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International Arbitration in Africa

Growth, developments & trends

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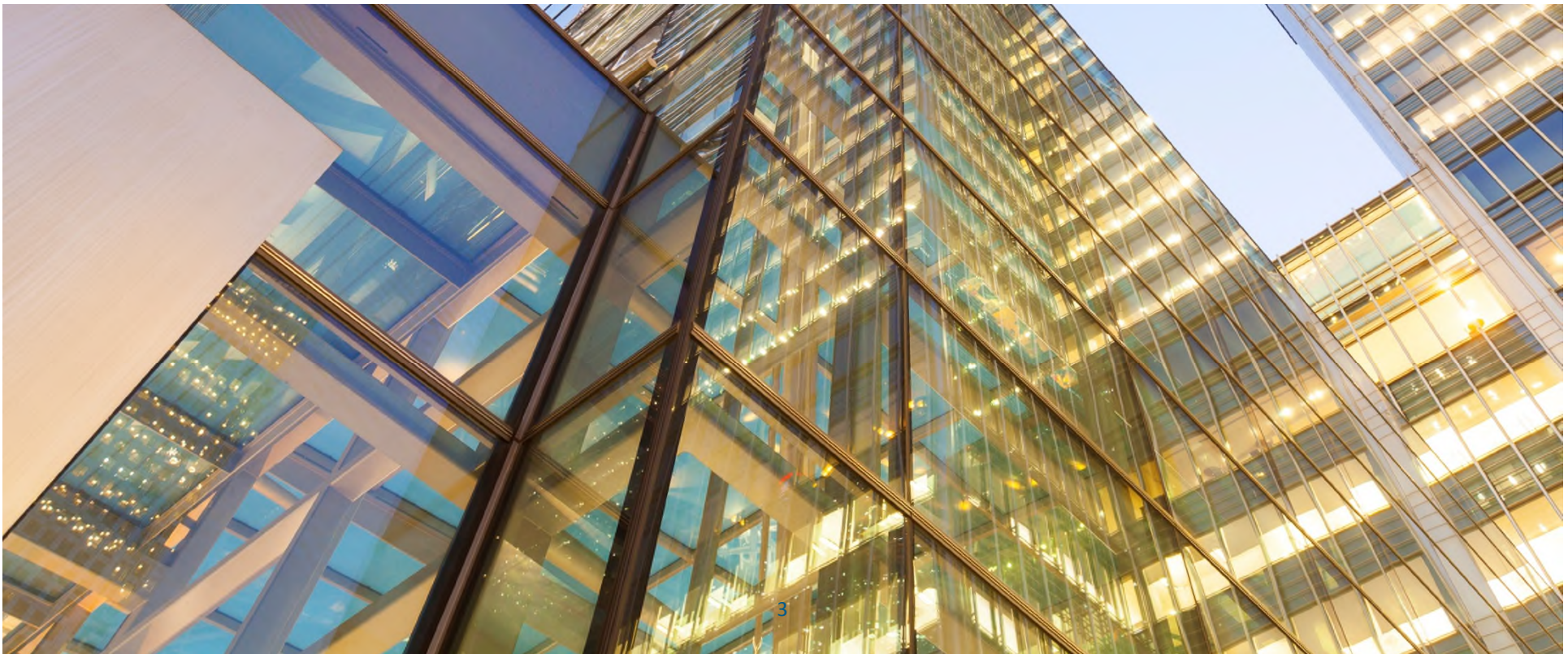
Structure of Presentation

- Part 1 – The African dispute resolution story: Opportunities & challenges
- Part 2 – Arbitration & other legal developments
- Part 3 – Investment treaty arbitrations
- Part 4 – Enforcement of awards
- Part 5 – Best practice & future trends



Part 1

THE AFRICAN DISPUTE RESOLUTION STORY – OPPORTUNITIES & CHALLENGES



Economic Opportunities

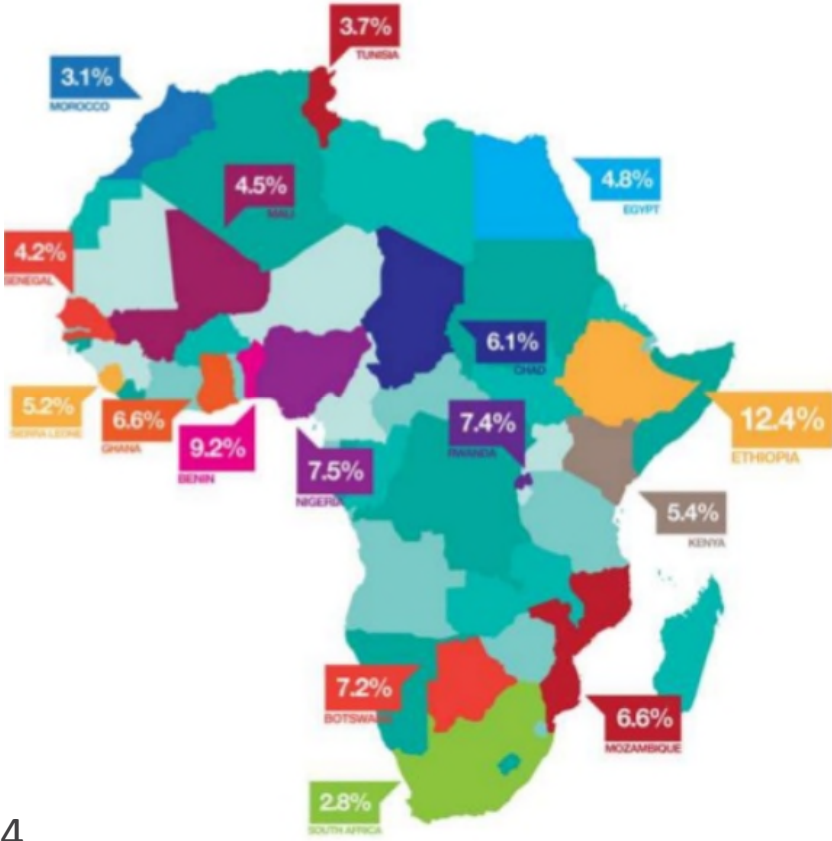
- Improving investment conditions.
- Diversification within economies.
- Sustainable growth.
- Foreign investment seeking higher level of returns.
- Multilateral and private sector investment.

Sector Opportunities

Growth in Africa

Before (2010)	Future (2030)
US\$1.7 trillion Collective GDP in 2010	US\$3.9 trillion Collective GDP in 2030
1.03 billion # consumers in 2010	1.4 billion # consumers in 2030
399 Million # people 15 – 24 in 2010	736 Million # people 15 – 24 in 2030
40% Urbanisation rate in 2010	50% Urbanisation rate in 2030

Sample African Country GDP Growth (2010 used as base year)



By 2030...

- 40% increase in collective GDP
- 55% increase in young consumers aged 15 to 24
- 10% increase in urbanisation rate

Top 10 investment challenges

1. Legal and linguistic diversity.
2. Need for early engagement with government and government authorities.
3. Evolving energy & natural resources legislative regimes.
4. Procurement legislation, indigenisation and local content policies.
5. Local and regional infrastructure, processes and practicalities.
6. Bribery & corruption compliance (UK Bribery Act 2010, FCPA).
7. Political risk and instability.
8. Exchange controls.
9. Licensing procedures.
10. Foreign ownership restrictions.

Legal background – local laws

Local laws derive from a number of sources

Primary sources:

- Civil law (e.g. former colonies of France, Belgium and Portugal)
- Common law (e.g. former British colonies)
- Mixed systems (e.g. combined civil/common or common/*shari'a*)
- Egyptian Civil Code (based on civil and *Shari'a* law)
- Customary laws





Part 2

ARBITRATION & OTHER LEGAL DEVELOPMENTS



Arbitration legislation

- UNCITRAL Model Law on International Commercial Arbitration.
 - Provides a means to implement modern arbitration legislation meeting international standards.
 - Currently adopted by eight countries in the region.
 - Comparatively low level of adoption.

Arbitration legislation (cont'd)

- International Arbitration Bill introduced in South Africa's Parliament.
 - Based on UNCITRAL Model Law on International Commercial Arbitration.
 - Governs international commercial arbitration between companies or individuals of different states, including public bodies.
 - Bill includes a confidentiality provision indicating that absent compelling reasons for a private hearing, if an arbitration proceeding involved a public body as a party, that proceeding will be held in public.

Arbitration legislation (cont'd)

- Ghana Alternative Dispute Resolution Act 2010.
 - Brings Ghana's arbitration legislation into line with modern international arbitration standards with measures addressing:
 - party autonomy;
 - the tribunal's power to determine its own jurisdiction; and
 - swift progress of proceedings etc.
- Some concerns:
 - The delineation of the scope of the Act is potentially unclear.
 - The Courts' extensive powers potentially leave the door open to excessive Court interference (or at least encourage frivolous court applications by parties wishing to frustrate the arbitral process).

Arbitration centres

- Mauritius
 - London Court of International Arbitration/Mauritius International Arbitration Conference (LCIA-MIAC)
- Morocco
 - Casablanca International Mediation and Arbitration Centre (CIMAC)
- South Africa
 - Arbitration Foundation of Southern Africa (AFSA)
- Kenya
 - Nairobi Centre for International Arbitration (NCIA)

Arbitration centres (cont'd)

- China-Africa
 - Shanghai International Arbitration Centre in China to establish the China-Africa Joint Arbitration Centre (CAJAC)
- Rwanda
 - Kigali International Arbitration Centre (KIAC)
- Egypt
 - Cairo Regional Centre for International Commercial Arbitration (CRCICA)
- Nigeria
 - Lagos Court of Arbitration



Part 3

INVESTMENT PROTECTION



Why are Investment Treaties and Investor/State Arbitration Relevant for your Business ?

- ❖ Companies make investments throughout the world, in various forms
- ❖ In doing so, interaction with State or State entities is commonly required to obtain permits, licenses, approvals; when the State is as a business partner, through the court system or otherwise
- ❖ When something goes wrong, in many jurisdictions around the world, resorting to the local recourse or challenge mechanisms may not be satisfactory or efficient
- ❖ In addition to the usual measures to which modern investors resort to protect their investments, international law and investment treaties provide an additional layer of efficient protection that is often overlooked

Bilateral investment treaty standards

- Treaty establishes the terms and conditions under which nationals of one country invest in the other.
- Often include following rights and protections:
 - Fair and equitable treatment;
 - Prohibition against arbitrary and discriminatory measures;
 - National treatment;
 - Most-favoured nation treatment;
 - Compensation in the event of expropriation;
 - Full protection and security;
 - Free transfers;
 - Observance of Obligations (“Umbrella Clause”).
- Allows a foreign investor to sue states by directly in arbitration for breach of the treaty.

Resolution of Investor/State disputes through international arbitration

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF MOZAMBIQUE CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT

ARTICLE IX

1. For purposes of this Treaty, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to an investment authorization, an investment agreement or an alleged breach of any right conferred, created or recognized by this Treaty with respect to a covered investment under this treaty.

2. A national or company that is a party to an investment dispute may submit the dispute for resolution under one of the following alternatives:

(a) to the courts or administrative tribunals of the Party that is a party to the dispute; or

(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or

(c) in accordance with the terms of paragraph 3.

3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b), and that ninety days have elapsed from the date on which the dispute arose, the national or company concerned may submit the dispute for settlement by binding arbitration:

(i) to the Centre, if the Centre is available; or

(ii) to the Additional Facility of the Centre, if the Centre is not available;
or

(iii) in accordance with the UNCITRAL Arbitration Rules; or

(iv) if agreed by both parties to the dispute, to any other arbitration institution or in accordance with any other arbitration rules.

State actions which may breach investors' rights under investment treaties and trigger international arbitration

Actions by the Executive / Ministries

- ❖ Cancellation of concessions for mining, oil and gas exploration and production, etc.
- ❖ Seizure of an investor's assets by the State
- ❖ Imposition of arbitrary or discriminatory taxation

Actions by Regulatory Agencies

- ❖ Arbitrary or discriminatory regulatory measures such as the withdrawal of industry subsidies

Actions by the Judiciary

- ❖ Denial of justice and lack of due process before domestic courts
- ❖ Arbitrary or discriminatory criminal proceedings against an investor

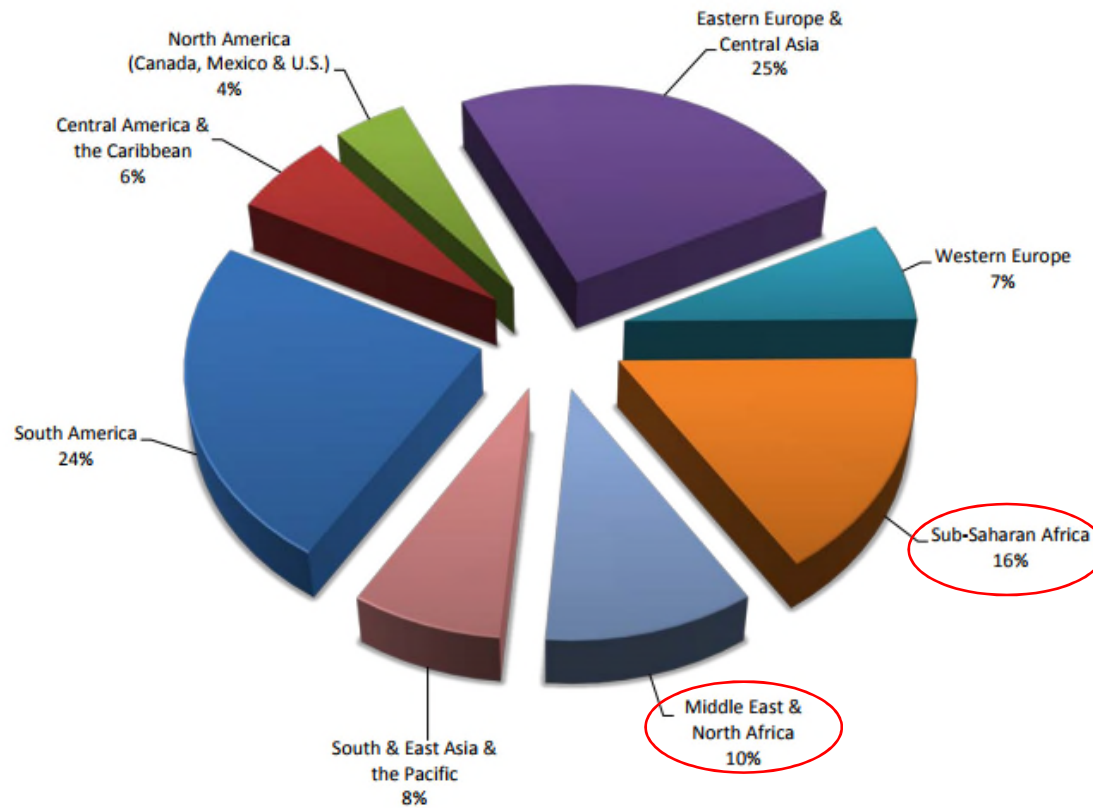
Actions by Police/Security Forces

- ❖ Failure to protect investors and their investments from physical harm arising from insurrection and political upheaval

Investor/State disputes involving an African State at the World Bank's Investor/State disputes Centre

5. Geographic Distribution of All ICSID Cases, by State Party Involved

Chart 6: Geographic Distribution of All Cases Registered under the ICSID Convention and Additional Facility Rules, by State Party Involved*:



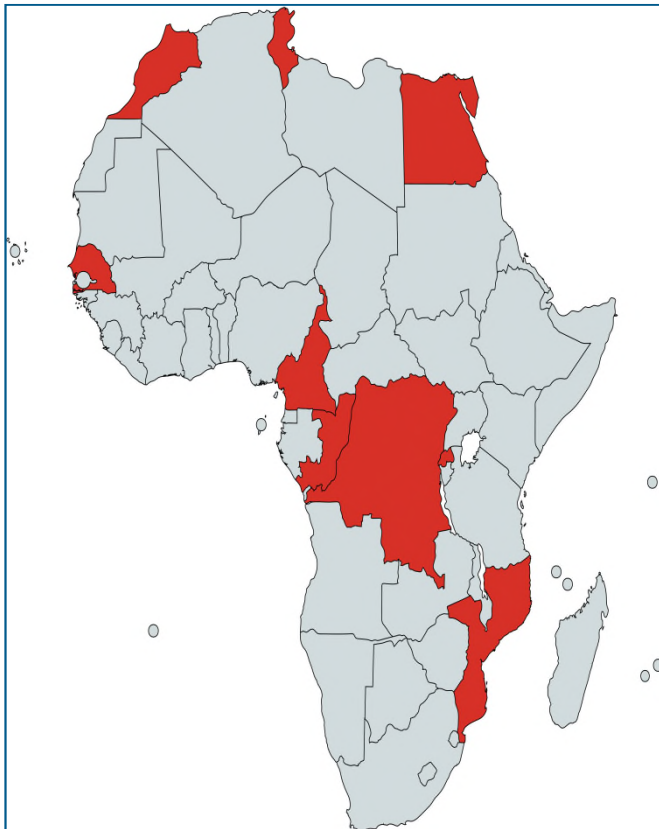
Source: ICSID's Annual Report 2016

Investor/State disputes involving an African State at the World Bank's Investor/State disputes Centre

- Telecoms : LTME Mauritius Limited and Madamobil Holdings Mauritius Limited v. Republic of Madagascar (filed in 2017)
- Oil & gas: Puma Energy Holdings (Luxembourg) SARL v the Republic of Benin (filed in 2017)
- Construction: CMC Muratori Cementisti CMC Di Ravenna SOC. Coop. Et al. V Republic of Mozambique (filed in 2017)
- Mining: AngloGold Ashanti (Ghana) Limited v. Republic of Ghana (filed in 2017) or BSG Resources v. Republic of Guinea (filed in 2016)
- Tourism and hospitality: Société Resort Company Invest Abidjan v. Republic of Côte d'Ivoire (filed in 2017)
- Media: Al Jazeera Media Network v. Arab Republic of Egypt (filed in 2016)
- Banking and Finance: Standard Chartered Bank (Hong Kong) Limited v. Tanzania (filed in 2016)
- Agribusiness: EcoDevelopment in Europe AB & others v. United Republic of Tanzania (filed in 2017)

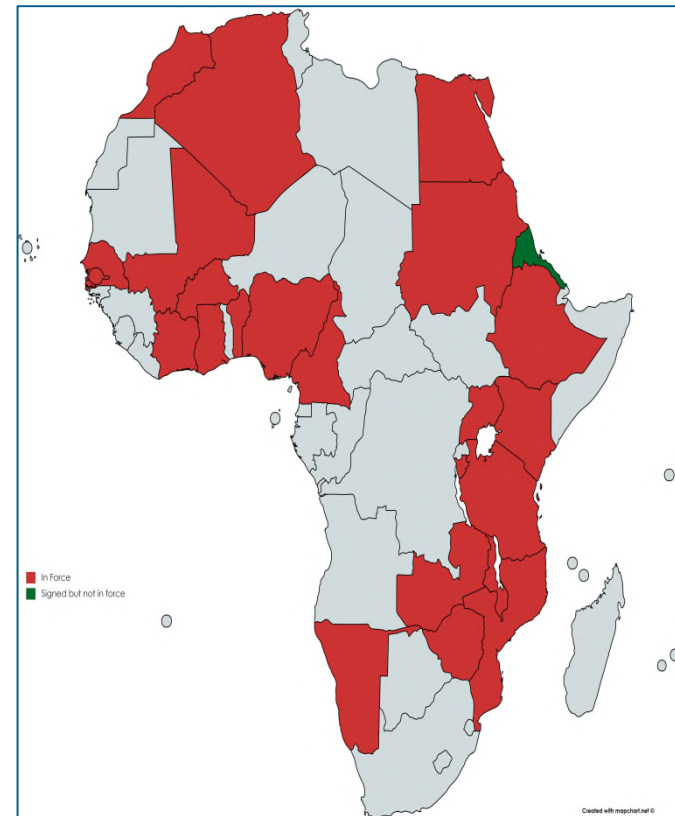
Investment Protection through Complex Structures and Protection of Indirect Investment

U.S. IIAs with African States

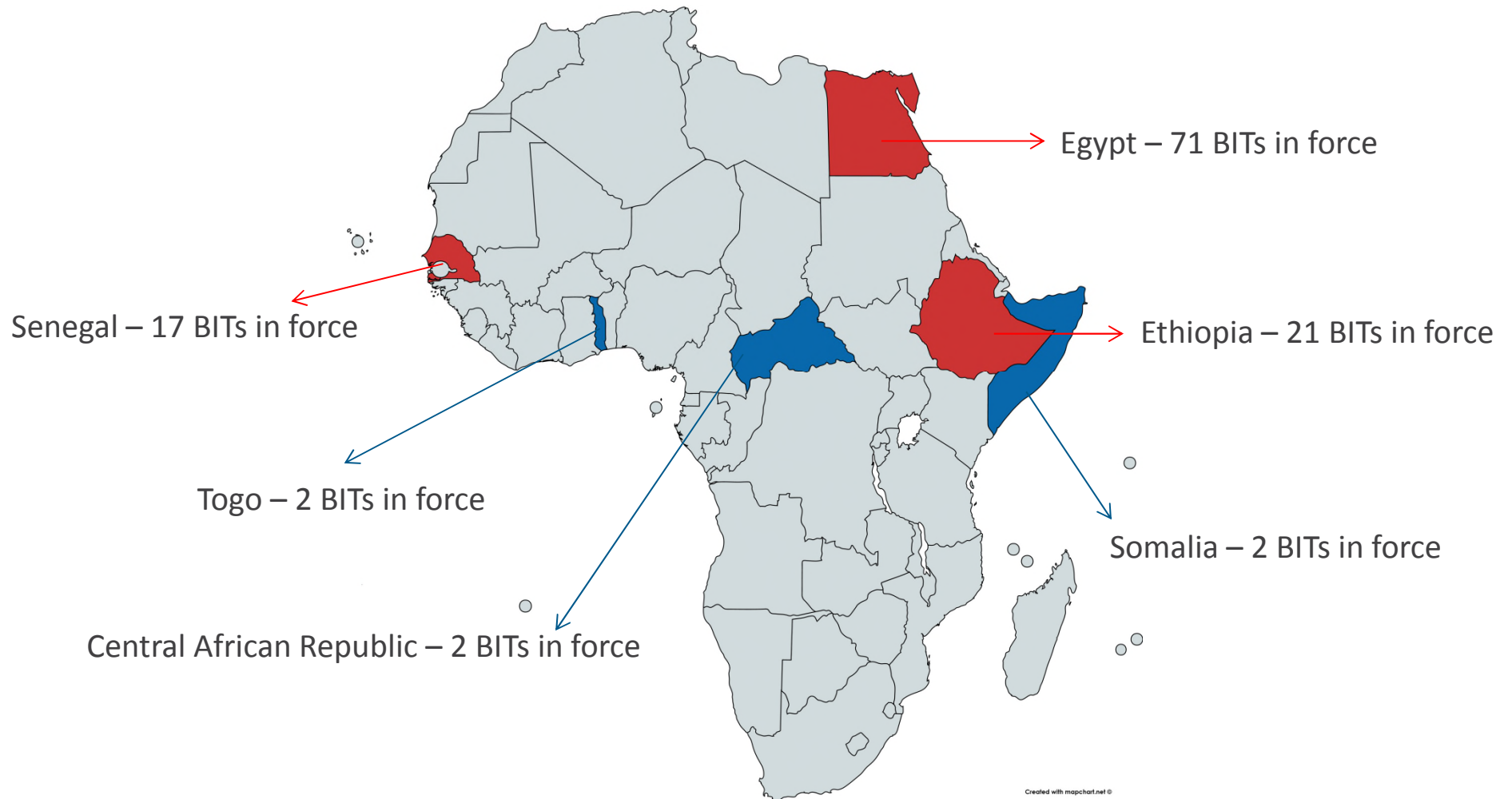


- Countries with treaties in force
- Countries with treaties signed but not in force

Netherlands IIAs with African States

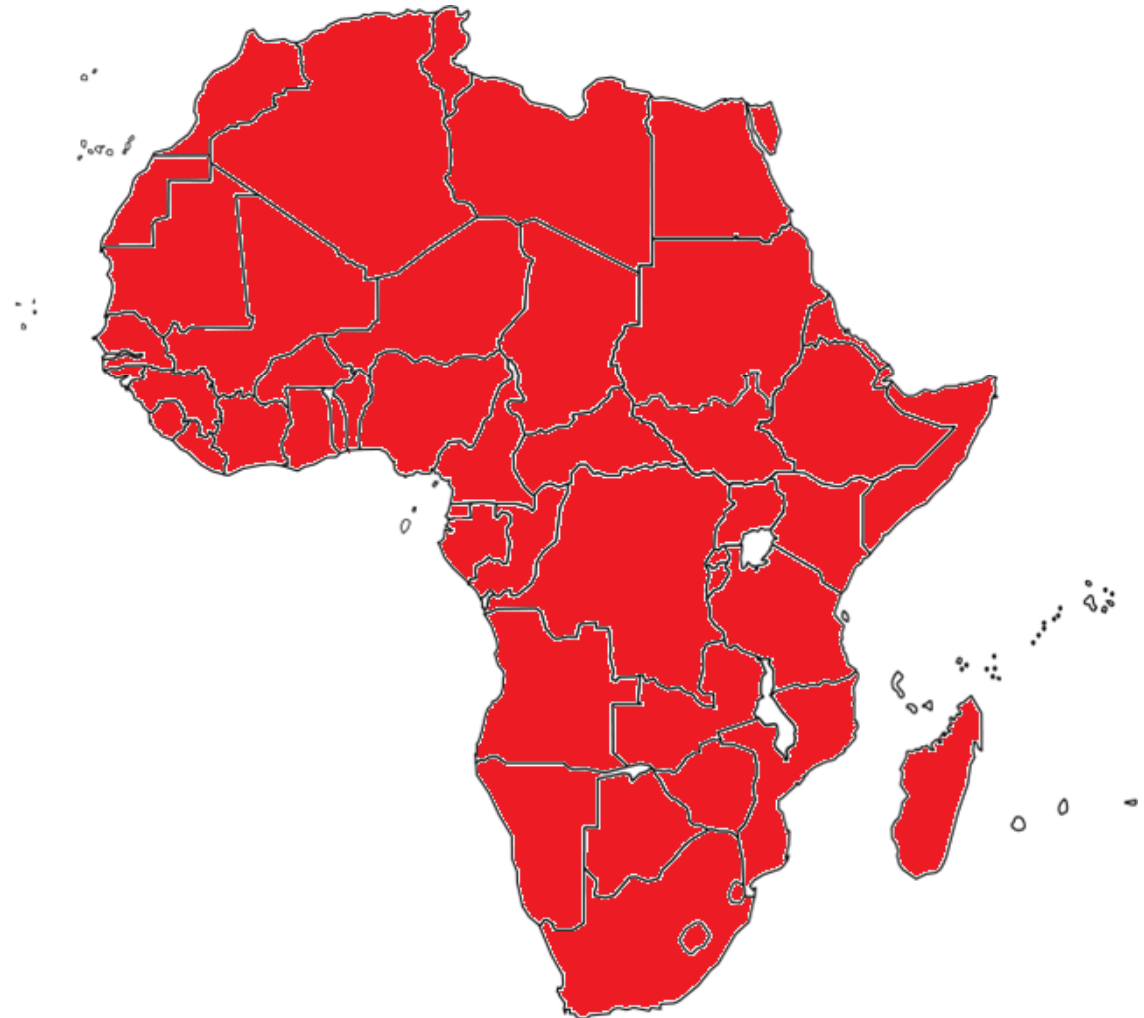


Investment Protection through Complex Structures and Protection of Indirect Investment



Investment Protection through Complex Structures and Protection of Indirect Investment

Every African State has at least one BIT in force, so it is almost always possible to structure the investment to enjoy investment protection



Investment Protection through Complex Structures and Protection of Indirect Investment

How to Structure an Investment to Qualify for Protection under Treaties: example

- Investment in Ghana
 - There is no US – Ghana BIT
 - 8 BITs in force available (China, Denmark, Germany, Malaysia, Netherlands, Serbia, Switzerland, United Kingdom)
- Consider content of BITs and check tax status
- **Netherlands – Ghana BIT**

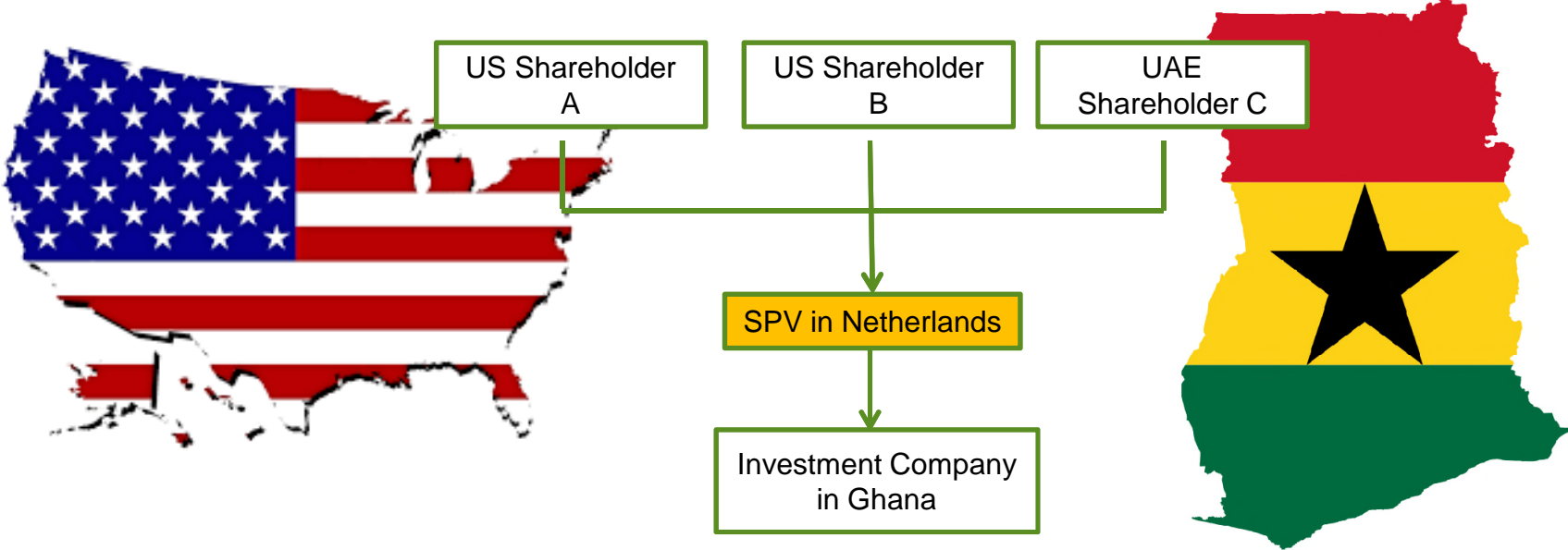


(b) the term 'nationals' shall comprise with regard to either Contracting Party:

- natural persons having the nationality of that Contracting Party in accordance with its laws;
- without prejudice to the provisions of (iii) hereafter, legal persons constituted under the law of that Contracting Party; and
- legal persons located either in Ghana or the Netherlands and controlled, directly or indirectly, by nationals of that Contracting Party.

Investment Protection through Complex Structures and Protection of Indirect Investment

How to Structure an Investment to Qualify for Protection under Treaties: example



Trends in African investment treaties

Investment Treaties Concluded in 2016

Countries	Type of Treaty	Date Signed
Ethiopia-United Arab Emirates	Bilateral Investment Treaty	February 23, 2016
Côte d'Ivoire-Turkey	Bilateral Investment Treaty	February 29, 2016
Ghana-Turkey	Bilateral Investment Treaty	March 1, 2016
Morocco-The Russian Federation	Bilateral Investment Treaty	March 15, 2016
Somalia-Turkey	Bilateral Investment Treaty	June 1, 2016
Mozambique-Singapore	Bilateral Investment Treaty	August 24, 2016
Kenya-Japan	Bilateral Investment Treaty	August 28, 2016
Rwanda-Morocco	Bilateral Investment Treaty	October 19, 2016
Rwanda-Turkey	Bilateral Investment Treaty	November 3, 2016
Nigeria-Singapore	Bilateral Investment Treaty	November 4, 2016
Nigeria-Morocco	Bilateral Investment Treaty	December 3, 2016



Part 4

ENFORCEMENT OF ARBITRAL AWARDS



Arbitration enforcement

- Routes to enforcement:
 - New York Convention
 - OHADA
 - Reciprocal arrangements
 - National law



New York Convention

- Provides that signatories shall:
 - recognise and uphold valid written arbitration agreements; and
 - recognise and enforce arbitral awards (subject to certain exceptions – e.g. public policy).
- Preferred means in most instances by which arbitrating parties seek to enforce international arbitration awards.
- A growing number of African countries are signatories. Recent additions include:
 - Angola (Mar 2017), Comoros (Apr 2015), Congo (Nov 2014) and Burundi (Jun 2014)

OHADA

- The acronym, in French, for "*Organisation for the Harmonisation of Business Law in Africa*".
- Aims are to modernise, standardise and harmonise commercial law in Africa.
- Almost all of the OHADA member states are former French colonies.
- Rules and institutions draw strongly on civil law legal traditions and French business law.

OHADA Uniform Arbitration Act

- Along similar lines to the UNCITRAL Model Law.
- Provides for the recognition and enforcement of arbitration agreements and arbitral awards.
- Arbitral awards are given final and binding status in all OHADA member states, on a par with a judgment of a national court.
- OHADA Common Court for Justice and Arbitration – role akin to that of the ICC International Court of Arbitration.
- Narrow definition of public policy – limited to manifest breaches of "*international public policy*".

Other potentially relevant treaties

- Common Market for Eastern and Southern Africa (COMESA) Treaty allows an investor that is resident in one member state can bring an action against an entity in another member state.
- Economic Community of West African States (ECOWAS) does not provide for a prescribed enforcement procedure and depends on the legal system in the jurisdiction where enforcement is sought.

Local courts and enforcement

Nigeria

- **IPCO v NNPC** - highlights the difficulties of enforcement in Nigeria.
- Challenges and appeals threatened to delay a final decision on enforcement by many years.
- **City Engineering** – restrictive view taken of limitation.
- **Statoil (Nigeria) Ltd v NNPC & Others.**
- **Nigerian Agip Exploration v NNPC & Oando.**

Tanzania

- **D B Shapriya v Bish International** - arbitration award would be enforced unless there was an “*error of law on the face of the award*” (approach of the English courts prior to the 1996 Arbitration Act).
- **Dowans v TANESCO** was another very pro-arbitration decision.
- **Standard Chartered Bank (Hong Kong) v TANESCO** – injunction against “*enforcing, complying with or operationalising*” an ICSID decision.

Local courts and enforcement

Kenya

- **Christ For All Nations v Apollo Insurance Co Limited** - challenge to an arbitral award on the grounds of public policy was rejected. The Kenyan Court noted the approach to public policy applied by the Indian Supreme Court.
- Public policy of Kenya inclines towards the finality of arbitral awards.

Cameroon

- **African Petroleum Consultants (APC) v Société Nationale de Raffinage** - application to the High Court of Cameroon for the enforcement of an arbitral award made in London (under the ICC Rules).
- Relied on the New York Convention and, in the alternative, Articles 30, 31 and 34 of the OHADA Uniform Arbitration Act.
- Award to be enforceable on both bases.

Local courts and enforcement

Zambia

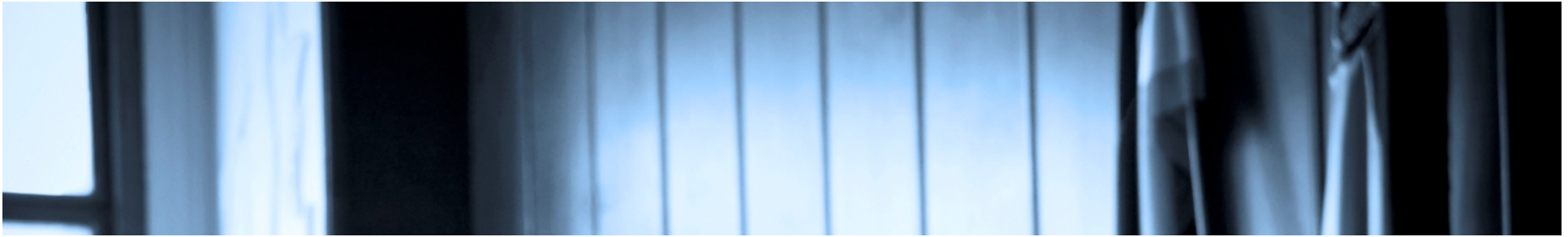
- **U&M Mining Zambia Ltd v Konkola Copper** - local Zambian court granted interim relief in support of foreign arbitral proceedings.
- A party was granted interim protective relief from Zambian courts concerning its interest in a Zambian copper mine, pending a London-seated, LCIA arbitration.

Enforcement and local courts' approach

- In states that are not party to the NYC, enforcement heavily depends on application of national law which may not be favourable.
- Some states have implemented legislation that requires the party seeking to enforce a foreign arbitral award to show no exception to enforcement exists – reversing burden of proof under the NYC:
 - Malawi – Arbitration law Cap 6:03
 - Sudan Arbitration Act 2005 (Law No 15/2005)

Getma International v Guinea

- Port investment dispute which was referred to arbitration.
- The OHADA CCJA annulled the arbitral award after it was found that the arbitrators had breached their mandate and the rules of the court by negotiating directly with the parties to secure an increase in their fee.
- Getma sought to enforce the annulled award in the US:
 - US lower court refused to enforce the award on the basis that none of the public policy arguments put forward by Getma were sufficient for it to disregard the CCJA's annulment decisions.
 - US Court of Appeal confirmed lower court decision – indicating that the annulment would need to amount to a violation of the US's most basic notions of morality and justice – which it did not.



Part 5

BEST PRACTICE & FUTURE TRENDS



Best Practice – dispute resolution strategy

- Early involvement of experienced local counsel.
- Early engagement and continued dialogue with government and governmental authorities.
- Assess framework of regional and bilateral investment treaties, specific legislations and local content rules.
- Ensure thorough negotiation of contracts and contractual dispute clauses.
- Considerations for the seat of the arbitration include:
 - Whether there is a modern arbitration law in place;
 - Supportive local courts; and
 - The existence of supporting infrastructure and service providers to support arbitration.

Best Practice – drafting arbitration agreements

- Clarify which form of dispute resolution applies.
- Specify the seat of the arbitration.
- Specify the governing law of the agreement.
- Address the qualifications and appointment of arbitrators.
- Address the language of the proceedings and law to be applied by the tribunal.
- State which institutional rules apply.
- Address any confidentiality issues.

Future Trends

- Possible consolidation of arbitral institutions across the continent.
- Increased involvement of international arbitral institutions such as ICC and LCIA in Africa.
- Emergence of a handful of African ‘super-seats’ which are seen as favourable for international investors.
- Growing acceptance amongst international investors of using African institutions and arbitrators.
- Increased legal spend upfront by African counter-parties and greater consideration of dispute strategy.

Q & A