FISCAL EXTRACTION THROUGH INVESTMENT ARBITRATION

How Investor-State Dispute Drain Africa and MENA Public Finance

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ABSTRACT

This study examines investor-state dispute settlement (ISDS) as an unplanned fiscal burden systematically constraining African governmental capacity to fulfil constitutional obligations regarding public service delivery, worker compensation and developmental investment. When a government faces unexpected investor arbitration award after its budget has been finalised, it confronts fiscal shock requiring immediate liquidity whilst exposing deeper structural tensions in how international investment treaties constrain fiscal sovereignty, subordinate democratic resource allocation to arbitral tribunal authority, and privilege investor expectations over citizen welfare. Through systematic analysis of arbitration cases and budget documentation across Egypt, Libya, Kenya and Mauritius, the research quantifies direct fiscal impacts of ISDS awards. The comparative examination reveals that arbitration liabilities operate as parallel taxation extracting public resources without legislative appropriation or democratic consent, generating fiscal compression whereby worker wages stagnate, public service infrastructure deteriorates, and developmental programmes experience systematic underfunding as governments reallocate expenditure toward investor compensation or increase borrowing to service awards. The study identifies the African Continental Free Trade Area Protocol on Investment as a legally grounded structural alternative to investor-state arbitration architecture.

INTRODUCTION

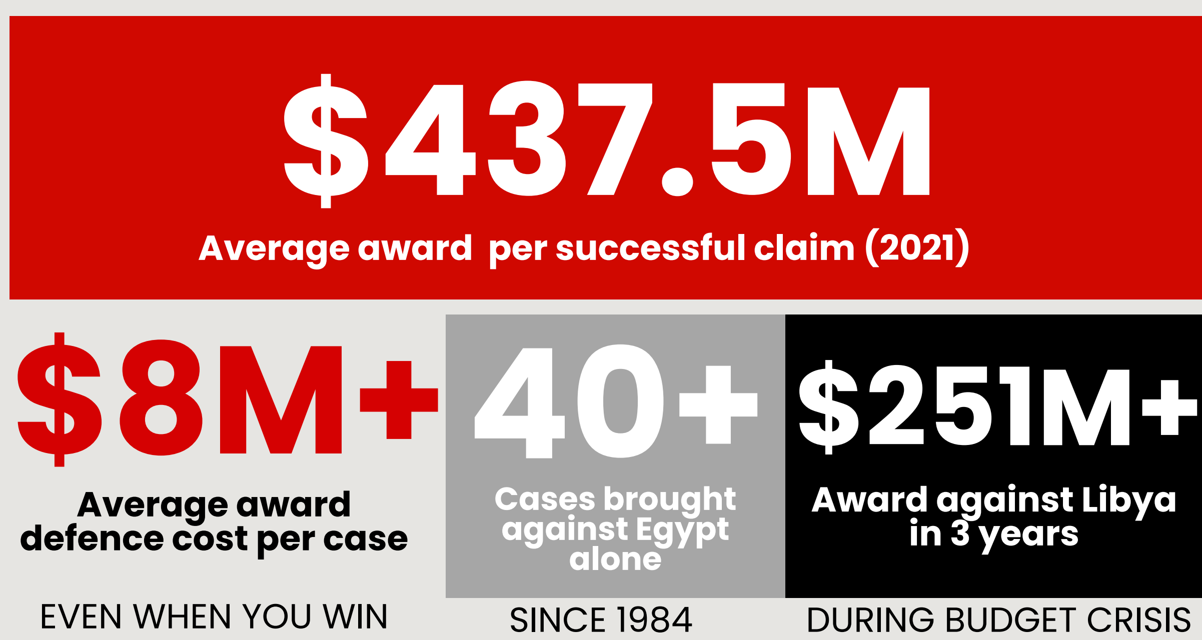
Investor-State Dispute Settlement (ISDS) represents one of contemporary international law's most consequential yet underexamined mechanisms for transferring public resources from African treasuries to multinational corporations. When arbitral tribunals order governments to pay compensation for alleged treaty breaches with awards ranging from millions to billions of dollars1, these awards do not materialise from abstract fiscal ether. They come directly from tax revenues collected from workers, small businesses, and consumers, revenues already allocated through parliamentary budget processes to education, healthcare, infrastructure, and public sector salaries.

The ISDS framework, established through the 1965 ICSID Convention2 and proliferating bilateral investment treaties,3,4 enables foreign investors to bypass domestic courts and arbitrate disputes before international panels whose decisions bind respondent states under the principle of pacta sunt servanda.5 This bypass mechanism operates through Article 26 of the ICSID Convention, which provides that consent to ICSID arbitration constitutes "consent to such arbitration to the exclusion of any other remedy", thereby eliminating requirements for exhaustion of local judicial remedies that would ordinarily apply under customary international law.

Once host states grant advance consent through investment treaties and investors invoke that consent by initiating arbitration under Article 25, domestic courts lose jurisdiction over the dispute, and investors gain direct access to international arbitration without first pursuing claims through national legal systems. This mechanism, which privileges investor access while bypassing domestic judicial oversight, imposes substantial fiscal burdens on respondent states. By 2021, average awards reached USD 437.5 million per successful claim,6 whilst legal defence costs exceeded USD 8 million per case regardless of outcome.7

This fiscal burden proves particularly destructive for African states operating under constrained revenue bases, high debt service obligations, and urgent development financing needs.8 No government maintains dedicated budget lines for potential arbitral liability.9 When tribunals order payment, finance ministries face binary choices: reallocate resources from planned expenditures in education, health, and infrastructure, or borrow additionally to satisfy awards whilst preserving development spending. Either pathway produces harm. Reallocation directly reduces service delivery and public sector employment. Borrowing compounds debt burdens and commits future revenues to servicing obligations incurred for current investor compensation. The result operates as systematic clawback of development finance, effectively nullifying domestic resource mobilisation efforts and constraining precisely the policy space African governments require to address structural transformation imperatives spanning digitalisation, climate crisis response, energy transition and youth employment.

YEAR IN NUMBERS



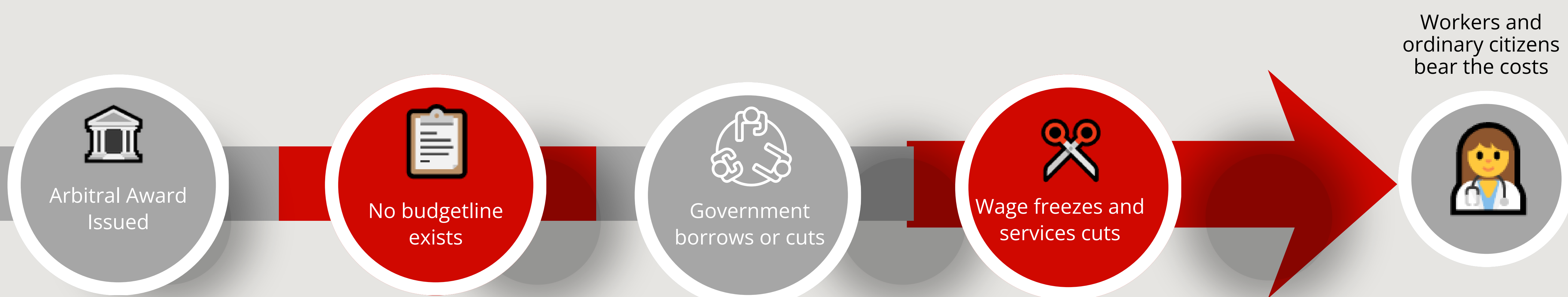
EVEN WHEN YOU WIN SINCE 1984 DURING BUDGET CRISIS

The mechanism's colonial lineage proves unmistakable. Investment treaties emerged during the 1960s and 1970s as newly independent African states negotiated with former colonial powers and international financial institutions under conditions of acute economic vulnerability.10 The treaties embedded asymmetric protections favouring capital mobility over regulatory sovereignty, granted foreign corporations standing unavailable to domestic investors or affected communities, and established arbitration outside domestic legal systems originally justified through claims that African courts lacked independence, suffered corruption, and proved incapable of protecting foreign property. These reliability arguments obscured how investors themselves frequently benefited from weak enforcement whilst selectively invoking rule of law concerns only when governmental actions threatened profit expectations. The resulting architecture perpetuates extraction patterns Walter Rodney11 documented, whereby legal frameworks systematically privilege metropolitan capital accumulation over African development, operationalise resource transfers from periphery to core, and constrain state capacity to reorient economic activity toward domestic welfare priorities.

This study examines four African jurisdictions selected to demonstrate how ISDS awards concretely constrain fiscal capacity, erode public sector compensation, and undermine service delivery across diverse economic and political contexts. The case studies establish causal pathways connecting arbitral awards to measurable reductions in education spending, healthcare budgets, infrastructure investment, and public sector wages, quantifying opportunity costs against developmental priorities governments explicitly committed to pursuing. This empirical foundation proves essential for moving beyond abstract critiques of investment arbitration toward concrete documentation of fiscal harm that ISDS inflicts on African populations. The learning generated through these case studies serves three purposes: demonstrating to policymakers the tangible costs of maintaining current investment treaty commitments, providing trade unions and civil society with evidence base for advocacy demanding treaty reform or termination, and informing negotiations over alternative frameworks including the African Continental Free Trade Area (AfCFTA) Protocol on Investment that African states can deploy to protect legitimate investment whilst reclaiming policy space necessary for pursuing development transformation agendas.

The study is structured as follows: section 2 presents detailed country case studies for Egypt, Libya, Kenya and Mauritius, quantifying the fiscal impacts. Section 3 presents an analytical and statistical analysis of the correlation between government related costs for settlement of ISDS claims, and government expenditure on critical public sector workers and public services. Section 4 evaluates AfCFTA's POI as a legally grounded structural alternative to investor-state arbitration, analysing provisions designed to protect legitimate investment whilst preserving regulatory sovereignty, eliminating investor-state dispute settlement in favour of state-to-state mechanisms. Section 5 presents an advocacy strategy for Protocol implementation. Section 6 concludes the study.

How ISDS hits your pay packet



Wage Compression

Nominal pay rises, but inflation runs faster. Real wages fall. Public workers lose purchasing power.

Service underfunding

Hospitals get less medicine. Schools lose staff. Infrastructure stagnates. The award is invisible; the suffering is not.

Hidden Austerity

Nobody announces: 'We are cutting because of ISDS.' The link is buried in opaque budget lines, citizens cannot trace it.

CASE STUDIES ON FISCAL IMPACTS OF ISDS

EGYPT

Egypt is the first country case examined in this study to unpack the fiscal implications of investor–state dispute settlement on national budgets, public service delivery, and the welfare of public sector workers. Egypt was selected because it represents the most heavily litigated African jurisdiction under the ISDS framework, having been a respondent in more than 40 cases before international tribunals since 1984. Its long engagement with arbitration makes it a particularly useful lens through which to observe how recurrent exposure to claims affects fiscal management and social expenditure. For this study, six recent contemporary cases are considered. They span multiple economic sectors, including energy, construction, transport, and manufacturing, and are subject to different bilateral and regional treaties. Out of these six cases, two have been concluded, three remain pending, and one was settled out of tribunal without disclosure of terms. Only one case, Unión Fenosa Gas v Arab Republic of Egypt,[12] was decided in favour of the investor with a published award amount. The table below summarises the available information on these cases.

No.	Parties	Economic Sector	Treaty Basis	Claim / Award (USD)	Status
1	*International Holding Project Group and others v Arab Republic of Egypt* (ICSID Case No. ARB/18/31)[13]	Construction	Egypt–Kuwait BIT (2001)	Award USD 4.8 million	Decided in favour of investor; partial annulment concluded Aug 2025; outcome not public
2	*Hashem Mohamed Saleh Al-Mehdhar and others v Arab Republic of Egypt (II)* (PCA Case No. 2024-46)[14]	Construction	OIC Investment Agreement (1981)	Data not available	Pending
3	*HeidelbergCement AG and others v Arab Republic of Egypt* (ICSID Case No. ARB/21/50)[15]	Manufacturing (Cement production)	Egypt–Germany BIT (2005); Egypt–France BIT (1974); Egypt–Italy BIT (1989)	Data not available	Pending
4	*KGL International for Ports, Warehousing and Transport K.S.C.C. v Arab Republic of Egypt* (ICSID Case No. ARB/21/21)[16]	Transportation and storage	Egypt–Kuwait BIT (2001)	Amount undisclosed	Settled
5	*Qatar Airways Group Q.C.S.C. v Arab Republic of Egypt*[17]	Air transport	Egypt–Qatar BIT (1999); Arab Investment Agreement (1980); OIC Agreement (1981)	Claim estimated within USD 5 billion sought from Arab bloc (share uncertain)	Pending
6	*Unión Fenosa Gas S.A. v Arab Republic of Egypt* (ICSID Case No. ARB/14/4)	Energy (LNG supply)	Egypt–Spain BIT (1992)	Claim USD 3.2 billion; Award USD 2.013 billion	Decided 31 Aug 2018 in favour of investor

These six cases show a continuum of fiscal risk: a few smaller cases, a large flagship award, several unresolved matters, and one opaque settlement. Together, they reveal the scale of Egypt's ISDS exposure and, more critically, the lack of public information required for fiscal accountability.

The foremost analytical challenge in examining Egypt's ISDS record lies in the absence of open data. Except for Unión Fenosa Gas and International Holding Project Group, the details of claims, costs, interest accruals, and settlements remain undisclosed. Even where awards are reported, there is no accompanying data on whether the state paid the full amount, negotiated a reduction, or rescheduled payment through debt instruments. For the partial annulment of the International Holding Project Group award, the decision was issued in August 2025, yet at the time of writing, no tribunal documents or fiscal statements have been made public. This opacity prevents researchers, parliamentarians, and civil society from determining the true magnitude of liabilities and how they were financed. It also constrains any direct assessment of how such payments or defence costs translate into reductions in public spending, salary freezes, or deferred service provision.

The one case with a clear award, Unión Fenosa Gas v Egypt, offers a concrete anchor for analysis. The tribunal in August 2018 ordered Egypt to pay USD 2.013 billion in compensation for the suspension of gas supplies by a state enterprise. This decision coincided with the 2018/2019 fiscal year. Reviewing Egypt's official expenditure reports for 2018/2019 and 2019/2020[18] shows no explicit budget line or disclosure corresponding to this liability. Total expenditure in 2018/2019 reached roughly EGP 1.42 trillion (about USD 79 billion at prevailing exchange rates), with allocations to education at EGP 115 billion and to health at EGP 61 billion. The award value alone therefore equated to around 40% of Egypt's annual health expenditure or 25% of its education spending that year. Yet there is no trace of a recorded outflow of this magnitude in the public accounts.

Consequently, two interpretations emerge. Either the payment was negotiated and rescheduled, possibly through off-budget arrangements or natural gas offsets, or the liability remains unrecorded as a contingent obligation awaiting fiscal space or a legal settlement. In either scenario, transparency is missing. The absence of disclosure means that public servants, who face recurrent wage controls and delayed promotions, cannot see how much of these fiscal constraints derive from arbitration obligations. In effect, ISDS liabilities become an invisible hand guiding austerity. The fiscal context of 2018–2020 was already tight. The government was under an IMF programme that emphasised deficit reduction, subsidy reform, and containment of the wage bill.[19] Public sector wage growth was limited to nominal adjustments that lagged behind inflation, while hiring slowed across education and health. Against that background, a USD 2 billion ISDS obligation even if paid over several years would exert downward pressure on recurrent expenditure. It is not unreasonable to infer that part of the compression experienced by teachers, nurses, and administrative staff in those years was indirectly related to the diversion of resources to settle or provision for such external claims.[20]

To contextualise these numbers, Egypt's total public expenditure in 2018/2019 was around EGP 1.5 trillion,[21] roughly USD 79 billion. The Unión Fenosa Gas award of USD 2.013 billion therefore represented about 2.5 per cent of total government expenditure for that year and approximately 40% of the health budget or 25% of the education budget when mapped against reported ministry allocations.[22] If Egypt were to pay such an award directly from current resources, it would equal the entire annual salary bill of approximately 600,000 teachers or cover nearly half of the state's medicine procurement for the same year. Even if spread over multiple years, the repayment would impose sustained pressure on the wage bill, which already accounted for nearly one-fifth of recurrent spending in 2018/19 and rose further in 2019/20 despite austerity measures.[23]

KEY EGYPT CASE: The $2 Billion Award that remained invisible

Unión Fenosa Gas v Egypt

Award: $2.013 BILLION

Year: August 2018

Sector: Energy (gas supply)

Treaty: Egypt–Spain BIT

Nowhere in the public budget — hidden

40% of Egypt's entire annual health budget that year

25% of Egypt's entire annual education budget

600,000 teachers' annual salaries it could have paid

Real wages fell ~15% in the 4 years after this award. Public servants absorbed the adjustment.

What is striking, however, is that no explicit reference to this liability or payment appears in the 2018/19 or 2019/20 expenditure statements.[24] There is no dedicated budget line for arbitration awards, no annex listing ISDS liabilities, and no disclosure of defence costs. This absence of reporting confirms the earlier analytical concern: arbitration liabilities remain off-budget, managed through confidential settlements, ministerial contingencies, or quasi-fiscal channels such as state-owned enterprises. The opacity prevents the public from tracing how fiscal adjustments affect them. Given this context, Egypt's 2018–2020 expenditure data suggest that any resource reallocation required to service the Unión Fenosa Gas award would have had to come from internal budget compression. The natural targets in an IMF-supported programme would be subsidies, public investment, and wages. Indeed, during those years, wage growth for public servants remained below inflation, recruitment was curtailed, and capital spending on schools and health facilities slowed.[25,26] These trends are consistent with fiscal diversion to meet external obligations.

The lack of public data also prevents assessment of cumulative effects. Defence costs for each arbitration can reach several million dollars, and the state may carry dozens of cases simultaneously. These costs, often paid from ministry budgets or special funds, do not appear as distinct items but are absorbed within general administrative expenditure. They thus erode fiscal headroom gradually and invisibly, with public workers and service users bearing the long-term consequences. In the Egyptian case, therefore, ISDS reveals two intertwined problems: a direct fiscal burden arising from large awards and a structural transparency deficit that obscures their social impact. This makes it impossible to design policies that shield essential services and workers from the fallout of arbitration. It also weakens democratic oversight, as parliament and trade unions lack the information to scrutinise the trade-off between paying foreign investors and financing domestic welfare. Therefore, in conclusion, five observations can be drawn from Egypt's experience.

- First, the country's exposure to ISDS is recurrent and cross-sectoral, demonstrating that arbitration risk is not confined to a single ministry but diffused across the economy.
- Second, the opacity surrounding claims, settlements, and payments prevents fiscal authorities from integrating these liabilities into the budget process, leading to hidden reallocations.
- Third, the Unión Fenosa Gas award of 2018 represents a substantial unplanned liability whose absence from published expenditure records suggests off-budget financing or deferment, undermining transparency.
- Fourth, the cumulative effect of legal defence and settlement costs likely contributed to fiscal compression during a period of wage restraint and service underfunding, with public sector workers absorbing the adjustment.
- Finally, Egypt's experience underscores the urgent need for an institutional mechanism to disclose, budget for, and manage ISDS liabilities so that the burden of investor protection does not fall on the very workers and citizens whose taxes sustain the state.

LIBYA

$250M IN AWARDS - & NO BUDGETLINE INDICATING ABSORPTION IN NATIONAL BUDGET

1. **Cengiz İnşaat (Turkey)**
   $51.5 million in 2018
2. **Etrak İnşaat (Turkey)**
   $21.9 million in 2019
3. **Strabag SE (Austria)**
   $84 million in 2020
4. **Olin Holdings (Cyprus)**
   $21.3 million in 2018
5. **Gargour Family (OIC)**
   $73 million in 2023

Libya offers a particularly revealing case for this research because it sits at the intersection of protracted political instability, fragmented fiscal governance, and recurring exposure to investment arbitration. It is an example of how ISDS awards compound the structural vulnerabilities of a state struggling to restore fiscal discipline while maintaining essential public services.27 Five significant cases are considered here, all decided in favour of investors, and all linked to disputes that arose during or in the aftermath of the civil conflict.

The absence of an explicit provision for arbitration costs in Libya's fiscal framework is not just a matter of accounting; it signals the structural weakness of fiscal governance.

All five cases were concluded in favour of investors, with cumulative known awards exceeding USD 251 million. This figure likely understates the total fiscal exposure because additional costs for legal defence, interest, and potential enforcement are not publicly reported. The persistent problem with assessing Libya's ISDS impact is the severe lack of data transparency. None of the awards appear in official budget documents.28 No information is published on whether Libya paid, negotiated, or deferred the settlements, nor on the fiscal source of the payments. The Central Bank of Libya's expenditure reports,29 which now provide greater transparency under international pressure, do not contain any line items for arbitration-related liabilities. This opacity means that ISDS awards remain an untraceable fiscal burden, creating uncertainty in the national accounts and eroding the predictability of public finance.

The fiscal environment in which these awards occurred is highly fragile. Libya lacked a formal national budget between 2020 and 2022 due to the political split between rival administrations.30 The Government of National Unity operated under an emergency "one-twelfth" spending rule,31 rolling forward the previous year's expenditure limits month by month. The 2023 revenue and expenditure statement from the Central Bank recorded total public expenditure of LYD 125.7 billion, of which LYD 60 billion went to salaries, LYD 12 billion to development spending, and LYD 20 billion to subsidies.32

Oil revenues accounted for nearly 80% of total revenue. The 2024 revenue and expenditure statement shows broadly similar patterns: total expenditure of LYD 123.2 billion, with salaries consuming LYD 67.6 billion over half of total spending.33 Mapping the known ISDS awards against these figures clarifies the magnitude of potential fiscal strain. The combined USD 251 million in awards equates to approximately LYD 1.3 billion at prevailing 2024 exchange rates. That is roughly 2% of the government's annual salary bill or 11% of total annual capital development expenditure. Even if spread across years, such obligations are significant in a context where salaries already dominate expenditure and public investment is minimal.

Source: Corporate Europe Observatory

Without disclosure, arbitration liabilities are likely to be met through ad hoc reallocation of funds from ministries or state enterprises. In practice, this means that the budget cuts needed to create fiscal room for these payments will fall on those items with the least political protection, which are: public services, local development, and the wages of public workers outside the security sector. The 2023 and 2024 budget tables[33] show that spending on health and education combined represented less than 7% of total expenditure (around LYD 9 billion for health and LYD 0.7 billion for education in 2023; LYD 8.6 billion and 0.68 billion respectively in 2024). Each arbitration award, therefore, represents an indirect cut in social protection as seen from the Libyan case where during these periods hospitals faced chronic drug shortages, schools operated with underpaid teachers, and local councils struggled to maintain basic infrastructure.[34], [35], [36]

The inability to trace ISDS payments also distorts the understanding of fiscal sustainability. In 2023, the Central Bank warned that the combination of large foreign exchange outflows and unrestrained spending "will have negative impacts on the reserves of the central bank and the financial sustainability of the state."[37] These outflows include external debt servicing, oil import barter arrangements, and unrecorded arbitration settlements. Such drains in foreign exchange reduce the state's capacity to pay public employees on time and to import essential goods. The effect on public sector workers is immediate. When liquidity tightens, the Ministry of Finance delays salary disbursements, often paying in arrears or in tranches. Teachers and healthcare workers report months-long delays in wages during years of fiscal stress, while security-related institutions are prioritised. The result is a skewed wage distribution that favours military and oil-sector employees while eroding the morale and productivity of civil servants. Arbitration obligations, even when invisible in the accounts, compound this inequity by draining the same limited pool of foreign currency that could be used to clear salary arrears or fund social programmes.

In this context, Libya's experience encapsulates the broader thesis of this study: that ISDS awards, when imposed on fragile states, do not merely penalise governments, they destabilise the fiscal foundations of the public sector. The absence of transparency and the politicisation of expenditure make it impossible to assess where the burden truly falls, but the symptoms are clear in delayed wages, underfunded services, and the erosion of fiscal trust between state and citizen. Five observations can therefore be drawn from Libya's case.

- First, Libya's ISDS exposure is large relative to its fiscal resilience, with more than USD 250 million in awards decided in favour of investors during a period of budgetary crisis.
- Second, the absence of published data on payments or settlements masks the true cost of arbitration, undermining fiscal transparency and accountability.
- Third, with salaries consuming over half of total expenditure, any off-budget payment, such as an arbitral award, inevitably compresses funds for wages and local services.
- Fourth, public investment in health and education remains marginal, and ISDS obligations aggravate this imbalance by diverting scarce resources toward external liabilities.
- Finally, the Libyan case demonstrates that in fragile states, ISDS does not simply redistribute capital; it reinforces austerity, widens wage inequality, and undermines the social legitimacy of fiscal policy.

KENYA

Kenya's experience with investor–state arbitration sits at the opposite end of the spectrum from Egypt and Libya. The Republic has not suffered compensation awards; rather it has successfully defended the few claims that reached the merits, while carrying a continuing burden of legal defence. That combination produces a distinctive fiscal question: when the State wins, and even obtains a costs award, do those recoveries appear in the public accounts; and do the defence outlays that made those wins possible feature transparently in the budget? Framed by the study's wider thesis on fiscal legitimacy, Kenya's record shows effective litigation capacity accompanied by budget opacity that prevents citizens from seeing the fiscal consequence of victories they have already paid to secure.

No.	Parties	Sector	Treaty Basis	Award (USD)	Status
1	*World Duty Free Company Limited v Republic of Kenya* (ICSID Case No. ARB/00/7)38	Services (airport concessions)	UK–Kenya BIT (1983)	Claim dismissed	Concluded 2006 – in favour of Kenya. Parties to each bear their own legal costs
2	*Cortec Mining Kenya Limited v Republic of Kenya* (ICSID Case No. ARB/15/29)39	Mining	UK–Kenya BIT (1983)	Claim dismissed	Concluded 2018 – in favour of Kenya for $3,226,429.21 plus $322,561.14 in ICSID costs
3	*WalAm Energy Inc. v Republic of Kenya* (ICSID Case No. ARB/15/7)40	Energy (geothermal)	Kenya–USA BIT (1999)	Claim dismissed	Concluded 2020 – in favour of Kenya. No data available.
4	*Spentech Engineering Limited v United Arab Emirates* (ICSID Case No. ARB/24/16)41	Engineering / infrastructure	Kenya–UAE BIT (2014)	Award USD 122,019.15	Concluded 2025 – in favour of investor

Three cases anchor the analysis. First, World Duty Free v Kenya ended in 2006 with the tribunal dismissing the investor's claim after finding the concession was procured by corruption; no damages were ordered against Kenya and there was no costs recovery beyond each side bearing its own legal expenses. In other words, Kenya won the claim but not its sunk defence costs. This matters for the budget year that followed, because any sizeable outlay to defend the claim had to be absorbed within recurrent allocations to the State Law Office and line votes, with no dedicated arbitration sub-head.

Secondly, Cortec Mining v Kenya closed in 2018 with a clean win for the Republic plus a quantified costs award: the tribunal ordered the claimants to pay the Republic USD 3,226,429.21 in legal costs and to reimburse USD 322,561.14 in ICSID advances. This is a rare instance where success generated an identifiable receivable rather than only avoided a payable. The fiscal question is whether, when Treasury compiled the ensuing budget cycle, these inflows were recognised as non-tax revenue and then appropriated to public purposes, or disappeared into cash management without parliamentary visibility.

Thirdly, WalAm Energy v Kenya was also dismissed in Kenya's favour; publicly available award materials have not disclosed a companion costs order.

The pattern thus remains: favourable merits outcomes, occasional costs recovery, and steady defence spending by the State. To defend each ISDS case, senior officials acknowledge that Kenya incurs around KSh 500 million for arbitration defence, a continuing call on public resources even where the State prevails.42

To test fiscal visibility, one must read the budgets before and after these turning points. The 2006/07 Budget Speech, delivered months before the World Duty Free dismissal and in the same fiscal window, offers no explicit line for arbitration outlays and no note of contingent or actual ISDS-related receipts.[43] Recurrent spending is presented at programme level; there is no legal-services-for-investment-disputes sub-vote and no annex on litigation liabilities or recoveries.[44] The practical effect is that any fees paid to defend the case were pooled within general administrative votes, and the public could not trace them. The broader macro publications of that era show similarly aggregated treatment of government operations, with no disclosure hook for arbitration-linked flows.

WINNING THE CASES BUT NOT BEING TRANSPARENT

THE VICTORIES	THE TRANSPARENCY PROBLEM
	• No budgetline for arbitration defence costs in any budget speech or estimates
	• The $3.55M cost award that Kenya won was never listed as non tax revenue - parliament cannot see it.
	• Citizen's funded the defence but cannot see what it cost or what was recovered
Kshs. 500 million per case in defence costs - absorbed in general admin votes, invisible to citizens.	• No dedictaed legal defence fund or litigation annex in budget documents
	Transparency turns legal wins into social gains. Right now, Kenya's victories are invisible fiscal benefits.

A parallel reading around the 2018 Cortec award leads to the same conclusion. The FY 2019/20 Budget Statement lays out revenues and the "Big Four" allocations in considerable detail, and the Parliamentary Budget Office's companion analysis dissects the Estimates by sector and risk; yet neither document isolates arbitration recoveries as a non-tax revenue item, nor do they create a budget head to ring-fence either receipts from cost awards or outlays for defence.[45], [46] If the USD 3.55 million ordered to Kenya in Cortec was collected, it is not surfaced for Parliament or the public as a discrete inflow that could be mapped to service delivery or wage relief.

From a fiscal-legitimacy standpoint, this invisibility matters. Defence costs, acknowledged around KSh 500 million,[47] are real cash charges against the same envelope that pays teachers, nurses, and county transfers. This opacity is not unique to Kenya. Egypt's defence of Veolia Proprete v. Arab Republic of Egypt,[48] spanning six years from 2012 to complete dismissal of investor claims in 2018, similarly generated substantial legal expenditure distributed across multiple fiscal years yet nowhere identifiable within Egypt's published budget documentation despite comprehensive expenditure classifications. The defence costs remained invisible within aggregate administrative allocations, demonstrating that budget opacity regarding ISDS costs is a systematic problem affecting states regardless of their institutional capacity, rather than a country-specific governance failure. When Kenya wins and is paid, the absence of a visible non-tax revenue line or a dedicated legal-defence fund means citizens cannot see the counter-flow back into the Consolidated Fund. The result is asymmetry: outlays are hidden in broad votes; recoveries, when they occur, are nowhere to be tracked. The social contract consequence is predictable: Parliament and the public cannot verify that recoveries are redistributed toward services, precisely the concern animating this study's objective.

Two further observations arise from the case record:

- First, the quality of Kenya's case management is an asset with measurable fiscal value. World Duty Free eliminated what could have been a very large liability; Cortec not only avoided a claim but produced a cash award. In a region where even a single adverse award can crowd out social spending, these wins protected and in principle augmented fiscal space.
- Secondly, however, neither the 2006/07 nor the 2019/20 fiscal documents build the institutional bridge from litigation outcomes to budget transparency. There is no arbitration annex listing cases, defence outlays, payables avoided, or receivables collected; there is no sub-head for investment-dispute defence in the Attorney-General's vote; there is no non-tax revenue code for arbitral cost recoveries, so that Parliament can appropriate them to high-impact uses.

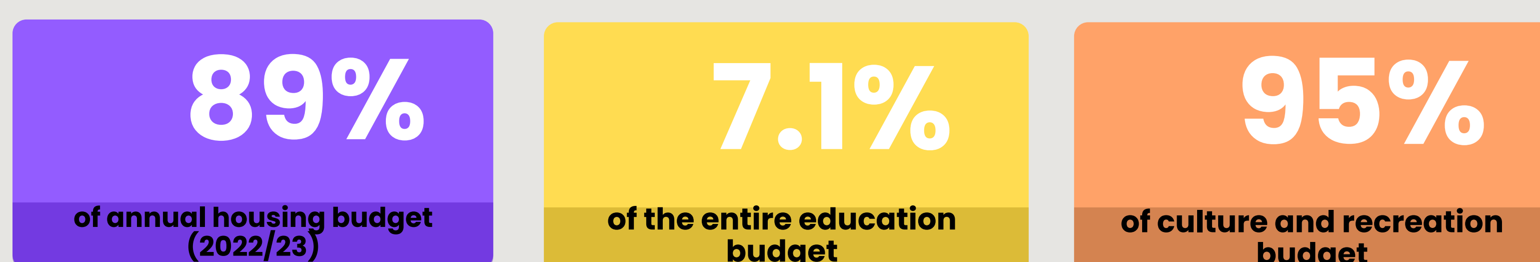
In short, Kenya's fiscal impact from ISDS is not the classic story of extraction by award; it is the quieter story of defence costs borne and recoveries un-signposted. The prudent policy response is straightforward and consonant with Kenya's own public-finance reform trajectory. Treasury should create a transparent budget framework for international dispute management: a visible sub-vote for legal defence spending; a dedicated non-tax revenue code for arbitral cost recoveries; and an annual litigation note in the Budget Policy Statement summarising the stock and flow of disputes, awards avoided, and amounts received. That framework would not only strengthen parliamentary oversight; it would also convert litigation victories into visible fiscal benefits, allowing the State to earmark recoveries toward frontline services or to reinvest in its litigation capacity. Until then, the Republic of Kenya's story in this field will remain one of commendable legal performance whose fiscal dividends are not shown to the public that financed them.

MAURITIUS

Mauritius is examined in this study as both an arbitral respondent and a financial hub whose treaty network amplifies the exposure of African states to investor–state dispute settlement. It is a small but strategic economy where arbitration costs, though modest in absolute value, bear disproportionately on limited public finances and policy credibility. As a respondent state, two major cases reveal this duality: Thomas Gosling and others v Republic of Mauritius49 and Patel Engineering Ltd v Republic of Mauritius.50

No.	Parties	Sector	Treaty Basis	Award (USD)	Status / Year
1	*Thomas Gosling and others v Republic of Mauritius* (ICSID Case No. ARB/16/32)	Real estate and tourism (Le Morne Brabant and Pointe Jérôme developments)	UK–Mauritius BIT (1986)	No damages awarded; tribunal dismissed claims, Feb 2020	Concluded
2	*Patel Engineering Ltd v Republic of Mauritius* (PCA Case No. 2017-34)	Real estate (construction and property development)	India–Mauritius BIT (1998)	USD 30 million	Award issued 2023 in favour of investor
3	*LTME Mauritius Limited and Madamobil Holdings Mauritius Limited v Republic of Madagascar,* (ICSID Case No. ARB/17/28)51	Telecommunications sector	Madagascar – Mauritius BIT (2008)	No data available52	Award issued in 2023 in favour of the state
4	*Export Trading Group v Mozambique* (2025-10)53	Wholesale and retail trade	Mauritius – Mozambique BIT (1997)	Claiming $120 million	Pending
5	*EEPL Holdings v Republic of Congo* (ICSID Case No. ARB/21/53)	Mining and quarrying	Congo – Mauritius BIT (2010)	Claiming $1134 million	Pending

THE PATEL AWARD" $30 MILLION



THE DUAL ROLE PROBLEM

Mauritius has 48 investment treaties. Foreign investors: from India, Australia, UK registered holding companies in Mauritius to sue Tanzania, Mozambique, and Congo under Mauritius treaties.

"Presents patterns of colonial logic of extraction through legality"

The Fundamental Assymetry

CORPORATION: Legal costs is considered a business expense, , its an allowable tax deduction, hence, the company doesn't have to no trade off with other spending

GOVERNMENT: Legal costs directly affect budgets mean for teachers salaries, doctors, nurses, medicines, housing, infrastructure development, etc

WORKERS: No representation in the case. No treaty rights. But they bear the fiscal adjustments.

COMMUNITIES: Displaced by investments, harmed by corporate conduct - yet do not benefit from ISDS at all.

In Thomas Gosling, the claim arose from the government's decision to prohibit development on land at Le Morne and Pointe Jérôme that was later designated a UNESCO World Heritage site. The investors alleged expropriation and unfair treatment under the UK–Mauritius Bilateral Investment Treaty of 1986. The tribunal accepted jurisdiction but dismissed the claim in February 2020, holding that the regulatory measures were legitimate acts of environmental and heritage protection. The dissenting opinion, however, found that the abrupt policy change had deprived the investors of their contractual value. The decision cost Mauritius roughly $9 million in legal and expert fees, an amount equal to the operating budgets of several parastatal agencies or the annual wage bill for hundreds of teachers.54 No damages were awarded, but the financial and institutional burden of defending the case was real, drawing on resources from the Attorney-General's Office and the Ministry of Finance at a time when the country's economy was still recovering from the pandemic shock.55

The second case, Patel Engineering Ltd was decided in 2023 under the India–Mauritius BIT of 1998. The dispute concerned the termination of a real estate and construction project in which the investor claimed that state interference had caused financial loss. The tribunal found Mauritius liable and ordered payment of $30 million. This award, though small compared with the billions faced by Egypt, is large in relation to Mauritius's fiscal scale. It represents roughly 1.2 billion Mauritian rupees, about 2.5% of total annual capital expenditure under the 2021–2022 national budget and nearly the entire allocation for housing and community amenities.56 It is also equivalent to the value of an entire year's increment in the education wage bill, showing how even modest awards can crowd out social spending.

These cases must be read against the backdrop of Mauritius's broader fiscal context. The 2021–2022 budget projected total expenditure at 162.6 billion Mauritian rupees and revenue at 137.7 billion, leaving a deficit of about 5% of gross domestic product. Public debt stood at 95% of GDP, while salaries and social protection absorbed more than 60% of total spending. In such a setting, any external payment of the magnitude ordered in the Patel case is significant. Yet, no mention of arbitration awards or contingent liabilities appears in the budget estimates or expenditure tables. There is no line item for international arbitration, no disclosure of payments, and no assessment of fiscal risk. This opacity conceals the true cost of arbitration and denies parliament and citizens the ability to scrutinise how public funds are being used. It also means that when awards fall due, they are likely to be financed through reallocation or borrowing, indirectly reducing funds available for health, education, and housing. Beyond the immediate fiscal outlay, these disputes have policy implications. The Thomas Gosling case underscores the difficulty of reconciling environmental protection with investor obligations, while the Patel award exposes the vulnerability of development-oriented projects to treaty litigation.

Mauritius's extensive BIT network of about 48 agreements with African, Asian and European partners[57] serves as conduit for investors using Mauritius holding structures to bring claims against African states, including EEPL Holdings' mining dispute against Republic of the Congo[58] under the Congo – Mauritius BIT[59] and Aqua Power and Catalysis Capital's $500 million claim against Tanzania[60] under the Mauritius – Tanzania BIT[61] over a power plant project. In 2024, agricultural trader ETG, headquartered in Mauritius, pursued arbitration against Mozambique under the Mauritius – Mozambique BIT[62] over seized exports seeking $120 million.[63] The arbitration is still pending.

While these claimants utilise Mauritius structures, the beneficial ownership often traces to foreign nationals establishing Mauritian holding companies to secure treaty protections for investments across Africa. ETG, though headquartered in Mauritius with global operations spanning 45 countries,[64] is owned by the Indian Patel family.[65] EEPL Holdings is a Mauritian subsidiary of Australian mining company Equatorial Resources Limited.[66] Aqua Power and Catalysis Capital, both headquartered in Mauritius, are owned by UK nationals.[67]

The asymmetry inherent in these disputes reveals ISDS's structural violence. When private companies initiate arbitration against Tanzania, Mozambique or Congo, their legal costs constitute ordinary business expenses deducted against taxable profits, absorbed within corporate budgets without competing claims on those resources. The respondent state, conversely, meets defence costs from public revenues already allocated through parliamentary process to teachers' salaries, hospital operations and infrastructure maintenance. Private capital faces no fiscal constraint requiring reallocation from one budget line to another, confronts no parliamentary oversight demanding justification for litigation expenditure, and experiences no trade union pressure to redirect legal fees toward worker compensation. The African state defending the claim must actively withdraw resources from education, healthcare or wages to finance its legal defence, creating immediate material harm to public sector workers and service users regardless of arbitration outcome. This is not incidental to ISDS architecture but constitutive of it.

Mauritius's role as an investment conduit thus mirrors the colonial logic of extraction through legality, simultaneously facilitating outbound capital flows and exposing itself to liability. Consequently, the impact on public sector workers and services is subtle but tangible. Legal fees and arbitral payments are drawn from the same fiscal envelope that funds wages and operational budgets. The 2021–2022 budget data show that while social protection spending rose slightly, the wage envelope barely grew, increasing by less than 1% despite inflation.[68] Hospitals and schools faced delays in infrastructure upgrades and staff recruitment, while housing projects were postponed.[69] These outcomes are symptoms of a tight fiscal environment where every unplanned external payment constrains the capacity to expand or maintain essential services.

The Mauritian experience thus reinforces the central argument of this study: that ISDS obligations, however small in appearance, translate into fiscal and social costs that outsize their nominal value. Five conclusions can be drawn:

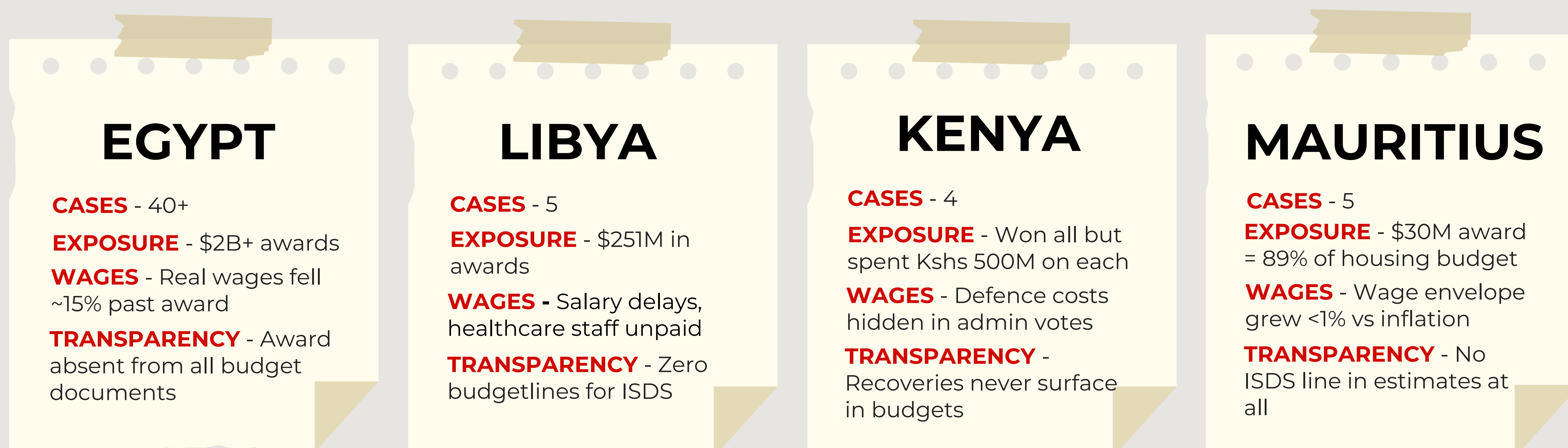
- First, even limited exposure to arbitration carries real fiscal consequences in small economies where capital budgets are narrow.
- Second, transparency is lacking; neither the government's expenditure reports nor parliamentary debates provide a clear account of arbitration costs.
- Third, legal defence itself constitutes a fiscal drain with opportunity costs for social investment.
- Fourth, Mauritius's dual role as respondent and treaty hub deepens the structural inequity of ISDS across Africa.
- Fifth, the absence of a dedicated legal and fiscal framework for managing arbitration risks leaves workers and citizens to bear the adjustment through compressed wages and deferred public spending.

Mauritius, in this sense, embodies the paradox at the heart of international investment law: a state that markets itself as a stable, investor-friendly jurisdiction yet pays a hidden social price to defend that reputation. The lesson from its experience is that fiscal legitimacy depends not only on attracting investment but on ensuring that the costs of protecting investors do not erode the foundations of public welfare and social justice.

QUANTIFYING THE FISCAL BURDEN ON EGYPT, LIBYA, KENYA AND MAURITIUS

This section presents analytical and empirical assessment of correlation between ISDS award payment and compression of public expenditure on workers' wages, social protection, healthcare, education and infrastructure development. The analysis demonstrates that arbitral awards impose both explicit costs through direct financial liability and implicit costs through fiscal displacement, regulatory chill and erosion of democratic accountability over resource allocation. These costs prove particularly destructive in contexts where governments already operate under constrained fiscal space, high debt service obligations and urgent development financing imperatives.

COMPARING THE FISCAL IMPACT OF ISDS ACROSS EGYPT, LIBYA, KENYA, AND MAURITIUS - FOUR COUNTRIES, ONE PATTERN



In every case: no budget line, no parliamentary oversight, no worker protection from the fiscal shock

3.1. EGYPT

The fundamental challenge in assessing fiscal impact lies in structural opacity surrounding payment channels. Egypt's budget documents contain no dedicated line item for arbitral awards, no disclosure of settlement terms and no accounting of legal defence costs. The Unión Fenosa Gas award, despite exceeding $2 billion, appears nowhere in published expenditure statements for 2018/2019 or subsequent fiscal years.[70] This absence cannot be attributed to administrative oversight but reflects deliberate off-budget management that insulates investor compensation from parliamentary scrutiny whilst enabling governments to compress wages and service delivery without explicit acknowledgment that such compression stems from arbitration obligations. The resulting information deficit prevents legislators, trade unions and civil society from tracing how much public revenue flows to foreign investors and which budget lines absorb the displacement.

Analysis of expenditure patterns around the award year nevertheless reveals clear indicators of fiscal stress consistent with servicing major external obligations. The 'Other Expenditures' category, which aggregates miscellaneous governmental costs not allocated to specific functional areas, demonstrates steady escalation coinciding with the arbitration timeline. This line item grew from 72.3 billion Egyptian pounds in fiscal year 2017/2018 to 77.7 billion pounds in 2018/2019, an increase of 5.3 billion pounds or 7.3%. Whilst this growth rate appears modest relative to earlier years, it occurs within broader context of fiscal consolidation undertaken pursuant to IMF programme that emphasised expenditure restraint.[71] The acceleration of Other Expenditures growth to 11.96% in 2019/2020, reaching 86.9 billion pounds, further suggests absorption of liabilities whose payment extended across multiple fiscal years. Over the five-year period from 2018 through 2023,[72] Other Expenditures nearly doubled from 77.7 billion to 127.5 billion pounds, far exceeding growth rates in most functional categories and indicating systematic channelling of resources toward obligations concealed within residual budget classifications.

Foreign interest payments provide even more dramatic evidence of debt-financed arbitration settlement. Egypt's external debt service obligations remained relatively stable through the early 2010s, fluctuating between 2.8 and 5 billion pounds annually. This pattern shifted decisively from 2016/2017 onwards, with foreign interest payments jumping from 9.6 billion pounds to 22.2 billion in 2017/2018, an increase of 131%.[73] The following fiscal year witnessed further escalation to 35.2 billion pounds, representing growth of 58.5% precisely coinciding with the Unión Fenosa Gas award issuance in August 2018. Foreign interest continued climbing through subsequent years, reaching 108.1 billion pounds by 2022/2023. This extraordinary expansion of external debt service, increasing more than tenfold over six years, proves inconsistent with Egypt's relatively stable foreign borrowing for conventional development projects and instead suggests recourse to external financing for purposes including arbitral award payment.

The hypothesis that Egypt financed arbitration obligations through external borrowing rather than budgetary reallocation gains support from examining concurrent expenditure trends. Capital investment, far from contracting to accommodate award payment, actually increased 35.8% from 105.7 billion pounds in 2017/2018 to 143.5 billion in 2018/2019, then rose further to 191.6 billion in 2019/2020.74 This apparent paradox whereby government simultaneously pays massive arbitral awards and expands infrastructure spending resolves through recognising both flows as debt-financed. Egypt's total external debt stock escalated from approximately USD 79 billion in 2017 to USD 137 billion by 2020, providing liquidity for both investment programme implementation and investor compensation. The fiscal constraint materialises not in contemporaneous expenditure cuts but through permanent debt service obligations that compound over subsequent years, progressively narrowing fiscal space available for recurrent spending on wages, operations and social protection.

The impact on public sector workers emerges most clearly through examining wage bill dynamics relative to inflation and total expenditure. Egypt's nominal wage and compensation expenditure grew 12.2% from 239.1 billion pounds in 2017/2018 to 268.4 billion in 2018/201975. Assessed without context, this figure suggests maintenance of worker remuneration. However, Egypt experienced consumer price inflation of 13.9% during 2018/2019, driven by currency devaluation and subsidy reforms mandated under IMF programme. The resulting real wage decline of approximately 1.5% means public sector workers experienced deterioration in purchasing power and living standards precisely during the year when government serviced the largest arbitral award in Egyptian history. This pattern persisted through subsequent years.

Nominal wage growth of 8.5% in 2019/2020 fell below inflation, whilst wage increases of 2.7% in 2021/2022 dramatically lagged 8.5% price growth, producing cumulative real wage compression of roughly 15% over the four years following the major award. Subsidies, which directly affect worker welfare through reducing costs of food, energy and transport, experienced particularly dramatic compression consistent with arbitration-driven fiscal stress. Total subsidy expenditure declined from 203.7 billion pounds in 2018/2019 to 132.7 billion in 2019/2020 and 121.5 billion by 2020/2021, reductions of 34.8% and 40.3% respectively from the award year baseline.76

3.2. LIBYA

The analytical challenge in assessing Libya's ISDS fiscal impact stems from severe data limitations compounded by institutional fragmentation. The Central Bank of Libya commenced publishing comprehensive revenue and expenditure statements only from 2023 onwards, following years of international pressure for fiscal transparency.77 Expenditure data for 2018 through 2020, the period when several major arbitral awards were issued, remains either unpublished or exists only in fragmentary form across rival governmental structures.78 The 2021 expenditure statement represents the earliest systematic accounting available, though even this document acknowledges operating under emergency provisions rather than legislatively approved budget. Consequently, the analysis necessarily focuses on fiscal patterns observable from 2021 through 2024, recognising that ISDS awards issued during 2018 through 2020 likely influenced expenditure trajectories in subsequent years through either deferred payment obligations or debt service arising from borrowed funds used for settlement.

Examination of Libya's published expenditure statements reveals no explicit budget line for arbitration settlements, legal defence costs or contingent liabilities arising from investment disputes. The 2023 and 2024 Central Bank reports, despite emphasising transparency enhancement, contain no reference to ISDS obligations in either revenue and expenditure summaries or detailed sectoral breakdowns. This opacity proves particularly striking given that Central Bank explicitly acknowledges cumulative foreign currency deficit of USD 9.9 billion for 2023 and USD 5.2 billion for 2024, noting that "continuing expansion of public expenditure with the same financial policies, and the worsening deficit in foreign exchange revenues to cover the increasing demand, will have negative impacts on the economic situation, and on the reserves of the central bank, and the financial sustainability of the state." The warning suggests awareness of substantial unaccounted obligations draining foreign currency reserves, yet provides no disaggregation that would enable identification of specific categories driving the deficit.

Health expenditure reveals how Libya's fiscal constraints directly harm service delivery and worker welfare. The Ministry of Health and affiliates received total allocations of 8.4 billion dinars in 2023 and 8.6 billion in 2024, representing approximately 6.8% of government spending in both years. This allocation, whilst appearing substantial in nominal terms, proves grossly insufficient when decomposed across competing needs. Salary costs consumed 2.8 billion dinars in 2023 and 3.3 billion in 2024,80 leaving 5.6 billion and 5.3 billion respectively for medicines, equipment, facility operations and capital investment. Given Libya's population of approximately 7 million, the non-wage health allocation translated to roughly 750 dinars per capita annually or USD 125 at official rates, sum inadequate for procuring essential medicines much less maintaining hospital infrastructure or acquiring modern diagnostic equipment.

Subsidies allocated to health totalled 4.1 billion dinars in 2023[81] and 3.9 billion in 2024,[82] designated primarily for pharmaceutical imports and medical equipment rather than direct service provision or worker compensation. Yet even these subsidy allocations suffered systematic implementation delays. The 2024 Central Bank statement acknowledges that many Chapter Four items remained "pending" subject to foreign exchange availability, indicating that budgeted amounts failed to translate into actual procurement. Healthcare workers reported chronic shortages of basic supplies including surgical gloves, antiseptics, syringes and wound dressings, forcing hospitals to request patient families purchase items commercially. Cancer patients faced months-long delays receiving chemotherapy because governmental pharmaceutical procurement contracts remained unfunded. Dialysis centres operated at reduced capacity due to absent supplies, directly causing preventable deaths.[83]

These operational failures occurred not because Libya lacked fiscal resources in abstract sense but because available funds flowed preferentially toward wages, energy subsidies and undisclosed obligations potentially including arbitration settlements, systematically starving operational budgets necessary for functional healthcare delivery.

Education expenditure exhibited similar patterns of apparent adequacy masking profound operational deficiency. The Ministry of Education received 677 million dinars in 2023 and 891 million in 2024, extraordinarily low allocations representing merely 0.5% and 0.7% of total government spending respectively. Higher education and technical education together absorbed additional 3.2 billion dinars in 2023 and 3.5 billion in 2024, yet combined education sector spending remained below 3% of expenditure. For comparison, UNESCO recommends governments allocate 4% to 6% of GDP or 15% to 20% of public expenditure to education;[84] Libya's education spending as share of GDP proved difficult to calculate given unreliable GDP estimates but clearly fell far below international benchmarks regardless of measurement approach adopted.

Social affairs expenditure, which encompasses pensions, disability benefits, cash transfers and institutional care, totalled 17.1 billion dinars in 2023 and 14.4 billion in 2024. The decline from 2023 to 2024 of 2.7 billion dinars, approximately 16%, occurred despite growing beneficiary population as conflict-affected families increasingly required assistance and demographic ageing expanded pension rolls. The reduction reflected fiscal compression driven by competing claims on limited revenues, compression that fell disproportionately on vulnerable populations lacking political voice or capacity to resist cuts. Subsidies to social affairs totalled 8.4 billion dinars in 2023 and 4.7 billion in 2024[85], reduction of 44% that translated directly into reduced benefit levels and delayed payments.

3.3. KENYA

The earliest and most emblematic case, World Duty Free v Republic of Kenya was concluded in 2006 yet examination of the 2006/07 Budget Speech[86] and the estimates of recurrent expenditure for that period[87] shows no classification or annex acknowledging such legal outlays. The allocation to the Attorney-General's Chambers increased only marginally that year, bundled under "governance and anti-corruption," suggesting that the fiscal burden of arbitration was silently absorbed. Thus, even in victory, the state's expenditure on defence reduced fiscal space for the justice and governance sectors, yet it left no visible fiscal trace. A similar pattern emerges after the Cortec Mining Kenya Limited v Republic of Kenya award in 2018. Kenya prevailed again, with the tribunal ordering the claimants to pay the government USD 3.23 million in legal costs and to reimburse USD 0.32 million in ICSID advances. These payments were a rare reversal of fiscal flow: an inflow to the Treasury rather than an outflow. Yet when the 2019/20 Budget Statement[88], [89] and the "Unpacking of the Estimates of Revenue and Expenditure"[90] are examined, no corresponding non-tax revenue entry or explanatory note appears. Instead, all legal and arbitration-related income was likely absorbed within the general revenue fund. This lack of explicit budgetary recognition obscures how victories in international tribunals translate, if at all, into fiscal benefits for the public. The absence of a code for arbitration receipts also prevents Parliament from deciding whether such recoveries should be re-allocated to fund litigation capacity, the wage bill, or social programmes under the Big Four Plan.[91]

The contrast between World Duty Free and Cortec demonstrates Kenya's dual fiscal reality. On one side lies commendable institutional competence that avoids external liability and even generates recoveries. On the other lies opacity that erodes the democratic value of those outcomes. Defence costs, estimated at half a billion Kenya shillings, equal roughly the annual development allocation to a medium-sized ministry. Each successful defence therefore represents both a saving and a hidden diversion of resources that could otherwise finance social health insurance, school capitation, or county transfers. When victories are not recorded as fiscal gains, citizens see only expenditure, not the protection of their collective wealth. From a fiscal-legitimacy perspective, the Kenyan case shows that success in arbitration is not only legal but also budgetary. The absence of disclosure transforms victories into invisible events. The Cortec award's proceeds, if received, should have appeared as extraordinary revenue, traceable to the Consolidated Fund, and earmarked for reinvestment in legal defence and public-interest programmes. That it did not underscores a systemic gap between legal accountability and fiscal transparency. The same opacity clouds the cost side: defence payments are scattered through recurrent sub-votes, denying citizens the knowledge of what their state spends to uphold its sovereign regulatory powers.

3.4 MAURITIUS

Examination of Mauritius budget estimates for FY 2020/21 through FY 2023/24[92] reveals no dedicated allocation for arbitration awards or investor compensation. The functional classification system employed, based on international Government Finance Statistics standards, categorises expenditure across ten major functions subdivided into detailed programme codes, yet nowhere appears classification corresponding to external legal obligations, treaty settlements or investor dispute resolution. The “General Public Services” function, which aggregates executive and legislative costs, financial and fiscal affairs, external relations and debt transactions, theoretically provides umbrella beneath which arbitration expenditure might logically fall, yet published estimates provide no sub-classification enabling identification of such obligations. The total allocation to General Public Services reached Rs 56.1 billion in FY 2020/21 estimates, revised upward to Rs 73.4 billion during year, difference of Rs 17.3 billion suggesting substantial mid-year adjustments potentially accommodating unanticipated liabilities though documentation provides no explanation for revision magnitude.

The “Contingencies and Reserves” line item, designated Vote 25-1 and managed by Financial Secretary, represents most plausible mechanism through which government might absorb arbitration settlements without explicit disclosure. The FY 2020/21 budget allocated Rs 700 million to contingencies, amount representing approximately 0.4% of total planned expenditure. However, revised estimates for same fiscal year reduced contingency allocation to zero, indicating either that contingency fund remained unutilised or that drawdowns were reclassified to other expenditure categories post-facto. The FY 2021/22 estimates restored contingency provision to Rs 800 million, increasing to Rs 1.0 billion for FY 2022/23 and Rs 1.2 billion for FY 2023/24, trajectory suggesting growing recognition of fiscal risk requiring buffer capacity yet providing no transparency regarding specific contingencies anticipated or how prior contingency expenditure was allocated.

The Thomas Gosling arbitration, though ultimately successful for Mauritius with tribunal dismissing investor claim, nonetheless imposed substantial legal costs. ICSID proceedings typically cost respondent states between USD 3 to 8 million for legal representation,[93] expert witnesses, tribunal fees and administrative expenses, with complex cases involving detailed jurisdictional and merits phases reaching upper end of range. The Gosling matter involved significant evidentiary proceedings including site visits, expert testimony regarding UNESCO World Heritage designation and extensive legal argument on regulatory takings doctrine, suggesting legal costs likely approached USD 5 million or approximately Rs 200 million at 2019-2020 exchange rates of roughly 40 rupees per dollar. The budget documentation acknowledges Rs 9 million in costs, figure appearing inconsistent with typical arbitration expenditure and suggesting either partial disclosure, cost-sharing arrangement, or absorption of expenses across multiple ministerial budgets without consolidated accounting.

The Patel Engineering award of USD 30 million (Rs 1.29 billion), when assessed against specific budget allocations, shows opportunity costs of investor compensation. The sum exceeds total planned expenditure for housing development in FY 2022/23 of Rs 1.36 billion, programme providing affordable housing units for low and middle-income families through National Housing Development Corporation and other vehicles. The award approximates 89% of total allocation to “Housing and Community Amenities” functional category for FY 2022/23, budget line encompassing not merely dwelling construction but community development, water supply and local infrastructure.[94] Alternatively, the award equals approximately 95% of total planned spending on “Recreation, Culture and Religion” function, or roughly 89% of environmental protection allocation, or 7.1% of entire education budget. Each of these comparisons demonstrates that even for relatively prosperous small island developing state, arbitration awards of USD 30 million magnitude represent substantial diversion of resources from public purposes to private investor compensation.

AFRICAN CONTINENTAL FREE TRADE AREA INVESTMENT PROTOCOL AS A STRUCTURAL ALTERNATIVE TO INVESTOR-STATE ARBITRATION

The cumulative effect across the 4 countries studied here establishes that investor-state arbitration operates as mechanism for involuntary resource transfer from treasuries of developing states, already facing acute fiscal constraints and competing developmental priorities, toward private investors whose commercial expectations receive protection unavailable to citizens, domestic businesses or public interest considerations. The transfer occurs through opaque processes excluding democratic participation, follows legal architecture privileging investor rights over state regulatory sovereignty, and generates fiscal impacts systematically disadvantaging public services, worker compensation and infrastructure investment necessary for achieving sustainable development objectives.

The architecture proves particularly pernicious given asymmetric nature of investment treaties whereby investors possess substantive protections and procedural rights to challenge governmental actions whilst states lack reciprocal mechanisms for compelling investor compliance with human rights obligations, environmental standards or developmental commitments. Citizens harmed by investor conduct cannot invoke treaty arbitration, communities displaced by investment projects possess no treaty standing, and workers subjected to rights violations lack access to investor-state dispute settlement. The resulting imbalance constitutes fiscal legitimacy crisis whereby public resources flow toward investor compensation for regulatory actions protecting citizen welfare, environmental integrity or developmental objectives, inversion that fundamentally contradicts principles of democratic sovereignty, human rights primacy and sustainable development supposedly guiding international economic governance.

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The imperative for structural reform, therefore, proves overwhelming. The African Continental Free Trade Area (AfCFTA) Protocol on Investment, adopted by African Union Assembly in February 2023, represents potentially transformative intervention in this reform discourse, offering continental architecture that fundamentally reconceptualises investment governance whilst providing legally grounded mechanism for African states to restructure treaty commitments, terminate outdated bilateral investment treaties, and establish alternative dispute resolution frameworks privileging sustainable development objectives.94

The Protocol on Investment derives legal authority from AfCFTA95. The AfCFTA Agreement constitutes binding international treaty under Vienna Convention on Law of Treaties, conferring upon State Parties reciprocal rights and obligations enforceable through designated dispute settlement mechanisms. Article 7 of AfCFTA Agreement mandated Phase II negotiations encompassing investment, competition policy and intellectual property rights, negotiations that produced Protocol on Investment subsequently adopted by Assembly of Heads of State and Government as integral component of AfCFTA framework. The Protocol, upon entry into force following ratification by requisite number of State Parties, will establish binding legal obligations applicable to intra-African investments, superseding inconsistent provisions in bilateral investment treaties between African states and establishing unified continental investment governance architecture.

The substantive provisions of Protocol on Investment reflect deliberate departure from traditional investment treaty architecture, incorporating multiple innovations designed to rebalance investor rights and state regulatory authority whilst embedding sustainable development objectives throughout investment governance framework:

- Article 1 establishes notably restrictive investment definition requiring enterprise or company with substantial business activity in host state territory, excluding portfolio investments, sovereign debt, purely contractual claims and intellectual property rights unless acquired through substantial business operations. This definitional narrowing, contrasting with expansive "asset-based" definitions in traditional bilateral investment treaties, limits treaty coverage to investments genuinely contributing to host state development through employment generation, technology transfer and productive capacity building, excluding speculative capital flows and treaty shopping structures lacking developmental contribution.

- Article 24 explicitly recognises state right to regulate including measures ensuring investment consistency with sustainable development goals and national policy objectives spanning environment, health, climate action, social welfare and essential security, right not subject to investor challenge or compensation claims. This provision, unprecedented in investment treaty practice, reverses presumption embedded in traditional treaties whereby regulatory measures affecting investor interests constitute potential treaty breaches requiring justification, instead affirming regulatory sovereignty as inherent state prerogative exercisable without investor consent or compensation absent demonstrable treaty violation.

- The Protocol's investment protection standards, whilst retaining core principles of national treatment and protection from uncompensated expropriation, incorporate multiple limitations and exceptions substantially narrowing investor rights relative to traditional treaty architecture. National treatment obligation applies solely to treatment of established investments in "like circumstances", term explicitly defined through multi-factor assessment considering investment effects on environment, communities and developmental objectives, rather than formal sectoral comparisons that traditional tribunals employ to maximise investor protections.

- Most-favoured-nation treatment similarly applies only to operational phase protections, explicitly excluding dispute settlement procedures and substantive obligations from other treaties, closure eliminating treaty shopping whereby investors invoke favourable provisions from unrelated agreements.

- The fair and equitable treatment standard, source of majority arbitral awards under traditional treaties, receives replacement with narrower "administrative and judicial treatment" obligation limited to fundamental denial of justice, manifest arbitrariness and abusive treatment, standard explicitly defined as equivalent to customary international law minimum standard without expansive interpretation permitting protection of investor expectations or legitimate regulatory change characterised as treaty breach.

- Expropriation provisions retain traditional prohibition on uncompensated taking yet incorporate explicit exceptions for non-discriminatory regulatory actions protecting legitimate public policy objectives including public health, environment, climate action and labour rights, actions that cannot constitute indirect expropriation regardless of economic impact on investment. These limitations collectively transform investment protection from absolute shield against regulatory change into balanced framework respecting investor property rights whilst preserving governmental capacity to pursue public interest objectives.

The Protocol's most revolutionary dimension concerns dispute resolution architecture, which fundamentally abandons investor-state arbitration in favour of prevention mechanisms, state-to-state dispute settlement and domestic judicial remedies:

- Article 44 establishes state-to-state dispute settlement as exclusive mechanism for resolving treaty interpretation disputes, applying AfCFTA Agreement's comprehensive dispute resolution procedures including consultations, panel adjudication and compliance monitoring, framework enabling home state to espouse investor claims through diplomatic protection whilst eliminating direct investor standing. The Protocol contemplates supplementary dispute resolution annex to be negotiated within twelve months of adoption, annex that may establish additional mechanisms yet cannot resurrect investor-state arbitration given Protocol's fundamental architecture premised on state-to-state settlement and domestic remedies exhaustion.

- Article 45 establishes dispute prevention and grievance management system whereby State Parties designate competent bodies for receiving investor complaints, undertaking mediation and facilitating amicable resolution, mechanism designed to address investor concerns before escalation to formal dispute proceedings.

- Article 46 requires investors and states to pursue amicable dispute resolution through consultations, negotiations, conciliation and mediation utilising mechanisms available in host state, exhaustion requirement that privileges domestic resolution over international arbitration.

The legal grounding for eliminating investor-state arbitration proves robust, derived from fundamental principle of international law that treaty-making authority resides with sovereign states possessing inherent competence to determine substantive obligations and procedural mechanisms governing treaty implementation. Investor-state arbitration constitutes procedural innovation developed through investment treaties themselves rather than mandatory feature of international investment law, innovation that states retain authority to modify, limit or eliminate through subsequent treaty negotiation. The Protocol exercises precisely this authority, establishing alternative dispute resolution architecture reflecting State Parties' assessment that investor-state arbitration generates excessive costs, constrains regulatory sovereignty disproportionately and privileges investor interests over developmental objectives warranting priority. The state-to-state dispute settlement mechanism substituted for investor-state arbitration thus reflects return to traditional international law framework whereby states bear responsibility for protecting their nationals' interests abroad through diplomatic channels and, when necessary, formal dispute proceedings against host states allegedly breaching treaty obligations.

The Protocol incorporates additional innovations strengthening investor accountability and balancing investor rights against host state interests, innovations historically absent from investment treaty architecture yet essential for aligning investment governance with sustainable development imperatives. Part V establishes comprehensive investor obligations spanning business ethics, human rights, labour standards, environmental protection, indigenous peoples' rights, anti-corruption, corporate governance and taxation compliance, obligations binding directly on investors rather than merely aspirational principles or state commitments regarding investment regulation. The investor obligations architecture proves particularly significant given traditional investment treaties' silence regarding investor conduct, omission that enabled egregious corporate behaviour including environmental degradation, labour rights violations, community displacement and corruption whilst arbitral tribunals rejected attempts to raise investor wrongdoing as defence to treaty claims.

The Protocol explicitly authorises host states to deny treaty benefits to investors breaching specified obligations, sanction enabling meaningful enforcement whilst avoiding arbitral forum shopping whereby investors invoke treaty protections despite systematic non-compliance with host state legal requirements or international standards. Article 47 establishes investor liability framework enabling home state civil actions against investors for damages caused in host state, procedural innovation addressing impunity whereby investors domiciled in strong legal systems escape accountability for overseas conduct harming communities or environment through jurisdictional gaps and judgement enforcement obstacles.

The Protocol possesses substantial potential as blueprint influencing African states' approach to extra-continental investment treaty negotiations and existing treaty reform, potential operating through demonstration effects, normative diffusion and explicit treaty language authorising modernisation of external investment relationships. Article 49(4) explicitly encourages State Parties to "take into account the requirements of this Protocol when negotiating international investment agreements and when reviewing existing international investment agreements concluded with Third Parties", language establishing Protocol as reference standard for assessing external treaties' compatibility with African developmental priorities and sovereign regulatory needs. This provision, whilst hortatory rather than mandatory, signals collective African position regarding acceptable investment treaty architecture, position that capital-exporting states negotiating with African partners cannot ignore without acknowledging explicit disregard for African Union consensus regarding balanced investment governance.

The Protocol's provisions regarding bilateral investment treaty termination and regional investment agreement alignment demonstrate explicit intent to restructure African investment treaty landscape toward Protocol-consistent architecture, restructuring that encompasses extra-continental relationships notwithstanding Protocol's formal geographical limitation. Article 49(1) mandates termination of bilateral investment treaties between State Parties within five years of Protocol entry into force, requirement extending to survival clauses that traditionally perpetuate treaty protections for existing investments decades beyond treaty termination, extension eliminating investor incentive to rush investments immediately preceding termination to capture long-term protection. This mandatory termination provision, unprecedented in investment treaty practice, eliminates approximately 150 bilateral investment treaties currently operative between African states, treaties whose outdated investor protections and expansive arbitration rights Protocol supplants with balanced architecture prioritising sustainable development. The termination provision establishes precedent that African states collectively possess authority and political will to exit dysfunctional investment treaty commitments when treaties demonstrably undermine developmental objectives, precedent applicable to extra-continental treaties generating comparable harms through excessive investor protections and regulatory constraints.

BUILDING CONTINENTAL CAMPAIGN FOR INVESTMENT TREATY REFORM AND ISDS ABOLITION

The Protocol on Investment exists presently as adopted text awaiting ratification by requisite number of jurisdictions before entry into force, ratification process that operates through domestic constitutional procedures spanning cabinet approval, parliamentary debate, legislative authorisation and instrument deposit with African Union Commission. This procedural pathway, seemingly technical and administrative, constitutes fundamentally political terrain where competing interests contest investment governance's future direction, terrain where organised constituencies advocating worker welfare, environmental protection and developmental sovereignty confront entrenched forces favouring investor privilege, arbitral authority and regulatory constraint. The outcome remains contingent rather than predetermined, dependent substantially upon capacity of progressive coalitions spanning trade unions, civil society organisations, parliamentary caucuses and affected communities to articulate compelling case for Protocol ratification whilst exposing costs of perpetuating existing investment treaty architecture that systematically disadvantages African treasuries, workers and citizens in favour of multinational capital and arbitral tribunals.

The strategic framework for continental campaign requires articulating theory of change connecting immediate advocacy objectives to ultimate goal of comprehensively restructuring African investment treaty architecture whilst abolishing investor-state arbitration as dispute settlement mechanism. This theory of change recognises multiple intervention points spanning legal proceedings, political mobilisation, institutional reform and normative transformation:

The legal dimension

- encompasses constitutional litigation challenging investment treaty provisions as conflicting with domestic constitutional guarantees regarding budget sovereignty, legislative authority and citizen rights;
- administrative law challenges contesting governmental treaty negotiation processes as procedurally deficient through excluding stakeholder consultation; and investment treaty interpretation advocacy urging tribunals to adopt restrictive readings preserving regulatory sovereignty and limiting compensation for legitimate regulation;
- finance, trade and justice ministries should undertake a whole of government review of legacy treaties with African partners, scored against the Protocol's clauses. The review should produce a public roadmap that classifies agreements for termination, renegotiation, or replacement with cooperation memoranda that exclude investor standing, and should publish draft replacement texts that track Protocol language on regulation, expropriation, transfers, investor obligations and dispute procedures. Trade unions and civil society should demand that the roadmap is tabled in parliament and updated annually; and
- this review should prioritise for termination or renegotiation of BITs with intermediary jurisdictions like Mauritius whose extensive 48 agreement BIT network enables conduit creation for third country investor claims.

- The political dimension comprises parliamentary lobbying for Protocol ratification and bilateral investment treaty termination; electoral mobilisation supporting candidates championing investment treaty reform; mass demonstrations and strike actions pressuring resistant governments; and diplomatic engagement with capital-exporting states through international solidarity networks.

- The institutional reform dimension involves establishing alternative dispute prevention mechanisms reducing conflicts before formal proceedings; strengthening domestic judicial capacity for resolving investor-state disputes through national courts applying transparent procedures and constitutional principles; building governmental capacity for defending investment treaty arbitrations when unavoidable through training, resource allocation and South-South cooperation sharing legal strategies; and implementing investor obligations enforcement mechanisms including civil liability procedures, contract compliance monitoring and benefit denial for violations.

- The normative transformation dimension encompasses public education campaigns explaining investment arbitration's fiscal costs and democratic accountability deficits; media advocacy reframing investment treaties from "investor protection" enabling development to "corporate privilege" undermining sovereignty; academic research producing evidence base supporting reform arguments; and international advocacy positioning African investment treaty reform as template for global investment governance transformation toward sustainable development prioritisation.

CONCLUSION

This study has established that ISDS operates as a parallel fiscal system imposing obligations on African treasuries through arbitral awards determined outside democratic budgetary processes, awards that function as involuntary taxation extracting public resources for private investor compensation without legislative appropriation, parliamentary oversight or citizen consent. The comparative analysis across Egypt, Libya, Kenya and Mauritius demonstrates that arbitration liabilities, whether massive awards reaching billions of dollars or modest judgments totalling tens of millions, systematically divert governmental expenditure from worker compensation, public service delivery and infrastructure investment toward satisfying commercial expectations of foreign investors whose treaty protections exceed rights available to domestic citizens, businesses or public interest considerations.

The fiscal compression mechanism operates through immediate budget reallocation, increased borrowing to finance awards and regulatory chill whereby governments defer legitimate policy reforms anticipating arbitration risk, triple burden that accumulates across multiple cases and jurisdictions to constitute structural constraint on African developmental autonomy. The social contract underpinning legitimate taxation, whereby citizens consent through democratic processes to revenue extraction in exchange for public services and collective welfare provision, fractures under arbitration architecture that extracts fiscal resources without democratic consent whilst privileging investor interests over citizen welfare, inversion that fundamentally contradicts principles of fiscal sovereignty, popular accountability and sustainable development supposedly guiding international economic governance.

The analytical challenge confronting comprehensive assessment of investor-state arbitration's fiscal burden stems substantially from data opacity spanning confidential settlement agreements, undisclosed legal defence expenditure and budget classification systems obscuring arbitration liability servicing within generalised accounts preventing precise quantification. The published arbitration awards documented throughout this study represent merely visible fraction of total fiscal impact, fraction excluding substantial settled cases whose terms remain confidential, ongoing disputes generating mounting legal costs without resolution, and regulatory measures foregone or weakened due to arbitration risk assessment that governmental officials acknowledge privately yet rarely document publicly. These evidentiary limitations notwithstanding, the available documentation establishes beyond reasonable dispute that investment arbitration imposes substantial fiscal burden on African states already confronting acute resource constraints and competing developmental priorities, burden disproportionate to arbitration's purported benefits regarding investment attraction given empirical evidence demonstrating weak correlation between bilateral investment treaty coverage and actual foreign direct investment inflows.

The crafters of the Protocol on Investment, informed by this accumulated evidence of arbitration's fiscal extraction, regulatory constraint and democratic accountability deficit, carefully constructed alternative architecture incorporating definitional narrowing restricting treaty coverage to investments with substantial business activity and developmental contribution, extensive public policy exceptions preserving regulatory sovereignty for legitimate objectives spanning health, environment, labour and climate action, comprehensive investor obligations establishing accountability for human rights and environmental standards compliance, and state-to-state dispute settlement eliminating investor standing whilst restoring governmental intermediation filtering claims through diplomatic assessment. These refinements, exceptions, reservations and carve-outs collectively constitute legally grounded framework protecting Africa and Middle East and North Africa countries party to AfCFTA from future investor-state arbitration whilst providing blueprint for reforming extra-continental investment relationships perpetuating dysfunctional architecture.

The normative transformation dimension encompasses public education campaigns explaining investment arbitration's fiscal costs and democratic accountability deficits; media advocacy reframing investment treaties from "investor protection" enabling development to "corporate privilege" undermining sovereignty; academic research producing evidence base supporting reform arguments; and international advocacy positioning African investment treaty reform as template for global investment governance transformation toward sustainable development prioritisation.