to the costs of these proceedings" (para 442).

In addition, the establishment of an early-warning system could help these States to resolve their conflicts with investors at the national level and avoid the international settlement and the costs associated with that. According to ICSID Caseload-Statistics 2020-1, 35% of ISDS cases were resolved 'during' the arbitral process. This suggests that these cases could have been settled at domestic level with a good early-warning mechanism as Peru did with its International Investment Disputes State Coordination and Response System.

This can be done through a collaboration with African institutions such as the African Union and the African Legal Support Facility. This is consistent with article 47 of PAIC which underscores the role of the African Union and the Regional Economic Communities in the designing and the development of programs in order to assist African States in investment issues. Recently also, the legal counsel of the African Union, in her speech before the 2nd NCIA International Arbitration and ADR Conference, has identified technical capacity building and close collaboration with Governmental officials, counsel and office of the Attorney General as a key element in boosting the capacity of the continent. In my opinion, this is an opportunity to seize because, in addition, the facilities of this continental organization are available for the organization of trainings sessions.

These are some thoughts I would like to put in the discussion as the deliberations of the UNCITRAL Working Group III(regarding ISDS reforms) are going on and the negotiations for the AfCTA investment protocol are expected to take place later this year.

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