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THE CHINA-AFRICA FACTOR IN THE CONTEMPORARY ICSID LEGITIMACY DEBATE

WON KIDANE*

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* Associate Professor of Law, Seattle University School of Law. This research has benefited from great input from so many colleagues over the years, but I would like to specially thank Barbara Swatt, Seattle University Law School adjunct professor and reference librarian, for singlehandedly creating and organizing the statistical information including the Annexure. I am deeply grateful for that.

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1. INTRODUCTION

The International Centre for the Settlement of Investment Disputes (ICSID)¹ was created at a time when most African countries had just gained independence and foreign investment required a more legitimate² protection in the former colonies.³ The ICSID Convention,⁴ which set up the Centre, came into force on

¹ Comprehensive information on the history, structure, and operations of ICSID is available on the official website at www.worldbank.org/icsid.

² See, e.g., Louis T. Wells, *Preface* to *THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES, OPTIONS* xv, xvi (José E. Alvarez & Karl P. Sauvart eds., 2011) (“In the rather distant past, the United States and other rich countries would occasionally act militarily or insist on state-state arbitrations when their investors claimed mistreatment abroad. Later, the United States would threaten (and occasionally act) to cut off aid, vote against loans by multilateral financial institutions to offending countries, and cancel trade preferences . . .”).

³ Professor Lowenfeld writes:

By the early 1960s, following the wave of decolonization in Africa and parts of Asia, and a wave of take-overs of foreign investments throughout the Third World, it had become apparent that it would be very difficult to achieve consensus on the obligations of host countries toward alien investment (read multinational corporations). The leading international aid institution, the World Bank, began to consider how, on the one hand, it could avoid becoming embroiled in controversies between home and host states concerning expropriation, and on the other hand, how it could assist the resolution of such controversies . . .

ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 536–37 (2d ed. 2008). See also Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT’L L.J. 427, 436–37 (2010) (“[T]he existing international law at the end of World War II—what one might call the ‘ancien régime’—failed to adequately protect the foreign investments of their [capital-exporting] nationals from injurious actions by host country governments The need for such protection was heightened by the prospect of post-War economic expansion and the decolonization of territories that had previously been under the control of capital-exporting states.”).

⁴ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Oct. 14, 1966, 17 U.S.T. 1270, 575 U.N.T.S. 159, available at www.worldbank.org/icsid [hereinafter ICSID Convention]. For a

October 14, 1966, when the twentieth instrument of ratification was deposited with the Secretariat of the United Nations.⁵ Significantly, fifteen of the original deposits of the ratification instruments came from African states.⁶ Naturally, the very first respondent state in ICSID proceedings was also an African state.⁷

Examination of the history of the ICSID Convention suggests that the African states' instantaneous and overwhelming acceptance of ICSID was solely propelled by the perception that doing so would increase the flow of badly needed foreign direct investment (FDI) from the West into the newly independent continent,⁸ although the Convention itself makes no such express

comprehensive article-by-article commentary of the Convention, see Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2d ed. 2009).

⁵ See *List of Contracting States and Other Signatories of the Convention (as of November 1, 2013)*, INT'L CTR. FOR SETTLEMENT OF INV. DISP. (Nov. 1, 2013), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English> (listing 158 States that have signed the Convention and 150 States that have deposited their instruments of ratification).

⁶ *Id.* The fifteen original African contracting states were: Benin, Burkina Faso, Central African Republic, Chad, Republic of Congo, Côte d'Ivoire, Gabon, Ghana, Madagascar, Malawi, Mauritania, Nigeria, Sierra Leone, Tunisia, and Uganda. A total of twenty instruments of ratification were deposited that day. The remaining six came from Iceland, Jamaica, Malaysia, Netherlands, and the United States. *Id.*

⁷ *Holiday Inns S.A. & Others v. Morocco*, ICSID Case No. ARB/72/1 (1972). For a list of all concluded ICSID cases, see *List of Concluded Cases*, INT'L CTR. FOR SETTLEMENT OF INV. DISP., <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtIsRH&actionVal=ListConcluded> (last visited April 2, 2014).

⁸ The statements of the representative of Sierra Leone during the African legal consultative meeting that occurred in Addis Ababa in 1963 (which is discussed more fully *infra* section 2.2 summarizes the general understanding very well: "[i]t would be easier for the developing countries to obtain the investments they needed if all agreements contained a clause to the effect that disputes could be referred to the Center [ICSID]." INT'L CTR. FOR THE SETTLEMENT OF INVESTMENT DISPUTES [ICSID], 2 HISTORY OF THE CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND FORMULATION OF THE CONVENTION 236, 255 (1968) [hereinafter *History of ICSID*]. For a discussion of this history, see *infra* section 2.2. Studies have since questioned this proposition. See, e.g., THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, and Investment Flows (Karl P. Sauvant & Lisa E. Sachs eds., 2009) (questioning the impact of BITs on foreign direct investment flows); Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 90 (2005) ("[I]nvestors . . . that are covered by a BIT certainly enjoy a higher degree of protection from the political risks of governmental intervention . . .").

promise.⁹ Structurally, however, ICSID's close affiliations with the World Bank never sat very comfortably with the Africans from the very beginning. The history is full of examples of expressions of misgivings about the establishment of a dispute settlement mechanism under the auspices of Africa's principal financier.¹⁰

While the history of Africa's relations with the Bank itself has been a troubled one,¹¹ it is remarkable that over the last half-century, many African states voluntarily submitted to the jurisdiction of ICSID tribunals and answered charges of expropriation and other alleged violations of the rights of private investors in Washington, D.C. and various European fora. Indeed, since its inception, more than twenty percent of all ICSID cases involved African states as respondents, with sixteen percent involving Sub-Saharan states.¹² Interestingly, however, so far, only two percent of the arbitrators and conciliators have been from Sub-Saharan Africa.¹³ Approximately seventy percent of all the

⁹ ICSID Convention, *supra* note 4, at pmb1. It appears to have been carefully drafted to avoid exactly that implication. It reads in relevant part: "Considering the need for international cooperation for economic development, and the role of private international investment therein; Bearing in mind the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States." *Id.*

¹⁰ AMAZU A. ASOUZU, INTERNATIONAL COMMERCIAL ARBITRATION AND AFRICAN STATES: PRACTICE, PARTICIPATION AND INSTITUTIONAL DEVELOPMENT 224-25 (2001) (summarizing the discussions indicating the African states' concerns about the affiliation of the Center with the World Bank, including concerns about the merger of the positions of the Bank's presidency with the chair of the Administrative Council of the Center).

¹¹ See, e.g., Celia W. Dugger, *World Bank Neglects African Farming, Study Says*, N.Y. TIMES, Oct. 15, 2007, <http://www.nytimes.com/2007/10/15/world/africa/15worldbank.html> ("Professor Sachs called the evaluation 'a blistering, devastating critique.' Professor Easterly, a research economist at the bank for more than a decade, likened the evaluation to saying Coca-Cola is bad at making its signature soft drink. 'Here's your most important client, Africa, with its most important sector, agriculture, relevant to the most important goal—people feeding their families—and the bank has been caught with two decades of neglect,' he said.").

¹² ICSID, THE ICSID CASELOAD—STATISTICS 11 (2012), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English31> [hereinafter ICSID 2012 STATISTICS]. These latest ICSID statistics show that sixteen percent of all ICSID cases were from Sub-Saharan Africa while ten percent were from the Middle East and North Africa. ICSID follows the World Bank's regional classification and merges North African States with the Middle East. Because many of the North African States have had cases before ICSID, the percentage of African States is clearly more than twenty percent. *Id.*

¹³ *Id.* at 16.

arbitrators, conciliators, and ad hoc committee members have been Western Europeans or North Americans.¹⁴ Significantly, forty-seven percent of all arbitrators and conciliators have been Western Europeans¹⁵ while the number of Western European states that were ever called upon to answer charges before ICSID tribunals in Washington or elsewhere was limited to a mere one percent.¹⁶ Even more remarkably, less than five percent of all arbitrators, conciliators, and ad hoc committee members have been women.¹⁷

Today, Africa's largest infrastructure financier is no longer the World Bank—it is China. Indeed, it was back in 2005 that the volume of China's investment in African infrastructure surpassed that of the World Bank's.¹⁸ In the decade of 2000, trade between Africa and China alone grew substantially.¹⁹ According to a recent UNCTAD report, the share of Asian Foreign Direct Investment inflows to Africa rose from 6.7% for the period 1995-1999, to 15.2% for the period 2000-2008.²⁰ Now, a network of at least thirty-five Bilateral Investment Treaties (BITs) purportedly protects China's enormous investment in Africa.²¹ The treaties signed after China's

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 11.

¹⁷ Michael Waibel & Yanhui Wu, *Are Arbitrators Political?* 27 & tbl.2 (Nov. 5, 2011) (unpublished manuscript), available at <http://www.wipol.uni-bonn.de/lehrveranstaltungen-1/lawecon-workshop/archive/dateien/waibelwinter11-12> [hereinafter Waibel & Wu Study] (conducting an empirical study based on ICSID database review).

¹⁸ CHARLES ROXBURGH ET AL., MCKINSEY GLOBAL INST., *LIONS ON THE MOVE: THE PROGRESS AND POTENTIAL OF AFRICAN ECONOMIES 15-16* (2010), available at [http://www.mckinsey.com/~media/McKinsey/dotcom/Insights_and_pubs/MGI/Research/Productivity Competitiveness and Growth/Lions on the move The progress of African economies/MGI_Lions_on_the_move_african_economies_full_report.ashx](http://www.mckinsey.com/~media/McKinsey/dotcom/Insights_and_pubs/MGI/Research/Productivity%20Competitiveness%20and%20Growth/Lions%20on%20the%20move%20The%20progress%20of%20African%20economies/MGI_Lions_on_the_move_african_economies_full_report.ashx). The report cites Chinese investment of \$23 billion for the development of Nigerian refinery Capacity and \$5-8 billion investment in Liberia and Guinea for railroads, ports and mines as examples. *Id.* Chinese investments are also replacing some of Africa's traditional business partners. *Id.*

¹⁹ AFRICAN CTR. FOR ECON. TRANSFORMATION (ACET), *LOOKING EAST: A POLICY BRIEF ON ENGAGING CHINA FOR AFRICAN POLICY-MAKERS 4, 5, 11* (2009), available at <http://www.rockefellerfoundation.org/uploads/files/2506a097-7a04-4da1-9af8-4423debec17e-lookingeastv1.pdf>.

²⁰ U.N. CONFERENCE ON TRADE & DEV. (UNCTAD), *ECONOMIC DEVELOPMENT IN AFRICA REPORT 2010: SOUTH-SOUTH COOPERATION AND THE NEW FORMS OF DEVELOPMENT PARTNERSHIP*, at 84, U.N. Doc. UNCTAD/ALDC/AFRICA/2010, U.N. Sales No. E.10.II.D.13 (2010), available at http://unctad.org/en/Docs/aldcafrica2010_en.pdf.

²¹ Norah Gallagher & Wenhua Shan, *Chinese Investment Treaties: Policies and Practice 39-40* (2009).

accession to ICSID in 1993 provide for open access to ICSID arbitration.²² However, China does not have as much experience with ICSID as Africa, although it has shown interest in pursuing investment arbitration in recent years as it assumes a greater role as an exporter of capital and seeks to protect its rapidly growing investments abroad.²³ Nonetheless, as this article will demonstrate, at its very core, ICSID was never designed for, nor has it ever meaningfully served, South-South disputes—which China-Africa disputes technically are. In light of this background, this article weighs in on the debate over ICSID's legitimacy from the perspective of Africa's experience in the last half-century and evaluates ICSID's suitability to resolve current and future investment disputes that arise out of the new economic partnerships between African states and Chinese investors.

The article is divided into five parts. Part 2 examines the various narratives on ICSID's legitimacy and critically appraises the existing empirical studies in light of Africa's experience. Part 3 discusses Africa's position on the fundamental doctrinal dilemma in foreign investment law vis-à-vis the new China factor. Part 4 provides a case study of selected ICSID cases involving African states to put the empirical studies in context and shed some light on the nature of justice that the tribunals have dispensed. Part 5 provides a more focused assessment of ICSID's suitability for the resolution of disputes between African states and Chinese investors. Part 6 concludes the article.

2. THE ICSID LEGITIMACY DEBATE AND THE EMERGING EMPIRICAL JUSTIFICATION

A provocative and oft-cited *New York Times* article once touted: "Their meetings are secret. Their members are generally unknown.

²² See *id.* at 38 (discussing the reduction of Chinese skepticism towards using ICSID to arbitrate international investment disputes and China's ultimate signing and ratification of the ICSID Convention). The BITs that China signed after its accession to the ICSID Convention in 1993 are with: South Africa (1997), Congo(DR) (2000), Botswana (2000), Sierra Leone (2001), Mozambique (2001), Kenya (2001), Nigeria (2001), Conte d'Ivoire (2002), Djibouti (2003), Benin (2004), Uganda (2004), Tunisia (2004), Seychelles (2007). *Id.* at 42 tbl.1.2.

²³ Chinese companies have begun using ICSID as an arbitral forum in recent times. See, e.g., *Ping An Life Ins. Co. of China, Ltd. & Ping An Ins. (Grp.) Co. of China, Ltd. v. Kingdom of Belg.*, ICSID Case No. ARB/12/29 (2013); *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6 (2007) (serving as examples of Chinese companies availing themselves of ICSID).

The decisions they reach need not be fully disclosed. Yet the way a small number of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged."²⁴ Interestingly, this was said in relation to the North American Free Trade Agreement (NAFTA) investment arbitration.²⁵ If these perceived intricacies affect the United States and Canada so greatly, how do the African states appearing before these tribunals fare? Opinions on ICSID arbitration range from harsh allegations of neo-liberal attempts to bankrupt developing countries²⁶ to more nuanced statements of misgivings²⁷ to the expression of confidence that ICSID is a fair and equitable forum.²⁸

The fact that ICSID tribunals have always suffered from a serious lack of diversity is not a subject of dispute, as it could clearly be seen from ICSID's publicly available arbitrator-nationality pie-chart, which needs no interpretation.²⁹ Interestingly, however, mainstream scholarly discourses have largely ignored how this deficit impacts arbitration outcomes; instead, scholars frame the issue, at a more general level, as contributing to coherency of the jurisprudence produced and

²⁴ Anthony DePalma, *Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes, But Go Too Far, Critics Say*, N.Y. TIMES, Mar. 11, 2001, <http://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html?pagewanted=all&src=pm>.

²⁵ *Id.*

²⁶ See, e.g., NICK BUXTON, TRANSNAT'L INST. & CORP. EUR. OBSERVATORY, LEGALIZED PROFITEERING? HOW CORPORATE LAWYERS ARE FUELLING AN INVESTMENT BOOM 1, 4-6 (2011), available at <http://www.sierraclub.ca/en/main-page/legalized-profiteering-how-corporate-lawyers-are-fuelling-investment-arbitration-boom> (describing the injustice created by the arbitration system in forcing developing and economically crippled countries to defend themselves at great cost and with a substantial likelihood of losing a judgment equal to a substantial percentage of their national budget); Cecilia Olivet, *The Dark Side of Investment Agreements*, TRANSNAT'L INST., Dec. 2011, at 1, 4, available at http://www.tni.org/sites/www.tni.org/files/the_dark_side_of_investment_treaties-final.pdf (discussing the adverse affects international investment arbitrations have on developing countries due to the rules favoring transnational corporations).

²⁷ See generally R. Rajesh Babu, *International Commercial Arbitration and the Developing Countries* 4 ASIAN-AFRICAN CONSULTATIVE ORG. Q. BULL. 385 (2006) (discussing arguments against ICSID and international investment arbitration based on the adverse consequences for developing countries).

²⁸ Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435 (2009) [hereinafter Franck Study].

²⁹ ICSID 2012 STATISTICS, *supra* note 12, at 16. See the pie-chart of arbitrator nationality. *Id.*

procedural regularity.³⁰ Quite remarkably, there is little discussion about the sources of the imbalance and the justifications that sustain it: a gap that this article attempts to begin to fill.

At the most general level, the dominant narrative is that “[i]nvestment arbitration is a success story”³¹ and, of course, ICSID is a major part of it—with NAFTA Chapter 11 arbitrations exemplifying the alleged success.³² Measured by caseload growth and enforcement track-record, ICSID has indeed been a “success story.” Having stayed almost dormant for decades—averaging one to four cases a year—the caseload began an upward trajectory in 1997, then receiving ten cases and steadily increasing to reach thirty-eight cases by the end of 2011.³³ This “success” is attributed to several factors, including the phenomenal growth of BITs, most of which provide for free access to investor-state arbitration.³⁴

As the foundational assumption that BITs improve the developing world’s ability to attract foreign investment has increasingly come under scrutiny,³⁵ and a critical mass of investment treaty arbitration decisions and awards became publicly available for review, critical inquiries about the legitimacy of the system as a whole began to emerge. Bolivia’s public renunciation of the Convention in 2007,³⁶ and Ecuador’s similar

³⁰ See *infra* notes 38–67 and accompanying text (discussing the mainstream scholarly discourse surrounding the coherence and consistency of ICSID tribunal decisions).

³¹ August Reinisch, *The Future of Investment Arbitration*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 894, 894 (Christina Binder, Ursula Kriebbaum, August Reinisch & Stephan Wittich eds., 2009).

³² The public attention to the Methanex case supports this notion. *Methanex Corp. v. United States*, NAFTA Arbitral Tribunal, Final Award on Jurisdiction and Merits (Aug. 3, 2005), available at <http://www.state.gov/documents/organization/51052.pdf>. See DePalma, *supra* note 24, at 1, 5 (highlighting the ICSID arbitration case *Methanex v. United States* and discussing the use of investment arbitration due to the vast reach of multinational corporations).

³³ ICSID 2012 STATISTICS, *supra* note 12, at 7. The total cases as of that date are 369. This figure includes the ICSID Additional Facilities cases.

³⁴ See Reinisch, *supra* note 31, at 895. Currently, there are approximately 3000 BITs in effect.

³⁵ See, e.g., Salacuse & Sullivan, *supra* note 8 (arguing that BITs do help countries promote foreign direct investment, though the benefits are slow to appear).

³⁶ Press Release, ICSID, Bolivia Submits a Notice Under Article 71 of the ICSID Convention (May 16, 2007), available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageTyp>

action in 2009,³⁷ fueled the curiosity of the scholarly community, resulting in the production of a corpus of instructive commentary on the legitimacy of the international investment arbitration system in general and ICSID in particular.³⁸

e=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcemen
t3 ("On May 2, 2007, the World Bank received a written notice of denunciation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) from the Republic of Bolivia. In accordance with Article 71 of the ICSID Convention, the denunciation will take effect six months after the receipt of Bolivia's notice, i.e., on November 3, 2007. In its capacity as the depository of the ICSID Convention, and as required by Article 75 of the ICSID Convention, the World Bank has notified all ICSID signatory States of the Republic of Bolivia's denunciation of the ICSID Convention.").

³⁷ Press Release, ICSID, Ecuador Submits a Notice Under Article 71 of the ICSID Convention (July 9, 2009), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement20> ("On July 6, 2009, the World Bank received a written notice of denunciation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) from the Republic of Ecuador. In accordance with Article 71 of the ICSID Convention, the denunciation will take effect six months after the receipt of Ecuador's notice, i.e., on January 7, 2010. In its capacity as the depository of the ICSID Convention, and as required by Article 75 of the ICSID Convention, the World Bank has notified all ICSID signatory States of the Republic of Ecuador's denunciation of the ICSID Convention.").

³⁸ Chief among them is INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY, *supra* note 31. Another example is the Harvard International Law Journal, which largely dedicated the second issue of its 50th volume, published in the summer of 2009, to this topic. 50 HARV. INT'L L.J. (2009), available at http://www.harvardilj.org/2009/06/issue_50-2. Around the same time period, the Chicago Journal of International Law (Vol. 9, Winter 2009) and the Suffolk Transnational Law Review also dedicated symposium issues to this issue. 9 CHI. J. INT'L L. (2009); 32 SUFFOLK TRANSNAT'L L. REV. (2009). Summarizing the objectives and proceedings of the Suffolk symposium, Professor David Caron noted: "In this Symposium's discussion of investor state arbitration, there may at first blush appear to be two very different points of perspective. On the one hand, a number of the articles view investor state arbitration as a system from afar: The view from '20,000 feet.' On the other hand, a number of articles are from the perspective of having been involved in individual arbitrations: The view from 'in the trenches.' At the level of individual arbitrations, questions often focus on how to win, or how to survive, the arbitration. From the perspective of the system, questions often focus on how the system of investment arbitration might better meet its objectives which in part often involve assessments about the legitimacy of the system as a whole." David D. Caron, *Investor State Arbitration: Strategic and Tactical Perspectives on Legitimacy*, 32 SUFFOLK TRANSNAT'L L. REV. 513, 513 (2009). Other notable parts of this corpus include a collection of essays in THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY (Michael Waibel et al. eds., 2010) and GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2007).

The most serious indictment of the system, of course, goes to the very essence of the investor-state arbitration system and the arbitrator accountability issue. Gus Van Harten describes these concerns very well: “arbitrators autonomously resolve core questions of public law: whether legislation is discriminatory, whether regulation is expropriation, whether a court decision is unfair or inequitable. . . . Th[e] lack of judicial supervision renders the arbitrator’s interpretation of public law – itself a fundamentally sovereign act – unaccountable in the conventional sense.”³⁹

Professor David Caron analyzes the dominant narrative about ICSID legitimacy concerns under four headings: “(1) the coherency of the system, (2) the integrity of decision-makers, (3) the representation of the public and (4) the curtailment of state public choice.”⁴⁰

The concern that is often framed in the context of coherency essentially pertains to the consistency of the substantive jurisprudence that the tribunals have generated over the last half-century.⁴¹ Professor Caron does not believe that the jurisprudence is so incoherent as to deprive “the system” of legitimacy.⁴² Indeed, he argues, rather convincingly, that “the root of the problem is embedded very deeply in the structure of arbitration itself” because, in essence, it is not “a system” but “a framework” within which investment claims are resolved under very diverse legal regimes much like commercial arbitration.⁴³ For him, the challenge

³⁹ VAN HARTEN, *supra* note 38, at 156.

⁴⁰ Caron, *supra* note 38, at 516.

⁴¹ This is one of the main factors that attracted the most commentary. See, e.g., JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 241 (2005) (“[T]he idea is not consistency at any cost, but respectable consistency.”); Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT’L L. 471 (2009) (positing that, although inconsistency is currently a problem, the passage of time will lead to more uniform results); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005) (proposing the creation of a permanent appellate body, enhanced transparency, and increased academic scrutiny in order to combat inconsistency); Jacques Werner, *Making Investment Arbitration More Certain: A Modest Proposal*, 4 J. WORLD INVESTMENT 767 (2003) (endorsing an appellate level of review for investment arbitration decisions and arguing that arbitrators should play an active role in consolidating proceedings or staying decisions where other arbitral panels have already issued an award).

⁴² Caron, *supra* note 38, at 516.

⁴³ *Id.* Caron rejects the idea that commercial and investment arbitrations are recognizably distinct. *Id.* at 513-14.

of coherency is inherent.⁴⁴ In fact, to the extent there is coherency, it is more “coincidental than planned.”⁴⁵ Moreover, coherency is more of an academic concern than a practical one because the users of the investment dispute settlement framework seem to tolerate a significant level of irregularity that academics might consider erroneous.⁴⁶ Caron similarly rejects the academic call for appellate discipline because, according to him, there is “little evident desire thus far on behalf of parties and states to build appeal structures which might yield greater consistency.”⁴⁷

Other critics give the issue of jurisprudential coherence more weight than Professor Caron because, unlike a purely private commercial arbitration, ICSID tribunals often sit in judgment of a sovereign act with profound public implications. For example, following the rendering of conflicting awards against the Czech Republic in *CME v. Czech Republic*⁴⁸ and *Lauder v. Czech Republic*,⁴⁹ Blackaby of Freshfields is quoted as saying: “Any system where diametrically opposed decisions can legally coexist cannot last long. It shocks the sense of rule of law or fairness.”⁵⁰ These two cases, along with the expressions of frustration by lawyers, are profound demonstrations of jurisprudential incoherency that characterizes investment arbitration today. Both cases were predicated on the same BIT provision and involved the same

⁴⁴ *Id.* at 516.

⁴⁵ *Id.* at 517 (“ICSID can be schizophrenic in this way--on the one hand, imagining ICSID as a framework calls for a concentrated focus on the particular dispute, while at the same time, imagining ICSID as a system represents an attempt to rearrange all of the free standing arbitrations as though they were part of a court system. This situation can lead to great surprise and frustration when the realization hits home that the patterns that sometimes present are more coincidental than planned. The question of whether there is a system present depends on whether the questions shared by the various tribunals are identical, or perhaps nearly so. Certainly ICSID tribunals share the procedural and jurisdictional limitations of the ICSID convention, but they do not necessarily address the same identical substantive questions since usually different concessions or BITs are involved.”).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *CME Czech Republic B.V. v. Czech Republic, UNCITRAL, Partial Award* (Sept. 13, 2001), 9 ICSID Rep. 121 (2006); 14 WORLD TRADE & ARB. MAT’LS 109 (2002) (cited in Reinisch, *supra* note 31, at 907).

⁴⁹ *Lauder v. Czech Republic, UNCITRAL, Final Award* (Sept. 3, 2001), 9 ICSID Rep. 66 (2006); WORLD TRADE & ARB. MAT’LS, *supra* note 48.

⁵⁰ VAN HARTEN, *supra* note 38, at 166 (citation omitted).

issues.⁵¹ While, in *Lauders*, the tribunal denied recovery, in *CME*, it awarded the investor nearly \$500 million.⁵²

Broadening the inquiry further, Van Harten suggests that “the burden of incoherence is borne most by those countries that lack the legal and administrative capacity effectively to fight off, or deter, investor claims.”⁵³ According to Reinisch, “[w]hat is far more serious for the acceptance of investment arbitration in general is a potential loss of confidence stemming from incomprehensible, unpredictable, and/or contradictory decisions and awards.”⁵⁴ He notes that, in recent times, the manifestations of the jurisprudential incoherence touch the very sensitive balance between the State’s sovereign regulatory right and private investment protection as exemplified by environmental cases such as the *Methanex* case.⁵⁵ Some others, however, suggest that there already is sufficient coherence that sustains the regime,⁵⁶ while others are hopeful that jurisprudential coherence and predictability will come through time.⁵⁷

⁵¹ See Reinisch, *supra* note 31, at 907 (mentioning the similarities of the *Lauders* and *CME* cases).

⁵² *Id.* at 907-08.

⁵³ VAN HARTEN, *supra* note 38, at 167.

⁵⁴ Reinisch, *supra* note 31, at 904.

⁵⁵ See *id.* at 903 (citing *Methanex Corp. v. United States*, Final Award on Jurisdiction and Merits (NAFTA Arb. Trib. 2005)). There are many investment arbitration cases involving the issue of indirect expropriation. For a recent analysis and additional citations, see SUZY H. NIKIEMA, IISD BEST PRACTICES INDIRECT EXPROPRIATION (2012), available at http://www.iisd.org/pdf/2012/best_practice_indirect_expropriation.pdf. For an older NAFTA-focused analysis of the issue, see Vicki Been & Joel C. Beauvias, *The Global Fifth Amendment? NAFTA’s Investment Protections and the Misguided Quest for an International “Regulatory Takings” Doctrine*, 78 N.Y.U. L. Rev. 30 (2003).

⁵⁶ Most notably, in his 2010 article, Professor Salacuse, employing regime theory, suggests that there is “a surprisingly high degree of uniformity and consistency.” Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT’L L.J. 427, 467 (2010). He attributes this to the similarity in the substantive rules contained in the nearly 3000 BITs, and to decision making by “the epistemic community” of similarly situated mainly Western arbitrators who produce the bulk of the jurisprudence. *Id.* at 465.

⁵⁷ See Brower & Schill, *supra* note 41, at 473-74 (“While some of these problems, in particular unpredictability and incoherence in investor-state dispute settlement, are considerable and in need of serious attention, arguably a solution will come with the passage of time. Increasing dispute-settlement procedures and doctrinal efforts promise to prove that concepts relating to investors’ rights, such as fair and equitable treatment and indirect expropriation, are not as vague and indeterminate as some argue. They increasingly will provide yardsticks for the judicial settlement of disputes that have proven to be workable not only in several

The second concern pertains to the integrity of the decision makers. Although it is, at times, “[p]hrased in terms of illegitimacy, this critique becomes an assertion of corruption.”⁵⁸ Caron notes that because outright corruption among arbitrators is rare, the legitimacy concern relating to corruption in essence touches the “identity, equality, independence and impartiality of arbitrators.”⁵⁹ Although he identifies the problems and states them very well, he does not belabor the issue further except critiquing the proposal to create a permanent panel of arbitrators as impracticable and unattractive to the parties who would want to nominate their own arbitrators.⁶⁰

The third concern is the denial of the representation of the public interest—in other words, the State, which is the respondent in investment arbitration, may not necessarily represent the interests of the communities that may be affected by the outcome of the arbitration.⁶¹ Professor Caron puts it in its proper context by saying “[e]levating the community past the state respondent creates a number of obvious political tensions”⁶² and suggests that civil society involvement through amicus filings might be a good solution.⁶³

The fourth concern is more fundamental and one which concerns the curtailing of state public interest, especially in regulatory takings cases. This concern goes to the heart of what Van Harten explains as the accountability problems of “The Businessman’s Court” sitting in judgment of sovereign decisions.⁶⁴

international fora—such as the Iran-US Claims Tribunal or the various claims commissions established at the beginning of the twentieth century to solve investment-related disputes—but also in domestic courts that entertain disputes concerning the relationship between property protection and competing private and public interests. Thus, the passage of time—bringing with it a continuous stream of investment jurisprudence, a refinement of state practice and treaty making, and growing doctrinal analysis—may help create a better understanding of the content and scope of the central principles of investment protection and result in the creation of a *jurisprudence constante*.”) (footnotes omitted).

⁵⁸ Caron, *supra* note 38, at 518.

⁵⁹ *Id.*

⁶⁰ *Id.* at 519. A very interesting point Professor Caron notes from experience is how “parties at present will go to great lengths to avoid ICSID making the appointment of the chair from its roster.” *Id.*

⁶¹ *Id.* at 520.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ VAN HARTEN, *supra* note 38, at 152–84.

Professor Caron suggests that the convergence of interests around this issue, as exemplified by China's increasing outward investment and changing attitudes, might help resolve the problem in the long term.⁶⁵ While that is true in some respects when China is taken in isolation, the fundamental question is enduring.

Apart from the macro level systemic concerns, there are concerns at the micro level involving each arbitration; they largely include mundane challenges that any kind of adjudicatory system faces, such as efficacy, cost, competence, poor reasoning, and ethics.⁶⁶ There is no shortage of suggestions as to how to make improvements in these areas.⁶⁷

2.1. Empirical Studies

ICSID does make vital information about most cases, including the names of arbitrators and counsels, available on its website.⁶⁸ However, there is a dearth of comprehensive and systematic empirical analysis of these cases. With that note, this section proceeds to review the limited available studies in association with the ICSID database and sets the stage for the Africa-specific assessment in the next sections.

As of March 28, 2012, the ICSID database shows that 233 cases have been concluded and 142 cases are pending.⁶⁹ While seventy percent of the arbitrators have come from Western Europe and North America, only two percent of all arbitrators have come from Sub-Saharan Africa.⁷⁰ In terms of the host states, while only one percent of cases involved Western European states, sixteen percent of all cases involved Sub-Saharan African states.⁷¹ ICSID data

⁶⁵ Caron, *supra* note 38, at 521 ("The old dichotomy has ceased to exist for some and we now find ourselves in a much more nuanced situation. In other terms, we could say that there once were upstream states and downstream states. But now there is only a lake where there is a convergence of interest of the states bordering the lake.").

⁶⁶ *Id.* at 522-23.

⁶⁷ See, e.g., Reinisch, *supra* note 31, at 908-16 (proposing means of quality assurance, appellate mechanism and de facto precedence).

⁶⁸ *ICSID Cases*, ICSID, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home (last visited March 18, 2013).

⁶⁹ *List of ICSID Cases*, ICSID, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListCases> (last visited March 18, 2013).

⁷⁰ *Id.*

⁷¹ *Id.*

further shows that while eighty-five percent of all cases involved an investor from a developed country as the claimant and a developing country as the respondent, only ten percent of all cases involved an investor from a developing country as the claimant and a developing country as the respondent.⁷² Quite interestingly, one of the two empirical studies of the ICSID database conducted recently suggests that arbitrators from developing countries arbitrate cases mainly between an investor from a developing country and a developing state.⁷³ Most significantly, ninety-five percent of all arbitrators so far have been men—described as “members of an exclusive and lucrative club, whose members are sometimes compared to a club of mainly European, gray-haired and well-connected men.”⁷⁴ No sophisticated empirical studies are needed to prove the glaring diversity deficit, but what do the studies conclude?

The Convention’s requirements of arbitrator qualifications are generic: good moral character, impartiality, and technical competence.⁷⁵ This rule cannot explain the disproportionately Western appointments. Explanation may lay in history, location, and affiliation. No attempt is made to provide comprehensive explanation here; however, it is important to note that such appointments necessitate the hiring of counsel with similar background which makes them acceptable to the arbitrators. Apparently for that reason, developing host states hire European and American law firms disproportionately.⁷⁶ The fees for leading arbitration specialists sometimes exceed \$1000 per hour, which does not include additional fees for their associates at several hundred dollars an hour.⁷⁷ Remarkably, by contrast, most developed countries mostly rely on in-house counsel in ICSID cases.⁷⁸

⁷² *Id.* For the World Bank’s and OECD’s classification of “developing” and “developed” nations, see Franck Study, *supra* note 28, at 446–47.

⁷³ Waibel & Wu Study, *supra* note 17, at 27.

⁷⁴ *Id.* at 18.

⁷⁵ ICSID Convention, *supra* note 4, at art. 14(1).

⁷⁶ See Waibel & Wu Study, *supra* note 17, at 28. (“[A]rbitrators from developing countries are significantly underrepresented. The proximate cause goes deeper: most host countries hire European and US law firms and legal counsel to defend against ICSID claims.”) (footnote omitted).

⁷⁷ *Id.* (citing SCHREUER, *supra* note 4, at art. 60, para. 8).

⁷⁸ See Waibel & Wu Study, *supra* note 17, at 21 (“For example, the United States, Mexico, Canada and Argentina, which account for twenty percent of

A couple of focused, smaller empirical studies have tested the impact of certain personal characteristics of arbitrators on case outcome. The first such study was conducted by Professor Susan Franck of Washington and Lee Law School. She describes her findings in her article titled "Development and Outcomes of Investment Treaty Arbitration."⁷⁹ The second empirical study was conducted by Professors Michael Waibel of Lauterpacht Center at Cambridge and Yanhui Wu of USC Marshall School of Business. It is titled "Are Arbitrators Political?"⁸⁰ Although they do not focus on the exact same set of variables, the two studies arrive at inconsistent findings to the extent they converge on the topics. Such inconsistencies might suggest the inevitable shortcomings of quantitative and even qualitative measurements of outcome to assess the nature or quality of justice in these kinds of cases; however, a combination of quantitative studies and a careful qualitative examination of selected cases might shed some light on the reality of ICSID arbitral justice. Therefore, the following sections focus on the above cited quantitative studies followed by a careful review of selected cases involving African states to measure the nature of justice that they have been receiving from ICSID tribunals in the last half-century.

2.2. A Closer Look at the Empirical Studies

It is fair to say that the ICSID database has been ripe for empirical analysis. While more comprehensive analysis is almost certainly forthcoming, the inquiry here will be limited to the two relatively recent studies mentioned above.

Professor Susan Franck's study empirically tested three hypotheses:

First, what kind of interaction effect might exist between the development status of the government respondent and the development status of the presiding arbitrator that could influence the outcome? Second, how does the respondent's development status affect outcome, if at all?

respondent states in our dataset, routinely handle all aspects of investment disputes in-house. Outside attorneys are only used on occasion to supplement in-house legal capabilities.").

⁷⁹ Franck Study, *supra* note 28.

⁸⁰ Waibel & Wu, *supra* note 17.

Third, how does the presiding arbitrator's development status affect outcome, if at all? In other words, is there a main effect for either respondent state's development status or presiding arbitrator's development status?⁸¹

What the Franck Study labels "development status" is apparently the development status of the country that hosts the investment which generated the controversy, and the development status of the country of the presiding arbitrator's nationality.⁸² The Study relied on two sources for the determination of development status: OECD membership and World Bank's income based classification (high-upper-middle-lower-middle and low income.)⁸³

The Study found that "there was no significant pattern of relationship between the World Bank status of the presiding arbitrator, the World Bank status of the respondent state, and the winner of an investment treaty arbitration."⁸⁴ It further found that for the selected sample of awards, "the number of winners and losers were statistically equivalent."⁸⁵

To arrive at this conclusion, the Franck Study analyzed forty-nine cases presided over by forty-nine arbitrators rendering forty-seven awards. A closer look at the numbers suggests that thirty-six of the forty-nine arbitrators came from high income or OCED countries. The representation of upper-middle, lower-middle and low-income countries was 8-5-0 respectively.⁸⁶ Because there were zero presiding arbitrators from low-income countries, the Study collapsed the numbers corresponding to the upper-middle and lower-middle countries, i.e., eight plus five and ran the equation against the thirty-six.⁸⁷ That is how it found statistical equivalency and concluded that "[t]he consistency in these results offers a powerful narrative that there is procedural integrity in investment arbitration."⁸⁸

Before observations about these findings are offered, it important to look at one additional and interesting finding, which

⁸¹ Franck Study, *supra* note 28, at 454 (footnotes omitted).

⁸² *Id.* at n.111 and accompanying text.

⁸³ *Id.* at 455-56.

⁸⁴ *Id.* at 462.

⁸⁵ *Id.* at 460.

⁸⁶ *Id.* at 459 tbl.2.

⁸⁷ *Id.* at 459-60.

⁸⁸ *Id.* at 464.

is that "presiding arbitrators from the developing world made larger awards against developing countries and smaller awards against developed countries."⁸⁹ This being the only source of bias the Study found, it suggests that "[e]ven at this stage, it is worth considering what should be done to address the potential bias of arbitrators from the developing world in favor of the developed world."⁹⁰ In trying to explain the possible source of bias, the Study speculates that "[it] may be that arbitrators from the developing world (particularly those seeking repeat appointments) believe that rulings in favor of the developed world are the price of admission to the 'club.'"⁹¹

Several observations could be made about this study. First, it looks at the least controversial issue. There is little concern, if any, that arbitrators might be biased for or against a state based on its level of development. If the United States enacts environmental laws that render Canadian investment in California unprofitable, the development stage of the potential presiding arbitrator's country might be the last thing that the selection process would look at as the ideological leanings and previous track-record are more important than whether he or she is from Australia or Indonesia. It is clear that a person's ideological leanings could be influenced by that person's upbringing, education, exposure, personal interest, and a whole host of other factors, which might include place of birth or perhaps, more importantly, place of residence. Nationality, however, is simply a poor indicator of political, ideological, or any other kind of bias. Second, the numbers do not seem to be well-balanced for a valid quantitative measurement when the study is forced to collapse categories to help the analysis. One notable fact is that there were no presiding arbitrators from low-income countries in the dataset although low-income countries routinely arbitrate cases before ICSID. That is one of the fundamental deficits that the Study fails to adequately address. Third, the Study concludes that to the extent there is bias or even lack of integrity, it implicates arbitrators from developing countries who seem to impose more substantial penalties in the form of an award against developing countries possibly motivated by their desire to be more acceptable to the "club." While the finding itself seems interesting, the attributed motive almost

⁸⁹ *Id.* at 478.

⁹⁰ *Id.*

⁹¹ *Id.* at 479.

contradicts the main finding, i.e., lack of development-based bias. A question might be asked, if the “club” is not entirely biased, why would arbitrators from developing countries think that they would gain more acceptance by imposing more significant awards against developing countries – unless, of course, they are misjudging their colleagues’ perceptions, which the study does not suggest. Finally, the Study omits the most serious and more credible allegation of bias, namely, ideological bias in favor of private investors (read multi-national corporations) no matter where they make their investment. This question is often framed as “investor-bias” or “host-country-bias.”⁹² Nobody could credibly allege that such bias is decisively associated with the development status of the arbitrator’s country of nationality. Significantly, however, Professor Franck’s previous⁹³ and subsequent studies more or less replicated the same results.⁹⁴

Drawing on the rich social science literature that substantially assesses the impact of personal characteristics—such as political ideology and collegiate politics—on case outcomes in domestic court litigation,⁹⁵ Waibel and Wu test different hypotheses relative

⁹² The Franck Study expressly excludes this inquiry. *See id.* at 479 n.16 and accompanying text (“This research does not evaluate differences in whether investors come from the developed or developing world because approximately 10% of investors were from developing world.”).

⁹³ In her 2007 study, finding no pro-investor bias, Professor Franck concludes that “[r]ecognizing the limitations, the initial descriptive quantitative data from public awards suggest investment treaty arbitration appears to be functioning relatively well. There is, nevertheless, room for improvement.” Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 83 (2007).

⁹⁴ Her 2011 study that compared the ICSID case outcome with other investment arbitrations also finds no bias on the basis of the development status (expressly noting Latin America). Susan Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51 VA. J. INT’L L. 825, 913 (2011).

⁹⁵ Among the sources they rely on are: RICHARD A. POSNER, *OVERCOMING LAW* (1995) (criticizing originalism in favor of a mixture of liberalism, pragmatism, and economics); GLENDON A. SCHUBERT, *QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR* (1959) (exploring bloc voting among Supreme Court justices, the justices’ incentives to vote in such blocs, and the consistency of the justices’ stances on recurring topics); Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 281 (1995) (“In the mass of cases that are filed . . . the law – not the judge – dominates the outcomes.”); Michael A. Bailey & Forrest Maltzman, *Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court*, 102 AM. J. POL. SCI., 369 (2008) (determining that law can play an important role in a judge’s opinion, as demonstrated by statistical analyses into stare decisis, deference to Congress, and protection of speech); William N.

to ICSID case outcome, focusing on decisions on jurisdiction and host state liability. Relevant for the purposes of this article are the following hypotheses: (1) "Arbitrators who are pro-investor will tend to vote in favor of affirming jurisdiction and liability of host states. Conversely, arbitrators who are pro-state are more likely to favor the host state;"⁹⁶ (2):

Arbitrators who judge the actions of host countries that belong to the same legal family will tend to assert jurisdiction less often and hold the host state liable on fewer occasions. Conversely, when arbitrators judge the actions of a host country belonging to a different legal family, they will be more likely to affirm jurisdiction and hold the host state liable;⁹⁷

and (3) "Arbitrators from developing countries are less likely to hold the host country liable because they are more familiar with

Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331, 334 (1991) (asserting that Congress is most likely to override the Supreme Court's statutory decisions when the Court is ideologically fragmented, "relies on the text's plain meaning and ignores legislative signals, and/or rejects positions taken by federal, state, or local governments"); Sheldon Goldman, *Voting Behavior on the United States Court of Appeals, 1961-1964*, 60 AM. POL. SCI. REV. 374, 379 (1966) (detailing the voting behavior of judges and how their political leanings may play a part); Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. (2010) (contending that liberal justices created the standing doctrine so that administrative agencies would not be subject to judicial review); Stuart S. Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843, 844 (1961) (revealing data comparing judges' decisions and political party lines); C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-1978*, 75 AM. POL. SCI. REV. 355, 366 (1981) (identifying personal attributes among judges, such as appointing president, past legal experience, and prestige of pre-law education, and concluding that their "influence . . . is transmitted directly and powerfully to judicial voting behavior"); Timothy B. Tomasi & Jess A. Velona, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766, 767 (1987) (assessing the conservatism of Reagan-appointed judges and finding that "Reagan judges are not significantly more conservative than their Republican colleagues"). Most notably, they cite DAVID W. RHODE & HAROLD J. SPAETH, *SUPREME COURT DECISION MAKING* 72 (1976) (noting that "judges base their decisions solely upon personal policy preferences"); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 64, 86 (1993) ("[T]he Supreme Court decides disputes before it in light of the facts of the case vis-à-vis precedent, the plain meaning of the Constitution and statutes, the intent of the framers, and a balancing of societal versus constitutional interests.").

⁹⁶ Waibel & Wu Study, *supra* note 17, at 21.

⁹⁷ *Id.* at 22-23.

the economic and social conditions in developing countries and host countries[,] the more likely source of future arbitral appointments.”⁹⁸

The first hypothesis is almost a restatement of the obvious: a decision maker’s ideological leanings impact his decisions. Property rights are a subject of serious ideology controversy. As discussed at length above, the ideological divide is enduring. Although the study used proxies as indicators of the ideological leanings of the arbitrators,⁹⁹ the finding is not surprising because it is clear that the parties spend significant amounts of time and resources in selecting arbitrators who are likely to be ideologically sympathetic to their side.

The second proposition is also not surprising because of the inherent human inclination to understand and appreciate the familiar. The third proposition, likewise, is not surprising for the same reasons, that is, familiarity and understanding of the circumstances.

The above-noted studies share the same characteristics; however, they all avoid the most fundamental question of the impact of the diversity deficit on outcome. Stated differently, what is the overall price of the cultural barrier that the Africans face when appearing before tribunals composed largely of Western arbitrators represented by counsel and firms who must necessarily share the judges’ cultural backgrounds? It might be impossible to empirically measure the cost or explicate the barrier, but the remainder of this article attempts to assess how African states have fared in the last half-century by looking at the available data and reviewing selected cases. Before that is provided, however, it is important to look at the historical background to understand why Africa signed on to this project and how that might affect its continued use of ICSID with its new partners—a framework arguably designed for a different purpose.

3. AFRICA’S ICSID STORY: A HISTORICAL PERSPECTIVE

Prior to the adoption of the text of the Convention, the World Bank conducted extensive consultations with various stakeholders from Africa to South America. Fortunately, ICSID has made

⁹⁸ *Id.* at 23.

⁹⁹ *Id.* at 22. The proxy is not a perfect one—they use frequency of appointment by one party or the other as an indication of the political leanings as pro-investor or pro-state. *Id.* at 34–40.

summaries of the records available in multiple volumes under the title *History of the Convention*.¹⁰⁰ This section relies on these volumes for the discussion of the *raison d'être* as understood by the Africans and the dilemmas they faced.

3.1. *Africa's Position on the Doctrinal Debate*

A fundamental doctrinal dilemma underpins the law of international investment.¹⁰¹ Its cogent articulation may be traced back to the famous 1938 exchange of letters between U.S. Secretary of State Cordell Hull and the Mexican Foreign Ministry, prompted by Mexico's seizure of agrarian property belonging to American citizens. These exchanges are highly instructive – Mr. Hull wrote:

The taking of property without compensation is not expropriation. It is confiscation. . . . We cannot question the right of a foreign government to treat its own nationals in this fashion if it so desires. This is a matter of domestic concern. But we cannot admit that a foreign government may take the property of American nationals in disregard of the rule of compensation under international law. Nor can we admit that any government unilaterally and through its municipal legislation can, as in this instant case, nullify this universally accepted principle of international law, based as it is on reason, equity and justice. . . . The right of prompt and just compensation for expropriated property is a part of this [international legal] structure.¹⁰²

The response of the Mexican Minister of Foreign Affairs was equally fascinating:

My Government maintains . . . [that] there does not exist in international law any principle universally accepted by countries, nor by the writers of treatises on this subject, that would render obligatory the giving of adequate compensation for expropriations of a general and

¹⁰⁰ HISTORY OF ICSID, *supra* note 8.

¹⁰¹ The Law of International Investment refers to a set of procedural and substantive rules that generally govern the relationship between the foreign investor, the state of the investor's nationality, and the host state. THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 6 (Peter Muchlinski, Frederico Ortino & Christoph Schreuer eds., 2008).

¹⁰² Letter from Cordell Hull, U.S. Secretary of State, to Mex. Ambassador to the U.S. (July 21, 1938), *excerpted in* LOWENFELD, *supra* note 3, at 476.

impersonal character. Nevertheless, Mexico admits, in obedience to her own laws, that she is indeed under obligation to indemnify in an adequate manner; but the doctrine which she maintains on the subject, which is based on the most authoritative opinions of writers of treatises on international law, is that the time and manner of such payment must be determined by her own laws.¹⁰³

This classic adaptation of what is popularly known as the Calvo doctrine undoubtedly provided the philosophical impetus for the initial unanimous rejection of the idea of a World Bank affiliated supranational arbitral body by the South American countries.¹⁰⁴ When the ICSID proposal was presented at the annual meeting of the Bank in Tokyo in 1964, all South American states voted “no” prompting the Latin press to famously tout “El No de Tokyo.”¹⁰⁵ A World Bank affiliated commentator aptly characterized it as the “Calvoesque rejection of foreign intervention.”¹⁰⁶

The Bank’s exchanges with the South American jurists during one of the legal consultative meetings in June 1964 provide valuable insight as to where they stood on the philosophical question and in fact offer good contrast with the African jurists’ position discussed below. The discussion was led by the then-World Bank General Counsel Aron Broches, who later became the first Secretary General of ICSID, subsequently serving in that capacity for thirteen years.¹⁰⁷

On the afternoon of Monday, February 3, 1964, Mr. Broches opened the first session of the consultative meeting in Santiago, Chile. The first reaction he received was the following seemingly

¹⁰³ Letter from Mex. Minister of Foreign Affairs to U.S. Ambassador (Aug. 3, 1938), excerpted in LOWENFELD, *supra* note 3, at 477.

¹⁰⁴ *Id.* at 540.

¹⁰⁵ *Id.*

¹⁰⁶ Paul C. Szasz, *The Investment Disputes Convention and Latin America*, 11 VA. J. INT’L L. 256, 259 (1971). Although there are other related reasons for the Latin American countries’ rejection of the idea, it is clear that the dominant reason was one derived from the Calvo doctrine: “that the Convention, which of course can be used only in relation to an alien investor, offends against the rule that foreigners must be treated equally with citizens.” *Id.* at 261 (citing José R. Chiriboga, *International Arbitration*, 4 INT’L LAW 801, 804 (1970)).

¹⁰⁷ Aron Broches Retires as Vice President and General Counsel, THE WORLD BANK, <http://go.worldbank.org/JDT8LQZ890> (last visited Mar. 18, 2013).

supportive statement by the representative of the Chilean Government, Mr. Brunner:

[T]he draft convention touched on novel problems and concepts in the field of international law in giving individuals direct access to States before international tribunals. The most enlightened jurists had long denied that only States could be subjects of international law Direct access of individuals to an international jurisdiction which was found in the Statute of the Central American Court of Justice and had been acquiring increasing importance in the European Economic Community was being projected upon the world plane through the initiative of the International Bank.¹⁰⁸

As the day progressed, stronger opinions were expressed. Mr. Ribeiro of Brazil made the following classic Calvoesquian statement: "[D]espite the optional character of the draft Convention, foreign investors would be granted a legally privileged position, in violation of the principle of full equality before the law."¹⁰⁹ Similarly, Mr. Escobar of Bolivia said:

[T]he sovereignty of States could not be subordinated to the authority of an international institution without being seriously impaired. . . those responsible for preparing the draft had failed to appreciate its adverse effects. Thus the Bank itself seemed to be displaying a lack of confidence in the institutions of the countries wishing to attract foreign capital.¹¹⁰

Having made that statement, he finally urged the Bank to abandon the idea altogether.¹¹¹

Another salient issue that the South American experts raised was the proposed affiliation of the Centre with the World Bank and, related to that, its location at the Headquarters of the Bank in Washington, D.C. Some experts suggested that it be allowed to

¹⁰⁸ HISTORY OF ICSID, *supra* note 8, at 305. Note that this statement is a summary contained in the report. It is not an exact transcription of the delegate's statements.

¹⁰⁹ *Id.* at 306.

¹¹⁰ *Id.* at 308.

¹¹¹ *Id.*

function in the country where the dispute arose.¹¹² Responding to these types of concerns, the chair said that if the affiliation of the Centre with the Bank were agreed upon, its location would be of secondary importance, and “should be decided on grounds of practicability.”¹¹³

Despite Mr. Broches’ able chairmanship and great efforts to convince, the negative sentiment dominated the entire consultative process, explaining the nearly universal rejection of the idea by the South American states.

Commentators later criticized the rejection. According to Szasz, for example, “[T]he Centre, as an international institution in which all Contracting States participate equally, must not be considered as a foreign power of the type against which the Latin Americans had for generations girded themselves.”¹¹⁴ In an effort to encourage the South American countries to accept the Convention, the same commentator warned that they were in competition with “capital-hungry and more flexible States.”¹¹⁵ Although there is no reference to specific countries, it is clear that the reference was made to African countries, which overwhelmingly accepted the Convention with enthusiasm from the very beginning. What then explains such a radically different approach by two capital receiving continents with relatively similar colonial experience? Did they have differing philosophical understandings? Where did Africa stand on the Hull-Calvo debate?

Former International Court of Justice President, Judge T.O. Elias expresses the dominant customary African conception of the ownership of land as: “I conceive that land belongs to a vast family of which many are dead, few are living, and countless members are unborn.”¹¹⁶ He notes that these conceptions are largely shared across many African societies.¹¹⁷ Although the expression suggests some form of communalism, individual possessory rights are recognized. Such rights were almost

¹¹² *Id.* at 312–13 (statement of Mr. Salazar, representative of Ecuador).

¹¹³ *Id.* at 313 (statement of Mr. Broches, the Chairman).

¹¹⁴ Szasz, *supra* note 106, at 259.

¹¹⁵ *Id.* at 265.

¹¹⁶ T. OLAWALE ELIAS, *THE NATURE OF AFRICAN CUSTOMARY LAW* 162 (1956) (quoting a statement made by a Nigerian chief to the West African Lands Committee in 1912).

¹¹⁷ *Id.* at n.1 and accompanying text.

indistinguishable from the concept of fee simple absolute under common law, except, unlike the Crown in England, the African customary chiefs never had a claim of ownership of all land and never considered all inhabitants their tenants.¹¹⁸ The chief “enjoys only an administrative right of supervisory oversight of the land for the benefit of the whole community.”¹¹⁹ Judge Elias characterizes the African customary land tenure system as “primitive communism” and describes the rights and responsibilities of the individual and the group.¹²⁰ Professor Lesley Obiora’s account of the conditions of alienability of property is instructive. She writes: “Members of a family, irrespective of sex, were entitled to occupancy and user rights subject to good behavior. While rights accruing via citizenship could not be ceded any more than citizenship on which they rested, persons could transfer their interest in land that they improved.”¹²¹ More importantly, however:

[T]here was a practical restraint on alienation insofar as the transferee had to be someone acceptable to the local community because the spatial proximity and the conditions of production meant that the transferee invariably associated with and was incorporated into the community. In this sense, political affiliation modified particular rights based on creative preemption.¹²²

It is clear, however, that the land and property ownership regime under African customary law—although replete with inconsistencies across the various societies—had solid and sophisticated philosophical foundations and less solicitous of more rights for outsiders.¹²³

¹¹⁸ *Id.* at 164.

¹¹⁹ *Id.* at 164-65.

¹²⁰ *Id.* at 83-92.

¹²¹ L. Amede Obiora, *Remapping the Domain of Property in Africa*, 12 U. FLA. J.L. & PUB. POL’Y 57, 60-61 (2000) (citing Elizabeth Colson, *The Colonial Period and Land Rights in COLONIALISM IN AFRICA 1870-1960: VOL. 3, PROFILES OF CHANGE: AFRICAN SOCIETIES AND COLONIAL RULE* 197, 200 (Peter Duigan, L.H. Gann & Victor Turner eds., 1971); ELIAS, *supra* note 116, at 167).

¹²² Obiora, *supra* note 121, at 60.

¹²³ 1 READINGS IN AFRICAN LAW 356, 356-90 (Eugene Cotran & N.N. Rubin eds., 1970).

As fate would have it, however, with the advent of colonialism, the philosophical foundations of the African notions of property and the modes and hierarchy of its allocation were “distort[ed]” and “disoriented.”¹²⁴ It is evident that “[c]olonial officials assumed that land must have an owner exercising a full range of rights parallel to those covered by the European concept of proprietary ownership.”¹²⁵ As Professor Obiora further notes, “[t]he development of new forms of property and technologies of production, the possibilities of individual acquisition, the acculturation of different values, reworked patterns of consumption and the like, redefined the socio-economic terrain.”¹²⁶ Upon independence, most African countries sought refuge in the communist ideologies of the Soviet Union (USSR), and latterly, the People’s Republic of China (PRC).¹²⁷ These ideologies have an unwavering stance on ownership of property. Marxism, the essential philosophical foundation, holds that private ownership of property enables the “exploitation of man by man.”¹²⁸ It makes no distinction between citizens and aliens. If the philosophical foundations of the time were seemingly more aligned with the Calvo doctrine, what then allured the African states into instantly accepting ICSID? Examination of the history might shed some light.

3.2. *Why Did African States Accept ICSID?*

The historical record clearly indicates that the only reason that the African states accepted ICSID is because they thought that they had to do so in order to attract private foreign investment to

¹²⁴ RENÉ DAVID & JOHN E.C. BRIERLEY, *MAJOR LEGAL SYSTEMS OF THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW*, 562 (3d ed. 1985). Although Professors David and Brierley say this in the broader context of the impact of colonial legal systems on African customary law, it is clear that the fate of the law of property was the same.

¹²⁵ Obiora, *supra* note 121, at 62.

¹²⁶ *Id.* at 66.

¹²⁷ Beverly I. Moran, *Homogenized Law: Can the United States Learn From African Mistakes?*, 25 *FORDHAM INT’L L.J.* 361, 367 (2001) (citing MICHAEL HODD, *THE ECONOMIES OF AFRICA* 34-35 (1991)). For a fuller discussion of Africa’s relationship with the USSR and PRC, see *SOVIET AND CHINESE AID TO AFRICAN NATIONS* (Warren Weinstein & Thomas H. Henriksen eds., 1980). For a detailed description of China’s involvement with the African nations, see ALAN HUTCHINSON, *CHINA’S AFRICAN REVOLUTION* (1975).

¹²⁸ KARL MARX & FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO* 172 (1948).

develop their ailing post-colonial economies.¹²⁹ Consider the summary of recorded proceedings of the African legal consultative meeting that took place in Addis Ababa between December 16 and 20 in 1963.¹³⁰ This meeting was also chaired by World Bank General Counsel Broches.¹³¹ It focused on at least four aspects of the proposal: (1) purpose and justification, (2) jurisdiction, (3) affiliation and location, and (4) panels.¹³² Each is discussed briefly as follows:

3.2.1. *Purpose and Justification*

The historical record is unambiguous on this point. It suggests that the participating African legal experts overwhelmingly believed that a reputable international dispute settlement mechanism would alleviate Africa's problem of attracting foreign investment. For example, the Executive Secretary of the Economic Commission for Africa, in a statement he made at the beginning of the meeting, said that:

[P]rivate capital was not moving in sufficient volume to areas in need of capital, one of the most serious impediments to its flow [was] the fear of investors that their investment would be exposed to political risks such as outright expropriation. . . . The Bank had therefore been led to wonder whether, in view of its reputation for integrity and its position of impartiality, it could not help in removing that obstacle to private investment.¹³³

The representatives of almost all of the twenty-nine states present in that meeting echoed that sentiment while raising some concerns about the jurisdiction, affiliation, location, and composition of panels.¹³⁴ The record interestingly shows that one of the vocal supporters of the initiative was Judge T.O. Elias, who was then a young representative of the Nigerian Government many years

¹²⁹ See HISTORY OF ICSID, *supra* note 8, at 236 (summarizing a statement by the Executive Secretary of the Economic Commission for Africa calling for a legal regime to promote private foreign investment).

¹³⁰ *Id.* at 236-98.

¹³¹ *Id.* at 236.

¹³² See *infra* notes 133-56 and accompanying text (providing a detailed summary of the delegates' discussion of these four areas).

¹³³ *Id.* at 240.

¹³⁴ *Id.* at 243-98.

before he ascended to the presidency of the International Court of Justice.¹³⁵

3.2.2. *Jurisdiction (Powers and Functions of the Centre)*

Objections were raised on the most fundamental question of standing of a private investor to proceed against a sovereign state in an arbitral forum.¹³⁶ Questions were also raised in connection with the complexities of dual nationality, i.e., whether a person including a juridical person having the nationality of the host state as well as another Contracting State may avail herself/itself of the benefits of the Convention.¹³⁷ A more serious objection to the jurisdiction of the Centre came from the representatives of Cameroon and Tunisia, who said that if a state expropriates property of a foreign investor in the public interest, “the only question that could be submitted to the Centre [should be the] adequacy of [the] compensation.”¹³⁸ Related to this, the representative from Cameroon asked, “where the parties had undertaken to have recourse to arbitration without specifying the law to be applied . . . would the tribunal be competent to decide upon the legality of such a sovereign act, and if so, by reference to which system of law?”¹³⁹ Although these objections mirror the objections of the South American bloc, they were not raised so vigorously and widely enough as to result in the majority’s rejection of the idea.¹⁴⁰

3.2.3. *Affiliation and Location*

Although the idea that the Centre’s affiliation with the Bank would give it appropriate prestige has not been disputed, concerns were raised with respect to the role of the President of the Bank as the chair of the Administrative Council and the location of the

¹³⁵ *Id.* at 244 (“In the opinion of his Government the document represented an attempt not only to restore the confidence of the investor but also to codify certain principles of customary law and to engage in the progressive development of international law, and he warmly recommended it.”).

¹³⁶ *Id.* at 256 (“[T]he effect of Article II, Section 1 would be to place nationals on a par with States. That represented a departure from customary international law and was a step which should not be taken lightly.”).

¹³⁷ *Id.* at 256–57.

¹³⁸ *Id.* at 259.

¹³⁹ *Id.* at 267.

¹⁴⁰ *See supra* Section 3.1 (discussing the objections of South American countries to ICSID).

Centre at the headquarters of the Bank in Washington, D.C. For example, one representative noted, "while the connection of the Center with the Bank would give the Center added prestige, the intention was nonetheless to create an independent body. It might therefore be desirable to indicate at the outset . . . that the seat of the Center could be transferred to another location."¹⁴¹ Similarly, another delegate questioned the appropriateness of the appointment of the President of the Bank as the chair of the Administrative Council. He noted in particular that "certain countries might not wish to include an arbitration clause in the possible arrangements owing to the preponderant role of the Chairman in the functioning" and inquired "whether it would not be possible to transfer some of the functions at present vested in the Chairman to some other person or body."¹⁴² The Bank's response to this inquiry was that "the draft Convention had been drawn upon the assumption that the link with the International Bank was considered beneficial and that the President of the Bank was recognized to be a suitable person for the functions vested in him."¹⁴³

As far as the place of the proceedings was concerned, at least two views were expressed: leaving the designation of the place to the Administrative Council or leaving the choice to the parties, with the understanding that the arbitral tribunal would pick the location if the parties failed to agree, similar to most commercial arbitral rules.¹⁴⁴ The final text provided that the "proceeding shall be held at the seat of the Centre."¹⁴⁵ Exceptions included the Permanent Court of Arbitration (PCA) at The Hague, any other facilities with which the Centre had made arrangements, and other places "approved by the Commission or Tribunal after consultation with the Secretary-General."¹⁴⁶

¹⁴¹ *Id.* at 248 (statement of the representative of United Arab Republic, Mr. Moustafa).

¹⁴² *Id.* (statement of the representative of Sierra Leone, Mr. Macaulay).

¹⁴³ *Id.* (statement of Mr. Broches, General Counsel of the Bank who chaired the meeting).

¹⁴⁴ *Id.* at 278 (statements of Mr. Elias of Nigeria and Mr. Macaulay of Sierra Leone).

¹⁴⁵ ICSID Convention, *supra* note 4, at art. 62.

¹⁴⁶ *Id.* at art. 63.

3.2.4. Panels /Arbitrators

The discussion on the panels and selection of arbitrators focused on at least two major points: qualifications and diversity of nationality. The African experts repeatedly emphasized the need for appointing persons with appropriate expertise in the field of international arbitration. For example, the representative of Dahomey (now the Republic of Benin) urged that the Administrative Council should make sure that the arbitrators it appoints are "technically competent."¹⁴⁷ Similarly, Mr. Elias of Nigeria suggested that:

if the parties to a dispute were to be given the freedom to appoint to a tribunal or commission persons from outside the Panels, that freedom should be qualified by a requirement that the persons so appointed should not be of a quality inferior to those designated to the Panels [by the President of the Bank].¹⁴⁸

Once the idea of the constitution of a panel of experts from which arbitrators would be drawn for each case, either by appointment or party choice, had been agreed to, a heated discussion ensued on the question of disqualification of arbitrators. The draft provided that arbitrators appointed by the Chairman (World Bank President) may only be challenged based on facts that have occurred subsequent to the appointment, while party-selected arbitrators may be challenged and disqualified on the basis of "any fact antecedent or subsequent to their appointment."¹⁴⁹ Because of the vigorous resistance to the idea of giving the Chairman's appointees a privileged position with respect to challenge and disqualification, the Chair of the meeting took note and said that he would seek further opinion in subsequent deliberation with

¹⁴⁷ HISTORY OF ICSID, *supra* note 8, at 245.

¹⁴⁸ *Id.* at 265.

¹⁴⁹ *Id.* at 276 (statements of Mr. Macaulay representative of Sierra Leone) ("[I]f, for example, an arbitrator appointed by the Chairman were challenged on grounds that he had a personal interest in the matter in dispute, the Chairman would be entitled to say that he had known of that interest but had not considered it a valid objection to his appointment, and his decision would be unchallengeable. It is not a matter of questioning the Chairman's integrity but his judgment.").

various stakeholders.¹⁵⁰ The final version did indeed abandon such privileged treatment.¹⁵¹

The importance of prohibiting arbitrators with the nationality of the disputing parties also raised a controversy. The most appealing opposition to the idea came from Mr. Moustafa of Egypt (then called the United Arab Republic). He noted in particular that "*An arbitrator of the same nationality as the party to the dispute was more likely to understand the issues involved and to be in a better position to offer the necessary explanations; he might even make an unfavorable award more acceptable.*"¹⁵² He seriously questioned the exact reason why nationality could exclude an otherwise qualified arbitrator. The record shows that the chair did not answer this question satisfactorily but simply said that he personally favored the exclusion approach.¹⁵³ The final text also disregarded the idea of the cultural competence of the arbitrators. It indeed maintained the idea that arbitrators appointed by the Chair when the parties fail to agree "shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute."¹⁵⁴ Although the merits of this approach might be debatable, the final text's entire omission of the cultural competence of arbitrators is worth noting. As a prelude to the discussions that follow, it is important to take note of the exact arbitrator qualifications that the Convention provides in Article 14:

(1) Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

(2) The Chairman, in designating persons to serve on the Panels, shall in addition pay due regard to the importance of assuring representation on the Panels of the principal

¹⁵⁰ *Id.* at 276 (statement of Mr. Broches, Chair of the meeting).

¹⁵¹ ICSID Convention, *supra* note 4, at arts. 56–58.

¹⁵² HISTORY OF ICSID, *supra* note 8, at 266 (emphasis added).

¹⁵³ *Id.*

¹⁵⁴ ICSID Convention, *supra* note 4, at art. 38.

legal systems of the world and of the main forms of economic activity.¹⁵⁵

It is important to note that the required qualifications are limited to good moral character, technical competence, and impartiality.¹⁵⁶ It is also worth noting that the requirements of diversity in subsection (2) are limited to legal systems and economic activity.

4. REVIEW OF THE AFRICA SPECIFIC DATASET: QUANTITATIVE INDICATORS¹⁵⁷

As of this writing, the ICSID database contains sixty-four completed cases involving at least one African state as the respondent. The data is broken down as follows:

4.1. Arbitrator Nationality

Of the sixty-four completed cases, sixty-one provide arbitrator nationality. The data shows that the pool of arbitrators in these cases consisted primarily of Europeans. Of the cases analyzed, fifty-nine percent of the arbitrators of initial case submissions were European. Europeans were appointed presidents of tribunals of initial case submissions in forty-three of the sixty-one cases, which is roughly seventy percent of the cases. In the cases where annulment proceedings commenced, twenty-four European arbitrators were on panels of Ad Hoc committees for the annulment proceedings. Europeans were appointed presidents of Ad Hoc committees in ten of the fourteen annulment proceedings, roughly seventy percent of the proceedings.

North America was the second most represented region. North American arbitrators made up fourteen percent of the panels of initial case submissions. North Americans were appointed presidents of four tribunals of initial case submissions, which is roughly six percent of the cases. Four North American arbitrators were on panels of Ad Hoc committee for annulment proceedings and three North Americans were appointed president of Ad Hoc committees, which is roughly twenty-one percent of the committees.

¹⁵⁵ *Id.* at art. 14.

¹⁵⁶ *Id.*

¹⁵⁷ The statistical analysis included in this section is entirely based on data available on the ICSID website. *ICSID Cases*, ICSID, *supra* note 68.

African representation on panels was close behind that of North America, with African arbitrators making up twelve percent of the panels of initial case submissions. Africans were appointed presidents of two tribunals of initial case submissions, which is roughly three percent of the cases. Eight African arbitrators were on panels of Ad Hoc committees for annulment proceedings.

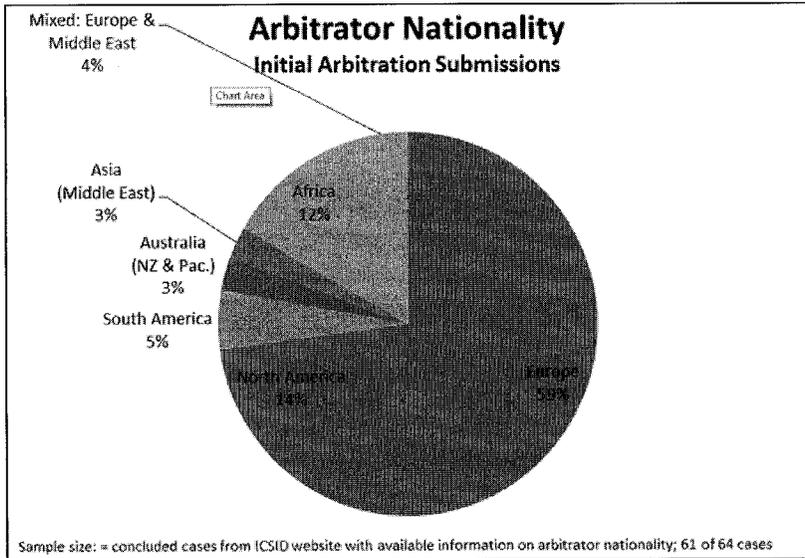
Arbitrators from South America made up five percent of the panels of initial case submissions. South Americans were appointed presidents of six tribunals, roughly ten percent. Three South American arbitrators were on panels of Ad Hoc committees for annulment proceedings

Arbitrators from the Australia region made up three percent of the panels of initial case submissions. Arbitrators from the Australia region headed two tribunals, one as president and one as sole arbitrator (*CDC Group v. Republic of Seychelles* (ARB/02/14)).¹⁵⁸ Two arbitrators from the Australia region were on panels of Ad Hoc committees for annulment proceedings.

Arbitrators from Asia and the Middle East made up three percent of the panels of initial case submissions. An arbitrator from the Asia/Middle East region was appointed president of one tribunal. Three arbitrators from Asia and the Middle East were on panels of Ad Hoc committees for annulment proceedings and one was appointed president of the Ad Hoc committee. The following chart demonstrates these statistics.

¹⁵⁸ For a breakdown of the arbitrators in this case, see *List of Concluded Cases: 107. CDC Group plc v. Republic of Seychelles* (ICSID Case No. ARB/02/14), ICSID, <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtIsRH&actionVal=ListConcluded> (last updated Feb. 28, 2014).

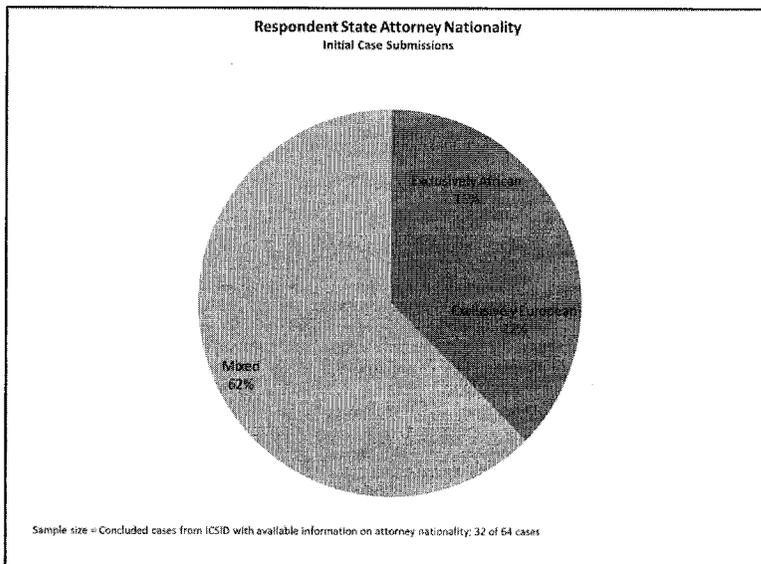
Figure 1



4.2. Counsel Nationality

The nationality of counsel representing the African states in these proceedings is provided in thirty-two of sixty-four cases. While in sixteen percent and twenty-two percent of these cases, the respondent states were represented by exclusively African and exclusively European counsel respectively, in the great majority of cases—i.e., sixty-two percent of the cases—the African states were represented by counsels composed of different nationalities including the specific African respondent state, European, American, and Australian.

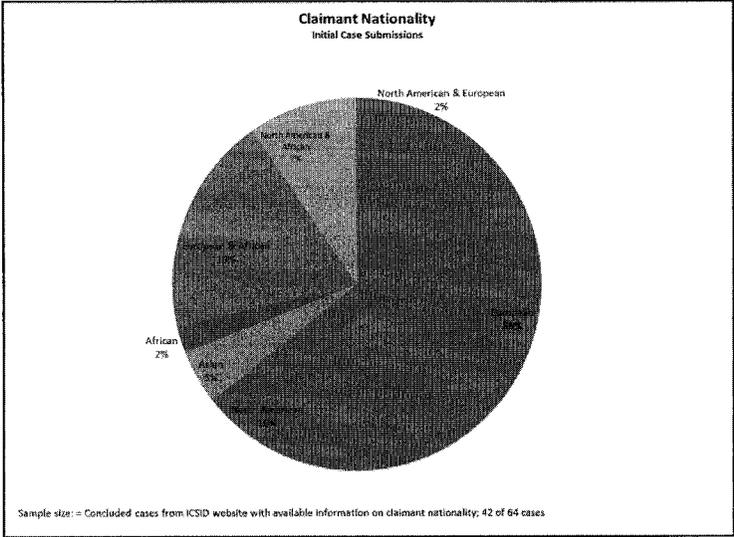
Figure 2



4.3. Claimant Nationality

In forty-two of the sixty-four cases, the publicly available data provides the nationality of the claimants. The majority of the claimants were from Europe, i.e., fifty-five percent with an additional ten percent representing a joint venture of European and North American investors. In an additional nineteen percent of the cases, European investors collaborated with African investors, and in seven percent of the cases North American investors collaborated with African investors. Only five percent and two percent of the cases involved exclusively Asian and African investors, respectively.

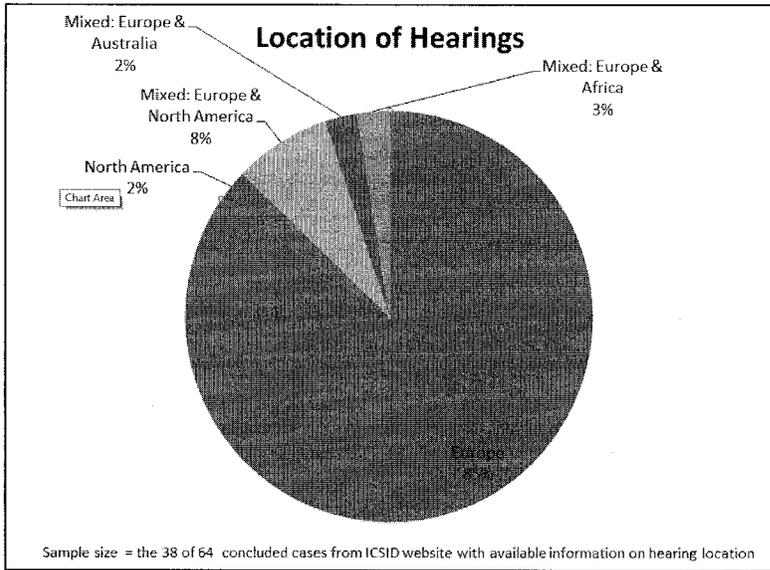
Figure 3



4.4. Location

The location of the arbitration (meaning the location of the actual hearing) is indicated in thirty-eight of the sixty-four cases. In eighty-five percent of the initial case submissions, hearings took place in Europe exclusively with an additional thirteen percent of the initial case submissions holding hearings in Europe along with another location. North America was the hearing location for two percent of the initial case submissions. No case was heard in Africa.

Figure 4

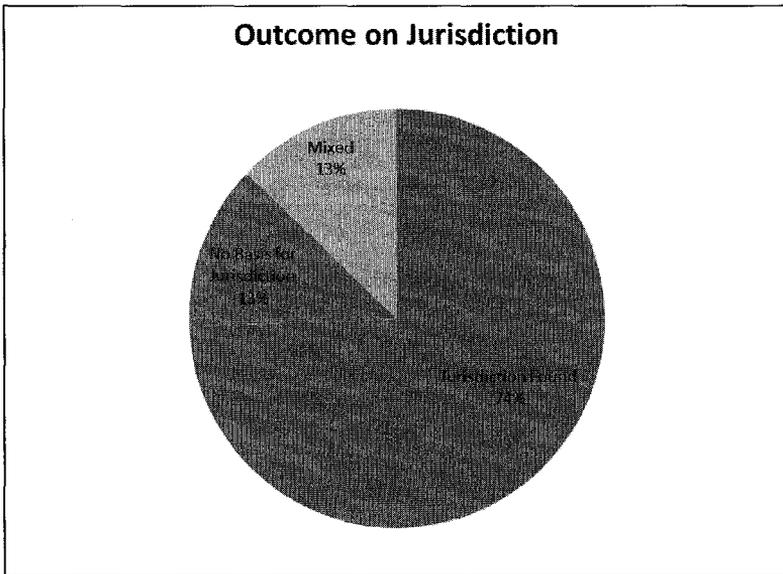


The data is thus unambiguous: African states routinely arbitrate cases with private investors almost exclusively in Washington, D.C., Paris, or London before three Western arbitrators and represented by Western law firms. They obviously spend a lot of money. What is the nature of the justice that they buy in Washington, Paris, or London?

4.5. Outcome on Jurisdiction

Outcome on jurisdictional challenges is indicated in thirty-seven of the sixty-four cases. A basis for jurisdiction was found in seventy-four percent of the cases, while thirteen percent of the cases found no basis for jurisdiction. Mixed outcomes on jurisdiction occurred in thirteen percent of the cases.

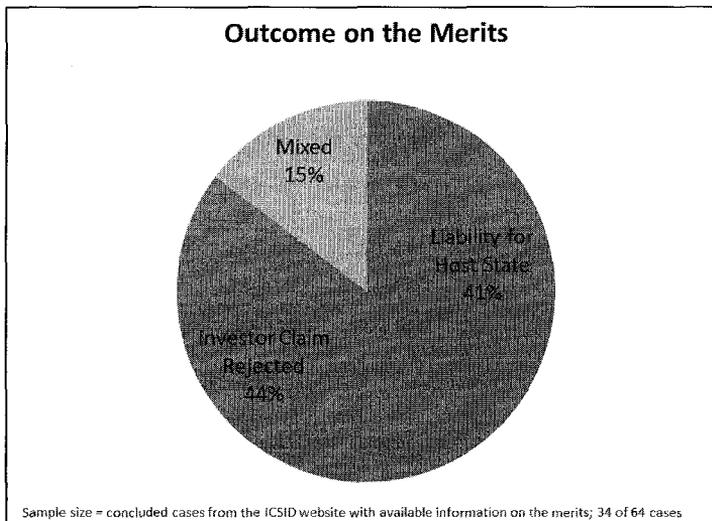
Figure 5



4.6. Outcome on the Merits

Outcome on the merits of the case is indicated in thirty-four of the sixty-four cases. In forty-four percent of the cases, investor claims were rejected, while forty-one percent of the cases found the respondent state liable. Another fifteen percent of the cases had a mixed outcome. As shown in the following chart, the outcome on the merits is fairly balanced.

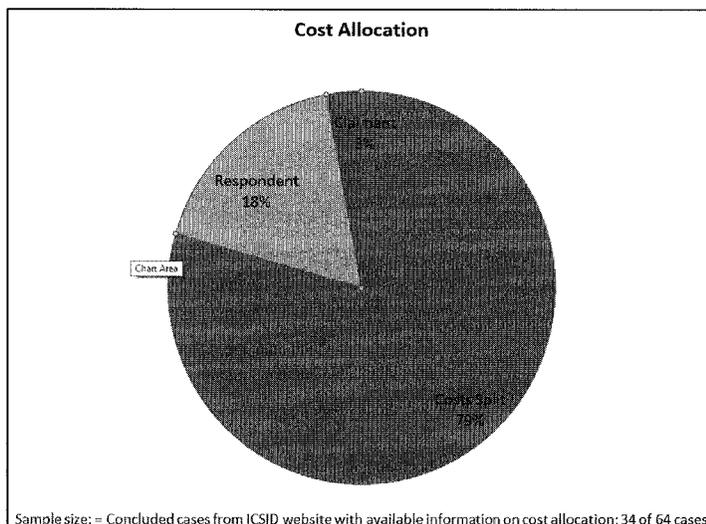
Figure 6



4.7. Allocation of Cost

Cost allocation is indicated in thirty-four of the sixty-four cases. In all but seven cases, the cost was split, i.e., each party was required to cover its own expenses and pay half of the costs of the tribunal. In six of the remaining seven cases, the respondent state was required to pay all or some parts of the claimant's costs. In one case the parties were required to pay their own expenses, but the respondent state was required to pay tribunal's costs, but that was included in the split category in the chart below. The investor-claimant was required to pay the respondent state's costs in only one case.

Figure 7



5. THE VIRTUES OF ARISTOCRATIC JUSTICE

The study described above shows that in the last half-century, African states defended investment claims in Europe and the United States, and prevailed on the merits in about half of the cases. The data also shows that ICSID tribunals found jurisdiction in the overwhelming majority of cases. It also shows that no matter who prevailed, the tribunals allocated costs evenly in the great majority of cases and awarded costs to the respondent state in only one case. This obviously paints a more complicated picture and invites deeper inquiry; the following sections make such attempt.

5.1. Who Are the “Virtuous” Men?

In their groundbreaking work, *Dealing in Virtue*, Professors Yves Dezalay and Bryant Garth equate virtue with “symbolic capital”:

Only a very select and elite group of individuals is able to serve as international arbitrators. They are purportedly selected for their ‘virtue’—judgment, neutrality, expertise—yet rewarded as if they are participants in international deal making. In more sociological terms, the *symbolic capital* acquired through a career of public service

or scholarship is translated into a substantial cash value in international arbitration.¹⁵⁹

They state that this “symbolic capital” can be arbitrarily acquired¹⁶⁰ and go on to make a historical comparison:

The careers of these noble individuals recall accounts of the medieval church. The son of a nobleman could become a bishop of the church simply because of family background and social prominence. Others would shave their heads, take vows of celibacy, devote everything to the church, and yet have no chance to rise to a position of eminence, such as bishop. Their hard work would help maintain the institutional structure that made the position of bishop attractive to the son of a nobleman, but they lacked the social platform to gain the top position.¹⁶¹

So how is this related to a career in arbitration? They continue to write:

There is similar phenomenon in arbitration. Without a suitable platform, defined now as more than social class (which is nevertheless useful), the arbitration devotee can never get selected as an arbitrator. There are individuals who, for example, teach at low-prestige schools, work in unknown law firms, or produce scholarship that is deemed to be too marginal, who cannot gain access to this world no matter how much they write, attend conferences, or in general profess the faith. Others need not even profess the faith or write about arbitration to enter the field more or less at the top.¹⁶²

So, who are these noble men? A generic description of their qualifications may read something like “academic standing, scholarly publication, particular kinds of practical experience, training in alternative dispute resolution, connections to business, connections to political power, particular language skills, [and]

¹⁵⁹ YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 8 (1996).

¹⁶⁰ *Id.* at 18.

¹⁶¹ *Id.* at 23.

¹⁶² *Id.*

proficiency in technical aspects of arbitration practice.”¹⁶³ More importantly, “the weight of different agents depends on their symbolic capital, i.e., on the recognition, institutionalized or not, that they receive from a group.”¹⁶⁴

Consider the “five-million-pound man,” Swiss arbitrator Pierre Lalive.¹⁶⁵ The media report exaggerated the fee he charged in the Westland case. It was not quite five-million pounds, but rather 4,697,258 British Pounds.¹⁶⁶ Lalive’s judgment may or may not be worth that much, similar to many professional services that consumers purchase on the marketplace,¹⁶⁷ but Dezalay and Garth use his career path to exemplify what it takes to join the aristocratic club: together with his renowned older brother, Lalive is a partner at the Lalive Law firm in Geneva; has written many books and articles; possessed an academic appointment in Geneva; taught at Columbia, Cambridge, the University of Brussels, and the Hague Academy of International Law; and served as president of the ICC’s Institute of Business Law and Practice, a member of the London Court of International Arbitration, and president of the Swiss Arbitration Association.¹⁶⁸

Although the arbitration field is still dominated by persons of this caliber, today’s career path is probably more like Jan Paulsson’s, whom Dezalay and Garth say is “the closest equivalent in his generation to Pierre Lalive of the older generation.”¹⁶⁹ Consider Paulsson’s ticket to prominence: multi-cultural upbringing (a son of Swedish missionaries, and grew up in Liberia), excellent academic credentials (Harvard College and Yale Law), early practice exposure to international arbitration, sustained

¹⁶³ *Id.* at 19.

¹⁶⁴ *Id.* at 18 (quoting PIERRE BOURDIEU & LOIC J. D. WACQUANT, AN INVITATION TO REFLEXIVE SOCIOLOGY 119 (1992)) (emphasis omitted).

¹⁶⁵ *Id.* at 19 n.3 (citing Jeremy Edwards, *The Five-Million Pound Man*, LEGAL BUSINESS, Nov. 1994, at 46–49). Lalive obtained such a large fee from the *Westland Helicopters Ltd. v. Arab Organisations for Industrialisation* case involving hundreds of millions. For a discussion of this case, see Justice Colman, *Westland Helicopters Ltd v. Arab Organisations for Industrialisation*, 10 ARAB L. Q. 115–43 (1995).

¹⁶⁶ DEZALAY & GARTH, *supra* note 159, at 19 n.3.

¹⁶⁷ Note the similarity of this with the recent debate on Wall Street executive compensation. See Frank Ahrens, *Isn’t That Rich? The Bonus Controversy of 2009*, WASH. POST, <http://www.washingtonpost.com/wp-srv/special/opinions/outlook-bonus/> (last visited Mar. 13, 2014) (compiling opinions of politicians and chief executives on the fairness of Wall Street bonuses).

¹⁶⁸ DEZALAY & GARTH, *supra* note 159, at 20.

¹⁶⁹ *Id.* at 24.

high-quality scholarly production and a great platform as a partner at one of the world's most prominent international arbitration firms, and as a professor at an American law school.¹⁷⁰ Everything is just right. That is how the virtue is acquired and maintained. Indeed, to use Professor Salacuse's characterization, these experts are members of an "epistemic community" with the ability to influence policy and shape jurisprudence.¹⁷¹

5.2. *Why Do the Africans Appoint the Virtuous Men?*

Simply stated, these men are evidently appointed because of their virtue. Africa is certainly under no obligation to appoint them as arbitrators or counsel. Consider this true statement:

Overall, who the arbitrator is in terms of expertise and prior experience is the most important single factor in both the decisional and the consensus processes. *Who* he or she is determines the availability of both substantive and fact finding norms, conditions the procedural and role norms that are held, and raises or lowers the degree of influence in interaction with other arbitrators.¹⁷²

This is often expressed—similar to the well-known real estate maxim—as "arbitrator, arbitrator, arbitrator."¹⁷³

¹⁷⁰ *Id.* For Paulsson's current biography, see also *Governing Board*, ICCA, http://www.arbitration-icca.org/about/governing-board/President/Jan_Paulsson.html (last visited Jan. 22, 2014).

¹⁷¹ Salacuse, *supra* note 3, at 465–67 (noting that "[s]ince the movement to negotiate investment treaties began, the epistemic community of international lawyers, scholars, jurists, and arbitrators has, through their advising, writing, advocacy, and judicial, and arbitral decisions, shaped the regime" of international investment," and noting further that to the extent there is coherence in the regime, it could be attributed to the similarity in the backgrounds of the members of the epistemic community who are mainly Western). Salacuse cites to the ICSID database which shows forty-three percent of arbitrators appointed so far being from only five countries, the United States (120), France (106), Britain (94), Canada (75), and Switzerland (70). *Id.* at 467 n.191 and accompanying text. Salacuse concludes that "arbitrators are very much a part of an international epistemic community with similar training and, in many cases, comparable background." *Id.* at 467.

¹⁷² DEZALAY & GARTH, *supra* note 159, at 8 n.6 (citing Mentschikoff & Haggard, *Decision Making and Decision Consensus in Commercial Arbitration*, in *LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES* 295, 307 (June Louin Tapp & Felice J. Levine eds., 1977)).

¹⁷³ William W. Park, *Arbitrator Integrity*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION*, *supra* note 38, at 189, 191 n.4.

Why do they nominate Queen's Counsel, Sir Ian Brownlie,¹⁷⁴ if the opposing party picks Queen's Counsel Sir Elihu Lauterpacht?¹⁷⁵ If the judge is Lalive, why does the respondent African state choose to hire Paulsson as counsel? If the system is manned by virtuous men of this stature, what options do the Africans have? What sustains the imbalance is simply put as a race to the top. There is no doubt that these learned men bring prestige and produce high quality jurisprudence, but does it necessarily mean that their appointment improves the quality of the justice that the African states receive? Or are the Africans perpetually defending themselves using everything in their arsenal? What is the nature of the justice that emerges out of this process?¹⁷⁶ The case studies provided in the next section will help shed some light.

¹⁷⁴ Sir Ian Brownlie is one of the most recognizable names in the area of international law. Before his death in Cairo at age seventy-seven, for over a period of twenty-five years, he appeared before the International Court of Justice in more than forty contentious cases. Philippe Sands, *Sir Ian Brownlie Obituary*, THE GUARDIAN (Jan. 11, 2010, 1:02 PM), <http://www.guardian.co.uk/theguardian/2010/jan/11/sir-ian-brownlie-obituary>. He had "a formidable reputation for integrity and independence." *Id.* His book, *Principles of Public International Law*, now in its eighth edition, is one of the most widely used treatises in the world. It has been translated into several languages including Chinese, Japanese and Russian. "Almost every international lawyer and judge has referred to this classic text." *Id.*

¹⁷⁵ Sir Lauterpacht is a prominent jurist with extensive experience as an advocate, adviser, arbitrator, and judge in many different forums involving such areas of the law as natural resources law, investment matters, expropriation, territorial and boundary problems, maritime delimitation, fisheries, and environmental issues. High profile International Court of Justice cases in which he was involved include the *Nottebohm* case, the *North Sea Continental Shelf* cases, the *Barcelona Traction* case, the *Nuclear Tests* cases, *Pakistan v. India Aerial Incident* case, *El Salvador v. Honduras*, *Kasikili* case, *Qatar v. Bahrain*, *Malaysia/Indonesia* (Sipadan and Ligitan) case, and the *Avena* case (Mexico v. US). Arbitral tribunal cases include: Chile/Argentina boundary disputes, the Egypt/Israel Tabá arbitration, the Iran-US Claims Tribunal, ICSID, etc. He was adviser on international law to the British Central Policy Review Staff, 1972-1974 and 1978-1980. He also served as an *ad hoc* Judge of the ICJ in the *Bosnia v. Yugoslavia* case (1993-2001), a member and President of the World Bank Administrative Tribunal, Chairman of the Asian Development Bank Administrative Tribunal, Chairman of the East African Common Market Tribunal, 1972-1975, a Presiding Commissioner of the UN Compensation Commission, an arbitrator in various World Bank (ICSID) and President of the Eritrea/Ethiopia Boundary Commission. His academic achievements are also equally impressive. For Sir Lauterpacht's full biography, see *Sir Elihu Lauterpacht CBE QC LL.D.*, 20 ESSEX STREET <http://www.20essexst.com/member/sir-elihu-lauterpacht> (last visited Mar. 4, 2014).

¹⁷⁶ See DEZALAY & GARTH, *supra* note 159, at 9 ("The operation of the market in the selection of arbitrators therefore provides a key to understanding the justice that emerges from the decisions of arbitrators.").

5.2.1. Case Study

Consider the following three statements on the state of a particular aspect of the law of international investment:

*"There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens."*¹⁷⁷

— Supreme Court of the United States, 1964

*"[A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios [sic], a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."*¹⁷⁸

— NAFTA Tribunal, 2005

*"[T]he obligation . . . not to nationalize . . . without fair compensation' . . . [constitutes] one of the generally recognized principles of international law."*¹⁷⁹ [Hence, full fair market value is appropriate compensation.]¹⁸⁰

— ICSID Tribunal, 1980

The arbitral process is riddled with complications flowing from legal uncertainty and fact-finding problems inherent in the law, notwithstanding the presence of competent counsel and arbitrators. For African states, this problem is compounded by the serious cultural barriers they face in not only commanding audience before the virtuous men but also in communicating with their own counsels. In order to contextualize these problems and assess the nature of justice received by the African states, three case

¹⁷⁷ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

¹⁷⁸ *Methanex Corp. v. United States*, Final Award of the Tribunal on Jurisdiction and Merits, 44 I.L.M. 1345, 1456 pt. IV, ch. D, ¶ 7 (NAFTA Ch. 11 Arb. Trib. 2005), available at <http://www.state.gov/documents/organization/51052.pdf>.

¹⁷⁹ *Benvenuti & Bonfant v. Government of the People's Republic of Congo*, ICSID Case No. ARB/77/2, Award, ¶¶ 4.63–4.64 (Aug. 8, 1980), 1 ICSID Rep. 330 (1993) (quoting Defense Memorial, People's Republic of Congo, at 5).

¹⁸⁰ *Id.* ¶¶ 4.73–4.79. This statement is my summation on this section.

studies are provided below. The purpose of this discussion is to illustrate typical factual and legal issues that arise and their resolution. Case samples were selected for demonstrative purposes only. The single most important selection criterion was the availability of a decision on the merits in English.

Before the selected cases are discussed, it is important to outline the basic framework for the constitution of arbitral tribunals under ICSID. At the most rudimentary level, the legal framework for the constitution of an ICSID tribunal is set forth under Articles 37 through 40 of the ICSID Convention.¹⁸¹ The party who wants to initiate an arbitration must first submit a request to the Secretary General of the Centre. If the request is not “manifestly” outside the jurisdiction of ICSID,¹⁸² the Secretary General registers the case, notifies the respondent and facilitates the constitution of the tribunal as soon as possible.¹⁸³ The parties appoint either a sole or an uneven number of arbitrators.¹⁸⁴ If a party or the parties fail to appoint an arbitrator or arbitrators, the Convention gives the Chairman of the Administrative Council,¹⁸⁵ who is the President of the World Bank,¹⁸⁶ the authority to make the necessary appointments.¹⁸⁷ Ordinarily, the arbitrators are

¹⁸¹ ICSID Convention, *supra* note 4, at arts. 37–40.

¹⁸² See ICSID Convention, *supra* note 4, at art. 36 (“(1) Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to the effect in writing to the Secretary-General who shall send a copy of the request to the other party. (2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings. (3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.”).

¹⁸³ *Id.* at art. 37(1).

¹⁸⁴ *Id.* at art. 37(2). For a detailed description of these provisions, see SCHREUER, *supra* note 4, at 475–89.

¹⁸⁵ The Administrative Council is composed of one representative of each Contracting State. ICSID Convention, *supra* note 4, at art. 4(1).

¹⁸⁶ *Id.* at art. 5 (“The President of the Bank shall be *ex officio* Chairman of the Administrative Council . . .”).

¹⁸⁷ *Id.* at art. 38 (“If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General . . . or such other period as the parties may agree, the Chairman shall, at the request of either party and after consultation with both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed.”). For a detailed description of these provisions, see SCHREUER, *supra* note 4, at 490–97. He

appointed from the Panel of Arbitrators.¹⁸⁸ The Panel is composed of arbitrators nominated by Contracting States and those nominated by the Chair of the Administrative Council. The Convention gives Contracting States the opportunity to nominate up to four arbitrators and the Chair to nominate ten arbitrators. The Convention allows the Contracting States to nominate persons who are not their nationals, but requires the Chair to appoint persons of different nationalities.¹⁸⁹ Although the disputing parties have the right to make appointments outside of the Panel, the Chair's choice is limited to the Panel when she exercises her default appointment authority under Article 38.¹⁹⁰

With this background on the constitution of ICSID tribunals, the following case studies identify the identity of the arbitrators and parties and their counsel, the place of arbitration, the factual and legal issues addressed, the outcome of the merits and the allocation of cost, followed by brief commentary on the nature of justice that emerge out of these cases.

*Case Study No. 1: Biwater Gauff (Tanzania) Limited (Claimant)
v. United Republic of Tanzania (Respondent)*¹⁹¹

This case, in many ways, is a quintessential investment arbitration involving an African state. The Arbitral Tribunal was composed of Mr. Gary Born, a national of the United States, appointed by the claimant; Mr. Toby Landau, a national of the United Kingdom, appointed by the respondent; and Mr. Bernard Hanotiau, a national of Belgium, appointed as president of the tribunal by the party-selected arbitrators.¹⁹² The award was rendered on July 24, 2008 and contains a 242 page majority opinion and a 10 page dissenting and concurring opinion by Mr. Gary Born. The claimant, Biwater Gauff (Tanzania) Ltd. (BGT), was

notes that "Art. 38 is the most important Article designed to safeguard the principle of non-frustration in the constitution of the tribunal." *Id.* at 490.

¹⁸⁸ ICSID Convention, *supra* note 4, at art. 40(1).

¹⁸⁹ *Id.* at art. 13(2). For a discussion of these provisions, see SCHREUER, *supra* note 4, at 45-47.

¹⁹⁰ ICSID Convention, *supra* note 4, at art. 40(1-2). For a detailed discussion of these provisions and bibliography, see SCHREUER, *supra* note 4, at 507-15.

¹⁹¹ Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award (Jul. 24, 2008), available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1589_En&caseId=C67.

¹⁹² *Id.* ¶ 25-27.

represented by counsels from the London office of Allen & Overy LLP, including Judith Gill, Matthew Gearing, Hannah Ambrose, Michelle de Kluyver, Autumn Ellis and Andrew Pullen.¹⁹³ The respondent state, Tanzania, was represented by a team of lawyers from Freshfields—consisting of Jan Paulsson, D. Brian King, Jonathan J. Gass, Marijn Heemskerk—along with attorneys from Tanzanian Attorney-General’s Chambers, including Julius Mallaba, and the Tanzanian law firm of Mkono & Co.¹⁹⁴ The proceeding took place at both the World Bank’s office in Paris¹⁹⁵ and Freshfields’ office in London.¹⁹⁶

In 2003, the World Bank, the European Investment Bank, and the African Development Bank awarded the Republic of Tanzania USD \$140,000,000 for the purpose of repairing, upgrading, and extending the water supply and sewer infrastructure of its capital city, Dar es Salaam.¹⁹⁷ As the tribunal put it, “[a]s a condition of the funding, the Republic was obliged to appoint a private operator to manage and operate the water and sewerage system, and to carry out some of the works associated with the Project.”¹⁹⁸ A lengthy bid process resulted in the selection of the claimant, Biwater, a joint venture of a UK corporation and a German corporation, with 80-20 shares respectively.¹⁹⁹ Because the foreign company was required to involve a local Tanzanian company, it selected STM, and they jointly incorporated “City Water,” with Biwater as the majority shareholder and STM as the minority shareholder.²⁰⁰ City Water signed three contracts—collectively called the Project Contract—with the Dar es Salaam Water and Sewerage Authority (DAWASA): the Water and Sewerage Lease Contract, the Supply and Installation of Plant and Equipment Contract and the Contract for the Procurement of Goods.²⁰¹ The Republic—as represented by DAWASA, a parastatal corporation established under Tanzanian law—is listed as a party solely in the Lease Contract, whereas the other two contracts list City Water and

¹⁹³ *Id.* ¶ 1.

¹⁹⁴ *Id.* ¶ 2.

¹⁹⁵ *Id.* ¶ 31.

¹⁹⁶ *Id.* ¶ 85.

¹⁹⁷ *Id.* ¶ 3.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* ¶ 4.

²⁰⁰ *Id.* ¶ 5.

²⁰¹ *Id.* ¶ 6.

DAWASA as parties.²⁰² Under the Lease Contract—the main subject of the dispute—City Water assumed the responsibilities from DAWASA to manage the water and sewerage operations, and also undertook the responsibility of designing and expanding the system while collecting revenue from customers for an initial period of ten years.²⁰³ A complex mix of circumstances with roots in the initial bidding process led to a serious failure of the enterprise.²⁰⁴ The dispute essentially pertained to the allocation of blame for the failure. According to the tribunal, almost every aspect of the business relationship was disputed; however, one thing was unusually clear—that the alleged expropriation or actions taken by the government caused no economic damage to the investor because the enterprise was not profitable from the very beginning.²⁰⁵ In fact, it was allegedly an “opportunistic” bid that sought to renegotiate the terms after the contract had been awarded.²⁰⁶

The tribunal found that the cumulative effect of the Tanzanian Government’s measures amounted to indirect expropriation, although no economic damage was caused.²⁰⁷ The factual findings of the tribunal include that the bid was poorly prepared; the project encountered problems almost as soon as it began; it immediately became clear that the enterprise would not work absent a renegotiation; renegotiations failed and the contract was terminated by DAWASA.²⁰⁸

In the process of terminating the contract, the Republic did certain things that rubbed the arbitrators the wrong way. The responsible minister gave a press statement about the termination of the contract (apparently he was running for Prime Minister), the Government withdrew some value added tax exemptions that they had promised, occupied City Water’s facilities and took over management, and finally arrested and deported the staff to Britain.²⁰⁹ On the basis of this, the Tribunal finally found that although it agrees “with the Republic’s position that the

²⁰² *Id.* ¶¶ 7–8.

²⁰³ *Id.* ¶ 9.

²⁰⁴ *Id.* ¶¶ 14–15.

²⁰⁵ *Id.* ¶ 767.

²⁰⁶ *Id.* ¶ 384.

²⁰⁷ *Id.* ¶¶ 461, 485.

²⁰⁸ *Id.* ¶ 486.

²⁰⁹ *Id.* ¶¶ 497–518.

termination of the Lease Contract at this time was inevitable, and was going to materialise within . . . weeks . . . these circumstances cannot avoid the conclusion that an expropriation of BGT's contractual and property rights took place."²¹⁰ The Tribunal put the theoretical justification as follows:

[W]hilst accepting that the effects of a certain severity must be shown to qualify an act as expropriatory, there is nothing to require that such effects be economic in nature. A distinction must be drawn between (a) interference with rights and (b) economic loss. A substantial interference with rights may well occur without actually causing any economic damage which can be quantified in terms of due compensation.²¹¹

Hence, "the absence of economic loss or damage is primarily a matter of causation and quantum—rather than a necessary ingredient in the cause of action of expropriation itself."²¹² Because none of the Republic's actions caused any economic damages to the investor, the Tribunal's remedy was declaratory in nature.²¹³ However, the finding of non-compensable fault on the part of the Republic allowed the Tribunal to allocate the cost of the proceeding equally and allow the parties cover their own expenses.²¹⁴

Several observations could be made here. The Tribunal had no difficulty in determining material facts. It quickly became clear that the project was a failed enterprise from its inception. The Republic had at least two reasons to involve the investor—it was required by the World Bank, which provided the funding, and it believed that the investor would have the resources and the expertise to carry out the project. When it did not work, the Republic took dramatic measures that an ordinary contracting party would not take, including detaining and deporting company executives. Although this caused no ascertainable economic damage to the investment, the Tribunal held that it was "the straw

²¹⁰ *Id.* ¶ 518.

²¹¹ *Id.* ¶ 464.

²¹² *Id.* ¶ 465. To be sure, as the Tribunal put it, "the 'fair market value' of City Water at the date of the expropriation, 1 June 2005, was nil." *Id.* ¶ 797.

²¹³ *Id.* ¶ 807.

²¹⁴ *Id.* ¶¶ 812–13.

that [broke] the camel's back."²¹⁵ Ill-advised as they might have been, it is not inconceivable that a differently constituted arbitral tribunal might alternatively view the actions as detached sovereign actions, which may be remedied through diplomatic means. The Tribunal did indeed sit in judgment of the acceptable levels of government misconduct in absolute terms. These findings are not surprising at all if the identity of the government in question and the nationalities of the mistreated officials played a role in the decision making process. More importantly, the finding of an actionable fault on the part of the Republic offered a legal basis for the allocation of cost.

Apart from its own unwise—perhaps politically motivated—behavior, the African state came out of the arbitration a total loser in many ways. When it took the money from the World Bank, it was required to hire a foreign investor. It picked one that was not up to the task for various reasons. The enterprise failed, nearly jeopardizing the water supply of its capital city. It then submitted to international arbitration and selected a learned arbitrator who was apparently offended by the government's erratic behavior. As a result, it ended up paying a large amount of money for basically winning the case. If signing the BITs and submitting to international arbitration was supposed to attract investors, it is difficult to see how this could help the Tanzanian Republic attract more investors. In any case, although the award is supported by detailed analysis and highly sophisticated reasoning, the value of such sophistication to the respondent state is a question worth asking.

*Case Study No. 2: Helnan International Hotels A/S v. The Arab Republic of Egypt (ICSID Case No. 05/19)*²¹⁶

The Tribunal was composed of Mr. Yves Derains, a citizen of France, as Chairman; Professor Rudolf Dolzer, a citizen of Germany, appointed by the respondent; and Mr. Michael Lee, a citizen of Britain, appointed by the claimant.²¹⁷ The claimant is

²¹⁵ *Id.* ¶ 456 (quoting *Seimens v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, ¶ 263 (Feb. 6, 2007)).

²¹⁶ *Helnan Int'l Hotels A/S v. The Arab Republic of Egypt*, ICSID Case No. ARB 05/19, Award, (Jul. 3, 2008), available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC772_En&caseId=C64.

²¹⁷ *Id.* ¶ 1.

Helnan International Hotels, a Danish company. It was represented by several attorneys from the London office of Baker Botts. The respondent, the Arab Republic of Egypt (“Egypt”) was represented by Professor Jan Paulsson of Freshfields and several Egyptian counsels including Dr. Mohamed Abdel Raouf.²¹⁸ The arbitration was conducted in Paris.²¹⁹

On September 8, 1986, Helnan entered into a management contract with the Egyptian Organization for Tourism (EGOTH) to manage the Cairo Shepherd Hotel, which EGOTH owned.²²⁰ While the initial contract was for a period of twenty-six years, a subsequent amendment permitted EGOTH to sell the hotel and granted Helnan the option of continuing to manage or terminate the management contract in exchange for adequate compensation.²²¹

In 2003, the Ministry of Tourism downgraded the Shepherd from a five-star to a four-star hotel because of unsatisfactory inspection results.²²² The downgrade prompted EGOTH to seek the termination of the management contract on grounds of impossibility of performance because the management contract required Helnan to run the hotel as a five-star.²²³ An arbitral tribunal constituted for that purpose in Cairo did exactly that—while awarding Helnan 12.5 million Egyptian pounds for the settlement of debts that it owed in connection with the performance of the management contract.²²⁴ EGOTH paid Helnan the 12.5 million EGP and the Egyptian courts then enforced the award by evicting Helnan and allowing EGOTH to take over.²²⁵

Based on the BIT between Egypt and Denmark signed in 1999, Helnan initiated this ICSID arbitration. Helnan alleged that EGOTH improperly conspired with the Egyptian Ministry of Tourism to solicit the downgrading of the hotel so that it could sell the hotel unencumbered by the management contract.²²⁶ These measures, Helnan argued, amounted to expropriation and violated

²¹⁸ *Id.* ¶ 2.

²¹⁹ *Id.* ¶¶ 14, 45.

²²⁰ *Id.* ¶ 3.

²²¹ *Id.*

²²² *Id.* ¶ 5.

²²³ *Id.* ¶ 6.

²²⁴ *Id.*

²²⁵ *Id.* ¶¶ 7-8.

²²⁶ *Id.* ¶¶ 58-63.

many provisions of the BIT, including non-discrimination, as well as fair and equitable treatment.²²⁷ Helnan also made several factual allegations and adduced evidence to prove the allegations.

Perhaps the most important question for the tribunal was whether the downgrade was improperly solicited so that Egypt could privatize the hotel unencumbered by the management contract.²²⁸ Helnan made at least three factual allegations that it said would prove a conspiracy: (1) on June 14, 2003, the Ministry of Tourism conducted an inspection and issued a harsh report; (2) without giving Helnan enough time to cure the problems, the Ministry conducted another inspection on September 4, 2003, filed its report the same day,²²⁹ and three days later, on September 7, 2003, the Ministry downgraded the hotel from five-star to four-star;²³⁰ (3) just twenty-five days later, EGOTH initiated an arbitration proceeding in Cairo for the termination of the contract—suggesting prior knowledge of the downgrade.²³¹ These facts collectively show the existence of a collusion to eject Helnan. These facts prove indirect expropriation.²³²

To prove the conspiracy, Helnan called its own witness and presented circumstantial evidence regarding the timing of the inspections and the subsequent decision to downgrade.²³³ It also relied on testimony of an Egyptian witness elicited through cross-examination.²³⁴ The Tribunal found the hastiness of the two inspections and the immediate decision to downgrade suspicious, but the Tribunal's finding of collusion seems to critically rely on the testimony of EGOTH's in-house counsel, who said that her department knew about the downgrade approximately sixty days prior to the commencement of the arbitral proceeding.²³⁵

The in-house counsel's testimony was so important to the outcome of the decision that the Tribunal reproduced it in part. The excerpt of the cross-examination reads:

²²⁷ *Id.* ¶¶ 50–53.

²²⁸ *Id.* ¶¶ 132–137.

²²⁹ *Id.* ¶ 58.

²³⁰ *Id.* ¶ 134.

²³¹ *Id.* ¶ 35.

²³² *Id.* ¶¶ 135–36.

²³³ *Id.* ¶¶ 64–79.

²³⁴ *Id.* ¶¶ 58–64.

²³⁵ *Id.* ¶ 154.

Q. When did you first learn of the downgrade of the Shepherd Hotel?

A. Before initiating the procedures for the arbitration by a very, very short time. Approximately 60 days before.

Q. I'm sorry, you learned of the downgrade 60 days before initiating the arbitration?

A. Approximately, yes.²³⁶

During redirect, the in-house counsel, Mrs. Dorreya Refaat, retracted the testimony, saying that she was mistaken in her estimate, but the Tribunal did not believe her, noting her retraction "was far from . . . convincing."²³⁷ It then held that "the Arbitral tribunal is satisfied that EGOTH and various Egyptian authorities, including the ministry of Tourism, played a significant role in the implementation of a plan aiming at terminating the Management contract."²³⁸ Finally, however, the Tribunal held that Helnan failed to prove that the Egyptian state did indeed adopt these measures to get rid of Helnan in order to privatize the hotel.²³⁹ The only evidence that Helnan submitted to this effect was an affidavit by Mr. Bahi Nasr, the former chair of the Egyptian Hotels Company, the predecessor of EGOTH.²⁴⁰ Nasr stated that the former undersecretary of the Ministry of Tourism told him there was an order to downgrade the Shepherd hotel and terminate the management contract so that it could be privatized.²⁴¹ However, when Mr. Nasr appeared before the Tribunal to offer testimony, he claimed he could not recall the particular conversation, but suspected that might have been the plan. Unimpressed with the testimony, the Tribunal totally discounted the statement.²⁴²

Some very interesting observations can be made about the Tribunal's handling of the proceedings. First, it appears that the Tribunal discounted all oral testimonies offered by Egyptian witnesses on both sides, instead relying exclusively on circumstantial evidence and inferences. It is difficult to determine

²³⁶ *Id.*

²³⁷ *Id.* ¶ 155.

²³⁸ *Id.* ¶ 156.

²³⁹ *Id.* ¶ 157.

²⁴⁰ *Id.* ¶ 158.

²⁴¹ *Id.*

²⁴² *Id.*

if a cultural miscommunication between an all-male European tribunal and one female and one male Egyptian witness who testified under cross examination administered by experienced, mostly European or American counsel in Paris played any role at all in the decision. But it is a fair question to ask. Second, having convinced itself that a conspiracy existed using mainly circumstantial evidence, the Tribunal shied away from attributing that conspiracy to the state. Finally, the Tribunal allocated cost equally, as is often done when the investor loses.²⁴³ It required each party to cover its own expenses and share the costs of the proceedings.²⁴⁴ Some finding of fault on the part of the state is often perceived to be necessary to such allocation of costs.²⁴⁵ Although the Tribunal noted that it allocated costs this way because of the claimant's win on jurisdiction and admissibility,²⁴⁶ it is more likely that the Tribunal's finding of the conspiracy was the basis for the equal allocation of cost. This is because winning on jurisdiction and inadmissibility is inconsequential if the merits are lost because this only allows a party to present a claim. Ultimately, however, it is clear that the State is the loser in many ways because it had to defend a claim and pay the expenses. It is unnecessary to ask the question of how an all-African tribunal might rule in this case because such a tribunal had already ruled on the related claim of termination in the Cairo arbitration.²⁴⁷ It is quite notable that the European company Helnan actually appointed an Egyptian arbitrator, Dr. Abdel Wahab, in the Cairo arbitration, although it later accused him of bias in favor of EGOH.²⁴⁸ Again, the Tribunal's analysis was highly sophisticated, but at the end of the day, the value of such sophistication and the fairness of the results might be questioned.

²⁴³ See *supra* Section 4.7 (discussing data related to the allocation of costs among parties in ICSID arbitrations).

²⁴⁴ *Id.* ¶¶ 171-74.

²⁴⁵ See *supra* Sections 4.6 and 4.7 (analyzing and depicting data related to outcomes on the merits and allocation of costs).

²⁴⁶ *Id.* ¶ 173.

²⁴⁷ *Id.* ¶¶ 150, 162.

²⁴⁸ *Id.* ¶ 164.

*Case Study No. 3: Gustav F W Hamester GmbH & Co KG v. Republic of Ghana (ICSID Case No. ARB/07/24)*²⁴⁹

The claimant in this case is Hamester, a German company. The respondent is the Republic of Ghana. The claim was based on a Germany-Ghana BIT.²⁵⁰ The arbitrators in this case were Professor Brigitte Stern, a French national and President of the tribunal, Dr. Bernardo M. Cremades, a Spanish national appointed by the claimant, and Mr. Toby Landau Q.C., a British national appointed by the respondent.²⁵¹ Both parties were represented by attorneys based in London, and the proceedings took place in London as well.²⁵²

The facts of this case are complex. For purposes of this analysis, it is sufficient to state that Hamester signed a joint venture agreement (JVA) with a Ghanaian public enterprise called Cocobod.²⁵³ The principal function of Cocobod is to buy cocoa beans from farmers for marketing and export, and the purpose of the joint venture with Hamester was to upgrade and modernize an old cocoa processing factory and share the profits in a mutually agreed proportion.²⁵⁴ Hamester and Cocobod (as a minority shareholder) incorporated a company called Wamco for this purpose.²⁵⁵ After the upgrading work was completed, they agreed that the entirety of the output would be sold to Hamester, but they did not fix the price in writing at that time.²⁵⁶ A few years later, Wamco became indebted to Cocobod for failing to pay for deliveries that it had taken.²⁵⁷ While the parties did not dispute that fact, Hamester denied that it was responsible for the debt, blaming it on failure to agree on price.²⁵⁸ Subsequently, the two sides made several attempts to agree on pricing, and eventually signed a price agreement. However, Hamester later alleged that it

²⁴⁹ Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award (June 18, 2010), available at <http://www.italaw.com/sites/default/files/case-documents/ita0396.pdf>.

²⁵⁰ *Id.* ¶ 1.

²⁵¹ *Id.* ¶ 8.

²⁵² *Id.* ¶¶ 4-5, 9.

²⁵³ *Id.* ¶ 22.

²⁵⁴ *Id.*

²⁵⁵ *Id.* ¶¶ 23-25.

²⁵⁶ *Id.* ¶¶ 29-33.

²⁵⁷ *Id.* ¶ 33.

²⁵⁸ *Id.*

signed this agreement under duress.²⁵⁹ In a related development, shortly after signing the price agreement, Cocobod failed to supply the required quantity of cocoa beans, blaming its failure on smuggling activities and outbreak of disease.²⁶⁰ Hamester considered Cocobod's failure to supply the cocoa as a breach of their contract.²⁶¹ After many efforts to renegotiate the price, Hamester abandoned the JVC and its managing director left Ghana.²⁶²

The parties disputed all of the facts including: whether the price agreement was made under duress, whether the failure to supply the required amount of cocoa constituted a breach of contract, and who owed Cocobod money, Hamester or the joint company Wamco.²⁶³ The parties also disputed the circumstances that led to the managing director's departure; while the managing director alleged that he feared for his own and his family's safety, Ghana suspected fraud and opened a police investigation.²⁶⁴ Related to the departure of the manager, Cocobod's General Manager of Operations, who was also a minority shareholder of Wamco, ordered the suspension of exports altogether.²⁶⁵ The sequence of the events, as well as the responsibility for each action, was disputed.²⁶⁶

Hamester alleged that Cocobod's actions collectively breached Ghana's treaty obligations, including the principles of fair and equitable treatment and non-discrimination amounting to expropriation.²⁶⁷ The respondent claimed that Hamester was a fraudulent partner from the very beginning, and that Hamester failed to make a bona fide investment.²⁶⁸ It further alleged that Hamester and its managing director defrauded Wamco throughout the JVC.²⁶⁹ Alternatively, even if Wamco was responsible for any breach of contract, the breach was not attributable to Ghana and

²⁵⁹ *Id.* ¶ 33-41.

²⁶⁰ *Id.* ¶ 42.

²⁶¹ *Id.* ¶ 43.

²⁶² *Id.* ¶¶ 44-67.

²⁶³ *Id.* ¶¶ 205-211, 257-262, 269-276.

²⁶⁴ *Id.* ¶¶ 55-57.

²⁶⁵ *Id.* ¶ 53, 269.

²⁶⁶ *Id.* ¶¶ 269-300.

²⁶⁷ *Id.* ¶¶ 68-79.

²⁶⁸ *Id.* ¶ 80-81.

²⁶⁹ *Id.* ¶ 81.

did not rise to the level of breach of treaty obligation.²⁷⁰ Without the need to determine each disputed fact, the Tribunal, after a lengthy legal analysis, decided that none of the alleged acts of breach were attributable to Ghana.²⁷¹ It held, in particular, that a breach of contract does not ordinarily rise to a breach of treaty obligation.²⁷² However, the tribunal allocated the cost of the proceedings equally and required each party to cover its own expenses.²⁷³

Because this case rested largely on the legal question of attribution, the factual inquiries were not remarkably detailed. Most notably, however, Ghana had to go through the process of defending itself against the German company for a failed business dealing. If every possible form of breach of contract is framed in the context of breach of a treaty obligation, the number of claims that a state would have to defend against could be staggering. Significantly, in this case, the Tribunal appears to be sensitive to that possibility. It is probably not unreasonable to expect more consistency in determining these kinds of legal questions as compared to findings of facts, which tend to be more culturally engrained because, at their core, they beg the uncomfortable question of who is better understood or more credible. It is interesting to observe that most, if not all, of the respondent's witnesses seem to be Ghanaians, while the expert witness was European.²⁷⁴ It is difficult to anticipate the possible outcome of this case had the facts been important. But it is fair to assume it would have been much more difficult for the Ghanaians to prove their allegations, including bad faith *ab initio* and sustained fraud on the part of the European business partner, before an all-European tribunal.

6. ICSID'S RELEVANCE FOR CHINA-AFRICA DISPUTES

As indicated in Section 1 above, Chinese investment in Africa has surpassed European investment in many areas. This trend is certain to continue. The investment is large by all standards.

²⁷⁰ *Id.* ¶¶ 84-85.

²⁷¹ *Id.* ¶¶ 171-312.

²⁷² *Id.* ¶¶ 313-350.

²⁷³ *Id.* ¶¶ 359-361.

²⁷⁴ *Id.* ¶ 19 (listing the fact witnesses for Ghana as: Mr. Kwame Spong, Dr. Sammy Ohene, Mr. Flix Auaye, Mr. Isaac Osei, and Mr. Reinhold Mueller. The expert witness was Mr. John Ellison.).

Investment disputes are inevitable. Some large-scale disputes have already arisen.²⁷⁵ To come back to the central question that this article raises: would ICSID be an attractive forum for them? The reality is that ICSID still has several advantages that make it attractive. With some measures of adaptability, it could serve as a good forum for the resolution of China-Africa or even more broadly Asia-Africa investment disputes. This section attempts to put the above discussions into perspective and outline some of the measures of adaptability that need to be taken.

6.1. Matured Legal and Institutional Framework and Maturing Jurisprudence

If the problems identified in this article, which are summarized under subsection 5 below, are addressed, reinventing the wheel of procedures and enforcement of investment awards, while ignoring the body of emerging 'case law,' is probably an unnecessary step for Africa and its new economic partners. As dubious as its genesis might have been, the enforcement of an arbitral award, as if it were the domestic court judgment of the state where it needs to be enforced, is an innovative legal notion that most African states and some Asian states, including China, have subscribed to for various historical and practical reasons.²⁷⁶ This method of enforcement is worth preserving, assuming that the decisions are rendered fairly and equitably in a manner that addresses the deficiencies identified above and summarized below. It is also unnecessary to ignore the maturing jurisprudence of international investment law of the last half-century, much of which could be attributed to ICSID tribunals.

6.2. Neutrality

One of the obvious advantages of ICSID, with its traditional Western-centric attributes, is that it still enjoys the advantage of

²⁷⁵ See, e.g., Alyx Barker, *Gabon Faces ICC Claim from Chinese Oil Producer*, GLOBAL ARB. REV., (March 19, 2013) <http://www.globalarbitrationreview.com/news/article/31421/> (reporting a claim for \$300 million dollars by a subsidiary of a Chinese oil and gas group against Gabon and the counterclaim for double that amount).

²⁷⁶ See ICSID Convention, *supra* note 4, at art. 54(1) ("Each Contracting State shall recognize an award rendered pursuant to this Convention 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.").

neutrality in the Africa versus non-European-investor disputes. Although the democracy deficit discussed above would still be an issue, ironically, it does not carry the unfair imbalance that often accompanies the resolution of disputes between a European investor and an African state.

The most serious problem remains the cultural competence of the members of the tribunal and counsel on both sides, and the attendant cultural barriers faced by African and Asian parties. As previously stated, the determination of complex facts is a deeply cultural phenomenon that requires familiarity with the culture. This could be addressed through a selection process that takes cultural competence into account—regardless of the arbitrators' home state.

6.3. Expertise

The law of international investment can be extremely complex, as are the legal relationships that precipitate investment disputes. Frequently, the scale of the economic relationship is also enormous. The identification, interpretation, and proper application of the law to the complex investment related factual circumstances and the rendering of a just and acceptable award almost always requires not only technical competence, exposure, and experience, but also appropriate temperament and reputation. Persons who serve on ICSID tribunals are often selected for these qualities. Any system of investment arbitration cannot ignore such expertise and reputation accumulated over a long period of time. Since such expertise is largely non-African and non-Asian, a new way of harnessing it must be considered, for example, consciously diversifying each tribunal. An ideal tribunal would have members from Africa and Asia, as well as Europe or other Western countries.

6.4. Convenience

The European fora are geographically and otherwise most convenient for disputes involving African states and Asian investors. It must be acknowledged that such convenience is not limited to the availability of matured institutions and facilities. For a variety of historical reasons, Africans and Asians are both more familiar with Europe than with each other. At the most basic level, they often communicate using European languages. As such, the convenience cannot be overstated. However, as indicated below,

serious cultural barriers must be addressed for the convenience to bear fruit.

6.5. *Adaptability*

Although ICSID has all of these advantages, to stay relevant for Africa and its new economic partners, it must make a conscious effort to address some of the problems identified in this article. First and foremost, it must address the serious democracy deficit that all indicators prove. In this day and age, any suggestion that there are no qualified women and qualified African or Asian arbitrators cannot be true. Traditional notions of justice demand some level of proximity between the judge and the judged. In modern times, elementary notions of legitimacy require some diversity in the arbitrator pool. Despite some efforts, the result so far has been disappointing. No matter how it is framed, what sustains such aristocratic justice is a level of monopoly enabled by ICSID and its World Bank roots and affiliation. At a time when the World Bank is no longer the only or even the most important source of financing for investment projects in Africa and elsewhere,²⁷⁷ the virtues of the existing system of justice will become even more questionable. ICSID must take affirmative steps to address the democracy deficit.

It may be argued that there is nothing that ICSID can do because the parties themselves nominate the virtuous men to act as arbitrators. For the sake of its own legitimacy, ICSID can lead by example when it has the occasion to exercise its appointment authority under Article 38. It could also take steps to demystify the process through a conscious outreach effort outside of the Washington, D.C.-London-Paris corridor. This may be accompanied by efforts encouraging hearings to take place outside of the traditional venues, preferably near or at the place where most of the evidence is found. Relocating the hearing venue would in turn encourage the involvement of traditionally under-represented groups to be involved as arbitrators, counsel, and expert witnesses.

Second, although much of the traditional literature addresses the incoherence of the jurisprudence and debates the need for appellate discipline, an important area that is often overlooked is

²⁷⁷ See *supra* Part 2 (discussing China's overtaking of the World Bank as the largest source of financing in Africa).

the allocation of cost. The allocation of cost appears to be a much bigger problem than realized because it offers at least two wrong incentives: (1) it fails to punish a party that brings forth non-meritorious or marginally meritorious claims; and (2) it sustains the arbitral process because the cost of proceedings is shared by both parties even when no fault is found on the part of the respondent state. Indeed, the allocation of cost almost always operates to the disadvantage of the respondent state because the private investor is almost always the party who initiates the process. If the investor is not afraid of being penalized for bringing a non-meritorious claim through the allocation of cost, it would have fewer disincentives to try its chances. The state's costs are likely to be higher in most instances because the respondent states arbitrate cases in the investor's home state or at least continent and therefore the state has to hire attorneys there in addition to paying for transportation and accommodation of in-house counsel, government officials, and covering expenses for fact and expert witnesses as well as translation and interpretation services. Although the private investor is also likely to bear similar costs, in many cases, the opportunity cost might be lower. In any case, unless somehow policed properly, the equal allocation of cost as a default rule is likely to result in abuse of the system.²⁷⁸ As Figure 7 shows, in all cases where the host state won, it was required to cover its own expenses and share the cost of the tribunal equally. The wisdom of this approach is questionable.

The third issue that ICSID must address, which is also related to the cost issue, is the liberal finding of jurisdiction. Apart from the difficulty in the definition and use of summary judgment standards, jurisdictional decisions also appear to suffer from wrongful incentives. Appointment as an arbitrator in ICSID proceedings is not only a prestigious honor, but also financially rewarding, although perhaps less so than high-stake commercial

²⁷⁸ See, e.g., Susan D. Franck, *Rationalizing Costs in Investment Treaty Arbitration*, 88 WASH. U. L. REV. 769, 778 (2011) ("As international arbitration has no equivalent to Federal Rule of Civil Procedure 11 requiring good-faith pleadings, the relationship has implications for using cost shifting in arbitration—perhaps even in domestic litigation—to create incentives that promote efficient and fair dispute resolution."). Summarizing her empirical study of costs in investment arbitration cases, Professor Franck puts the problem mildly as "the larger picture suggests that costs exhibited a degree of uncertainty." *Id.* at 778.

arbitrations.²⁷⁹ Persons who serve in this capacity are, in most cases, of high moral and ethical character and are unlikely to be influenced by the financial gains and added prestige that accompany the appointment. However, there is a built-in incentive for various stakeholders for the cases to continue beyond the jurisdictional phase; such stakeholders include highly compensated outside counsel representing respondent states and in-house counsel and officials who get various travel and related benefits when the case continues. Unfortunately, the jurisdictional decisions are sometimes tied to the allocation of cost. In at least one of the cases profiled above, the tribunal allocated cost equally because the investor prevailed on the jurisdictional issue only.²⁸⁰ Such being the reality of investment arbitration, ICSID must be sensitive to jurisdictional decisions by tribunals operating under its auspices. Although it does not have a direct supervisory role, it could monitor the decisions, make them available to the extent parties allow, attract and encourage commentary and academic writing, and make statistics on jurisdictional decisions by specific tribunals and arbitrators available in an intelligible manner.

Fourth and related to the above, ICISD must define and enforce serious ethical and conflict standards. Although structurally it does not have regulatory and supervisory jurisdiction on at least party appointed arbitrators, it could use its good offices to disseminate specific data on trends and track-records, invite and encourage commentary on such issue, set-up and systematize conflicts check processes, and make such data available for future litigants. So much has been said about the need for ethical rules in international arbitration,²⁸¹ but it is perhaps more acutely

²⁷⁹ Under Regulation 14(1) of the most recent ICSID Administrative and Financial Regulation, the current daily payment for meetings, hearings, and work related to the case is \$3000. Arbitrators are also eligible for additional per diems, accommodation, travel, and other allowances. ICSID, *Administrative and Financial Regulations, Regulation 14(1): Direct Costs of Individual Proceedings*, at 60, ICSID Doc. ICSID/15/Rev.1 (Jan. 2003), compiled in ICSID CONVENTION, REGULATIONS AND RULES, available at <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/part C-chap03.htm>.

²⁸⁰ See Franck, *supra* note 278, at 778 ("Tribunals were most likely to rationalize their decisions using the parties' relative success and equitable considerations.").

²⁸¹ See, e.g., Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341 (2002) (discussing a methodology for prescribing normative code of ethics for international arbitration).

important in investment arbitration involving economically weaker states.

Finally and most importantly, ICSID must attempt to create a generally welcoming and navigable environment for those who have traditionally, implicitly considered it an imposition as a condition of receiving foreign investment or even a condition of doing business or receiving loans.

7. CONCLUSION

The statistical studies and the closer review of ICSID cases involving African states do not necessarily reveal systematic and glaring bias against or purposeful disadvantage to the positions of African states. In fact, the outcome seems to be surprisingly balanced and the jurisprudence profound. However, measuring outcome neither explains nor justifies ICSID's diversity deficit and related shortcomings. As this article demonstrated, a deeper inquiry paints an unflattering picture on the reasons for the African states' acceptance from the very beginning and their experience in the last half-century: a history of benevolent imposition and effective exclusion from meaningful decision making. As the economic leverage increasingly shows diversity and leans Eastwards, to stay relevant and useful, ICSID must take a closer look at its half-century of arbitral justice and attempt to remedy the perceived inequities. This article has attempted to identify and characterize some of the glaring problems and offered thoughts on how they might be addressed.

APPENDIX I

Country	Location	Parties	Attorneys	Arbitrators	Jurisdiction (Yes / No)
Algeria	Paris	L.E.S.I. S.p.A. & Astaldi S.p.A. v. People's Democratic Republic of Algeria, ICSID Case No. ARB/05/3 Investor nationality: Italian	Professor Antonio Crivellaro, Professor Luca Radicati di Brozolo, and Andrea Carlevaris (Bonelli Erede Pappalardo, Milan) for Claimant S.E.M. Abdelmalek Sellal, Minister of Water Resources Algeria; Dominique Falque (Falque & Assoc., Paris, France); Mohammed Chemloul & Professor Ahmed Laraba (Algeria) for Respondent	President: Pierre Tercier (Swiss) Arbitrators: Emmanuel Gaillard (French), Bernard Hanotiau (Belgian)* * Bernard Hanotiau (Belgian) appointed following the passing away of André J.E. Faurès (Belgian)	Yes
		Consortium Groupement L.E.S.I. - DIPENTA v. People's Democratic Republic of Algeria, ICSID Case No. ARB/03/8 Investor nationality: Italian	Professor Antonio Crivellaro (Bonelli Erede Pappalardo, Milan) for Claimant S.E.M. Abdelmadjid Attar, Minister of Water Resources Algeria; Dominique Falque (Falque & Assoc., Paris, France); Mohammed Chemloul & Professor	President: Pierre Tercier (Swiss) Arbitrators: Emmanuel Gaillard (French), André J.E. Faurès (Belgian)	No. Consortium had no standing, new request for arbitration would need to be brought by Italian companies on their own behalf. See ARB/05/3.

			Ahmend Laraba (Algeria) for Respondent		
Burkina Faso		Société d'Investigati on de Recherche et d'Exploitati on Minière v. Burkina Faso, ICSID Case No. ARB/97/1 Investor nationality: French (incorporat ed under French law)		President: Argyrios A. Fatouros (Greek) Arbitrators: Séna Agbayissah (Togolese), Pierre Tercier (Swiss)	
Burundi	Paris	Goetz v. Republic of Burundi, ICSID Case No. ARB/95/3 Investor nationality: Belgian	Dominique Herbosch, (Herbosch & Herbosch, Belgium) for Claimant Marie Ancilla Ntakaburimvo, Ministry of Justice, Burundi for Respondent	President: Prosper Weil (French) Arbitrators: Mohammed Bedjaoui (Algerian), Jean-Denis Bredin (French)	Yes: on issues of legality of withdrawal of free zone certification No: on issues of reimburse ment of taxes and customs duties
		Goetz v. Republic of Burundi, ICSID Case No. ARB/01/2 Investor nationality: Belgian	Dominique Herbosch, (Herbosch & Herbosch, Belgium); Professor Bernard Hanotiau & Erica Stein (Hanotiau & van den Berg, Brussels, Belgium) for Claimant S.E. Madame Marie Ancilla Ntakaburimvo, Minister of	President: Gilbert Guillaume (French)* Arbitrators: Jean-Denis Bredin (French), Ahmed Sadek El Kosheri (Egyptian) * Gilbert Guillaume (French) appointed following the resignation of Prosper Weil	Yes

			Justice and Attorney General; Protais Nkezimana, Counsel for the State; Sixte Sizimwe Kazirukanyo, Bar of Burundi; Nicolas Angelet (Liedekerke, Wolters, Waelbroek, Kirkpatrick, Brussels, Belgium) for Respondent.	(French)	
Cameroon		Lafarge v. Republic of Cameroon, ICSID Case No. ARB/02/4			
	Washington, D.C.	Klückner Industrie-Anlagen GmbH v. United Republic of Cameroon & Société Camerounaise des Engrais, ICSID Case No. ARB/81/2 Investor nationality: German	Philippe Nouel, Esq. for Claimant Ministry of Industrial and Commercial Development, Ministry of Finance, and Jan Paulsson Esq. (Coudert Freres, Paris) for Respondent	(a) Original Tribunal (1981) President: Eduardo Jimenez De Arechaga (Uruguayan) Arbitrators: William D. Rogers (U.S.), Dominique Schmidt (French) (b) First Annulment Proceeding Ad hoc Committee (1984) President: Pierre Lalive (Swiss) Members: Ahmed Sadek El-Kosheri (Egyptian), Ignaz Seidl-Hohenveldern (Austrian) (c)	Yes

				<p>Resubmission Proceeding Tribunal (1985) President: Carl F. Salans (U.S.) Arbitrators: Jorge Castaneda (Mexican), Juan Antonio Cremades Sanz-Pastor (Spanish)</p> <p>(d) Second Annulment Proceeding Ad hoc Committee (1988) President: Sompong Sucharitkul (Thai) Members: Andrea Giardina (Italian), Kéba Mbaye (Senegalese)</p>	
Central African Republic	Paris	Shareholders of SESAM v. Central African Republic, ICSID Case No. CONC/07/1		President: Emmanuel Gaillard (French) Conciliators: Pierre Mayer (French), Antoine Grothe (Central African)	
	Paris	M. Meerapfel Söhne AG v. Central African Republic, ICSID Case No. ARB/07/10	Cabinet Caluwé & Horsmans, Brussels, Belgium for Claimants Cabinet Bizon Ingénierie Juridique, Bangui, Central African Republic; Jacques Vergès and Corinne Blanc, Paris,	President: Azzedine Kettani (Moroccan) Arbitrators: François T'Kint (Belgian), Marie-Madeleine Mborantsuo (Gabonese)	

			France for Respondent		
Democratic Republic of the Congo	Zurich	International Quantum Resources Ltd., Frontier SPRL & Compagnie Minière de Sakania SPRL v. Democratic Republic of the Congo, ICSID Case No. ARB/10/21 Investor Nationality: IQ Registered in British Virgin Islands; Frontier: Congolese; COMISA: Congolese	M. Geoffrey Cowper (Fasken Martineau DuMoulin, Vancouver, Canada); Dominique Gibbons, René Cadieux, & Philippe Charest-Beaudry (Fasken Martineau DuMoulin, Montreal, Canada); Yves Baratte (Simons & Simons LLP, Paris, France) for Claimant José Maria Perez & Louis Christophe Delanoy (Bredin Prat, Paris, France) for Respondent	President: Pierre Tercier (Swiss) Arbitrators: Horacio A. Grigera Naón (Argentine), Brigitte Stern (French)	
	Paris	African Holding Co. of Am., Inc. & Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo, ICSID Case No. ARB/05/21 Investor Nationality: African Holding Company: United	David Rivkin Barton Legum Yulia Andreeva Anne-Sophie Dufêtre (Debevoise & Plimpton LLP) David A. Saltman (Law Offices of David A. Saltman, New Jersey, USA) for Claimant S.E. le Bâtonnier Honorius Minay Booka, Ministre de la Justice et Garde des Sceaux, Palais de Justice Tshibangu Kalala, Cabinet Kikangala &	President: Francisco Orrego Vicuña (Chilean)* Arbitrators: Otto L.O. de Witt Wijnen (Dutch), Dominique Grisay (Belgian)** * Francisco Orrego Vicuña (Chilean) appointed following the resignation of Ahmed Sadek El-Kosheri (Egyptian) ** Dominique Grisay	No

		States SAFRICAS: Congolese	Associés for Respondent	(Belgian) appointed following the resignation of Teresa Giovannini (Swiss)	
		Russell Res. Int'l Ltd. v. Democratic Republic of the Congo, ICSID Case No. ARB/04/11		President: Horacio A. Grigera Naon (Argentine) Arbitrators: Franklin Berman (British), Yawovi Agboyibo (Togolese)	
	Paris	Mimincoco LLC v. Democratic Republic of the Congo, ICSID Case No. ARB/03/14		President: Ahmed Sadek El-Kosheri (Egyptian) Arbitrators: Marc Lalonde (Canadian), Catherine Kessedjian (French)	
		Ridgepoint e Overseas Devs., Ltd. v. Democratic Republic of the Congo, ICSID Case No. ARB/00/8		President: Raúl E. Vinuesa (Argentine) Arbitrators: Andreas F. Lowenfeld (U.S.), Brigitte Stern (French)	
		Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7 Investor Nationality: American	In Annulment Proceeding: Philip Botha (Philip J. Botha Attorneys Johannesburg, South Africa); Emmanuel Gaillard (Shearman & Sterling LLP Paris, France) for Claimant Tshibangu	(a) Original Arbitration Proceeding President: Andreas Bucher (Swiss) Arbitrators: Yawovi Agboyibo (Togolese), Marc Lalonde (Canadian),* * Marc Lalonde (Canadian) appointed	Yes

			<p>Kalala (Brussels, Belgium); Nicolas Angelet and Joe Sepulchre (Liedekerke, Wolters, Waelbroeck, Kirkpatrick, Brussels, Belgium) for Respondent</p>	<p>following the passing away of Willard Z. Estey (Canadian)</p> <p>(b) Annulment Proceeding Ad hoc Committee President: Antonias C. Dimolitsa (Greek) Members: Robert S.M. Dossou (Beninese), Andrea Giardina (Italian)</p>	
		<p>Banro Am. Res., Inc. & Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo, ICSID Case No. ARB/98/7</p> <p>Investor Nationality: A bit muddy. Banro American Resources: American but Banro Resource: Canadian; SAKIMA: Congolese subsidiary</p>		<p>President: Prosper Weil (French) Arbitrators: Alioune Digne (Senegalese), Carveth Harcourt Geach (South African)</p>	No
	Washington, D.C. Supplemental	Am. Mfg. & Trading, Inc. v. Democratic		(a) Original Arbitration Proceeding President:	Yes

	hearing in Paris	Republic of the Congo, ICSID Case No. ARB/93/1 Investor nationality: American		Sompong SucharitkuL (Thai) Arbitrators: Heribert Golsong (German), Kéba Mbaye (Senegalese) (b) Revision Proceeding President: Sompong SucharitkuL (Thai) Arbitrators: Daoud L. Khairallah (Lebanese),* Kéba Mbaye (Senegalese) * Daoud L. Khairallah (Lebanese) appointed following the death of Heribert Golsong (German)	
Republic of the Congo	GenevaParis	Benvenuti & Bonfant v. People's Republic of the Congo, ICSID Case No. ARB/77/2 Investor nationality: Head office Rome; Italian		President: Jørgen Trolle (Danish)* Arbitrators: Rudolf Bystricky (Czechoslovak), Edilbert Razafindralambo (Malagasy) * Jørgen Trolle (Danish) appointed following the resignation of Alex Bonn (Luxembourg)	Yes
	Paris	AGIP SpA v. People's Republic of the Congo,	Piero Bernadini and Professor Andrea Giardina for Claimant	President: Jørgen Trolle (Danish) Arbitrators:	Yes

		<p>ICSID Case No. ARB/77/1</p> <p>AGIP S.p.A Italian; subsidiary AGIP (Congolese) SA (Congolese) ; AGIP owned 90% of Hydrocarbons (Swiss)</p>	<p>Minister of Justice and Labor, Minister of Energy and Mines, Legal Advisor to Ministry of Industry and Tourism and Roger Martin for Respondent</p>	<p>René-Jean Dupuy (French), Fuad Rouhani (Iranian)</p>	
Cote d'Ivoire		<p>Compagnie Française pour le Développement des Fibres Textiles v. Côte d'Ivoire, ICSID Case No. ARB/97/8</p> <p>Investor Nationality: no award: CFDT appears to be French</p>		<p>President: Pierre Draï (French) Arbitrators: Matthieu De Boisséson (French), Marcel Storme (Belgian)</p>	
		<p>Adriano Gardella SpA v. Côte d'Ivoire, ICSID Case No. ARB/74/1</p> <p>Investor Nationality: Italian</p>		<p>President: Pierre Cavin (Swiss)* Arbitrators: Jacques Michel Grossen (Swiss),** Dominique Poncet (Swiss),</p> <p>* Pierre Cavin (Swiss) appointed following the passing away of André Panchaud (Swiss),</p>	Yes

				** Jacques Michel Grossen (Swiss) appointed following the passing away of Edonard Zellweger (Swiss)	
Egypt	Paris	Malicorp Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/08/18 Investor Nationality: Incorporated in UK	Christian Bremond, Sylvie Morel, Yassin Tagelding Yassin, Jean-Pierre Coutard (Brémond, Vaïsse, Rambert & Associés, Paris, France) for Claimant Thomas H. Webster, Asser HARB (Paris – France) & H.E. Sedky Kholousy, Mr. Ahmed Saad (The Egyptian State Lawsuits Authority, Cairo, Egypt) for Respondent (b) Annulment Brémond, Vaïsse, Rambert & Associés, Paris, France for Claimant Dr. Prof. Ahmed El-Kosheri (The Egyptian State Lawsuits Authority, Cairo, Egypt) for Respondent	(a) Original Arbitration Proceeding Tribunal constituted: June 02, 2009 President: Pierre Tercier (Swiss), Arbitrators: Luiz Olavo Baptista (Brazilian), Pierre-Yves Tszchanz (Swiss/Irish) (b) Annulment Proceeding Ad hoc Committee constituted: July 08, 2011 President: Andrés Rigo Sureda (Spanish) Members: Stanimir A. Alexandro V (Bulgarian), Eduardo Silva Romero (Colombian/French)	Yes
	Paris	Helnan International Hotels A/S v. Arab Republic of Egypt,	Michael P. Lennon Jr., Ania Farren, and Devashish Krishan (Baker Botts London, UK) & Peter	(a) Original Arbitration Proceeding President: Yves Derains (French) Arbitrators:	Yes

		ICSID Case No. ARB/05/19 Investor Nationality: Incorporated in Denmark	Griffin, (Conyngham Advisors, London UK) for Claimant Counselor Milad Sidhom, President States Lawsuits Authority, Dr. Ahmed El Kosheri, (Kosheri, Rashed & Riad Cairo, Egypt); Jan Paulsson, (Freshfields Paris France), Dr. Karim Hafez, (Hafez Law Firm, Cairo, Egypt) & Dr. Mohamed Abdel Raouf (Abdel Raouf Law Firm, Cairo, Egypt) for Respondents	Michael J.A. Lee (British), Rudolf Dolzer (German) (b) Annulment Proceeding Ad hoc Committee President: Stephen M. Schwebel (U.S.) Members: Bola Ajibola (Nigerian), Campbell McLachlan (New Zealand)	
	Paris	Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt, ICSID Case No. ARB/05/15 Investor Nationality: Italian (investor dual Egyptian citizenship point of controversy in Jurisdiction decision)	Reginald R. Smith, Craig S Miles, Kenneth R. Fleuriet (King & Spalding LLP) for Claimant Dr. Ahmed Kamal Aboulmagd, Hazim A. Rizkana Helmy, (Hamza & Partners Baker & McKenzie International - Cairo), Lawrence W. Newman (Baker & McKenzie LLP - New York), H. E. Counsellor Milad Sidhom Boutros, Hussein M. F. Mostafa, Asser	(a) Original Arbitration Proceeding President: David A.R. Williams (New Zealand) Arbitrators: Francisco Orrego Vicuña (Chilean), Michael C. Pryles (Australian) (b) Annulment Proceeding Ad hoc Committee President: Stephen M. Schwebel (U.S.) Members: Azzedine Kettani (Moroccan), Peter Tomka	Yes Vicuña partial dissent on juris.

			M A Harb (State Law Suites Authority, Egypt) for Respondent	(Slovak)	
	Paris	Jan de Nul N.V. & Dredging Int'l N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13 Investor Nationality: Belgian	Prof. Antonio Crivellaro and Prof. Luca Radicati di Brozolo Bonelli Erede Pappalardo (Milan, Italy) for Claimant Dr. Iskandar Ghattas Under Secretary, Ministry of Justice; Dr. Mostafa Abdel Ghaffar, Director of International Cooperation, Ministry of Justice; Hosam Abdel Azim, President of the Office of State Litigation; Osama Mahmoud, Office of State Litigation and Robert Saint-Esteban and Louis-Christophe Delanoy, Bredin Prat (Paris France) for Respondent	President: Gabrielle Kaufmann-Kohler (Swiss) Arbitrators: Pierre Mayer (French), Brigitte Stern (French)	Yes
	The Hague	Joy Mining Machinery Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/03/11 Investor Nationality: Incorporate	Hugh R. McCombs, James E. Tancula, Michael D. Regan, Timothy Tyler, James Fielden, James A. Chokey, Kim R. Kodousek for Claimant Dr. Ahmed	(a) Original Arbitration President: Francisco Orrego Vicuña (Chilean) Arbitrators: Christopher G. Weeramantry (Sri Lankan), William Laurence Craig	No

		d under the laws of England and Wales,	Sadek El-Kosheri, Dr. Andres Reiner, Counselor Hossam Abd-El Azim, Counselor Osama Aboul-Kheir, Mahmoud Soysal for Respondent	(U.S.) (b) Annulment Proceeding Ad hoc Committee President: Antonias C. Dimolitsa (Greek) Members: Michael Hwang (Singaporean), José Luis Shaw (Uruguayan)	
	Paris - 1st sess. Cairo - hearing of witnesses Geneva - hearing of witnesses Geneva - oral argument	Ahmonseto, Inc. & Others v. Arab Republic of Egypt, ICSID Case No. ARB/02/15 Investor Nationality: United States		(a) Original Arbitration Proceeding President: Pierre Tercier (Swiss) Arbitrators: Ibrahim Fadlallah (Lebanese/French), Alain Viandier (French) (b) Annulment Proceeding Ad hoc Committee President: Piero Bernardini (Italian) Members: Azzedine Kettani (Moroccan), Peter Tomka (Slovak)	Yes
	Paris	Champion Trading Co. & Ameritrade Int'l, Inc. v. Arab Republic of Egypt, ICSID Case No. ARB/02/9	Mr. Emmanuel Gaillard, Mr. John Savage, Shearman & Sterling (Paris, France; Singapore) for Claimant Robert Saint-Esteben, Tim Portwood,	President: Robert Briner (Swiss) Arbitrators: L. Yves Fortier (Canadian), Laurent Aynès (French)	Yes

		Investor Nationality: Champion: United States; Ameritrade International: United States; James T. Wahba, John B. Wahba and Timothy T. Wahba (dual citizens United States and Egypt)	Matthieu Pouchepadass, Bredin Prat (Paris, France) for Respondent		
	Initially Washington D.C. (subsequent hearings could take place in Paris, Hague or Washington D.C. or any other place upon agreement of parties)	Middle East Cement Shipping & Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6	Nicolaos Georgilis, Sarwat A. Shahid, Ashraf Yehia for Claimant Counselor Ibrahim M. Refaat, President Counselor Hussein M. Fathi, Vice- President Counselor Osama A. Mahmoud, Vice- President Egyptian State Lawsuits Authority Dr. Aktham El Kholy, Counsel for Respondent	President: Karl-Heinz Böckstiegel (German) Arbitrators: Piero Bernardini (Italian), Don Wallace, Jr. (U.S.)	Yes
	Paris	Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4 Investor	Emmanuel Gaillard, John Savage & Peter Griffin (of Shearman & Sterling) for Claimant Counselor Osama Ahmed	(a) Original Tribunal 1998/1999 President: Monroe Leigh (U.S.) Arbitrators: Ibrahim Fadlallah (Lebanese/Fren	Yes

		Nationality: Incorporated in the United Kingdom	Mahmoud and Counselor Hussein Mostafa Fathi from Egyptian State Lawsuits Authority; Eric Schwartz and Simon B. Stebbing of Freshfields Bruckhaus Deringer for Respondent	ch), Don Wallace, Jr. (U.S.) *,** * Don Wallace, Jr. (U.S.) appointed following the resignation of Michael F. Hoellering (U.S.) ** Michael F. Hoellering (U.S.) appointed following the resignation of Hamzeh Haddad (Jordanian), (b) Ad Hoc Proceeding (2001) President: Konstantinos D. Kerameus (Greek) Members: Andreas Bucher (Swiss), Francisco Orrego Vicuña (Chilean) (c) Interpretation Proceeding (2004) President: Klaus M. Sachs (German) Arbitrators: Ibrahim Fadlallah (Lebanese/Fren ch), Carl F. Salans (U.S.)	
		Mfr. Hanover Trust Co. v. Arab		President: Ignaz Seidl- Hohenveldern (Austrian)	

		<p>Republic of Egypt and General Authority for Investment and Free Zones, ICSID Case No. ARB/89/1</p> <p>Investor Nationality: no award. Presumably United States</p>		<p>Arbitrators: Mohamed Yassin Abdel A'Al (Sudanese), Andreas Bucher (Swiss)</p>	
	<p>Hague (prelim) Washington, D.C. (seat)</p>	<p>Southern Pacific Props. (Middle East) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3</p> <p>Investor Nationality: Incorporated in Hong Kong</p>	<p>Peter Munk as Agent, assisted by: William Laurence Craig, Jan Paulsson, Paul D. Friedland, Jean-Claude Najjar, Harvey McGregor Q.C., Mohammed Kamel, Charles Kaplan and Michael Polkinghorne as Counsel and Aron Broches as Consultant for Claimant</p> <p>Iskandar Ghattas, assisted by Hassan Baghdadi, Fawzy Mansour, Jean-Denis Bredin, Robert Saint-Esteban, Ahmed Medhat and Emmanuel Gaillard as Counsel and Rudolf Dolzer as Consultant for Respondent</p>	<p>(a) Original Arbitration Proceeding President: Eduardo Jimenez de Arechaga (Uruguayan) Arbitrators: Mohamed Amin El Mahdi (Egyptian), Robert F. Pietrowski, Jr. (U.S.)</p> <p>(b) Annulment Proceeding Ad hoc Committee President: Claude Reymond (Swiss) Members: Arghyrios A. Fatouros (Greek), Kéba Mbaye (Senegalese)</p>	<p>Yes. Note two decisions on jurisdiction Nov 27, 1985 and April 14, 1988. Dissenting opinion on jurisdiction (Mohamed Amin El Mahdi) • Award and Dissenting Opinion of May 20, 1992, 8 ICSID Rev. – FILJ 328 (1993); 32 ILM 933 (1993), with correction at 32 ILM 1470 (1993); 8 Int'l Arb. Rep., No. 8, at Sec. A (Aug. 1993); 19 Y.B. Com. Arb. 51 (1994) (excerpts); 3</p>

					ICSID Rep. 189 (1995); French translation of English original in 121 Journal du droit international 229 (1994) (excerpts).
Gabon	Paris	Participaciones Inversiones Portuarias SARL v. Gabonese Republic, ICSID Case No. ARB/08/17		President: Jan Paulsson (French) Arbitrators: Ibrahim Fadlallah (Lebanese/French), Brigitte Stern (French)	
	Paris	Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic, ICSID Case No. ARB/04/5 Investor Nationality: Incorporated in Gabon but tribunal found sufficient "foreign control" to confer jurisdiction		(a) Original Arbitration Proceeding President: Ibrahim Fadlallah (Lebanese/French) Arbitrators: Charles Jarrosson (French), Michel Gentot (French) (b) Annulment Proceeding President: Franklin Berman (British) Members: Ahmed Sadek El-Kosheri (Egyptian), Rolf Knieper (German)	Yes
		Société d'Etudes de Travaux et de Gestion SETIMEG S.A. v.		President: Claude Reymond (Swiss) Arbitrators: Henri Caillavet	

		Republic of Gabon, ICSID Case No. ARB/87/1		(French),* Marie-Madeleine Mborantsuo (Gabonese) * Henri Caillavet (French) appointed following the resignation of Edgar Faure (French)	
The Gambia		Alimenta S.A. v. Republic of The Gambia, ICSID Case No. ARB/99/5		President: Charles N. Brower (U.S.) Arbitrators: Samuel K.B. Asante (Ghanaian), Kenneth S. Rokison (British)	
Ghana	London	Gustav F W Hamster GmbH & Co. KG v. Republic of Ghana, ICSID Case No. ARB/07/24 Investor Nationality: Joint venture between Hamster, a German company, and a company created under laws of Ghana	Akbar Ali, AFA Law, London UK, Andrew Goddard Q.C. & Riaz Hussain Atkin Chambers, London UK for Claimant Hon. Betty Mould-Iddrisu Attorney-General and Minister for Justice, Republic of Ghana and Arthur Marriott Q.C., Thomas Geuther, Paul Cohen & Christina Loucas, Dewey & LeBoeuf, London UK for Respondent	President: Brigitte Stern (French) Arbitrators: Bernardo M. Cremades (Spanish), Toby Landau (British)	Yes re: claim No re: counterclaim
	The Hague	Vacuum Salt Prods. Ltd. v. Republic of	Mr. Joel B. Hams Mr. Gerald J. Ferguson Mr. E. Kwasi	President: Robert Y. Jennings (British)	No

		Ghana, ICSID Case No. ARB/92/1 Investor Nationality: Incorporated under laws of Ghana - no jurisdiction	Mensah Mr. Andrew G. McCormick for Claimant Mr. Joe Reindorf Mr. Kwabena A.A. Mate Mr. Samuel A. Stem for Respondent	Arbitrators: Charles N. Brower (U.S.), Kamal Hossain Bangladeshi)	
Guinea		Mar. Int'l. Nominees Establishment v. Republic of Guinea, ICSID Case No. ARB/84/4 Investor Nationality: Liechtenstein (according to 505 F. Supp. 241)		President: Donald E. Zubrod (U.S.) Arbitrators: Jack Berg (U.S.), David K. Sharpe (U.S.) Annulment Proceeding Ad hoc Committee President: Sompong Sucharitkul (Thai) Members: Aron Broches (Dutch), Kéba Mbaye (Senegalese) Resubmission Proceeding	Yes
	Paris	Atl. Triton Co. Ltd. v. People's Revolutionary Republic of Guinea, ICSID Case No. ARB/84/1 Investor Nationality: Norwegian	Olivier Edwards, Marie-Christine de Percin for Claimant Jan A. Paulsson for Respondent	President: Pieter Sanders (Dutch) Arbitrators: Jean-François Prat (French), Albert Jan Van Den Berg (Dutch)	Yes
Kenya	London - first sessionThe Hague	World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case	Geoffrey Robertson Q.C.; Oliva Holdsworth, Peter Buscemi (Morgan, Lewis	President: Gilbert Guillaume (French) Arbitrators: V.V. Veeder	Yes

		No. ARB/00/7 Nationality: Incorporated in Isle of Man	& Brockius LLP Washington, D.C.) Paul K. Muite, Nairobi for Claimant Jan Paulsson, Constantine Partasides and Mitesh Kotecha (Freshfields, Bruckhaus Deringer) for Respondent	(British),* Andrew Rogers (Australian) * V.V. Veeder (British) appointed following the resignation of James R. Crawford (Australian)	
Liberia		Int'l Trust Co. of Liberia v. Republic of Liberia, ICSID Case No. ARB/98/3		President: Albert Jan Van Den Berg (Dutch) Arbitrators: Ian S. Forrester (British), Maureen Ponsonby (British)	
	London Paris	Liber. E. Timber Corp. v. Republic of Liberia, ICSID Case No. ARB/83/2 Investor Nationality: Liberian but tribunal found that LETCO under "foreign control" of French nationals	Robert L. Simpson for Claimant Initially Jan Paulsson (Coudert Brothers, Paris Office), Coudert Brothers withdrew. Liberia did not substitute representation and became "defaulting party"	President: Bernardo M. Cremades (Spanish) Arbitrators: Jorge Goncalves Pereira (Portuguese),* D.A. Redfern (British) * Jorge Goncalves Pereira (Portuguese) appointed following the resignation of Frank Church (U.S.)	Yes
Madagascar		SEDITEX Eng'g Beratungsgesellschaft für die Textilindustrie m.b.H. v.		President: André J.E. Faures (Belgian) Conciliators: Dominique Carreau (French),	

		Republic of Madagascar , ICSID Case No. CONC/94/1		Raymond Ranjeva (Malagasy)	
		SEDITEX Eng'g Beratungsgesellschaft für die Textilindustrie m.b.H. v. Democratic Republic of Madagascar , ICSID Case No. CONC/82/1			
Mali		Société d'Exploitation des Mines d'Or de Sadiola S.A. v. Republic of Mali, ICSID Case No. ARB/01/5		President: Bernardo M. Cremades (Spanish) Arbitrators: Robert S.M. Dossou (Beninese), Ibrahim Fadlallah (Lebanese/French)	Yes
Morocco	Paris	Consortium R.F.C.C. v. Kingdom of Morocco, ICSID Case No. ARB/00/06 Investor Nationality: Italian	Piero G. Parodi, (Studio Avvocati, Milan) and Hamid Andaloussi (Avocat au Barreau de Casablanca) for Claimant Christian Camboulive (Gide Loyrette & Nouel, Paris), Ahmed Zejjari (Directeur des Affaires Juridiques du Ministère de l'Équipement), Monsieur le	(a) Original Arbitration Proceeding President: Robert Briner (Swiss) Arbitrators: Bernardo M. Cremades (Spanish), Ibrahim Fadlallah (Lebanese/French) (b) Annulment Proceeding Ad hoc Committee President: Bernard Hanotiau	Yes but only claims based on BIT violations and related breach of contract

			Bâtonnier Mohamed Naciri (Avocat au Barreau de Casablanca), and Aurélia Antonietti, Gaëlle Le Quillec (Gide Loyrette & Nouel, Paris) for Respondent	(Belgian) Members: Arghyrios A. Fatouros (Greek), Franklin Berman (British)	
	Paris	Salini Costruttori S.p.A. & Italstrade S.P.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4 Investor Nationality: Italian	Antonio Crivellaro (Bonnelli Erede & Pappalardo); Giorgio Sacerdoti for Claimant Ahmed Zejjari (Head of the Legal Department, Ministry of Infrastructure), Mr. le Bâtonnier Mohammed Naciri (Casablanca), Aurélia Antonietti, Christian Camboulive (Gide Loyrette & Nouel, Paris) for Respondent	President: Robert Briner (Swiss) Arbitrators: Bernardo M. Cremades (Spanish), Ibrahim Fadlallah (Lebanese/French)	Yes but only claims based on BIT violations
		Holiday Inns S.A. v. Kingdom of Morocco, ICSID Case No. ARB/72/1 Investor Nationality: Holiday Inns: Swiss; Occidental Petroleum: American		President: Gunnar Lagergren (Swedish)* Arbitrators: Paul Reuter (French), J.C. Schultz (Dutch)** * Gunnar Lagergren (Swedish) appointed following the passing away of Sture Petren (Swedish)	

				** J.C. Schultsz (Dutch) appointed following the resignation of John Foster (British)	
Niger		TG World Petroleum Ltd. v. Republic of Niger, ICSID Case No. CONC/03/1			
Nigeria	Paris	Shell Nigeria Ultra Deep Ltd. v. Federal Republic of Nigeria, ICSID Case No. ARB/07/18		President: Juan Fernández-Armesto (Spanish)* Arbitrators: Hamid G. Gharavi (Iranian/French), William W. Park (U.S.) * Juan Fernández-Armesto (Spanish) appointed following the Resignation of Nabil Elaraby (Egyptian)	
		Guadalupe Gas Products Corp. v. Federal Republic of Nigeria, ICSID Case No. ARB/78/1		President: Ivan Wallenberg (Swedish) Arbitrators: Elihu Lauterpacht (British), Pieter Sanders (Dutch)	
Rwanda		Olyana Holdings LLC v. Republic of Rwanda, ICSID Case No.		President: Bruno Simma (German) Arbitrators: Pierre Lalive (Swiss), Brigitte Stern	

		ARB/10/10		(French)	
Senegal	Initially the Hague (subsequent hearings could take place in Paris or any other place upon agreement of parties)	Société Ouest Africaine des Bétons Industriels v. Senegal, ICSID Case No. ARB/82/1 Investor Nationality: SOABI incorporate in Senegal but Tribunal found "foreign control" Belgian	In Jurisdiction Proceeding: Gilbert-Charles Danon for Claimant Moctar Mbacké (agent judiciaire de l'Etat); Patrick F. Murray and Christian Valtin for Respondent	President: Aron Broches (Dutch)* Arbitrators: Kéba Mbaye (Senegalese), J.C. Schultz (Dutch)** * Aron Broches (Dutch) appointed following the resignation of Rudolf Bindschedler (Swiss) ** J.C. Schultz (Dutch) appointed following the resignation of Jean Van Houtte (Belgian)	Yes. Two discussions jurisdiction decision of Aug. 1 1984 and in Feb 25, 1988 final award. Kéba Mbaye (Senegalese) Dissenting opinion refers to 1984 decision on jurisdiction
Seychelles	Sydney (Int.) London (Oral)	CDC Grp. plc v. Republic of Seychelles, ICSID Case No. ARB/02/14 Investor Nationality: Incorporated in England and Wales		(a) Original Arbitration Proceeding Sole Arbitrator: Anthony Mason (Australian) (b) Annulment Proceeding Ad hoc Committee President: Charles N. Brower (U.S.) Members: Michael Hwang (Singaporean), David A.R. Williams (New Zealand)	Yes
South Africa	London – first session The Hague --	Piero Foresti, Laura de Carli and others v.	Peter Leon, Kevin Williams, Vladislav Movshovich, and Jonathan	President: Vaughan Lowe (U.K.) Arbitrators: Charles N.	Yes

	hearing	<p>Republic of South Africa, ICSID Case No. ARB(AF)/07/1</p> <p>Investor Nationality: Italian nationals; Finstone: Inc. in Luxembourg</p>	<p>Veeran (Webber Wentzel); Toby T. Landau QC; Professor Sir Elihu Lauterpacht CBE QC; and Dr. Guglielmo Verdirame for Claimants</p> <p>Jan Paulsson, Georgios Petrochilos, Jonathan Gass, and Ben Juratowitch (Freshfields Bruckhaus Deringer); Gerrit Grobler SC, instructed by Siphon Mathebula (Office of the State Attorney of the Republic of South Africa) for Respondent*</p> <p>* Seth Nthai was involved in the proceeding but was withdrawn by South Africa</p>	<p>Brower (U.S.), Joseph M. Matthews (U.S.)</p>	
		<p>Republic of Gabon v. Société Serete S.A., ICSID Case No. ARB/76/1</p> <p>Investor Nationality: Republic of Gabon</p>		<p>President: Pierre Tercier (Swiss) Arbitrators: Victor-Gaston Martiny (Belgian), Hans Spitznagel (Swiss)</p>	
Tanzania	London	<p>Standard Chartered Bank v. United Republic of Tanzania, ICSID Case No.</p>	<p>Herbert Smith Freehills (London, UK) for Claimant</p> <p>Mkono & Co. (Dar es Salaam, Tanzania);</p>	<p>President: William W. Park (U.S.) Arbitrators: Barton Legum (U.S.), Michael C. Pryles (Australian)</p>	

		ARB/10/12 Investor Nationality: Hong Kong	Hunton & Williams (Washington, D.C., U.S.) for Respondent		
	Paris	Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22 Investor Nationality: Incorporate d in England and Wales	Judith Gill, Mathew Gearing, Hannah Ambrose, Michelle de Kluyver, Autumn Ellis and Andrew Pullen (Allen & Overy LLP, London, U.K.) for Claimant Julius Mallaba (Attorney- General's Chambers Dar es Salaam, Tanz.); Hon. Nimrod E. Mkono MP; Dr. Wilbert B. Kapinda, Carel Daele and Bart Williams (Mkono & Co., Dar es Salaam, Tanz.) & Jan Paulsson, D. Brian King, Jonathan J. Gass and Marijn Heemskerk (Freshfields, Amsterdam, the Netherlands) for Respondent	President: Bernard Hanotiau (Belgian) Arbitrators: Gary B. Born (U.S.), Toby Landau (U.K.)	Yes re: BIT No re: TIA (Tanzanian Investment Act of 1997)
	London	Tanzania Electric Supply Co. Ltd. v. Ind. Power Tanzania Ltd., ICSID Case No. ARB/98/8 Investor Nationality: Odd-		(a) Original Arbitration Proceeding President: Kenneth S. Rokison (U.K.) Arbitrators: Charles N. Brower (U.S.), Andrew Rogers (Australian) (b)	Yes

		<p>Claimant is incorporated in Tanzania – public utility wholly owned by Tanzania government.</p> <p>Respondent is joint venture between Tanzanian engineering company and Malaysian corp.</p>		<p>Interpretation Proceeding President: Kenneth S. Rokison (U.K.) Arbitrators: Makhdoom Ali Khan (Pakistani),* (U.S.) Andrew Rogers (Australian)</p> <p>* Makhdoom Ali Khan appointed after resignation of Charles N. Brower</p>	
Togo	Paris	<p>Togo Electricité & GDF-Suez Energie Services v. Republic of Togo, ICSID Case No. ARB/06/7</p> <p>Investor Nationality: Togo Electricity: registered in Togo (majority of stock owned by French co.); GDF: French</p>	<p>Thierry Lauriol (Cabinet Jeantet Associés, Paris, France) for Togo</p> <p>Ibrahim Fadlallah & Christine Baude-Tuxidor (Paris, France) for GDF</p> <p>Eric Sossah (New Haven, Connecticut) & Amélie Bulté (Paris, France) for Respondent</p> <p>Annul. Proceeding: Same as above for Claimants</p> <p>Hamid G. Gharavi, Bertrand Derains, Marie-Laure Bizeau, Nada Sader (Derains & Gharavi, Paris, France); Mathieu Hérisson (Paris,</p>	<p>(a) Original Arbitration Proceeding President: Ahmed Sadek El-Kosheri (Egyptian) Arbitrators: Marc Grüniger (Swiss), Marc Lalonde (Canadian)</p> <p>(b) Annulment Proceeding President: Albert Jan Van Denberg (Neth.) Members: Franklin Berman (U.K.), Rolf Knieper (German)</p>	Yes

			France) for Respondent		
		Togo Electricité v. Republic of Togo, ICSID Case No. CONC/05/ 1		President: António Maria Ribeiro De Sampaio Caramelo (Portuguese) Conciliators: Bernard Hanotiau (Belgian), Pierre B. Meunier (Canadian)	
Tunisia		Ghaith R. Pharaon v. Republic of Tunisia, ICSID Case No. ARB/86/1		President: Claude Reymond (Swiss) Arbitrators: Giorgio Bernini (Italian), Karl- Heinz Böckstiegel (German)	
Zimbabwe	Paris	Bernardus Henricus Funnekotter & Others v. Republic of Zimbabwe, ICSID Case No. ARB/05/6 Investor Nationality: Several individual farmers: Netherlands	Charles Owen Verrill, Jr. (Wiler Rein U.S., Washington, D.C.); Matthew Coleman (Steptoe & Johnson London, U.K.) for Claimant Fatima Maxwell & Virginia Mabiza (Civil Division, Attorney General's Office Harare, Zimbabwe); Phillip Kimbrough & Tristan Moreau (Kimbrough & Associates, Paris, France) for Respondent	President: Gilbert Guillame (French) Arbitrators: Ronald A. CASS (U.S.), Mohammad Wasizafar (Pakistani)	Yes

APPENDIX II

Country	Location	Parties	Liability Host State (Yes / No)	Award	Costs Awarded (state/claim /split)	Annulment (Yes/No)
Algeria	Paris	LESI, S.p.A. & Astaldi, S.p.A. v. People's Democratic Republic of Algeria, ICSID Case No. ARB/05/3 Investor nationality: Italian (E)	No		Costs split between parties	
		Consortium Groupement L.E.S.I. - DIPENTA v. People's Democratic Republic of Algeria, ICSID Case No. ARB/03/8 Investor nationality: Italian (E)			Costs split between parties	
Burkina Faso		Société d'Investigation de Recherche et d'Exploitation Minière v. Burkina Faso, ICSID Case No. ARB/97/1 Investor nationality: French (incorporated under French law)				
Burundi	Paris	Antoine Goetz v.	No: re legitimate	Parties reached	Split	

		<p>Republic of Burundi, ICSID Case No. ARB/95/3</p> <p>Investor nationality: Belgian</p>	<p>changes in government policy concerning economy; discrimination; encouraging investment</p> <p>Possibly: violation of adopting measures to restrict investors of property rights. Must provide compensation or grant new free zone certificate</p>	<p>d a settlement which became the Award Burundi pay USD \$ 2,989,636 plus 8% interest</p> <p>Also drafted Special Convention for future economic interactions between parties.</p>		
		<p>Antoine Goetz v. Republic of Burundi, ICSID Case No. ARB/01/2</p> <p>Investor nationality: Belgian</p>	<p>Yes</p>	<p>USD \$1,000,000 damages for illegal measures taken with regard to African Bank of Commerce. €175,000 euros damages for</p>	<p>Split</p>	

				unlawful measure regarding Affirmet, CCA & CCA Maintenance plus interest		
Cameroon		Lafarge v. Republic of Cameroon, ICSID Case No. ARB/02/4				
	Washington, D.C.	Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon & Société Camerounaise des Engrais, ICSID Case No. ARB/81/2 Investor nationality: German	No	Claim and counter claim rejected	Split - Each party to pay own costs and half costs of arbitration	Yes - Annulled. Unanimous decision to annul award. Costs of annulment split equally
Central African Republic	Paris	Shareholders of SESAM v. Central African Republic, CONC/07/1				
	Paris	M. Meerapfel Söhne AG v. Central African Republic, ICSID Case No. ARB/07/10				

Democratic Republic of the Congo	Zurich	<p>Int'l Quantum Res. Ltd., Frontier SPRL & Compagnie Minière de Sakania SPRL v. Democratic Republic of the Congo, ICSID Case No. ARB/10/21</p> <p>Investor Nationality: IQR registered in British Virgin Islands; Frontier: Congolese; COMISA: Congolese</p>				
	Paris	<p>African Holding Co. of Am., Inc. & Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo, ICSID Case No. ARB/05/21</p> <p>Investor Nationality: African Holding; United States; SAFRICAS: Congolese</p>	No		Split - each party to pay own costs and half costs of arbitration	
		Russell Res. Int'l Ltd. v. Democratic Republic of				

		the Congo, ICSID Case No. ARB/04/11				
	Paris	Miminco LLC v. Democratic Republic of the Congo, ICSID Case No. ARB/03/14		Award embodying parties' settlement agreement was rendered 11/19/ 2007)		
		Ridgepointe Overseas Dev., Ltd. v. Democratic Republic of the Congo, ICSID Case No. ARB/00/8				
		Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7 Investor Nationality: American	Yes	USD \$750,000 plus 7.75% interest	DRC to pay USD \$95,000 costs, Any of claimant's costs beyond \$95,000 paid by Claimant	Yes - Annulled. Manifest excess of powers and failure to state reasons
		Banro Am. Res., Inc. et al. v. Democratic Republic of the Congo, ICSID Case No. ARB/98/7 Investor Nationality: A bit muddy. Banro American		Only excerpt s publish ed		

		Resources: American; Banro Resource: Canadian; SAKIMA: Congolese subsidiary				
	Washington, D.C. Supplemental hearing in Paris	Am. Mfg. & Trading, Inc. v. Democratic Republic of the Congo, ICSID Case No. ARB/93/1 Investor nationality: American	Yes	USD \$9,000,000 plus 7.5% interest	Split	
Republic of the Congo	GenevaParis	S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo, ICSID Case No. ARB/77/2 Investor nationality: Head office in Rome; Italian	Yes	<ul style="list-style-type: none"> • CFA 3,300,000 lost profits • CFA 110,098,936 10% interest compensation value of PLASCO • CFA14 2,780,253 advances to PLASCO • 10% Interest for advances in 1973 & 1974 (CFA 64,002,539) & 1975 	Split - Each party to pay own costs and half costs of arbitration	

				(CFA 78,777,714), • CFA 61,000,000 to SODIS CA for debts of PLASCO • CFA 1,000,000 Plus interest indemnification as consequence of dissolution of EDICO • CFA 5,000,000 Moral damages plus interest • US \$15,000 plus 6% int. on add'l damages		
	Paris	AGIP S.p.A. v. People's Republic of the Congo, ICSID Case No. ARB/77/1 Investor Nationality: AGIP S.p.A Italian; subsidiary	Yes	• Lit. 202,807,838 (Annexes 50 & 52), US \$ 333,297.76 (Annex 56), F968,071.86		

		AGIP (Congolese) SA (Congolese); AGIP owned 90% of Hydrocarbo ns (Swiss)		(Annex es 54 & 58) for non- recover y of comme rcial debts • F16,688 ,388 (Annex es 61,63, 65 and 67 for payme nts made by AGIP as garan tor • F 2,800,0 00 for 50% of shares of compa ny • F3 lost profits		
Cote d'Ivoire		Compagnie Française pour le Développem ent des Fibres Textiles v. Côte d'Ivoire, ICSID Case No. ARB/97/8 Investor Nationality: no award. CFDT appears to be French.				
		Adriano Gardella	No. Claim and		Each party to bear own	

		S.p.A. v. Côte d'Ivoire, ICSID Case No. ARB/74/1 Investor Nationality: Italian	Counter-claim rejected		costs split cost of tribunal	
Egypt	Paris	Malicorp Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/08/18 Investor Nationality: Incorporated in the U.K.	No	Tribunal rejected claim	Costs split between parties	
	Paris	Helnan Int'l Hotels A/S v. Arab Republic of Egypt, ICSID Case No. ARB/05/19 Investor Nationality: Incorporated in Denmark	No		Split - Each party to pay own costs and half costs of arbitration	Yes. Annul holding in paragraphs 148 and 162 of Award. Tribunal exceeded authority by requiring Helnan to exhaust local remedies before commencing ICSID proceeding. Annulment did not affect substance of Award in favor of Egypt
	Paris	Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt,	Yes	\$74,550,794.75 plus interest	Respondent must pay \$6,000,000 of Claimant's legal costs. Cost of	Annulment proceeding begun, discontinued July 26, 2010

		ICSID Case No. ARB/05/15 Investor Nationality: Italian (investor dual Egyptian citizenship point of controversy in Jurisdiction decision)			tribunal is split	
	Paris	Jan de Nul N.V. & Dredging Int'l N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13 Investor Nationality: Belgian	No. Claims dismissed on merits		Split - Each party to pay own costs and half costs of arbitration	
	The Hague	Joy Mining Machinery Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/03/11 Investor Nationality: Incorporated under the laws of England and Wales	No		Split - Each party to pay own costs and half costs of arbitration	
	Paris - 1st sess. Cairo - hearing of witnesses Geneva - hearing	Ahmonseto, Inc. & Others v. Arab Republic of Egypt, ICSID Case No.	No		Split - Each party to pay own costs and half costs of arbitration	Annulment proceeding initiated but subsequently discontinued for lack of payment

	of witnesses Geneva - oral argument	ARB/02/15 Investor Nationality: United States				
	Paris	Champion Trading Co. & Ameritrade Int'l, Inc. v. Arab Republic of Egypt, ICSID Case No. ARB/02/9 Investor Nationality: Champion: United States; Ameritrade International: United States; James T. Wahba, John B. Wahba and Timothy T. Wahba (dual citizens United States and Egypt)	No		Costs award to Egypt; Claimant pays all own cost, all costs of arbitration and half of Egypt costs	
	Initially Washington D.C. (subsequent hearings could take place in Paris, Hague or Washington D.C. or any other place upon agreement of	Middle East Cement Shipping & Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6	Yes, but some claims for damages rejected.	\$ 2,190,430.00 and \$1,558,970.00 in compound interest .	Split - Each party to pay own costs and half costs of arbitration	

	parties)					
	The Hague - 1st session, Paris	Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4 Investor Nationality: Incorporated in United Kingdom	Yes	Approx. \$20,000,000 plus costs and 9% interest	Yes, but only portion of attorney's fees and costs incurred in presenting merits of arbitration	Application for annulment rejected
		Manufacturers Hanover Trust Co. v. Arab Republic of Egypt & General Authority for Investment and Free Zones, ICSID Case No. ARB/89/1				
	Hague (prelim) Washington, D.C. (seat)	Southern Pacific Props. (Middle East) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3 Investor Nationality: Incorporated in Hong Kong	Yes	US \$ 27.6 million	Egypt had to pay \$5,093,00 for legal, audit and arbitration costs attributable to proceedings	Annulment proceeding initiated but subsequently discontinued because of settlement by parties
Gabon	Paris	Participaciones Inversiones Portuarias SARL v. Gabonese Republic, ICSID Case				

		No. ARB/08/17				
	Paris	Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic, ICSID Case No. ARB/04/5 Investor Nationality: Incorporated in Gabon but tribunal found sufficient "foreign control" to confer jurisdiction	Yes	71,130,377,782.00 Central African Francs - damages (from complaint in US Dist. Ct S.D. N.Y. 1:2010cv04061)	\$ 296,455 U.S. dollars and €1,100,000 euros expenses and costs (from complaint in US Dist. Ct S.D. N.Y. 1:2010cv04061)	Annulment filed, ICSID rejected; Affirmed award, lifted stay of execution of award; Assessed Gabon costs of annulment challenge
		Société d'Etudes de Travaux et de Gestion SETIMEG S.A v. Republic of Gabon, ICSID Case No. ARB/87/1				
The Gambia		Alimenta S.A. v. Republic of The Gambia, ICSID Case No. ARB/99/5				
Ghana	London	Gustav F.W. Hamester GmbH & Co. KG v. Republic of Ghana, ICSID Case No. ARB/07/24	No		Split - Each party to pay own costs and half costs of arbitration	

		Investor Nationality: Joint venture: Hamester German and company created under laws of Ghana				
	The Hague	Vacuum Salt Prod. Ltd. V. Republic of Ghana, ICSID Case No. ARB/92/1 Investor Nationality: Incorporated under laws of Ghana -- no jurisdiction	No		Split - Each party to pay own costs and half costs of arbitration	
Guinea		Mar. Int'l Nominees Establishment v. Republic of Guinea, ICSID Case No. ARB/84/4 Investor Nationality: Liechtenstein (according to 505 F. Supp. 241)	Yes, but Guinea also received an award on counter-claim	MINE: \$12,459,483 (incl. \$275,000 for ICSID arbitration) Guinea: \$210,000 Balance due to MINE: \$12,249,483	Split - Each party to pay own legal costs. MINE award included arbitration costs	Partial. Ad hoc rejected annulment holding resp. in breach of contract. Granted annulment on damages
	Paris	Atl. Triton Co. Ltd. v. People's Revolutionary Republic of Guinea, ICSID Case No. ARB/84/1 Investor	Split	Atlantic Triton awarded US\$226,867 but had to issue	Split - Each party to pay own costs and half costs of arbitration	

		Nationality: Norwegian		bank garan tee to Guinea in same amoun t pendin g final judgme nt in shipyar d procee dings A.T. awarde d \$100,00 outstan ding manag ement fees		
Kenya	London - first session The Hague	World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/07 7 Investor Nationality: Incorporate d in Isle of Man	No	Claim rejecte d	Split - Each party to pay own costs and half costs of arbitration	
Liberia		Int'l Trust Co. of Liberia v. Republic of Liberia, ICSID Case No. ARB/98/3				
	London Paris	Liberian E. Timber Corp. v. Government of the Republic of	Yes	US \$8,095, 904 lost profits; US \$654,38		

		Liberia, ICSID Case No. ARB/83/2 Investor Nationality: Liberian but tribunal found that LETCO under "foreign control" of French nationals		2 cost incurre d as result of exprop riation		
Madaga scar		Seditex Eng'g Beratungsg ellschaft für die Textilind ustrie GmbH. v. Madagascar, ICSID Case No. CONC/94/ 1				
		Seditex Eng'g Beratungsg ellschaft für die Textilindust rie m.b.H. v. Democratic Republic of Madagascar, ICSID Case No. CONC/82/ 1				
Mali		Société d'Exploitati on des Mines d'Or de Sadiola S.A. v. Republic of Mali, ICSID Case No. ARB/01/5	Yes	Mali ordere d to refund collecte d stamp duty (CFA 1,800,0 24,000)	Mali had to pay all costs and expenses of tribunal	
Morocc	Paris	Consortium	No		Split - Each	Claimant's

o		R.F.C.C. v. Kingdom of Morocco, ICSID Case No. ARB/00/6 Investor Nationality: Italian			party to pay own costs and half costs of arbitration	annulment arguments rejected
	Paris	Salini Costruttori S.p.A. & Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4 Investor Nationality: Italian				
		Holiday Inns S.A. & Others v. Kingdom of Morocco, ICSID Case No. ARB/72/1 Investor Nationality: Holiday Inns: Swiss; Occidental Petroleum: American				
Niger		TG World Petroleum Ltd. v. Republic of Niger, ICSID Case No. CONC/03/ 1				
Nigeria	Paris	Shell Nigeria Ultra Deep Ltd. v. Federal				

		Republic of Nigeria, ICSID Case No. ARB/07/18				
		Guadalupe Gas Products Corp. v. Fed. Republic of Nigeria, ICSID Case No. ARB/78/1				
Rwanda		Olyana Holdings LLC v. Republic of Rwanda, ICSID Case No. ARB/10/10				
Senegal	Initially the Hague (subsequent hearings could take place in Paris or any other place upon agreement of parties)	Société Ouest Africaine des Bétons Industriels v. State of Senegal, ICSID Case No. ARB/82/1 Investor Nationality: SOABI incorporated in Senegal but Tribunal found "foreign control" Belgian	Yes	150,000,000 FCFA - - lost profits 552,989,664 FCFA - damages 255,937,342 FCFA - - Interest accrued	Costs split - Award breaks down tribunal costs	
Seychelles	Sydney (Int.), London (oral)	CDC Grp. plc v. Republic of Seychelles, ICSID Case No. ARB/02/14 Investor Nationality: Incorporate	Yes	£1,771,096.95 plus 9% interest	State to pay legal fees and arbitration costs	Application for annulment rejected

		d in England and Wales				
South Africa	London - first session The Hague hearing	Piero Foresti, Ida Laura de Carli & Others v. Republic of South Africa, ICSID Case No. ARB(AF)/07/1 Investor Nationality: Italian nationals; Finstone: Incorporated in Luxembourg	No Claimant requested discontinuance based on agreement between parties. Award memorialized dismissal with prejudice and allocation of costs	Fees and costs only amount awarded	€ 4000,000 euros for Respondent Concurring opinion clarifies that the moderate amount of costs reflects Claimant's efforts to employ Historically Disadvantaged South Africans (HDSA)	
		Gabon v. Société Serete S.A., ICSID Case No. ARB/76/1 Investor Nationality: Republic of Gabon				
Tanzania	London	Standard Chartered Bank v. United Republic of Tanzania, ICSID Case No. ARB/10/12 Investor Nationality: Hong Kong				
	Paris	Biwater Gauff (Tanzania) Ltd. v. United Republic of	No. But found that TZ violated BIT	No damages. Declaratory remedy	Split - Each party to pay own costs and half costs of arbitration	

		Tanzania, ICSID Case No. ARB/05/22 Investor Nationality: Incorporate d in England and Wales		es		
	London	Tanzania Elec. Supply Co. Ltd. v. Independent Power Tanzania Ltd. , ICSID Case No. ARB/98/8 Investor Nationality: Odd-- Claimant is incorporated in Tanzania --public utility wholly owned by Tanzania . Respondent is joint venture between Tanzanian engineering company and Malaysian corp.			Split - Each party to pay own costs and half costs of arbitration	
Togo	Paris	Togo Electricité & GDF-Suez Energie Servs. v. Republic of Togo, ICSID Case No. ARB/06/7 Investor Nationality: Togo	Yes, some of Togo Eleclectrici- ty's claims accepted but other rejected. GDF's claims rejected and Responde	•10,623 ,742,58 2 CFA francs contrac tual indem nities •1,191, 141,211 CFA francs balance	Each party to bear own costs split cost of tribunal as follows 80% by Respondent and 20% by Claimants	Togo had to pay costs: € 341.285,02 euros à Togo Electricité et €200.000 euros à GDF

		Electricity: registered in Togo (majority of stock owned by French co.); GDF: French	nt's counter-claims rejected	bank accts • 1,501,862,962 CFA francs ownership in Togo electric • 58,524,403 CFA francs bank charges • 3,588,415,997 CFA francs balance on 22 Feb 2006 • 221.975 CFA francs balance prior to 22 Feb 2006 • plus interest		
		Togo Electricité v. Republic of Togo, ICSID Case No. CONC/05/1				
Tunisia		Ghaith R. Pharaon v. Republic of Tunisia, ICSID Case No. ARB/86/1				
Zimbabwe	Paris	Bernardus Henricus Funnekotter & Others v. Republic of	Yes	13 individual claims to	Parties pay own costs and Respondent pays fees of	

		Zimbabwe, ICSID Case No. ARB/05/6 Investor Nationality: Several individual farmers: Netherlands		farms totalin g € 8,220,0 00 plus interest	Tribunal / ICSID.	
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