

# Kluwer Arbitration Blog

## Africa's track record in ICSID proceedings

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On 18 April 2012, South Sudan signed and ratified the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the 'ICSID Convention'). In accordance with Article 68(2) thereof, the Convention entered into force for Sudan thirty days later, i.e. on 18 May 2012. The membership of Africa's newest republic of the ICSID Convention offers a good opportunity to look into Africa's track record in ICSID proceedings.

### 1. ICSID Membership

South Sudan is the forty-fourth, on a total of fifty-four, African state to have signed and ratified the Convention. Four states signed the Convention but have not ratified it to date. These are: Ethiopia, Guinea-Bissau, Namibia and Sao Tome and Principe. The remaining six African states neither have signed nor ratified the Convention. These are: Angola, Djibouti, Eritrea, Equatorial Guinea, Libya and South Africa.

### 2. Africa's involvement in ICSID proceedings

Of the forty-four African Contracting States, seventeen (or 39%) have not been involved in ICSID proceedings to date. These are: Benin, Botswana, Cape Verde, Chad, Comoros, Lesotho, Malawi, Mauritania, Mauritius, Mozambique, Sierra Leone, Somalia, South Sudan, Sudan, Swaziland, Uganda and Zambia.

Together, the other twenty-seven Contracting States have been involved in eighty-four ICSID proceedings, corresponding to 24% of all proceedings under the ICSID Convention to date. Of the eighty-seven proceedings, seventy-eight were initiated under the ICSID Arbitration Rules, of which two were initiated by the state party against the foreign investor. Six proceedings were initiated under the ICSID Conciliation Rules.

The ranking of African Contracting States that have been involved in investment disputes under the ICSID Convention is topped by Egypt, with sixteen proceedings to date. This relatively high figure can partly be explained by the fact that Egypt has also the most BITs in place of all African states and has attracted more foreign investments than most of its neighbours. The Democratic Republic of Congo (DRC) is second in the ranking with nine proceedings. Four states have faced ICSID on four occasions: Congo Republic, Gabon, Guinea and Tanzania. Six states have been involved in three proceedings: Algeria, Cameroon, Central African Republic, Liberia, Morocco, and Zimbabwe. Ten countries appeared in ICSID proceedings twice: Burundi, Gambia, Ghana, Ivory Coast, Madagascar, Niger, Nigeria, Senegal, Togo and Tunisia. For five states, ICSID proceedings

have been a single experience to date: Burkina Faso, Kenya, Mali, Rwanda, and the Seychelles.

In addition, there have also been three proceedings against non-Contracting States under the ICSID Additional Facility Rules: one arbitration against South Africa and one arbitration and one conciliation proceeding against Equatorial Guinea.

International investment disputes logically occur in those industries that attract foreign investments. In descending order, the following industries have been involved in Africa's ICSID proceedings: industrial activities (15%), mining (14%), agriculture and forestry (12%), oil and gas contracts (11%), contracts to construct and/or upgrade and operate (11%), hospitality (10%), construction contracts (8%), power generation contracts (7%) and general commercial activities (7%).

### **3. Investors claiming from African States**

Of the eighty-two ICSID proceedings that have been initiated so far against African Contracting States (two proceedings were initiated by the States), fifty-three (or 65%) were initiated by claimants from Europe. In fourteen proceedings (or 16%), the claimants were incorporated in the United States of America. The remaining proceedings (15%) were more or else equally divided between claimants coming from the Middle East, Australia/Asia and the rest of the world. In three proceedings (4%), I have not been able to identify the nationality of the claimant.

It is striking that despite the thirty BITs that China has entered into with African States, of which thirteen have entered into force, and the massive investments made by Chinese investors in Africa, not one investment dispute has been initiated by a Chinese claimant.

In most of the proceedings, the claimant was a corporate company. Only in ten proceedings was the claimant a natural person.

### **4. Outcome of the ICSID proceedings**

Of the seventy-six proceedings that have been initiated under the ICSID Arbitration Rules against African states, fifty-six have been concluded and twenty are pending to date. Contrary to the perception that investment arbitration is biased against developing countries in general and African states in particular, the latter have fared reasonably well in these proceedings.

In the fifty-six concluded arbitrations, more claims have been settled than upheld. In twenty-one arbitrations (or 38%), the parties settled the claims. Of these, thirteen settlements occurred before any award or decision was issued by the ICSID Tribunal. In the remaining eight cases, the settlement only occurred after the Tribunal had issued a decision on jurisdiction or liability or an award.

More claims have been dismissed than upheld. In fifteen arbitrations (or 27%), the claims were dismissed. Of these, seven were dismissed on jurisdictional grounds and eight on the merits.

Only in thirteen arbitrations (or 23%) have the claims been upheld, involving eleven different states. These are: the Central African Republic, Congo Republic (twice), Egypt (twice), Gabon, Guinea, Liberia, Senegal, Seychelles, Tanzania, Togo, and Zimbabwe. In turn, this means that thirty-three African Contracting States (or 75%) have either never been involved in ICSID proceedings, saw the claims rejected or settled the claims on terms that were agreeable to them.

Finally, five arbitrations (or 7%) were discontinued and in three cases I have not been able to identify the outcome of the proceedings on the basis of the publicly available information.

The outcome of the ICSID arbitrations involving African states is very similar to the outcome of investment disputes globally. In its March 2011 report, the United Nations Conference for Trade and Development (UNCTAD) stated that 40% of the concluded investment cases were decided in favour of the host state, 30% were settled and 30% were decided in favour of the investor. Comparing these global figures with Africa's figures suggests that Africa is not more dangerous than any other region in the world to make foreign investments in.

## 5. African Arbitrators and Counsel

Of the seventy-five ICSID arbitration proceedings in which a tribunal has been constituted to date, the African state party appointed a non-African arbitrator to the tribunal in fifty-five cases (73%). Only in nine proceedings (12%), did the African state appoint an African arbitrator. In the remaining nine proceedings, either the appointment was made by ICSID or the author has not been able to identify the arbitrator appointed by the African state, if any.

The absence of African arbitrators can in part be explained by the fact that African states predominantly appoint international lawyers to represent their interests. These lawyers are, in general, much more familiar with European and American arbitrators than with African arbitrators and it is known that counsel often has a decisive role in a party's selection of the arbitrator.

## 6. Turning back to South Sudan

South Sudan's ratification of the ICSID Convention will increase its investment prospects. It highlights the state's acceptance and respect of international investment law. It is, however, only a first step. In order to be legally meaningful from an investor's point of view, South Sudan will have to confirm its commitment to ICSID arbitration when it enters into concrete investment contracts or bilateral investment treaties or adopts domestic investment legislation.

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