ISSN : 1875-4120
Issue : Vol. 17, Issue 4
Published : May 2020

This paper was presented at the 2019 Symposium on "*Salient Issues in Int'l Commercial Arbitration: International Arbitration in Times of Economic Nationalism*" organized by the Center on International Commercial Arbitration at the American University Washington College of Law in Washington, D.C.

Editors of this TDM Special Issue:

Dr. Björn Arp
View profile

Prof. Rodrigo Polanco
View profile

Transnational Dispute Management
www.transnational-dispute-management.com

The African States' Diverging Policies Towards International Arbitration
by G. Aréou

About TDM

TDM (Transnational Dispute Management): Focusing on recent developments in the area of Investment arbitration and Dispute Management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting.

Visit www.transnational-dispute-management.com for full Terms & Conditions and subscription rates.

Open to all to read and to contribute

TDM has become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

If you would like to participate in this global network please contact us at info@transnational-dispute-management.com: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

TDM is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

The African States' Diverging Policies Towards International Arbitration

Dr Guillaume ARÉOU, Reed Smith*

Africa is well-known for its customary secular dispute resolution mechanisms such as the "Gacaca"[1] in Rwanda and the "Shimguilina"[2] in Ethiopia. These traditional mechanisms to settle disputes have evolved and arbitration is nowadays a preferred mode of dispute resolution, although criticized by some States and part of the civil society.

One of the criticisms addressed by States and Non-Governmental Organizations towards the Investor-State Dispute Settlement mechanism is that it does not equally balance the rights and obligations conferred to foreign investors and States. A reason for such a criticism may be found in the severe economic crisis that lead to numerous international arbitration cases. For instance, African States were hit by a significant economic crisis in 2014 mainly caused by a downturn in the price of raw materials.[3] Consequently, some African States have adopted nationalist economic policies, notably in the mining industry. In order to regain control of their own resources, States such as Mozambique and the Democratic Republic of Congo amended their mining codes, respectively in 2014[4] and 2018.[5] For their part, Zimbabwe, Kenya, Namibia, Sierra Leone and Mali have announced their willingness to adopt reforms in the same vein.[6] Consequently, there exists a dilemma for African States between the need to attract foreign direct investment and the need to protect their economies. This tension can be seen in policymaking related to arbitration adopted by African States. Indeed, an analysis of the economic and legal policies implemented by African States reveals the diversity of concerns affecting African States. One must keep in mind that Africa is a continent composed of 54 States and 8 regional economic communities, which are at different stages of economic development. In 2017, Foreign Direct Investment (hereinafter "FDI") flows in Africa slumped to 42 billion USD[7] to rise to 46 billion USD in 2018.[8] This increase does not reflect the slow economic recovery of African States since FDI reached 59 billion USD in 2016.[9] In 2019, East Africa is still the fastest growing region[10] with Ethiopia continuing to be the biggest FDI recipient in the region.[11] On the contrary, the Central Africa region continues to underperform.[12]

---

*The author wishes to thank Stanislas Walch and Arthur Poulhazan, legal interns at Reed Smith, for their assistance with the preparation of this article. The views and opinions expressed in this article are those of the author and do not necessarily reflect the position of the firm.

[1] F. MASENGO, "Chapter 12: Attitude of Rwandan Courts Towards Arbitration", *in* Emilia Onyema (ed), *Rethinking the Role of African National Courts in Arbitration*, Kluwer Law International, 2018, p. 327.

[2] H.-G. FEYISSA, "The Role of Ethiopian Courts in Commercial Arbitration", *Mizan Law Review*, vol. 4, n° 2, Autumn 2010, p. 300.

[3] K. KHAMSI, L.-A. BRET, "Mining Arbitration in Africa", *The Middle Eastern and African Arbitration Review*, 2017, *Global Arbitration Review*, p. 44.

[4] Code minier du Mozambique adopté par la loi n° 20/2014 du 18 août 2014.

[5] Code minier de la République démocratique du Congo adopté par la loi n° 18/001 du 9 mars 2018.

[6] A. SHEPPARD, L.-A. BRET, "Mining Arbitrations in Africa", *The Middle Eastern and African Arbitration Review*, 2019, *Global Arbitration Review*, p. 31.

[7] UNCTAD, World Investment Report, 2018, p. 40.

[8] UNCTAD, World Investment Report, 2019, p. x.

[9] UNCTAD, World Investment Report, 2017, p. x.

[10] African Economic Outlook, 2019, p. 6.

[11] UNCTAD, World Investment Report, 2019, p. 37.

[12] African Economic Outlook, 2018, p. 11.

In a study released in June 2019, the United Nations Conference on Trade and Development (hereinafter "UNCTAD") noted that "African States adopted 14 policy measures favourable to investment and 8 less favourable".[13] The economic nationalism trend observed in the policymaking of African States relies also on the restrictive regulations adopted towards international arbitration.

There is a fragmentation in the African States' policymaking related to international arbitration. These diverging attitudes by African States towards international arbitration at the domestic level are also reflected at the supra-national level where contradicting policies can also be observed. While the Organization for the Harmonization of Business Law in Africa (hereinafter "OHADA") adopted the Uniform Acts on Arbitration and Mediation in 2017, aiming to promote arbitration, the South African Development Community (hereinafter "SADC") adopted its bilateral investment treaty model in 2012, which does not refer to ICSID.

These diverging policies towards international arbitration reflect the African States' policymaking in the field of arbitration. What is surprising is that a similar divergence may be observed by African domestic organs concerned by international arbitration. On the one hand, the multiplication of domestic arbitral institutions demonstrates African States' willingness to develop arbitration. On the other hand, some decisions rendered by domestic African courts related to the control of the international public policy may be qualified, as compared to "economic nationalism", as "legal nationalism". Indeed, one may question whether a kind of "legal nationalism" could emerge through one of the grounds of annulment, namely the violation of international public policy.

Consequently, one may question if there is an identifiable trend away from international arbitration across Africa[14]?

African States have adopted divergent regulations towards international arbitration at both the domestic and the regional level. This divergence is substantial and one might question whether the restrictive regulations adopted by African States towards international arbitration are a global trend (**I**). The second divergence observed towards international arbitration is functional. It relates to the decisions rendered by domestic judicial organs and the multiplication of domestic arbitration institutions (**II**).

I. African States' Diverging Policies Towards International Arbitration At Domestic And Supra-National Levels: A Global Trend?

An overview of economic policies adopted in 2018 demonstrates that African States follow a more global trend of States enacting measures affecting foreign investment. The World Investment Report published in June 2019 by the UNCTAD shows that "55 economies introduced at least 112 measures affecting foreign investment".[15] However, the same study concluded that a majority of States still favour policies attracting investment.[16] This global

[13] UNCTAD, World Investment Report, 2019, p. 85.
[14] N. Tarawali poses this question specifically for Investment Arbitration. N. TARAWALI, "Towards or Away from Investment Treaty Arbitration in Africa?", *Emerging Market Restructuring Journal*, Issue n° 9, summer 2019.
[15] UNCTAD, World Investment Report, 2019, pp. xi et 84.
[16] UNCTAD, World Investment Report, 2019, p. xii.

study reflects the diverging approaches adopted by African States to promote and protect investments.

It is undeniable that some African States have taken steps to move away from international arbitration. However, a general conclusion may lead to misinterpretation, not reflecting the state of play of the African States' positions towards international arbitration. One can conclude that African States' policies towards international arbitration are not homogeneous and that restrictive regulations towards international arbitration are limited. Furthermore, these policies are not always linked with the country's economic performance (**A**). This heterogeneity towards international arbitration policies also applies at the regional and continental levels. While there are regional initiatives supportive to international arbitration, there are also African regional economic communities less supportive to international arbitration (**B**).

A. Heterogeneous African States' Policies Towards International Arbitration at Domestic Level

Since 2016, Namibia has adopted restricted policies towards international arbitration, privileging mediation and domestic courts rather than international arbitration. Contrary to Tanzania[17], Namibia's economy faces a contraction with a projection of 1.7% in 2019 and expects to recover a growth rate of 0.8% in 2020.[18] And, unlike Tanzania[19], Namibia has no ICSID case recorded. Consequently, the adoption of the Investment Promotion Act of August 2016 is a political choice to restrict the recourse to international arbitration. Indeed, Section 28 of this Act allows a foreign private investor recourse to mediation or to resort directly to the Courts of Namibia. The recourse to arbitration is very circumscribed since a written agreement between both the Minister and the foreign private investor is necessary.

The case of South Africa appears to be mixed between the restrictive approach towards investment arbitration and the promotion of commercial arbitration. The case of South Africa is specific. South Africa is not a Member State in the ICSID Convention and recently terminated some Bilateral Investment Treaties it concluded. However, South Africa strongly promotes its domestic arbitral institution, the Arbitration Foundation of Southern Africa.

Like Namibia, South Africa recently revised its Protection of Investment Act, which entered into force on 13 July 2018. Section 13 of this Act relates to dispute resolution and gives preference to mediation. The Protection of Investment Act implemented by South Africa further restricts the recourse to international arbitration for investment disputes. Indeed, according to Section 13 subsection (5) two conditions must be fulfilled for an investor to resort to international arbitration. The investment must be covered by the text and the investor must have exhausted domestic remedies. However, meeting these two conditions are not sufficient for South Africa to give its consent to arbitration since Subsection 5 provides that "The government **may** consent to international arbitration". Consequently, the recourse to international arbitration is subject to the express agreement of South Africa.

[17] Tanzania has a flourishing economy but has adopted a series of regulations that have restricted the recourse to international arbitration. Z. YOUNG, "Seeming Causality between the Attack on Investment Arbitration and the Rise of Resource Nationalism", *in Arbitration in Times of Economic Nationalism*, *Transnational Dispute Management*, 14 November 2019.
[18] "Economic Outllook", Bank of Namibia, July 2019, p. 2.
[19] Tanzania has been hit by 7 ICSID cases from 2005 to July 2019, the last case being registered on 31 May 2019.

The above analysis demonstrates that although South Africa is reluctant to commit to investment arbitration, it has taken steps to develop commercial arbitration through the Arbitration Foundation of Southern Africa. Another way for South Africa to develop arbitration is linked with the development of Sino-Africa economic relationships and the signature of cooperation agreement with the China-Africa Joint Arbitration Centre (CAJAC).

The examples of Namibia and South Africa demonstrate that there is a trend to economic nationalism through restrictive measures related to international arbitration. The case of South Africa is of particular interest since this country makes a clear difference between investment arbitration and commercial arbitration, restricting the former and promoting the latter. However, and as it has been described above, Africa is a very diverse continent and these three examples do not reflect a global trend from African States to depart from international arbitration.

The example of Mozambique shows that African States may adopt diverging policies towards international arbitration. Mozambique has a sustainable economy with a GDP of 3.5% in 2018 and an expected GDP of 4.5% in 2019 and 5.0% in 2020. Mozambique has also a sustainable FDI record and in 2015, it ranked third in Africa after Angola and Egypt.[20] These economic numbers explain, for a large part, the supportive policies adopted by Mozambique regarding international arbitration. In order to maintain and increase the level of FDI, the government of Mozambique has made the choice to make arbitration "a preferred dispute resolution mechanism".[21] Recourse to ICSID is available to investors under most of the BITs.[22] It is noteworthy that arbitration is also allowed for Public-Private Partnerships under Article 39 of the Law n° 15/2011 of 10 August 2011.

However, the Mozambican Investment Law which provides recourse to ICSID arbitration does not apply in the oil & gas and mining sectors governed by specific rules.[23] Consequently, it can be said that Mozambique is supportive to international arbitration.[24]

Supportive policies towards international arbitration may also be a means for African States to attract more foreign investors and develop their FDI. In 2018, FDI flows to Angola continued to be largely negative (-5.7 billion USD).[25] Angola adopted a similar approach to Mozambique. The new Private Investment Law was adopted in 2018, which does not reconsider the Voluntary Arbitration Law of 25 July 2003, which is supportive to arbitration. Indeed, its article 1 provides for a general principle that a dispute may be submitted to arbitration unless it is reserved by law. Angola has also several arbitral institutions on its territory, which demonstrate its willingness and openness to arbitration.[26] This supportive approach towards international arbitration might be balanced regarding investment arbitration specifically. Indeed, the last

[20] N. LOUSA, R. GUIMARAES, "Mozambique", *The Middle Eastern and African Arbitration Review*, *Global Arbitration Review*, 2017, p. 88.
[21] F. VAZ PINTO, J. GALVAO TELES, P. DUARTE ROCHA, "Mozambique", *The Middle Eastern and African Arbitration Review*, *Global Arbitration Review*, 2019, p. 71.
[22] F. VAZ PINTO, J. GALVAO TELES, P. DUARTE ROCHA, "Mozambique", *The Middle Eastern and African Arbitration Review*, *Global Arbitration Review*, 2019, p. 72.
[23] F. VAZ PINTO, J. GALVAO TELES, P. DUARTE ROCHA, "Mozambique", *The Middle Eastern and African Arbitration Review*, *Global Arbitration Review*, 2019, p. 74.
[24] N. LOUSA, R. GUIMARAES, "Mozambique", *The Middle Eastern and African Arbitration Review*, *Global Arbitration Review*, 2017, p. 90.
[25] UNCTAD, World Investment Report, 2019, p. 38.
[26] F. VAZ PINTO, R. do NASCIMENTO FERREIRA, R. VALENTI, "Angola", *The Middle Eastern and African Arbitration Review*, *Global Arbitration Review*, 2019, p. 49.

bilateral investment treaty concluded by Angola with Brazil in 2015 (entered into force on 28 July 2017) provides in its article 15 (6) that the disputes may be referred to state-to-state arbitration rather than investor-state arbitration. As the Angola-Brazil bilateral investment treaty is the last one concluded, it is too early to conclude that it constitutes a general shift from Angola to depart from investment arbitration.

B. African States' Diverging Policies Towards International Arbitration at Supra-National Levels

Policies related to arbitration have been analysed in four African States: South Africa, Namibia, Mozambique and Angola. All these countries are part of the South African Development Community (hereinafter "SADC"). The SADC was launched in 1992 and is composed of 16 States with 345.2 million people in 2018 and a GDP of 721.321 billion US$.[27] The SADC Treaty intends to promote economic growth through regional integration. In order to foster economic growth, article 28 (2) of the SADC Protocol on Finance and Investment signed in 2006 gives private investors a choice of recourse to the SADC Tribunal, the ICSID or an ad hoc tribunal. While the SADC Investment Protocol of 18 August 2006 refers to international arbitration, it is only upon the prior exhaustion of local remedies (article 28 (1)).

In 2012, the SADC released its bilateral investment treaty model, a non-binding instrument, which is more restrictive about international arbitration. Indeed, article 29 (4) of the SADC BIT model no longer includes a reference to ICSID. On the contrary, it provides that investors shall first submit their dispute before domestic courts and that investors have to exhaust local remedies. Consequently, it can be said that the SADC BIT model was a premise of policies adopted by South Africa and Tanzania.[28] However, other SADC member States have not followed this BIT model, such as Angola and Mauritius. Diversity is thus a keyword when one observes African States policies towards arbitration.

The example of SADC as a regional economic community demonstrates that the diverging policymaking towards international arbitration at the domestic level is also true at the supra-national level. Indeed, a comparison between the SADC model BIT and the recent reform adopted by the Ohada in 2017 confirms that divergence also exists in policies adopted by regional economic communities.

The Ohada was launched in 1993, similar to SADC. It comprises 17 Member States from West Africa with a population of approximately 280 million people and a global FDI of roughly 12 billion USD. Like the SADC regional economic community, it also intends to facilitate exchanges and investment within its regional zone. However, and as it will be demonstrated, African States from the Ohada region have decided to be supportive to arbitration to meet their economic goal. Ohada Member States explain their supportive attitude towards arbitration as necessary in order to strengthen the confidence of both local and foreign investors and to significantly improve the business climate in the region.

This is one of the reasons Ohada engaged in in-depth reforms to its arbitration and mediation mechanisms, which culminated with the adoption of the Uniform Acts on Arbitration and

[27] SADC Selected Economic and Social Indicators, 2018.

[28] Z. YOUNG, "Seeming Causality between the Attack on Investment Arbitration and the Rise of Resource Nationalism", *in Arbitration in Times of Economic Nationalism*, *Transnational Dispute Management*, 14 November 2019.

Mediation signed on 23 November 2017 and entered into force on 15 March 2018. These reforms were implemented to create an even more favourable framework for arbitration. First of all, and contrary to the SADC model BIT, the Uniform Act on Arbitration extends its offer for dispute resolution to investment arbitration. Indeed, article 3 of this act provides that "an arbitration can be based under an arbitration agreement or under an instrument related to investment, such as an investment code or a bilateral or multilateral agreement on investments". By referring expressly to investment, the Uniform Act on Arbitration has significantly extended its scope.

The divergence of African States policymaking at both the domestic and regional levels towards international arbitration can also be examined at the continental level. Two instruments will be analysed: the draft Pan-African Investment Code and the African Continental Free Trade Area. The first text has no binding effect and should serve as guideline. The second intends to create a body of laws for a single economic market in Africa. One of the objectives set out in the preamble of the Pan-African Investment Code is to recognize the "right [of State] to regulate all the aspects relating to investments within their territories **with a view to meeting national policy** objectives and to promoting sustainable development objectives". However, the preamble of the draft Pan-African Investment Code expresses the need "to achieve **an overall balance of the rights and obligations between Member States and the investors**". This provision has to be read in light of the reforms implemented by African States to regain control over their natural resources, notably in the mining and petroleum sectors. The drafters of the Pan-African Investment Code took note of the diverging policies adopted by African States towards arbitration and included in black and white that there is a "**need to ensure national and continental coherence in investment policymaking**". This objective may be reached through the African Continental Free Trade Area (hereinafter "AfCFTA"), which will have a binding effect over 55 Member States, Nigeria and Benin being the last ones to have signed this text. The text covers both economy and – in a near future – investment policies. The Legal Instruments on Investment, including the dispute resolution mechanism, will be addressed in phase II of the negotiations related to the AfCFTA. Initially scheduled to be completed by January 2020, this phase of negotiations has been extended to June 2020.[29] The draft legal text on the Protocol on Investment should be submitted for adoption during the session of January 2021.

A completely integrated market is a long-term objective for African States. With this objective in mind, one will recall the prediction made by the President of Niger in his report released in February 2019 where he stated that "our efforts to establish the AfCFTA will produce results **if we remain united, speak with one voice and consolidate our integration**".[30] Depending on the level of investment protection by the AfCFTA, the economic nationalism analysed above will be bypassed by a common integrated market that protects African States and their companies.

The above analysis confirms that African States' have adopted diverging policies towards international arbitration at both domestic and supra-national levels. It has also been noted that while some African States adopted unfavourable measures towards international arbitration some other States have adopted supportive measures in this field. Consequently, it cannot be said that there is a global trend by African States to depart from international arbitration but

[29] Report on the African Continental Free Trade Area by the President of Niger, 10-11 February 2019, point 15.
[30] Report on the African Continental Free Trade Area by the President of Niger, 10-11 February 2019, point 27.

rather "for every 'anti-arbitration' development there is a countervailing example of a State presenting itself as 'pro-arbitration'".[31]

II. The diverging roles of African Domestic Organs Towards International Arbitration

Firstly, it is important to note that as part of this analysis, the term "African domestic organs" refers to domestic judicial institutions and domestic arbitral institutions. The first category of organs control the correct application of policies adopted towards international arbitration by private investors, State entities and the State itself. The interventionism of judicial domestic organs is always a source of defiance from private foreign investors, notably in Africa. The purpose of this analysis is not to consider the level of interventionism by African States in arbitration cases but rather to examine if legal means exist to complement economic nationalism measures. At the domestic level, the role played by Courts of Appeal is fundamental to control arbitral awards and one of the grounds for annulment is currently much debated. It concerns the control exercised by Courts of Appeal when examining whether an award violates international public policy. This control of public international policies could be seen, if exercised extensively, as a legal means of nationalism (**A**). The role of domestic judicial organs is thus very different from domestic arbitral institutions, which aim at promoting and developing arbitration. The proliferation of arbitral institutions within the Africa continent, and the competition it implies, contributes to the economic development of African States (**B**).

A. The Control of the International Public Policy: A False Allegation of Nationalism?

One crucial factor to the efficiency of international arbitration is the role played by domestic courts: to ensure its support to the arbitral proceedings when it is needed and to recognize and enforce arbitral awards in a timely period. The repartition of the roles between judicial organs and arbitral tribunals has been well summarized by Hailegabriel G. Feyissa who stated that "there is a need to maintain a balance between the level of court involvement and the smooth functioning of arbitration."[32]

One of the controls exercised by Courts of Appeal relies on the award's conformity with international public policy. The judgment rendered by the Supreme Court of Mauritius on 31 May 2019 in the *Betamax* case is thus of particular interest since it examined this issue in light of Mauritius laws but also with reference to French jurisprudence. The *Betamax* case is not only of particular interest from a legal point of view but also because of the consequences it may have on Mauritius as a supportive seat for international arbitration, since this country has tried for many years to promote arbitration and position itself as the international arbitration hub in Africa.

The judgment rendered on 31 May 2019 by the Supreme Court of Mauritius opposed *State Trading Corporation v. Betamax*. It is important to note that *State Trading Corporation* is the trading arm of the Government of Mauritius, notably for the importation in Mauritius of

[31] N. Tarawali poses this question specifically for Investment Arbitration. N. TARAWALI, "Towards or Away from Investment Treaty Arbitration in Africa?", Emerging market Restructuring Journal, Issue n° 9, summer 2019, p. 4.
[32] H.-G. FEYISSA, "The Role of Ethiopian Courts in Commercial Arbitration", *Mizan Law Review*, vol. 4, n° 2, Autumn 2010, p. p. 297.

essential commodities. In 2009, *State Trading Corporation* and *Betamax* entered into a contract of affreightment. The Government of Mauritius decided to terminate this contract in 2015. Further to the termination of this contract, *Betamax* initiated an arbitration proceeding. The Sole Arbitrator rendered his award on 5 June 2017 stating that it had jurisdiction to examine the case and ordered *State Trading Corporation* to pay *Betamax* damages in the amount of 120 million USD. Further to this award, an application to set aside this award under the Mauritius International Arbitration Act of 2008 has been initiated by *State Trading Corporation* before the Supreme Court of Mauritius. One of the arguments raised by *State Trading Corporation* to set aside the award was that it did not comply with the public policy of Mauritius.[33] *State Trading Corporation* specifically argued that the award should be annulled because it would seek to enforce an illegal contract based on the fact that this contract had been concluded in breach of the Public Procurement Act and the Public Procurement (Amendment n° 2) Regulations 2009.[34]

Two counter-arguments raised by Counsels for *Betamax* and related to the violation of Mauritius' public policy are interesting for the purposes of this article:

- the Court's function regarding an application to set aside an award is to conduct an extrinsic review of the award in terms of its compliance with international public policy and not to determine whether the Tribunal's decision was against the law.

In other terms, *Betamax* argued that a Court of Appeal does not have to act as an appellate body and that the grounds for annulment are to be interpreted restrictively.

- it is the international public policy of Mauritius and not its domestic public policy which should be considered and it has not been established that there was any such breach.[35]

As to this second line of arguments, *Betamax* tried to contrast the international public policy with the domestic public policy in a vain attempt to move the debate towards the distinction between the international public policy and the domestic public policy. The last argument raised by *Betamax* counsels has no legal interest but demonstrates the consequences of a negative decision on this issue by the Supreme Court of Mauritius. Indeed, *Betamax* counsels stated that "in so far there are competing public policy considerations, the public policy of promoting Mauritius as a jurisdiction of choice in the field of international arbitration should prevail".[36]

In the *Betamax* case, the Supreme Court of Mauritius concluded that they had "absolutely no difficulty in holding that the public policy of Mauritius prohibits the recognition or enforcement of an award giving effect to such an illegal contract which shakes the very foundations of the public financial structure and administration of Mauritius in a manner which unquestionably violates the fundamental legal order of Mauritius".[37]

The control exercised by Courts of Appeal regarding the compliance of arbitral awards with public policy has raised strong debates as to the intensity of the control exercised, especially in

[33] Supreme Court of Mauritius, *State Trading Corporation v. Betamax Ltd*, judgment of 31 May 2019, p. 7.
[34] Supreme Court of Mauritius, *State Trading Corporation v. Betamax Ltd*, judgment of 31 May 2019, p. 14.
[35] Supreme Court of Mauritius, *State Trading Corporation v. Betamax Ltd*, judgment of 31 May 2019, p. 15.
[36] Supreme Court of Mauritius, *State Trading Corporation v. Betamax Ltd*, judgment of 31 May 2019, p. 15.
[37] Supreme Court of Mauritius, *State Trading Corporation v. Betamax Ltd*, judgment of 31 May 2019, p. 41.

France. Therefore, when the Supreme Court of Mauritius referred to French jurisprudence and adopted a very similar principle as the one adopted in France, it is noteworthy. Indeed, the Supreme Court of Mauritius concluded that "the breach of the legal provisions must be flagrant, actual and concrete"[38] when the Paris Court of Appeal uses the adjectives "manifest, effective and concrete".

The reference to French jurisprudence by the Supreme Court of Mauritius is unsurprising since the Counsels for *Betamax* relied on French jurisprudence to assert that "the prevalent trend in international arbitration has developed a very restrictive approach to public policy control". *Betamax* Counsels further alleged that "the Court's function […] is essentially limited to conducting an extrinsic review of the award in terms of its compliance with international public policy and not to determine whether the Tribunal's decision was wrong in law".[39] However, it must be recalled that French jurisprudence is now constant and favours a maximalist control when examining the violation of international public policy.

The swift exercised by the Paris Court of Appeal from a minimalist to a maximalist approach when exercising its control on the violation of international public policy took place in 2014.[40] French jurisprudence is now well-established, notably with the judgment rendered by the Paris Court of Appeal in the *Alstom* case on 10 April 2018. The French judges reiterated the principle according to which "it belongs to the Court […] to seek, in law and in fact, all the elements allowing to appreciate whether the recognition and the enforcement of the award violates in a manner that is manifest, effective and concrete the French conception of the international public policy".[41]

The reference by the Supreme Court of Mauritius that "the breach of the legal provisions must be flagrant, actual and concrete" reminds undoubtedly to the French jurisprudence. Counsels from *Betamax*, who relied on certain French jurisprudence, could have relied on another French jurisprudence. In the annulment proceeding opposing the *Democratic Republic of Congo* and *Customs and Tax Consultancy LLC*, the Paris Court of Appeal concluded that "according to the *bona fide* principle in the enforcement of conventions, a State cannot invoke before the annulment judge, in order to depart from its contractual obligations, the violation of its own legislation".[42] Indeed, *State Trading Corporation* argued that the contract of affreightment was illegal because it was concluded in breach of Mauritian public policies.[43] This radical solution highlights concerns that domestic courts might have when examining a case with a State entity. This is the reason why the control exercised by Courts of Appeal over arbitral awards may lead to "legal nationalism". The *Betamax* case has a particular consonance since Mauritius has been simultaneously trying to promote and develop itself as the arbitration hub in Africa.

B. Domestic Arbitral Institutions: A Factor of Economic Development?

[38] Supreme Court of Mauritius, *State Trading Corporation v. Betamax Ltd*, judgment of 31 May 2019, p. 37.
[39] Supreme Court of Mauritius, *State Trading Corporation v. Betamax Ltd*, judgment of 31 May 2019, p. 31.
[40] S. BOLLEE, M. AUDIT, « La lutte contre le blanchiment, nouvel avatar d'un contrôle renforcé du respect de l'ordre public international, note sous *Paris, Pôle 1 – Ch. 1, 21 février 2017* », *Rev. arb.*, 2017-3, p. 934.
[41] E. GAILLARD, "Etendue et modalités du contrôle de l'absence de violation de l'ordre public international par les arbitres, note sous *Cour d'appel de Paris (Pôle 1 - Ch 1), 10 avril 2018* », *Rev. arb.*, 2018-3, pp. 582-583.
[42] J.-B. RACINE, "Le contrôle de la sentence par le juge de l'annulation en matière de corruption, note sous *Paris, Pôle 1 – Ch. 1, 16 mai 2017* », *Rev. arb*, 2018-1, p. 256.
[43] Supreme Court of Mauritius, *State Trading Corporation v. Betamax Ltd*, judgment of 31 May 2019, p. 14.

In 2016, 71 African arbitral institutions were counted. From the Cairo Regional Center for International Commercial Arbitration (hereinafter "CRCICA") in Egypt, the oldest arbitral institution on the Africa Continent, to the most recent ones, the African continent has seen a proliferation of arbitral institutions. For example, Nigeria and South Africa have six arbitral institutions and Mauritius, while one of the smallest countries of the continent, already has two.[44]

The functions of these arbitral institutions are two-fold: first, they are part of a more global policymaking designed to attract foreign direct investment. Second, the launch of these arbitral institutions is also part of a competition initiated by African States to promote their own domestic arbitral institution(s) as the hub for arbitration on the continent. When established in May 2012, the Kigali International Arbitration Centre intended "to be the regional choice for commercial dispute resolution".[45] Less than 10 years later, and with growing success, the KIAC describes itself as "one of the leading arbitration institutions in Africa providing ADR services in both national, regional and international contexts".[46]

The success of the KIAC demonstrates that a domestic arbitral institution can have impressive results in just a few years, which benefit the attractiveness of its home country. Although the recent history of Rwanda was terrifying with the genocide of 1994, the Government has managed to rebuild a strong economic system with a stable judiciary. In 2018, Rwanda had a sustainable economy with a GDP of 8.7% in 2018 and an expected GDP of 7.8% in 2019.[47] These strong economic numbers make Rwanda attractive for foreign private investors. Besides, the strong marketing promotion of the KIAC led to significant results with a growth of 117% of cases registered (26) in 2016-2017.[48] In less than ten years, the KIAC registered 89 cases[49] involving both African parties (South Africa, Kenya, Burundi, Nigeria Senegal, Zambia and Uganda) and international ones (United States, Italy, Korea, Turkey, Pakistan, Spain, Switzerland, Singapore, France, India and China).[50] One of the keys to the success of the KIAC is the pro-arbitration judicial system in Rwanda[51] and the celerity in the enforcement of most of the KIAC awards.[52] Although this number is relative, the KIAC Secretariat promotes itself by stating "none of the awards issued by KIAC have been set aside".[53]

Besides freshly established arbitral institutions such as the KIAC, the CRCICA, a well-known and well-established Egyptian arbitral institution, is trying to keep a leading position in the arbitration market in Africa. Compared to the KIAC, the CRCICA has extensive experience in administering arbitral cases with more than 1300 cases registered.[54] Faced with harsh competition, CRCICA has announced growing activity in 2018 with 77 new cases registered compared to 65 in 2017.[55] In order to further develop its attractiveness, the CRCICA, which

[44] G. TRAVAINI, "Arbitration Centres in Africa: Too Many Cooks", *Kluwer Arbitration Blog*, 1 October 2019.
[45] KIAC Annual Report, July 2012 - June 2013, p. 1.
[46] KIAC Annual Report, July 2017 - June 2018, p. 7.
[47] https://data.worldbank.org/country/rwanda
[48] KIAC Annual Report, July 2016 - June 2017, p. 1.
[49] KIAC Annual Report, July 2017 - June 2018, p. 8.
[50] KIAC Annual Report, July 2017 - June 2018, p. 8.
[51] KIAC Annual Report, July 2016 - June 2017, p. iv.
[52] KIAC Annual Report, July 2017 - June 2018, p. 8.
[53] KIAC Annual Report, July 2016 - June 2017, p. 1.
[54] I. SELIM, D. HUSSEIN, "CRCICA Overview", *The Middle Eastern and African Arbitration Review*, 2019, *Global Arbitration Review*, p. 2.
[55] https://crcica.org/Arbitration_Statistics.aspx

administered 70% of its cases in Arabic[56] in 2018, adopted a French version of its Arbitration Rules in 2017. Ismail Selim, the Secretary General, does not fear competition among African arbitral institutions and advocates. On the contrary, he emphasizes that there is a need "to strengthen cooperation and coordination with other African arbitration institutions".[57]

Recent economic development between China and Africa also demonstrates the proliferation of arbitral institutions. The Belt and Road Initiative launched by China focuses mainly on economic development with Africa. The Belt and Road Initiative includes another aspect which relates to arbitration: the willingness to conclude cooperation agreements in the field of arbitration. Indeed, China has established cooperation agreements with several African countries and their domestic arbitral institutions. Deline Beukes, Chief Executive Officer of the CAJAC Johannesburg, stated that "CAJAC was designed to make use of existing arbitral institutions. The Shanghai International Arbitration Centre (SHIAC) and the Arbitration Foundation of Southern Africa were the first two centres entrusted with the responsibility of establishing CAJAC in both Johannesburg and Shanghai".[58] In 2017, the CRCICA signed the Belt and Road Arbitration Initiative Cooperation Agreement with the Beijing Arbitration Commission and the Beijing International Arbitration Center.[59] Similar Cooperation Agreements have been signed by China with other African countries, for instance with the Nairobi Centre for International Arbitration.

The proliferation of numerous arbitral institutions in Africa questions the need for each country to have its own arbitral institution and for the continent to have a restricted number of leading arbitral institutions. If Gregory Travaini questioned the usefulness of this proliferation[60], Joseph Otoo underlines the fact that the "proliferation of African arbitration institutions has also helped with improving the whole ecosystem supporting arbitration".[61]

"Where you stand depends on where you sit". This quote attributed to Nelson Mandela reflects not only the existing economic and legal diversity in the policymaking of African States but also the choice African States have to further develop, or, on the contrary, to restrict recourse to international arbitration. The negotiation of the Protocol on Investment of the African Continental Free Trade Area, which promises to be long and highly debated, will constitute a good barometer on the way forward to international arbitration decided by African States.

[56] CRCICA Caseload of the Year 2018, p. 5.
[57] CRCICA Annual Report, 2017, p. 3.
[58] S. HABIB, "Interviews with Our Editors: Interview with Deline Beukes, CEO of the China Africa Joint Arbitration Centre Johannesburg", *Kluwer Arbitration Blog*, 26 November 2018.
[59] I. SELIM, D. HUSSEIN, "CRCICA Overview", *Global Arbitration Review*, 9 May 2018, p. 2.
[60] G. TRAVAINI, "Arbitration Centres in Africa: Too Many Cooks", *Kluwer Arbitration Blog*, 1 October 2019.
[61] J. OTOO, "AfAA and the coming age of African Arbitration", *African Law Business*, 24 April 2019.