The Middle Eastern and African Arbitration Review 2021

Published by Global Arbitration Review in association with

ALC Advogados
Al Tamimi & Compan
Bryan Cave Leighton Paisner LLP
Clifford Chance
Coşar Avukatlık Bürosu
DLA Piper
FTI Consulting
HRA Advogados
Matouk Bassiouny & Hennawy
Morais Leitao
NERA Economic Consulting
Obeid Law Firm
Saudi Center for Commercial Arbitration (SCCA)
CRCIC
Udo Udoma & Belo-Osagie

www.globalarbitrationreview.com

gar

The Middle Eastern and African Arbitration Review 2021

A Global Arbitration Review Special Report

Reproduced with permission from Law Business Research Ltd
This article was first published in May 2021
For further information please contact Natalie.Clarke@lbresearch.com

© Law Business Research 2021

The Middle Eastern and African Arbitration Review 2021

Head of insight Mahnaz Arta
Account manager J'nea-Louise Wright

Production editor Katie Adams
Chief subeditor Jonathan Allen
Subeditor Simon Tyrie
Head of content production Simon Busby
Senior content coordinator Gracie Ford

Publisher David Samuels

Cover image credit ismagilov/iStock/Thinkstock

Subscription details
To subscribe please contact:
Global Arbitration Review
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL
United Kingdom
Tel: +44 20 3780 4134
Fax: +44 20 7229 6910
subscriptions@globalarbitrationreview.com

No photocopying. CLA and other agency licensing systems do not apply.
For an authorised copy, contact gemma.chalk@globalarbitrationreview.com.

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer–client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as at April 2021, be advised that this is a developing area.

ISBN: 978-1-83862-579-5

© 2021 Law Business Research Limited

Printed and distributed by Encompass Print Solutions
Tel: 0844 2480 112

© Law Business Research 2021

The Middle Eastern and African Arbitration Review 2021

A Global Arbitration Review Special Report

Published in association with:

ALC Advogados

Al Tamimi & Compan

Bryan Cave Leighton Paisner LLP

Clifford Chance

Coşar Avukatlık Bürosu

DLA Piper

FTI Consulting

HRA Advogados

Matouk Bassiouny & Hennawy

Morais Leitao

NERA Economic Consulting

Obeid Law Firm

Saudi Center for Commercial Arbitration (SCCA)

CRCIC

Udo Udoma & Belo-Osagie

© Law Business Research 2021

Preface vi

Overviews

Damages in the Middle East and Africa: Trends from Recent Cases and Some Challenges 1
Fabrizio Hernández, Timothy McKenna and Ralph Meghames
NERA Economic Consulting

Energy Arbitrations in the Middle East 9
Thomas R Snider, Khushboo Shahdadpuri and Aishwarya Suresh Nair
Al Tamimi & Company

Investment Arbitration in Africa 22
Théobald Naud, Ben Sanderson and Maxime Desplats
DLA Piper

Mining Arbitrations in Africa 33
Audley Sheppard QC, Amanda Murphy and Karolina Rozycka
Clifford Chance

Remote Hearings and the Use of Technology in Arbitration 42
Mohamed Hafez
CRCICA

The Covid-19 Factor: the Impact of Covid-19 on Damages Assessments 51
James Church-Morley and Ting Ting Liew
FTI Consulting

Country chapters

Angola 55
Filipe Vaz Pinto, Ricardo do Nascimento Ferreira and Frederico de Távora Pedro
Morais Leitão, Galvão Teles, Soares da Silva & Associados and ALC Advogados

Egypt 62
Amr Abbas and John Matouk
Matouk Bassiouny & Hennawy

Lebanon 77
Nayla Comair-Obeid
Obeid Law Firm

Mozambique.. 84
Filipe Vaz Pinto, Joana Galvão Teles and Paula Duarte Rocha
Morais Leitão, Galvão Teles, Soares da Silva & Associados and HRA Advogados

Nigeria.. 92
Uzoma Azikiwe and Festus Onyia
Udo Udoma & Belo-Osagie

Saudi Arabia.. 98
Hamed Hassan Merah and James MacPherson
Saudi Center for Commercial Arbitration (SCCA)

Turkey 109
Utku Coşar, İpek Sumbas Çorakçı and Hakan Yakışık
Coşar Avukatlık Bürosu

United Arab Emirates 117
Charles Lilley and Richard Dupay
Bryan Cave Leighton Paisner LLP

© Law Business Research 2021

Welcome to *The Middle Eastern and African Arbitration Review 2021*, one of *Global Arbitration Review*'s annual, yearbook-style reports.

Global Arbitration Review, for those not in the know, is the online home for international arbitration specialists everywhere. We tell them all they need to know about everything that matters.

Throughout the year, *GAR* delivers pitch-perfect daily news, surveys and features, organises the liveliest events (under our GAR Live and GAR Connect banners) and provides our readers with innovative tools and know-how products.

In addition, assisted by external contributors, we curate a series of regional reviews – online and in print – that go deeper into the regional picture than the exigencies of journalism allow. *The Middle Eastern and African Arbitration Review*, which you are reading, is part of that series. It recaps the recent past and provides insight on what these developments may mean, from the pen of pre-eminent practitioners who work regularly in the region.

All contributors are vetted for their standing before being invited to take part. Together they provide you the reader with an invaluable retrospective. Across 128 pages they capture and interpret the most substantial recent international arbitration developments, complete with footnotes and relevant statistics. Where there is less recent news, they provide a backgrounder – to get you up to speed, quickly, on the essentials of a particular seat.

This edition covers Angola, Egypt, Lebanon, Mozambique, Nigeria, Qatar, Saudi Arabia, Turkey and the UAE, and has overviews on energy arbitration, investment arbitration, mining arbitration, damages (from two perspectives) and virtual hearings.

Among the nuggets you will encounter as you read:

- a helpful chart setting out the largest awards affecting Africa and the Middle East, recently;
- the admonition to expect a wave of restructurings of energy projects locally, and even formal insolvency proceedings;
- a data-led breakdown of investor-state disputes in Africa starting from 2013;
- the revelation that a number of Africa-related mining disputes-opted to pause proceedings rather than attempt virtual hearings when the pandemic struck;
- a brisk summary of the extra considerations that covid-19 has introduced into damages calculation;
- an in-depth analysis of Angola's BITs and the modernisation of BITs in the region more generally; and
- a clear-eyed commentary on recent Nigerian court decisions, some of which are 'not entirely satisfactory'.

Plus, much much more.

We hope you enjoy the review. I would like to thank the many colleagues who helped us to put it together, and all the authors for their time. If you have any suggestions for future editions, or want to take part in this annual project, *GAR* would love to hear from you. Please write to insight@globalarbitrationreview.com.

David Samuels
Publisher
May 2021

© Law Business Research 2021

Investment Arbitration in Africa

Théobald Naud, Ben Sanderson and Maxime Desplats
DLA Piper

In summary

This article provides an overview of recent trends and developments in investment arbitration across Africa. It discusses the rise of investment disputes on the continent and the various initiatives to reform the ISDS system, notably efforts to increase the representation of arbitrators of African origin and to modernise investment instruments. The article considers the salient features of this new generation of investment instruments, which focus on sustainable economic development, as well as the multiplication of African dispute resolution forums. Finally, it concludes by reviewing the current status of the African Continental Free Trade Area Agreement, as well as a recent declaration by the African Union regarding ISDS in the wake of the covid-19 pandemic.

Discussion points

- General overview of recent investment case statistics
- The modernisation of investment instruments
- Developments regarding diversity initiatives involving Africa
- Updates regarding the African Continental Free Trade Area Agreement

Referenced in this article

- The African Continental Free Trade Area Agreement (AfCFTA)
- The Draft Pan-African Investment Code (PAIC)
- 2008 ECOWAS Supplementary Investment Act; 2018 ECOWAS Common Investment Code
- 2006 SADC Protocol on Finance and Investment
- 2017 Revised COMESA Investment Area Agreement
- 2016 Nigeria-Morocco BIT
- 2012 Mali Investment Code
- 2018 Ivory Coast Investment Code
- 2020 Benin Investment Code

Africa can rightly claim to be the birthplace of investment arbitration. In 1964, the World Bank convened the first of four regional conferences in Addis Ababa to discuss the creation of a new international institution: the International Centre for the Settlement of Investment Disputes (ICSID). As Aron Broches, then general counsel for the World Bank, main drafter of the ICSID Convention and founding secretary-general of ICSID, noted at the time:

> *[I]t was very fitting that the first of four regional meetings to be held by the Bank should take place in Africa. African countries had an urgent need to encourage the international flow of capital and skills and had shown a willingness to create an atmosphere conducive to financial and economic cooperation.*[1]

The system for resolving investment disputes has been in place for over 50 years. That system is not without its critics, and some of the most active voices arguing for change are African. In this article, we will look at some of the key recent trends in investment arbitration in Africa and initiatives to reform the system – from the negotiation of new investment treaties and codes, to the demand for more diverse tribunals through the greater representation of African arbitrators. We will also reflect briefly on how covid-19 might give rise to investment claims.

Recent trends in investment arbitration in Africa

General overview of recent case statistics

Investment disputes involving African states have steadily increased over the last two decades.[2] Despite the economic downturn caused by the covid-19 pandemic, the ICSID, the leading forum for settling investment disputes, registered 58 cases in 2020 – the most since its creation.[3] Of these cases, nine involve an African state: Algeria, Cameroon, Zambia, Benin, Tanzania, South Sudan, Nigeria and Egypt.[4] ICSID is on track, moreover, to surpass its 2020 caseload of African disputes in 2021. Indeed, just in the first quarter of 2021, investors have already initiated claims against three African states: Tanzania, Nigeria and Mauritania,[5] and several more have been intimated, with investors threatening the Republic of Congo with a US$27 billion claim over a revoked mining licence, as reported by *Global Arbitration Review*.[6]

The ICSID's case statistics show that, while those African states that have been sued the most continue to feature in its registry (eg, Egypt, the Democratic Republic of Congo (DRC) and Algeria),[7] there are also 'newcomers' to ICSID disputes, notably Benin and Zambia.[8] Similarly, while the construction, oil and gas, and mining sectors each account for a substantial portion of cases, there has been a rise in disputes in the telecommunications sector in Africa. Finally, ICSID's recent case data confirms an increased use by African states of amicable modes of dispute resolution.

Recent investment disputes involving African states

Over the last few years, African states have been involved in a growing number of investment disputes. Statistics show that 28 out of 54 African states have been sued by investors before international arbitral tribunals.[9] However, more than half of these investment disputes involve just four states: Egypt, Libya, Algeria and the DRC.[10] While statistics of investment disputes vary slightly, ICSID has recorded similar trends. In the last 10 years, ICSID statistics show a steady rise in disputes involving African states (see Chart 1 below), with certain states frequently appearing as respondents (ie, Egypt and Algeria):[11]

© Law Business Research 2021

2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
8 cases	12 cases	13 cases	8 cases	10 cases	6 cases	9 cases	12 cases	10 cases	9 cases
Cameroon (1)	Algeria (2)	Burundi (1)	Burundi (1)	Cabo Verde (1)	Egypt (3)	Egypt (1)	Algeria (2)	Cameroon (1)	Algeria (1)
Egypt (4)	Egypt (3)	Cameroon (1)	Egypt (1)	Cameroon (1)	Ghana (1)	Gambia (3)	Egypt (2)	DRC (1)	Benin (1)
Guinea (1)	E. Guinea. (3)	Egypt (6)	Gambia (1)	Egypt (1)	Ivory Coast (1)	Ivory Coast (1)	Gabon (2)	Egypt (2)	Cameroon (1)
Liberia (1)	Guinea (2)	Madagascar (1)	Guinea (1)	Guinea (1)	Mauritius (1)	Madagascar (2)	Gambia (1)	Morocco (2)	Egypt (1)
Niger (1)	S. Sudan (1)	Mali (1)	Mauritania (1)	Kenya (2)		Mozambique (1)	Morocco (2)	Rwanda (1)	Nigeria (1)
	Uganda (1)	Nigeria (1)	Mozambique (1)	Libya (1)		Tanzania (1)	Rwanda (1)	S. Leone (1)	S. Sudan (1)
		Tunisia (1)	Senegal (1)	Senegal (1)			Senegal (1)	Tanzania (2)	Tanzania (2)
		Uganda (1)	Sudan (1)	Tanzania (1)			Togo (1)		Zambia (1)
				Uganda (1)					

Though Egypt is the African state that has been sued the most before ICSID, it appears to be an outlier, as these claims were often filed in the aftermath of the crisis in the country following the Arab Spring. A spike in investment disputes is not uncommon following political or economic unrest. But what is more noticeable is the steady increase in investment disputes in African states with no ongoing exceptional crisis.

The rise of disputes in the telecommunications sector across Africa

African states have been subject to investment claims across a growing numbers of sectors, particularly the construction, manufacturing and mining sectors. A report by the Transnational Institute, an international research and advocacy institute, indicates that, as at January 2019, the number of investments claims per sector against African states was the following (see Chart 2 below):[12]

Sector	Number of claims
Construction	25
Manufacturing	16
Mining and quarrying	14
Transport	10
Information and communication	9
Agriculture, forestry and fishing	8
Real estate	6
Water supply-related activities, waste disposal, sewerage	6
Financial activities	5
Extraction of crude petroleum and natural gas	4

These trends are largely corroborated by ICSID's statistics, which show that the distribution of cases by economic sectors is that the oil, gas and mining, electric power and other energy, and construction sectors account for most of the disputes (24 per cent, 17 per cent, and 9 per cent respectively) (see Chart 3 below)):[13]

Sector	%
Oil, gas and mining	24%
Electric power and other energy	17%
Other industries	12%
Construction	9%
Transportation	8%
Finance	8%
Information and communication	7%
Water, sanitation and flood protection	4%
Agriculture, fishing and forestry	4%
Tourism	4%
Services and trade	3%

However, there is reason to suggest that this case distribution will evolve to include more telecoms-related disputes.

As it stands, these ICSID statistics indicate that disputes in the 'Information and communication' sector, which includes telecoms-related investment disputes, account for 7 per cent of disputes. However, the telecoms sector is one the fastest-growing sectors around the globe,[14] including across Africa, and is poised to become the source of an increasing number of disputes. Though the first telecoms-related investment dispute was only registered in 1994 at ICSID,[15] it is reported that there have been 70 telecoms-related disputes filed at ICSID and other institutions around the world since.[16] ICSID statistics alone indicate that it has registered 54 disputes in the 'Information and communication' sector, including seven involving an African state.[17] Importantly, these statistics indicate that nearly half of all cases in the 'Information and communication' sector were registered in the past five years.[18]

The potential for growth of telecoms-related investment disputes in Africa is to be followed closely. While telecoms-related cases involving African states are fewer than those in other sectors, the amounts in dispute can be exorbitant and reach into the billions of US dollars.[19] As access to internet and mobile telephones expand across Africa, states and investors should be mindful of their investment obligations in this sector.

Propensity of African states to resort to amicable modes of dispute resolution

Recent ICSID statistics confirm the propensity of African states to resort to amicable modes of dispute resolution, notably

© Law Business Research 2021

conciliation. Indeed, since 2018, ICSID has registered two conciliations involving African states: one in 2019, *La Camerounaise des Eaux (CDE) v Cameroon*, which is currently pending; and one in 2018, *Société d'Energie et d'Eau du Gabon v Gabon*. Of the 13 conciliation proceedings registered by ICSID in its history, 10 have involved an African state (see Chart 5 below)[20]:

Case No.	Claimants	Respondents	Status
CONC/20/1	Barrick (Niugini) Ltd	Papua New Guinea	Pending
CONC/19/1	La Camerounaise des Eaux (CDE)	Cameroon	Pending
CONC/18/1	Société d'Energie et d'Eau du Gabon	Gabon	Concluded
CONC/16/1	Xenofon Karagiannis	Albania	Pending
CONC(AF)/12/2	Equatorial Guinea	CMS Energy Corporation and others	Concluded
CONC(AF)/12/1	Hess Equatorial Guinea, Inc and Tullow Equatorial Guinea Ltd	Equatorial Guinea	Pending
CONC/11/1	RSM Production Corporation	Cameroon	Concluded
CONC/07/1	Shareholders of SESAM	Central African Republic	Concluded
CONC/05/1	Togo Electricité	Togo	Concluded
CONC/03/1	TG World Petroleum Limited	Niger	Concluded
CONC/94/1	SEDITEX Engineering Beratungsgesellschaft für dieTextilindustrie mbH	Madagascar	Concluded
CONC/83/1	Tesoro Petroleum Corporation	Trinidad and Tobago	Concluded
CONC/82/1	SEDITEX Engineering Beratungsgesellschaft für dieTextilindustrie mbH	Madagascar	Concluded

A factor that explains why states use amicable modes of dispute resolution is the fact that such mechanisms are frequently integrated into the dispute resolution clauses of their investment instruments.[21] More critically, as some scholars suggest, this propensity may be due to the fact that investment disputes involving African states often arise from contracts.[22] Indeed, to explain this propensity and African specificity, certain scholars contend that contractual provisions are more clear than provisions in investment treaties, and that this facilitate negotiations and therefore dispute settlement.[23] In sub-Saharan francophone Africa, the region that accounts for most ICSID conciliations, over 50 per cent of disputes are contract-based.[24] As at 2019, contract-based disputes account for around 40 per cent of all investment disputes in Africa; whereas, for the rest of the world, they only constitute around 17 per cent of investment disputes.[25]

In 2018, ICSID began working on a new set of mediation rules to complement its conciliation and arbitration rules and the United Nations adopted the 'Convention on International Settlement Agreements Resulting from Mediation'.[26] In keeping with this trend, the largely francophone sub-Saharan African states of the OHADA space adopted a Uniform Act on Mediation (UAM) in 2018, which will provide a more structured format for mediations.[27] Indeed, the UAM is part of a larger trend in Africa to diversify the mechanisms for settling investment disputes.

An evolving investment law landscape

The investment landscape in Africa is rapidly evolving. Scholars have characterised this evolution as the 'Africanisation' of investment law.[28] Africanisation conceives African states increasingly as 'investment rule makers', rather than 'rule takers'.[29] Its aim is to situate the resolution of investment disputes on African grounds, both in terms of substantive and procedural rules, but also in terms of where these disputes physically take place, and who the arbitrators are.

This evolution is punctuated by the diversification and Africanisation of investment instruments on the continent. A feature accompanying this evolving trend, moreover, has been the multiplication of dispute resolution forums on the continent to administer or settle investment disputes. Similarly, this trend is characterised by a distinct shift towards more balanced investments instruments.

The diversification and 'Africanisation' of investment instruments

Consistent with trends observed around the world, over the past few years, African states have signed and ratified considerably fewer investment instruments that include investor-state dispute settlement (ISDS) mechanisms: African states only signed one BIT in 2020, five in 2019 (see Chart 6 below), and a trade agreement, the China-Mauritius Free Trade Agreement, which contains ISDS provisions.[30] Not to be overlooked, since deciding to leave the European Union, the United Kingdom has been quite active in signing trade agreements, styled as 'economic partnership agreements' or 'partnership, trade and cooperation agreements', with African states.[31] However, none of these agreements include ISDS.

The appetite of African states for signing and ratifying investment instrument that include ISDS has waned in recent years. But based on the treaties they have signed, African states have clearly diversified their treaty partners. As the table below indicates, African states have increasingly signed more 'South-South' BITs and intra-African BITs since 2015 (see Chart 6 below).

© Law Business Research 2021

2015	2016	2017	2018	2019	2020
Angola-Mozambique BIT	Ivory Coast-Mauritius BIT	Angola-UAE BIT	Congo-Morocco BIT	Burkina Faso-Turkey BIT	Morocco-Japan BIT
Angola-Brazil BIT	Ivory Coast-Turkey BIT	Burundi-Turkey BIT	Ethiopia-Brazil BIT	Burkina Faso-Canada BIT	Ivory Coast-Japan BIT
Comoros-UAE BIT	Equatorial Guinea-UAE BIT	Burundi-UAE BIT	Kenya-Singapore BIT	Cabo Verde-Hungary BIT	
Guinea-Canada BIT	Ethiopia-UAE BIT	Cabo Verde-Mauritius BIT	Mali-UAE BIT	Gambia-UAE BIT	
Guinea Bissau-Morocco BIT	Ethiopia-Morocco BIT	Chad-Turkey BIT	Mali-Turkey BIT	Morocco-Brazil BIT	
Malawi-Brazil BIT	Gambia-Mauritius BIT	Ethiopia-Qatar BIT	Mauritania-Turkey BIT		
Mauritania-UAE BIT	Ghana-Turkey BIT	Morocco-Zambia BIT	Rwanda Singapore BIT		
Mauritius-UAE BIT	Kenya-Japan BIT	Morocco-South Sudan BIT	Rwanda-Qatar BIT		
Mauritius-Zambia BIT	Mauritius-Sao Tome-et-Principe BIT	Mozambique-Turkey BIT	Zambia-Turkey BIT		
Mozambique-Brazil BIT	Morocco-Nigeria BIT	Rwanda-UAE BIT	Zimbabwe-UAE BIT		
Senegal-UAE BIT	Morocco-Rwanda BIT	Sudan-Belarus BIT			
	Morocco-Russia BIT	Tunisia-Turkey BIT			
	Mozambique-Singapore BIT	Uganda-UAE BIT			
	Nigeria-Singapore BIT				
	Nigeria-UAE BIT				
	Rwanda-Turkey BIT				
	Somalia-Turkey BIT				

The diversification and Africanisation of investment instruments have also been coupled with an evolution in the design of African investment treaties, from bilateral to multilateral. Multilateral investment treaties (MITs) are not a new feature in Africa. Indeed, many African states have long been parties to MITs such as the 1980 Arab Investment Agreement or 1981 Investment Charter of the Organisation of the Islamic Conference – to name a few.[32] What marks a departure, however, is that the new generation of MITs are adopted by regional economic communities (RECs) modelled after the then European Economic Community, as part of a continent-wide step towards greater economic integration.

Indeed, in October 2017, the African Union Commission adopted the first harmonised Draft Pan-African Code on Investment (PAIC). Although the PAIC is not binding, it provides clear insights into the pan-African approach to international investment protection. The PAIC is to serve as a model for the investment chapter of the African Continental Free Trade Agreement (AfCFTA), which entered into force on 30 May 2019. The PAIC has been drafted from the perspective of developing countries with a view to promoting sustainable development and 'presents the African consensus on the shaping of international investment law'.[33] This consensus presently includes ISDS, as the PAIC states that 'Member States may, in line with their domestic policies, agree to use' ISDS mechanisms.[34]

Consistent with the PAIC, African RECs across the continent have adopted legal frameworks to encourage the development of intra-African investments. Indeed, as the building blocks of economic integration, African RECs have adopted several MITs. In 2008, the Economic Community of West African States (the ECOWAS) enacted the Supplementary Act adopting Community Rules on Investment and the Modalities for their Implementation (ECOWAS SIA) and, in 2018, it adopted an investment code that has not entered into force: the ECOWAS Common Investment Code (ECOWIC).

Likewise, in 2016, the Southern African Development Community (SADC) amended its 2006 annex relating to the Cooperation on Investment of the Protocol on Finance and Investment (the SADC Investment Protocol). Similarly, in 2017, the Common Market for Eastern and Southern Africa (COMESA) revised its 2007 Common Investment Area Agreement. While the COMESA investment agreements are not in force, the MITs adopted by these African RECs confirm the Africanisation of investment law.

The multiplication of African dispute resolution forums

One of the more noteworthy developments with the Africanisation of investment law is the multiplication of African forums to settle investment disputes. The prospect of having investment disputes resolved by local African judicial jurisdictions has been an alternative seldom pursued by investors, if ever. Recently, however, African investment and investment-related instruments increasingly provide for the possibility of investment disputes involving African states to be administered by African dispute resolution centres, and based on instruments and even settled by African judicial institutions.

In this regard, the 2016 PAIC is very much part of this trend. As the purported consensus standard for the regulation of investments throughout the continent,[35] the PAIC provides that:

> *Where recourse is made to arbitration . . . the arbitration may be conducted at any established African public or African private alternative dispute resolution center.*[36]

Indeed, all the new generation of regional investment instruments make reference to African dispute resolution forums. For instance, the 2006 SADC Investment Protocol provides that disputing parties may refer their dispute to the SADC Tribunal,[37] although the SADC Tribunal has since been suspended.[38] Likewise, the 2017 Revised COMESA Investment Area Agreement provides that parties may submit their dispute to the COMESA Court of Justice or an 'African international arbitration institution'.[39]

© Law Business Research 2021

The 2018 ECOWIC, in the same vein, provides that '[w]here recourse is made to arbitration, the arbitration may be conducted at any established public or private alternative dispute resolution centres or the arbitration division of the ECOWAS Court of Justice'.[40] While the PAIC, the 2018 ECOWIC and the 2017 Revised COMESA Investment Area Agreement may presage the future of investor-state dispute resolution on the continent, these instruments have not yet entered into force.

This particular trend appears to be in force in western Africa, however. In fact, the 2008 ECOWAS SIA provides that any dispute between an ECOWAS member state and an investor that is not amicably settled 'may be submitted to arbitration as follows: (a) a national court; (b) any national machinery for the settlement of investment disputes; (c) the relevant national court of the Member States'.[41]

The inclusion of African dispute resolution forums is a trend that has been introduced either as an added option to be considered alongside ICSID or, more exceptionally, to the exclusion of ICSID altogether.

For instance, besides allowing disputing parties the possibility of submitting their dispute to ICSID, four BITS involving OHADA states provide for arbitration under the auspices of the Court of Common Justice and Arbitration (CCJA) in their dispute resolution clauses: the 2001 Burkina Faso-Benin BIT; the 2003 Burkina Faso-Guinea BIT; the 2003 Equatorial-Guinea-Spain BIT; and the 2007 Senegal-France BIT.[42] This is consistent with the 2017 revision to the Uniform Act on Arbitration (UAA) and the CCJA Arbitration Rules, which both confirm that an arbitration under these rules may be based on 'an instrument regarding an investment, in particular an investment code or a bilateral or multilateral investment treaty'.[43]

The trend of including African forums alongside ICSID is also reflected in African investment codes. For instance, the 2020 Benin Investment Code provides that parties may submit their dispute inter alia to Benin's Center for Arbitration, Mediation, and Conciliation (CAMeC) or the procedures provided in the UAA, but also ICSID.[44] Likewise, the 2012 Mali Investment Code provides that disputing parties may submit their dispute inter alia to the local competent court, ICSID arbitration, or the procedural rules available under the UAA.[45]

Elsewhere in western Africa, the promotion of African dispute resolution has been to the exclusion of ICSID arbitration. Rather than phasing out their BITs as South Africa had begun doing,[46] when revising its investment policy at the national level, Ivory Coast opted for a more 'nationalist approach'.[47] Indeed, the 2018 Investment Code, amending the 2012 Investment Code, notably removes Ivory Coast's offer to arbitrate pursuant to the ICSID Convention.[48] Instead, the amended code provides a more narrow set of dispute resolution alternatives, which suggest that parties may choose the competent Ivorian domestic jurisdiction or an arbitration procedure administered by the Court of Arbitration of Ivory Coast, which has no public track record in administering investment disputes. [49]

Towards more balanced investment instruments

There is an evident shift towards more balanced investment instruments across Africa. Investments instruments on the continent increasingly contain sustainable development considerations in their preamble and, more concretely, in their substantive provisions. The new generation of investment instruments increasingly affirm African states' right to regulate for the public interest. This quest towards more balanced instruments is also evidenced by the emergence of investors' obligations.

Unlike older investment treaties, which emphasised investment protection and 'merely' economic development, the new generation of BITs and MITs put an accent on host-states' right to regulate and on 'sustainable' economic development, which embraces goals beyond economic growth and integrates a social and environmental dimension with the notion of development.

While African states seek to have more balanced investment instruments, few of them have decided to phase out the 'unbalanced' BITs they have previously ratified. This creates a peculiar situation for both African states and investors seeking to have a better assessment of their rights and obligations. Nevertheless, the trajectory or trend of investment law on the continent is one of doing away with unbalanced BITs.

Indeed, the new generation of African BITs and MITs all include provisions to encourage sustainable development and a more balanced distribution of rights and obligations between states and investors. For instance, as is the case with all the new generation of BITs and MITs, the PAIC's preamble recognises the state's right 'to regulate all the aspects relating to investments within their territories with a view to meeting national policy objectives and to promoting sustainable development objectives'.

These sustainable development considerations are also incorporated in more substantive investment provisions. The 2016 Nigeria-Morocco BIT, for instance, defines an investment in terms of sustainable development. It defines an investment as:

> *an enterprise within the territory of one State established, acquired, expanded or operated, in good faith, by an investor of the other State in accordance with law of the Party in whose territory the investment is made taken together with the assets of the enterprise which contribute to the sustainable development of that Party.*[50]

Furthermore, the new generation of investments instruments affirm the right to regulate either expressly or implicitly, by narrowing the scope of the standards of protections available to investors. For instance, article 14 of the SADC Investment Protocol expressly affirms the right to regulate. It states that:

> *Nothing in this Annex shall be construed as preventing a State Party from exercising its right to regulate in the public interest and to adopt, maintain or enforce any measure that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns.*

Consistent with this trend, the new generation of investment instruments narrow the scope of the traditionally expansive standard of protections in BITs. For instance, the PAIC includes provisions entitled as 'exceptions' to the most-favoured nation treatment standard (MFNT) and national treatment standard (NT). The PAIC's MFNT is a near identical copy of the PAIC's NT standard and states that:

> *Any regulatory measure taken by a Member State that is designed and applied to protect or enhance legitimate public welfare objectives, such as national interests, public health, safety and the environment, does not constitute a breach of the National Treatment principle.*[51]

Lastly, the new generation of investment instruments increasingly require investors to comply with corporate social responsibility obligations and to conduct social and environmental impact assessments. To be sure, the incorporation of investor's treaty obligation

© Law Business Research 2021

is not strictly speaking new. Indeed, the 1980 Arab Investment Agreement imposed obligations on foreign investors. [52]

What was once an isolated or exceptional case appears to be a growing trend in the new generation of instruments. Several of the more recently ratified Canadian BITs on the continent, for instance, provide that the contracting states should encourage investors to incorporate recognised standards of corporate social responsibilities in their policies.[53] The ECOWAS SIA is more emphatic. Indeed, its Chapter III, entitled 'Obligations and Duties of Investors and Investments' requires investors to comply with several obligations, which include upholding human rights, refraining from corruption, complying with the host state's laws, and conducting a social and environmental impact assessment.[54] As the next section makes clear, the emergence of investor's obligations in Africa is a trend with significant implications.

Caveat investors? The emergence of investors' obligations

A number of critics of the ISDS system point to what they see as an imbalance between states and investors with, traditionally, bilateral investment treaties granting investors a swathe of rights but without subjecting those investors to any concomitant obligations to the state. As highlighted above, new investment treaties seek to strike a better balance in this regard. Recently, tribunals have shown a willingness to take a close look at the conduct of investors. Tribunals are paying keen attention to the need for investors to comply with domestic laws designed to protect the environment.

In October 2018, the tribunal in *Cortec Mining et al v Kenya* found that the investors did not have a protected investment under the UK–Kenya BIT as they had failed to comply with Kenyan law in obtaining a mining licence.[55] The tribunal – in line with an earlier decision of the Kenyan Court of Appeal – found that the investors had failed to comply with provisions of Kenyan law requiring an environmental impact licence to be issued before the valid grant of any mining licence. Of crucial importance in this case is the fact that the BIT in question did not include express wording that is found in a number of treaties requiring that investments be made 'in accordance with [host state] law'.

Unanimously, the tribunal held that a requirement to comply with host state law could be implied into the interpretation of both the BIT and the ICSID Convention. Following this decision, any attempt by an investor to argue that it is not required to comply with local law seems to be fraught with difficulty. An annulment application brought by the investor was unsuccessful.

In light of the greater emphasis being placed on the obligations of investors, it is likely that in the near future we will see claims brought by states against investors. The drafting of recent BITs opens the door to such claims as well as counterclaims by the host state. Of course, older BITs offer little room for states to sue the investor and, to date, the limited examples of states taking a proactive approach have arisen under investment agreements. For example, in 2019, a Rwandan state-owned company initiated a contractual ICSID arbitration against a local subsidiary of the US energy company ContourGlobal (*Energy Utility Corporation Limited v KivuWatt Limited*, ICSID Case No. ARB/19/3). However, the ICSID case was discontinued before the tribunal was constituted, with the state entity later initiating an UNCITRAL proceeding against KivuWatt instead.

Arbitrator appointments in African ISDS cases – statistics

In recent years, a growing number of arbitration practitioners have voiced concerns over the lack of diversity within arbitral panels beyond gender inequalities, in particular an imbalance in representation from the African continent on arbitral panels. As noted by Dr Onyema, 'between 1998 and 2007, a total of 472 parties from Sub-Saharan Africa arbitrated their disputes before the International Chamber of Commerce (ICC). But over the same period, only 64 arbitrators from the same region were appointed by the ICC'.[56] Although these figures mainly deal with commercial arbitration, investment arbitration is not immune to this problem either. According to ICSID statistics, as at December 2018, ICSID cases involving sub-Saharan African states accounted for 15 per cent of all ICSID cases whereas, over the same period, sub-Saharan African arbitrators, conciliators and ad hoc committee members appointed in ICSID cases accounted for only 2 per cent of total appointments.[57]

The former president of the International Court of Justice, Judge Abdulqawi Yusuf, considers that the lack of geographical diversity affects the system's legitimacy.[58] There have been a number of recent initiatives, however, to bring about change. In September 2019, Dr Onyema, Stuart Dutson and Kamal Shah co-authored 'An African Promise', which 'establishes concrete and actionable steps that the international arbitration community can and must take towards [improving the profile and representation of African arbitrators; and appointing Africans as arbitrators especially in arbitrations connected with Africa]'.[59] Notably, the African Promise calls on the arbitral community to: consider African candidates when appointing arbitrators; collect statistics in relation to appointment of African arbitrators and make them publicly available; and encourage Africans to pursue arbitrator appointments.[60] Eighteen months later, 330 persons have signed the African Promise.

Recent statistics show that a significant change is yet to come, at least in relation to investment arbitration. Of the 58 new cases registered by ICSID in 2020, nine were against African states (ie, 15.5 per cent of the total new cases). At the same time, African arbitrators represented only 4 per cent of the total number of appointments (only eight African arbitrators out of the 181 arbitrators, conciliators and ad hoc committee members appointed in 2020 on cases registered under the ICSID Convention and the Additional Facility Rules).[61]

Although they are not directly related to appointments of African arbitrators in the field of investment arbitration, other very recent initiatives may also have a positive impact on the issue of under-representation of African arbitrators. In this regard, the recent compilation of a list of arbitrators of African descent with ties to the United States[62] should increase the visibility of some of those African arbitration practitioners.[63] In the same spirit, the International Council for Commercial Arbitration (ICCA) issued a 'Diversity and Inclusion Policy' and 'Diversity and Inclusion Implementation Plan' in May 2020.[64] The ICCA notably aims to ensure that publications and panelists at ICCA conferences come from diverse backgrounds, increase accountability by publishing its data regarding diversity, and develop an inclusion fund to support participation and travel in its activities.[65] The launch earlier this year of the group, Racial Equality for Arbitration Lawyers, whose goal is notably to 'focus on racial equality and representation of other unrepresented groups in international arbitration at an international level more generally',[66] is likewise a positive development.[67]

One can hope that all these initiatives will combine to foster the appointment of African arbitrators in investment arbitrations. The very recent appointments of Gérard Niyungeko of Burundi, Sanji Mmasenono Monageng and Edward William Fashole Luke of Botswana in ICSID cases *WalAm Energy LLC v Republic of*

© Law Business Research 2021

Kenya (ICSID Case No. ARB/15/7), *Nachingwea UK Limited (UK), Ntaka Nickel Holdings Limited (UK) and Nachingwea Nickel Limited (Tanzania) v United Republic of Tanzania* (ICSID Case No. ARB/20/38) and *Winshear Gold Corp v United Republic of Tanzania* (ICSID Case No. ARB/20/25) respectively may be a harbinger of a real shift to come. [68]

Legal updates

AfCFTA

In 2012, African states set out with the ambition to establish an unprecedented 'Continental Free Trade Area'.[69] Negotiations were launched under the aegis of the African Union with the primary objective of 'boosting intra-Africa trade'.[70] The agreement would give rise to the creation of an impressive single market for goods and services of 1.2 billion people with a combined gross domestic product of more than US$2.2 trillion.[71]

On 30 May 2019, the AfCFTA became a reality.[72] To date, it has been signed by 54 states (the Member States)[73] and ratified by 36, including Nigeria, Egypt and South Africa, the three largest economies of the continent.[74]

Under the AfCFTA, the Member States will work to progressively eliminate tariffs and non-tariff barriers to both 'trade and investment'.[75] The Member States also have the ambition to create a continent-wide customs union providing for the free movement of capital and persons.[76]

The AfCFTA's implementation is comprised of two phases.

Phase I, which pertains to the liberalisation of trade in goods and services, is almost completed, with Member States successfully negotiating a wide range of annexes and protocols. Although Schedules of tariff concessions and Rules of Origin have not all been finalised,[77] preferential trading across the territories of the AfCFTA Member States, which was initially slated for 1 July 2020, officially started on 1 January 2021 nonetheless. [78]

Natural persons and corporate entities have no right of recourse under the AfCFTA. Similarly to what the World Trade Organization has instituted, the protocols only provide for a state-to-state dispute resolution mechanism. In other words, traders and investors seeking to establish the liability of a Member State under the AfCFTA may only do so by seeking diplomatic protection.[79]

For these reasons, intra-African investors are now casting their eyes on the Phase II negotiations, which include the negotiation of a protocol on investment.

However, negotiations are behind schedule, especially in light of the covid-19 pandemic. Investors eagerly await, therefore, to discover the contents of the protocol on investment, both in terms of the substantive protections it will offer and the rights of recourse that will be made available to them.

Covid-19 and moratoriums on claims

The pandemic has caused significant headaches to states around the world, and undoubtably has put some strain on precarious economies and health systems in Africa. The World Health Organization reports that there have been nearly 3 million confirmed cases of covid-19 in Africa,[80] with likely many cases going unreported. In response to the pandemic, at the 14th meeting of the African Union Ministers of Trade on 24 November 2020, the ministers adopted a 'Declaration on the Risk of Investor–State Dispute Settlement with respect to COVID-19 related measures'.[81]

The Declaration consists of a preamble and six recommendations set out below:

i) Invite Member States to explore all available options under international law to mitigate against the risk of COVID-19 Pandemic related ISDS claims, considering the interaction between pandemics and international investment law.

ii) Commit to work towards the adoption of a set of guidelines for African governments to minimize the challenges of ISDS and to address and reform existing investment treaties.

iii) Request Member States to consider renegotiating their investment treaties by integrating provisions better suited to exceptional situations in accordance with new trends at the regional and international levels.

iv) Invite Member States to explore all possibilities for mitigating the risks of ISDS, including a mutual temporary suspension of ISDS provisions in investment treaties in relation to COVID-19 Pandemic government measures.

v) Call upon African Union to consider incorporating relevant issues raised in this declaration within the Investment Protocol to the AfCFTA and other relevant negotiations.

vi) Requests the African Union Commission to provide support to Member States in the on-going negotiations within different organisations that are working towards the development of legal instruments to address the risks of ISDS for COVID-19 Pandemic related measures and other global health threats in accordance with international law.[82]

Moreover while there have been calls for a moratorium on ISDS claims during the pandemic,[83] it appears that African states have not issued any such moratoriums.

Conclusion

Africa has quietly, but very effectively, been one of the most innovative forums for investment arbitration over the years. The most recent developments in treaty drafting contribute to a coming of age of Africa in the field of investment protection.

African states have responded to the criticism that bilateral investment treaties are weighted too heavily in favour of investors by ensuring that new treaties impose obligations on investors, in particular with regard to the protection of environmental and corporate social responsibility obligations. Other significant developments include express provisions on a state's right to regulate and a desire that disputes involving African states should be heard on African soil.

The Africanisation of investment arbitration should be applauded and encouraged to continue, while attention will also turn to observing how the new treaties, the new laws and the new practitioners all join together as elements that contribute to creating a safe economic environment for foreign investment in Africa. The next decade will be one of action, where states will bear the responsibility of properly implementing the new mechanisms they have created. More changes are no doubt on the horizon.

Notes

1 History of the ICSID Convention, vol. II-1, available at https://icsid.worldbank.org/en/Documents/resources/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-1.pdf, pp 239–240.

2 ICSID, The ICSID Caseload – Statistics Special Focus – Africa (May 2017), Annex 2, available at: https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/Special%20Issues/ICSID%20Web%20Stats%20Africa%20%28English%29%20June%202017.pdf (providing an overview of the ICSID caseload involving African State as of 31 May 2017).

3 ICSID, The ICSID Caseload – Statistics, Issue 2021-1, p. 7, available at: https://icsid.worldbank.org/sites/default/files/publications/The%20

© Law Business Research 2021

ICSID%20Caseload%20Statistics%20%282021-1%20Edition%29%20ENG.pdf.

4 The nine cases are: (1) *United Agencies Limited SA v People's Democratic Republic of Algeria*, ICSID Case No. ARB/20/1; (2) *Hope Services LLC v Republic of Cameroon*, ICSID Case No. ARB/20/2; (3) *Kansanshi Mining Plc v Republic of Zambia*, ICSID Case No. ARB/20/17; (4) *Teyliom International and others v Republic of Benin*, ICSID Case No. ARB/20/24; (5) *Winshear Gold Corp v United Republic of Tanzania*, ICSID Case No. ARB/20/25; (6) *Nachingwea UK Limited (UK), Ntaka Nickel Holdings Limited (UK) and Nachingwea Nickel Limited (Tanzania) v United Republic of Tanzania*, ICSID Case No. ARB/20/38; (7) *Qatar National Bank (QPSC) v Republic of South Sudan and Bank of South Sudan*, ICSID Case No. ARB/20/40; (8) *Eni International BV, Eni Oil Holdings BV and Nigerian Agip Exploration Limited v Federal Republic of Nigeria*, ICSID Case No. ARB/20/41; and (9) *Gesenu SpA v Arab Republic of Egypt*, ICSID Case No. ARB/20/45.

5 The three cases are : (1) *Mauritanian Copper Mines SA v Islamic Republic of Mauritania*, ICSID Case No. ARB/21/9; (2) *Shell Petroleum NV and The Shell Petroleum Development Company of Nigeria Ltd v Federal Republic of Nigeria*, ICSID Case No. ARB/21/7; and (3) *Montero Mining and Exploration Ltd v United Republic of Tanzania*, ICSID Case No. ARB/21/6.

6 Alison Ross, 'Congo threatened with US$27 billion claim over revoked mining licence' (21 March 2021), available at: https://globalarbitrationreview.com/congo-threatened-us27-billion-claim-over-revoked-mining-licence.

7 ICSID, Pending Cases, available at: https://icsid.worldbank.org/cases/pending (indicating that ICSID has registered: 35 cases involving Egypt, eight of which are pending; nine cases involving Algeria, two of which are pending; 10 cases involving the Democratic Republic of Congo, one of which is pending).

8 See ICSID, Cases Database, available at: https://icsid.worldbank.org/cases/case-database.

9 Transnational Institute, 'ISDS in Numbers: Impacts of Investment Arbitration Against African States' (Oct. 2019), p. 4, available at: https://www.tni.org/files/publication-downloads/isds_africa_web.pdf.

10 ibid.

11 See ICSID, Cases Database, available at: https://icsid.worldbank.org/cases/case-database.

12 See ICSID, Cases Database, available at: https://icsid.worldbank.org/cases/case-database; see also Transnational Institute, 'ISDS in Numbers: Impacts of Investment Arbitration Against African States' (Oct. 2019), p. 8, available at: https://www.tni.org/files/publication-downloads/isds_africa_web.pdf.

13 ICSID, The ICSID Caseload – Statistics, Issue 2021-1, p. 12, available at: https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282021-1%20Edition%29%20ENG.pdf.

14 Kate Cervantes-Knox and Lucia Bizikova, 'Current trends in investor state disputes in the telecommunications sector', Lexology Pro, Blog – Technology's Legal Edge (9 November 2020), available at: https://www.lexology.com/library/detail.aspx?g=132b7ed0-ff35-467a-aadd-bb2b94dd4b0e.

15 ibid.

16 ibid.

17 The seven cases are: (1) *AAN Digital Services Holding Company (KSC) v Democratic Republic of Congo*, ICSID Case No. ARB/19/24; (2) *LTME Mauritius Limited and Madamobil Holdings Mauritius Limited v Republic of Madagascar*, ICSID Case No. ARB/17/28; (3) *Al Jazeera Media Network v Arab Republic of Egypt*, ICSID Case No. ARB/16/1; (4) *PT Ventures, SGPS, SA v Republic of Cabo Verde*, ICSID Case No. ARB/15/12; (5) *Michael Dagher v Republic of the Sudan*, ICSID Case No. ARB/14/2; (6) *Orascom TMT Investments Sàrl v People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35; (7) *Millicom International Operations BV and Sentel GSM SA v Republic of Senegal*, ICSID Case No. ARB/08/20.

18 See ICSID, Cases Database, available at: https://icsid.worldbank.org/cases/case-database.

19 *Orascom TMT Investments Sàrl v People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35 (indicating that the amount in controversy was in the billions of US dollars).

20 See ICSID, Cases Database, available at: https://icsid.worldbank.org/cases/case-database.

21 Marie-Andrée Ngwe and Marion Deligny Malchair, 'La propension des Etats africains à résoudre leurs litiges d'investissements à l'amiable' (2019) 34(2) ICSID Rev—FILJ 388-410, 392-401.

22 ibid., 405-06.

23 ibid., 405 (citing Roberto Echandi and Priyanka Kher, 'Can International Investor–State Disputes be Prevented? Empirical Evidence from Settlements in ICSID Arbitration' (2014) 29(1) ICSID Rev—FILJ 41–65, 12–13).

24 Cf. ICSID, Cases Database, available at: https://icsid.worldbank.org/cases/case-database (indicating that 30 out of 56 ICSID disputes involving OHADA member-states are based on contracts).

25 Ngwe and Malchair, supra note 21, 393-94.

26 ICSID, Services, Mediation & Conciliation, Investor-State Mediation, available at: https://icsid.worldbank.org/services/mediation-conciliation/mediation/overview; see also United Nations, 'Convention on International Settlement Agreements Resulting from Mediation,' opened for signatures 7 August 2019 (entered into force 12 September 2020).

27 OHADA, Uniform Act on Mediation, Official J. OHADA, 15 December 2017 (entered into force 15 March 2018).

28 Makane Moise Mbengue and Stefanie Schacherer, 'The Africanisation of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18 *J. World Inv. & Trade* 414, 446.

29 ibid.

30 China-Mauritius Free Trade Agreement, signed on 17 October 2019, articles 8.24-8.25, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6073/download.

31 UNCTAD, Investment Policy Hub, United Kingdom, Treaties with Investment Provisions (TIP), available at: https://investmentpolicy.unctad.org/international-investment-agreements/countries/221/united-kingdom.

32 Unified Agreement for the Investment of Arab Capital in the Arab States, signed 26 November 1980 (entered into force on 7 September 1981 [1980 Arab Investment Agreement]; Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference, 5 June 1981 (entered into force February 1988).

33 Mbengue and Schacherer, supra note 28, 415.

34 PAIC, article 42(1), available at: https://au.int/en/documents/20161231/pan-african-investment-code-paic.

35 Mbengue and Schacherer, supra note 28, 415.

36 PAIC, article 42.

37 SADC Protocol on Finance and Investment, signed on 18 August 2006 (entered into force 16 April 2010), article 28(2), available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2730/download.

38 SADC suspended its Tribunal in 2008 following its ruling in *Mike Campbell (Pvt) Limited v Zimbabwe* [2008] SADCT 2. See International Justice Resource Center, Southern African

© Law Business Research 2021

Development Community Tribunal, available at https://ijrcenter.org/regional-communities/southern-african-development-community-tribunal/.

39 COMESA, Revised Common Investment Area Agreement, article 26, available at: https://www.comesa.int/wp-content/uploads/2019/04/COMESA-Gazette-Volume-21-Final_upload_web.pdf.

40 ECOWAS, ECOWAS Common Investment Code, July 2018, article 54, available at: https://wacomp.projects.ecowas.int/wp-content/uploads/2020/03/ECOWAS-COMMON-INVESTMENT-CODEFRENCH.pdf.

41 ECOWAS Supplementary Act A/SA 3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS, 19 December 2008 (entered into force on 19 January 2009), article 33(6), available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3266/download.

42 Sylvie Bebohi Ebongo, 'Enforcement of OHADA Investment Arbitration Awards' (16 February 2021), available at https://jusmundi.com/en/document/wiki/en-enforcement-of-ohada-investment-arbitration-awards.

43 OHADA, Revised Uniform Act on Arbitration, Official J. OHADA, 15 December 2017 (entered into force on 15 March 2018); see also CCJA Arbitration Rules, article 2.1.

44 Loi No. 2020-02 du 20 mars 2020 portant Code des investissements au Benin, article 45, available at: https://sgg.gouv.bj/doc/loi-2020-02/.

45 Loi No. 2012-016 du 27 février 2012 portant Code des investissements au Mali, article 29, available at: https://investmentpolicy.unctad.org/investment-laws/laws/258/mali-code-des-investissements.

46 Arnaud Oulepo, 'Cote-d'Ivoire Investment Code Amendments: Regaining Control over Investment Dispute Settlement' (20 May 2020), available at: http://arbitrationblog.kluwerarbitration.com/2020/05/20/cote-divoire-investment-code-amendments-regaining-control-over-investment-dispute-settlement/.

47 ibid.

48 ibid.

49 ibid., see Ordonnance No. 2018 – 646 du 1 aout 2018 portant sur le Code des investissements, article 50, available at : https://www.cepici.gouv.ci/web/docs/Ordonnance-2018-646-du-01-08-2018code-investissement.pdf.

50 Morocco-Nigeria BIT, signed on 3 December 2016, article 3, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download.

51 PAIC, article 10(2) (NT standard); see also PAIC, article 8(2) (MFNT standard).

52 1980 Arab Investment Agreement, articles 14-15.

53 See, eg, Benin-Canada BIT, signed 9 January 2012 (entered into force 12 May 2014), article 16; Senegal-Canada BIT, signed 27 November 2014 (entered into force 5 August 2016), article 16; Mali-Canada BIT, signed 28 November 2014 (entered into force 8 June 2016), article 15.3; Ivory Coast-Canada BIT, signed 30 November 2014 (entered into force 14 December 2015), article 15.2; Guinea-Canada BIT, signed 27 May 2015 (entered into force 27 March 2017), article 16. These Canadian BITs are available at: UNCTAD, Investment Policy Hub, Canada, Bilateral Investments Treaties (BITs) https://investmentpolicy.unctad.org/international-investment-agreements/countries/35/canada.

54 ECOWAS Supplementary Investment Act, articles 11-18.

55 *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya*, ICSID Case No. ARB/15/29. The authors would like to note that DLA Piper represented the Republic of Kenya in these proceedings.

56 Emilia Onyewa, 'Too few of Africa's commercial disputes are resolved by African arbitrators – why this must change' (21 November 2019), available at: https://theconversation.com/too-few-of-africas-commercial-disputes-are-resolved-by-african-arbitrators-why-this-must-change-125038.

57 ICSID, The ICSID Caseload – Statistics, Issue 2019-1, p. 19, available at: https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/ICSID%20Web%20Stats%202019-1%20%28English%29_rev.pdf.

58 Alison Ross, 'Somali judge-arbitrator takes presidency of ICJ' (7 February 2018), available at: https://globalarbitrationreview.com/tribunal-appointments/somali-judge-arbitrator-takes-presidency-of-icj.

59 'The African Promise', available at: https://researcharbitrationafrica.com/the-african-promise/.

60 ibid.

61 ICSID, The ICSID Caseload – Statistics, Issue 2021-1, pp. 18-19, available at: https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282021-1%20Edition%29%20ENG.pdf.

62 Jack Ballantyne, 'New US list promotes arbitrators of African descent' (4 September 2020), available at: https://globalarbitrationreview.com/diversity/new-us-list-promotes-arbitrators-of-african-descent.

63 'Arbitrators of African Descent – with a U.S. Nexus' (August 2020), available at: https://www.simpsonadr.net/files/ArbitratorsofAfricanDescentAugust2020-Final.pdf.

64 ICCA, 'Diversity and Inclusion Policy' (11 May 2020), available at: https://cdn.arbitration-icca.org/s3fs-public/document/media_document/icca_diversity_and_inclusion_policy_final11may2020.pdf; ICCA, 'Diversity and Inclusion Implementation Plan' (11 May 2020), available at: https://cdn.arbitration-icca.org/s3fs-public/document/media_document/icca_diversity_and_inclusion_implementation_plan_final_11may2020.pdf.

65 ICCA, 'Diversity and Inclusion Implementation Plan' (11 May 2020), available at: https://cdn.arbitration-icca.org/s3fs-public/document/media_document/icca_diversity_and_inclusion_implementation_plan_final_11may2020.pdf.

66 REAL (Racial Equality for Arbitration Lawyers), Strategic Goals, available at: https://letsgetrealarbitration.org/strategic-goals/.

67 *GAR*, 'New group puts spotlight on race' (18 January 2021), available at: https://globalarbitrationreview.com/diversity/new-group-puts-spotlight-race.

68 *GAR*, 'Who is sitting at ICSID?' (4 March 2021), available at: https://globalarbitrationreview.com/tribunal-appointments/who-sitting-icsid-4.

69 Decision of the African Union Assembly on Boosting Intra-African Trade and Fast Tracking the Continental Free Trade Area, 31 May 2012, Assembly/AU/Dec. 394(XVIII), p. 1, available at: https://au.int/en/documents/20120531.

70 ibid.

71 UNCTAD World Investment Report 2019, Special Economic Zones, p. 39 ('The elimination of tariffs under the Agreement could support market-seeking FDI, as foreign investors venture to tap into a market of 1.2 billion people with a combined GDP of more than $2.2 trillion'), available at: https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf.

72 African Union, Press Release, 'AfCFTA Agreement secures minimum threshold of 22 ratification as Sierra Leone and the Saharawi Republic deposit instruments', 29 April 2019, available at: https://au.int/en/pressreleases/20190429/afcfta-agreement-secures-minimum-threshold-22-ratification-sierra-leone-and.

73 Of the 55 African Union member states, Eritrea is the only state that

© Law Business Research 2021

has not signed the AfCFTA. The current member states of AfCFTA are: Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cabo Verde, Central African Republic, Chad, Comoros, Congo, the Democratic Republic of Congo, Ivory Coast, Djibouti, Equatorial Guinea, Egypt, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, the Kingdom of Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Saharawi Arab Democratic Republic, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, South Sudan, Sudan, Kingdom of Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia and Zimbabwe. See AfCFTA, Preamble and article 1.

74 UNECA, 'Zambia is latest country to ratify the African Continental Free Trade Area (AfCFTA) agreement' (8 February 2021), available at: https://www.uneca.org/stories/zambia-latest-country-ratify-african-continental-free-trade-area-afcfta-agreement.

75 AfCFTA, Preamble.

76 AfCFTA, article 3.

77 PwC Nigeria, 'COVID-19 and the African Continental Free Trade Area Agreement, Key Considerations' (2020), available at: https://www.pwc.com/ng/en/publications/covid19-and-the-afcfta-agreement.html.

78 Decision On The Start Of Trading Under The African Continental Free Trade Area (Afcfta) 13th extraordinary session, 5 December 2020, Ext/Assembly/AU/Dec.1(XIII), available at: https://afcfta.au.int/en/documents/2020-12-05/decision-start-trading-under-afcfta

79 AfCFTA, Article 20 and Protocol on Rules and Procedures on the Settlement of Disputes, article 3.

80 WHO, Coronavirus (COVID-19) Dashboard, available at: https://covid19.who.int/ (last visited 12 March 2021).

81 African Union, 'Declaration on the Risk of Investor–State Dispute Settlement with Respect to COVID-19 Related Measures', 24 November 2020 (on file with authors).

82 ibid.

83 Columbia Center on Sustainable Development, 'Call for ISDS Moratorium During COVID-19 Crisis and Response'(6 May 2020), available at: http://ccsi.columbia.edu/2020/05/05/isds-moratorium-during-covid-19/.

Théobald Naud
DLA Piper

Théobald is a partner in DLA Piper's Paris office. He represents clients in investment arbitration and international commercial arbitration proceedings. He also represents clients in French courts to challenge or enforce international arbitration awards and arbitration clauses.

Théobald has significant experience in arbitration proceedings administered by ICSID, the ICC and the PCA, as well as ad hoc arbitrations pursuant to the UNCITRAL Arbitration Rules.

He is fluent in both English and French and has argued cases in both languages.

Ben Sanderson
DLA Piper

Ben is of counsel and the practice manager responsible for the global international arbitration practice at DLA Piper. He has extensive experience advising clients in international arbitration disputes across a range of sectors including energy, mining and technology. He has represented both states and commercial parties in investment treaty claims. He recently co-led a team that obtained a decisive victory for Kenya, for which they were nominated 'International Arbitration Team of the Year' by Legal Business and the decision was shortlisted by *Global Arbitration Review* for the 'Award of the Year' award.

The Legal 500 includes the following client recommendations: 'Ben Sanderson [is] excellent at running international arbitrations that involve large teams of lawyers based in different countries' (UK International Arbitration, 2019 and 2020).

Ben is a visiting lecturer on international arbitration and public international law for the master's programme at Universidad Carlos III, Madrid.

Ben also sits as an arbitrator.

© Law Business Research 2021

Maxime Desplats
DLA Piper

Maxime focuses his practice on international disputes resolution. He is a counsel at DLA Piper, based in Paris. He regularly represents clients before arbitral tribunals in proceedings conducted in English or in French. He also frequently assists clients before various French courts and African jurisdictions.

Maxime is part of the team working on the consequences of the *Achmea* decision on the investor-state dispute settlement mechanisms included in the bilateral investment treaties concluded between Member States of the European Union.

Maxime has also participated in internal investigations linked to allegations of corruption.

DLA Piper

27 Rue Laffitte
75009 Paris
France
Tel: +33 1 40 15 24 18 / +44 20 7796 6475

Théobald Naud
theobald.naud@dlapiper.com

Ben Sanderson
ben.sanderson@dlapiper.com

Maxime Desplats
maxime.desplats@dlapiper.com

www.dlapiper.com

DLA Piper is acknowledged as a leader in the international arbitration field, ranked in Global Arbitration Review's GAR30 as one of the leading global practices. The firm has one of the largest international dispute resolution practices in the world, with more than 1,400 lawyers across the globe. The team has extensive experience acting for both commercial parties and states in international arbitration proceedings, including significant experience of investment treaty disputes.

DLA Piper has particular expertise in African disputes. DLA Piper is acting in numerous commercial disputes for private entities, and has recently represented the Republic of Guinea and the Republic of Kenya in ICSID proceedings, as well as representing the Democratic Republic of the Congo in respect of enforcement issues arising from two arbitral awards and the Republic of Zambia in a commercial arbitration.

DLA Piper has a presence in 20 countries in Africa, with DLA Piper offices in South Africa and Morocco; and DLA Piper Africa firms in Algeria, Angola, Botswana, Burundi, Ethiopia, Ghana, Kenya, Mauritius, Mozambique, Namibia, Rwanda, Senegal, Tanzania, Tunisia, Uganda, Zambia and Zimbabwe.

© Law Business Research 2021

an **LBR** business

ISBN 978-1-83862-579-5