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ARTICLE

Foundation and Innovation: The Participation of African States in the ICSID Dispute Resolution System

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INTRODUCTION

Since the beginning of the 1990s, the world has seen a sharp overall increase in foreign direct investment (FDI) inflows, from around US$200 billion in 1990 to more than US$1.76 trillion in 2015.[2] Projections for 2017–18 suggest a further increase to surpass US$1.8 trillion.[3] The African continent is no exception to this global trend.[4] Makhtar Diop, World Bank Vice President for the Africa Region, pointed out in June 2015 that '[t]he continent has become the second most attractive investment destination in the world—ranking just behind North America—as investors are looking beyond the more established markets of South Africa, Nigeria and Kenya. Increased investment and industrialization will help to unlock the potential for job

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[2] UNCTAD, World Investment Report (WIR) 2004, fig I.1. FDI inflows, global and by group of countries (1980–2003) 3 <http://unctad.org/en/Docs/wir2004_en.pdf>; WIR 2016, fig I.1. Global FDI inflows by group of economies (2005–15) and projections (2016–18) 2 <http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf>.

[3] WIR 2016 (n 2) 2. See also WIR 2017, 2 <http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf>; OECD, FDI in Figures (April 2017) <http://www.oecd.org/investment/FDI-in-Figures-April-2017.pdf?utm_source=Adestra&utm_medium=email&utm_content=Foreign percent20direct percent20investmentpercent20fallspercent207percent25percent20in percent202016percent2Cpercent20despitepercent20apercent20healthy percent20secondpercent20half&utm_campaign=Financepercent20andpercent20Investmentpercent20Newspercent20- percent20Aprilpercent202017&utm_term=demo>.

[4] See Matina Stevis, "Foreign Investment in Africa Seen at Record $80 Billion in 2014, Report Shows," Wall Street Journal, May 19, 2014 <http://www.wsj.com/articles/SB10001424052702304422704579571363402013176>; Javier Blas, "Foreign investment in Africa set to reach record," Financial Times, May 19, 2014 <http://www.ft.com/intl/cms/s/0/bb92ba22-df2e-11e3-86a4-00144feabdc0.html#axzz3uRsZX6Ww>. While growth and investment showed signs of weakness in the region in 2015-2016, most analysts were still expecting both to pick up in 2017-2018. See Steve Johnson, 'Africa's Economic Growth Heads for 22-year Low' *Financial Times* (2 December 2016); African Development Bank Group, OECD, and UNDP, African Economic Outlook (AEO) 2017 (May 22, 2017) 47 <http://www.africaneconomicoutlook.org/en/home>; WIR 2017 (n 3) 3, 48; World Bank Group, 'World Economic Prospects—Broad-Based Upturn, but for How Long?' (January 2018) 117, 137 <https://openknowledge.worldbank.org/handle/10986/28932>.

creation and poverty reduction in African countries. Foreign direct investment (FDI) in the region has hit a record $60 billion, five times its 2000 level.'[5]

With the continued rise of FDI in the past three decades, recourse to investor-State arbitration, and in particular ICSID arbitration, in order to resolve disputes in this field, has increased in Africa as it has in the rest of the world.[6]

What distinguishes African States in this global trend is the critical role they played in the creation, development, and innovations of the ICSID dispute resolution system. In fact, in addition to the unique features of the ICSID dispute resolution system, one of the reasons investment contracts, laws and treaties involving African parties so often refer to ICSID arbitration lies in the decisive contribution of African States to the birth and development of the system. Not only did African States play a key role in the negotiation, drafting and entry into force of the ICSID Convention, but the cases involving African States laid the first foundations of ICSID jurisprudence and gave rise to some of its most fundamental developments.

As we have recently celebrated the 50th anniversary of the entry into force of the ICSID Convention, it seemed appropriate to revisit the vital contribution of African States to the creation and development of the ICSID dispute resolution system. With the help of statistical data, this article also examines further features of the participation of African States in the system, including the actors, decision-makers and characteristics of proceedings involving African States. The article concludes with a consideration of some of the recent evolutions and trends in African-focused ICSID arbitration such as a growing recourse by African investors to ICSID arbitration, the more comprehensive transparency of proceedings, and large-scale investment treaty initiatives. These all demonstrate that African States remain pillars and pioneers of ICSID arbitration.

I. THE DECISIVE CONTRIBUTION OF AFRICAN STATES TO THE CREATION AND DEVELOPMENT OF THE ICSID DISPUTE RESOLUTION SYSTEM

African States were key participants in both the creation and development of the ICSID dispute resolution system. Their contribution was all the more significant given the highly innovative features of the ICSID Convention at the time that it was first proposed.

The ICSID Convention was specifically designed to provide conciliation and arbitration facilities for the neutral and peaceful resolution of disputes between States and foreign investors, taking into account 'the special characteristics of the

[5] Makhtar Diop, Yuan Li, Li Yong, and HE Ato Ahmed Shide, 'Africa Still Poised to Become the Next Great Investment Destination' (June 30, 2015) <http://www.worldbank.org/en/news/opinion/2015/06/30/africa-still-poised-to-become-the-next-great-investment-destination>. While African countries are very diverse and FDI has evolved at different paces in different parts of the continent, the growth of FDI as well as intra-African investment is seen as "creating a virtuous circle that encourages greater foreign investment." (ibid.) Among the initiatives designed to further improve the investment climate in the region, Makhtar Diop and his co-authors point to "the African Union's Comprehensive Free Trade Agreement and single air-transport market, [. . .] [which] place regional integration and trade at the center of the continent's progress." (ibid.) On regional integration and the African Continental Free Trade Area, see n 141, 169, and 170.

[6] See Alexis Martinez and Emma Mason, 'Arbitration in Africa: Past, Present, and Future', Kluwer Arbitration Blog (January 13, 2016) <http://kluwerarbitrationblog.com/2016/01/13/arbitration-in-africa-past-present-and-future/>. See also Section II.A.i.c.

disputes covered, as well as of the parties to whom it would apply.'[7] With this objective in mind, the drafters of the Convention proposed a text that conferred a direct right of recourse to arbitration on foreign investors while excluding diplomatic protection, thereby depoliticizing the investor-State dispute resolution process. The Convention also 'maintain[ed] a careful balance between the interests of investors and those of host States.'[8] In procedural terms, this meant that conciliation and arbitration proceedings could be instituted by host States as well as investors. In the drafters' view, the provisions of the Convention had to be 'equally adapted for both cases.'[9] The uniqueness of the dispute resolution system that emerged also derived from its autonomous, self-contained nature. The Convention was built to create a level playing field where arbitration is presumed to be the parties' exclusive remedy[10] and no party, whether State or investor, has to seek post-award remedies in the courts of the other party or of a third country. Once an award was rendered, the Convention would essentially allow for only three main types of post-award remedies (interpretation, revision and annulment), all of which are administered by ICSID.[11] Finally and importantly, the Convention also required that Member States recognize the binding character of ICSID Convention awards and enforce these awards as if they were judgments of their own domestic courts.[12] Possessing such characteristics (neutrality, balance, autonomy and an efficient enforcement mechanism), the ICSID dispute resolution system was to mark 'a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.'[13]

In order to appreciate the extent of the contribution of African States to the establishment of this novel and unique procedural mechanism, it is helpful to briefly recall the context in which the ICSID Convention came into being and the World Bank's longstanding interest in the resolution of investment disputes. It is with this context in mind that the participation of African States in the negotiation and the drafting of the ICSID Convention as well as its entry into force will be addressed. Indeed, the distinctive role that African States played in shaping the nascent ICSID system set the stage for their continued contribution to its evolution.

[7] Report of the Executive Directors of the International Bank for the Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Report of the Executive Directors), available on the ICSID website at <http://icsidfiles.worldbank.org/icsid/ICSID/StaticFiles/basicdoc/partB.htm> para 11.

[8] Report of the Executive Directors (n 7) para 13.

[9] Report of the Executive Directors (n 7) para 13. The Convention also provides for the possibility of filing counterclaims (see Article 46 of the ICSID Convention). Statistics show that, overall, investors have been claimants much more frequently than States have, relying on investment treaties that primarily provide for substantive obligations on the part of the State. In recent years, a number of States (including African States) have begun placing greater emphasis on the obligations of investors in investment treaties (see Conclusion).

[10] Report of the Executive Directors (n 7) para 32. Article 26 of the ICSID Convention provides that "[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention." The Convention and the Arbitration Rules also allow the parties to provide in the agreement recording their consent to ICSID arbitration that they may seek provisional measures from State courts (see Article 47 of the ICSID Convention; ICSID Arbitration Rule 39(6)).

[11] See arts 50–52 of the ICSID Convention. Art 53(1) provides, in relevant, part that '[t]he award shall be binding on the parties and *shall not be subject to any appeal or to any other remedy except those provided for in this Convention*' (emphasis added).

[12] See arts 53 and 54 of the ICSID Convention; Report of the Executive Directors (n 7) paras 41–42.

[13] Report of the Executive Directors (n 7) para 9.

A. *The Elaboration and Entry into Force of the ICSID Convention*

(i) *The economic context and the World Bank's interest in investment dispute settlement*

While the number of newly independent States kept increasing in the 1950s and 1960s, financial aid for development began to stagnate in the early 1960s.[14] States started to look towards private foreign investment to meet their financing needs.[15] In response to these changes, in 1961, the UN General Assembly resolved that the 1960s would be the 'United Nations Development Decade' during which States were, *inter alia*, '[to] pursue policies that will lead to an increase in the flow of development resources, public and private, to developing countries on mutually acceptable terms' and '[to] adopt measures which will stimulate the flow of private investment capital for the economic development of the developing countries, on terms that are satisfactory both to the capital-exporting countries and the capital-importing countries.'[16] Despite such efforts, private investors remained reluctant to invest in developing countries due, in large part, to perceived political or non-commercial risks.[17] With no multilateral consensus on a set of substantive rules to promote and protect foreign investment,[18] the idea of an agreement on a procedural mechanism to resolve disputes between investors and States appeared more achievable.[19]

At the time, finding a way to increase and encourage foreign investment in developing countries was a major concern for the management of the World Bank.[20] This was reflected in the Articles of Agreement of the International Bank for Reconstruction and Development (IBRD), which mandated the IBRD to promote foreign investment in member countries.[21] To further these goals, the Bank considered different multilateral solutions, including the creation of a center to provide facilities for conciliation and arbitration of investment disputes (which ultimately became ICSID).[22]

As Dr Parra explains in his History of ICSID the World Bank's decision to get involved in the resolution of investment disputes was no coincidence. The IBRD

[14] Antonio Parra, *The History of ICSID* (2nd ed, OUP 2017) 12 (Parra).
[15] ibid 11–12.
[16] See General Assembly Resolution, 1710 (XVI), United Nations Development Decade (December 19, 1961) <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/167/63/IMG/NR016763.pdf?OpenElement>; Parra (n 14) 12 n 11.
[17] Parra (n 14) 12 and n 14. See also The Promotion of the International Flow of Private Capital: Progress Report by the Secretary-General, United Nations Economic and Social Council, E/3325, 8 (February 26, 1960) (UN 1960 Report). See also ICSID, History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention (1968) Volume II-1, Summary Record of Proceedings of the Settlement of Investment Disputes Consultative Meeting of Legal Experts, Addis Ababa, December 16–20, 1963 (April 30, 1964) (History of the ICSID Convention, Addis Ababa Meeting), 240.
[18] Parra (n 14) 18–19; Lucy Reed, Jan Paulsson and Nigel Blackaby, *Guide to ICSID Arbitration* (Kluwer 2010) (Reed and others) 1–2; R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP, 2012) 9; C Schreuer and others, *The ICSID Convention—a Commentary* (OUP 2009) ix (Schreuer and others).
[19] Parra (n 14) 17, 19; Reed and others (n 18) 1–2.
[20] Parra (n 14) 23–24.
[21] Under Article I of the Articles of Agreement of the IBRD, one of the purposes of the Bank is '[t]o promote private foreign investment by means of guarantees or participations in loans and other investments made by private investors [. . .].' See also Parra (n 14) 21. The IBRD is the first and largest of the five institutions that make up the World Bank. Its constituent treaty, the Articles of Agreement of the IBRD, came into force at the end of 1945. The Bank began operating in 1946 and was informally being referred to as the "World Bank," a name that the institution came to adopt officially. The "World Bank" is now officially employed to mean both the IBRD and its affiliate the International Development Association (IDA). See Parra (n 14) 2 and n 7.
[22] Parra (n 14) 12–17.

'had a longstanding interest in the settlement of disputes between member countries and foreign investors.'[23] According to Dr Parra, the Bank had identified, as early as 1947, a need for some form of international mechanism to facilitate the resolution of such disputes.[24] The World Bank as an institution, and its president at the time, Eugene Black,[25] had been approached by member governments (including from Africa) to assist them with the resolution of disputes involving investors.[26]

On 19 September 1961, President Black addressed the Board of Governors[27] stating, 'our experience has confirmed my belief that a very useful contribution could be made by some sort of special forum for the conciliation or arbitration of these disputes.'[28] He informed the Board of Governors that he intended 'to explore with other institutions, and with our member governments, whether something might not be done to promote the establishment of machinery of this kind.'[29]

At its Seventeenth Annual Meeting in September 1962, the Board of Governors of the Bank decided to ask the Executive Directors to study the desirability and practicability of setting up institutional facilities, sponsored by the World Bank, that would be devoted to the settlement of investment disputes through conciliation and arbitration.[30]

[23] ibid 19.

[24] ibid. See also Parra (n 14) 19, n 76 indicating that the IBRD 1946–47 Annual Report raised the possibility of setting up an "impartial body of technical experts" to resolve investment disputes.

[25] Eugene Black was president of the Bank from 1949 to 1963.

[26] Parra (n 14) 20–23. Dr Parra refers, *inter alia*, to the World Bank's role in efforts to resolve the dispute related to Egypt's nationalization of the Suez Canal Company in 1956 (ibid 21–22). Other examples were discussed in the first regional consultative meeting in Addis Ababa (see Section I.A.ii.): '[the Bank] had on a number of occasions been approached by governments and foreign investors who had sought its assistance in settling investment disputes and had been encouraged to bend its efforts in that direction by such events as the enactment by Ghana of foreign investment legislation which contemplated the settlement of certain investment disputes "through the agency of" the World Bank. Similarly, Morocco and a group of French investors had entrusted to the President of the Bank the appointment of the President of an arbitral tribunal to settle disputes that might arise under a series of long-term contracts' (History of the ICSID Convention, Addis Ababa Meeting (n 17) 240).

[27] Today, the World Bank Group is composed of five institutions: The International Bank for Reconstruction and Development (IBRD); The International Finance Corporation (IFC); The International Development Association (IDA); The Multilateral Investment Guarantee Agency (MIGA); and ICSID. The World Bank is made up of 189 Member Countries (or shareholders) that are represented by a Board of Governors, who are the ultimate policymakers at the World Bank. The governors, who meet once a year, are generally member countries' ministers of finance or ministers of development. They delegate specific duties to 25 Executive Directors, who make up the Board of Directors. The five largest shareholders appoint an executive director, while other member countries are represented by elected executive directors. The World Bank Group President, presently Dr Jim Yong Kim, chairs meetings of the Board of Directors and is responsible for overall management of the Bank. The President is selected by the Board of Directors for a five-year, renewable term. The Executive Directors normally meet at least twice a week to oversee the Bank's business, including approval of loans and guarantees, new policies, the administrative budget, country assistance strategies and borrowing and financial decisions (see <http://www.worldbank.org/en/about/leadership>). ICSID is composed of a Secretariat and an Administrative Council presided by the President of the World Bank Group. Each ICSID Member State has one seat and one vote on the Administrative Council. The Administrative Council plays no role in the administration of individual cases. Rather, its mandate is to address organizational matters related to ICSID's institutional framework, such as adopting rules and regulations for the Centre or approving the Centre's annual reports and its budget (see <https://icsid.worldbank.org/en/Pages/about/Structure.aspx> and <https://icsid.worldbank.org/en/Pages/about/Administrative-Council.aspx>). Led by a Secretary-General, the ICSID Secretariat is in charge of the day-to-day management of individual cases (see <https://icsid.worldbank.org/en/Pages/about/Secretariat.aspx>).

[28] ICSID, History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention (1968) Volume II-1, Excerpt from address by President Eugene R. Black to the Annual Meeting of the Board of Governors 3.

[29] ibid.

[30] Report of the Executive Directors (n 7) para 6; ICSID, History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention (1968) Volume II-1, Resolution No. 174 of the Board of Governors: "Study of Settlement of Investment Disputes" (September 18, 1962) 51.

(ii) *The participation of African states in the negotiation, drafting and entry into force of the ICSID Convention*

The task of devising a preliminary draft Convention (the Preliminary Draft) was headed by the Bank's general counsel, Aron Broches. Mr Broches' draft was discussed by the Bank's Executive Directors in a series of meetings from December 1962 to June 1963.[31] In September 1963, the Executive Directors agreed that four regional consultative meetings with legal experts designated by governments would be convened to discuss the Preliminary Draft.[32]

The first of these regional meetings, each of which lasted one week, took place in Addis Ababa, Ethiopia, at the headquarters of the UN Economic Commission for Africa.[33] Of the four meetings, the one in Addis Ababa drew the most participants. Fifty-two legal experts from 29 African countries were in attendance, including Nigeria's then Attorney General and Minister of Justice, Mr Taslim Olawale Elias, who would later become the President of the International Court of Justice.[34]

Prior to discussing the provisions of the Preliminary Draft in detail,[35] Mr. Broches presented the principles underlying the draft under review and the delegates expressed broad agreement with these principles in a round of general statements.[36] The delegates addressed some of the fundamental ideas that were to govern the Convention, such as the investor's direct access to arbitration,[37] the need 'to strike a balance between the interests of investors and those of developing countries,'[38] and the need to give investors assurances as to how disputes between them and States would be settled in order to attract private investment.[39] Attorney General Elias notably characterized the Preliminary Draft as 'an attempt not only to restore the confidence of the investor but also to codify certain principles of customary law and to engage in the progressive development of international law, and he warmly recommended it.'[40] During this week-long meeting, the African

[31] Schreuer and others (n 18) 2, para 3. For a detailed review of Mr Broches' 'Working Paper', which then served as a basis for the Preliminary Draft, see Parra (n 14) 30–53.

[32] Report of the Executive Directors (n 7) para 7; Parra (n 14) 43; Schreuer and others (n 18) 2 para 4.

[33] Report of the Executive Directors (n 7) para 7. See also Parra (n 14) 53–54; Schreuer and others (n 18) 2; History of the ICSID Convention, Addis Ababa Meeting (n 17) 239. The other three regional meetings took place in Santiago de Chile, Geneva and Bangkok. All four meetings were chaired by Mr Broches. For views on the discussions held at the Addis Ababa meeting, see eg Won Kidane, 'The China-Africa Factor in the Contemporary ICSID Legitimacy Debate' (2014) 35 U Penn J Int'l L 559, esp 579–91; Charles N Brower, *A Study of Foreign Investment Law in Africa: Opportunity Awaits*, with Michael P. Daly, submitted for the 'ICCA Congress Series' in conjunction with the 2016 International Council for Commercial Arbitration Congress held in Mauritius (May 2016) at 5–10 <http://www.arbitration-icca.org/media/7/82088225980224/brower__daly_a_study_of_foreign_investment_law_in_africa.pdf> (Brower and Daly).

[34] History of the ICSID Convention, Addis Ababa Meeting (n 17) 236–38. See also ibid 239–40 (in his introductory remarks at the Addis Ababa meeting, Mr Broches declared that it was 'very fitting' that the first regional consultative meeting was taking place in Africa. He noted the 'large attendance' and that 'governments had sent such eminent representatives'); ICSID, History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention (1968) vol II-1, Executive Directors' Meeting of January 7, 1964, Extracts from statement by Mr Broches regarding the African regional meeting held in Addis Ababa Ethiopia, 295–96 (History of the ICSID Convention, statement by Mr Broches). In his statement to the Executive Directors, Mr Broches explained why he believed that the Addis Ababa meeting had been 'very successful.' See also Parra (n 14) 48–49.

[35] The discussion of the provisions of the Preliminary Draft spanned a period of four days (ibid (n 34) 296).

[36] History of the ICSID Convention, Addis Ababa Meeting (n 17) 239–47; History of the ICSID Convention, statement by Mr Broches (n 34) 296 (Mr Broches saw 'complete agreement' with the underlying principles in the delegates' general statements).

[37] History of the ICSID Convention, Addis Ababa Meeting (n 17) 245 (Mr Kpognon of Dahomey).

[38] ibid 244 (Mr Elias of Nigeria), 246 (Mr Benani of Morocco).

[39] ibid 244 (Mr Abdoulaye of Guinea); 245 (Mr Gachem of Tunisia, Mr Kpognon of Dahomey, Mr Onny of Ghana), 247 (Mr Ali of Somalia).

[40] ibid 244.

States' delegates also offered additional new ideas, which Mr Broches then conveyed to the Bank's Executive Directors.[41]

Following the four regional meetings and a report from the Executive Directors,[42] the Board of Governors requested that the Executive Directors formulate a definitive version of the Convention so that it would be acceptable to the largest possible number of governments.[43] The Bank invited its members to designate representatives to a Legal Committee that would assist the Executive Directors in this task.[44] Here again, African States were present and participated in the elaboration of the definitive version of the text. Fifteen of the 61 members of the Legal Committee were designated by African States.[45] The Legal Committee met in Washington DC from November 23 to December 11, 1964.[46] On March 18, 1965, the Executive Directors adopted a resolution approving the final text of the Convention and the Report of the Executive Directors for submission for approval to member governments of the Bank.[47] The resolution directed the President of the Bank (George D Woods at the time) to transmit the text of the Convention and the Report of the Executive Directors to all members governments for their 'early and favorable consideration.'[48]

The ICSID Convention was to enter into force 30 days after the requisite 20 ratifications were achieved.[49] African States played a key role in the speedy entry into force of the Convention.[50] Tunisia was the first State to sign the Convention, on May 5, 1965, and Nigeria was the first to ratify it, on August 23, 1965. Notably, 15 of the first 20 countries to ratify the ICSID Convention were African States.[51] They were:

- Benin
- Burkina Faso
- Central-African Republic
- Chad
- Côte d'Ivoire

[41] History of the ICSID Convention, statement by Mr. Broches (n 34) 297–98. Mr Broches referred in particular to suggestions regarding an investment guarantee institution, the scope of activity of the Centre and state-controlled corporations and development boards, and the definition of the term 'investment'.

[42] Mr Broches prepared a final text for submission to the Executive Directors who in turn submitted a report to the Board of Governors at its 19th Annual Meeting in Tokyo in September 1964. The Executive Directors concluded that 'it would be desirable to establish the institutional facilities envisaged, and to do so within the framework of an inter-governmental agreement' (Report of the Executive Directors (n 7) para 8).

[43] Report of the Executive Directors (n 7) paras 1, 8.

[44] Report of the Executive Directors (n 7) para 8.

[45] ICSID, History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention (1968) vol I, 354–403; Report of the Executive Directors (n 7) para 8; Parra (n 14) 75.

[46] Report of the Executive Directors (n 7) para 8.

[47] ibid para 2; ICSID, History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention (1968) vol II-2, Excerpt from the Minutes of the Meeting of the Executive Directors, March 18, 1965. Approval of Resolution 65-14 approving the Text of the Convention and of the Report of the Executive Directors, 1039–40.

[48] Parra (n 14) 85.

[49] Article 68 of the ICSID Convention.

[50] Meg Kinnear and others (eds), *Building International Investment Law. The First 50 years of ICSID* (Kluwer Law International 2015) preface 1i (Kinnear and others).

[51] The five other countries that ratified the Convention in the group of 20 are the USA, Iceland, Jamaica, Malaysia and the Netherlands.

- Gabon
- Ghana
- Madagascar
- Malawi
- Mauritania
- Nigeria
- Republic of Congo
- Sierra Leone
- Tunisia
- Uganda

The ICSID Convention came into force on October 14, 1966. While the number of States to ratify the Convention grew rapidly and had already reached 90 by 1988, it is clear that without the early support of African States, the ICSID Convention would not have entered into force when it did.[52]

In addition to this decisive contribution at the inception of the ICSID system, African States and the cases they were involved in played an important role in the development of ICSID jurisprudence, as outlined below.

B. *The Foundations of ICSID Jurisprudence: African States Have Often Been the First to Test the Provisions of the ICSID Convention and Rules*

The first foundations of ICSID jurisprudence were laid in cases in which African States were involved. Indeed, among the first 25 cases that were registered at ICSID, the majority (15 out of 25) involved African States. This figure is consistent with the significant number of African States among the first Contracting States.[53]

A few examples will offer a glimpse of the trailblazing impact of African cases in which many of the provisions of the ICSID Convention were tested and applied for the first time.[54] The very first ICSID case, *Holiday Inns*, which was registered in 1972, involved Morocco (also among the first States to have ratified the Convention).[55] It is in that case as well that the first request for provisional measures was submitted and ruled upon.[56] *Holiday Inns* is similarly the first in a long line of cases involving African States that have explored the requirements to establish *ratione personae* jurisdiction over locally incorporated companies under art 25(2)(b) of the ICSID Convention.[57]

[52] Between 1967 and 1971, the number of States having ratified the ICSID Convention rose from 36 to 62, and African countries represented 50 percent of the Member States in 1971. On May 1, 2018, African States accounted for approximately 29% of ICSID Member States. For additional data on ICSID membership, see Parra (n 14) 122 and the ICSID database of Member States at <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>.

[53] Parra (n 14) 124 and n 106.

[54] This is aptly illustrated by the timeline showing some of the highlights of ICSID's first 50 years, which appears on pages 8–9 of ICSID's 2016 annual report <https://icsid.worldbank.org/en/Documents/resources/ICSID_AR16_English_CRA_bl2_spreads.pdf>

[55] *Holiday Inns SA and others v Morocco*, ICSID Case No ARB/72/1; P Lalive, 'The first "World Bank arbitration" (*Holiday Inn v Morocco*)—Some legal problems' (1980) 51(1) BYBIL 123 (The First 'World Bank' Arbitration). Morocco signed the ICSID Convention in 1966 and ratified it the following year.

[56] See the table of ICSID Decisions on Provisional Measures, available on the ICSID website at <https://icsid.worldbank.org/en/Pages/process/Decisions-on-Provisional-Measures.aspx>. See also The First 'World Bank' Arbitration (n 55) 132–37.

[57] See eg The First 'World Bank' Arbitration (n 55) 137–42; *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No ARB/81/2 (*Klöckner v Cameroon*), Award

The first ICSID award was also rendered in a case involving an African State (Côte d'Ivoire), in 1977.[58] The first case in which a State was the claimant, which the Centre registered in 1976, again involved an African State (Gabon).[59] It was also an African State—Guinea—which filed the first successful counterclaim in an ICSID case, which the Centre registered in 1984.[60]

In a case registered the same year involving Egypt, an ICSID tribunal upheld for the first time its jurisdiction on the basis of the host country's investment law.[61] Scholars have emphasized the historical importance of this case — *SPP v Egypt* — in ICSID jurisprudence.[62] Indeed, *SPP v Egypt* is seen as marking the birth of 'arbitration without privity,'[63] along with *AAPL v Sri Lanka*, the first case in which a tribunal presided by an eminent African jurist upheld its jurisdiction on the basis of the arbitration provisions of a bilateral investment treaty (BIT).[64] Also very influential was the now famous 2001 *Salini* decision,

21 October 1983, ICSID Rep (vol 2) 3, esp 15–17; *Société Ouest Africaine des Bétons Industriels v Republic of Senegal*, ICSID Case No ARB/82/1 (*SOABI v Senegal*) Decision on Jurisdiction (August 1, 1984) paras 28–46; *Liberian Eastern Timber Corporation v Republic of Liberia*, ICSID Case No ARB/83/2, Award (March 31, 1986) ICSID Rep (vol 2) 343, esp 351–54; *Vacuum Salt Products Ltd v Republic of Ghana*, ICSID Case No ARB/92/1, Award (February 16, 1994) paras 25–55; *Tanzania Electric Supply Company Limited v Independent Power Tanzania Limited*, ICSID Case No ARB/98/8 (*Tanzania Electric v IPTL*) Award (July 12, 2001) para 10; *Compagnie d'Exploitation du Chemin de Fer Transgabonais v Gabonese Republic*, ICSID Case No ARB/04/5 (*Transgabonais v Gabon*) Decision on Jurisdiction (December 19, 2005) and Decision on the application for annulment (May 11, 2010), introductory note and excerpts available in the ICSID Review—(2011) 26(1) ICSID Rev—FILJ 153–72, 173–80, 214–55; *Millicom International Operations BV and Sentel GSM SA v Republic of Senegal*, ICSID Case No ARB/08/20 (*Millicom v Senegal*) Decision on Jurisdiction of the Arbitral Tribunal (July 16, 2010) paras 106–15; *National Gas SAE v Arab Republic of Egypt*, ICSID Case No ARB/11/7 (*National Gas v Egypt*) Award (April 3, 2014) paras 115–49; *AHS Niger and Menzies Middle East and Africa SA v Republic of Niger*, ICSID Case No ARB/11/11 (*Menzies v Niger*) Decision on Jurisdiction (March 13, 2013), introductory note and excerpts of Award (July 15, 2013) paras 131–48; and *Société Industrielle des Boissons de Guinée v Republic of Guinea*, ICSID Case No ARB/12/8, Award (May 21, 2014) paras 95–118.

[58] *Adriano Gardella SpA v Côte d'Ivoire*, ICSID Case No ARB/74/1, Award (August 29, 1977).

[59] *Gabon v Société Serete SA*, ICSID Case No ARB/76/1. This case was the sixth case registered at ICSID.

[60] *Maritime International Nominees Establishment v Republic of Guinea*, ICSID Case No ARB/84/4) (*MINE v Guinea*) Award of January 6, 1988, 4 ICSID Rep 61 (1997). In *MINE v Guinea*, consent was based on the arbitration clause contained in the parties' contract. More recently, Burundi argued in *Goetz v Burundi II* that the tribunal had jurisdiction to rule on its counterclaim on the basis of the BIT invoked by the claimants. The *Goetz v Burundi II* tribunal upheld its jurisdiction for the first time on that basis (see *Antoine Goetz and others v Republic of Burundi*, ICSID Case No ARB/01/2 (*Goetz v Burundi II*) Award (June 21, 2012) paras 269–81).

[61] *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No ARB/84/3 (*SPP v Egypt*). The possibility to institute ICSID arbitration proceedings on the basis of a host State's law was contemplated by the drafters of the Convention and materialized for the first time in the *SPP v Egypt* case. See *SPP v Egypt*, Preliminary Objections to Jurisdiction, Decision (November 27, 1985) paras 49–52, 70–88, ICSID Rep (vol 3) 120–21, 126–30; Decision on Jurisdiction (April 14, 1988) paras 69–118, ICSID Rep (vol 3) 145–62; Report of the Executive Directors (n 7) para 24 ('[...] a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.')

[62] See eg Jan Paulsson, 'Arbitration Without Privity' (1995) 10(2) ICSID Rev—FILJ 232–57; Jan Paulsson, 'The Pyramids Case', (2014) 1 Collected Courses of the International Academy for Arbitration Law 2012, 1; Emmanuel Gaillard, *La Jurisprudence du CIRDI* (Pedone 2004) 357–61.

[63] Paulsson, 'Arbitration Without Privity' (n 62).

[64] *Asian Agricultural Products Limited v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/87/3. The case was presided over by Professor Ahmed Sadek El Kosheri. His two distinguished colleagues on the Tribunal were Samuel K.B. Asante (of Ghana) and Professor Berthold Goldman (of France). Commentators point to the influential role Professor El Kosheri has had in the development of ICSID Arbitration, including in cases that involved African states [Brower and Daly (n 33) 21]; Nassib G Ziadé (Foreword) in Mohamed Abdel Raouf, Philippe Leboulanger, Nassib G. Ziadé (eds), *Festschrift Ahmed Sadek El-Kosheri, From the Arab World to the Globalization of International Law and Arbitration* (Wolters Kluwer 2015) xiii–xiv). In addition to presiding the first BIT case, Professor El Kosheri sat on the first annulment committee in *Klöckner v Cameroon* (n 68). He was also the president of the tribunal in *Togo Electricité and GDF-Suez Energie Services v Republic of Togo*, ICSID Case No ARB/06/7 (*Togo Electricité v Togo*) a member of the *Goetz v Burundi II* tribunal (n 60) and a member of the *Transgabonais v Gabon* ad hoc committee (n 57). For the full list of cases in which Professor El Kosheri participated as member of the Tribunal or ad hoc Committee, see <https://icsid.worldbank.org/en/Pages/cases/searchcases.aspx>. Among the other distinguished figures from the continent, one could also mention Judge Kéba Mbaye (n 69) or Judge Abdulqawi Ahmed Yusuf who recently became the president of the International Court of Justice and has already sat in eight ICSID cases, either as

in which the tribunal ruled on the criteria to be used for the definition of an investment pursuant to Article 25 of the ICSID Convention.[65] Yet again an African State (Morocco) was a party to that case. More recently, in 2016, another African State (Senegal) prevailed in the first ICSID case in which one of the claimants sought to rely on the Most-Favored-Nation (MFN) Treatment clause of the General Agreement on Trade in Services (GATS)[66] to access the dispute resolution provisions of the Senegal–Netherlands BIT and the Senegal–United Kingdom BIT.[67]

African States were also parties in the first cases testing the post-award remedies provided under the ICSID Convention, namely interpretation, revision, and annulment. The first decision on annulment was rendered in 1985 in a case to which Cameroon was a party.[68] The Democratic Republic of Congo was the first State to file an application for revision of an award in 1998.[69] The first application for interpretation was filed in 2005 in *Wena v Egypt*.[70]

ICSID's African Member States have also been among the first to promote and implement more comprehensive transparency in proceedings. The first non-disputing party submissions (or *amicus* briefs) under the 2006 ICSID Arbitration Rules were filed in *Biwater Gauff v Tanzania*.[71] In that case, the Government of Tanzania took the view that the non-disputing parties 'appear[ed] to be potentially appropriate *amici*,'[72] should be given access to the categories of documents identified in their application[73] and should be allowed to attend the

arbitrator or *ad hoc* committee member. For the full list of these cases, see <https://icsid.worldbank.org/en/Pages/cases/searchcases.aspx>. Dr Ibrahim Shihata, who was the longest serving Secretary-General in the history of ICSID, is another key actor from the continent. Commentators have highlighted his 'significant and decisive role in the cause of peaceful and successful resolution of international investment disputes.' Charles N Brower, 'Ibrahim Shihata and the Resolution of International Investment Disputes: The Masterful Missionary' (2000) 15(2) ICSID Rev—FILJ 288, at 288; see also Nassib G Ziadé, 'Ibrahim FI Shihata (1937–2001): A Builder of International Organizations and a Leader in Economic Development' (2016) 3(1) BCDR Inter Arb Rev 1.

[65] *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4 (*Salini v Morocco*) Decision on Jurisdiction (July 16, 2001) para 52. See also the recent commentary that Professor Emmanuel Gaillard and Dr Yas Banifatemi wrote for the 50th anniversary of the Convention: Emmanuel Gaillard and Yas Banifatemi, 'The Long March Towards a Jurisprudence Constante on the Notion of Investment', in Kinnear and others (n 50) 97–126. The year the *Salini* decision was rendered Dr Maurille Okilassali published an article on the participation of African States in which he pointed out that ICSID arbitration had considerably developed with the participation of African States. See Maurille Okilassali, 'La participation des Etats africains à l'arbitrage du CIRDI' (2001) 13 Revue Camerounaise de l'Arbitrage, 3.

[66] Article II.1 of the GATS provides that '[w]ith respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.'

[67] *Menzies Middle East and Africa SA and Aviation Handling Services International Ltd v Republic of Senegal*, ICSID Case No ARB/15/21 (*Menzies v Senegal*) Award (August 5, 2016).

[68] *Klöckner v Cameroon* (n 57), Decision on Annulment (May 3, 1985).

[69] *American Manufacturing & Trading, Inc v Democratic Republic of the Congo*, ICSID Case No ARB/93/1. The application for revision was registered on January 29, 1999. Judge Kéba Mbaye of Senegal was among the three arbitrators who heard this first application for revision. He also sat as arbitrator or *ad hoc* committee member in the following cases: *Klöckner v Cameroon* (n 57) (Second Annulment Proceeding); *SOABI v Senegal* (n 57); *SPP v Egypt* (n 61) (Annulment Proceeding); and *MINE v Guinea* (n 60) (Annulment Proceeding). Judge Mbaye, former Vice-President of the ICJ, is also well-known for being instrumental in the creation of the OHADA system, another illustration of the ability of African States to innovate in the juridical sphere (see Alhousseini Moulioul, *Understanding OHADA* (2d ed., OHADA June 2009) <http://www.ohada.com/content/newsletters/1403/Comprendre-l-Ohada-en.pdf>). In the words of Professor Paul-Gérard Pougoué, the mechanism for legal integration that the OHADA system has created amounts to 'a true epistemological break in Africa'. Paul-Gérard Pougoué, 'OHADA, instrument d'intégration juridique' (2001) 2(2) RASJ 11; translated by the author.

[70] *Wena Hotels Limited v Arab Republic of Egypt*, ICSID Case No ARB/98/4.

[71] *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No ARB/05/22 (*Biwater Gauff v Tanzania*).

[72] *Biwater Gauff v Tanzania* (n 71) Procedural Order No 5 (February 2, 2007) para 42.

[73] Ibid para 43.

hearing.[74] It is also in a case involving an African State (Guinea)[75] that the parties agreed for the first time to apply the 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration in an ICSID arbitration.[76]

Finally, African States were not only trailblazers in ICSID arbitration, but they were also the first to participate in conciliation proceedings under the Convention. *SEDITEX v Madagascar*, which was registered in 1982, was the first conciliation case.[77] Thirty years later, it was again in a case involving an African State (Equatorial Guinea) that the new IBA Rules for Investor-State mediation were reportedly applied for the first time in an ICSID conciliation proceeding.[78] While the parties' agreement to apply the IBA Rules suggests both an appetite for innovation and a flexible approach to conciliation and mediation, it may also reflect a growing interest in these investment dispute resolution methods, in particular among African States.[79]

[74] Ibid para 45.

[75] *BSG Resources Limited (in administration), BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v Republic of Guinea*, ICSID Case No. ARB/14/22 (*BSGR v Guinea*).

[76] *BSGR v Guinea* (n 75) Procedural Order No 1 (May 13, 2015) para 26.1. See also Procedural Order No 2 for the Tribunal's further directions on transparency. For further developments on transparency, see Conclusion.

[77] *SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie mbH v Democratic Republic of Madagascar*, ICSID Case No CONC/82/1 (*SEDITEX* (ICSID CONC/82/10)). It is noteworthy that all but two of the ICSID conciliation cases involved African States (the other two States being Trinidad & Tobago and Albania). In addition to *SEDITEX* (ICSID CONC/82/10), these conciliation cases were as follows on December 31, 2017: *SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie mbH v Madagascar*, ICSID Case No CONC/94/1; *TG World Petroleum Limited v Republic of Niger*, ICSID Case No CONC/03/1; *Togo Electricité v Republic of Togo*, ICSID Case No CONC/05/1; *Shareholders of SESAM v Central African Republic*, ICSID Case No CONC/07/1; *RSM Production Corporation v Republic of Cameroon*, ICSID Case No CONC/11/1; *Hess Equatorial Guinea, Inc and Tullow Equatorial Guinea Limited v Republic of Equatorial Guinea*, ICSID Case No CONC(AF)/12/1; and *Republic of Equatorial Guinea v CMS Energy Corporation and others*, ICSID Case No CONC(AF)/12/2) (*Equatorial Guinea v CMS*). These eight cases were all based on dispute resolution provisions contained in contracts. This particular basis of consent is more common in cases involving African States than in the rest of ICSID cases. This distinctive feature of African participation in the ICSID dispute resolution system is addressed in section II.B.i.a).

[78] *Equatorial Guinea v CMS* (n 77). This is also the first ICSID conciliation case filed by a State. On the combination of the ICSID conciliation rules and the 2012 IBA Rules for Investor-State mediation, see Frauke Nitschke, 'The IBA's Investor–State Mediation Rules and the ICSID Dispute Settlement Framework', (2014) 29(1) ICSID Rev—FILJ 112–32 (Nitschke); Eloïse Obadia, 'The Future of Investment Mediation', presentation to the ICC Young Arbitrators Forum, June 10, 2016. For an example of combination of arbitration and mediation, see Eloïse Obadia, 'How Proactive Arbitrators Really Are in Conducting Arbitral Proceedings: An ICSID perspective', (1999) 16(2) News from ICSID 10.

[79] The growing interest in conciliation and mediation of investment disputes, which is reflected *inter alia* in express references in recent treaties, is also palpable in Africa. See eg art 23 of the Agreement Between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments, signed on April 20, 2015 and entered into force on October 11, 2017 (Canada–Burkina Faso FIPA) <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/burkina_faso/fipa-apie/index.aspx?lang=eng>; art 26 of the 2007 Investment Agreement for the COMESA Common Investment Area (COMESA Agreement) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3092>; and art. 29.1 of the 2012 SADC Model Bilateral Investment Treaty Template (SADC Model BIT) <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf>. (The earlier 2006 SADC Protocol on Finance and Investment (2006 PFI) does not provide for mediation in relation to investor-State disputes but in relation to disputes involving Development Finance Institutions. The 2006 PFI was amended in 2016 to remove investor-State dispute resolution provisions and to provide only for the settlement of State-to-State investment disputes under a 2014 revised protocol on the SADC Tribunal. This 2016 amendment, which reportedly entered into force, does not provide for mediation. On these issues, see eg Luke Eric Peterson, 'Investigation: in aftermath of investor arbitration against Lesotho, SADC member-states amend investment treaty so as to remove ISDS and limit protections' *IA Reporter* February 20, 2017 <https://www.iareporter.com/articles/investigation-in-aftermath-of-investor-arbitration-against-lesotho-sadc-member--states-amend-investment-treaty-so-as-to-remove-isds-and-limit-protections/>; Jarrod Hepburn, 'South African court finds fault with former President's role in neutering of a regional tribunal; ruling comes on the heels of arbitral finding that sanctioned Lesotho for its role in same events' *IA Reporter* March 2, 2018 <https://www.iareporter.com/articles/south-african-court-finds-fault-with-former-presidents-role-in-neutering-of-a-regional-tribunal-ruling-comes-on-the-heels-of-arbitral-finding-that-sanctioned-lesotho-for-its-role-in-same-events/>). See also the discussion around South Africa's current approach to investment dispute resolution, which in some respects tends to move away from treaty-based investment arbitration and includes a greater role for mediation with Regulations on Mediation Rules in terms of the Protection of Investment Act 2015 (at the time of writing, the Regulations and the

As the above account establishes, a first glance at the creation of ICSID and its jurisprudence offers many illustrations of the foundational and innovative role of African States in the early and later years of the system. We now turn to provide an overview of different facets of the participation of African States in ICSID arbitration proceedings through the prism of statistics compiled by the Centre up to December 31, 2017. The sections that follow will primarily focus on key actors of the system—the States—and the decision-makers selected by the States (and the investors)—the arbitrators—before then examining the bases of consent to, and outcomes of, the proceedings involving African States.

II. OVERVIEW OF AFRICAN STATES' PARTICIPATION: ACTORS, DECISION-MAKERS, AND OUTCOMES IN ICSID PROCEEDINGS

A. *Actors and Decision-Makers in ICSID Proceedings Involving African States*

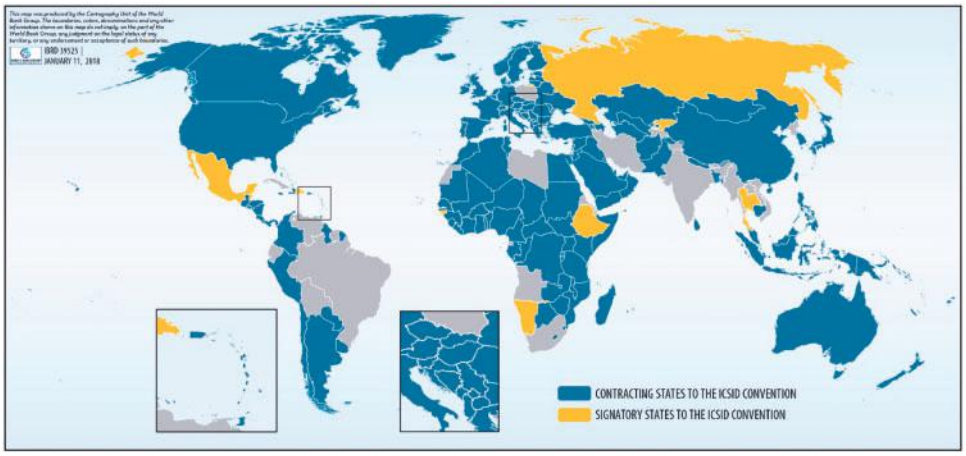
African States have continued to be key participants in the ICSID dispute resolution system until present time, as shown by the statistics reviewed below.

Protection of Investment Act had not yet entered into force): see the Statement on the Cabinet Meeting December 6, 2017, para 11 <https://www.gov.za/speeches/statement-cabinet-meeting-wednesday-6-december-2017-7-dec-2017-0000>, which indicates that the Regulations have been approved by the Cabinet; Jackwell Feris, 'Draft Regulations on Mediation Rules for Investor-State Disputes' (January 25, 2017) <https://www.lexology.com/library/detail.aspx?g=a99b08f9-990c-4b5c-a7f6-4fca993a5fdb>, who suggests that 'the intention is for the Draft Regulations to be effective on the same date the Investment Act comes into effect; Sophia Louw, 'Comments on Foreign Direct Investment under South Africa's Investment Protection Regime' (April 25, 2018) <https://africaarbitration.org/2018/04/25/comment-on-foreign-direct-investment-under-south-africas-investment-protection-regime-by-sophia-louw/>, who states that the Protection of Investment Act is not yet in force). The recent SOAS Arbitration in Africa Survey suggests that this growing interest in mediation is equally perceptible among dispute resolution practitioners in Africa (Emilia Onyema and others, SOAS Arbitration in Africa Survey, Domestic and International Arbitration: Perspectives from African Arbitration Practitioners, 2018 (SOAS Survey), pp 26–27 <http://eprints.soas.ac.uk/25741/1/SOAS%20Arbitration%20in%20Africa%20Survey%20Report%202018.pdf>. Among other things, these various examples appear to illustrate an inclination among many African States to have recourse to all of the available methods of dispute resolution, ranging from mediation to conciliation to arbitration, while signaling a potential for greater development of conciliation and mediation. ICSID's statistics on settlements and other types of discontinuances also suggest that this potential exists (see Section II.B.ii.a). In this regard, ICSID's current work on investment mediation offers further opportunities for collaboration (see eg ICSID's yearly investment mediation training program: <https://icsid.worldbank.org/en/Pages/News.aspx?CID=242> or ICSID's recent webinar on the topic: <https://icsid.worldbank.org/en/Pages/Events.aspx?CID=166>). Further information on investment mediation, including a bibliography, is available at <https://icsid.worldbank.org/en/Pages/process/Other-ADR-Mechanisms.aspx and https://icsid.worldbank.org/en/Pages/process/adr-mechanisms--mediation.aspx>.

(i) *Which African States are participating, in what proportion, and how do they manage proceedings internally?*

a) The ICSID Member States

As Map 1 shows below, as of January 11, 2018, ICSID has 153 Member States. The last African State to ratify the ICSID Convention was São Tomé and Principe, in 2013.[80]

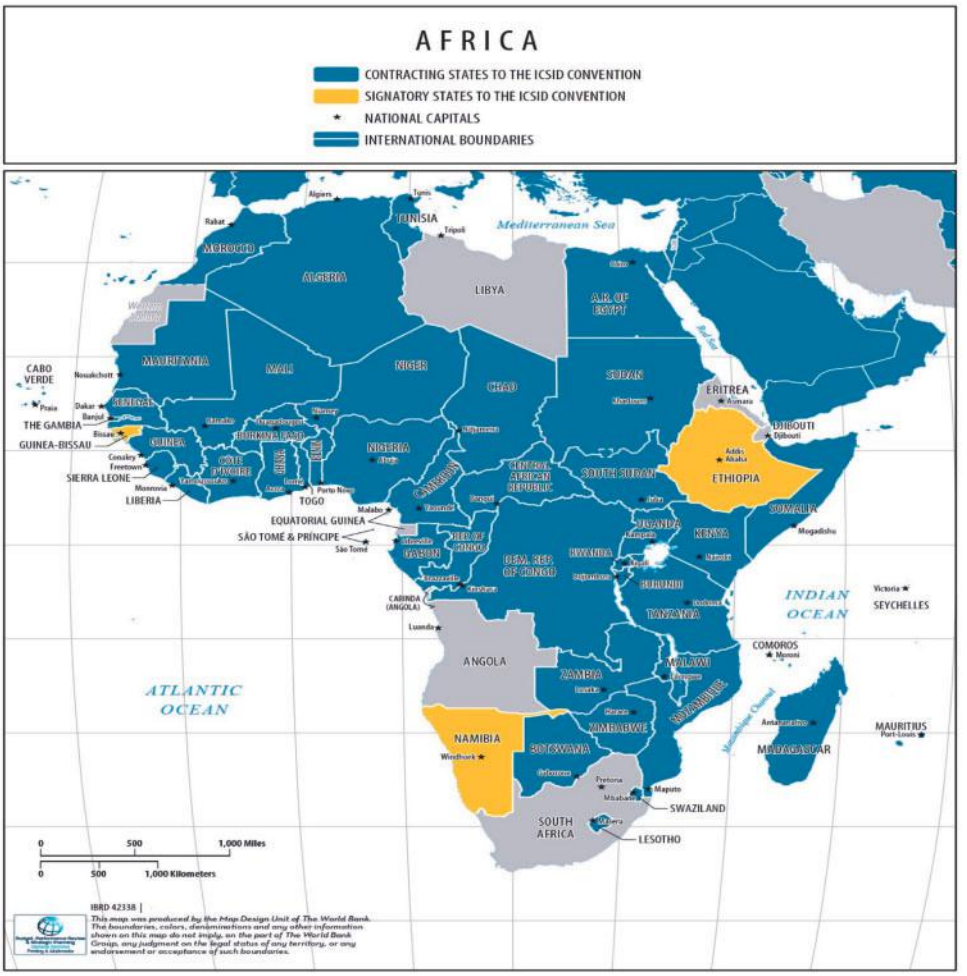


Map 1.

A large majority of the African States (45) are Member States, as shown in the more detailed map of Africa below (Map 2). Only a few African countries (such as South Africa, Angola and Libya) have not signed the ICSID Convention.[81] Ethiopia, Guinea-Bissau and Namibia have signed but not yet ratified the ICSID Convention.

[80] The latest State to sign the ICSID Convention is Mexico and the latest State to ratify the ICSID Convention is the Republic of Nauru. Mexico signed the Convention on January 11, 2018. See the ICSID website <https://icsid.worldbank.org/en/Pages/News.aspx?CID=267>. Nauru signed and deposited its instrument of ratification with the IBRD on April 12, 2016, and the ICSID Convention came into force for Nauru on May 12, 2016. See the ICSID website <https://icsid.worldbank.org/en/Pages/News.aspx?CID=181>.

[81] The list of non-signatories includes Angola, Djibouti, Equatorial Guinea, Eritrea, Libya, and South Africa. For recent reflections on Western Sahara and trade and investment treaties, see Kate Parlett, 'Trade and Investment Agreements in Disputed Territories: The case of Western Sahara', Kluwer Arbitration Blog, April 4, 2017 <http://arbitrationblog.kluwerarbitration.com/2017/04/04/reserved-for-4-april-kate-parlett-on-western-sahara/>.



Map 2.

b) African States which have been party to one or more ICSID proceedings

The majority of the African States have participated in one or more ICSID proceedings.[82] Aside from Egypt, no African State has been involved in more than nine ICSID proceedings, the majority having been involved in one to four

[82] A list of all ICSID Convention and Additional Facility cases involving African States through December 31, 2017 can be found at Annex 1.

proceedings.[83] The States which have participated in ICSID proceedings are set forth in the following list:[84]

Egypt	30
Democratic Republic of Congo	9
The Gambia	7
Guinea	7
Algeria	6
Tanzania	6
Cameroon	5
Madagascar	5
Burundi	4
Republic of Congo	4
Côte d'Ivoire	4
Gabon	4
Senegal	4
Tunisia	4
Central African Republic	3
Equatorial Guinea	3
Ghana	3
Kenya	3
Liberia	3
Morocco	3
Nigeria	3
Uganda	3
Zimbabwe	3
Mali	2
Mozambique	2
Niger	2
Togo	2
Burkina Faso	1
Cape Verde	1
Libya	1
Mauritania	1
Mauritius	1
Rwanda	1
Seychelles	1
South Africa	1
South Sudan	1
Sudan	1
Total	**144**

A number of African Member States have not yet participated in an ICSID proceeding. They include Benin, Botswana, Chad, Comores, Lesotho, Malawi, Sao Tomé and Principe, Sierra Leone, Somalia, Swaziland and Zambia.

[83] These figures are for the period from October 14, 1966 through December 31, 2017.
[84] These ICSID proceedings include arbitrations and conciliations on the basis of the ICSID Convention and the Additional Facility Rules. The large majority are arbitrations based on the ICSID Convention. See n 87.

Among the non-Contracting African States, South Africa, Equatorial Guinea and Libya have participated in ICSID proceedings which were introduced under the ICSID Additional Facility (AF) Rules. The AF Rules allow for the administration of disputes by the Centre when the State party to the dispute or the State whose national is a party to the dispute, is not a State which has ratified the ICSID Convention.[85]

It is also interesting to note the nationalities of investors in the cases involving African States. Of the 144 cases involving African States to date, the data collected by the Centre indicates that 22 percent were initiated by African investors, whereas the remaining 78 percent were initiated by investors from States outside of the African continent.[86]

c) The number of cases involving African States

The total number of cases registered at ICSID amounted to 650 on December 31, 2017.[87] Chart 1 below highlights a notable increase in the number of cases registered at ICSID starting in the 2000s. Some of the factors driving this evolution include the intensification of foreign investment flows, the increase in the number of investment treaties in force and the choice offered in those treaties to consent to arbitration as a means to resolve investment disputes.

[85] More specifically, Article 2 of the ICSID Additional Facility Rules states:

The Secretariat of the Centre is hereby authorized to administer, subject to and in accordance with these Rules, proceedings between a State (or a constituent subdivision or agency of a State) and a national of another State, falling within the following categories:

(a) conciliation and arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State;

(b) conciliation and arbitration proceedings for the settlement of legal disputes which are not within the jurisdiction of the Centre because they do not arise directly out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State; and

(c) fact-finding proceedings.

[86] These numbers are based on data available up to December 31, 2017. See also ICSID Caseload—Statistics (Special Focus—Africa), May 2017 (ICSID Africa Statistics) 13, available on the ICSID website <https://icsid.worldbank.org/en/Documents/resources/ICSID percent20Web percent20Stats percent20Africa percent20(English) percent20June percent202017.pdf>. While the May 2017 issue of the ICSID Africa Statistics showed a 21%–79% distribution between African and non-African investors, the April 2016 issue indicated a 20%–80% distribution. See ICSID Caseload—Statistics (Special Focus—Africa), April 2016, p. 13, available on the ICSID website <https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%20Africa%20(English)%20June%203%202016%20Final.pdf>. For statistical purposes, African investors also include locally incorporated companies that are alleged by claimants to be under foreign control within the meaning of Article 25(2)(b) of the ICSID Convention.

[87] This number includes the arbitration and conciliation cases brought on the basis of the ICSID Convention and the AF Rules (see the ICSID Caseload—Statistics (Issue 2018-1) <https://icsid.worldbank.org/en/Documents/resources/ICSID percent20Web percent20Stats percent202018-1(English).pdf). The large majority were ICSID Convention arbitrations (583) followed by AF arbitrations (57), then ICSID Convention conciliations (8) and finally, conciliations on the basis of the Additional Facility Rules (2). The Centre has also provided services ranging from acting as appointing authority to providing full administration services in more than sixty cases where the UNCITRAL Arbitration Rules or other *ad hoc* arbitration rules were applicable. Recent statistics on cases administered under the UNCITRAL Arbitration Rules are available on the ICSID website at <https://icsid.worldbank.org/en/Documents/resources/ICSID percent20Web percent20Stats percent202018-1(English).pdf>. ICSID is the only institution that can administer arbitrations and conciliations under the ICSID Convention, the AF and the UNCITRAL Rules, as well as mediations, thus offering the broadest range of choices for investment dispute resolution.

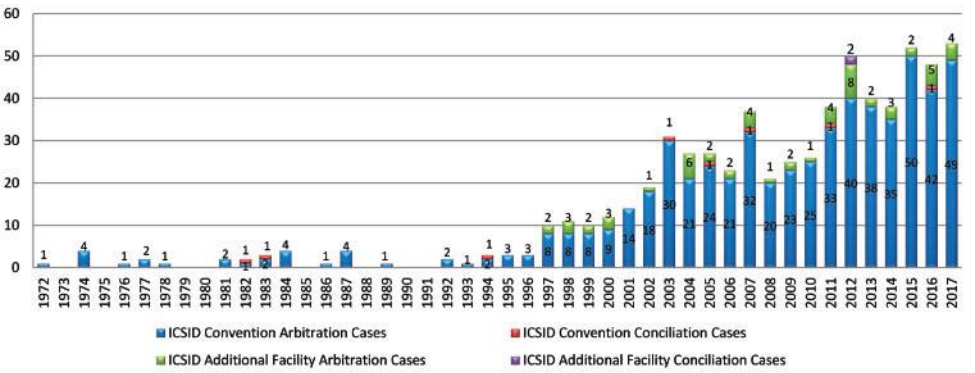


Chart 1. Number of cases registered under the ICSID Convention and Additional Facility Rules, by calendar year.

As indicated above, the number of cases involving an African State registered by ICSID amounted to 144 on December 31, 2017.[88] This represents approximately 22 percent of the 650 cases registered by that date on the basis of the ICSID Convention and the AF Rules.

The breakdown by decade of ICSID cases involving African States is as follows:

1971–80:	6
1981–90:	10
1991–2000:	18
2001–10:	42
2011–2017:	68

These numbers suggest that the African continent is part of a general trend reflecting an increase in the number of arbitrations since the 2000s. However, while the number of cases involving African cases has increased in absolute terms from 1971 through 2017, it has decreased until the 2001-2010 period relative to ICSID's total caseload. Indeed, due to the greater number of African Member States in the early years of the system, African States participated in over 66% of ICSID cases in the period from 1971 through 1980 (6 out of 9 cases). As the number of other Member States grew, the share of cases involving African States started decreasing and went from 58% in the period from 1981 through 1990 (10 out of 17 cases), to 32% in the period from 1991 through 2000 (18 out of 55 cases), and eventually reached less than 17% in the period from 2001 through 2010 (42 out of 250 cases). This figure increased slightly to 21% in the period from 2011 through 2017 (68 out of 319 cases).

d) The internal management of arbitrations by States[89]

Beyond statistics, the impact of State participation in the ICSID dispute resolution system is also driven by the good practices that States involved in ICSID

[88] This number includes the arbitrations (136) and conciliations (8) based on the ICSID Convention and the AF Rules.

[89] On this question, see more generally, Practice Notes for Respondents in ICSID Arbitration, notably, pages 8 to 11, available on the ICSID website <https://icsid.worldbank.org/en/Documents/resources/Practicepercent20Notes percent20forpercent20Respondentspercent20-percent20Final.pdf>.

proceedings may have elected to adopt. Some African States have established within their administrations entities or designated officials who are specialized in conducting international litigations and arbitrations. One example is the Egyptian State Lawsuits Authority (ESLA), which includes a department called the Foreign Disputes Department (FDD), exclusively dedicated to the representation of Egypt in international disputes, including investment arbitrations.[90]

The existence and maintenance of an entity or group of specialized officials presents many advantages, particularly when the composition of this entity or group remains stable over time. As pointed out by one of ESLA's experienced counselors, this type of internal organization allows both for the acquisition of know-how and experience in dealing with international investment disputes and for the reduction of costs associated with managing these disputes. The entity is in a position to prepare the case as soon as a notice of dispute is received and to conduct an early assessment with a view to advising competent authorities whether the dispute should be settled amicably.[91] In addition to monitoring the dispute throughout the proceedings, the entity in charge can promptly designate counsel with experience in the field (if and when that is deemed necessary). Another advantage is to offer a point of contact with knowledge of the relevant procedures and substantive law not only for other organs of the State and for the lawyers who will defend the State alongside this entity, but also for the opposing party, the tribunal and the arbitral institution. This allows the proceedings to run more smoothly and efficiently, thus saving time and money. Some may also see this as a tool (among others) to allow States to avoid default procedures. Finally, the establishment of a specialized entity allows for cooperation between officials specialized in dispute resolution and officials in charge of the negotiation and drafting of treaties, who are thus able to share their analysis of the issues raised in proceedings involving the State.

Drawing on its experience and expertise, such an entity will also be well equipped to deal with the key phase following the filing and registration of a request for arbitration—namely, the selection of the members of the tribunal, which is discussed below.

(ii) *The selection of arbitrators in cases involving African States*

It is generally accepted that the selection of tribunal members is a particularly important phase in arbitration. This phase is where the parties exercise their right to appoint the arbitrator of their choice, a right which the majority of parties appear to value greatly.[92]

Generally, once the case has been registered by the Secretary General of ICSID, the parties agree on a method of constituting the tribunal pursuant to which they each appoint an arbitrator and agree on the appointment of a president. In the event that one of the parties does not appoint an arbitrator and/or the parties cannot agree on the appointment of a presiding arbitrator, the ICSID Convention and Arbitration Rules contain mechanisms which allow the Chairman of the Administrative Council of ICSID to make the relevant appointments under certain

[90] The *Agent judiciaire de l'Etat* in certain African countries can also play that role.

[91] These views on the benefits of the existence of the FDD in ELSA were shared by Ms Lela Kassem, counselor at ESLA, in an exchange with the author. The author is grateful to Ms Kassem for taking the time to discuss this topic.

[92] See eg Queen Mary/White & Case 2012 International Arbitration Survey, 5 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2012_International_Arbitration_Survey.pdf>; and more recently, the Berwin Leighton Paisner (BLP) 2017 International Arbitration Survey: Party Appointment Arbitrators <https://res.cloudinary.com/lbresearch/image/upload/v1515581879/BLP_Survey_xasu5i.pdf>.

conditions. This procedure is designed to prevent a party's failure to act from paralyzing the proceedings.

It is useful to pause here to examine the data compiled by the Centre with respect to the appointment of arbitrators in ICSID proceedings.

While some of the most renowned African jurists have sat in ICSID proceedings,[93] it appears, when comparing the data by region, that relatively few arbitrators from the African continent have been appointed in ICSID arbitrations (see Chart 2 below).[94]

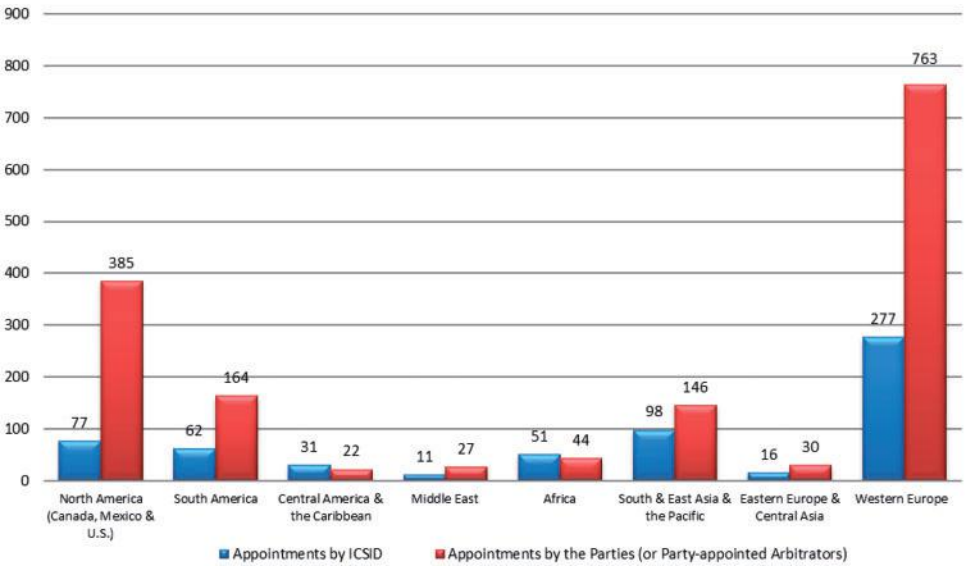


Chart 2. Arbitrators, conciliators and ad hoc committee members appointed in cases registered under the ICSID Convention and Additional Facility Rules—distribution of appointments by ICSID and by the parties (or party-appointed arbitrators) by geographic region.

The appointment of arbitrators is, in the majority of cases, done by the parties (not by the institution), as the chart above confirms. This suggests that parties generally (including African parties), independently of whether they are claimants or respondents, appoint few arbitrators from the African continent relative to arbitrators from other regions. Indeed, the numbers show that ICSID, which appoints far fewer arbitrators than the parties, has appointed more African arbitrators than the parties.[95]

[93] See n 64 and 69. Judge Yusuf, currently President of the ICJ, emphasized the need for more Africans to be appointed to tribunals in a 2015 keynote speech, a summary of which is available at <https://globalarbitrationreview.com/article/1034844/africa-must-have-more-representation-on-tribunals-says-somali-judge>.

[94] This chart presents the data up to December 31, 2017 regarding the arbitrators, conciliators and members of *ad hoc* committees appointed in cases registered on the basis of the ICSID Convention and of the AF Rules (it being understood that *ad hoc* committees can be constituted only in ICSID Convention cases).

[95] For additional statistical data and analysis on the appointment of African arbitrators in domestic and international arbitrations, see the SOAS Survey (n 79). See also African Society of International Law (AFSIL), 2016 AFSIL Principles on International Investment for Sustainable Development in Africa (AFSIL Principles on International Investment) <https://www.unil.ch/investmentafrica/files/live/sites/investmentafrica/files/Events/AfSIL%2028-29.10.2016/2016%20AFSIL%20Principles%20Investment.pdf>. Principle 12 addresses this issue and provides that "African States should ensure effective participation of African lawyers and experts in the negotiation and drafting of investment agreements as well as in the settlement of investment disputes."

The relatively low number of appointments could also be explained in part by the way in which Member States exercise (or do not exercise) their right to designate arbitrators to ICSID's list (or 'Panel') of arbitrators.[96] Members of the Panel are designated by Member States, each of which can designate up to four people for a period of six years, with the possibility of renewal. Certain States from the African continent and other world regions have not yet exercised their right to make designations to the Panel (or do not regularly update their designees). Other States designate people who are not likely to be appointed as arbitrators because they do not have the necessary experience in arbitration and international law. While parties to arbitration proceedings are free to appoint from or outside the Panel, selecting from the Panel is mandatory when the Chairman of the Administrative Council of ICSID has to appoint an arbitrator pursuant to Article 38 of the ICSID Convention, and members of annulment committees pursuant to Article 52 of the Convention. ICSID continuously strives to raise awareness among Member States as to the importance of exercising their right to designate qualified arbitrators to the Panel, for which they enjoy vast freedom.[97] Despite progress in this area thanks to the increased diligence of States and the efforts of the Centre, there is still room for improvement.

With this in mind, ICSID has put into place several initiatives. One of them has been to offer 'ballot' procedures for the appointment of the president of the tribunal. Specifically, when the Chairman of the Administrative Council of ICSID is requested by a party to appoint the president of a tribunal pursuant to Article 38 of the ICSID Convention, the parties are first invited to choose a president from a list or 'ballot' of at least five candidates.[98] The primary purpose of the proposed ballot is to facilitate the appointment a mutually agreeable president. In drawing up the list of potential presiding arbitrators, ICSID will consider *inter alia*: expertise in international investment law, public international law and international arbitration; expertise with respect to the issues raised in the case; the absence of conflicts of interest; relevant language capacity; availability; diversity (both gender and regional)[99]; and any other specific characteristics of the case. As indicated above, the Centre also maintains regular communications with Member

[96] See Article 13 of the ICSID Convention.

[97] Id. Member States are not obligated to designate their own nationals to the Panel.

[98] To make its selection, each party is invited to fill out a form to indicate which of the proposed candidates it consents to appoint as president. If the parties agree on one candidate, that candidate will be invited by the Secretariat to indicate whether he/she accepts the appointment. If the parties agree on more than one candidate, the Secretariat will select one of them and invite that person to accept their appointment as president. If none of the candidates is selected using this process, the President of the Administrative Council of ICSID will appoint the president from the ICSID Panel of Arbitrators, pursuant to Article 38 of the ICSID Convention (on the appointment process see <https://icsid.worldbank.org/en/Pages/process/Selection-and-Appointment-of-Tribunal-Members-Convention-Arbitration.aspx>). In addition to the arbitrators designated by Member States, the ICSID Panel of Arbitrators includes 10 individuals who are designated by the Chairman of the Administrative Council of ICSID. When making designations to the Panel, the Chairman must 'pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity.' (Article 14(2) of the ICSID Convention).

[99] On the issue of diversity, see eg the views offered by Professor Won Kidane in a recent blog post, including on the connections between cultural diversity within tribunals and the quality of arbitral justice: Won Kidane, 'Does Cultural Diversity Improve or Hinder The Quality of Arbitral Justice?' Kluwer Arbitration Blog (March 31, 2017) <http://arbitrationblog.kluwerarbitration.com/2017/03/31/does-cultural-diversity-improve-or-hinder-thequality-of-arbitral-justice/>.

States to invite them to designate arbitrators (and conciliators) to ICSID's Panels. The Secretariat is available to respond to any queries that States may have regarding the designation process.

These initiatives, whether in cases or institutional relations, are designed to promote the participation of highly competent arbitrators (and conciliators) whose profiles reflect the diversity of Member States and investors in ICSID cases.[100]

In order to complete this overview of the participation of African States in the ICSID dispute resolution system, the bases of consent to, and outcomes of, ICSID proceedings and post-award remedies will now be examined.

B. *Bases of consent to, and Outcomes of, ICSID Arbitration Proceedings Involving African States*

ICSID's statistics on the sources of consent and, to a lesser extent, on the economic sectors in which disputes arise reveal trends that seem distinctive to arbitrations involving African States. By contrast, the statistics on the outcomes of proceedings and post-award remedies show, on the whole, that there is an alignment in trends in cases involving African States and those observed across the entire caseload.

(i) *Sources of consent and economic sectors involved in ICSID cases: identifying distinctive features of African participation*

a) Sources of consent to the participation of African States in ICSID arbitration

A review of the Centre's statistics on cases registered under the ICSID Convention and the Additional Facility Rules shows the preponderance of cases in which consent is based on bilateral or multilateral investment treaties (BITs and MITs, respectively), with a share of 74.8 percent of all cases. Among the other sources of consent, contract-based cases represent 16 percent of cases and cases in which claimants invoke the host State's investment law account for the remaining 9.2 percent share (see Chart 3 below).

[100] The Centre has taken a wide range of initiatives designed to foster diversity not only in the selection of arbitrators, but more generally by promoting awareness as to ICSID procedures and international investment law. These include training for lawyers, government officials or students in person or remotely by using video conference systems; organizing conferences and publishing the works of scholars from all world regions in the *ICSID Review-FILJ* (a special issue featuring articles of African scholars on Africa and the ICSID system will be published next winter); in addition to the World Bank's existing network of offices on the continent, expanding ICSID's network of cooperation agreements with institutions and other arbitration centers in Africa with a view to fostering collaboration and offering further hearing venues on the continent (a tribunal recently took the initiative to propose to hold the hearing on the merits in an African country, something parties rarely do, if ever).

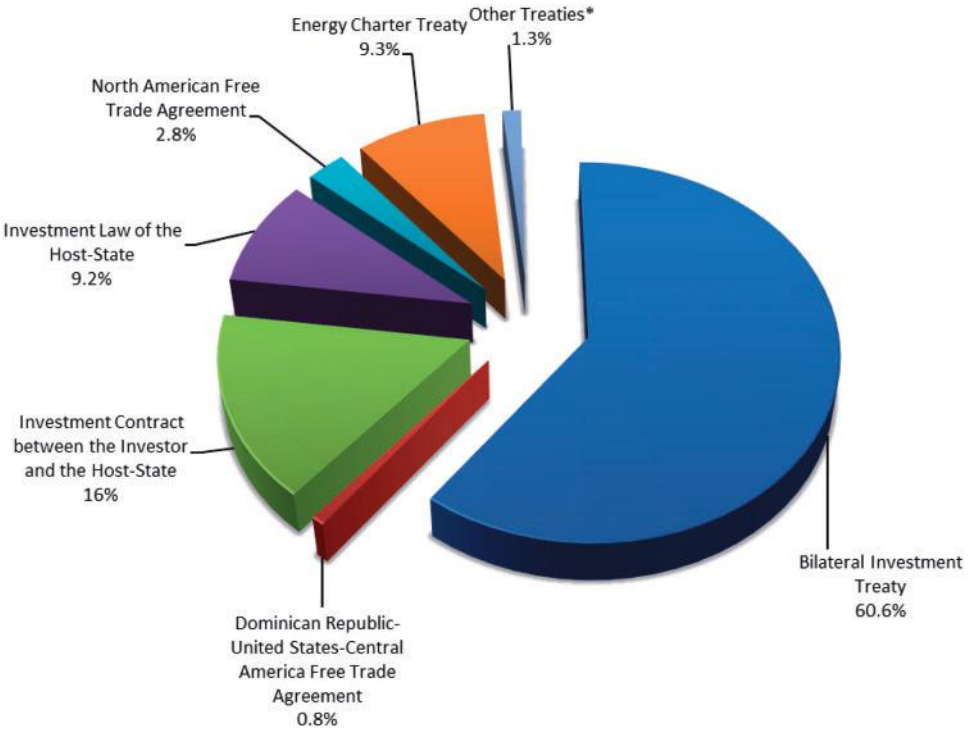


Chart 3. Bases of consent in cases registered under the ICSID Convention and the Additional Facility Rules.
* 'Other Treaties' refers to the Agreement on Promotion, Protection and Guarantee of Investments among member states of the Organization of the Islamic Conference; ASEAN Agreement for the Promotion and Protection of Investments; Canada–Colombia Free Trade Agreement; Canada–Peru Free Trade Agreement; Central America–Panama Free Trade Agreement; Chile–Colombia Free Trade Agreement; Colombia–Mexico Free Trade Agreement; United States–Panama Trade Promotion Agreement; and the Oman–United States Free Trade Agreement.

There are various reasons for the dominance of BITs among the sources of consent (over 60 percent), including the strong growth in the number of these investment agreements in the 1990s (see Chart 4 below[101]) and the option they often offer to investors in their dispute resolution provisions to arbitrate disputes relating to investments.

[101] This chart is based on data provided by UNCTAD, available at <http://investmentpolicyhub.unctad.org/IIA>.

Chart 4. Growth in International Investment Agreements (IIAs) (1980–2017)

A closer look at the cases involving African States shows that the distribution of the sources of consent among these cases differs in a number of ways from the overall ICSID caseload breakdown (see Chart 5 below). Contract-based cases account for a much larger share of cases involving African States (39 percent).[102] The same goes for cases in which consent is founded on a domestic investment law (16 percent).[103] BIT-based cases make up only 45 percent of the total number of cases involving African States.[104] In light of the high number of cases in which consent is based on the dispute resolution provisions of contracts, some authors have pointed out that cases involving African parties have contributed to maintaining the vitality of ICSID arbitration clauses in investment contracts at a time when the majority of ICSID cases are based on BITs and MITs.[105]

[102] For examples of cases in which consent was based on a dispute resolution clause in a contract, see *Togo Electricité v Togo* (n 64); *RSM Production Corporation v Central African Republic*, ICSID Case No ARB/07/2 (*RSM v Central African Republic*); *Lundin Tunisia BV v Republic of Tunisia*, ICSID Case No ARB/12/30 (*Lundin v Tunisia*); *Tullow Uganda Operations Pty Ltd and Tullow Uganda Limited v Republic of Uganda*, ICSID Case No ARB/13/25 (*Tullow v Uganda*); *African Petroleum Gambia Limited (Block A1) v Republic of The Gambia*, ICSID Case No ARB/14/6 [*APGL (Block A1) v The Gambia*] and *African Petroleum Gambia Limited (Block A4) v Republic of The Gambia*, ICSID Case No ARB/14/7 [*APGL (Block A4) v The Gambia*]. Further examples of both concluded and pending cases in which claimants have invoked the dispute resolution clause of a contract can be found on the ICSID website using the search engine available at <https://icsid.worldbank.org/en/Pages/cases/searchcases.aspx> and the search function called 'Instrument(s) invoked' in the left-hand column.

[103] See eg *SPP v Egypt* (n 61); *Société Civile Immobilière de Gaëta v Republic of Guinea*, ICSID Case No ARB/12/36; *Interocean Oil Development Company and Interocean Oil Exploration Company v Federal Republic of Nigeria*, ICSID Case No ARB/13/20; and *BSGR v Guinea* (n 75).

[104] See eg *Consortium RFCC v Kingdom of Morocco*, ICSID Case No ARB/00/6 (RFCC v Morocco) *Consortium Groupement L.E.S.I. - DIPENTA v People's Democratic Republic of Algeria,* ICSID Case No. ARB/03/8; *LESI, SpA and Astaldi, SpA v People's Democratic Republic of Algeria*, ICSID Case No ARB/05/3; *Joseph Houben v Republic of Burundi*, ICSID Case No ARB/13/7; *VICAT v Republic of Senegal*, ICSID Case No ARB/14/19. In a number of cases, claimants have relied on a combination of consent instruments. See eg *Goetz v Burundi II* (n 60) (BIT and Contract); *ABCI Investments Limited v Republic of Tunisia*, ICSID Case No ARB/04/12 (BIT and Investment Law); *Millicom v Senegal* (n 57) (BIT and Contract); *Menzies v Niger* (n 57) (Contract and Investment Law); *Menzies v Senegal* (n 67) (BIT/GATS and Investment Law).

[105] Timothy G Nelson, 'RSM and Millicom: Two African Cases Illustrate the Continued Vitality of Contractual Arbitration Clauses within ICSID' (October 2011) 12(5) J World Invest Trade, 689–99, esp 690.

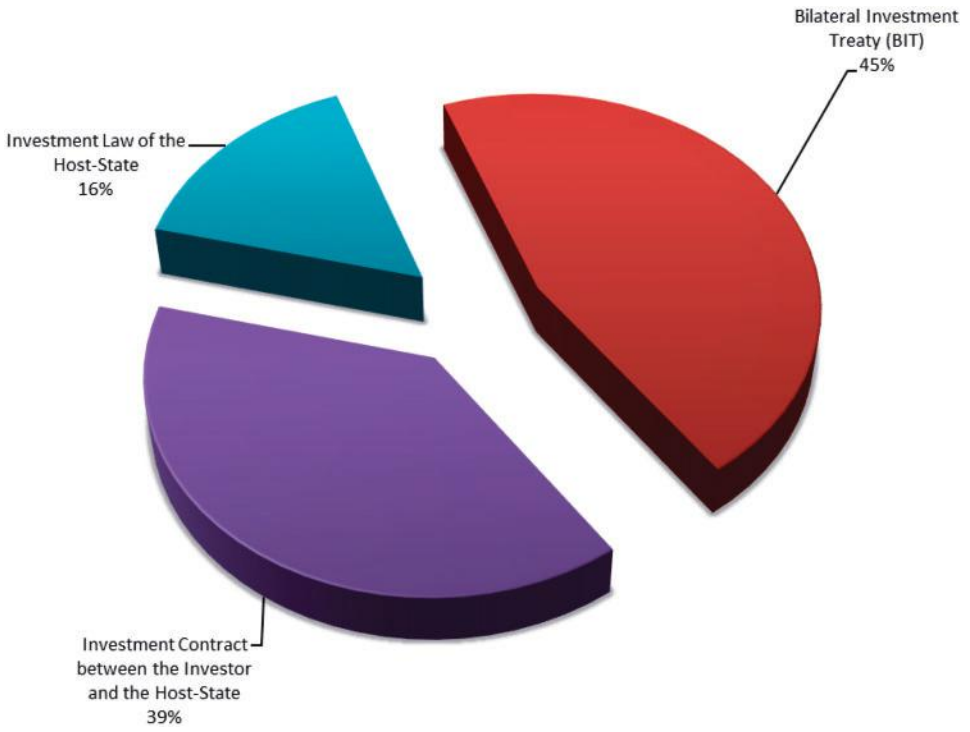


Chart 5. Bases of consent in cases registered under the ICSID Convention and the Additional Facility Rules and involving African States.

The Centre's statistics on consent instruments used in cases from other world regions confirm this distinctive feature of the African caseload at ICSID. ICSID's 2017 statistics on the European Union (EU) show that out of the 117 cases involving EU Member States[106] consent in 58 percent of cases was based on a BIT, 41 percent on the Energy Charter Treaty (ECT) and 1 percent on an investment contract between an investor and a State.[107] The Centre's statistics on the South and East Asia and Pacific Region (SEAP region) further underline the specificity of African cases. In the 48 cases involving States from the SEAP region,[108] the majority of cases—65 percent—were based on a BIT, with another 4 percent being based on MITs (the ECT and the ASEAN Agreement for the Promotion and Protection of Investments).[109] While the proportion of contract-based cases is closer to that observed in cases involving African States (27 percent), cases based on investment laws account for only 4 percent of cases in that region.[110]

[106] These cases were instituted either under the ICSID Convention or under the AF Rules.
[107] These were the figures on December 31, 2017. The April 2017 statistics are available on the ICSID website. See ICSID Caseload—Statistics (Special Focus—European Union) April 2017 (ICSID EU Statistics) 9 <https://icsid.worldbank.org/en/Documents/resources/ICSID percent20Web percent20Stats percent20EU(English)April percent202017.pdf>.
[108] These are again cases which were instituted either under the ICSID Convention or under the AF Rules.
[109] These were the figures on December 31, 2017. The October 2016 statistics are available on the ICSID website. See ICSID Caseload—Statistics (Special Focus—South & East Asia and the Pacific Region) October 2016 (ICSID SEAP Region Statistics) 10 <https://icsid.worldbank.org/en/Documents/resources/ICSID percent20Web percent20Stats percent20Asia percent20Statistics percent20Oct percent202016.pdf>.
[110] ICSID SEAP Region Statistics (n 109), 10.

A commentator noted in 2013 that the number of BITs concluded by African States amounted to 769, with more than 80 percent of these being with non-African parties.[111] He also pointed out that 65 percent of BITs concluded with a non-African party and 20 percent of those concluded with other African States had by then entered into force.[112] He further noted that the number of BITs varied depending on the region of the continent, North African countries having concluded the highest number of treaties (306)[113] and Central African countries the lowest number (89).[114] More recent studies report similar figures.[115]

While a brief review of the sources of consent sheds light on a singular feature of cases involving African States, a similar exercise with respect to the relevant economic sectors out of which disputes have arisen also underscores certain differences with ICSID's global caseload, though not as pronounced as the differences shown above.

b) Economic sectors concerned

When considering all of the cases based on the ICSID Convention and the Additional Facility Rules, the economic sectors which are most represented in ICSID cases to date (December 31, 2017) are oil, gas, and mining (24 percent) electric power and other sources of energy (17 percent) and transportation (9 percent), as shown in Chart 6 below.

[111] Karel Daele, 'Part VI: Investment Treaties and Investor-State Arbitration—Chapter 6: Investment Arbitration Involving African States' in Lise Bosman (ed), *Arbitration in Africa: A Practitioner's Guide* (Kluwer Law International 2013) 403 (Daele). While keeping in mind the distribution of the different bases of consent among cases involving African States, these figures on treaties with African and non-African States can be examined against those on the nationality of investors in those cases. See Section II.A.i.b and n 86.

[112] Daele (n 111) 403.

[113] The North Africa region is described in Karel Daele's study (n 111) as comprising the following States: Algeria, Egypt, Libya, Morocco, South Sudan, Sudan, and Tunisia. In 2013, Egypt was by far the State that had concluded the highest number of BITs (100). Morocco ranked second (61 BITs) and Tunisia third (54 BITs). According to UNCTAD, these numbers remain identical or very similar today (Egypt (100), Morocco (68) et Tunisia (54)). See <http://investmentpolicyhub.unctad.org/IIA>.

[114] The Central Africa region is described in Daele's study as comprising the following States: Angola, Cameroon, Central African Republic, Chad, Republic of the Congo, Democratic Republic of Congo, Equatorial Guinea, Gabon and Sao Tomé and Príncipe.

[115] A 2017 study by UNCTAD notes that among the 165 intra-African BITs, 38 were in force at the end of 2016 (UNCTAD, 'Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties', IIA Issues Note, No 2, June 2017, page 6, frame 1). This represents approximately a 23 percent share. See also L Paéz, 'Bilateral Investment Treaties and Regional Investment Regulation in Africa: Towards a Continental Investment Area' (2017) 18(3) J World Trade Invest & Trade 379–413 (Paéz), esp 386; Makane Moïse Mbengue and Stefanie Schacherer, 'The "Africanization" of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18(3) J World Trade Invest & Trade 414–48 (Mbengue and Schacherer), esp 416; Thomas Kendra, 'Intra-African Investment Treaties: In Search of a New Balance' *Global Arbitration Review* (February 14, 2018) (Kendra).

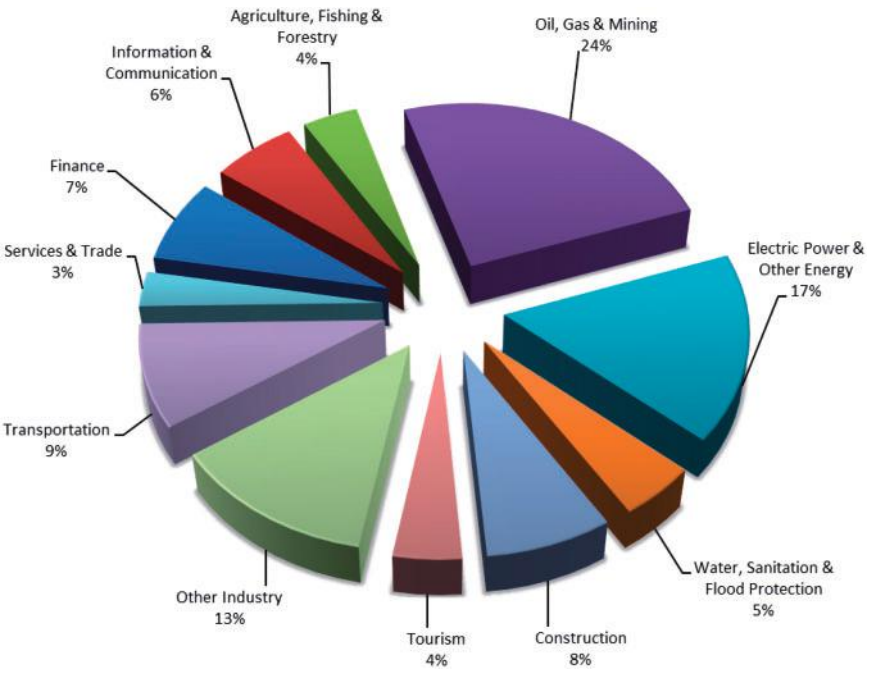


Chart 6. Economic sectors in cases registered under the ICSID Convention and the Additional Facility Rules.

The economic sectors involved in the subset of cases involving African States are shown in Chart 7 below. This chart again highlights the importance of the energy sector as a whole. In cases involving African States, the oil, gas and mining sector accounts for an even higher share with a third of the cases (33 percent).[116] By contrast, the electric power sector accounts for only 5 percent of the cases.[117] The construction sector is the second most important sector, with 10 percent of the cases.[118] Among the other sectors making up more than 5 percent of cases are the transportation sector (7 percent), tourism (7 percent) and agriculture, fishing and forestry (6 percent) and water sanitation and flood protection (6 percent).

[116] See eg in the mining sector, *Société d'investigation de Recherche et d'Exploitation Minière v Burkina Faso*, ICSID Case No ARB/97/1; *Banro American Resources, Inc and Société Aurifère du Kivu et du Maniema SARL v Democratic Republic of the Congo*, ICSID Case No ARB/98/7; *Joy Mining Machinery Limited v Arab Republic of Egypt*, ICSID Case No ARB/03/11 or more recently *Société des Mines de Loulo S.A. v. Republic of Mali* (ICSID Case No. ARB/13/16). See also, as examples in the oil sector, *RSM v Central African Republic* (n 102); *Lundin v Tunisia* (n 102); *Tullow v Uganda* (n 102); *APGL (Block A1) v The Gambia* (n 102); and *APGL (Block A4) v The Gambia* (n 102).

[117] See eg *Tanzania Electric v IPTL* (n 57); *Togo Electricité v Togo* (n 64); *Standard Chartered Bank (Hong Kong) Limited v United Republic of Tanzania*, ICSID Case No ARB/15/41.

[118] See eg *RFCC v Morocco* (n 104); *Salini v Morocco* (n 65); or more recently under the AF Rules, *Grupo Francisco Hernando Contreras v Republic of Equatorial Guinea*, ICSID Case No ARB(AF)/12/2. These figures are consistent with recent data on capital investment into Africa. According to the Financial Times, "[...] capital investment into Africa remains, at its core, resource-seeking, with oil and gas investments accounting for $33bn—roughly a third—of the total. Real estate was the second-most popular sector, attracting $12bn in investment, followed by communications at $6bn" (Courtney Fingar, "Foreign Direct Investment in Africa surges," Financial Times, May 19, 2015 <https://www.ft.com/content/79ee41b6-fd84-11e4-b824-00144feabdc0>).

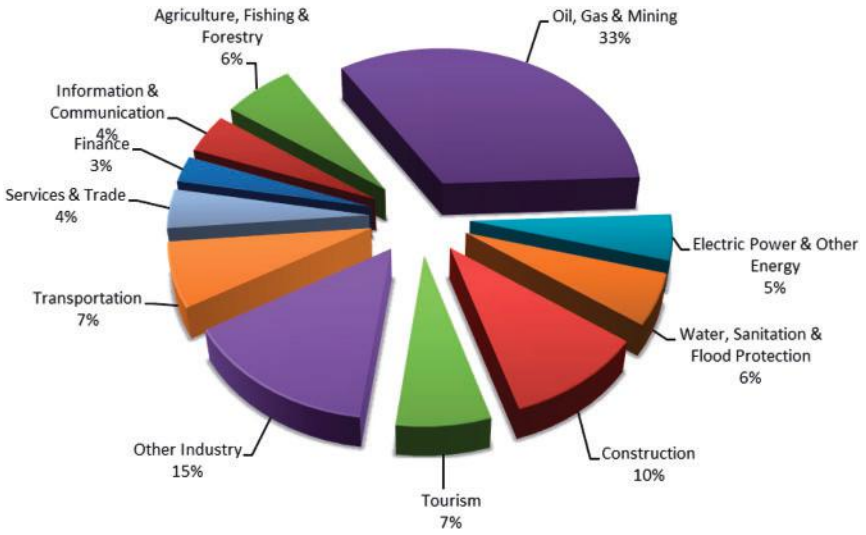


Chart 7. Economic sectors in cases registered under the ICSID Convention and the Additional Facility Rules involving African States.

While the above charts would appear to indicate that the electric power sector has given rise to significantly fewer cases in the Africa region than in the rest of the world, the statistics from the EU and the SEAP region qualify this initial impression by revealing sharper differences between the EU on the one hand and the SEAP and Africa regions on the other. In disputes involving a State from the EU, the electric and other power sector accounts for a 41 percent share of these disputes.[119] In disputes involving States from the SEAP region, the figure goes down to 11 percent.[120] While the figure is even lower in disputes involving African States,[121] these statistics seem to highlight a distinctive feature in the EU region, which reflects in large part a significant increase in disputes in the renewable energy sector.[122] By contrast, the share of disputes in the oil, gas and mining sectors is much lower in disputes involving EU member states (7 percent)[123] than it is in disputes involving States from either Africa (33 percent) or the SEAP region (38 percent).[124]

While this brief overview of the sources of consent to ICSID arbitration and the relevant economic sectors in cases involving African States reveal certain differences, ICSID's statistics related to the outcome of proceedings and post award remedies show more of an alignment with general trends.

(ii) *Outcomes of proceedings and post-award remedies in cases involving African States: alignment with the general evolution of ICSID's caseload*

ICSID's statistics related to the outcomes of proceedings and post award remedies show that cases involving African States and ICSID cases overall maintain a similar balance.

[119] This figure is based on data available up to December 31, 2017. See also ICSID EU Statistics (n 107) 10.
[120] This figure is based on data available up to December 31, 2017. See also ICSID SEAP Region Statistics (n 109) 11.
[121] This smaller share may partly have to do with the fact that the electric power sector has yet not developed to the same extent as others have, such as the oil, gas and mining sectors.
[122] See eg the recent cases in the renewable energy sector involving Spain.
[123] This figure is based on data available up to December 31, 2017. See also ICSID EU Statistics (n 107) 10.
[124] This figure is based on data available up to December 31, 2017. See also ICSID SEAP Region Statistics (n 109) 11.

a) Outcomes of proceedings involving African States

Chart 8 shows the portion of disputes decided by tribunals and conciliation commissions in cases based on the ICSID Convention and the AF Rules, and the portion of cases which resulted in a settlement or discontinuance. Chart 9 shows the same information for cases involving African States.[125]

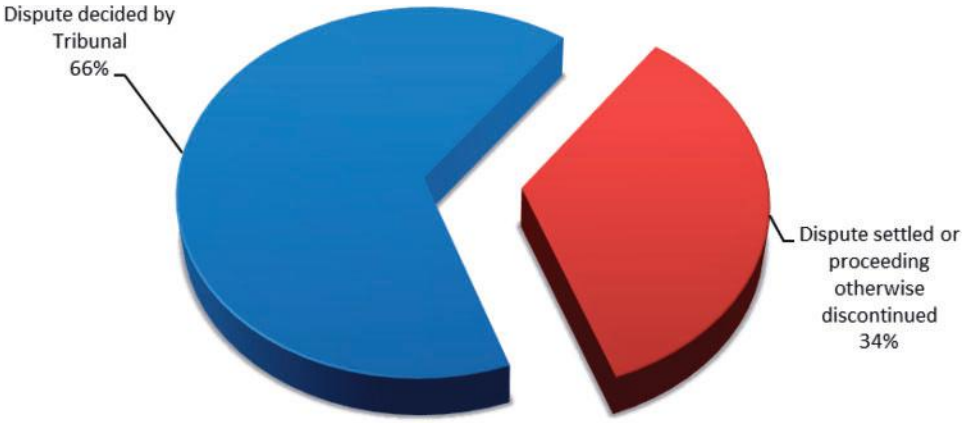


Chart 8. Outcomes in cases registered under the ICSID Convention and the Additional Facility Rules.

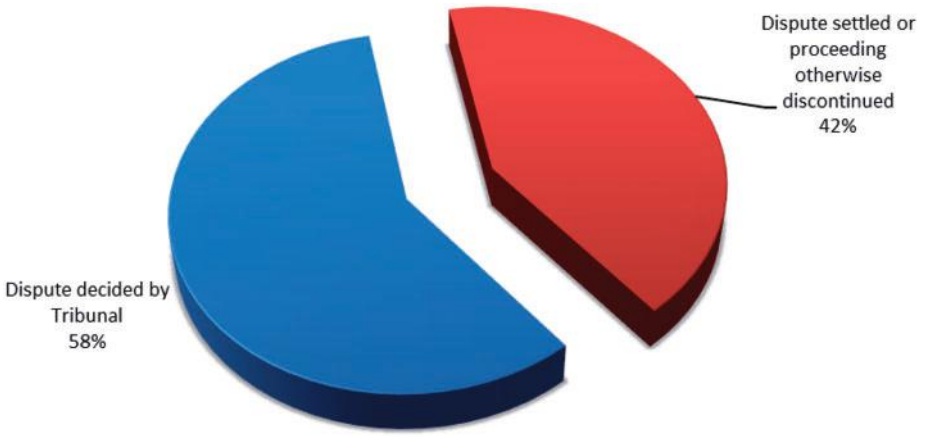


Chart 9: Outcomes in cases registered under the ICSID Convention and the Additional Facility Rules and involving African States.

It appears from the above charts that a significant number of cases based on the ICSID Convention and the AF Rules—more than a third (34 percent)—result in a settlement or are otherwise discontinued.[126] The percentage in cases involving African States is even higher, up to 42 percent.

The numbers in the next two charts (Charts 10 and 11) present in greater detail the different types of settlement and discontinuances in ICSID and AF

[125] These charts are based on data available up to December 31, 2017.
[126] For more statistics on this topic see Nitschke (n 78) 117–25.

cases. They show similarities between the cases involving African States, and all ICSID cases, with the exception of two categories of discontinuances - namely discontinuances at the request of one of the parties and discontinuances at the request of both parties. The percentage of discontinuances at the request of one party is significantly lower in cases involving African States (18 percent versus 27 percent). Conversely, the percentage of discontinuances at the request of both parties is significantly higher in cases involving African States than that related to all ICSID cases (59 percent versus 47 percent). This suggests that African States have been taking full advantage of non-litigious dispute resolution methods, often in a joint endeavor with the other party. These methods remain open to the parties throughout the arbitration[127] and the above figures suggest potential for greater use of such methods, including mediation.[128]

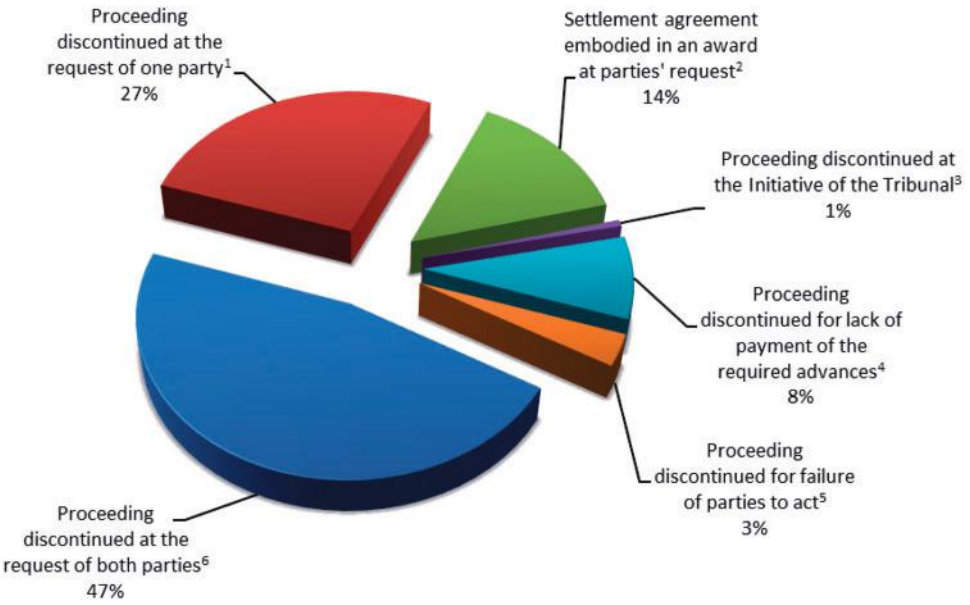


Chart 10. Arbitration proceedings under the ICSID Convention and Additional Facility Rules—Tribunal Rulings, Settlement and Discontinuances (all cases).[129]

[1] ICSID Arbitration Rule 44. No case concluded to date on the basis of Arbitration (Additional Facility) Rule 50.
[2] ICSID Arbitration Rule 43(2) and Arbitration (Additional Facility) Rule 49(2).
[3] In accordance with Article 44 of the ICSID Convention.
[4] ICSID Administrative and Financial Regulation 14(3)(d).
[5] ICSID Arbitration Rule 45 and Arbitration (Additional Facility) Rule 51.
[6] ICSID Arbitration Rule 43(1) and Arbitration (Additional Facility) Rule 49(1).

[127] Nitschke (n 78) 116.
[128] See n 79.
[129] This chart is based on data available up to December 31, 2017.

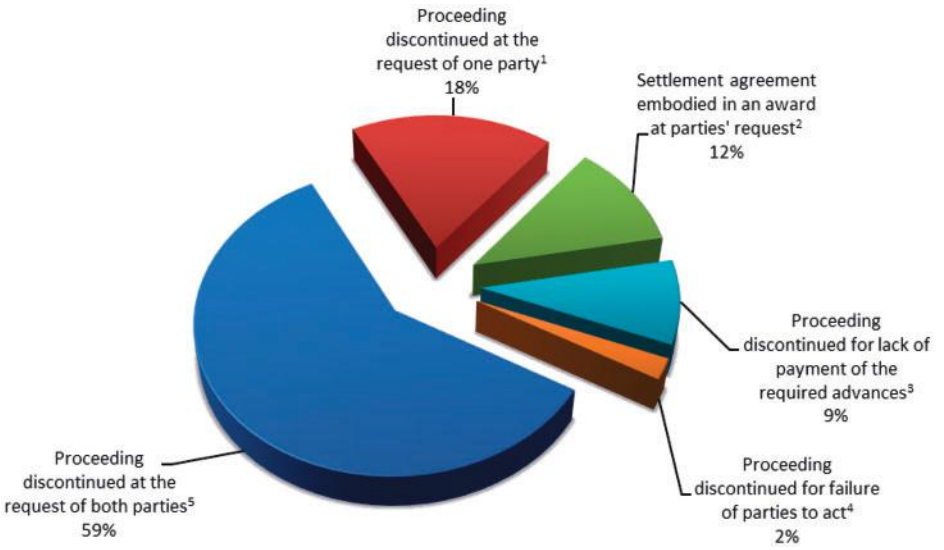


Chart 11. Arbitration Proceedings under the ICSID Convention and Additional Facility Rules—Tribunal Rulings, Settlement and Discontinuances (cases involving African States).[130]

[1] ICSID Arbitration Rule 44. No case concluded to date on the basis of Arbitration (Additional Facility) Rule 50.
[2] ICSID Arbitration Rule 43(2) and Arbitration (Additional Facility) Rule 49(2).
[3] ICSID Administrative and Financial Regulation 14(3) (d).
[4] ICSID Arbitration Rule 45 and Arbitration (Additional Facility) Rule 51.
[5] ICSID Arbitration Rule 43(1) and Arbitration (Additional Facility) Rule 49(1).

In respect of cases which resulted in an award, Charts 12 and 13 show the outcomes in all ICSID Convention and AF Rules cases, and then in cases involving an African State.

These charts show three main categories of outcomes: awards by which the tribunal declines jurisdiction; awards which dismiss all claims; and awards which uphold the investors' claims in part or in full.

When examining all of the ICSID Convention and AF cases, a balance between these categories emerges (see Chart 12 below). The awards in which the tribunal declines its jurisdiction and those in which it dismisses all claims together account for 52 percent of awards rendered. Awards upholding claims in part or in full represent 48 percent of awards rendered.

[130] This chart is based on data available up to December 31, 2017.

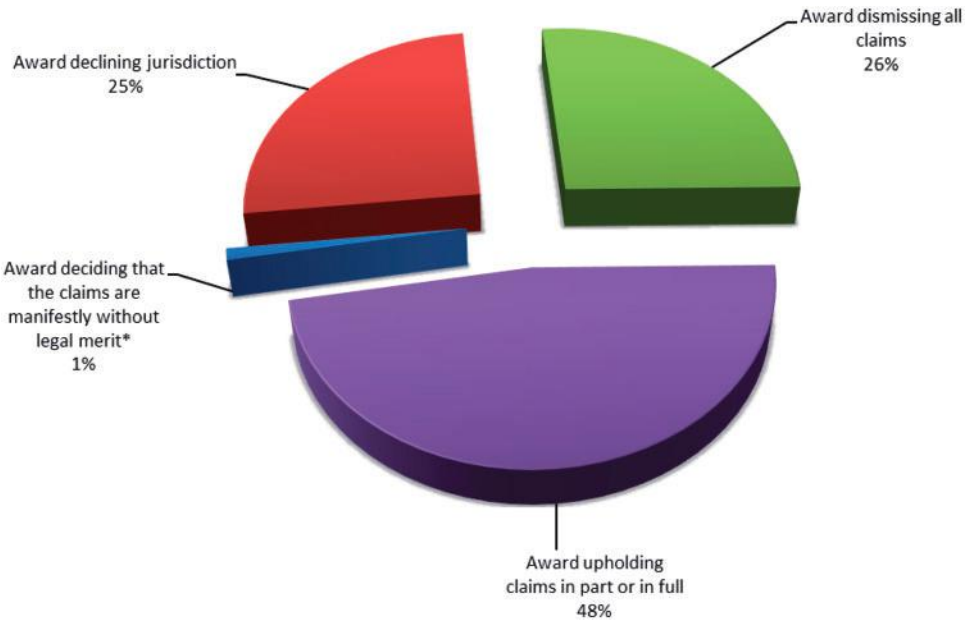


Chart 12. Arbitration Proceedings under the ICSID Convention and Additional Facility Rules—Tribunal Rulings.
*Pursuant to ICSID Arbitration Rule 41(5) and Article 45(6) of the Arbitration (Additional Facility) Rules.

A similar, albeit inversed, balance can be observed in the cases involving African States. This is shown in Chart 13 below; the awards in which tribunals declined their jurisdiction and those dismissing all claims account for 44 percent of the awards rendered. Those upholding all or only part of the claims made account for 56 percent of the awards rendered.

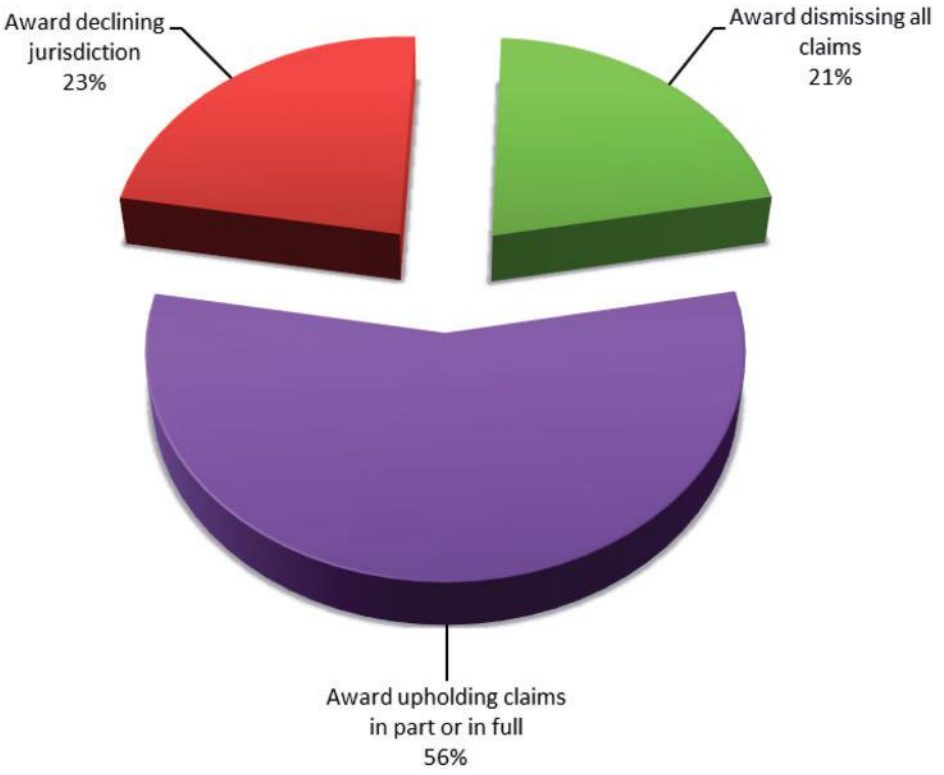


Chart 13. Arbitration Proceedings under the ICSID Convention and Additional Facility Rules—Tribunal Rulings (cases involving African States).

b) Post-award remedies: outcomes in annulment proceedings involving African States

When an award is rendered on the basis of the ICSID Convention, a party may submit an application for annulment[131] under the conditions and for the limited grounds set out in the ICSID Convention and the ICSID Arbitration Rules.[132]

[131] There are also other types of remedies once an ICSID award has been rendered, including interpretation (art 50 of the ICSID Convention) and revision (art 51 of the ICSID Convention). Of the three, annulment is the post-award remedy which is most often invoked by parties.

[132] Art 52 of the ICSID Convention allows parties to apply for the annulment of an award on the following grounds:

(a) that the Tribunal was not properly constituted;
(b) that the Tribunal manifestly exceeded its powers;
(c) that there was corruption on the part of a member of the Tribunal;
(d) there has been a serious departure from a fundamental rule of procedure; or
(e) that the award has failed to state the reasons on which it is based.

As shown in the two charts below, the statistics on annulment related to all ICSID cases (Chart 14) and those related to cases involving African States (Chart 15) have evolved in the same manner.[133] They both show an increase in the number of awards rendered, especially from the 2001–10 decade and a proportionately limited number of annulments.[134]

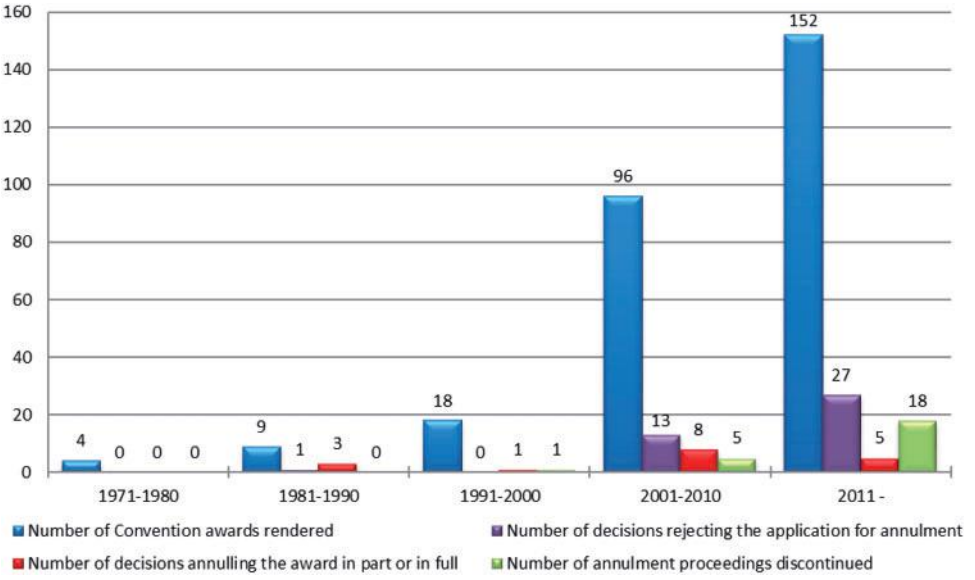


Chart 14. Annulment Proceedings under the ICSID Convention. Awards rendered and outcomes in annulment proceedings under the ICSID Convention, by decade (1971–2017).

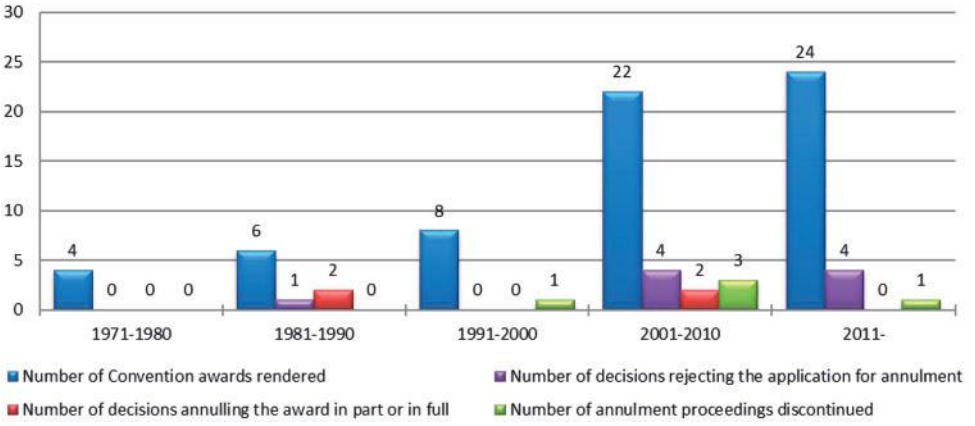


Chart 15. Annulment Proceedings under the ICSID Convention involving an African State. Awards rendered and outcomes in annulment proceedings under the ICSID Convention, by decade (1971–2017)

[133] These charts are based on data available up to December 31, 2017.

[134] See Updated Background Paper on Annulment for the Administrative Council of ICSID, para 112 <https://icsid.worldbank.org/en/Documents/resources/Background%20Paper%20on%20Annulment%20April%202016%20ENG.pdf>. This Background Paper is based on data available up to April 15, 2016.

CONCLUSION

African States have long been key and innovating participants in the ICSID dispute resolution system. Drawing on their vast experience, African States can still further amplify certain aspects of their participation[135] as they continue to open new paths and create novel ways to contribute to and improve the system. Recent developments provide examples of the new facets of their participation and that of African investors. Among the trends that seem to be emerging are (i) the increasing number of investors from African States which have recourse to ICSID arbitration to invoke the substantive provisions put into place by their States of origin with the States that have received their investments; (ii) comprehensive transparency in investment arbitration proceedings, as evidenced in recent cases involving African States; and (iii) multilateral initiatives in the area of trade and investment at both regional and continental levels.[136]

The first trend is an ever-increasing recourse to ICSID arbitration. As noted above, a review of recent ICSID cases appears to suggest that intra-African investment arbitration, involving both States and investors from the continent, is developing.[137] While the share of intra-African cases still remains relatively low by comparison with the entire caseload involving African States,[138] factors such as the entry into force of a greater number of investment treaties,[139] recent regional and continental initiatives in the area of trade and investment,[140] and increased trade and exchanges between African States[141] suggest that this burgeoning trend could further materialize. It is also noteworthy that investors from the African continent recently relied upon an offer to arbitrate at ICSID provided in the Canada–Egypt BIT. This is the first arbitration on the basis of one of the BITs that Canada has concluded with emerging countries.[142] As pointed out by a commentator, one reason behind this

[135] See Section II.A.ii.

[136] Another trend—the growing interest in investment mediation—is briefly addressed above in n 79.

[137] See Section II.A.i.b; n 86; and cases such as *LTME Mauritius Limited and Madamobil Holdings Mauritius Limited v Republic of Madagascar*, ICSID Case No. ARB/17/28; *Oded Besserglik v Republic of Mozambique*, ICSID Case No ARB(AF)/14/2; *Sudapet Company Limited v Republic of South Sudan*, ICSID Case No ARB/12/26.

[138] On December 31, 2017, 22% of the ICSID Convention and AF cases involving an African State had been filed by an investor whose home State nationality was also that of an African State (see Section II.A.i.b). By way of comparison, by April 30, 2017, 78% of the ICSID Convention and AF cases involving an EU Member State had been instituted by an investor which also had the nationality of an EU Member State, ICSID EU Statistics (n 107) 11.

[139] See the issues raised in Section II.B.i.a; (n 111–115).

[140] See n 141 and 170.

[141] The AEO 2016 underlines that '[t]he resilience in Africa's growth is partly owed to domestic factors, including private consumption, public infrastructure development and private investment. In the medium term, continued improvement in the business environment and fast expanding regional markets may increasingly become new sources of growth for the continent. The rise of intra-regional trade, in particular, illustrates growing opportunities for African producers to diversify their trade' [AEO 2016 (May 23, 2016) 5]. <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/AEO_2016_Report_Full_English.pdf>). See also AEO 2016, 88: 'There are signs of change. The growth of pan-African banks in recent years has revolutionised Africa's financial sector. They now account for a large share of investment between African regions. The resilience of Africa's growth performance, supported by strong consumer demand, could also be a launchpad for intra-African investment in consumer-focused areas such as financial services and telecommunications. Current initiatives to rationalise and bring together Africa's regional communities could dismantle obstacles to bigger markets. The creation of the TFTA [Tripartite Free Trade Area], in particular, could boost intra-African trade and investment.' On the desired effects of the TFTA and the African Continental Free Trade Area (AfCFTA), see AEO 2017 (n 4) 91. On the potential effects of other mega-regional treaties on Africa such as the Trans-Pacific Partnership Agreement (TPP, now the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)) or the Regional Comprehensive Economic Agreement (RCEP), see AEO 2017 (n 4) 85.

[142] *Global Telecom Holding SAE v Canada*, ICSID Case No ARB/16/16. See Luke Eric Peterson, 'Canada hit by first legal blowback under its BITs with developing countries, as Egyptians telecoms giant launches arbitration' *IA Reporter*

development lies in the fact that investment flows now go both ways between high-income and emerging countries.[143] Observers will note that the pioneering dimension of cases involving African States in the early years of the ICSID system[144] is still present today in the initiatives of African investors who invoke investment protection instruments that have never been used before.[145]

The second trend that has emerged is characterized by the increasingly comprehensive transparency in arbitration proceedings, including those involving African States. ICSID had opened the path for further transparency with a number of innovations when its amended arbitration rules entered into force in 2006. These innovations included the possibility for a non-disputing party to file a written submission with the arbitral tribunal[146] and the prompt publication of excerpts of the tribunal's legal reasoning where the parties do not consent to publication of the award.[147] Both tools have already been used in cases involving African States.[148] Again, as noted above,[149] it is noteworthy that the first non-disputing party submissions that were made pursuant to ICSID Arbitration Rule 37(2) were filed in a case to which an African State was a party, *Biwater Gauff v Tanzania*, the very year that the amended Arbitration Rules entered into force. Similarly, a number of African States have recently adopted treaty provisions that are reminiscent of those of ICSID Arbitration Rule 37(2). Recent examples of such provisions are found in the Foreign Investment Promotion and

(June 7, 2016) <http://www.iareporter.com/articles/canada-hit-by-first-legal-blowback-under-its-bits-with-developing-countries-as-egyptians-telecoms-giant-launches-arbitration/>.

[143] ibid. The increase in investment flows between emerging countries, including in the context of large-scale investment projects such as the One Belt, One Road (OBOR) project or the Asia–Africa Growth Corridor (AAGC), could also give rise to new developments in this area. As pointed out in the AEO 2017, 'China and India, Africa's 8th and 9th largest trading partners in 2000, are the countries now in 1st and 2nd place' (AEO 2017 (n 4) 74). China has also become one of Africa's largest investors, alongside more traditional investors such as the USA, the UK or France (see Ernest & Young's (EY's) Attractiveness Program Africa, May 2017, Connectivity redefined <http://www.ey.com/Publication/vwLUAssets/ey-attractiveness-program-africa-2017-connectivity-redefined/$FILE/ey-attractiveness-program-africa-2017-connectivity-redefined.pdf>; WIR 2017 (n 3) p. 44, Figure A (showing the top 10 investor economies by FDI stock in Africa)). Taking into account the prospect of a possible rise in investment disputes between Chinese and African parties, Prof Won Kidane offers views on the role of ICSID as the forum for the resolution of these disputes. See Won Kidane, 'ICSID's Relevance for the Resolution of China-Africa Disputes' (January 2014) 11(1). Transnatl Disp Mgmt <https://www.transnational-dispute-management.com/article.asp?key=2042>.

[144] See Section I.B.

[145] According to Andrew Newcombe and Lluís Paradell, the first bilateral investment agreement which included an investor-State arbitration provision with the State's unconditional consent was the agreement between Chad and Italy of 1969. This BIT would have marked 'the true beginning of modern BIT practice.' (Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Wolters Kluwer Legal & Regulatory, 2009, 45).

[146] See ICSID Arbitration Rule 37(2).

[147] See ICSID Arbitration Rule 48(4).

[148] As regards ICSID Arbitration Rule 37(2) and non-disputing party submissions, see eg the following cases: *Biwater Gauff v Tanzania* (n 71); *Bernhard von Pezold and others v Republic of Zimbabwe*; ICSID Case No ARB/10/15; *Border Timbers Ltd, Border Timbers International (Private) Limited, and Hangani Development Co (Private) Limited v Republic of Zimbabwe*, ICSID Case No ARB/10/25. See also under the AF Rules: *Piero Foresti, Laura de Carli and others v Republic of South Africa*, ICSID Case No ARB(AF)/07/1. The full list of tribunal decisions on the participation of non-disputing parties in ICSID and AF arbitrations is available on the ICSID website: <https://icsid.worldbank.org/fr/Pages/Process/Decisions-on-Non-Disputing-Party-Participation.aspx>. As to ICSID Arbitration Rule 48(4), see eg the excerpts published on the ICSID website in the following cases involving African States: *Patrick Mitchell v Democratic Republic of Congo*, ICSID Case No ARB/99/7; *RSM v Central African Republic* (n 102); *M Meerapfel Söhne AG v Central African Republic*, ICSID Case No ARB/07/10; *H&H Enterprises Investments, Inc v Arab Republic of Egypt*, ICSID Case No ARB/09/15; *National Gas v Egypt* (n 57); and *Menzies v Niger* (n 57).

[149] See Section I.B.

Protection Agreements (FIPAs) that Canada signed with Benin, Burkina Faso, Cameroon, Côte d'Ivoire, Guinea, Mali, Nigeria, Senegal, and Tanzania in the period 2013–15.[150]

In addition, in keeping with ICSID's best practices and under the instructions of the tribunal, the parties to ICSID proceedings are invited to consent to the publication of the award and any order or decision issued in the proceeding.[151] In the event that no agreement is reached on publication at the first procedural meeting (the 'first session'),[152] parties will again be invited to consent to publication once the case has been concluded. ICSID has also fully renovated and expanded its website, which offers vast resources, including a database with arbitrators' CVs,[153] videos with

[150] See art 34 of the Agreement Between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments signed on January 9, 2013 and entered into force on May 12, 2014 (Canada–Benin FIPA) <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/benin/fipa-apie/index.aspx?lang=eng>; art 33 and annex IV of the Canada-Burkina Faso FIPA (n 79); art 31 of the Agreement Between Canada and the Republic of Cameroon for the Promotion and Protection of Investments, signed on March 3, 2014 and entered into force on December 16, 2016 (Canada-Cameroon FIPA) <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cameroon-cameroun/fipa-apie/index.aspx?lang=eng>; art 31 of the Agreement Between the Government of Canada and the Government of the Republic of Côte D'Ivoire for the Promotion and Protection of Investments signed on November 30, 2014 and entered into force on December 14, 2015 (Canada–Côte d'Ivoire FIPA) <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ivory_coast-cote_ivoire/fipa-apie/index.aspx?lang=eng>; art 32 of the Agreement for the Promotion and Reciprocal Protection of Investments between Canada and the Republic of Guinea, signed on May 27, 2015 and entered into force on March 27, 2017 (Canada-Guinea FIPA) <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/guinea-guinee/fipa-apie/index.aspx?lang=eng>; art 31 of the Agreement Between Canada and Mali for the Promotion and Protection of Investments signed on November 28, 2014 and entered into force on June 8, 2016 (Canada–Mali FIPA) <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/mali/fipa-apie/index.aspx?lang=eng>; art 32 of the Agreement Between Canada and the Federal Republic of Nigeria for the Promotion and Protection of Investments, signed on May 6, 2014 but not yet entered into force (Canada-Nigeria FIPA) <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nigeria/fipa-apie/index.
aspx?lang=eng>; art 32 of the Agreement Between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments, signed on November 27, 2014 and entered into force on August 5, 2016 (Canada-Senegal FIPA) <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/senegal/fipa-apie/index.
aspx?lang=eng>; art 31 of the Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments, signed on May 17, 2013 and entered into force on December 9, 2013 (Canada–Tanzania BIT) <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tanzania-tanzanie/fipa-apie/index.aspx?lang=eng>. See also the views expressed on those treaties in the following articles: R Willard and S Moreau, 'The Canadian Model BIT—A Step in the Right Direction for Canadian Investment in Africa?', Kluwer Arbitration Blog (July 18, 2015) <http://kluwerarbitrationblog.com/2015/07/18/the-canadian-model-bit-a-step-in-the-right-direction-for-canadian-investment-in-africa/>; JA Vanduzer, 'Canadian Investment Treaties with African Countries: What Do They Tell Us About Investment Treaty Making in Africa', (2017) 18(3) J World Trade Investment & Trade 556–84. Regional agreements such as the COMESA Agreement (n 79) or the SADC Model BIT (n 79) also include provisions on non-disputing party submissions. The COMESA Agreement was signed on May 23, 2007 and includes provisions on non-disputing party submissions in its art 28 (see <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3092>). It has not entered into force yet. The SADC Model BIT also includes provisions on *amicus curiae* submissions (see in particular art 29.15 and schedule 4 <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf>).

[151] ICSID's draft template for procedural order no. 1 usually offers two options, which are of course first reviewed (and amended as the case may be) by the tribunal and then discussed by the parties who may also propose changes thereto.

Option 1: The parties consent to ICSID publication of the award and any order or decision issued in the present proceeding.

Option 2: The ICSID Secretariat will publish the award and any order or decision in the present case where both parties consent to publication. Otherwise, ICSID will publish excerpts of the award pursuant to Arbitration Rule 48(4) and include bibliographic references to rulings made public by other sources on ICSID's website and in its publications.

See also on transparency and the ICSID Rules amendment process, Meg Kinnear's Brower lecture at the 2018 ASIL Annual Meeting (Meg Kinnear's Brower lecture), 30:30–31:55 <https://www.youtube.com/watch?v=xDUtMVejidI&feature=youtu.be&list=PLTPAfLBOjfQLSs3s8Nx5Jj94Guj3goxCs>.

[152] See ICSID Arbitration Rules 13 and 20.

[153] See <https://icsid.worldbank.org/en/Pages/arbitrators/CVSearch.aspx>.

interviews of arbitrators[154] and mediators,[155] consultation and background papers published by the Centre,[156] caseload statistics,[157] tables of decisions,[158] information, comments and suggestions on rule amendments,[159] and wider case search capabilities.[160] Like many other ICSID users, African parties have proved open and willing to utilize these innovate procedures and facilities.

This trend of promoting ever greater public access to documents from arbitration proceedings, is again reflected in various ways in investment treaties that African States recently signed. The aforementioned FIPAs that Benin, Burkina Faso, Cameroon, the Côte d'Ivoire, Guinea, Mali, Nigeria, Senegal, and Tanzania signed with Canada are notable examples,[161] as are the 2008 Rwanda-United States BIT,[162] the 2013 Japan-Mozambique BIT[163] or the 2016 Morocco-Nigeria BIT.[164]

This evolution towards more comprehensive transparency was further advanced with the recent adoption of the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration (Rules on Transparency). Here again countries from the African continent were at the forefront of this development. The Rules on Transparency came into effect on April 1, 2014, and provide for the publication of

[154] See eg Prof Böckstiegel on the preparation and conduct of hearings (<https://livestream.com/ICSID/events/7357520>), David Rivkin on efficiency in investor-State arbitration proceedings (<https://livestream.com/ICSID/events/6894037/videos/147040996>), and Catherine Amirfar on environmental obligations and investor-State arbitration (<https://livestream.com/ICSID/events/7292772>). Please note that featured videos may change over time.

[155] See <https://icsid.worldbank.org/en/Pages/process/adr-mechanisms--mediation.aspx>, including currently an interview of Anna Joubin-Bret on the existing framework and process considerations in investor-State mediation (<https://livestream.com/ICSID/events/8049375/videos/169963243>).

[156] See <https://icsid.worldbank.org/en/Pages/resources/Background-Papers.aspx>.

[157] See <https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx>.

[158] See <https://icsid.worldbank.org/en/Pages/resources/Tables-of-ICSID-Decisions.aspx>.

[159] See <https://icsid.worldbank.org/en/Pages/about/Amendment-of-ICSID-Rules-and-Regulations.aspx>; Meg Kinnear's Brower lecture (n 151).

[160] See <https://icsid.worldbank.org/en/Pages/cases/searchcases.aspx>.

[161] See art 33 of the Canada–Benin FIPA (n 150); art 32 of the Canada–Burkina Faso FIPA (n 79); art 30 of the Canada–Cameroon FIPA (n 150); art 30 of the Canada–Côte d'Ivoire FIPA (n 150); art 31 of the Canada–Guinea FIPA (n 150); art 30 of the Canada–Mali FIPA (n 150); art 31 of the Canada–Nigeria FIPA (n 150); art 31 of the Canada–Senegal FIPA (n 150) and art 30 of the Canada–Tanzania FIPA (n 150).

[162] See art 29 of the Treaty between the Government of the United States of America and the Government of the Republic of Rwanda concerning the Encouragement and Reciprocal Protection of Investments (US–Rwanda BIT), which was signed on February 19, 2008 and entered into force January 1, 2012 <https://www.state.gov/documents/organization/101735.pdf>. Art 28 contains brief provisions on *amicus* submissions: 'The tribunal shall have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party.' Arts 10.19 and 10.20 of the United States–Morocco Free Trade Agreement, which was signed on June 15, 2004 and entered into force on January 1, 2006, contain similar provisions <https://ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text>. The provisions of the aforementioned FIPAs and the US–Rwanda and US–Morocco treaties are reminiscent of the Canadian and US model BITs, respectively. On the negotiation of the US–Rwanda BIT, see eg the views of Wolfgang Alschner and Dmitriy Skougarevski, in 'Rule-Takers or Rule-Makers? A New Look at African Bilateral Investment Treaty Practice' (2016) 4 TDM 4 <https://www.transnational-dispute-management.com/article.asp?key=2357>.

[163] See art 17.12 of the Agreement between the Government of Japan and the Government of the Republic of Mozambique on the Reciprocal Liberalisation, Promotion and Protection of Investment (Japan–Mozambique BIT), which was signed on June 2, 2013 and entered into force on August 29, 2014 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3114>. A similar provision (art 15.13) is found in the Agreement between the Government of Japan and the Government of the Republic of Kenya on the Reciprocal Liberalisation, Promotion and Protection of Investment (Japan–Kenya BIT), which was signed on August 28, 2016 and entered into force on September 14, 2017 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/5374>. These provisions leave publication of the arbitration documents to the discretion of the State party to the dispute (see art 17.2 of the Japan–Mozambique BIT and art 15.2 of the Japan–Kenya BIT).

[164] See art 10.5 of the Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, which was signed on December 3, 2016 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/5409>. For a first review of the treaty's provisions, see eg Kendra (n 115); Tarcisio Gazzini, 'Nigeria and Morocco move towards a "New Generation" of Bilateral Investment Treaties' (May 8, 2017) <http://www.ejiltalk.org/nigeria-and-morocco-move-towards-a-new-generation-of-bilateral-investment-treaties/>. See also the provisions on public access to documents and hearings in art 28(5) and (6) of the COMESA Agreement and art 29.17 of the SADC Model BIT (n 150).

information on, and documents from, the arbitral proceedings, as well as non-disputing party submissions and open hearings (with certain exceptions to transparency).[165] They were applied for the first time in an ICSID arbitration in 2015 pursuant to the parties' agreement. Just as when the non-disputing party submissions were filed for the first time, the State party to this ICSID case was an African State. This highlights, yet again, the innovative spirit that has characterized the participation of African States in the ICSID dispute resolution system since its beginnings. It should also be added that the first State that signed and ratified the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration was also a State from the Africa region (Mauritius).[166] Now commonly referred to as the Mauritius Convention on Transparency, this instrument allows Parties to investment treaties concluded before April 1, 2014 to express their consent to apply the Rules on Transparency in arbitrations that would arise under these treaties.[167]

It is remarkable that these latest developments, which commentators analyze as no less than a 'paradigm shift',[168] found their first supporters among the founding States of the ICSID dispute resolution system.

The third trend is the manifestation of various recent multilateral initiatives in the area of trade and investment, some of which are projects of unprecedented magnitude.[169] Whether at the regional or continental level,[170] experts have underscored the work currently done by African States to achieve a new balance in

[165] See the UNCITRAL website <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html>. The 2013 UNCITRAL Arbitration Rules include the Rules on Transparency (see art 1(4) of the 2013 UNCITRAL Arbitration Rules). The Rules on Transparency in turn provide that they shall apply to proceedings under the UNCITRAL Arbitral Rules that are initiated pursuant to a treaty concluded on or after April 1, 2014 (unless the Parties to the treaty have agreed otherwise). A number of treaties concluded after April 1, 2014, including treaties to which African States are party, refer to the UNCITRAL Arbitration Rules (see list at <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Rules_status.html>). As indicated above in n 87, ICSID regularly administers cases under the UNCITRAL Arbitration Rules.

[166] Mauritius has been an ICSID Member State since 1969 <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>. A number of other ICSID Member States from the Africa region have signed, but not yet ratified, the Mauritius Convention on Transparency, including Benin, Cameroon, the Republic of Congo, Gabon, The Gambia, and Madagascar.

[167] The Mauritius Convention on Transparency was also ratified by Canada and Switzerland and entered into force on October 18, 2017. On the Rules on Transparency and the Mauritius Convention, see *inter alia* Esme Shirlow, 'Dawn of a new era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration' (2016) 31(3) ICSID Rev—FILJ 622–54; Dimitrij Euler and others (eds), *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (CUP 2015); Lise Johnson, 'The Mauritius Convention on Transparency: Comments on the Treaty and Its Role in Increasing Transparency of Investor-State Arbitration' CCSI Policy Paper, September 2014.

[168] Toby Landau and Romesh Weeramantry, 'A Case for Transparency in Investment Arbitration' in Kinnear and others (n 50) 643.

[169] The African Union states that the newly created African Continental Free Trade Area (AfCFTA) is designed to "bring together fifty-four African countries with a combined population of more than one billion people and a combined gross domestic product of more than US $3.4 trillion." (see the African Union's website: https://www.au.int/web/en/ti/cfta/about). Leaving aside the AfCFTA, the TFTA is currently Africa's largest free trade area and could boost intra-regional trade by USD 8.5 billion according to economists from UNECA (see United Nations Economic Commission for Africa, "Tripartite Agreement could boost intra-regional trade by one third", October 8, 2015, available at https://www.uneca.org/stories/tripartite-agreement-could-boost-intra-regional-trade-one-third; AEO 2017, p. 91). One should also mention large-scale projects such as the OBOR project and the AAGC, which are also designed to involve a number of African States (see n 143).

[170] Continent-wide projects include the Draft Pan-African Investment Code (PAIC), of which a draft of December 2016 is available at <https://au.int/en/documents/20161231/pan-african-investment-code-paic> and the Agreement establishing the African Continental Free Trade Area (CFTA), which has just been signed (see the African Union's website: https://au.int/CFTASummit2018). Also of significant magnitude is the TFTA, which the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA) and the Southern African Development Community (SADC) agreed to establish in June 2015 (see n 141 and 169). The author understands that at the time of writing the investment chapters of both the TFTA and the AfCFTA are yet to be negotiated. On the various regional initiatives and the harmonization issues they may give rise to, see Paéz (n 115) 393–403. On the PAIC, see Mbengue and Schacherer (n 115) 414–48.

investment treaties between the need to protect foreign investments and the host State's power to regulate, between the rights and obligations of investors and those of States.[171] This objective is both reminiscent of, and consistent with, one of the overarching principles the ICSID system, namely to 'maintain a careful balance between the interests of investors and those of host States.'[172] These recent trends, in particular the recent treaty initiatives, and the current rules amendment process at ICSID[173] offer opportunities to further explore and deepen the dialogue and exchanges between ICSID, its member States and its users on the full range of methods for the peaceful resolution of investment disputes. In light of the African States' first fifty years of participation in the ICSID system and their renewed involvement as both trend promoters and rule makers,[174] there is no doubt that these ambitious initiatives will greatly benefit from the experience and contributions of African States, as well as their proven ability to innovate.

[171] See Makane Moïse Mbengue, 'Special Issue: Africa and the Reform of the International Investment Regime—An Introduction' (2017) 18(3) J World Trade Investment & Trade 371–78 (Mbengue), esp. 371; Kendra (n 115). See also the AFSIL Principles on International Investment, n (95).
[172] Report of the Executive Directors (n 7) para 13. See also Section I.A.ii. and n 38.
[173] For a presentation of the amendment process, see n 157.
[174] Mbengue (n 171) 378.

Annex 1

List of ICSID Cases involving African State Parties (as of December 31, 2017)

	Case No.	Claimant(s)		Respondent
1	ARB/72/1	Holiday Inns S.A. and others	v.	Morocco
2	ARB/74/1	Adriano Gardella S.p.A.	v.	Côte d'Ivoire
3	ARB/76/1	Gabon	v.	Société Serete S.A.
4	ARB/77/1	AGIP S.p.A.	v.	People's Republic of the Congo
5	ARB/77/2	S.A.R.L. Benvenuti & Bonfant	v.	People's Republic of the Congo
6	ARB/78/1	Guadalupe Gas Products Corporation	v.	Nigeria
7	ARB/81/2	Klöckner Industrie-Anlagen GmbH and others	v.	United Republic of Cameroon and Société Camerounaise des Engrais
8	CONC/82/1	SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H.	v.	Democratic Republic of Madagascar
9	ARB/82/1	Société Ouest Africaine des Bétons Industriels	v.	Republic of Senegal
10	ARB/83/2	Liberian Eastern Timber Corporation	v.	Republic of Liberia
11	ARB/84/1	Atlantic Triton Company Limited	v.	People's Revolutionary Republic of Guinea
12	ARB/84/3	Southern Pacific Properties (Middle East) Limited	v.	Arab Republic of Egypt
13	ARB/84/4	Maritime International Nominees Establishment	v.	Republic of Guinea
14	ARB/86/1	Ghaith R. Pharaon	v.	Republic of Tunisia
15	ARB/87/1	Société d'Etudes de Travaux et de Gestion SETIMEG S.A.	v.	Republic of Gabon
16	ARB/89/1	Manufacturers Hanover Trust Company	v.	Arab Republic of Egypt and General Authority for Investment and Free Zones
17	ARB/92/1	Vacuum Salt Products Ltd.	v.	Republic of Ghana
18	ARB/93/1	American Manufacturing & Trading, Inc.	v.	Democratic Republic of the Congo
19	CONC/94/1	SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H.	v.	Madagascar
20	ARB/95/3	Antoine Goetz and others	v.	Republic of Burundi
21	ARB/97/1	Société d'Investigation de Recherche et d'Exploitation Minière	v.	Burkina Faso
22	ARB/97/2	Société Kufpec (Congo) Limited	v.	Republic of Congo

23	ARB/97/8	Compagnie Française pour le Développement des Fibres Textiles	v.	Côte d'Ivoire
24	ARB/98/3	International Trust Company of Liberia	v.	Republic of Liberia
25	ARB/98/4	Wena Hotels Limited	v.	Arab Republic of Egypt
26	ARB/98/7	Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L.	v.	Democratic Republic of the Congo
27	ARB/98/8	Tanzania Electric Supply Company Limited	v.	Independent Power Tanzania Limited
28	ARB/99/5	Alimenta S.A.	v.	Republic of The Gambia
29	ARB/99/6	Middle East Cement Shipping and Handling Co. S.A.	v.	Arab Republic of Egypt
30	ARB/99/7	Patrick Mitchell	v.	Democratic Republic of the Congo
31	ARB/00/4	Salini Construttori S.p.A. and Italstrade S.p.A.	v.	Kingdom of Morocco
32	ARB/00/6	Consortium R.F.C.C.	v.	Kingdom of Morocco
33	ARB/00/7	World Duty Free Company Limited	v.	Republic of Kenya
34	ARB/00/8	Ridgepointe Overseas Developments, Ltd.	v.	Democratic Republic of the Congo and Générale des Carrières et des Mines
35	ARB/01/2	Antoine Goetz & others	v.	Republic of Burundi
36	ARB/01/5	Société d'Exploitation des Mines d'Or de Sadiola S.A.	v.	Republic of Mali
37	ARB/02/4	Lafarge	v.	Republic of Cameroon
38	ARB/02/9	Champion Trading Company and Ameritrade International, Inc.	v.	Arab Republic of Egypt
39	ARB/02/14	CDC Group plc	v.	Republic of the Seychelles
40	ARB/02/15	Ahmonseto, Inc. and others	v.	Arab Republic of Egypt
41	ARB/03/8	Consortium Groupement L.E.S.I. - DIPENTA	v.	People's Democratic Republic of Algeria
42	ARB/03/11	Joy Mining Machinery Limited	v.	Arab Republic of Egypt
43	ARB/03/14	Miminco LLC and others	v.	Democratic Republic of the Congo
44	CONC/03/1	TG World Petroleum Limited	v.	Republic of Niger
45	ARB/04/5	Compagnie d'Exploitation du Chemin de Fer Transgabonais	v.	Gabonese Republic
46	ARB/04/11	Russell Resources International Limited and others	v.	Democratic Republic of the Congo
47	ARB/04/12	ABCI Investments Limited	v.	Republic of Tunisia
48	ARB/04/13	Jan de Nul N.V. and Dredging International N.V.	v.	Arab Republic of Egypt

49	ARB/05/3	LESI, S.p.A. and Astaldi, S.p.A.	v.	People's Democratic Republic of Algeria
50	ARB/05/6	Bernardus Henricus Funnekotter and others	v.	Republic of Zimbabwe
51	CONC/05/1	Togo Electricité	v.	Republic of Togo
52	ARB/05/15	Waguih Elie George Siag and Clorinda Vecci	v.	Arab Republic of Egypt
53	ARB/05/19	Helnan International Hotels A/S	v.	Arab Republic of Egypt
54	ARB/05/21	African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L.	v.	Democratic Republic of the Congo
55	ARB/05/22	Biwater Gauff (Tanzania) Limited	v.	United Republic of Tanzania
56	ARB/06/7	Togo Electricité and GDF-Suez Energie Services	v.	Republic of Togo
57	ARB/06/12	Scancem International ANS	v.	Republic of Congo
58	ARB(AF)/07/1	Piero Foresti, Laura de Carli and others	v.	Republic of South Africa
59	ARB/07/2	RSM Production Corporation	v.	Central African Republic
60	ARB/07/10	M. Meerapfel Söhne AG	v.	Central African Republic
61	ARB/07/18	Shell Nigeria Ultra Deep Limited	v.	Federal Republic of Nigeria
62	CONC/07/1	Shareholders of SESAM	v.	Central African Republic
63	ARB/07/24	Gustav FW Hamester GmbH & Co KG	v.	Republic of Ghana
64	ARB/08/17	Participaciones Inversiones Portuarias SARL	v.	Gabonese Republic
65	ARB/08/18	Malicorp Limited	v.	Arab Republic of Egypt
66	ARB/08/20	Millicom International Operations B.V. and Sentel GSM S.A.	v.	Republic of Senegal
67	ARB/09/14	Mærsk Olie, Algeriet A/S	v.	People's Democratic Republic of Algeria
68	ARB/09/15	H&H Enterprises Investments, Inc.	v.	Arab Republic of Egypt
69	ARB/09/19	Carnegie Minerals (Gambia) Limited	v.	Republic of The Gambia
70	ARB/10/4	Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud	v.	Democratic Republic of the Congo
71	ARB/10/10	Olyana Holdings LLC	v.	Republic of Rwanda
72	ARB/10/12	Standard Chartered Bank	v.	United Republic of Tanzania
73	ARB/10/15	Bernhard von Pezold and others	v.	Republic of Zimbabwe
74	ARB/10/20	Standard Chartered Bank (Hong Kong) Limited	v.	Tanzania Electric Supply Company Limited
75	ARB/10/21	International Quantum Resources Limited, Frontier SPRL and Compagnie Minière de Sakania SPRL	v.	Democratic Republic of the Congo

76	ARB/10/25	Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co. (Private) Limited	v.	Republic of Zimbabwe
77	ARB/11/6	Bawabet Al Kuwait Holding Company	v.	Arab Republic of Egypt
78	ARB/11/7	National Gas S.A.E.	v.	Arab Republic of Egypt
79	ARB/11/11	AHS Niger and Menzies Middle East and Africa S.A.	v.	Republic of Niger
80	ARB/11/14	Diamond Fields Liberia, Inc.	v.	Republic of Liberia
81	ARB/11/16	Hussain Sajwani, Damac Park Avenue for Real Estate Development S.A.E., and Damac Gamsha Bay for Development S.A.E.	v.	Arab Republic of Egypt
82	CONC/11/1	RSM Production Corporation	v.	Republic of Cameroon
83	ARB/11/29	Getma International and others	v.	Republic of Guinea
84	ARB/11/32	Indorama International Finance Limited	v.	Arab Republic of Egypt
85	ARB(AF)/12/2	Grupo Francisco Hernando Contreras	v.	Republic of Equatorial Guinea
86	ARB/12/8	Société Industrielle des Boissons de Guinée	v.	Republic of Guinea
87	CONC(AF)/12/1	Hess Equatorial Guinea, Inc. and Tullow Equatorial Guinea Limited	v.	Republic of Equatorial Guinea
88	ARB/12/11	Ampal-American Israel Corporation and others	v.	Arab Republic of Egypt
89	ARB/12/15	Veolia Propreté	v.	Arab Republic of Egypt
90	CONC(AF)/12/2	Republic of Equatorial Guinea	v.	CMS Energy Corporation and others
91	ARB/12/26	Sudapet Company Limited	v.	Republic of South Sudan
92	ARB/12/30	Lundin Tunisia B. V.	v.	Republic of Tunisia
93	ARB/12/32	Gelsenwasser AG	v.	People's Democratic Republic of Algeria
94	ARB/12/34	Tullow Uganda Operations PTY LTD	v.	Republic of Uganda
95	ARB/12/35	Orascom TMT Investments S.à r.l.	v.	People's Democratic Republic of Algeria
96	ARB/12/36	Société Civile Immobilière de Gaëta	v.	Republic of Guinea
97	ARB/13/3	Ossama Al Sharif	v.	Arab Republic of Egypt
98	ARB/13/4	Ossama Al Sharif	v.	Arab Republic of Egypt
99	ARB/13/5	Ossama Al Sharif	v.	Arab Republic of Egypt
100	ARB/13/7	Joseph Houben	v.	Republic of Burundi
101	ARB/13/14	RSM Production Company	v.	Republic of Cameroon
102	ARB/13/15	Lundin Tunisia B.V.	v.	Republic of Tunisia
103	ARB/13/16	Société des Mines de Loulo S.A.	v.	Republic of Mali

104	ARB/13/20	Interocean Oil Development Company and Interocean Oil Exploration Company	v.	Federal Republic of Nigeria
105	ARB/13/23	ASA International S.p.A.	v.	Arab Republic of Egypt
106	ARB/13/25	Tullow Uganda Operations Pty Ltd and Tullow Uganda Limited	v.	Republic of Uganda
107	ARB/13/29	Cementos La Union S.A. and Aridos Jativa S.L.U	v.	Arab Republic of Egypt
108	ARB/13/34	Courts (Indian Ocean) Limited and Courts Madagascar S.A.R.L.	v.	Republic of Madagascar
109	ARB/13/37	Utsch M.O.V.E.R.S. International GmbH, Erich Utsch Aktiengesellschaft, and Mr. Helmut Jungbluth	v.	Arab Republic of Egypt
110	ARB/14/2	Michael Dagher	v.	Republic of the Sudan
111	ARB/14/4	Unión Fenosa Gas, S.A.	v.	Arab Republic of Egypt
112	ARB/14/6	African Petroleum Gambia Limited (Block A1)	v.	Republic of The Gambia
113	ARB/14/7	African Petroleum Gambia Limited (Block A4)	v.	Republic of The Gambia
114	ARB(AF)/14/2	Oded Besserglik	v.	Republic of Mozambique
115	ARB/14/19	VICAT	v.	Republic of Senegal
116	ARB/14/22	BSG Resources Limited	v.	Republic of Guinea
117	ARB/14/23	Tamagot Bumi S.A. and Bumi Mauritania S.A.	v.	Islamic Republic of Mauritania
118	ARB/14/31	Tariq Bashir and SA Interpétrol Burundi	v.	Republic of Burundi
119	ARB/15/7	WalAm Energy Inc.	v.	Republic of Kenya
120	ARB/15/11	Total E&P Uganda BV	v.	Republic of Uganda
121	ARB/15/12	PT Ventures, SGPS, S.A.	v.	Republic of Cabo Verde
122	ARB/15/18	Capital Financial Holdings Luxembourg S.A.	v.	Republic of Cameroon
123	ARB/15/21	Menzies Middle East and Africa S.A. and Aviation Handling International Ltd.	v.	Republic of Senegal
124	ARB/15/29	Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited	v.	Republic of Kenya
125	ARB(AF)/15/1	Strabag SE	v.	Libya
126	ARB/15/41	Standard Chartered Bank (Limited) Hong Kong	v.	United Republic of Tanzania
127	ARB/15/46	BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL	v.	Republic of Guinea
128	ARB/15/47	ArcelorMittal S.A.	v.	Arab Republic of Egypt
129	ARB/16/1	Al Jazeera Media Network	v.	Arab Republic of Egypt
130	ARB/16/2	Champion Holding Company and others	v.	Arab Republic of Egypt

131	ARB/16/11	Société Resort Company Invest Abidjan, Stanislas Citerici and Gérard Bot Beograd	v.	Côte d'Ivoire
132	ARB/16/15	AngloGold Ashanti (Ghana) Limited	v.	Republic of Ghana
133 A	ARB/16/32	Thomas Gosling and others	v.	Republic of Mauritius
134	ARB/16/37	LP Egypt Holdings I, LLC, Fund III Egypt, LLC and OMLP Egypt Holdings I, LLC	v.	Arab Republic of Egypt
135 A	ARB/17/1	Ortiz Construcciones y Proyectos S.A.	v.	People's Democratic Republic of Algeria
136	ARB/17/18	(DS)2, S.A., Peter de Sutter and Kristof de Sutter	v.	Republic of Madagascar
137	ARB/17/23	CMC Muratori Cementisti CMC Di Ravenna SOC. Coop., CMC Muratori Cementisi CMC di Ravenna Soc. Coop. A.R.L. Maputo Branch, and CMC Africa Austral, LDA	v.	Republic of Mozambique
138	ARB/17/28	LTME Mauritius Limited and Madamobil Holdings Mauritius Limited	v.	Republic of Madagascar
139	ARB/17/31	Future Pipe International B.V.	v.	Arab Republic of Egypt
140	ARB/17/33	EcoDevelopment in Europe AB and others	v.	United Republic of Tanzania
141	ARB/17/38	African Petroleum Gambia Limited and APCL Gambia B.V. (Dispute under the Block A4 Licence)	v.	Republic of The Gambia
142	ARB/17/39	African Petroleum Gambia Limited and APCL Gambia B.V. (Dispute under the Block A1 Licence)	v.	Republic of The Gambia
143	ARB/17/40	APCL Gambia B.V.	v.	Republic of The Gambia
144	ARB/17/48	Wise Solutions CDI, SA	v.	Côte d'Ivoire