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## **Enforcing arbitral awards in Sub-Saharan Africa--Part 2**

**Arbitration analysis:** In Part 2 of this series, Steven Finizio, Danielle Morris and Katherine Drage of Wilmer Cutler Pickering Hale and Dorr LLP focus on enforcing awards subject to investment treaties.

In [Part 1](#) of this series, we discussed the importance of enforcement of awards to those investing in Africa and the difficulties enforcing parties can face--see: [Enforcing arbitral awards in Sub-Saharan Africa--Part 1](#). In this Part 2, we focus on the enforcement of arbitral awards made pursuant to investment treaties  
New York Convention

While it is difficult to generalise about the enforceability of foreign arbitral awards in Sub-Saharan Africa, there are a number of significant issues, including the fact that almost half of the countries in the region have not ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Sub-Saharan African States have taken a variety of different legislative approaches to the enforcement of foreign arbitral awards. Even in those countries that have adopted modern legislation, such as the UNCITRAL Model Law or the OHADA Uniform Act, the courts have limited experience with regard to enforcing foreign awards and it is often difficult to find court decisions on enforcement. Given the current uncertainty, it is important to get specialist advice about the applicable legal regime both when assessing the risks of investing in a particular country and before initiating arbitration proceedings. In considering an investment in Sub-Saharan Africa, it is also important to consider both any potentially applicable BITs and the growing number of regional treaties, which although little used to date, offer potentially useful protections for investments.

Legislation on enforcement of foreign arbitral awards and treaties in Sub-Saharan Africa

Note: at the end of this document we set out a list of all the countries in Sub-Saharan Africa and indicate whether a country is a contracting state to the New York Convention and has based its arbitration law on the Model Law or the Uniform Act. The list also identifies the various arbitration (and investment protection)-related treaties each country has ratified.

### **Enforcing arbitral awards made pursuant to investment treaties**

Foreign investors should and often do consider the availability of bilateral investment treaties (BITs) and multilateral investment treaties (MITs) in weighing the risks of investment in a country. States in Sub-Saharan Africa are currently party to over 200 BITs, as well as MITs that include protections for investments.

In October 2012, South Africa cancelled its BITs with Belgium, Luxembourg, Spain, Germany, Switzerland, the Netherlands and Denmark. As an alternative to BIT protections, South Africa published a draft Promotion and Protection of Investment Bill for public comment in October 2013. The Bill is still under discussion and has yet to be enacted.

These treaties guarantee protection to the investments of foreign investors, such as fair and equitable treatment and compensation for direct or indirect expropriation. Investment treaties often also offer binding arbitration for resolution of disputes between foreign investors and host states. Many investment treaties provide for arbitration under the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules, but some provide for arbitration under other rules, such as the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (note: UNCITRAL provide rules for ad hoc proceedings, ie proceedings that are not administered by an arbitral institution), the International Chamber of Commerce (ICC) or the Stockholm Chamber of Commerce (SCC) Arbitration Rules. Within Sub-Saharan Africa, regional treaties such as the Southern African Development Community (SADC), the Economic Community of West African States (ECOWAS) and the Common Market for Eastern and Southern Africa (COMESA) can also provide the legislative framework for BIT-like investment protections, or the adjudicative forum within which disputes are decided and awards are enforced.

The sections below address enforcement in Sub-Saharan Africa of arbitral awards made pursuant to an investment treaty under various regimes, including the ICSID Convention and other arbitration rules, as well as some of the potential protections and enforcement mechanisms available under regional treaties.

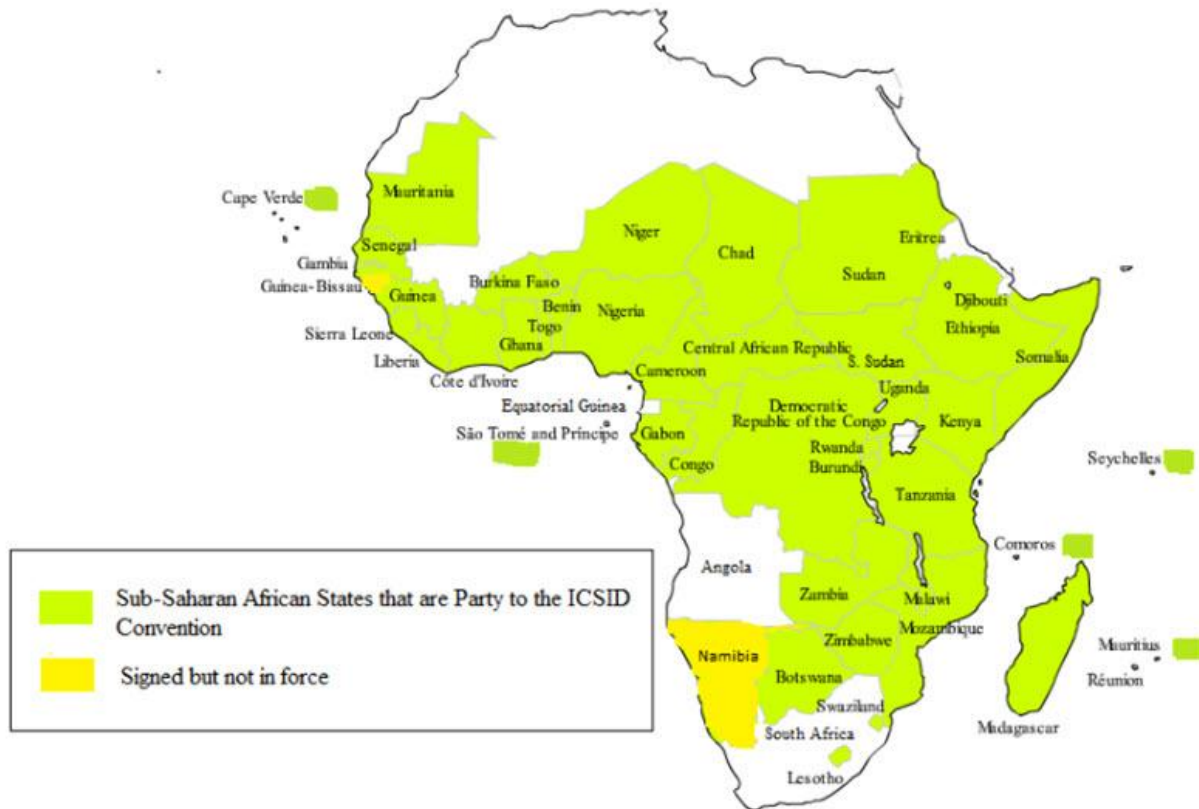
### **Enforcing treaty awards made under the ICSID Convention**

Forty-one countries in Sub-Saharan Africa are Member States to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention); South Africa is the most prominent country that is not a member of ICSID (Angola, Djibouti, Equatorial Guinea, Eritrea and South Africa are not Member States of the ICSID Convention).

#### **ICSID Rules**

The ICSID Convention seeks to facilitate international investment by providing a means of resolving investment disputes separate from any domestic courts. The ICSID Convention established the ICSID, which administers arbitrations under its Arbitration Rules. Each Contracting State commits to enforcing an arbitral award issued by a tribunal under the ICSID Convention as if that award were a final judgment of its own courts.

SUB-SAHARAN AFRICAN COUNTRIES  
THAT ARE MEMBERS OF THE ICSID CONVENTION



In contrast to arbitral awards governed by the New York Convention regime, ICSID awards cannot be annulled or set aside by domestic courts. The only way to challenge an ICSID award is through an annulment process also administered by ICSID. In theory, investment treaty awards made pursuant to the ICSID Convention should be easier to enforce because there is not supposed to be a risk of interference by domestic courts. It is less clear what has happened in practice.

Approximately, 15 ICSID awards have been made (and not annulled) against Sub-Saharan African States. There is very little information about whether these awards have been voluntarily complied with or, if not, whether these awards have been successfully enforced against the Respondent State:

- o *Antoine Goetz & Others and SA Affinage des Metaux v Republic of Burundi* (ICSID Case No ARB/01/2)
- o *M. Meerapfel Söhne AG v Central African Republic* (ICSID Case No ARB/07/10)
- o *American Manufacturing & Trading, Inc v Republic of Zaire* (ICSID Case No ARB/93/1)
- o *Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v Democratic Republic of the Congo* (ICSID Case No ARB/10/4)
- o *AGIP SpA v People's Republic of the Congo* (ICSID Case No ARB/77/1)
- o *SARL Benvenuti & Bonfant v People's Republic of the Congo* (ICSID Case No ARB/77/2)

- o *Atlantic Triton Company Limited v People's Revolutionary Republic of Guinea* (ICSID Case No ARB/84/1)
- o *Maritime International Nominees Establishment v Republic of Guinea* (ICSID Case No ARB/84/4) (award partially annulled)
- o *Liberian Eastern Timber Corporation (LETCO) v the Government of the Republic of Liberia* (ICSID Case No ARB/83/2)
- o *AHS Niger and Menzies Middle East and Africa SA v Republic of Niger* (ICSID Case No ARB/11/11)
- o *Société Ouest Africaine des Bétons Industriels v Senegal* (ICSID Case No ARB/82/1)
- o *CDC Group plc v Republic of Seychelles* (ICSID Case No ARB/02/14)
- o *Standard Chartered Bank (Hong Kong) Limited v Tanzania Electric Supply Company Limited* (ICSID Case No ARB/10/20)
- o *Togo Electricité and GDF-Suez Energie Services v Republic of Togo* (ICSID Case No ARB/06/7)
- o *Funnekotter v Republic of Zimbabwe* (ICSID Case No ARB/05/06)

The lack of public reports to the contrary suggests that Sub-Saharan African States have complied with most of the treaty awards issued against them, although there appears to be some examples of non-compliance.

A recent decision of the Tanzanian High Court, for example, demonstrates potential risks to parties seeking to rely on the protections of the ICSID regime. In *Standard Chartered Bank Limited*, the Tanzanian High Court issued an injunction ordering the parties to an ICSID arbitration against Tanzania to refrain from 'enforcing, complying with or operationalising' the ICSID tribunal's 'Decision on Jurisdiction and Liability' of 12 February 2014 (note: this was a final award on the merits, with a quantum stage to follow). The court's order appears to violate Tanzania's obligation under the ICSID Convention to enforce any ICSID award as a final judgment of its own courts. If the injunction is not lifted before the tribunal issues an award on damages, there is a risk that the investor will not be able to enforce that award in Tanzania. Such an outcome may present serious concerns for potential foreign investors about Tanzania's willingness to comply with its obligations under the ICSID Convention.

In addition to the fundamental question of whether the State will voluntarily comply with an award, a number of practical issues may arise at the enforcement stage, including whether courts in the State will enforce the award (and how quickly) and whether the State has sufficient assets to satisfy the award. For these reasons, investors may seek to enforce the award in other jurisdictions where the State has assets or in multiple jurisdictions at the same time (see: A. Asouzu, *African States and the Enforcement of Arbitral Awards: Some Key Issues*, (15) 1 *Arbitration International* (1999), p 40). Although it is simultaneously possible to seek enforcement in both the host State and other States where the host State has assets, an investor's decision to seek enforcement elsewhere suggests that the host State has not voluntarily complied with the award.

In theory, other ICSID Member States are obligated to enforce an ICSID award as if it were a final judgment of their own courts (see article 54(1) of the ICSID Convention, which states: '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.'). but enforcement in other countries can raise additional issues. For example, in a case against Liberia, *LETCO*, the US District Court for the Southern District of New York was willing to enforce an ICSID award in favour of the investor, but the investor was unable to locate assets of Liberia in the US that were not subject to sovereign immunity (see also: *In re Liberian Eastern Timber Corp*, 1986 U.S. Dist. LEXIS 31062 (S.D.N.Y. Sept. 5, 1986), *LETCO v the Government of the Republic of Liberia*, ICSID Case No ARB/83/2, Arbitral Award of 31 March 1986 and Rectification of 17 June 1986, 26 *ILM* 647, 675 (1987) and *Liberian Eastern Timber Corp. v Republic of Liberia*, 650 F. Supp. 73 (S.D.N.Y. 1986) at 78, which states: 'The levy and collection of taxes

intended to serve as revenues for the support and maintenance of governmental functions are an exercise of powers particular to a sovereign.'). The claimant was likewise denied execution of the award against bank accounts used by the Liberian Embassy in the US on the basis of sovereign immunity (see: *LETCO*). In a recent decision involving the enforcement of an award against Congo, the French Court of Cassation held that a State's claim to immunity cannot extend beyond customary international law principles. In *Commisimpex SA v Republic of the Congo*, the claimant sought enforcement of an award against a number of bank accounts held in the name of the Congolese diplomatic mission in Paris. The French court held that diplomatic missions do not have immunity from execution beyond that of the states they represent, and that customary international law only requires an express waiver of immunity, departing from previous decision in which the court had held that a waiver of immunity must also specifically indicate the categories of assets to which it applies (see: Cour de cassation, Chambre civile 1, 13 Mai 2015, 13-17751, Publié au bulletin).

Similarly, in *Funnekotter* (Arbitral Award of 22 April 2009), there is an ongoing dispute as to whether assets the investors are seeking to attach in the US belong to Zimbabwe and are commercial assets not subject to sovereign immunity (see: *Funnekotter v Agricultural Development Bank of Zimbabwe*, 2013 U.S. Dist. LEXIS 164496 (S.D.N.Y. Nov. 15, 2013)). In that case, a group of Dutch investors obtained an ICSID award as the result of unlawful expropriation of their property in Zimbabwe. Zimbabwe did not voluntarily pay the compensation awarded by the ICSID tribunal and the investors sought to attach certain of Zimbabwe's commercial assets in the US (it is not clear whether the investors also sought to enforce the award in Zimbabwe). The US District Court for the Southern District of New York confirmed the award (see *Funnekotter v Republic of Zimbabwe*, No 09 Civ. 8168(CM), 2011 WL 666227 (S.D.N.Y. Feb. 10, 2011)), rendering it enforceable in the US, but Zimbabwe has so far refused to appear in the ongoing US enforcement proceedings.

### **Enforcing non-ICSID treaty awards**

As noted above, many investment treaties also provide for non-ICSID arbitration pursuant to other arbitration rules, such as the UNCITRAL, the ICC or the SCC Arbitration Rules.

Unlike the ICSID Convention, which provides a self-contained enforcement regime, investment treaty awards issued under these other arbitral rules are subject to the same enforcement mechanisms as foreign arbitral awards arising from commercial contracts (discussed in Part 1). This means that enforcement takes place pursuant to the arbitration legislation in that country (including, potentially, legislation implementing the New York Convention and/or the Organization for the Harmonization of African Business Law (OHADA) Uniform Act, as discussed above), with the added complexity that an investor is asking a domestic court to enforce an award against the State.

### **Potential investment protections available under regional economic treaties**

In addition to protections arising under BITs, investors may have rights arising from investment protection provisions in regional economic treaties. There are a number of regional treaties that are potentially applicable for foreign investments in Sub-Saharan Africa. As described below, depending on the treaty, arbitral awards issued pursuant to these treaties would be enforced either pursuant to the ICSID regime or pursuant to national arbitration legislation in the country where enforcement is sought.

#### **The South African Development Community (SADC)**

The SADC is an inter-governmental organisation of 15 Southern African States that aims to foster socio-economic co-operation and development between Member States. It has a founding treaty and 27 legally-binding protocols, one of which is the SADC Protocol on Finance and Investment (the Protocol), which

gives foreign investors the ability to bring claims directly against SADC Member States through international arbitration proceedings. There is no requirement that the foreign investor be a national of another SADC Member State in order to bring claims (see article 2(2) of the Protocol, which defines an 'investor' as 'a person that has been admitted to make or has made an investment').

SADC MEMBER STATES			
Angola	Malawi	Namibia	Tanzania*
Botswana*	Madagascar*	Seychelles	Zambia*
DRC*	Mauritius*	South Africa*	Zimbabwe*
Lesotho*	Mozambique*	Swaziland	

\* Also a Contracting State to the New York Convention

The Protocol, which entered into force on 16 April 2010, allows foreign investors in an SADC country to bring an arbitration claim under the ICSID Arbitration Rules or the UNCITRAL Arbitration Rules for breach of the Protocol's provisions related to expropriation and the guarantee of fair and equitable treatment (see articles 5 and 6 of the Protocol, respectively). The Protocol permits recourse to international arbitration for a broadly-defined range of 'investments' (under Annex 1) in the event that domestic remedies have been exhausted and six months have passed since the SADC State was put on notice of the claim (note: although article 28 of the Protocol initially offered investors the option of arbitration before an SADC tribunal, in addition to arbitration under the ICSID or the UNCITRAL Arbitration Rules, an SADC Summit withdrew that option on 20 May 2011).

To date, there does not appear to have been a significant number of claims made under the Protocol. However, the Protocol may present a useful means of investment protection, especially where the relevant investment is not otherwise covered by a BIT. The enforcement of any award issued pursuant to the Protocol will depend on whether the award is issued under the ICSID Convention or the UNCITRAL Rules, as discussed above.

### **The Economic Community of West African States (ECOWAS)**

The ECOWAS was created in 1975 by the ECOWAS Treaty, which was revised in 1993. Article 3(1) of the ECOWAS Treaty states that its aim is to 'promote cooperation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standard of its peoples ... and contribute to the progress and development of the African Continent'. The ECOWAS has 14 Member States in Sub-Saharan Africa (note: this excludes Mali, an ECOWAS Member State that is part of North Africa and so outside the scope of this article), seven of which are also members of OHADA.

ECOWAS MEMBER STATES					
Benin*+	Ivory Coast*+	Guinea*+	Niger*+	Sierra Leone	
Burkina Faso*+	The Gambia	Guinea sau+	Bis-Nigeria*	Togo+	
Cape Verde	Ghana*	Liberia*	Senegal*+		

\* Also a Contracting State to the New York Convention

+ Also an OHADA Member State

The ECOWAS Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation of 19 December 2008 (the Supplementary Act) addresses investment protections. The Supplementary Act provides the same BIT-like standards as the Protocol (see: the Supplementary Act's article 6 ('Most-Favoured-Nation Treatment'), article 7 ('Minimal Regional Standards') and article 8 ('Expropriation')) and also provides for recourse to arbitration after a cooling-off period of six months (see: article 33(2) of the Supplementary Act). Article 33(6) of the Supplementary Act, however, limits the referral to arbitration to national courts and 'any national machinery for the settlement of investment disputes'. As under the Protocol, there is no requirement that the foreign investor be a national of another ECOWAS Member State (see: article 1(d) of the Supplementary Act, which defines an 'investor' as 'any individual or company of any Member State of ECOWAS or a company that has invested or is making an investment in the territory of a Member State'). Although the parties may refer the dispute to the ECOWAS Community Court, if there is disagreement as to the method of dispute resolution to be adopted, the ECOWAS Court of Justice has yet to hear any such dispute (note: pending the establishment of the arbitration tribunal provided for at article 16 of the ECOWAS Treaty, the Community Court of Justice has the power to act as arbitrator in such disputes. See *The Law, Practice and Procedure of the Community Court of Justice--Meaning and Implication*, presented by Hon. Justice H. N. Donli at the West Africa Human Rights Forum, 7-9 December 2006, p 6. See also the ECOWAS Community Court of Justice website.

Although article 35(2) of the Supplementary Act requires Member States to 'abide by the decisions of mediation, arbitration and judicial bodies on investment disputes', the Supplementary Act does not itself include an enforcement mechanism for arbitral awards issued pursuant to it. As a result, the enforcement of such awards will depend on the applicable legal regime in the jurisdiction where enforcement is sought.

### **The Common Market for Eastern and Southern Africa (COMESA)**

The COMESA Treaty (the Treaty) is intended to promote co-operation in the cultural and social affairs within the Common Market. COMESA has 18 Member States in Sub-Saharan Africa (note: this excludes Egypt and Libya, COMESA Member States that are part of North Africa).

COMESA MEMBER STATES					
Burundi*	Djibouti	Kenya*	Mauritius*	South dan	Su- Uganda*
Comoros	Eritrea	Madagascar*	Rwanda*	Sudan	Zambia*
DRC*	Ethiopia	Malawi	Seychelles	Swaziland	Zimbabwe*

\* Also a Contracting State to the New York Convention

Article 159 of the Treaty provides BIT-like protections, including fair and equitable treatment and protection against expropriation without compensation. Pursuant to Article 26 of the Treaty, an investor that is a resident of a COMESA Member State may bring a claim before the COMESA Court of Justice, which under article 28 has jurisdiction to determine any matter arising from an arbitration clause contained in a contract conferring such jurisdiction (note: in *The Republic of Mauritius v Polytol Paints & Adhesives Manufacturers Co Ltd*, Preliminary Application No 1 of 2012, the COMESA Court of Justice confirmed that a company resident in a COMESA Member State was allowed to bring a case against a Member State. Citing article 26 of the Treaty, the Court set out the three jurisdictional requirements: (1) that the case should be brought by a resident of a Member State, (2) the case should be challenging the legality of a regulation in view of the provisions of the COMESA Treaty and (3) the company should have exhausted local remedies. In 2007, COMESA Member States developed a multilateral treaty creating the COMESA Common Investment Area, which

would provide further investment protections and recourse to dispute resolution, including ICSID or UNCITRAL arbitration; however, the treaty has not yet come into force.

### **The Economic Community of the Great Lakes Countries (ECGLC)**

The ECGLC is a sub-regional organisation founded under the Agreement of Gisenyi in Rwanda in 1976. It consists of three Member States: Burundi, the Democratic Republic of Congo (DRC) and Rwanda, with the purpose of promoting regional integration and economic co-operation. The ECGLC established an Investment Code (the Code) in 1982, which provides for certain investment guarantees (article 13 of the Code) as well as for arbitration of disputes arising out of investments undertaken in accordance with the Code (article 54 of the Code). The dispute resolution mechanism available under the Code has not yet been used to enforce investment guarantees. This may be due to the availability of other, more familiar mechanisms given that all three Member States have also ratified the ICSID Convention.

### **The African Charter on Human and Peoples' Rights**

Among other protections, the African Charter on Human and Peoples' Rights (the Charter) guarantees in article 14 the right to property. Specifically, an individual's property may only 'be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws'. Every State in Africa except South Sudan has ratified the Charter.

The African Court on Human and Peoples' Rights has jurisdiction over disputes concerning the interpretation and application of the Charter, and an investor whose property is expropriated by a Sub-Saharan African State may be able to bring a claim against the State before that court. However, such claims are subject to the requirement that the State has made a declaration accepting the competence of the court to hear such claims. Pursuant to article 3 of the Protocol to the Charter, five States in Sub-Saharan Africa have made such declarations: Burkina Faso, Ghana, Malawi, Rwanda and Tanzania. Member States that are subject to the Court's jurisdiction must comply with its judgments and must guarantee their execution.

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## LEGISLATION ON ENFORCEMENT OF FOREIGN ARBITRAL AWARDS AND TREATIES IN SUB-SAHARAN AFRICA

COUNTRY	<i>Basis for International Arbitration Legislation</i>		<i>Potentially Relevant Treaty Rights</i>					
	UNCITRAL Model Law	Uniform Arbitration Act	New York Convention	ICSID	OHADA	SADC	ECOWAS	COMESA
Angola						X		
Benin		X	X	X	X		X	
Botswana			X	X		X		
Burkina Faso		X	X	X	X		X	



Burundi			X	X				X
Cameroon		X	X	X	X			
Cape Verde				X			X	
Central African Republic		X	X	X	X			
Chad		X		X	X			
Comoros		X	Currently in ratification process	X	X			X
DRC		X	X	X	X	X		X
Republic of Congo		X		X	X			
Ivory Coast		X	X	X	X		X	
Djibouti			X					X
Equatorial Guinea		X			X			
Eritrea								X
Ethiopia				X				X
Gabon		X	X	X	X			
The Gambia				X			X	
Ghana			X	X			X	
Guinea		X	X	X	X		X	
Guinea-Bissau		X		signed, not yet in force	X		X	
Kenya	X		X	X				X
Lesotho			X	X		X		
Liberia			X	X			X	
Madagascar	X		X	X		X		X

Malawi				X		X		X
Mauritania			X	X				
Mauritius	X		X	X		X		X
Mozambique	X		X	X		X		
Namibia				signed, not yet in force		X		
Niger		X	X	X	X		X	
Nigeria	X		X	X			X	
Rwanda	X		X	X				X
Sao Tome and Principe			X	X				
Senegal		X	X	X	X		X	
The Sey- chelles				X		X		X
Sierra Leone				X			X	
Somalia				X				
South Africa			X			X		
South Sudan				X				X
Sudan				X				X
Swaziland				X		X		X
Tanzania			X	X		X		
Togo		X		X	X		X	
Uganda	X		X	X				X
Zambia	X		X	X		X		X
Zimbabwe	X		X	X		X		X