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International Commercial Arbitration: Case Study of the Experiences of African States in the International Centre for Settlement of Investment Disputes

TSOTANG TSIETSI*

Abstract

African countries have experienced dire balance-of-payment problems. In order to improve their economic prospects, they need to attract foreign investment. But foreign investors are wary of investing in African economies, not primarily because of economic risks, but because of political risks. In order to assure investors, African countries have ratified the International Convention for the Settlement of Investment Disputes. This is meant to reflect to potential investors that the African States are willing to submit to international arbitration, which is supposed to have the positive spin-off of encouraging investment. But this article questions whether this membership has really been to the advantage of African States. There is no proven correlation between membership and investment inflows. African States hardly ever use the ICSID to bring cases against foreign investors; instead, African States are often the respondents. The seat of arbitration is usually in a developed country with non-African arbitrators and lawyers.

I. International Commercial Arbitration

There are a multitude of dispute settlement mechanisms that parties can choose from in order to settle any disputes that may arise between them. The options range from negotiation, inquiry and fact-finding, mediation and good offices, conciliation, arbitration, or litigation. This article focuses on arbitration, specifically international commercial arbitration. International commercial arbitration is a method of resolving disputes that may arise out of international commercial agreements, such as investment agreements. The key characteristics of international commercial arbitration are that it is a dispute settlement procedure that is consensual, private, and confidential and that it leads to a final and binding award determining the rights and obligations of the disputants.[1]

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1. U.N. Conference on Trade and Dev., New York and Geneva, 2005, *Dispute Settlement: International Commercial Arbitration, 5.1 International Commercial Arbitration*, 5, U.N. Doc. UNCTAD/EDM/Misc.232/

International commercial arbitration can be ad hoc or institutional. Ad hoc means the parties decide, at the time of their commercial agreement, that they will resort to arbitration in the event of disagreement but do not refer to any standing arbitral institution.[2] When a dispute arises, it is then that they must agree on the arbitrators as well as the rules and procedures that will govern their arbitration. This has the obvious short-coming in that, when parties are already in dispute, it may not be possible for them to reach agreement due to the general mood of discord.[3] What can be of assistance is for the parties to agree to adopt standing rules such as the United Nations Commission on Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.[4] Institutionalized arbitration refers to arbitration held under the auspices of a standing forum for arbitration such as the Permanent Court of Arbitration (PCA) or the International Chamber of Commerce (ICC).[5] Parties usually agree before a dispute arises that it will be resolved by a named arbitral institution. Arbitration can be between two states or it can be between a state on one hand and a non-state entity (such as an individual or a corporation) on the other hand. In the latter case it is referred to as "mixed arbitration."[6] The International Convention for the Settlement of Investment Disputes between States and Nationals of Other States creates a system for institutionalized mixed arbitration.[7]

Arbitration has been lauded over litigation as a faster and easier method of settling legal disputes.[8] Unlike with litigation, where the judges are arbitrarily designated, arbitration allows parties to select their arbitrators, which means that they can choose individuals with particular expertise who are able to quickly comprehend complex technical issues.[9] As Collier and Lowe have correctly asserted,

> "[w]here the courts might appear remote, rigid, and slow and expensive in their procedures and the judges might seem unversed in the ways of commerce and the law, insensitive and ill adapted to the exigencies of commercial life, arbitrators offered an attractive alternative. [Arbitrators] were originally drawn from the same commercial community as the traders, often experienced in the trade, capable of offering practical suggestions for the settlement of the dispute and of doing so informally, quickly and cheaply."[10]

Arbitrators that are quick to grasp the complex issues will also be quick to dispense with the dispute, thus saving the parties time and, more importantly, money. Another argu-

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Add.38, *available at* http://unctad.org/en/Docs/edmmisc232add38_en.pdf [hereinafter U.N. Conference on Trade and Dev. 5.1].

2. *Id.* at 31.

3. *Id.*

4. *Id.*

5. *Id.* at 30. For a list of commercial arbitration institutions and the rules of those institutions, *see International Commercial Arbitration Institutions and Institution Rules*, LEX MERCATORIA, http://www.jus.uio.no/lm/arbitration/institution.rules.html (last visited Sept. 6, 2013).

6. GEORGIOS PETROCHILOS, PROCEDURAL LAW IN INTERNATIONAL ARBITRATION 227 (James L. Fawcett eds. 2004).

7. *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 1(2), *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270 [hereinafter Convention].

8. U.N. Conference on Trade and Dev. 5.1, *supra* note 1, at 15.

9. *Id.* at 14.

10. JOHN G. COLLIER & VAUGHN LOWE, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES 45–46 (1999).

ment has been that arbitration is preferable to litigation because it gives parties more control over the dispute resolution process by allowing them to determine—by agreement—the forum, the applicable law, and the procedures to be adopted.[11] There is flexibility because the parties can choose to by-pass certain procedural requirements associated with litigation that could potentially lengthen the settlement of the dispute. This flexibility also contributes to faster and cheaper resolution of disputes. The arbitration agreement, or *compromis d'arbitrage*, may even provide for settlement by application of extra-judicial principles.[12] For example, Article 42(3) of the Convention allows for the settlement of disputes *ex aequo et bono* according to principles of what is fair and just, thus overriding the application of strict rules of law.[13] Govindjee et al. agree that "one of the main reasons that arbitration is a more popular remedy than going to court is because the normal court process has very complex and specific rules relating to the manner in which a case is presented to the presiding officer."[14]

The inequality of the parties is said to be mitigated by the neutrality of arbitration.[15] It doesn't matter if the dispute is between a state on one side and an individual investor on the other; they are both equal before the tribunal, particularly because the battle is not fought on the turf of any of the parties to the dispute. Arbitration further assures parties of confidentiality.[16] The ambits of this confidentiality is captured in Article 30 of the London Court of International Arbitration (LCIA) Rules, which provide that

> "[u]nless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain - save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority."[17]

The confidential character of arbitration was also captured by the English Court of Appeals in *Dolling-Baker v. Merrett*, which states that:

> "[a]s between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must, in my judgment, be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and indeed not to disclose in any other way

11. U.N. Conference on Trade and Dev. 5.1, *supra* note 1, at 15.

12. U.N. Conference on Trade and Dev., New York and Geneva, 2005, *Dispute Settlement: International Commercial Arbitration, 5.2 The Arbitration Agreement*, U.N. Doc. UNCTAD/EDM/Misc.232/Add.39 at 11, *available at* http://unctad.org/en/Docs/edmmisc232add39_en.pdf.

13. Convention, *supra* note 7, art. 42(3).

14. AVINASH GOVINDJEE ET AL., COMMERCIAL LAW 2: FRESH PERSPECTIVES 296 (2007).

15. U.N. Conference on Trade and Dev. 5.1, *supra* note 1, at 16.

16. *Id.* at 7 - 8.

17. Rules of the London Court of International Arbitration, art. 30, *reprinted in* 10 Y.B. COM. ARB. 157, 166 (1985), *available at* http://www.lcia.org//Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx#article14.

> what evidence had been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court. That qualification is necessary, just as in the case of the implied obligation of secrecy between banker and customer."[18]

Once parties agree to arbitration, that agreement will exclude recourse to other methods of resolving the dispute. In the *Maritime International Nominees Establishment*[19] litigation, the courts of Belgium and Switzerland dismissed applications for the indication of provisional measures in a dispute of which the International Centre for the Settlement of International Disputes was seized.[20] Similarly the United States Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.* upheld the parties' agreement to arbitrate.[21] Soler was a Puerto Rican automobile dealership that entered into a contract with Mitsubishi (a Japanese company) under which Mitsubishi manufactured vehicles that were then sold by Soler.[22] Paragraph VI of the parties' agreement contained an arbitration clause providing that disputes were to be "finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association."[23] When, subsequently, Mitsubishi filed a request for arbitration, Soler contested submission to arbitration.[24] The District Court ordered parties to go for arbitration as per their agreement.[25] On appeal to the Supreme Court, it was held that an agreement to arbitrate must be complied with and that the policy considerations favoring upholding the agreement to arbitrate outweighed U.S. public policy against the arbitration of anti-trust claims.[26] In *Scherk v. Alberto-Culver Co.*[27] the Supreme Court considered that an agreement to arbitrate is "in effect, a specialized kind of forum-selection clause"[28] and that that a "parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate" the orderly and predictable resolutions that the parties had intended to achieve with their forum-selection clause, but would also invite "mutually destructive jockeying" for advantage.[29]

Dispute resolution by way of arbitration is also commended for leading to a final and binding determination of a dispute and an award that is not subject to any appeal mechanism.[30] International Chamber of Commerce Arbitration Article 34(6) provides that "[e]very award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be

18. Dolling-Baker v. Merrett, [1990] 1 W.L.R. 1205 A.C. at 1213 (Eng.).

19. Mar. Int'l Nominees Establishment v. Government of Guinea (Liech. v. Guinea), ICSID Case No. ARB/84/4, 5 ICSID Rev. 95 (1990).

20. Similarly, states are bound not to give diplomatic protection or to bring international claims in respect to disputes involving their nationals who have submitted to arbitration, unless the State party to the dispute has failed to comply with an award. Convention, *supra* note 7, art. 27.

21. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 640 (1985).

22. *Id.* at 616–17.

23. *Id.* at 617.

24. *Id.* at 618–20.

25. *Id.* at 620.

26. *Id.* at 638–39.

27. Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

28. *Id.* at 519.

29. *Id.* at 516–517.

30. U.N. Conference on Trade and Dev. 5.1, *supra* note 1, at 8.

deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."[31] This is echoed in Article III of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which requires the Contracting States to "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon."[32] The fact that an award is not subject to appeal on the merits gives the parties added security about the finality of the resolution process. Arbitration awards are also easier to enforce in foreign states than judicial judgments tend to be. Usually, "unless there is a treaty between the State in which the judgment was issued and the State in which enforcement is sought, the requested court is under no international obligation to enforce the judgment,"[33] thus complicating enforcement for the successful party. "By way of contrast, 135 States are party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. While there are lingering problems with implementation of the Convention by the courts in some States, they are on the whole relatively minor ones."[34]

II. Problems with International Commercial Arbitration

While not disagreeing with the above arguments, it is important to note that it is not always the case that arbitration, especially international investment arbitration, becomes a speedy and inexpensive tool for dispute settlement.[35] Frank E.A. Sander notes that the "theoretical advantages of arbitration over court adjudication are manifold . . . . These theoretical advantages [however] are not always fully realized."[36] There are several reasons why these advantages may not materialize. First of all is the argument that arbitration costs less than litigation. If the arbitration is institutional, it means that the parties have to pay a fee for using the facilities and pay the Secretariat for managing the process.[37] Parties also have to pay the arbitrators sitting as the tribunal and any incidental expenses of the arbitration (such as the costs of photocopying, transcribing, translating, etc.).[38] These costs can add up and defeat the goal of arbitration of offering a cost-effective resolution for a dispute. Out of 254 arbitrations that were conducted between 1991 and 2010 in over twenty arbitral institutions, it was found that party costs averaged around £1,348,000 in common law countries and £1,521,000 in civil law countries and that 74 percent of party costs were spent on external legal costs.[39] Taking the example of the

31. Int'l Chamber of Commerce, ICC Rules of Arbitration (2012), *available at* http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/ (last visited Sept. 4, 2013).

32. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 4739.

33. U.N. Conference on Trade and Dev. 5.1, *supra* note 1, at 16.

34. *Id.* at 17.

35. *Id.* at 15.

36. CHARTERED INST. OF ARBITRATORS, CIARB COSTS OF INTERNATIONAL ARBITRATION SURVEY 2011 2 (2011), *available at* http://www.ciarb.org/conferences/costs/012-the-survey/ (follow "Download the results of CIArb's survey" link).

37. OLSWANG, COSTS IN ARBITRATION PROCEEDINGS (July 2007), *available at* http://singaporeinternationalarbitration.files.wordpress.com/2012/07/costs-in-arbitration-proceedings.pdf.

38. *Id.*

39. CHARTERED INST. OF ARBITRATORS, *supra* note 36, at 2.

London Court of International Arbitration, some of the relevant fees include the following:[40]

1. A non-refundable Registration Fee (payable in advance with the request for arbitration) of £1,750.
2. Time spent by the Secretariat of the LCIA in the administration of the arbitration-£225 per hour (for the Registrar/Deputy Registrar/Counsel; £100 or £150 per hour for other Secretariat personnel depending on the activity).
3. Appointment Fee (payable in advance with request–non-refundable)-£1,250.[41]
4. Deciding challenges to the appointment of arbitrators-£1,250.[42]
5. Fees for arbitrators (approximately £450 per hour depending on the circumstances and complexity of the case and on the qualifications of the arbitrators).
6. "A sum equivalent to 5% of the fees of the Tribunal (excluding expenses) in respect of the LCIA's general overhead [as well as] [e]xpenses incurred by the Secretariat and by members of the LCIA Court, in connection with the arbitration (such as postage, telephone, facsimile, travel etc.), and additional arbitration support services, whether provided by the Secretariat or the members of the LCIA Court from their own resources or otherwise."[43]

Regarding the argument that arbitration resolves disputes quicker than litigation instead, it can be found that arbitration can involve a lot of lengthy paperwork on technical issues arising from lengthy and complex agreements and facts.[44] This can lengthen the time needed to arbitrate a dispute. Typically, arbitrations can last up to a year and a half to two years—hardly a speedy resolution.[45] Furthermore, the argument that the element of the finality of the award is always a positive outcome is flawed. Errors made in the arbitral award cannot be corrected on appeal and this can operate detrimentally on the effected party.[46] Another limitation of arbitration is that an arbitral tribunal has limited powers and depends on the national legal system at various stages of the arbitration process.[47] For example, a tribunal cannot subpoena witnesses to appear before it or order the attachment of funds for the enforcement of an award.[48] Redfern and Hunter comment that

> [these] are not powers that any state is likely to delegate to a private arbitral tribunal, however eminent or well-intentioned that arbitral tribunal may be. In practice, if it becomes necessary for an arbitral tribunal to take coercive action in order to deal properly with the case before it, such action must usually be taken indirectly, through the machinery of the local courts, rather than directly, as a judge himself can do.[49]

40. *Schedule of Arbitration Costs*, LONDON COURT OF INT'L ARBITRATION (Mar. 30, 2013), http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Costs.aspx.

41. Excluding time spent in carrying out the function and expenses incurred.

42. Excluding time spent in carrying out the function and expenses incurred.

43. *Schedule of Arbitration Costs*, *supra* note 40, at 1(d)-(e).

44. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 85 (2009).

45. CHARTERED INST. OF ARBITRATORS, *supra* note 36, at 12.

46. U.N. Conference on Trade and Dev. 5.1, *supra* note 1, at 15.

47. ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 24 (4th ed. 2004).

48. *Id.* at 24 – 25.

49. *Id.* at 25.

So, even though parties may wish to completely exclude national courts, this may not always be possible to achieve due to the limited powers of arbitrators.

Another problem emanates from the freedom of the parties to select the procedural rules that are applicable to their arbitration. Parties often exclude common law evidence rules only to find, to their disadvantage, that excluding these rules (for example the hearsay rule) can lead to decisions based on unreliable evidence.[50] Lastly, arbitrations have been tainted by the problem of arbitrators wishing to act in disputes that they attempted to conciliate or mediate. In conciliation, parties have to be more open with information because they understand the role of the conciliator as being to facilitate the parties in reaching their own resolution of the dispute. To do this, the third party generally needs to know what each party will and will not accept. The problem arises when the dispute moves from conciliation/mediation to arbitration and the conciliator/mediator shows an interest in acting as arbitrator. Parties in this situation are often caught in an embarrassing dilemma. On the one hand, they do not want to insult or question the integrity of the arbitrator (who may be desired in other future disputes), but on the other hand, they do not want him or her to act in both roles. For this reason, the agreement should include a "without prejudice" proviso as a minimum but should provide that conciliators/mediators cannot act as arbitrators in the same dispute. But despite these challenges, arbitration remains very popular for resolving international commercial disputes, particularly the arbitral procedures under the International Convention for the Settlement of Investment Disputes.

III. The Origins of the International Convention for the Settlement of Investment Disputes

The International Convention for the Settlement of Investment Disputes between States and Nationals of other States (Convention) was the brainchild of the Executive Board of the International Bank for Reconstruction and Development (IBRD) or the World Bank.[51] It arose out of the realization that developing economies would benefit from increased investment flows from the developed world.[52] There were many reasons why the South could be attractive to investors from the North, such as the abundance of natural resources, cheaper labor, as well as less regulated markets. But investors from developed countries regarded such destinations as risky due to their social, political, and economic instability. Investors were also wary of using the courts in developing countries to resolve investment disputes, particularly where the foreign government was a potential defendant. The problems they perceived as associated with these domestic courts included the impartiality of the judges and inefficient judicial processes, together with unfa-

50. George M. Von Mehren & Claudia T. Salomon, *Submitting Evidence in an International Arbitration: The Common Lawyer's Guide*, 20 J. INT'L ARB. 285, 285 (2003).

51. *See* Int'l Ctr. for Settlement of Inv. Disputes, *ICSID Convention, Regulations and Rules*, 11, (Apr. 2006), *available at* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf [hereinafter ICSID Convention, Regulations and Rules].

52. *See* U.N. Conference on Trade and Dev., New York and Geneva, 2003, *Course on Dispute Settlement: International Centre for Settlement of Investment Disputes, 2.1 Overview*, 11, U.N. Doc. UNCTAD/EDM/Misc.232, *available at* http://unctad.org/en/Docs/edmmisc232overview_en.pdf [hereinafter U.N. Conference on Trade and Dev. 2.1].

miliar laws and procedures. There were also the difficulties associated with enforcing judgments against the state. It was felt that one measure that would positively influence foreign investors to invest in developing economies would be if these countries were to guarantee access to international arbitration should any dispute arise out of a foreign investment.[53] Therefore, in 1964, the Executive Directors of the World Bank drafted a convention establishing facilities and procedures that would be available on a voluntary basis for the settlement of investment disputes between Contracting States and nationals of other Contracting States through conciliation and arbitration.[54] This draft convention was submitted to the governments of the Member States of the World Bank and it entered into force on October 14th, 1966.[55] It aims at strengthening international partnership in achieving the economic development of developing countries by stimulating the flow of international private capital into such countries.[56]

IV. Arbitration Under the International Convention for the Settlement of Investment Disputes

One hundred and fifty eight states are signatories to the Convention, with 149 having deposited instruments of ratification of the Convention.[57] The Convention creates the International Centre for the Settlement of Investment Disputes (the Centre or ICSID),[58] which provides facilities for conciliation as well as arbitration.[59] Requests for conciliation are rare; the procedure has only been invoked nine times in the history of the Centre.[60] Conciliation, in general, involves a third person, or commission, assessing the arguments of the disputants and putting forth advice on how to settle the dispute; the settlement tries to take the interests of both parties into account.[61] The advice is not binding on the parties and is thus markedly different from arbitration, which concludes with a final, binding, and enforceable award.[62] In 1978, the Centre added the Additional Facility to its

53. *See id.* at 12.

54. *ICSID Convention, Regulations and Rules*, *supra* note 51, at 38.

55. *Id.* at 5.

56. U.N. Conference on Trade and Dev. 2.1, *supra* note 52, at 11.

57. Int'l Ctr. for Settlement of Inv. Disputes, *List of Contracting States and Other Signatories of the Convention (as of May 20, 2013)*, ICSID/3 (May 20, 2013), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English [hereinafter *List of Contracting States*].

58. Convention, *supra* note 7, art. 1(1).

59. *Id.* art. 1(2).

60. RSM Prod. Corp. v. Republic of Cameroon, ICSID Case No. CONC/11/1 (June 11, 2013); Republic of Equatorial Guinea v. CMS Energy Corp., ICSID Case No. CONC(AF)/12/2 (filed June 29, 2012); Hess Equatorial Guinea, Inc. v. Republic of Equatorial Guinea, ICSID Case No. CONC(AF)/12/1 (filed May 15, 2012); Shareholders of SESAM v. Central African Republic, ICSID Case No. CONC/07/1 (Aug. 13, 2008); Togo Electricité v. Republic of Togo, ICSID Case No. CONC/05/1 (Apr. 6, 2006); TG World Petroleum Ltd. v. Republic of Niger, ICSID Case No. CONC/03/1 (proceeding closed on Apr. 8, 2005); SEDITEX Engineering Beratungsgesellschaft für dieTextilindustrie m.b.H. v. Madagascar, ICSID Case No. CONC/94/1 (July 19, 1996); Tesoro Petroleum Corp. v. Trinidad and Tobago, ICSID Case No. CONC/83/1 (Nov. 27, 1985); SEDITEX Eng'g Beratungsgesellschaft für die Textilindustrie m.b.H. v. Democratic Republic of Madagascar, ICSID Case No. CONC/82/1 (proceeding closed on June 20, 1983).

61. *See* U.N. Conference on Trade and Dev. 2.1, *supra* note 52, at 13.

62. *Id.*

services.[63] This allows conciliation and arbitration to proceed even under circumstances where a dispute involves a non-State party or where the investor is not a national of a contracting State.[64] The Convention is not applicable to Additional Facility Proceedings and Contracting Parties are not automatically bound by the Additional Facility Rules.[65] For disputing parties to have access to the Additional Facility, they have to mutually agree and, further, seek the approval of the Secretary General, who will reach a decision considering whether the jurisdictional requirements of the Facility are met.[66] This Facility has been invoked in forty-four disputes before the Centre.[67]

The Centre is made up of two main organs—the Administrative Council and the Secretariat.[68] The former is the decision-making organ that meets once a year, usually at the same time as the meetings of the World Bank Governors.[69] It is chaired by the President of the World Bank and each Member State has one vote.[70] The Council is responsible for the adoption of the rules for conciliation and arbitration proceedings and generally for supervising the operation of the Centre.[71] The Secretariat is responsible for the day-to-day running of the Centre and has employees from the Member States.[72] In addition, the Centre maintains a list of persons of high moral character and recognized competence in the fields of law, industry, or finance who may be relied upon to exercise independent judgment and who may serve as conciliators or arbitrators.[73]

A State must ratify the Convention for it to apply. Furthermore, the parties to the dispute must consent to the submission of a dispute to the Centre. Under the Convention, consent to arbitration is presumed to exclude all other remedies, although that presumption may be rebutted.[74] For example, a Contracting State may stipulate that local remedies must first be exhausted before it engages in arbitration,[75] or parties to a dispute may agree between themselves upon an alternative dispute settlement procedure before approaching the Centre. Article 25 of the Convention provides for the subject matter jurisdiction of the Centre and reads as follows:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit

63. *Id.* at 10.
64. *Id.*
65. Int'l Centre for Settlement of Inv. Disputes, ICSID Additional Facility Rules 10 (Jan. 2003), *available at https://icsid.worldbank.org/ICSID/ICSID/AdditionalFacilityRules.jsp.*
66. *Id.*
67. Forty-two times in arbitration proceedings and twice in conciliation proceedings. *See Search ICSID Cases*, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=Main&actionVal=ViewAllCases (last visited Sept. 16, 2013) (follow "Click here for advanced search options" link and select "Additional Facility" under "Procedural Rules Applied" drop-down tab).
68. *Convention*, *supra* note 7, art. 3.
69. *Id.* art. 7(1).
70. *Id.* art. 5, 7(2).
71. *Id.* art. 6.
72. *Id.* art. 11.
73. *Id.* art. 12, 14(1).
74. *Id.* art. 26.
75. *Id.*

to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.[76]

The proceedings begin with the claimant lodging a request for arbitration, which contains the issues in dispute, with the Secretary General of the Centre.[77] The dispute is registered by the Secretary General and the other party is notified of such and furnished with a copy of the claim.[78] The arbitral tribunal is established soon thereafter.[79] The tribunal may be composed of a sole arbitrator or three arbitrators.[80] Where there are three arbitrators, one party appoints one arbitrator, the other appoints the second arbitrator, and the final arbitrator (who will function as the Umpire or President of the tribunal) is appointed by agreement of the parties.[81] After deciding on its jurisdiction, as per Article 41 of the Convention, the tribunal will proceed to examine the written submissions as well as the oral submissions of the parties.[82] The Convention contains clauses to ensure that neither party can frustrate the proceedings. An example is Article 45, which provides that the tribunal may proceed regardless of the non-appearance of one party, although it further cautions that such failure to appear "shall not be deemed an admission of the other party's assertions."[83]

The award is agreed upon by a majority of the votes of the members of the tribunal,[84] and the Centre is prohibited from publishing the award without the consent of the parties.[85] The award is binding on the parties and is not subject to any appeal or other remedy, except for those provided for in the Convention.[86] The remedies mentioned in the Convention are Interpretation (Article 50)[87], Revision (Article 51),[88] and Annulment of the Award (Article 52).[89] Otherwise, Article 54 enjoins Contracting State parties to recognize awards as "binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."[90] Recognition and enforcement of the award may be sought in any state that is party to the Convention.[91] Therefore, the victor may select recognition and enforcement in the most favorable forum. This will be determined by the availability of suitable assets in the state where enforcement is sought. A party must furnish the award, certified by the Secretary

76. *Id.* art. 25(1).
77. *Id.* art. 36(1)(2).
78. *Id.* art. 36.
79. *Id.* art. 37(1).
80. *Id.* art. 37(2)(a).
81. *Id.* art. 37.
82. *Id.* art. 41.
83. *Id.* art. 45.
84. *Id.* art. 48(1).
85. *Id.* art. 48(5).
86. *Id.* art. 53(1).
87. *Id.* art. 50(1) (where there is a dispute between the parties as to the meaning or scope of an award).
88. *Id.* art. 51(1) (where, after the grant of an award, there is the discovery of some fact of such a nature as decisively to affect the award).
89. *Id.* art. 52(1)(a)-(e) (on grounds that: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that 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).
90. *Id.* art. 54(1).
91. *Id.*

General, to a competent court in order to obtain recognition and enforcement.[92] Because of the international law principle of state immunity from execution, only commercial property may be the subject of execution and not property serving an official or governmental purpose, although this distinction is not always easy to make.[93]

Collier and Lowe state that "the ICSID Convention has been a great success: it has been ratified by over 125 States, from all geographical and political blocs, and accession to the Convention appears to be a high priority for newly independent States keen to attract foreign investments."[94] But it begs to be questioned whether there is much benefit that has been derived by African States nearly four decades after joining the Convention.

V. The Experience of African Countries in the International Centre for the Settlement of Investment Disputes

On the African continent there are forty-six countries that are Contracting State parties to the Convention.[95] The last African country to deposit its instrument of ratification was Sao Tome and Principe, which ratified the Convention on May 20, 2013.[96] The eleven African States that are not parties are Angola, Djibouti, Equatorial Guinea, Eritrea, Libya, Réunion, South Africa, Western Sahara, Ethiopia, Namibia, and Guinea-Bissau. The last three states signed the Convention but have never ratified it, so they will not be taken to be parties to the Convention in this article.[97] This is because ratification is the means by which "a State establishes on the international plane its consent to be bound by a treaty".[98] Membership thus begins with ratification and, further, without ratification the Convention cannot be invoked in any arbitration before the Centre. Article 68 of the Convention clearly pronounces that the Convention is "subject to ratification, acceptance or approval by the signatory States in accordance with their constitutional procedures."[99] African States make up about 31 percent of the total membership of the Centre.[100]

Most African States became contracting state parties to the Convention in the 1960's as they were gaining independence,[101] and since then, out of the 428 arbitrations that have been conducted under the auspices of the Convention, 101 have involved African nations, of which thirty-two arbitration cases are still pending.[102] An African State party has initi-

92. *Id.* art. 54(2).

93. U.N. Conference on Trade and Dev., New York and Geneva, 2003, *Dispute Settlement: International Centre for Settlement of Investment Disputes, 2.9 Binding Force and Enforcement*, 18, U.N. Doc. UNCTAD/EDM/Misc.232/Add.8, *available at* http://unctad.org/en/Docs/edmmisc232add8_en.pdf.

94. COLLIER & LOWE, *supra* note 10, at 60.

95. *List of Contracting States*, *supra* note 57.

96. *Id.* The Convention entered into force on June 19, 2013.

97. *Id.*

98. Vienna Convention on the Law of Treaties art. 2(1)(b), May 23, 1969, 1155 U.N.T.S. 331.

99. *Convention*, *supra* note 7, art. 68(1).

100. *See List of Contracting States*, *supra* note 57.

101. *See id.* Twenty-six countries joined in the 1960s, twelve in the 1970s, none in the 1980s, four in the 1990s, and four have joined since the year 2000.

102. Out of nine disputes that have been brought for conciliation under ICISD, eight have involved African states; only one of which involved the African State as the claimant. *Search ICSID Cases*, *supra* note 67 (follow "Click here for advanced search options" link and select "Conciliation" under "Arbitration/Conciliation" drop-down tab).

ated proceedings on only two occasions in the history of the Centre.[103] And, although they are members, Benin, Botswana, Cape Verde, Chad, Comoros, Lesotho, Malawi, Mauritania, Mauritius, Mozambique, Sierra Leone, Somalia, South Sudan, Sudan, Swaziland, Uganda, and Zambia have never been involved in any form of proceedings in the Centre, either as claimants or as respondents.

African States primarily signed on to the Convention because it was recommended that this would give assurance to potential investors that their economies were safe to invest in because of the guarantee of an internationalized dispute settlement procedure. Many African States are parties to Bilateral Investment Treaties (BITs), which specifically make reference to the Centre's dispute settlement procedures and form the basis of consent in many disputes brought against them before arbitral tribunals. African States are parties to 227 BITs,[104] the first of which was signed between Germany and Togo[105] and the last one was between China and Mali.[106] Cases involving African States have involved disputes in many economic sectors such as mining, hospitality, telecommunications, oil exploration, commercial farming, and power generation, just to name a few.

Most of the claimants in arbitrations against African States (fifty-three) have been European, while fourteen have been from the United States of America.[107] Although China and Chinese investors are leading investment on the African continent[108] and China has entered into thirty BITs with African States, there has never been an arbitration conducted between an African State and a Chinese investor in the Centre.[109] One reason for this had to do with China's notification under Article 25(4) of the convention.[110] When China ratified the convention, it stipulated that it "would only consider submitting disputes over compensation resulting from expropriation and nationalization."[111] Therefore, arbitration was only available where the dispute involved expropriation, and, even then, the merits of the expropriation were excluded; only the quantum of the compensation awarded could be the subject of arbitration. During that period Jie Wang remarked that,

> perhaps due to such reservation and limitation, there have been no publicly reported ICSID cases involving China as a party despite the size of the country, the volume of

103. *CMS Energy Corp.*, ICSID Case No. CONC(AF)/12/2; Gabon v. Société Serete S.A., ICSID Case No. ARB/76/1 (discontinued on Feb. 27, 1978).

104. INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, INVESTMENT PROMOTION AND PROTECTION TREATIES: CHRONOLOGICAL INDEX (July 2012), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDNewsLettersRH&actionVal=ShowDocument&DocId=DCEVENTS16.

105. *Id.* at 1. Signed May 16, 1961 and entered into force December 21, 1964.

106. *Id.* at 30. Signed February 12, 2009 and entered into force July 16, 2009.

107. Karel Daele & Mishcon de Reya, *Africa's Track Record in ICSID Proceedings*, KLUWER ARB. BLOG (May 30, 2012), http://kluwerarbitrationblog.com/blog/2012/05/30/africa%E2%80%99s-track-record-in-icsid-proceedings/.

108. Tayyab Safdar, *China's Growing Influence in Africa*, THE EXPRESS TRIB., Aug. 30, 2012, *available at* http://tribune.com.pk/story/428026/chinas-growing-influence-in-africa/ ("[T]here are around 800 Chinese firms in Africa, investing in the infrastructure, energy and banking sectors . . . [and] [t]he deepening relationship between China and the continent has led to the formation of the Forum on China-Africa Cooperation (FOCAC)").

109. Daele & Reya, *supra* note 107.

110. *Convention*, *supra* note 7, art. 25(4).

111. Int'l Ctr. for Settlement of Inv. Disputes, *Contracting States and Measures Taken by Them for the Purpose of the Convention*, ICSID/8-D (May 2013).

its in-bound investment, the scale of its operations, and the in-depth involvement of the state of economic activity within its borders.[112]

But new generation Chinese BITs have modified this stance. Now, China's Model Law provides that all disputes are arbitrable, not just questions of the quantum of compensation.[113] It has been suggested that this change of position is attributable to the trend that

China has gradually become one of the world's largest capital *exporters*, so its requirements and expectations [have changed] towards greater levels of investment protection. China invested US$11.7 billion in Sub-Saharan Africa in 2006, mainly in the production and export of oil from Angola, Chad, Nigeria, and Sudan. Such extensive investment will inevitably give rise to disputes.[114]

Apart from this, cultural factors also come into play. Chinese investors are more likely to seek to resolve disputes amicably without resort to formal processes such as arbitration or litigation. This culture is also reflected in the requirements of the new Model BIT. Section III of the proposed text concerns investor–state dispute settlement and provides that,

1. The disputing parties shall first attempt to settle a claim through consultation or negotiation.

2. With a view to settling the claim amicably, the disputing investor shall deliver to the disputing Contracting Party written notice of its intention to submit a claim to arbitration at least six months before the claim is submitted.[115]

This is evidence of the preference given to the amicable settlement of disputes by attempting consultation and negotiation before referring disputes to arbitration. A last possible reason for the lack of Africa-China arbitrations in the Centre is that there are very close ties between African governments and the Chinese government. This means that disputes between a Chinese investor and an African government can often be resolved through diplomatic processes without resort to arbitration under the convention.

One glaring trend that can be seen when studying cases involving African nations in the Centre is that the tribunals that are selected by parties tend to be comprised of non-African arbitrators.[116] They are usually presided over by a non-African national, and the other two arbitrators are also non-African nationals. This is so in the majority of arbitrations in the Centre. Some tribunals have been mixed, with African and non-African arbi-

112. Jie Wang, *Investor-State Arbitration: Where Does China Stand?*, 32 SUFFOLK TRANSNAT'L L. REV. 493, 494 (2009).

113. *Id.* at 498.

114. NORAH GALLAGHER & WENHUA SHAN, CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICE 382 n.3 (2009).

115. *Id.* at 401.

116. *See, e.g.*, Ampal-American Isr. Corp. v. Republic of Egypt, ICSID Case No. ARB/12/11 (registered on May 23, 2012) (arbitrators from Canada, Chile, and New Zealand) (pending); Int'l Quantum Res. Ltd. v. Democratic Republic of Congo, ICSID Case No. ARB/10/21 (discontinued on Apr. 12, 2012) (arbitrators from Switzerland, Argentina, and France); Getma Int'l v. Republic of Guinea, ICSID Case No. ARB/11/29 (registered Nov. 3, 2011) (arbitrators from Belgium, Spain and Switzerland) (pending).

trators.[117] But where there is such a mixed tribunal, almost invariably the President of the tribunal will be a non-African citizen. The only two exceptions are the cases of *M. Meerapfel Söhne AG v. Central African Republic*,[118] where the Tribunal was made up of arbitrators from Morocco, Gabon, and Belgium, and the Moroccan national was President of the Tribunal, and *RSM Production Corp. v. Central African Republic*,[119] where the tribunal was composed of a Moroccan national who presided over the arbitration with two French arbitrators. It is disappointing if cases involving African States are overwhelmingly presided over by non-African arbitrators. If we recall Article 13(1) of the convention, it provides that each contracting State may designate persons who may serve on panels of arbitrators.[120] The Centre then maintains a list of these potential arbitrators and parties may select arbitrators from the list in the event of a dispute arising between them. Panel members may serve for renewable periods of six years.[121] Most developed countries have designations that are up to date; for example, Australia (designations to expire in 2016), Denmark (2018), France (2018), Japan (2014), and the United States (2015).[122] There are some developed countries that are not up-to-date with their designations, such as the United Kingdom (whose panel designations expired in 2010), but by-and-large, the majority of developed countries are up-to-date with their designations of potential panelists.[123] But when we look at the designations of most African States, we find that they are way behind in renewing their panel designations.[124] Some illustrative examples are Uganda (which has a designation that dates back to 1973), Central African Republic (designations expired in 1986), Madagascar (1987), Ghana (1990), and Liberia (1991).[125] Yes, there are some states that are up-to-date with their designations,[126] but the majority are not—and by a long stretch![127] African States should be looking for competent figures in their respective societies who they can nominate to panels. If none exist, then they should be nurturing and grooming potential panelists. It is important that Africans contribute to the jurisprudence of the Centre if African States are to be meaningful members of the Centre.

More discouraging still is that some African States, after selecting non-African arbitrators, use non-African lawyers to represent them in the arbitrations. For example, in *Grupo*

117. *See, e.g.*, AHS Niger v. Republic of Niger, ICSID Case No. ARB/11/11, Award (Jul. 15, 2013) (arbitrators from Colombia (President), France, and Cameroon); Antoine Abou Lahoud v. Dem. Rep. Congo, ICSID Case No. ARB/10/4 (registered on Mar. 4, 2010) (arbitrators from U.S. (President), France, and Egypt); Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic, ICSID Case No. ARB/04/5, Award (Mar. 7, 2008), 26 (1) ICSID Rev. FILJ 153, 162 (2011) (arbitrators from Britain (President), Germany, and Egypt).

118. M. Meerapfel Söhne AG v. Central African Republic, ICSID Case No. ARB/07/10, Award (May 12, 2011).

119. RSM Prod. Corp. v. Central African Republic, ICSID Case No. ARB/07/2, Award (July 11, 2011).

120. *Convention*, *supra* note 7, art. 13(1).

121. *Id.* art. 15(1).

122. Int'l Ctr. for Settlement of Inv. Disputes, *Members of the Panels of Conciliators and of Arbitrators*, ICSID/10 (July 2013).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* Cameroon (2014), Mauritius (2015), Nigeria (2015), Morocco (2016), Somalia (2016), East Timor (2017), DRC (their designation to the panel of arbitrators expires in 2018, but the one for the panel of conciliators expired in 2012), Kenya (2018), and the Seychelles (2018).

127. *Id.*

Francisco Hernando Contreras v. Republic of Equatorial Guinea,[128] the claimant selected Spanish legal representatives, and the respondent government was represented by lawyers from the United States of America. In *International Quantum Resources Ltd. v. Democratic Republic of Congo*,[129] the claimant was represented by Canadian lawyers, while the government's lawyers were from France. Again in *Mærsk Olie, Algeriet A/S v. The Peoples' Democratic Republic of Algeria*,[130] the claimant was represented by lawyers from the United States of America, and Algeria chose legal representatives from the United States of America and from France. In other tribunals, governments choose a team of lawyers made up of some foreign lawyers and some lawyers from the host state. For example, in *Standard Chartered Bank (Hong Kong) Ltd. v. Tanzania Electric Supply Company Ltd.*,[131] the government was represented by lawyers from the United Kingdom as well as Tanzania. Similarly, in *Millicom International Operations B.V. v. Republic of Senegal*,[132] Senegal was represented by two French lawyers and one Senegalese lawyer. The two states that have a good track record of using local lawyers are Egypt (which uses the Egyptian State Lawsuits Authority) and Zimbabwe (which uses the Zimbabwean Office of the Attorney General).[133] There are yet other states that do try to utilize indigenous lawyers, but more can and should be done. It is important for African lawyers to be entrusted with international commercial arbitrations by their own governments. Otherwise, it looks like the governments do not have confidence in their own lawyers. What sometimes happens is that the claimant companies choose non-African lawyers and then the African government feels that they also need to select non-African lawyers who can "match" those of the claimants. Choosing non-African lawyers in turn influences panel selection. Daele argues that it is these non-African lawyers who influence states to select non-African arbitrators to the panels.[134] The States themselves also potentially lose out because they end up paying exorbitant legal fees for these foreign lawyers whereas local representatives might charge much lower fees.

The seat of arbitrations tends to be in foreign nations, such as the United Kingdom (London) or the Netherlands (The Hague).[135] Parties in arbitration want to settle their disputes in neutral territory, but why is it that the perception seems to be that there is no neutral territory on African soil? This view that Africa cannot host international commercial arbitrations adds to the costs of governments who have to travel to Europe or the Americas in order to resolve their disputes with foreign investors. African countries must start with ensuring that they have adequate facilities for arbitrations, as well as competent personnel to man them, and then they must push for arbitrations to be held on the African continent.

128. Grupo Francisco Hernando Contreras v. Republic of Equatorial Guinea, ICSID Case No. ARB(AF)/12/2 (registered on Mar. 23, 2012).

129. *Int'l Quantum Res. Ltd.*, ICSID Case No. ARB/10/21.

130. Mærsk Olie, Algeriet A/S v. People's Democratic Republic of Algeria, ICSID Case No. ARB/09/14 (registered July 20, 2009).

131. Standard Chartered Bank (Hong Kong) Ltd. v. Tanzania Elec. Supply Co. Ltd., ICSID Case No. ARB/10/20 (registered on Oct. 1, 2010).

132. Millicom Int'l Operations B.V. v. Republic of Senegal, ICSID Case No. ARB/08/20, Award (Nov. 27, 2012).

133. *See, e.g.*, Veolia Proprete v. Arab Republic of Egypt, ICSID Case No. ARB/12/15 (registered June 25, 2012); Border Timbers Ltd. v. Republic of Zimbabwe, ICSID Case No. ARB/10/25 (registered Dec. 20, 2010).

134. Daele & Reya, *supra* note 107.

135. LUCY REED, JAN PAULSSON & NIGEL BLACKABY, GUIDE TO ICSID ARBITRATION 48 (2011).

The costs of arbitrations are also cause for concern, bearing in mind the fragile economies of most African countries. The Centre is financed out of charges that it metes out on disputants for using their facilities. But Article 17 of the convention goes on to add that where

> the expenditure of the Centre cannot be met out of charges for the use of its facilities, or out of other receipts, the excess shall be borne by Contracting States which are members of the Bank in proportion to their respective subscriptions to the capital stock of the Bank, and by Contracting States which are not members of the Bank in accordance with rules adopted by the Administrative Council.[136]

Chapter VI of the Convention covers the costs of proceedings. Article 60(1) provides that it is up to each Tribunal to determine the fees and expenses of its members in consultation with the Secretary General of the Centre.[137] Article 61(2) provides that,

> in the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.[138]

This means that the African nations will have to pay to travel to the seat of the arbitration, they must contribute some money towards financing the Centre, they have to pay the fees and expenses of the arbitrators, as well as representation fees for their legal counsel, and then they might also have to pay the expenses of the other party should an award of costs be made against them. Let's see how those costs can add up:[139]

1. A party lodging an arbitration claim must pay a non-refundable lodging fee of US$25,000.
2. If a supplementary decision is requested after the award has been rendered, then the requesting party must pay US$10,000 for such a supplementary decision.
3. The same amount as above is payable for requests for the interpretation, revision, or annulment, in whole or in part, of the award or the resubmission of the dispute to another tribunal should the original award be annulled.
4. The arbitrators are entitled to a fee of US$3,000 for every day that they are engaged in the arbitration, as well as travel and subsistence allowances.
5. Apart from the arbitrators, the Centre is itself entitled to levy administrative charges following the constitution of the arbitral tribunal. This is to the tune of US$32,000 annually.
6. Parties must also pay for any additional services from the Centre, such as the provision of copies or translations.

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136. *Convention*, *supra* note 7, art. 17.

137. *Id.* art. 60(1).

138. *Id.* art. 61(2).

139. Int'l Ctr. for Settlement of Inv. Disputes, *Schedule of Fees* (2013), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=scheduledFees&reqFrom=Main.

In *Malicorp v. the Arab Republic of Egypt*, the claimant submitted that it had expended a total of €239,734.14, and the respondent submitted that it had expended $489,773.60.[140] This begs the question of whether arbitration in the Centre is really the cheaper alternative that African States were promised.

The argument that arbitrations are supposed to be a quicker alternative to litigation has been discussed above. Yet, the Centre has been subject to much criticism for delays in finalizing proceedings. On average, arbitrations under the convention take between three to four years, which cannot be described as a speedy resolution.[141] This can be attributable to many reasons such as delays in appointing arbitrators. Sometimes after the tribunal has been constituted, one or more arbitrators may resign, thus necessitating the appointment of replacements. For example, in *Société Ouest Africaine des Bétons Industries v. Senegal*, the claim was registered in November of 1982, and the tribunal was constituted in September of 1983 but had to be reconstituted in December of 1983 and again in May of 1985, after the resignations of two arbitrators.[142] This delayed proceedings as parties had to select new arbitrators. The dispute was finally concluded by an award rendered in May of 1988—more than six years after its initial registration.[143] In other cases, delays are caused by the death of an arbitrator, such as in *Patrick Mitchell v. Democratic Republic of Congo*, where the Secretary General registered the claim in October of 1999, and the tribunal was constituted in November of the following year.[144] But it had to be re-constituted following the death of one of the arbitrators in February of 2002, thus necessitating the appointment of a replacement.[145] The arbitral award was rendered in February of 2004.[146]

Delays are more marked where annulment proceedings are concerned. Annulments are governed by Article 52 of the convention, which provides that either party to a dispute may request the annulment of an award by written application to the Secretary General.[147] The grounds upon which an award may be annulled are where

(a) The Tribunal was not properly constituted;
(b) The Tribunal manifestly exceeded its powers;
(c) There was corruption on the part of a member of the Tribunal;
(d) There was serious departure from a fundamental rule of procedure; or
(e) The award failed to state the reasons on which it was based.[148]

140. Malicorp Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/08/18, Award (Feb. 07, 2011).

141. Anthony Sinclair, Louise Fisher & Sarah Macrory, *ICSID Arbitration: How Long Does It Take?*, 4 GLOBAL ARB. REV. (2009), *available at* http://www.goldreserveinc.com/documents/ICSID%20arbitration%20%20How%20long%20does%20it%20take.pdf.

142. Société Ouest Africaine des Bétons Industriels v. Senegal, ICSID Case No. ARB/82/1, Award (Feb. 25, 1988), 2 ICSID Rep. 164, 191–94, (1994).

143. *Id.* at 190.

144. Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Award (Feb. 9, 2004).

145. *Id.*

146. *Id.*

147. Convention, *supra* note 7, art. 52.

148. *Id.*

Applications for annulment must be made within 120 days after the date on which the award was rendered.[149] Article 52(3) provides that the Chairman of the Centre must appoint an ad hoc Committee of three persons from the Centre's Panel of Arbitrators to consider the application for annulment.[150] The criteria is that members of this committee cannot have been on the original tribunal that rendered the award; neither can a member be of the same nationality as any of the disputants. The award may be annulled in whole or in part and if it is so annulled, parties are free to resubmit the dispute to a new tribunal. Numerous criticisms have been leveled against the annulment procedure. It has been said that "ICSID of course has lost much of its credibility as a consequence of the annulments of arbitral awards which have added another negative feature to the massive complexity of its constitution and rules"[151] and also that,

> the substantial effort made by the creators of the ICSID regime to insulate the process from national review will be rendered almost meaningless if every award can be challenged internally and subject to mere second guessing . . . if this unhappy trend were to continue potential parties would be justified in avoiding the ICSID arbitral process."[152]

Annulments affect the final and binding nature of the arbitral award and can make the dispute resolution process drag over a long period of time, which is against the desired aim of choosing arbitration over litigation. Perhaps one of the most famous cases in this regard is that of *Klöckner Industrie-Anlagen GmbH v. Cameroon*.[153] In that case, a conglomeration of European countries was engaged in the construction and operation of a fertilizer company in Cameroon. They had a falling out with the government over the non-repayment of a loan. The companies registered their dispute with the Centre on April 14, 1981, and the arbitral tribunal (composed of a Uruguayan President and two other arbitrators, one from the United States and one from France) was constituted on October 26, 1981.[154] The tribunal rendered an award on October 21, 1983, in favor of the government on the grounds of bad faith on the part of the claimants in their dealings with the government.[155] The claimants submitted an application for annulment of the award, and this application was registered on February 16, 1984.[156] The Chairman of the Centre constituted an ad hoc committee to determine the merits of the application on March 19, 1984, which committee, on the March 19, 1984, decided to annul the award.[157] The dispute was then resubmitted to another arbitral tribunal in July of 1985, but with the tribunal only being constituted in March of the following year. This tribunal took two

149. "Except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered." *Id.* art. 52(2).

150. *Id.* art. 52(3).

151. Stephen R. Bond, *Dispute Resolution in the New Europe: 1992 and Arbitration*, 5 MEALEY'S INT'L ARB. REP. 15 (1990).

152. STEPHEN J. TOOPE, MIXED INTERNATIONAL ARBITRATION 259 – 60 (1990).

153. Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon and Société Camerounaise des Engrais, ICSID Case No. ARB/81/2, Award (Oct. 21, 1983), 2 ICSID Rep. 9 (1994).

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

years to dispose of the dispute and its award was rendered on January 26, 1988.[158] This second award also became subject to an annulment application,[159] and the decision of the second ad hoc tribunal was that the award should stand. With this decision (rendered on May 17, 1990), the dispute finally came to a conclusion, almost ten years after the dispute had originally been registered with the Centre. This flies in the face of the goal of arbitration being to give the parties speedy, final, and binding resolution to their disputes.

Another key feature of arbitrations involving African States before the Centre is that about half of the claims against African States are dismissed, most at the jurisdictional stage rather than on the merits. *Banro American Resources, Inc. v. Democratic Republic of the Congo*[160] was dismissed on the ground that the tribunal found that it did not have jurisdiction. In *Malicorp Ltd. v. the Arab Republic of Egypt*,[161] where the company alleged that the government's actions of withdrawing its permits were illegal, the tribunal held that they were justified on account of breach of contract by the investor, inter alia because the investor was enjoined to incorporate a domestic company in Egypt for the running of the project, yet it failed to do so. The tribunal held that each party must pay its own legal fees and expenses of their representatives, as well as half the costs of the arbitration proceedings, including the fees of the tribunal and the Centre.[162] Again in *Gustav F.W. Hamester GmbH & Co. KG v. the Republic of Ghana*,[163] the tribunal found in favor of the government and dismissed the proceedings. The tribunal held that each party shall "bear the costs of the arbitration in equal shares; [e]ach Party shall bear its own legal fees and expenses."[164] Thus, even where the government wins arbitrations, they still lose out because the tribunals do not order the claimants to bear the costs of the arbitrations; thus, it becomes an expensive victory for the government. If the tribunals were to award costs to governments where claims are dismissed, then this might have the effect of chilling litigation and ensuring that only watertight cases are brought for arbitration. This might be more favorable to African State parties.

In ICSID Case Number ARB/05/22 (*Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*),[165] the claimants succeeded in proving a violation by the state of a BIT between the United Kingdom of Great Britain and Northern Ireland and the United Republic of Tanzania,[166] but the tribunal held that, as the claimant had failed to sustain a claim for damages, it was not entitled to compensation but merely to a declaratory order. It further held that each party should pay its own costs.[167] So again, even though the case was not

158. *Id.*

159. Klöcker Industrie-Anlagen GmbH v. United Republic of Cameroon, ICSID Case No. ARB/81/2, Committee Decision on Annulment, ¶ 1 (May 3, 1985), 1 ICSID Rev.—FILJ 89 (1986).

160. Banro Am. Res., Inc. v. Democratic Republic of the Congo, ICSID Case No. ARB/98/7, Award (Sept. 1, 2000).

161. *Malicorp Ltd.*, ICSID Case No. ARB/08/18.

162. *Id.* at 47.

163. Gustav F W Hamester GmbH & Co. KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, ¶ 362 (June 18, 2010).

164. *Id.* at 102.

165. Biwater Gauff Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, ¶ 812 (July 24, 2008).

166. Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Tanzania for the Promotion and Protection of Investments, U.K.-Tanz., Jan. 7, 1994, U.K.T.S. 1996 No. 90.

167. *Biwater Gauff Ltd.*, ICSID Case No. ARB/05/22, Award, ¶ 813.

dismissed per se, the claimant failed to get the relief it wanted, and although the government did not have to compensate the claimant, it still lost money due to the costs of the arbitration.

Many more cases never reach a final arbitral award because of discontinuance. Approximately sixteen arbitrations have been discontinued on different grounds. Some are discontinued on the basis of Arbitration Rule 44 (Discontinuance at Request of a Party).[168] The rule provides that

> [i]f a party requests the discontinuance of the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall in an order fix a time limit within which the other party may state whether it opposes the discontinuance. If no objection is made in writing within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal, or if appropriate the Secretary-General, shall in an order take note of the discontinuance of the proceeding. If objection is made, the proceeding shall continue.[169]

One illustrative example is the *Piero Foresti v. the Republic of South Africa* arbitration, which was registered under the Additional Facility.[170] The claim revolved around South Africa's Mineral and Petroleum Resources Development Act, 2002,[171] which enjoined mining companies operating in South Africa to achieve 26 percent ownership rights of such companies by historically disadvantaged persons (HDPs) by 2014,[172] and 40 percent HDPs' participation in management by 2009.[173] The companies claimed that the Act effectively extinguished mining rights held by the claimants and that it was expropriatory and, thus, against Article 5 of the BIT between South Africa and Italy.[174] But the claimants subsequently sought discontinuance of the proceedings under Article 50 of the Additional Facility Rules on the ground that they felt that they had "received partial relief" and that "given the costs of the arbitration and current economic conditions, it was . . . appropriate to seek discontinuance."[175] The tribunal felt it warranted to order the claimants to pay €400,000 in respect of the fees and costs borne by the respondent government in the proceedings. The amount was decided taking into account "the Respondent's legal costs and associated expenses as well as the fees and expenses of the Tribunal and the Centre."[176]

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168. Arbitrations discontinued at the request of the claimant on the basis of Rule 44 are Tanzania Elec. Supply Co. Ltd. v. Indep. Power Tanzania Ltd., ICSID Case No. ARB/98/8 (discontinued on Aug. 19, 2010); Scancem Int'l ANS v. Democratic Republic of the Congo, ICSID Case No. ARB/06/12 (discontinued on July 10, 2008); Am. Mfg. and Trading, Inc. v. Democratic Republic of the Congo, ICSID Case No. ARB/93/1 (discontinued on July 26, 2000); Société Kufpec (Congo) Ltd. v. Republic of Congo, ICSID Case No. ARB/97/2 (discontinued on Sept. 8, 1997); Mfrs. Hanover Trust Co. v. Arab Republic of Egypt, ICSID Case No. ARB/89/1 (discontinued on June 24, 1993).

169. *ICSID Convention, Regulations and Rules*, *supra* note 51, at 121, Rule 44.

170. Piero Foresti v. Republic of South Africa, ICSID Case No. ARB(AF)/07/1, Award, (Aug. 4, 2010).

171. Mineral and Petroleum Resources Development Act 28 of 2002 (S. Afr.).

172. DEPT. OF MINERAL RES., REPUBLIC OF S. AFR., BROAD-BASED SOCIO-ECONOMIC EMPOWERMENT CHARTER FOR THE SOUTH AFRICAN MINING INDUSTRY, *available at* http://www.polity.org.za/polity/govdocs/misc/mining-charter.htm.

173. *Id.*

174. *Piero Foresti*, ICSID Case No. ARB(AF)/07/1, Award, ¶ 54.

175. *Id.* at 21.

176. *Id.* at 31.

Other claims have been discontinued where there has been settlement between the parties and they mutually sought discontinuance of proceedings under Arbitration Rule 43(1),[177] which stipulates that,

> [i]f, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall, at their written request, in an order take note of the discontinuance of the proceeding.[178]

Sub-article 2 further expands that "[i]f the parties file with the Secretary-General the full and signed text of their settlement and in writing request the Tribunal to embody such settlement in an award, the Tribunal may record the settlement in the form of its award."[179] *Guadalupe Gas Products Corp. v. Nigeria*,[180] *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*,[181] and *Mminco LLC v. Democratic Republic of the Congo*[182] are examples of arbitrations that were discontinued under Rule 43(2).[183]

The last category of discontinued cases is where the tribunal itself discontinues an arbitration. This is usually on grounds of Regulation 14(3) of the Administrative and Financial Regulations. The article reads thus:

> "(a). . . the parties shall make advance payments to the Centre . . .
>
> (i) initially as soon as a Commission or Tribunal has been constituted, the Secretary-General shall, after consultation with the President of the body in question and, as far as possible, the parties, estimate the expenses that will be incurred by the Centre during the next three to six months and request the parties to make an advance payment of this amount;
>
> (ii) if at any time the Secretary-General determines, after consultation with the President of the body in question and as far as possible the parties, that the advances made by the parties will not cover a revised estimate of expenses for the period or any

177. Arbitrations discontinued on the basis of Rule 43(1) include the following: Shell Nigeria Ultra Deep Ltd. v. Federal Republic of Nigeria, ICSID Case No. ARB/07/18 (discontinued on Aug. 1, 2011); Partiicipiones Inversiones Portuarias SARL v. Gabonese Republic, ICSID Case No. ARB/08/17 (discontinued on Jan. 10, 2011); Olyana Holdings L.L.C. v. Republic of Rwanda, ICSID Case No. ARB/10/10 (discontinued on Jan. 7, 2011); Joy Mining Machinery Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/03/11 (discontinued on Dec. 16, 2005); Société d'Etudes de Travaux et de Gestion SETIMEG S.A. v. Republic of Gabon, ICSID Case No. ARB/87/1 (discontinued on Jan. 21, 1993); Ghaith R. Pharaon v. Republic of Tunisia, ICSID Case No. ARB/86/1 (discontinued on Nov. 21, 1988); Holiday Inns S.A. v. Morocco, ICSID Case No. ARB/72/1 (discontinued on Oct. 17, 1978); *Gabon*, ICSID Case No. ARB/76/1. *See List of Concluded Cases*, INT'L CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, (Sept. 17, 2013), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded.

178. *ICSID Convention, Regulations and Rules*, *supra* note 51, at 120, Rule 43(a).

179. *Id.*

180. Guadalupe Gas Prods. v. Nigeria, ICSID Case No. ARB/78/1 (award embodying settlement agreement rendered on July 22, 1980).

181. S. Pac. Properties (Middle East) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award (May 20, 1992).

182. Mminco LLC v. Democratic Republic of the Congo, ICSID Case No. ARB/03/14 (award embodying settlement rendered on Nov. 19, 2007).

183. *See List of Concluded Cases*, *supra* note 177.

> subsequent period, he shall request the parties to make supplementary advance payments.
>
> (b) the Centre shall not be required to provide any service in connection with a proceeding or to pay the fees, allowances or expenses of the members of any Commission, Tribunal or Committee, unless sufficient advance payments shall previously have been made;
>
> (d) . . . each party shall pay one half of each advance or supplemental charge, without prejudice to the final decision on the payment of the cost of an arbitration proceeding to be made by the Tribunal . . .
>
> If any proceeding is stayed for non-payment for a consecutive period in excess of six months, the Secretary-General may, after notice to and as far as possible in consultation with the parties, move that the competent body discontinue the proceeding.[184]

Several tribunals have discontinued arbitrations involving African States as parties on the grounds of lack of payment of advances pursuant to the above Article[185]—for example, in *Ahmonseto, Inc. v. Arab Republic of Egypt*[186] and in *Russell Resources International Ltd. v. Democratic Republic of the Congo*.[187] Discontinuance means wasted time and wasted resources for the parties involved and it means that the disputes are not resolved with finality by the rendering of a binding award.

VI. Conclusion

African States have been parties to the International Convention for the Settlement of Investment Disputes for decades now and have been involved in many cases before its arbitral tribunals. But African States themselves hardly ever bring cases against foreign companies that have set up shop in their territories. This gives the impression that arbitrations are supposed to offer relief only for foreign corporations against African governments and not the other way around; yet arbitration is supposed to be a tool to be wielded by either of the parties to a commercial transaction. Furthermore, African States have failed to host any arbitrations on their territories; neither do their professionals (lawyers or otherwise) get much exposure and practice in either representing states or sitting in arbitral tribunals. But it is conceded that some African States lack lawyers with the skills and practical experience required in this type of dispute resolution process. If local lawyers simply do not have the necessary skills, then governments cannot entrust them with such cases. More will have to be done to capacitate indigenous lawyers in order to reverse the current position. The astronomical costs involved in arbitrations have also been shown to make the proceedings of questionable value to African States. In addition to this is the waste of time that results from numerous cases being dismissed or discontinued on various grounds or awards being annulled on various grounds.

184. *ICSID Convention, Regulations and Rules*, *supra* note 51, at 61, Reg. 14(3).

185. *See List of Concluded Cases*, *supra* note 177.

186. Ahmonseto, Inc. v. Arab Republic of Egypt, ICSID Case No. ARB/02/15, Award (June 18, 2007).

187. Russell Res. Int'l Ltd. v. Democratic Republic of the Congo, ICSID Case No. ARB/04/11 (discontinued on Feb. 10, 2009).

African nations were enticed to ratify the convention because of promises that foreign investors would find their economies more attractive to invest in. Yet, there has not been a proven correlation between membership and investment flows into African countries. Foreign investment gravitates towards countries with the highest financial returns and greatest perceived safety. Where debt problems are severe, governments are unstable, and economic reforms are only beginning, membership to the Centre will not be enough to sway investors to invest in that State. One also wonders if Africa is a more dangerous continent for foreign investment than others such that guarantees of access to arbitration is imperative for these states to attract foreign investment. A cursory look at the case list shows that many more cases are brought by investors against South American countries than African ones.

The recommendations are therefore three-fold. First, to make the Centre more beneficial to African Member States, these states must capacitate their people to take a more active role in the arbitrations—as legal representatives and as tribunal members. African States should also invest in the necessary infrastructure and human capital development that would allow African countries to be used as the seat of arbitrations under the convention. Second, Roland Burrows opined that "arbitration can cost just as much or as little as the parties wish it to cost."[188] It is imperative that states thoroughly assess what contributes to the accelerated costs of arbitration and try to minimize such costs, *e.g.* by hiring local representatives. Third, as membership to the Centre merely gives investors added confidence when they have already decided to invest in a country but does not, in and of itself, make an investor *choose* a country as its investment destination, it is crucial that African nations prioritize the improvement of their investment climates in order to attract foreign direct investment and not believe that mere membership to the Centre will necessarily lead to improved investment inflows.

188. CHARTERED INST. OF ARBITRATORS, *supra* note 36, at 16.