ICCA
INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

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"Africa & the World: The Changing Landscape of International Arbitration"

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Outline

- ★ **Prologue:** Africa – A Continental Snapshot.
- ★ African Trade and Economics: A Transformative Growth
- ★ Foreign Direct Investment in Africa: Opportunities and Challenges.
- ★ International Arbitration Overview: Africa & the World.
- ★ **Epilogue:** International Arbitration: The Changing Landscape.

Prologue: Africa - Continental Snapshot

★The recorded history of early civilization arose in Egypt, and Nubia, the Sahel (*covers parts of (from west to east) the* ***Gambia, Senegal, southern Mauritania, central Mali, Burkina Faso, southern Algeria*** *and* ***Niger, northern Nigeria*** *and* ***Cameroon, central Chad, southern Sudan, northern South Sudan*** *and* ***northern Eritrea***), the Maghreb the Horn of Africa, and South Africa. The ***Homo Erectus*** is said to have originated in Africa.

★Some anthropological studies *consistently* established that **ancient Egyptians** were **originally Africans** and **overtime gained biological affinities** towards **Middle Eastern** and **southern European populations**.

Prologue: Africa - Continental Snapshot

★ Africa is now composed of **55** Sovereign States (***54 members of the African Union to the exclusion of Morocco***), with more than **1 billion** inhabitants.

★ Legal systems in Africa are a diverse mix of **common**, **civil**, **customary** and **religious** law. There are over **700 (known) languages**, and working languages include: **English**, **French**, **Portuguese**, and **Arabic**.

★ **Africa** has experienced ***high*** and ***continuous*** economic growth in the past decade. The **average annual *real* growth rate:**

1980-1989 → 1.8%

1990-1999 → 2.6%

2000-2010 → 5.3%

(***UNCTAD Report 2014 "Catalyzing investment for Transformative Growth in Africa***)

Africa - Economics & Trade

★ According to the **IMF**, **4 of the 6 fastest growing economies** in the world in 2014 are in **Sub-Saharan Africa**.

★ Furthermore, **12 African countries** had an **average growth rate** above the developing-country average of **6.1%** over the period 2000–2010, and **2 countries** (**Angola** and **Equatorial Guinea**) had **double-digit** growth rates.

★ Between 2000-2011, the **services sector** share of total value added was about **47%** (with **average growth rate of 5.2%**), compared to **37%** for **industry sector** (with **average growth rate of 3.5%**) and **16%** for **agriculture sector** (with **average growth rate of 5.1%**). In some countries this was due to a boom in **telecommunications activities**.

(*UNCTAD Report 2014 "Catalyzing investment for Transformative Growth in Africa"*) & (UNCTAD World Investment Report 2013)

Africa - An Investment Magnet?

★ **Favourable commodity prices, stronger economic cooperation with emerging economies, higher official development assistance** since 2000, and an **increase in FDI flows** contributed to economic growth process.

★ Over the **past two decades** the **average investment rate in Africa** hovered around **18%**. (*This is well below the 25% target for reducing poverty*). However, only **9** countries in Africa have sustained investment rates of 25% and above. These are: **Algeria**, **Botswana**, **Cape Verde**, **the Congo**, **Equatorial Guinea**, **Guinea**, **Lesotho**, **Sao Tome and Principe**, and **Seychelles**.

(***UNCTAD Report 2014 "Catalyzing investment for Transformative Growth in Africa"***)

Africa – Foreign Direct Investment

★ In **2012**, Africa received **US$50 billion** in FDIs (about **3.7% of global inflows**). This reached **US$56.3 billion** in **2013**. (*In **2008**, the **US$59 billion** represented about **3.2%** of global inflows*).

★ **Africa** continues to attract ***relatively small FDI compared to other continents***. Nevertheless, it attracted **significant FDIs** into the **manufacturing** and **services sectors**, the **extractive industries** account for the bulk of FDIs in the past decade.

★ In **North Africa**, FDIs increased by **35% (US$11.5 billion in 2012** - *still much lower than the levels reached by Egypt prior to 2011*). In **East Africa**, recently discovered **gas reserves** in **Tanzania** and **oil fields** in **Uganda** increased FDIs from **US$4.5 billion in 2011 to US$6.3 billion in 2012**.

(***UNCTAD Report 2014 "Catalyzing investment for Transformative Growth in Africa"***) & (**UNCTAD World Investment Report 2013**)

Africa – Foreign Direct Investment

★ Between 2012-2014, FDI **outflows** from **Africa** **tripled** compared to outflows from **developing Asia** and **Latin America** and the **Caribbean** remained at their 2011 levels.

★ Measured by FDI stock, **Malaysia**, **South Africa**, **China** and **India** are the **largest developing-country investors** in **Africa**.

★ **South Africa** ranked as the **15th top host economy for 2013-2015** (UNCTAD Survey, 2013). It has abundant **human**, **financial** and **natural resources**. Over the period 2000 – 2011, South Africa's **average investment ratio** was about **17.9%**, compared to the **continental average** of **18.7%** and the **world average** of **21.7%**.

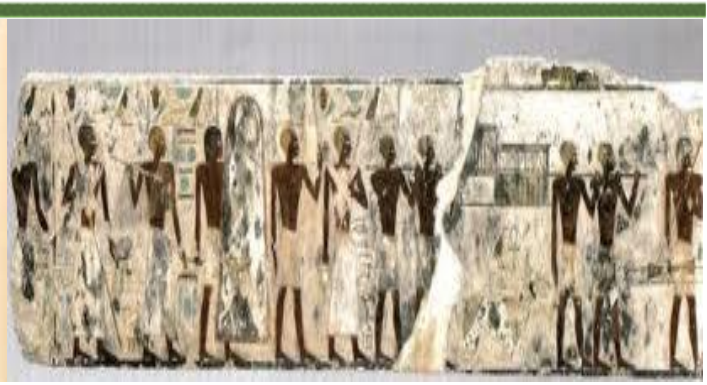
(*UNCTAD Report 2014 "Catalyzing investment for Transformative Growth in Africa"*) & (UNCTAD World Investment Report 2013)

Africa – FDI Risks and Challenges

★ **21 out of 40 riskiest economies** in the **world** are **African States**, with the **5 riskiest in Africa.** Such risks, whether perceived or real, **adversely impact FDI** and include: **Macroeconomic volatility**, **political instability**, **legal uncertainty**, **policy reversals**, **poor infrastructure**, **high transactions cost associated with starting and operating a business and weak enforcement of contracts**. (*Weak infrastructure **reduces productivity of companies** in **Africa** by 40% and **growth of per capita income** by **2%***).

★ **14 out of 20 least competitive countries** on the **Global Competitiveness Index** are in **Africa**, and **Africa** trails behind **South East Asia**, and **Latin America** and the **Caribbean**, with the greatest gap in: **quality of institutions**, **infrastructure**, **macroeconomic stability**, **education** and **ICTs**. *(World Economic Forum, 2013)*

Africa - *Arbitrium Historia*



- ***Seth* and *Osiris/Horus* dispute resolved by *Thoth* (*He who decides impartially*).**

- **Arbitrating funerary trust arrangements in 2500 B.C. and 2300 B.C.**

- **Arbitrating Tribal Disputes (Africa).** Before the advent of colonial rules in Africa, **arbitration** was known and (is still) prevalent in the customary laws of African jurisdictions or societies. Its **nature, purpose and philosophy were entirely different from those of the arbitration imported into the continent**.

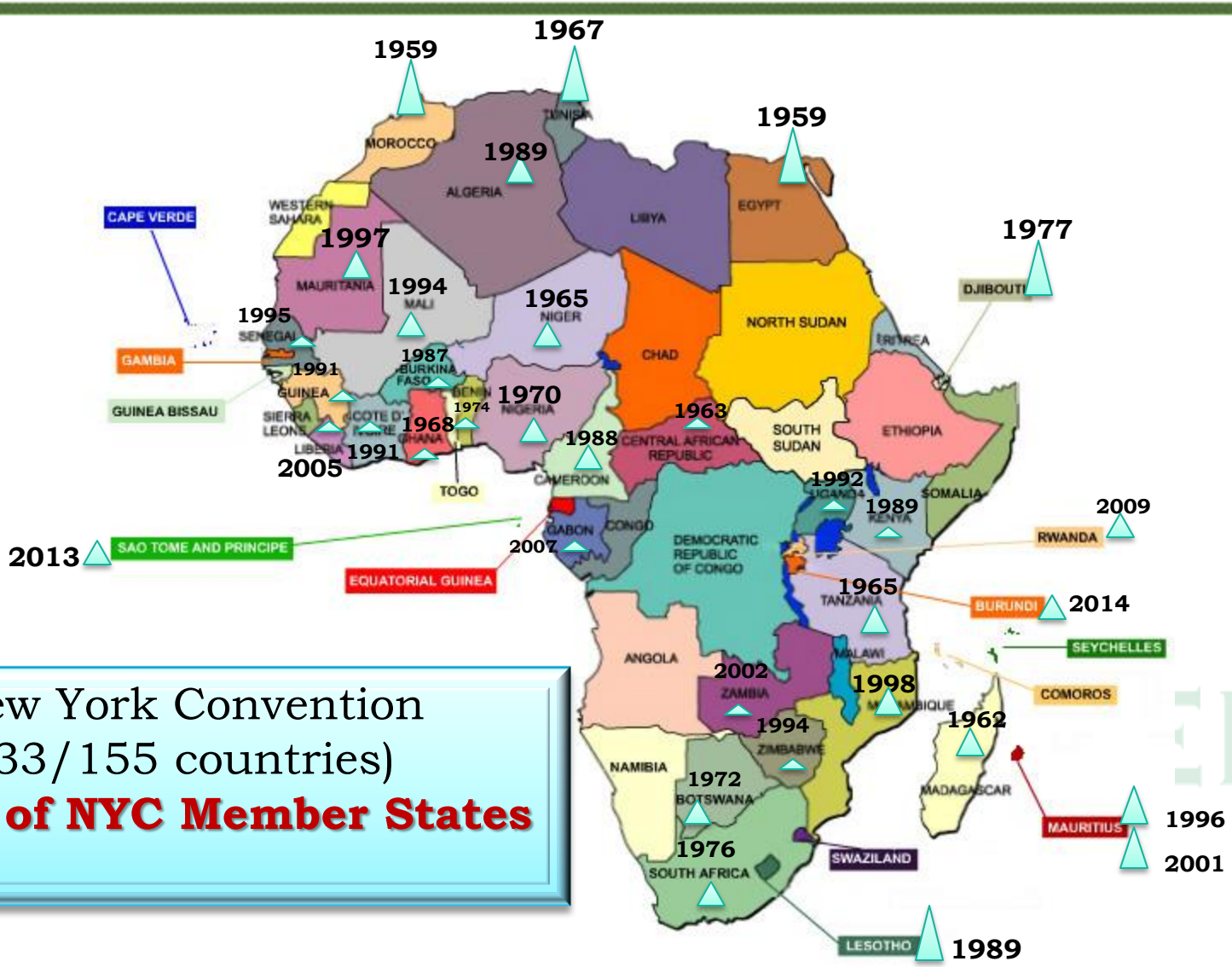
Africa & the World: ADMPS & FDI

★ In the **MENA** and **SSA regions** the legal framework on **Alternative Dispute Resolution (ADR)** is perceived as a **moderate** to **minor obstacle** to **FDI**.

★ The **Arbitrating and Mediating Disputes Perception Score (AMDPS)** *measures the average perception of contributors, based on a scale from 1 to 5, of the extent to which the legal framework on ADR is an obstacle to FDI*. The highest scores indicate the regions where the obstacle is perceived as bigger. The highest scores are **2.7** in **SSA region** and **2.8** in **MENA region**. (***FDI Regulations database, 2012***)

★ There seems to be a **direct relationship between FDI and AMDPS. Economies that score better on the AMDPS tend to facilitate the receipt of more FDI inflows.**

Africa - The Arbitration Landscape
The NYC (33 Countries)

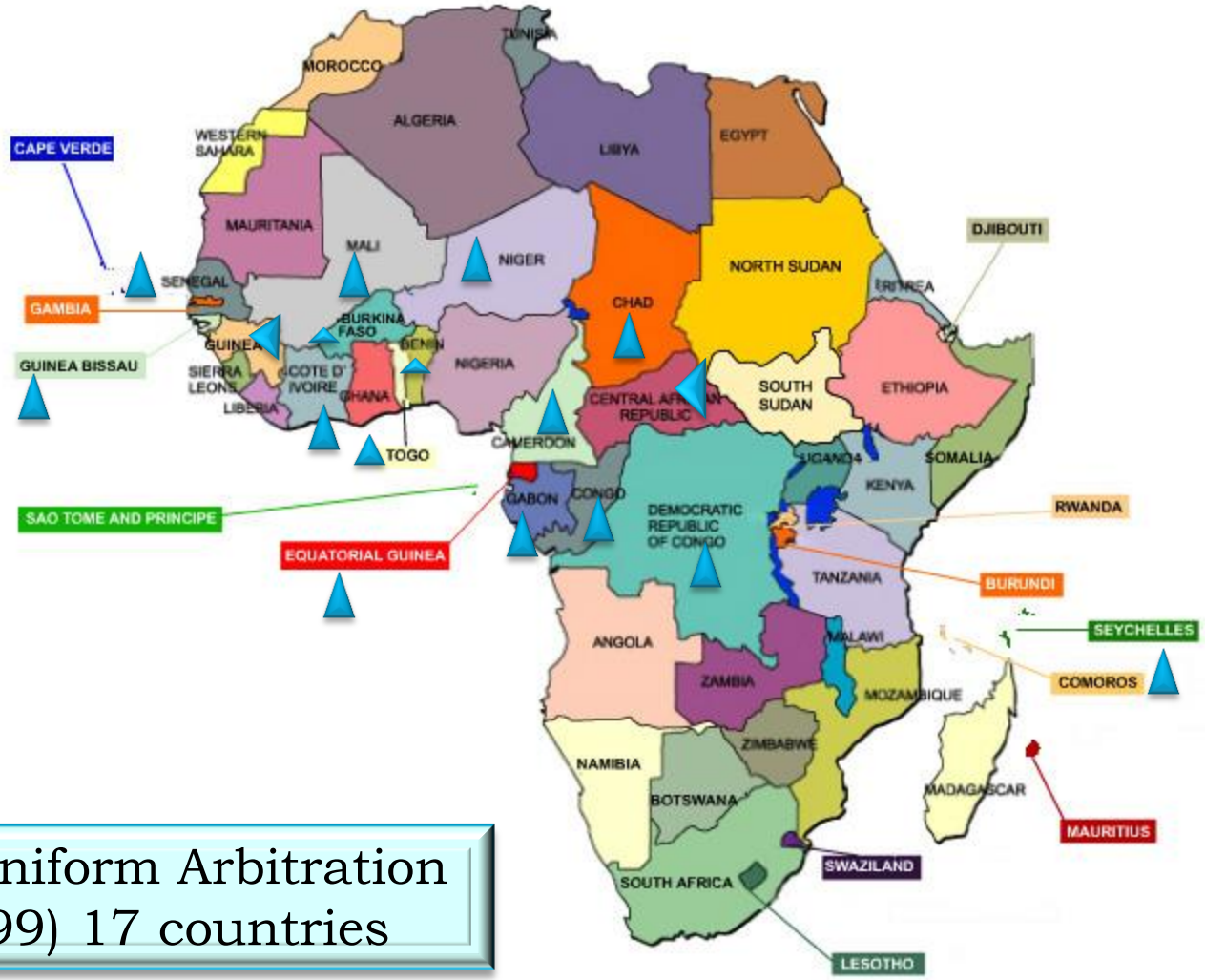


New York Convention
(33/155 countries)
21.3% of NYC Member States

Africa - The Arbitration Landscape
The ML (10 Countries)

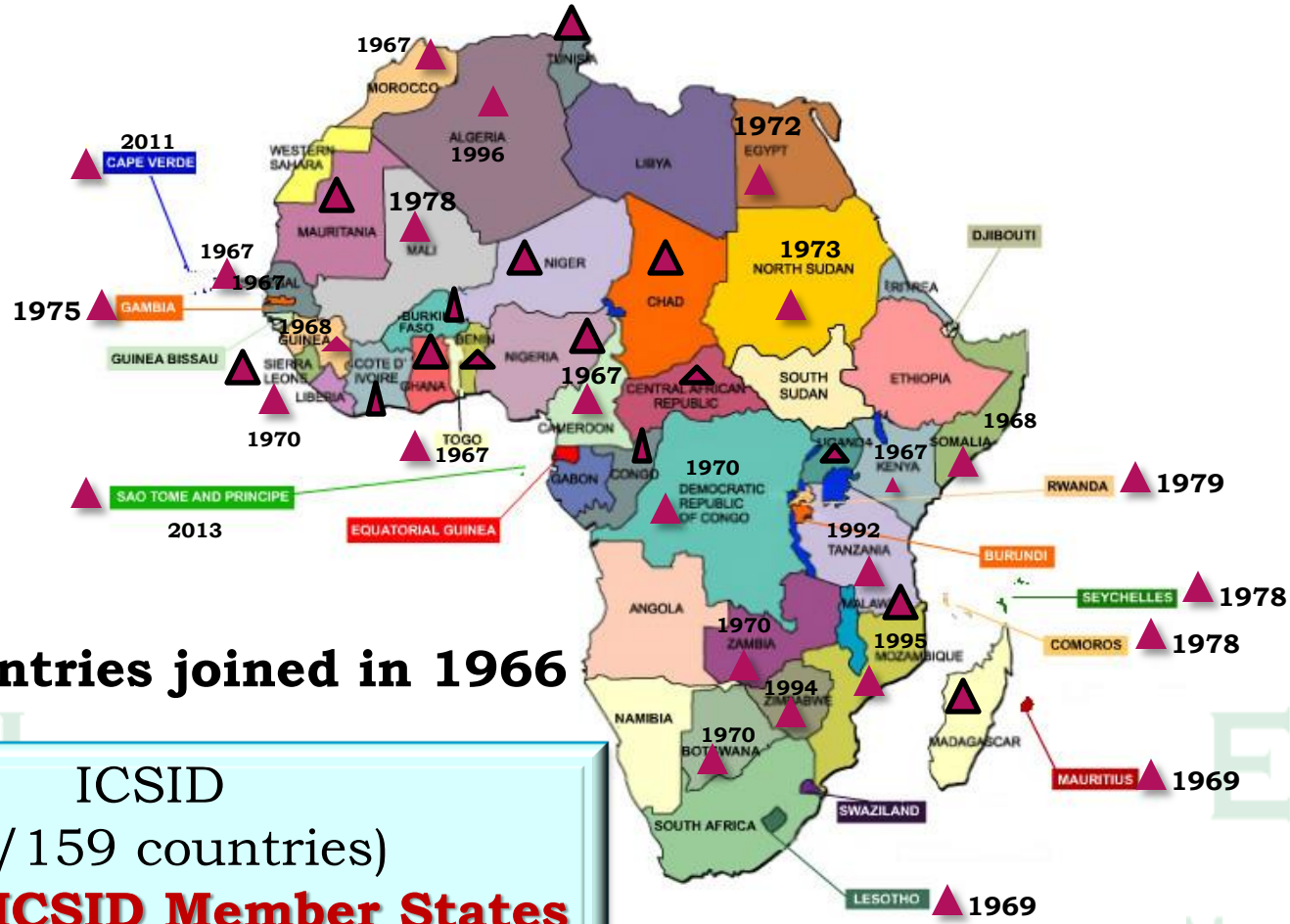
UNCITRAL ML
(10/69 countries)
14.5% of total number of ML adopting States

Africa - The Arbitration Landscape
OHADA Uniform Arb. Act (17 Countries)



OHADA Uniform Arbitration Act (1999) 17 countries

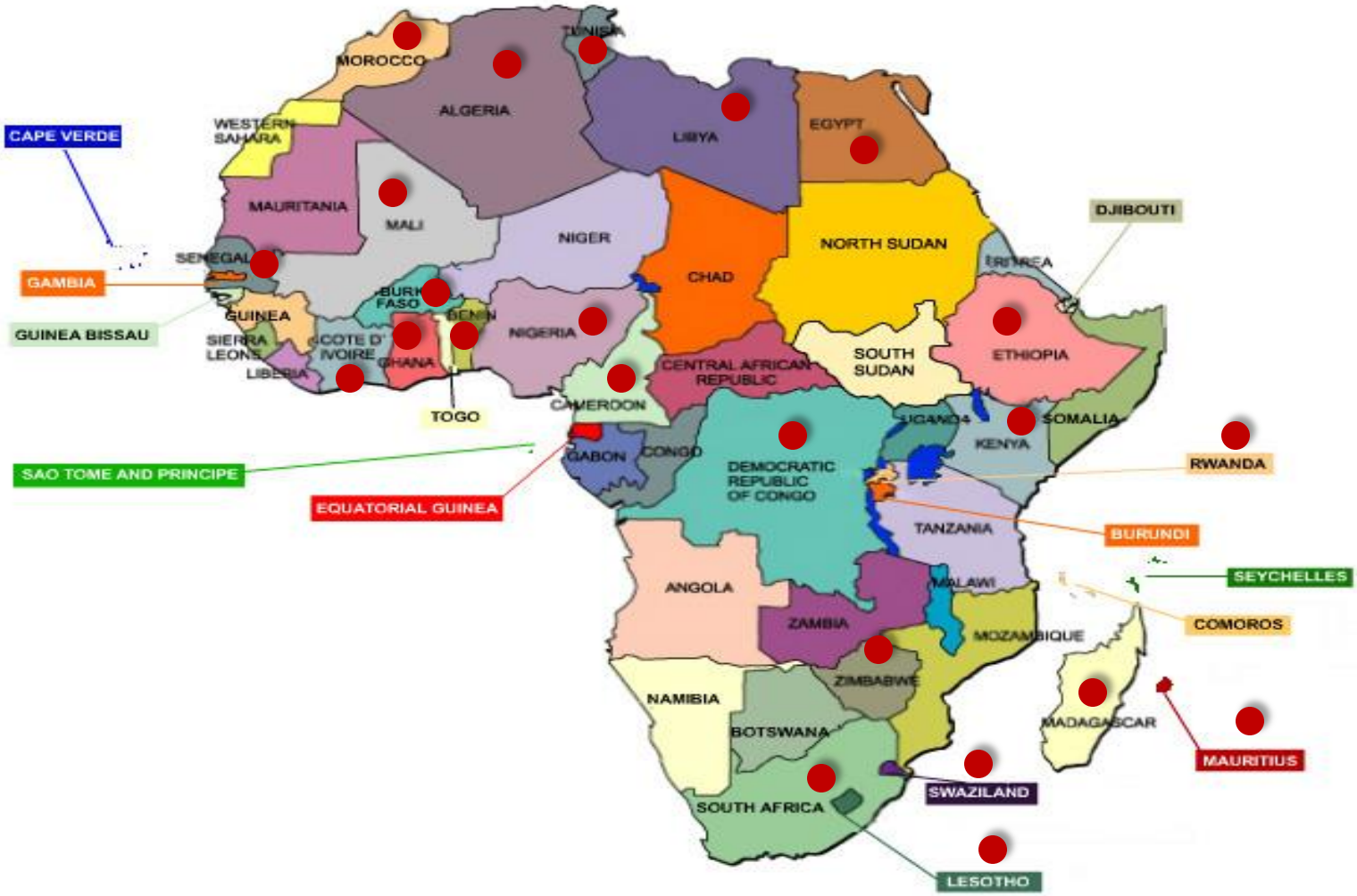
Africa - The Arbitration Landscape
ICSID (41 Countries)



▲ **16 countries joined in 1966**

ICSID
(41/159 countries)
25.8% of ICSID Member States

Africa - The Arbitration Landscape
Arbitration Centers/Institutions



Africa – Statistical Share in International Institutional Arbitration

ICC 2013

Sub-Saharan Africa cases involved parties from **29 nationalities** and seats in **8 countries** in the region. African involvement increased by more than **85% in 14 years**.

In 2010, 70% of the seats of arbitration were in Europe, 14% in Asia/Pacific, 14.5% in the Americas, and **1.5% in Africa** (**compared to 0.5% ten years ago**). In 2013, cases involving State and State owned entities (86 cases out of 767) **34% came from Africa** (**9% North Africa and 26% Sub-Saharan Africa**).

LCIA 2013

A total of 290 arbitrations were referred to the LCIA with around **12% involving African Parties** (with **Mauritius 1.8%** and **Nigeria 2%** and **South Africa 1.4%**)

Africa & the World:
The International Arbitration Landscape

★ The most active African States in arbitration (*in terms of known number of cases*) are: **Egypt**, **Mauritius**, **Nigeria**, **South Africa**, **Tunisia**.

★ African States concluded **828** known **BITs**, with the following **6 countries** having concluded the **highest** number of BITs: (*ICSID & UNCTAD Statistics*)

- **Egypt (around 102-109 BITs)**
- **Morocco (around 63-67 BITs)**
- **Tunisia (around 54-59 BITs)**
- **South Africa (around 50 BITs)**
- **Algeria (around 42-47 BITs)**
- **Mauritius (around 38-41 BITs)**

Africa & the World:
International Investment Arbitration

★ The total number of known **treaty-based cases** (**1987-2013**) reached **568** cases. About **three-quarters** of which were brought against **developing** and **transition economies**.

★ The **top 10** Respondent States (**1987-2013**) included **1 African** State (**Egypt**) and **3 South American States** (**Argentina**, **Ecuador**, **Venezuela**) and **3 East European States** (**Poland**, **Czech Republic**, **Ukraine**).

(UNCTAD Recent Developments in ISDS, 2014 Report)

Africa & the World: ICSID Statistics until 31 Dec. 2014

★ **In total and until 31 December 2014**, ICSID had registered **497 cases**, with **26%** State Parties involved from the **MENA** and **SSA regions** (10% MENA region and 16% SSA region).

★ In terms of **economic sectors**: the **Oil, Gas & Mining** sector **topped** the chart by **26%**, followed by the **energy and power** sector with **14%** of all registered cases.

★ With respect to appointed arbitrators, conciliators and *ad hoc* committee members:

- **MENA & SSA regions** **6%**
- **Western European and North American regions** **69%**

(ICSID Caseload Statistics Issue 2015-1)

Africa & the World: ICSID Statistics in 2014 ONLY

★ In **2014:** ICSID registered **38 cases**. **9 cases** were filed against **African States** (**23.68%**).

- **21%** of the 9 cases filed against countries from the **SSA region**.
- **3.6%** of the 9 cases filed against countries from the **North Africa region**.
- The 9 cases were brought against **8 African States**:

Gambia	**Egypt**	**Mauritania**	**Senegal**
2	**1**	**1**	**1**
Mozambique	**Sudan**	**Guinea**	**Burundi**
1	**1**	**1**	**1**

(ICSID Caseload Statistics Issue 2015-1)

Africa & the World: ICSID Statistics in 2014 ONLY

★ In **2014: Oil, Gas & Mining disputes** topped the chart with **37%**, followed by **energy and power disputes 26%** of the 2014 registered cases.

★ In **2014:** only **4 African arbitrators** were appointed (**Morocco**, **Somalia**, **Egypt**, and **Nigeria**) out of **155 appointed arbitrators**. Arbitrators from **France**, **UK** and **USA topped the appointments** with **19**, **11**, and **10** appointments respectively.

(ICSID Caseload Statistics Issue 2015-1)

Epilogue: The Changing Landscape of International Arbitration – Enculturation and Evolution

★ The Emergence of '**Arbitral Enculturation/ Acculturation**': The '**Third Culture**'

★ **The International Arbitration Cosmos: Spatial – Temporal Continuum & Global Competition and Seat Saturation (Traditional, New and Migrating Seats).**

Thank You

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