Towards an Investment Dispute Resolution Regime for the African Continental Free Trade Area and Beyond

MINI-DISSERTATION

BY
KUDZAI MATABA

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SUPERVISOR: DR. OYENIYI ABE

Contents

DECLARATION

I Kudzai Mataba declare that, except for the references as well as any other assistance duly indicated and acknowledged, this dissertation titled, “Towards An Investment Dispute Resolution Regime for the African Continental Free Trade Area and Beyond” is my own work that has never been previously submitted in part or in its entirety at any institution for degree purposes or otherwise.

ABSTRACT

On the 7th of July, African Leaders marked the launch of the operational phase of the African Continental Free Trade Agreement (AfCFTA). Among its main objectives, this Agreement aims to contribute to the movement of capital and to facilitate investment building on the initiatives and developments in the State Parties and Regional Economic Communities (RECs). It also seeks to resolve the challenges of multiple and overlapping membership to RECs, with the overall goal of enhancing and deepening greater regional integration. The upcoming drafting of an Investment Protocol under the Protocol presents an apt opportunity for the Continent to address the concerns of many African States with the Current Investor-State Dispute System (ISDS) which is centred on international arbitration most frequently under the auspices of ICSID. Although globally there has been growing dissatisfaction with this system, the arguments of African States against it are nuanced to their overall weaker economic positions in the global economy. It is the view of many African States and the Global South at large that this system presents extensive costs which have led to regulatory chill particularly in environmental matters, that the system lacks African representation and finally that the power imbalance fostered is in favour of investors against States. Such discontent has been signalled over the past decade by a trend by both individual States and RECs to withdraw from this system in favour of the resolution of investment disputes at National levels. This has resulted in a mirage of investment dispute resolution laws on the Continent coupled by several regional dispute resolution principles under the RECs, which do not always correspond or complement one another. Recognising that a clear investor protection regime and more particularly a clearly delineated and trusted dispute resolution mechanism is significantly influential towards the attraction of Foreign Direct Investment (FDI), this research will ascertain how the continent through the adoption of a binding Investment Protocol can address the concerns of Member States with the current ISDS system without compromising investor security. This will be achieved through a study of the lessons of the RECs in addressing this problem and reconciling the experiences of the RECs with the leading proposals from African

scholars. In a final analysis a plausible model for the harmonisation of Investor-State Dispute Resolution for the continent will be forwarded.

Acknowledgements

"Kusatenda Huroyi" (to be ungrateful is akin to practicing witchcraft)
Oliver Mtukudzi, Sarawoga 2013

All glory and thanksgiving belong to God, who began this good work in me, has carried me through and seen it to its completion.

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To my comrades in arms throughout this LLM year, Ruvimbo, Brian, Isaac and Kago, you have become indispensable parts of my life.

"The teacher who walks in the shadow of the temple, among his followers, gives not of his wisdom but rather of his faith and his lovingness.
If he is indeed wise he does not bid you enter the house of his wisdom, but rather leads you to the threshold of your own mind."
— Khalil Gibran, The Prophet

Dedication

This thesis is dedicated to my dearly departed maternal grandparents as well as to the memory of my beloved Grandfather Boniface Mataba (1944- 2009).

Abbreviations

AfCFTA	African Continental Free Trade Area
AJS	African Justice Scoreboard
AU	African Union
CAMEX	Chamber of Foreign Trade
CERDS	Charter of Economic Rights and Duties of States
CFIA'S	Cooperation and Facilitation Investment Agreements
COMESA	Common Market for East and Southern Africa
ECOWAS	Economic Community of West African States
EUJS	European Justice Scoreboard
FCN Treaty	Treaty of Friendship, Commerce and Navigation
FDI	Foreign Direct Investment
IBRD	International Bank for Reconstruction and Development
ISDS	Investor State Dispute Resolution
ICSID	the International Centre for Settlement of Investment Disputes
NIEO	New International Economic Order
PAIC	Pan African Investment Code
RECs	Regional Economic Communities.
SADC	Southern African Development Community
SAATM	Single African Air Transport Market

Chapter One
Introduction

1.1 Introduction

During the 18th Ordinary Session of the Summit of the African Union, hosted in Addis Ababa in the Federal Democratic Republic of Ethiopia, African Heads of State and Government declared "the promotion of intra-African trade [as being] a fundamental factor for sustainable economic development, employment generation and effective integration of Africa into the global economy[1]." This declaration was operationalized through the fast tracking of the establishment of a "Continental Free Trade Agreement by 2017[2]. The need to promote and integrate African economies as well as to coordinate policies among Regional economies towards the eventual establishment of a singular trading community, was initially agreed upon by African leaders in The Abuja Declaration of 1991[3]. In more recently African Heads of State and Government launched "Agenda 2063" which is "a shared framework for inclusive growth and sustainable development for Africa to be realized in the next fifty years[4]". With the goals of this Agenda is the greater integration of African economies.

On 21 March 2018 The Agreement Establishing the African Continental Free Trade Agreement (AfCFTA) was signed by 44 heads of State and Government out of the African Unions 55 Member States, in Kigali, Rwanda[5].This Agreement came into force on the 30th of May 2018 and on the 7th of July 2019 , the "operational phase" of this agreement was officially launched and this saw African countries reaching agreement on common "rules of origin, the monitoring and elimination of non-tariff

[1] International Trade Centre (2018). A business guide to the African Continental Free Trade Area Agreement. ITC, Geneva 1.
[2] International Trade Centre (2018). A business guide to the African Continental Free Trade Area Agreement. ITC, Geneva 1.
[3] International Trade Centre (2018). A business guide to the African Continental Free Trade Area Agreement. ITC, Geneva 1.
[4] International Trade Centre (2018). A business guide to the African Continental Free Trade Area Agreement. ITC, Geneva 1.
[5] International Trade Centre (2018). A business guide to the African Continental Free Trade Area Agreement. ITC, Geneva 1.

barriers, a unified digital payments system and an African trade observatory dashboard[6]". This agreement, in Article 3 sets out three broad objectives as follows;

The general objectives of the AfCFTA are to:

(a) Create a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent and in accordance with the Pan African Vision of "An integrated, prosperous and peaceful Africa" enshrined in Agenda 2063;

(b) Create a liberalised market for goods and services through successive rounds of negotiations;

(c) Contribute to the movement of capital and natural persons and facilitate investments building on the initiatives and developments in the State Parties and RECs;

(h) Resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes[7] ".

The AfCFTA will not be a standalone Agreement and is to be complimented by other continental initiatives, including the Protocol on Free Movement of Persons, Right to Residence and Right to Establishment, and the Single African Air Transport Market (SAATM). The first round of AfCFTA negotiations commonly known as phase I dealt with agreements on goods, services and the procedures for the settlement of disputes, whilst the much-anticipated phase II negotiations which will deal with slightly more contentious issues such as the regulation of intellectual property, competition and investment were expected to begin in August 2019 but this date has since been pushed forward to early 2020[8]. No definitive reason has been provided for this shift however one can speculate that the organizers are not prepared to begin the negotiations. Pursuant to these phase II negotiations, African States intend to conclude a separate Investment Protocol under the AfCFTA. The legal text of the Investment Protocol is expected to be ready for adoption by early January 2021. Although the Continental body's primary aim will be to increase intra-African trade, it also seeks to create a unified trade policy for the African

[6] Draper P, Edjigu H & Freytag A "Analyzing Intra-African Trade AfCFTA much ado about nothing" (2018) World Economics Journal, 19: 4 55.

[7] The Agreement Establishing The African Continental Free Trade Area (2018) Article 3.

[8] Draper (note 6 above) 56.

Continent as well as for its dealings with other role players in the global economy[9].

Within the context of both African and global dissatisfaction with the current Investor-State Dispute Settlement (ISDS) regime, there is great speculation as to the nature of investor protection, the proposed AfCFTA Investment Protocol will provide[10]. A clear investor protection regime and more particularly a clearly delineated and trusted dispute resolution mechanism is significantly influential towards the attraction of Foreign Direct Investment (FDI). The negotiators of this Agreement have through the Trade Dispute resolution mechanism, which has been concluded, shown an affinity towards inter-dispute resolution which is also the common practice of the World Trade Organization. The negotiators of the Investment Protocol may choose to "[continue] and [reinforce] the trends and dynamics of the African Union's Pan African Investment Code (PAIC)[11]". The drafters may also opt to overhaul the entire ISDS regime and emerge with an African solution to their concerns but undoubtedly which ever route is taken towards the conclusion of the Investment Protocol, lessons must be learnt from the efforts by Regional Economic Communities (RECs) to harmonize investment protection laws. Recognition must also be given to the recommendations of African scholars, such as Mbengue, Nyombi and Ngobeni towards resolving this issue as expressed particularly through the consultation phase towards the drafting of the Pan- African Investment Protocol under the auspices of the African Union[12]. The Investment Protocol itself is yet to be opened up for public consultation as the primary negotiations have not yet commenced. This research project shall recommend suitable investment dispute resolution system for the AfCFTA in light of these considerations.

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[9] Songwe V "Intra-African trade: A path to economic diversification and inclusion" (2019) Boosting Trade and Investment: A new agenda for regional and international engagement 104.

[10] Chidede T "Investor-state dispute settlement in Africa and the AfCFTA Investment Protocol" (2019) Tralac Blog Articles [accessed at https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html on 10 May 2019].

[11] Mbengue M "Special Issue: Africa and the reform of the International Investment Regime" (2017) Journal of World Investment and Trade 18 371.

[12] Mbengue (note 11 above) 371.

1.2 Research Context: Background

It is widely accepted that foreign investment is a fundamental building block towards the achievement of the sustainable growth and development of a region. Foreign investment can be defined as "the transfer of tangible or intangible assets from one country into another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets[13]." The mobilization of both domestic and foreign resources has thus become a key concern of legislators, statesmen and the business community worldwide[14]. "Although FDI is crucial for the economic growth of African countries, intra-regional investment is equally important, especially if Africa wants to achieve self-determination[15]". Investment holds the potential to fast-track economic growth by increasing "the productive capacity of an economy" which creates employment opportunities, laying the foundations for higher per capita incomes[16]. At this juncture it must be noted that the benefits of investment in a host-country do not automatically accrue. This Thesis argues that there is a great need for regulations to "balance the economic requirements of investors for protection with the need to ensure that investments make a positive contribution to sustainable development in the host state[17]".

The national and sub-regional investment legislative regimes in Africa are characterized by overlapping regulations, which although not solely responsible, have played a significant role towards the adoption of a globally reluctant attitude concerning investing on the continent[18]. The adoption of an Investment Protocol under the AfCFTA presents an opportunity to establish a coherent and consistent framework "that will govern investment protection, promotion and facilitation on the

[13] Sornarajah M "The International Law on Foreign Investment" second edition Cambridge University Press 7.
[14] Odysseas R "Multilateral Investment Treaties in Africa and the Antagonistic Narratives of Bilateralism and Regionalism" (2017) Texas International Law Journal 52 313.
[15] Nyombi C "A Case for a Regional Investment Court for Africa" (2018) 43 N.C. J. Int'l L. 68.
[16] Mbengue M (note 5 above) 372.
[17] Carim X "International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa" in *Rethinking bilateral investment treaties critical issues and policy choices*" (2016) eds Kavaljit Singh and Burghard Ilge 52.
[18] Nyombi (note 15 above) 68.

African continent," in an effort to alter the exponential decline in investment into Africa[19].

This thesis argues that dispute resolution clause in any investment agreement is crucial in offering investors the security of knowing that any conflict arising between himself and the host state will be dealt with in a fair manner and by a "neutral forum"[20]. An investor from a foreign jurisdiction will often be distrusting of the ability of domestic courts and tribunals in an investment host state especially in the Global South to be neutral in settling disputes between himself and the host state[21]. Judiciaries in the Global South and particularly Africa have a perceived history of lacking independence and of fostering corrupt practices[22]. The host state although dealing with the investor in a horizontal relationship, still retains decisive influence over the judiciary and even though to influence the judiciary in any manner would be an abuse of powers, the possibility of this occurring remains. Arbitration in a neutral forum has widely been viewed as the most effective manner of securing "impartial justice" for an investor and the ICSID system has been the most commonly used towards this end[23].

Within the context of contemporary challenges with the ICSIDS system and drawing from the successes and failures of comparable regional groupings in this domain, this research project shall propose a viable alternative investment dispute resolution system for the greater African context.

1.3 Research Problem

The research problem to be tackled by this research project is to ascertain how the continent can address the concerns of Member States with the current ISDS system without compromising investor security.

Negotiations towards the adoption of an Intra-African Investment Protocol under the AfCFTA come at a time when the ISDS system is in turmoil globally. Previous

[19] Mbengue M "The quest for a Pan-African Investment Code to promote sustainable development" (2016) Bridges Africa Report Volume 5. [accessed at https://www.ictsd.org/bridges-news/bridges-africa/news/the-quest-for-a-pan-african-investment-code-to-promote-sustainable on 10 May 2019].

[20] Sornarajah (note 13 above) 250.

[21] Sornarajah (note 13 above) 250.

[22] Olasunkanmi A "Constitutionalism and The Challenges of Development In Africa" (2014) International Journal of Politics and Good Governance Volume 5, No. 5.4 Quarter IV .

[23] Sornarajah (note 13 above) 250.

attempts to reform the ISDS system were often termed as being premature or politically motivated however the Europeans Union's recent formulation of an Investment Court System has rekindled international dialogue on this matter[24]. The EU's Investment Court System has been included in Free Trade Agreements between the EU and Vietnam as well as Mexico, the Comprehensive Economic and Trade Agreement with Canada (CETA) and the Investment Protection Agreement with Singapore[25]. The EU first proposed this investment dispute resolution mechanism in the now failed Trans-Atlantic Trade and Investment Partnership negotiations and the lack of consensus on this contentious issue is amongst the plethora of reasons for the breakdown in this negation depicting the polarized views on reforming the system and indicative of the difficult task before the EU on deciding a new path[26]. For the purpose of this research an analysis of the text of the Investment Court System as provided in the EU- Vietnam FTA will be provided in order to assess the viability of a permanent court in addressing African concerns with the subsisting ISDS regime.

In Africa, countries such as South Africa and Namibia have begun to let their existing Bilateral Investment Treaties lapse in favour of domestic regulation of the field and especially dispute resolution[27]. Regional Groupings such as SADC have in their Investment Protocols begun to shun away from a preference for International Arbitration. The writer questions what approach towards investment dispute resolution shall the Continent adopt, within the context of growing dissatisfaction with this regime,? Some of the leading concerns levelled by African States against this system are the extensive costs of International Arbitration, the lack of African representation on international arbitral tribunals and finally the power imbalance fostered in favour of investors[28]. The writer argues that some of the more global concerns with this system include inconsistency of awards, the finality of awards and lastly the so called "double-hatting" by the few practitioners involved in the field which sees a small set of individuals playing the role of arbitrator, expert witness and

[24] Benedetti J "The proposed Investment Court System: does it really solve the problems?" Revista Derecho del Estado. 42 (2018) 83. DOI:https://doi.org/10.18601/01229893.n42.04.
[25] Benedetti (note 24 above) 84.
[26] Nyombi (note 15 above) 68.
[27] Carim X (note 17 above) 54.
[28] Carim X (note 17 above) 54.

counsel in succession. However, what further puts Africa in a precarious position is the continents arguably strong need for especially foreign investment in the absence of judiciaries that are widely considered to be independent and competent to uphold the rule of law trusted judiciaries. Many African countries have subscribed to the ICSID system in order to appease and attract investors from abroad and thus recognize the need for the system whilst holding reservations about its practice[29].

This research shall map out how African REC's have meandered through the balancing of investor and State rights and obligations in as far as dispute resolution is concerned, then go on to assess the significance of the Pan-African Investment Protocol and finally the suggestions of African scholars towards the adoption of an African Dispute resolution mechanism will be assessed.

1.4 Aims and Objectives of the Research

This research shall:

a) Investigate the evolution of the ISDS system so as to identify the importance and core causes of the perceived power imbalance in favour of investors in this regime.

b) Explore how African REC's have addressed African concerns with the ISDS system, evaluating their successes and failures.

c) Examine the Pan-African Investment Code so as to ascertain its viability as a model for the AfCFTA Investment Protocol.

d) Critically evaluate Brazil's Agreement on Investment Facilitation.

e) Ascertain the viability of an African Investment Court and the proposal for an African Justice Scoreboard which will determine on a case by case basis the viability of the use of domestic courts

1.5 Limitations of the study

This research shall only concern itself with the dispute resolution element of investment protection and to this end will primarily focus on the ICSID system of dispute resolution. This is informed by the fact that in 2015, 62% of all dispute arbitrations were conducted under this body of rules[30]. This system thus emerges as

[29] Nyombi (note 15 above) 68.
[30] Nyombi (note 15 above) 68.

the most frequently used. Insights will not be drawn from the reforms proposed by mega trading blocs such as the USA, EU or Australia despite awareness of their proposals due to perceived differing issues the Global North has with the ISDS system in comparison to the issues raised by States in the Global North.

The Southern African Development Community (SADC), The Common Market for East and Southern Africa (COMESA) and Economic Community of West African States (ECOWAS) have been adopted as case studies of the progress of African REC's on developing an African approach to dispute resolution and only these groups shall be studied in depth because they have the most developed and extensive legal framework on this topic on the Continent.

1.6 Research Questions

Broadly, this research seeks to make an inquiry as to which system of investor-state dispute resolution system will be most appropriate for the upcoming Investment Protocol of the AfCFTA. This investigation will be framed within the context of growing dissatisfaction of African States with the current ICSID regime. Recognition must however be paid towards the global and particularly western skepticism towards African judiciaries. This question will be broken down as follows:

1. What is the Importance of an Africa specific Regional/Continental Investment Dispute Resolution Regime and what have been the key challenges and concerns with the subsisting ISDS regime for Africa?

2. What has been the approach of African Regional Economic Communities (REC's) and the African Union (AU) to Investor-State Dispute resolution?

3. What reforms or alternatives to the current ISDS regime have been availed by African scholars to the AU and what lessons can be learnt from other "Global-South" solutions to these issues, particularly the Brazilian "Agreement on Cooperation and Facilitation of Investment ". Can they address African concerns?

1.7 Literature Review

> *"National markets are held together by shared values and confidence in certain minimum standards. But in the new global market people do not yet have that confidence" –Kofi Annan.*

The extensive integration of African economies through the creation of REC's was intended to utilize the "economies of scale" to the continents advantage so as to collectively overcome the prejudices and perceived weaknesses surrounding investing on the continent. Within the context of Africa's several small and fragmented economies, regional integration would create "wider economic space" for growth[31]". This thesis argues that through the harmonization of regional investment laws "investors will have access to a wider range of skills and resources as well as the potential to form regional value chains[32]. A regional investment standard has the potential to deter countries from engaging in a "race to the bottom" in their pursuit of creating attractive investment destinations within their own borders. It is the writer's opinion, however that the proliferation of Regional Economic Communities operating concurrently on the continent today serve to complicate the legal regime governing investment. This view is substantiated by the fact that, in the West African region, three REC's co-exists whilst six can be found in the Eastern and Southern African Sub-regions and two co-exist in the North African region[33]. Most if not all of these REC's regulate foreign investment in some manner. "In this complex mosaic, 28 countries retain dual membership, 20 are members of three RECs, the Democratic Republic of Congo belongs to four RECs, and [only] six countries maintain single membership"[34]. In more practical terms this means to the writer is that when a foreign investor seeks to invest in any one African country, they must ensure compliance with the governing domestic laws and investment contracts he has entered into in the host country as well as the regional agreements the host state is party to and any possible Bilateral Investment Treaty in force between his own home State and the investment host State[35]. The writer deems it to be commonplace, that

[31] United Nations Commission for Africa Report: Investment policies and Bilateral Investment treaties in Africa: Implications for regional integration (2017) 34.

[32] Markowitz C & Langalanga "The rise of sustainable FDI: Emerging trends in the SADC region" 2017 World Commerce Review.

[33] Nyombi (note 15 above) 67.

[34] Mbengue (note 11 above) 54.

[35] Nyombi (note 15 above) 67.

at the core of any trans-national business relationship is the need for legal certainty and predictability. The current mirage of investment regulation on the African Continent is thus strongly unsatisfactory.

Calls for the harmonization of African investment dates back to the 1970s with scholars such as Akiwumi (1975) noting that "the disparities….and the absence of coordination [of investment laws] at national and sub-regional levels was hindering economic development"[36]. The coming into force of the AfCFTA thus presents an opportunity for the achievement of this goal through the adoption of a continental framework. Incidentally, the adoption of a new and comprehensive dispute resolution framework furthermore avails to the continent an opportunity to redress the institutional weaknesses that have prevailed in the sub regional regimes. Most recently such shortcomings have been exemplified in the suspending of the Southern African Development Community (SADC) Tribunal, following the judgement in *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe (2/2007) [2008] SADCT 2 (28 November 2008) (referred to as Campbell v Zimbabwe).* In this case, the SADC Tribunal made a ruling against the Government of Zimbabwe, finding that the Government has illegally expropriated land[37]. Towards the adoption of a Continental framework the writer believes that there is much to be learnt from the past failures of African sub-regional attempts at harmonization of Investment laws and dispute resolution mechanisms as well as from other sub-regional groups particularly in the Global-South.

Negotiations surrounding investment protection in the new AfCFTA agreement coincide with a more global discussion towards the reform of the Investor State Dispute Settlement (ISDS) regime but more particularly the International Centre for Settlement of Investment Disputes (ICSID) system. Over the past two decades there have been louder calls for the need of an appellate body, a more transparent system, a system that champion sustainable development as well as for dispute resolution mechanisms with a greater sensitivity towards "national public policy[38]." The European Union has recently put forward a proposal for the establishment of a

[36] The World Bank Annual Report (2017) (note 12 above) 44.

[37] Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe (2/2007) [2008] SADCT 2 (28 November 2008).

[38] Kalicki J & Joubin-Bret A "Reform of Investor-State Dispute Settlement (ISDS): In Search of a Roadmap" (2013) Transnational Dispute Management Editorial Report [accessed at https://www.transnational-dispute-management.com/article.asp?key=2023].

permanent investment court and consequently moving away from the ICSID system based on the reasoning that "the interpretation of concepts and principles that are peculiar to States and public international law cannot be left to the view of ever changing arbitrators"[39]. The Comprehensive Economic Trade Agreement ("CETA") between the EU and Canada now has provisions towards this effect establishing a permanent court and there are strong indications to suggest that all future EU Trade Agreements with investment chapters will move away from the ICSID system in this manner[40].

Disputes between States arising from allegations of violations the property rights of a national have been known in history as early as the 18th century[41]. In the post-colonial era, disputes of this nature were resolved through diplomatic channels in which the dispute would be resolved between the home and host States and not the investor and the State[42]. This process would be facilitated through "consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, retorsion, severance of diplomatic relations, economic pressure and, the final resort, the use of force"[43].The first ever recorded Investor-State arbitration took place in 1987 whilst the first ever Bilateral Investment Treaty was signed in 1959 between Germany and Pakistan[44]. Before this, investment had been governed mainly by the Treaty of Friendship, Commerce and Navigation ('FCN Treaty') if it occurred between developing and developed countries. This Treaty however did not address the issue of settlement of disputes because the Latin American countries constituted the group "developing countries" and they followed the Calvo Doctrine[45]. This doctrine suggests that the country in which the dispute arises or investment located shall have jurisdiction over any arising disputes

As the trade landscape between developing and developed countries broadened, "the ISDS system was essentially invented to avoid parochialism and bridge a

[39] Kalicki J & Joubin-Bret A (note 38 above).
[40] Kalicki J & Joubin-Bret A (note 38 above).
[41] Singh S & Sharma S "Investor-State Dispute Settlement Mechanism: The Quest for a Workable Roadmap Sachet" (2013) Utrecht Journal of European and International Law Merkourios 29 88.
[42] Singh S & Sharma S (note 41 above) 90.
[43] Singh S & Sharma S (note 41above) 90.
[44] Singh S & Sharma S (note 41 above) 91.
[45] Singh S & Sharma S (note 41 above) 91.

perceived maturity gap in judiciaries around the world[46]." At the root of the system was an assumption that domestic courts in the Global South would be ill prepared and incapable of ensuring justice to investors from the Global North and so the investor's home state needed to moderate and monitor any disputes arising.

This thesis argues that in an effort to attract foreign investment by boosting investor confidence, African States on both a regional and national level entered into a series of Bilateral and Intra-regional Investment Treaties from the early 1960s onwards consequently subscribing to the ISDS system[47]. It is also the writers conviction that Africa's adoption of the ISDS system was also spurred on by policy directives and advice from the Bretton Woods Institutions Structural Adjustment Programme[48]. The extent to which these agreements have led to significant development and transformation of African economies however remains highly contested[49]. However, in an effort to maximize the economies of scale and reap the benefits of regional economic harmonization, some REC's in sub-Saharan Africa have developed legal frameworks for investment regulation[50].The Common Market for Eastern and Southern Africa (COMESA), Economic Community of West African States (ECOWAS) and Southern African Development Community (SADC) have each concluded a regional Protocol on this subject area. Due to the overlapping nature of some of these groupings, some countries are party to more than one protocol as is the case for the Democratic Republic of Congo, Libya, Madagascar, Malawi, Mauritius, Seychelles, Swaziland, Zambia and Zimbabwe which are all bound by the Protocols in COMESA and SADC with the exception of Libya which is a member of COMESA and the AMU[51]. The EAC despite not having an Investment Protocol has adopted a model investment agreement binding on its members[52].

The "Investment Agreement for the COMESA Common Investment Area" was adopted by COMESA member States in 2007 stemming from the creation of a

[46] Kidane W "Alternatives To Investor–State Dispute Settlement An African Perspective" (2018) Global Economic Governance" 5 Discussion Paper [accessed at https://www.africaportal.org/documents/18000/GA_Th3_DP_kidane_20180129.pdf on 10 May].

[47] Paez L "Bilateral Investment Treaties and Regional Investment Regulation in Africa: Toward a Continental Investment Area" (2017) Journal of World Investment and Trade 18 379.

[48] Paez (note 47 above) 383.

[49] Paez (note 47 above) 380.

[50] Paez (note 47 above) 394.

[51] Paez (note 47 above) 394.

[52] Paez (note 47 above) 395.

COMESA Free Trade Area in 2000 but with the ultimate goal of creating a COMESA Common Market[53]. The Agreement strongly relies on the domestic investment laws of member States. "For example, the agreement only applies to investments of COMESA investors that have been specifically registered pursuant to the Agreement with the relevant authority of the Member State in which the investment is made[54]." The primary dispute resolution channel under this agreement is through the COMESA Court of Justice which will facilitate negotiation, mediation or arbitration. The ICSID and UNICITRAL channels may be used upon agreement[55]. The agreement also makes provision for State dispute resolution which may only be facilitated through a tribunal constituted under the COMESA Court of Justice.

The ECOWAS Regulation namely "The Supplementary Act Adopting Community Rules on Investment" was concluded in 2008. Some of its most salient features include that it addresses issues of corporate governance, corporate social responsibility, and minimum standards for environmental, labour and human rights protection as well as corruption[56]. Disputes are resolved through the national courts as well as the ECOWAS Court of Justice. There is also provision for the use of national mediation centers however no reference is made to any International mechanisms such as ICSID process[57].

The SADC Member States concluded a "Protocol on Finance and Investment" in 2006 and it came into force in 2010. Its main aim was to harmonize the financial and investment policies of member states towards the creation of a "favorable" investment climate" within the region[58]. It further grants Member States extensive policy space by allowing them to exclude short term portfolio investments, sensitive industries and "activities with potential negative effects on the national economy" from the ambit of the Protocol[59]. The Protocol makes provision for investor- State dispute resolution via domestic courts or tribunals of the host state. Only after this may international arbitration be pursued using the UNCITRAL rules. The dispute resolution regime provided for in the Protocol is available only to SADC Member

[53] Paez (note 47 above) 396.
[54] Paez (note 47 above) 396.
[55] Paez (note 47 above) 410.
[56] Paez (note 47above) 397.
[57] Paez (note 47 above 410.
[58] Paez (note 47 above) 398.
[59] Paez (note 47 above) 398.

State investors. All other investors must thus rely on any operative investment treaties in place between the home and host States or the national laws of the host State. The SADC Tribunal has since been suspended.

This thesis suggests that another growing trend on the continent has been the adoption of Model Investment Agreements within REC's which aim to facilitate consistency in investment regulation. They are unique in their ability to take cognizance of a country's existing Treaty obligations and the requirements of individual domestic jurisdictions[60]. Model Investment laws are soft laws and thus are not binding in nature. To date two such models exist on the Continent, the EAC Investment Code[61] and the SADC Model Bilateral Investment Treaty Template. The SADC Model BIT is not prescriptive in nature but rather offers a collection of suggested legislative options and offers a brief analysis of the legal consequences of including each clause[62]. This research shall seek to ascertain the viability of non-binding mechanisms such as the development of a Model Investment Agreement for the AfCFTA Investment Protocol.

It is the writer opinion that the fragmentation of these regimes strengthens the calls for the creation of a harmonized investment regime for the continent which it can be expected, would ease the cost of doing business between the RECs themselves. The existence and progress already made by these REC'S creates a great opportunity for the successful implementation of an Investment Protocol in AfCFTA because negotiators will be able to build on the principles that have already been agreed up at regional levels. The forming of the Tri-partite Free Trade Agreement (TFTA) which has seen collaboration between SADC, The EAC and COMESA is a fundamental step towards Continental harmonization of trade and investment related laws. The AU has already developed a Pan-African Investment Code (PAIC) which can also be used as departure point in the new Investment Protocol under AfCFTA.

The PAIC subscribes to the ISDS system however with some significant modifications[63]. Despite disgruntlement with the system, many African legislators

[60] Paez (note 47 above) 398.
[61] East African Community Investment Code 2002.
[62] Rolland S & Trubek D "Legal Innovation In Investment Law: Rhetoric And Practice In Emerging Countries" (2018) Penn Law: Legal Scholarship Repository 379.
[63] Makane M, Mbengue & Schacherer S "The Africanization of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime" (2018) Journal of Investment 441.

view the ISDS system as an effective way to render their country attractive to foreign investors[64]. The PAIC seeks to overcome some of the criticisms leveled against the ISDS system by, for example, mandating that investors and host states must "initially seek to resolve the dispute within 6 months at the latest, through consultations and negotiations which may include the use non-binding third party mediations or other mechanism"[65]. Local remedies must first be exhausted in the above manner before a request for international arbitration can be tendered. The PAIC further limits an investors access to the ISDS system requiring that the host States consent for arbitration be sought on a case by case basis or "on the basis of international law[66]." Finally, the PAIC allows for States to file suits against investors in Investor-State arbitration. The ICSID system allows for counter claims but only in exceptional cases, however in practice, tribunals often reject this claim on the basis that no clear treaty provision expressly allows for such claims by the State[67]. In conclusion the PAIC seeks to rebalance the rights and obligations of States and Investors so as to bypass the shortcomings of the ISDS system.

Brazil has recently rolled out a new generation of Investment Facilitation Agreements which depart from the traditional ISCID regime named Cooperation and Facilitation Investment Agreements. To date such Agreements have been concluded with Angola, Mexico and Mozambique whilst negotiations are currently underway with Algeria, Chile, Colombia, Morocco, Nigeria, Peru, South Africa and Tunisia[68]. It is necessary to note that all CFIA's are identical.[69] Generally, these Agreements however, aim to facilitate the amicable settlement of disputes between investors and states and offer a final resort to State-State resolution mechanisms as an alternative to the traditional investor –State arbitration process[70].

[64] Makane, Mbengue & Schacherer (note 63 above) 442.
[65] Makane, Mbengue & Schacherer (note 63 above) 442.
[66] Makane, Mbengue & Schacherer (note 63 above) 444.
[67] Makane, Mbengue & Schacherer (note 63 above) 444.
[68] Brauch M "Brazil's Cooperation and Investment Facilitation Agreements with Mozambique, Angola, and Mexico: A Comparative Overview"(2016) in in *Rethinking bilateral investment treaties critical issues and policy choices*" eds Kavaljit Singh and Burghard Ilge 142.
[69] Ngobeni and Fabatunde "Recent Developments in the Regulation of Investor-State Dispute Resolution: Any Lessons For the Southern African Development Community" African Journal of Legal Studies 20.
[70] Brauch M (note 68 above) 142.

In an effort to redress the imbalances that currently subsist in the relations between host states and investors, the preamble of these ACFI agreements, commonly state that:

> The parties express their wish to deepen the bonds of friendship and the spirit of cooperation between them, broadly reaffirming their legislative autonomy and public policy space whilst recognizing the need for strengthened bonds between the private sector and governmental authorities[71].

A key provision of the CFIA is that before a dispute can be referred for arbitration it is to be assessed by means of "consultations mediations and negotiations" and is subject to a pre-emptive examination by the Joint Committee[72]. Should the dispute remain unresolved following this process, the two-party States may resort to State-State arbitration[73]. This thesis will seek to assess the suitability of this approach for the African continent. Towards this purpose the Agreement between Angola and Brazil will be studied in order to understand the key tenants and principles underlying Brazils Approach. This thesis argues, the high degree of inter-State co-operation and human resources demands of this approach may make it most unsuitable for an inter-African regime.

Finally, this research will look at the suggestions for ISDS reform forwarded by African scholars to the drafters of the AfCFTA. The primary proposals include the formation of a Permanent Regional Investment Court or the formation of an African Justice Scoreboard to determine in which States the use of a local court would be appropriate.

Another African scholar, Nyombi makes a proposal for the formation of a Permanent Regional Investment Court that would handle Investment disputes amongst AfCFTA Member States. This court could eventually be incorporated into future International Investment Agreements involving AfCFTA members. Thus it would be the singular dispute resolution channel for the Continent[74].The establishment of a Permanent Court would solve some of the ongoing concerns of African States with the ISDS system such as the inconsistent rulings passed by ad hoc tribunals. This proposal is

[71] Brauch M (note 68 above) 145.
[72] Brauch M (note 68 above) 145.
[73] Brauch M (note 68 above)145.
[74] Nyombi (note 15 above) 100.

not novel within the global context and mirrors the proposal of the European Union to include a Permanent Court for all EU Investment agreements. A key concern with this suggestion is one of design. It would be necessary in the establishment of any such body to avoid the shortcomings of the SADC tribunal which was dismantled by Southern African leaders when it began to make findings against States and in favor of investors[75].

In comparison, Ngobeni another African scholar, suggests that there is great value in the use of domestic courts that are well versed with local domestic laws, towards the resolution of Investor-State disputes. He also forwards that the use of local courts puts foreign investors in the same position as local investors who have no recourse to International Arbitration[76]. The use of local courts will also encourage the development of domestic laws on investment matters through usage. Investor security can only be secured where the local courts are independent and the rule of law prevails[77]. The use of domestic courts as a court of first instance appears to be the approach generally forwarded by the African Union in other subject Treaties such as the African Charter on Human Rights. It is the writers aversion that, local courts should only be used where appropriate[78]. Ngobeni thus suggests the formation of an African Justice Scoreboard (AJS)[79]. This Scoreboard would act as an "independent gateway" for the determination of the state of the rule of law in Member State and thus provide an indication of the general circumstances under which an investor-state dispute would be treated if referred to a local court[80]. What would set this Scoreboard apart from all other rule of law scoreboards would be that the AJS would be legally binding and thus confer rights to investors in the same manner that BITs do. Although the African Union has a Peer Review Mechanism, it does not have a "dedicated independent, consistent and legally binding mechanism for the assessment and monitoring of the state of the rule of law[81]." This research will investigate this proposal so as to assess its viability for the AfCFTA as a tool towards dispute resolution.

[75] Nyombi (note 15 above) 100.
[76] Ngobeni and Babatunde (note 69 above) 20.
[77] Ngobeni and Babatunde (note 69 above) 20.
[78] Ngobeni and Babatunde (note 68 above) 20.
[79] Ngobeni and Babatunde (note 68 above) 20.
[80] Ngobeni and Babatunde (note 68 above) 20.
[81] Ngobeni and Babatunde (note 68 above) 20.

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1.8 Research Methodology

This study shall be carried out through desktop research. The primary sources to be consulted shall be the Constitutive Act of the AfCFTA and Investment Protocols of SADC, AMU, COMESA and ECOWAS as well as the Draft Pan-African Investment Code and the various Brazilian Investment Facilitation Agreements as no model is yet to be published. Insights from published articles, journals, newspapers and internet sources will be used to gain understanding of the interaction of distinguished academics with this subject area. The opinions and statistics offered in the working documents and reports of International Organizations such as the World Bank as they relate to the topic will also be taken into consideration and used as reference points

1.9 Chapter Synopsis

This research will culminate into five chapters. Chapter one will situate the research problem by highlighting the key questions to be explored. Chapter two will provide a critical analysis of the historical evolution of the the ISDS system on the African continent so as to contextualize the concerns of African states with the current system. Chapter three will offer an exposition of the progress made by African REC's in addressing their concerns with the ISDS as well as the efforts of the African Union to engage with this matter through the Pan-African Investment Code with the aim of putting forward a viable prototype for the Continental Investment Protocol. In Chapter four, the propositions of African Academics to the AfCFTA will also be considered and an enquiry will be made into Brazil's reform method which is building in support on the African continent and has already been subscribed to by Angola and Mozambique whilst talks are under way with Algeria, Chile, Colombia, Morocco, Nigeria, Peru, South Africa and Tunisia. Finally, chapter Five will offer a recommendation to the AfCFTA negotiators highlighting the pitfalls they should avoid based on the lessons learnt from the REC'S and weighing the suitability of the suggestions that have thus far been made to the AfCFTA.

2.1 Introduction

Assigning an appropriate conceptual framework to Investor State Arbitration is a complex task because the field of ISDS demonstrates elements of both private commercial law and public international law[1]. A private commercial law perspective of Investor-State dispute resolution is concerned primarily with the adjudication of contractual breaches between foreign investors and host States, whilst a public law perspective of this field would be more aimed at the establishment of a system that facilitates the "protection of property" and upholds the rule of law in the "treatment of foreign investors" by host States[2]. This research project supports the perspective of theorizing investment dispute resolution through the lens of public international law but more importantly through the rule of law concept of public law.

2.2 The Rule of Law

As has been enunciated, the theoretical framework of "the observance of the rule of law" stands as the corner stone of the ISDS system[3]. Investors in their dealings with host states seek some guarantee that they will be dealt with in a fair manner and that any arising dispute will be adjudicated by a neutral forum, presumably one that is competent to uphold "the rule of law"[4]. The meaning of the concept "rule of law" is highly contested. A substantive understanding of the concept would however embody the principles of ; "supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, procedural and legal transparency"[5].

International forums such as the ad hoc ICSID and UNICITRAL forums have historically been thought of as the best alternative to the perceived incompetence's of judiciaries in developing countries however the "public law challenge" to international investment arbitration suggests that even these international forums fail

[1] Schill W "Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach" (2012) 52 Va. J. Int'l L. 58.
[2] Schill (note 1 above) 59.
[3] Fallon R H "The Rule of Law as a concept in Constitutional Discourse (1997) The Columbia Law Review 97:1 2.
[4] Fallon (note 3 above) 2.
[5] INTERNATIONAL LAW ASSOCIATION SYDNEY CONFERENCE (2018) "RULE OF LAW AND INTERNATIONAL INVESTMENT LAW" 8.

to guarantee adherence to the rule of law[6]. This perspective suggests that investment treaty arbitration through ad hoc tribunals, restricts governmental action and policy making thus concerning itself with the exercise of public law without conforming to the fundamental principles which ensure adherence to the rule of law such as separation of powers, legal certainty or predictability[7]. The current ISDS system under which the legality of the exercise of a State's public powers is adjudicated by arbitrators appointed by the disputing parties and are not bound by prior judgements- not even the ones that they have personally handed down- which is perceived to be unacceptable. What further taints this system is that a handful of arbitrators will rotationally serve as arbitrator, counsel or expert witness which presents opportunities for conflicts of interest to arise. Arbitrators and counsel appointed on an ad hoc basis may be perceived to feel pressured to protect the interests of future appointers[8]. According to this perspective, this system may serve as a threat to "State sovereignty" and ultimately to "national self-determination[9]". This research forwards a perspective of investment dispute resolution for the continent that is best able to promote and facilitate the rule of law. Furthermore, this research will argue that the aim of African States in the negotiations of the Investment Protocol subsidiary to the AfCFTA should be to forward a system that can protect the rule of law and not blind allegiance to the current ad hoc arbitration system which falls short in this regard.

2.3 The Global Economic Order

In addition to being positioned in the field of public international law, investor-State dispute resolution must also be understood within its position in the "Global Economic Order[10]". The concept of a "Global Economic Order" can be defined as a set of governing rules that can be international or domestic or transnational, in nature, that order the economic relations between and amongst States and often deals with trade, investment or finance related issues[11]. The current Global Economic Order is largely dominated by neo-liberalist thinking which suggests that the State's role must be confined to creating an environment in which

[6] Schill (n1 above) 68.
[7] Schill (n1 above) 68.
[8] Schill (n1 above) 70.
[9] Schill (n1 above) 69.
[10] F Morosini, M Ratton and S Badin "Reconceptualizing International Investment Law from the Global South: An Introduction" eds Fabio Morosini and Michelle Ratton Sanchez Badin. New York: Cambridge University4.
[11] Morosini F et el (n10 above) 6 & 4.

entrepreneurship can thrive by, championing privatization and ensuring for the protection of proprietary rights as well as the sanctity of contracts, in essence enforcing the rule of law[12]. As a result of this thinking, an ISDS system in which investors hold a disproportionate levels of power in relation to the power held by States, has been created. This can be exemplified by the fact that investors alone can initiate proceedings under the ICSID system and the State has limited legal avenues through which to appeal a decision rendered by ad hoc ICSID tribunals.

2.4 A Third World Approach

Investor- state dispute resolution can also be conceptualised through the lens of a "Third World Approach of International Law[13]". Chimini suggests that International Law under which the ISDS system falls under, plays an important role in legitimizing and sustaining the structurally unequal relations between the global north and south especially in their economic dealings[14]. Third World Approaches to understanding the ISDS system suggests that dominant social and economic powers do not exert their influence through the use of force but rather through shaping the world order according to the rules and principles that they subscribe to[15]. The "language of law" thus plays and has always played a pivotal role towards the legitimization of dominant western ideals, which in discourse are often associated with "rationality, neutrality, objectivity and justice"[16]. International Institutions such as the World Bank Group thus play a role in ensuring the sustenance of a particular legal culture ideologically, by legitimating the norms that dominant powers seek to advance[17]. Thus, a Third World Approach to International Law suggests that the global north powers, seek to occupy and maintain a superior moral ground through the presentation of third world peoples, in particular, African peoples as being incapable of self-governance or achieving internationally acceptable levels of legal development, which shall be displayed through the historical exposition of this field of study[18]. Overall this perspective calls for the critical investigation of the origins of the

[12] Morosini F et el (note 10 above) 6.
[13] Chimni B S "Third World Approaches to International Law: A Manifesto" (2016) International Community Law Review 8:3 17.
[14] Chimni (note 13 above) 18.
[15] Chimni (note 13 above) 18.
[16] Chimini (note 13 above) 18
[17] Chimini (note 13 above) 18.
[18] Chimini (note 13 above) 20.

ISDS system towards the development of a system that addresses the concerns and needs of the African continent.

2.5 Conclusion

In conclusion, this study will be framed through the intersecting lenses of public international law with a primary focus on how adherence to the principles of rule of law can be ensured so as to boost investor security in African host States. Next the ISDS system must also be considered as being a by-product of a global neo-liberal perspective that marginalizes State interference and influence so as to promote the private players in an economy. Lastly a “Third World Approach to International Law” which suggests that the entire ISDS system needs to be critiqued due to its flawed origins which saw the marginalization of African perspectives towards its development. In the next chapter the foundations of the emergence of Investor-State dispute resolution on the continent will be traced through these intersecting perspectives. The aim of this exposition will be to unveil the inherent flaws to the ISDS system which necessitate reform.

3.1 Introduction

The historical evolution of international investment law has been shaped by a wide variety of economic, political and historical events[1]. A clear understanding of the history and evolution of the ISDS system as well as a contextualization of the role played by the "rule of law" concept is critical towards solving the crisis the system finds itself in today. When African States "opened the door" to the ISDS regime, it can be argued that they did not foresee that the power of ad hoc arbitral tribunals would delve so deep into issues of seeming public policy[2]. On the face of it, International Investment Agreements and their subsequent dispute resolution clauses were created in order to facilitate investment in developing countries by protecting foreign investors from unfair discrimination and the weak judiciaries of host States particularly in the Global South[3]. It is debatable whether or not these agreements have any substantive value in promoting investment in developing countries however the negative consequences of the stretching of the meaning of clauses such as "fair and equitable treatment" on developing countries is less contentious[4]. This chapter will therefore trace the foundations of the ISDS system in Africa such an exercise will bring to the fore the critical fears and concerns that the system sought to appease and so highlight its inherent biases.

3.2 Historical Background

During the Middle Ages up until the time of the formation of the nation State in the 17th century, the property and personhood of an "alien" or foreigner were at risk of abuse and unequal treatment from the governing authority itself or with its permission[5]. The notion of "State responsibility" with regard to injuries sustained by aliens in foreign land only began to develop in the mid-18th century[6]. Emmerich

[1] Sornarajah M "The International Law on Foreign Investment" second edition Cambridge University Press 17.
[2] Tienharra K "Investor–state dispute settlement" (2017) Regulatory Theory: Foundations and Theories Drahos P (eds) ANU Press 677.
[3] Tienharra (note 2 above) 677.
[4] Tienharra (note 2 above) 677.
[5] O. Thomas Johnson, Jr. & J Gimblett, "*From Gunboats to BITs: The Evolution of Modern International Investment Law*" Yearbook on International Investment Law & Policy 2010–2011 (Karl P. Sauvant ed., 2012) 649.
[6] O. Thomas Johnson, Jr. & J Gimblett (n 5 above) 649.

Vattel in 1758 coined this principle as follows, “Whoever uses a citizen ill, indirectly offends the State, which is bound to protect the citizen[7]”.

3.2.1 The Colonial Era

This period was characterized by the birth and exponential growth of industrialization most notably in Great Britain but also in other Western European States as well as the United States of America.[8] As these nations began to generate excess capital through their industrial enterprises, an opportunity for financial investment abroad, arose particularly between 1870 and 1914[9]. This investment flowed primarily between colonial powers and their empires abroad and were governed by the domestic or municipal law of the colonial master in question[10]. At this time there was no need for international regulation of the treatment of alien property. When dealing with States that were not integrated within the colonial regime, with the ostensible aim of promoting trade the Western powers created enclaves within which the jurisdiction of the host State was excluded.[11] The governing law in these enclaves was that of the home State of the European trader.[12] This system was governed through treaties that were often concluded as a result of the use of force. The use of force in order to protect the property of nationals, was also common amongst capital exporting States that fell out of the imperial regime[13].

The United States entered into a series of bilateral “Friendship, Commerce and Navigation” treaties with its trading partners[14]. These treaties contained provisions that guaranteed “full and perfect protection” to the property of foreign nationals present within the territory of the other treaty partner[15]. They also made provision for compensation for the expropriation of property as well as foundational principles of national treatment and most favored nation treatment with regards to the rights of foreign nationals[16]. The overall objective of these treaties was to protect the property

[7] O. Thomas Johnson, Jr. & J Gimblett, (n5 above) 649.
[8] O. Thomas Johnson, Jr. & J Gimblett, (n5 above) 649.
[9] O. Thomas Johnson, Jr. & J Gimblett, (n5 above) 649.
[10] O. Thomas Johnson, Jr. & J Gimblett, (n 5 above) 649.
[11] Sornarajah (note 1 above) 17.
[12] Sornarajah (n1 above) 18.
[13] Sornarajah (n1 above) 18.
[14] Vandevelde K “A Brief History of International Investment Agreements” (2005)U.C. Davis Journal of International Law & Policy 12 157.
[15] Vandevelde (note 14 above) 158.
[16] Vandevelde (note 14 above) 158

of the foreign national. Trade and property were protected in the same treaty and the protection of property came secondary to the creation of trading relationships.

The nature of these investment flows began to be altered in the late 19th century, when States in Central and South America began to break away from the Spanish empire that they had once formed a part of[17]. As these States established themselves and recovered from the scourge of civil wars, they faced internal weaknesses, witnessing "frequent insurrections and other mob violence" creating an unstable and unpredictable environment for foreign investment to be sustained[18]. Western States threatened to withdraw their investments if sufficient compensation was not offered to their nationals for any damage to property.

International Customary Law provided the normative basis for the protection of foreign property abroad during the colonial era.[19] The thinking of the Western powers was firstly that their nationals when dealing with a host State, deserved treatment benchmarks at a certain international minimum standard, even if that standard of protection was not afforded to the nationals of the host State. Secondly, Western Powers asserted that they were obligated to offer their nationals where these minimum international standards were not achieved. This notion was supported by the concept of diplomatic protection which states that "an injury to a foreign national caused by an act or omission of the host State as an international wrong against that national's home State, for which the home State was entitled — but not bound — to seek reparation in its own name."[20] The weaknesses of this regime included that it was disputed by the South American Continent, it contained vague language and lastly in the absence of a bi-lateral agreement by a host State for disputes to be submitted for arbitration, the only remedy available for the enforcement of international customary law, was espousal[21].

Espousal is the legal process during which the State of an injured individual assumes a claim as its own against the State which caused any such injury. The short-comings of this approach include that States have no general duty to take on the claims of their nationals and the national in question must first exhaust all local

[17] O. Thomas Johnson, Jr. & J Gimblett (note 5 above) 470.
[18] O. Thomas Johnson, Jr. & J Gimblett (note 5 above) 470.
[19] Vandevelde (note 14 above) 159.
[20] O. Thomas Johnson, Jr. & J Gimblett (note 5 above) 470.
[21] Vandevelde (note 14 above) 163.

remedies available in the host State before approaching the State for assistance which is a financial strenuous activity. Finally, once an investor has espoused a claim, he loses control over the matter and the State is at liberty to settle the matter on its own terms.

The Latin American Countries however failed to subscribe to this line of thinking and in a bid to protect their newly established independence sought to follow what came to be known as the "Calvo doctrine", which suggests that any disputes emanating from an investment must be adjudicated upon based on the law of the investment of the host State[22].

3.2.2 The Post- Colonial Period

In this period the relations between former colonial masters and newly liberated States were driven by an imbalance of power and it was during this time that the development of international investment law as we know it today began to take form[23]. The post-colonial period was characterized by nationalistic fervor and hostility by the newly independent States towards their former imperial masters[24]. This hostility was propelled by anti-colonial movements which advocated for the newly formed States to take control of the critical sectors that served as the backbone of their economies and were predominantly run by foreign nationals from imperial powers. This led to a wave of nationalizations of foreign owned property which necessitated dialogue on standards and methods of foreign investment protection[25]. The nationalization measures initiated Soviet States as they emerged following the Second World War, encouraged African States to adopt similar positions. The Soviet States posed State Regulation to be a better alternative to the liberal market policies forwarded by the western bloc[26].

This era of hostility was followed by era of pragmatism during which developing States despite promoting and supporting reforms on a global level that protected sovereign control over foreign investment, began to enter into investment treaties on

[22] Sonarajah (note 1 above) 22.
[23] Sonorajah (note 1 above) 22.
[24] Sonarajah (note 1 above) 24.
[25] Sonorajah (note 1 above) 24.
[26] Sonorajah (note 1 above) 22.

a bilateral level that enhanced their structures of foreign investment protection[27]. The fall of the communist empire which led to a global economic order that championed liberal policies played a role in the opening up of third world countries to foreign investment but also there was increasing competition for a limited amount of foreign investment[28]. Developing countries became more willing to make legal compromises towards the protection of foreign investment[29].

The neo-liberalist policies of International Institutions such as the International Monetary Fund and the World Bank also played a significant role towards the formulation of and ascension to investment protection standards by developing countries[30]. These institutions required the "liberalization of the entry of foreign investment, national treatment after entry, protection against violation of certain guaranteed standards of treatment, and secure means of dispute settlement" as a prerequisite for financial assistance[31]. These institutions also encouraged the conclusion of bilateral investment treaties which provided the foundational guarantees for investment protection. It is Sonorajah's opinion that this neo-liberal thinking spilt over even into the interpretation of investment treaties at the expense of the intended meaning intended by the contracting States[32].

In today's world however, developing States are no longer the primary or exclusive importers of foreign direct investment and in some respect, Western powers have begun to feel the somewhat consequences of an investment paradigm they created[33]. Investment law can no longer be formulated and understood within a purely neo-liberal perspective and new issues have been brought to the fore such as the need to protect ethnic groups, environmental protection and labour protection.

3.3 The Context of the Emergence of the Bilateral Investment Treaty

In the early 1970's, socialist countries together with States from the developing world, began to exert pressure on the United Nations to pass recognition of a

[27] Sonarajah (note 1 above) 22.
[28] Sonarajah (note o1 above) 22.
[29] Sonarajah (note 1 above) 23.
[30] Sonorajah (note 1 above) 24.
[31] Sonarajah (note 1 above) 24
[32] Sonorajah (note 1 above) 24.
[33] Sonorajah (note 1 above) 24.

general right to expropriate foreign owned property without compensation[34]. These States were able to lobby this position as a result of their numerical majority on the General Assembly. In May 1974, the General Assembly finally heeded to this call and adopted "the Declaration of the New International Economic Order (NIEO), which declared the full and permanent sovereignty of States over their economic activities as well as their natural resources[35]. The right of sovereignty was found to be inclusive of the "the right of nationalization or transfer of property to nationals[36]." The Declaration was silent on the obligation to offer compensation. In December of the same year, the General Assembly further adopted the "Charter of Economic Rights and Duties of States" (CERDS)[37]. Article 2.2 of this Charter holds that States have the right "to nationalize, expropriate or transfer ownership of foreign property in which case appropriate compensation should be paid by the State adopting such measures….[38]" The Charter in essence held that compensation should be paid but the use of the word "should" and not the word "must" suggests that this is a non-obligatory binding[39]. Furthermore, the compensation to be offered is to be calculated in light of the precepts of national law, in which case, it may be possible for national law to not necessitate the payment of any such compensation[40].

Facing the threat of expropriation without compensation and within the context of an inefficient international customary law regime and the outlawing of the use of force the modern BIT was formulated.

After experiencing several expropriations at the hands of the victors of WW2 through the reparations called for in the treaty of Versailles, Germany was particularly cautious of the possibilities of expropriation without expropriation opened up by the UN in these two declarations[41]. The *Factory At Chorzów, Germany v Poland,*

[34] Vandevelde (note 14 above) 167.
[35] Vandevelde (note 14 above) 167.
[36] Vandevelde (note 14 above) 167
[37] Vandevelde (note 14 above) 167.
[38] Charter of Economic Rights and Duties of States General Assembly resolution 3281 (XXIX)
New York, 12 December 1974 Charter of Economic Rights and Duties of States General Assembly resolution 3281 (XXIX)
New York, 12 December 1974..
[39] Charter of Economic Rights and Duties of States General Assembly resolution 3281 (XXIX)
New York, 12 December 1974 Charter of Economic Rights and Duties of States General Assembly resolution 3281 (XXIX)
New York, 12 December 1974.
[40] Charter of Economic Rights and Duties of States General Assembly resolution 3281 (XXIX)
New York, 12 December 1974 Charter of Economic Rights and Duties of States General Assembly resolution 3281 (XXIX)
New York, 12 December 1974 Article 2.2.
[41] Vandevelde (note 14 above) 168.

Judgment, Claim for Indemnity, Merits, Judgment No 13, (1928) PCIJ Series A No 17, ICGJ 255 (PCIJ 1928) (Charzow) case had also exposed the country to dangers of expropriation without compensation and consequently in 1959, Germany entered into two BIT's with Pakistan and then later with the Dominican Republic[42]. Other countries in Western Europe quickly followed suit with France entering into its first BIT in 1960 and Switzerland in 1961[43].

For the first time States began to contract on purely investment related matters, leaving trade matter to the exclusive jurisdiction of the GATT. The first round of BIT's were typically drafted by developed States, reflecting their needs and then handed to developing States for signatures only[44]. Although both States took on the same obligations, these agreements were perceived to be non-reciprocal in nature by developing States because in practice it was their behavior, as the investment-importing party that was being regulated. Developing countries were at the time influenced to sign these BIT's as a result to the misconception that providing investment protection would directly and automatically attract more investment into their economies.[45]

Having looked at the historical and political framework within which the ISDS system was formulated it is now necessary to look more closely into the formation of the institutions that govern the system.

3.4 An International Investment Arbitration Framework

Throughout the 18th and 19th centuries, the use or threat of use of force had been the predominant method employed towards the resolution of disputes that could not be settled through diplomatic channels[46].

Following the American War of Independence, Great Britain and the United States of America set up a series of ad hoc tribunals tasked with hearing the claims of nationals arising from the Wars destruction[47]. These tribunals which consisted of two

[42] Vandevelde (note 14 above) 168.
[43] Vandevelde note 14 above) 169.
[44] Vandevelde (note 14 above) 169.
[45] Vandevelde (note 14 above) 169.
[46] O. Thomas Johnson, Jr. & J Gimblett (note 5 above) 654.
[47] O. Thomas Johnson, Jr. & J Gimblett (note 5 above) 654.

commissioners appointed by each party and a fifth selected through a unanimous vote of the four, became the pro-type of future investment arbitration panels. The success of this panels set up by the US and Great Britain paved the way for the establishment of a permanent seat of arbitration[48]. Accordingly, in 1899 at the Hague Peace Conference, the Convention of the Pacific Settlement of International Disputes was established[49]. This treaty arose from common thinking that arbitration presented "the most effective and at the same time the most equitable, means of settling disputes which diplomacy failed to settle"[50]. Through Chapters II and III of this treaty, a Permanent Court of Arbitration was established, sitting at The Hague[51]. Article 19 of this treaty further encouraged signatories to enter into general arbitration agreements with each other so as to extend the obligation of arbitration to all cases "which they may consider possible to submit" to the Court[52].

The treaty of Versailles in 1919 which set out the peace terms between Germany and the allied powers in Article 304 established another series of Tribunals which were to resolve all outstanding disputes and also deal with issues of compensation for wartime expropriations and other measures taken by the German State to deprive the property rights of foreign nationals[53]. The entrusting of dispute resolution to arbitration further solidified the status of this legal method.

The Covenant of the League of Nations in 1922 established a Permanent Court of International Justice. In 1923 the League of Nations went on to adopt the Geneva Protocol on Arbitration Clauses in which it was agreed that contracting parties would "recognize the validity of arbitration agreements between private parties[54]". In 1922 the International Chamber of Commerce for the first time adopted rules of arbitration and the following year established the Court of Arbitration[55].

Institutionalized arbitration is suggestive of arbitration processes undertaken under the rules and regulations of renowned International Institutions that deal with investment matters, such as the permanent Court of Arbitration or the International

[48] O. Thomas Johnson, Jr. & J Gimblett (note 5 above) 654.
[49] O. Thomas Johnson, Jr. & J Gimblett (note 5 above) 654.
[50] O. Thomas Johnson, Jr. & J Gimblett (note 5 above) 654.
[51] O. Thomas Johnson, Jr. & J Gimblett (note 5 above) 654.
[52] O. Thomas Johnson, Jr. & J Gimblett (note 5 above) 654.
[53] O. Thomas Johnson, Jr. & J Gimblett (note 5 above)654.
[54] O. Thomas Johnson, Jr. & J Gimblett (note 5 above) 658.
[55] O. Thomas Johnson, Jr. & J Gimblett (note 5 above) 658.

Chamber of Commerce. The International Convention for the Settlement of Investment Disputes is one of the most predominantly used investment arbitration institutions and the and thus the critique of the ISDS system offered by this research will mainly focus on this institution and its processes.

The ICSID Convention, was conceptualized by the Executive Board of the International Bank for Reconstruction and Development (IBRD) and arose from a common perception that the economies of developing States would strongly benefit from an increased flow on investment from developed States[56]. Investors from the Global North could also benefit from the relatively less regulated markets of developing States as well as the abundance of natural resources on particularly the African Continent[57]. The Global South as a whole was however considered to be a high risk investment destination by Western investors especially due to the prevailing levels of economic, social and political instability. In addition to these fears, investors were also skeptical of seeking recourse in the local courts of developing countries, more so, when the host government was the respondent in the matter[58] .

The courts in the Global South were perceived to be plagued with impartial judges, inefficient processes as well as unfamiliar laws to investors from the Global North. The enforcement of judgements in these courts was also deemed to be a tedious process. International arbitration which would guarantee access to adjudication by a neutral International formal was thought of as a measure that would distill some of the fears of foreign investors[59]. Consequently, in 1964 a draft Convention was presented to the Member States of the World Bank and in October 1966 the Convention entered into force. The main objective of this Convention is to "strengthen international partnership in achieving the economic development of developing countries by stimulating the flow of international private capital into such countries"[60]. The Convention is only applicable to States which have ratified the Convention.

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[56] Tsietsi T "International Commercial Arbitration: Case Study of the Experiences of African States in the International Centre for Settlement of Investment Disputes" (2013) International Commercial Arbitration 47:2 255.

[57] Tsietsi T (note 56 above) 255.

[58] Tsietsi T (note 56 above) 655.

[59] Tsietsi (note 56 above) 656.

[60] Tsietsi (note 56 above) 657.

The Convention established the International Centre for the Settlement of Investment Disputes which is tasked with providing "facilities for the conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States"[61]. The institution is composed of a Secretariat, the Panel of Conciliators and the Panel of Arbitrators.

States rarely make requests for conciliation and this procedure has been invoked only nine times in the history of the Centre[62]. This is most likely due to the unbinding nature of the advice given in the conciliation process in comparison to the arbitration process which gives rise to final, binding and enforceable awards.

In 1978, the Additional Facilities were agreed upon under which, the Centre will facilitate conciliation or arbitration in matters involving non-State parties or in instances where the investor is not a national from a contracting State[63]. The Convention does not apply to Additional Facility Proceedings and Contracting Parties to the Convention are not bound automatically to the Additional Facility Rules[64]. In order for disputing parties to make use of the Additional Facility, they must reach a mutual agreement to be bound by these rules and furthermore the Secretary General must adjudicate whether the jurisdictional requirements for the Facility Rules have been met[65].

In addition to ratifying the agreement, States must also submit to the jurisdiction of the Centre. Such consent accordingly excludes recourse to all other remedies however this presumption may be rebutted[66]. Parties may for example agree amongst themselves to pursue a different avenue of dispute resolution before approaching the Centre, or a Contracting State may under its domestic law require for the preliminary exhaustion of local remedies[67].

In as far as the Jurisdiction of the Centre is concerned, the Convention in Article 25 holds that "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent

[61] Sutherland, P. F. "The World Bank Convention on the Settlement of Investment Disputes" (1978) International and Comparative Law Quarterly 369.
[62] Tsietsi (note 56 above) 567.
[63] International Centre for Settlement of Investment Treaty 1966 Chapter 1 .
[64] International Centre for Settlement of Investment Treaty 1966 Chapter 1 .
[65] International Centre for Settlement of Investment Treaty Additional Facility Rules 1966.
[66] International Centre for Settlement of Investment Treaty 1966 Chapter 2.
[67] International Centre for Settlement of Investment Treaty 1966 Chapter 2.

subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre[68]." It is also possible for an investment host State to unconditionally submit to the jurisdiction of the Centre by entering into a Bilateral Investment Treaty, however, "when the parties have given their consent, no party may withdraw its consent unilaterally[69]."

The arbitration process begins with the lodging of an arbitration request by the claimant to the Secretary General of the Centre[70]. After the matter is registered, the other party to the dispute is duly notified and provided with a copy of the claim[71]. The arbitral tribunal which hears the matter is typically composed of three arbitrators. Each party appoints an arbitrator and the third is appointed jointly by the two-party selected arbitrators[72].

The award is decided upon by a majority vote and the Centre may not publish the details of an award without the consent of the involved parties[73]. The award is final and binding[74]. No appeal facilities are available and an unsatisfied party may only file for a revision under Article 51, annulment of the award under article 52 or for a re-interpretation of the agreement in question under article 50[75]. Failing this, Article 54 binds the Contracting State parties to recognize these awards s binding[76]. Contracting States must also commit to enforce the pecuniary obligations mandated by the award within the State party's territory as though it were a final judgement of a domestic court in that State[77].

3.5 African Experiences of International Arbitration

There are currently forty-six Contracting State parties to the ICSID Convention on the African continent[78]. The countries that are non-party to the Convention are Angola, Djibouti, Equatorial Guinea, Eritrea, Libya, Réunion, South Africa, Western

[68] International Centre for Settlement of Investment Treaty 1966 Chapter 2.
[69] International Centre for Settlement of Investment Treaty 1966 Article 25.
[70] International Centre for Settlement of Investment Treaty 1966 Article 36..
[71] International Centre for Settlement of Investment Treaty 1966 Article 38.
[72] International Centre for Settlement of Investment Treaty 1966 Article 37.
[73] International Centre for Settlement of Investment Treaty 1966 Chapter Article 39.
[74] Sutherland (note 61 above) 382.
[75] International Centre for Settlement of Investment Treaty 1966 Article 50.
[76] International Centre for Settlement of Investment Treaty 1966 Article 54.
[77] Sutherland (note 61 above) 382.
[78] Sutherland (note 61 above) 382.

Sahara, Ethiopia, Namibia, and Guinea-Bissau although some of these States have signed but not ratified the Agreement[79]. African States currently make up 31% of the membership of the Centre[80]. The 1960's saw a proliferation of ratifications to the Convention by African States, as they gained independence. As of 2013, out of the 428 arbitrations that have been conducted by the Centre, 101 involved African States, which depicts the continents frequent interaction with the system.[81]. An African State has only ever initiated arbitration proceedings on two occasions in the history of the Centre. Benin, Botswana, Cape Verde, Chad, Comoros, Lesotho, Malawi, Mauritania, Mauritius, Mozambique, Sierra Leone. Somalia, South Sudan, Sudan, Swazi-land, Uganda, and Zambia have never engaged with the Centre either as claimants or respondents[82].

The recommendations of international financial institutions such as the IMF and World Bank drew African States to ratify this Convention under the presumption that by opening up for International Arbitration, potential investors would be more assured against the risks presented by African economies[83]. The Bilateral Investment Treaties entered into by African States starting from the early 1960's also mandated that the Centre would be the dispute resolution channel of choice between contracting parties[84]. Typically, cases involving African States have emerged from the mining, hospitality, telecommunications, oil exploration, commercial farming and power generation sectors[85].

3.6 The Grievances of African States with the ISDS System through the lens of the ICSID System

One of the recurring criticisms of the ICSID system by African States is that of lack of representation on arbitration tribunals. Empirical evidence emerging from a 2017 ICSID study suggests that from a total of 613 cases that have been registered under the ICSID Convention as well as the Additional Facility rules, 22% have involved an African State however, only in 4% of these cases was an African role player involved

[79] Sutherland (note 61 above) 382.
[80] Sutherland (note 61 above) 382.
[81] Sutherland (note 61 above) 382.
[82] Sutherland (note 61 above) 384.
[83] Sutherland (note 61 above) 384.
[84] Sutherland (note 61 above) 384.
[85] Sutherland (note 61 above) 384.

in the adjudication process[86]. In hard figures this means that only 90 Africans up until 2017 had engaged with the ICSIS arbitration system either as an arbitrator, conciliator or as an ad hoc committee member. In comparison, 979 Western Europeans and 437 North Americans have engaged with the system in these capacities[87].

Even in the cases where an African arbitrator sits on the panel it is seldom ever as the presiding officer or President of the Tribunal. There have however been two exceptions to this general observation in the cases of *M. Meerapfel Söhne AG v. Central African Republic, ICSID Case No. ARB/07/10* in which the tribunal was composed of arbitrators from Morocco, Gabon and Belgium and presided over by the Moroccan arbitrator[88]. In the case of *RSM Production Corporation v. Central African Republic, ICSID Case No. ARB/07/2*, the tribunal was composed of two French nationals and a Moroccan who once again was the President of the Tribunal[89]. The criticism of the ISDS system by African States must be viewed within the context of Article 13(1) of the Convention which provides that each contracting State may elect persons "who may serve on panels as arbitrators[90]". The Centre keeps a list of persons whom have been elected by their State as possible arbitrators. These arbitrators may serve six-year renewable terms[91]. The conventions requirements towards the designation of an arbitrator are simply that the person be of good moral character, impartiality, and technical competence and so it may not be argued that the bar has been set too high for African qualification[92].

African States are currently behind on their panel designations. Uganda's last valid designation was in 1973 whilst the Central African Republic's designation expired in 1986, Madagascar in 1987 and Ghana in 1990[93]. Although there are some countries that are up-to date on panelist designations, these fall far in the minority. In order for African States to be more represented on ICSID panels it is necessary for them to

[86] Le Bars B " Evolution of Investment arbitration in Africa" (2019) Global Arbitration Review [accesses at https://globalarbitrationreview.com/print_article/gar/editorial/1169359/the-evolution-of-investment-arbitration-in-africa?print=true on 14 August 2019].
[87] Le Bars B (note 86 above).
[88] *RSM Production Corporation v. Central African Republic, ICSID Case No. ARB/07/2.*
[89] RSM Production Corporation v. Central African Republic, ICSID Case No. ARB/07/2
[90] International Centre for Settlement of Investment Treaty 1966 Article 13 .
[91] Tsietsi T (note 56 above) 262.
[92] Kidane "The China Factor in the Contemporary ICSID legitimacy debate" (2014) University of Pennsylvania Journal of International Law, Vol. 35, No. 3,Seattle University School of Law Research Paper No. 15-07.
[93] Tsietsi T (note 56 above) 262

nominate qualified individuals and if non-exist, some resources must be expanded towards the training and grooming of suitable individuals[94].

In most cases, African countries after selecting non-African arbitrators, will go on to seek representation by non-African lawyers[95]. The two African States with good track records in employing African lawyers to defend their matters are Egypt which is represented by the Egyptian State Lawsuits and Zimbabwe which is represented by the Office of the Attorney General in all their matters at the Centre consistently[96].The more common use of American lawyers by African Governments is indicative of a lack of confidence in local litigators[97]. It is of great importance that African lawyers are trusted and considered competent by their own Governments in order for these States to exercise some influence in the ICSID system[98]. Daele is of the opinion that these non-African lawyers employed by African States often influence their clients to also select non-African arbitrators whom they are more familiar with[99].

The cost of ICSID Convention membership is yet another major concern of African States partly in light of their predominantly fragile economies[100]. Although the Centre is financed through the charges that the disputing parties pay to use the facilities, Article 17 goes on to state that "on where the expenditure of the Centre cannot be met out of charges for the use of its facilities, or out of other receipts, the excess shall be borne by Contracting States members of the Bank in proportion to their respective subscriptions to stock of the Bank, and by Contracting States which are not members of the accordance with rules adopted by the Administrative Council[101]. Article 61(2) further provides that in the case of arbitration proceedings the Tribunal shall, "except as the parties wise agree, assess the expenses incurred by the parties in connection with proceedings, and shall decide how and by whom those expenses, fees and expenses members of the Tribunal and the charges for the use of the facilities of the shall be paid[102]." Such decision shall form part of the award[103].

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[94] Tsietsi T (note 56 above) 262.
[95] Tsietsi (note 56 above) 263
[96] Tsietsi (note 56 above) 263.
[97] Tsietsi (note 56 above) 263.
[98] Tsietsi T (n56 above) 263.
[99] Tsietsi T (n56 above) 263.
[100] Tsietsi T (n56 above) 264.
[101] International Centre for Settlement of Investment Treaty Article 17.
[102] International Centre for Settlement of Investment Treaty 1966 Article 61.
[103] International Centre for Settlement of Investment Treaty Chapter 1.

A party seeking to lodge an arbitration claim must put down a non-refundable amount of US$25 000[104]. The arbitrators themselves are entitled to a fee of approximately US$3 000 per day that they are occupied with an arbitration which is non-exclusive of travel and subsistence costs[105]. In the case of *Malicorp Limited v. The Arab Republic of Egypt, ICSID Case No. ARB/08/18,* Egyptian Government accumulated costs of up to US$489 000[106].

The possibility of incurring such high costs coupled with the long delays experienced when using the Centre's facilities, in the perspective of African lawyers has a regulatory chill effect on African governments[107].

In the case of *Société Ouest Africaine des Bétons Industriels v. Senegal, ICSID Case No. ARB/82/1*, the original claim was registered in November 1982 and the tribunal was duly constituted within a year of this date[108]. However, two arbitrators went on to resign and so another tribunal had to be constituted five months later[109]. The dispute was finally concluded in 1988 which was more than five years after the initial registration of the matter and in that time the Government could not pass any legislation on the matter at hand[110]. Although delays of this nature are not peculiar to the ICSID arbitration system alone, they could be mitigated through the use of domestic courts[111].

South Africa's ambassador to the WTO, Xavier Carrim repeatedly questioned the legitimacy of a system that leaves matters of public policy such as expropriation and regulation of sensitive industries to three individuals who are appointed on an ad hoc basis[112]. In 2015, South Africa cancelled all its existing investment treaties, now investment including all dispute resolution are regulated by domestic laws and courts[113]. This paradigm shift has not negatively affected the countries investment prospects in any significant way and the Department of Trade and Industry is of the

[104] Tsietsi (note 56 above) 264.
[105] Tsietsi (note 56 above) 264.
[106] Tsietsi (note 56 above) 264.
[107] Tsiesti (note 56 above) 264.
[108] Tsietsi (note 56 above) 267.
[109] Tsiesti (note 56 above) 267.
[110] Tsiesti (note 56 above) 267.
[111] Tsietsi T (n56 above) 267.
[112] Carim X "International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa" in Rethinking bilateral investment treaties critical issues and policy choices" (2016) eds Kavaljit Singh and Burghard Ilge 52.
[113] Carim(note 112 above) 53.

opinion that there is no direct correlation between investment agreements and increased investment flows [114].It is also possible that investors contracting with the South African government do not need the extra protection of particularly guarantees of International arbitration because the country is perceived to have a credible and strong rule of law record[115]. This paradigm shift in South Africa's investment policy was stirred by the 2006 case of *Foresti v. South Africa (2007) Piero Foresti, Laura de Carli and others v. Republic of South Africa (ICSID Case No. ARB(AF)/07/1)*, .in which Finstone, a country incorporated in Luxemburg alongside its Italian owners sought to sue the South African Government for USD 340 million[116]. This claim arose from the claimant's allegation that the respondent legislative amendments in the mining charter that consequently vested all ownership of minerals in the State and demanded a percentage shareholding by members of historically disadvantaged communities in all mining companies as a fundamental infringement of their rights[117]. This legal challenge marked the first time in the history of the ICSID system that an investor "directly confronted State regulation linked to fundamental human rights norms[118]." These proceedings were ultimately dismissed at the claimants request but this case still highlighted an investors ability to strong hold a State into not following a developmental agenda in favour legislation that best serves the investor[119].

3.7 Conclusion

By tracking the context within which the ISDS system came into use on the continent and examining the general trends emerging from the continents interaction with the system, this chapter has highlighted how the system was developed in response to Western fears of being subjected to the judiciaries of developing States initially in Latin America and then in Africa as well. In line with Third World Perspectives to

[114] Carim (note 112 above) 53.
[115] Carim (note 112 above) 52.
[116] Foresti v. South Africa (2007) Piero Foresti, Laura de Carli and others v. Republic of South Africa (ICSID Case No. ARB(AF)/07/1).
[117] Foresti v. South Africa (2007) Piero Foresti, Laura de Carli and others v. Republic of South Africa (ICSID Case No. ARB(AF)/07/1)
[118] Foresti v. South Africa (2007) Piero Foresti, Laura de Carli and others v. Republic of South Africa (ICSID Case No. ARB(AF)/07/1).
[119] Foresti v. South Africa (2007) Piero Foresti, Laura de Carli and others v. Republic of South Africa (ICSID Case No. ARB(AF)/07/1).

international law, the historical overview of this field of law made it clear that the African continent played no major role in the development of this system and all attempts to assert a developing world perspective for example through the United Nations New International Economic Order (NIEO) and the Charter of Economic Rights and Duties of States, (CERDS) declarations were futile. The prevailing neo-liberalist approach to international law was depicted through the discussion on the role of international financial institutions in promoting arbitration institutions modeled on the needs of investment exporting countries. Finally, an evaluation of the interaction of selected African States with the ICSID system showed that some of the dissatisfaction echoed on the continent with the system is partly self-imposed such as the low number of role players in the arbitration process whilst others such as the exorbitant costs are endemic to the system. Some countries such as South Africa have successfully managed to withdraw from the system in favour of domestic regulation without negatively affecting their investment prospects which suggests that there are options outside the ICSID system that ought to be considered towards the formulation of an investment dispute resolution regime for the continent. The next chapter will evaluate the approaches taken by regional economic groups on the continent towards addressing their concerns with the ICSID system with the overall aim of suggesting a dispute resolution system for the continent.

4.1 Introduction

From the early 1990's, African countries have been occupied with the complex and ambitious task of establishing a regional integration framework[1]. Regional Economic Communities have to date worked on this integration project and significant progress has been made in establishing and consolidating free trade areas, customs unions and common markets in line with the Abuja Treaty's ultimate vision of a common African Economic Community[2]. The integration of African economies through the establishment of REC's is intended to maximize on "the economies of scale" towards the overcoming of the continents actual and perceived structural weakness such as poor infrastructure, weak rule of low and low consumer incomes[3]. Within the context of Africa's several small and fragmented economies, regional integration is expected to "create wider economic space for growth[4]. Through the harmonization of regional investment laws "investors [are expected to] have access to a wider range of skills and resources as well as the potential to form regional value chains"[5]. The aim of this chapter will be to track the progress made by sub-Saharan REC's, particularly SADC, COMESA, ECOWAS and the EAC in establishing regional investment regimes so as to draw lessons from their successes and failures towards the adoption of a continental framework on this subject area.

4.2 Importance of a harmonized regime

The promotion of investment within REC's has in recent years received increasing levels of attention, as is witnessed by the emergence of Regional investment protocols and model BIT's. The continent has also experienced an increase in intra-African investment, with greenfield investment projects alone growing to 18%" from 2009 to 2013 from 10% between 2003 and 2008[6].

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[1] Paez L "BITS and Regional Investment Regulation in Africa" (2017) Journal of World Investment and Trade 18 393.

[2] Paez L (note 1 above) 393.

[3] United Nations Commission for Africa Report: Investment policies and Bilateral Investment treaties in Africa: Implications for regional integration 34.

[4] United Nations Commission for Africa Report: Investment policies and Bilateral Investment treaties in Africa: Implications for regional integration (2017) 34..

[5] Markowitz C & Langalanga A "The rise of sustainable FDI: Emerging trends in the SADC region"(2016) World Commerce Review 1.

[6] United Nations Commission for Africa Report: Investment policies and Bilateral Investment treaties in Africa: Implications for regional integration (2017) 34.

A regional investment standard has the potential to deter countries from engaging in a "race to the bottom" in their pursuit of creating attractive investment destinations within their own boarders. A key shortcoming of these regional efforts is that they have developed in isolation from each other, this situation is worsened by the fact many REC's on the continent have overlapping membership, meaning that some States find themselves bound to more than one investment regime. The incoming "Investment Protocol" in the AfCFTA provides an opportunity for the adoption of a uniform investment protocol for the African goal within the context of the overarching aim of working towards the establishment of a common African Economic Community. This agreement also provides an apt occasion for the continent to address the institutional weaknesses that have plagued the sub-regional investment regimes such as the suspending of the Southern African Development (SADC) Tribunal, following a judgment made against Zimbabwe in the case of *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe (2/2007) [2008] SADCT 2 (28 November 2008) (referred to as Campbell v Zimbabwe)* The coming to effect of the agreement also provides the continent with an opportunity to institute reforms to the prevailing ISDS system with which many African States are disgruntled with.

4.3 The regional Approaches

4.3.1 The Southern African Development Community

In 2006 the regional grouping adopted a Protocol on Finance and Investment that consequently came into force in 2010[7]. The specific aim of this legislation was to facilitate the harmonization of both the financial and investment policies of Member States within the over-arching objectives of the REC to "facilitate regional integration, create a favorable investment climate[8].

Under this Protocol, an investor was defined as "a person that has been admitted to make or has made an investment". Article 19 of Annex 1 of the 2006 SADC FIP, provided that Member States are obligated to harmonize their "investment policies, laws and practices" into a singular regime that will be uniformly applied throughout the SADC region[9]. All domestic frameworks are envisaged to align with the regional standard[10]. Article 27 of Annex 1 further laid down the obligation of States to provide

[7] SADC Investment Protocol on Finance and Investment 2006.
[8] SADC Investment Protocol on Finance and Investment Preamble 2006.
[9] SADC Investment Protocol Annex 1 Article 19 2006.
[10] SADC Investment Protocol Preamble.

investors with access to domestic courts, judicial and administrative tribunals or any other competent authority towards the resolution of disputes arising from an investment[11]. In article 28, the Annex provided that after the lapsing of 6 months, if the exhaustion of local remedies brought no amicable resolution to a dispute, the dispute would be resolved through arbitration. In this scenario, the investor could approach the SADC Tribunal, the ICSID, *ad hoc* arbitration or any other tribunal established pursuant to a special agreement or constituted in terms of the New York Convention rules[12]. If parties reached no consensus on the use of alternative procedures, the disputing parties were bound to submit the matter "to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules"[13].These provisions applied only to disputes that arose after the coming into force on the FIP on 16 April 2010.

The SADC Tribunal was established in terms of Article 16(1) and (2) of the SADC Foundational Treaty on 7 August 2000[14]. The additional Protocol that set out the composition and competencies of the Tribunal, provided the body with jurisdiction over all "all applications referred to it in accordance with the SADC Treaty and the Protocol on the Tribunal concerning the interpretation and application of the Treaty; the interpretation, application or validity of the Protocols; all subsidiary instruments adopted within the framework of the SADC and acts of the SADC institutions; as well as over all matters provided for in any other agreements that member States may conclude among themselves or within the Community and that confer jurisdiction on the Tribunal"[15]. Furthermore, the Tribunal had personal jurisdiction over inter-State disputes as well as disputes arising between natural or juristic persons and State[16].

According to Article 32 of the Protocol on the Tribunal, the decisions handed down by this body were "binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the State concerned"[17]. SADC Member

[11] SADC Investment Protocol Annex 1 Article 27 2006.
[12] SADC Investment Protocol Annex 1 Article 28 2006.
[13] SADC Investment Protocol Annex 1 of 2006.
[14] SADC Investment Protocol Annex 1 of 2006.
[15] SADC Tribunal Protocol Article 32.
[16] SADC Tribunal Protocol Article 32.
[17] SADC Tribunal Protocol Article 32.

States were further obligated to ensure the enforcement of Tribunal decisions within their territories and any such failure was to be investigated and if so established, reported to the SADC Summit of leaders for further action[18].

In August 2010, the SADC Summit of Leaders ordered that a review of the "role, function and terms of reference" of the Tribunal be carried out within a 6-month period[19]. During this time, the terms of office of the Tribunal judges were not renewed and open vacancies were not staffed[20]. The tribunal had also been ordered not to take on any new cases within this period and so the Tribunal was de facto under suspension[21]. In May 2011, this 6 month inquiry period was further extended for another year and this time, the Summit gave an order to the regional ministers of justice to begin the process of amending the Protocol on the Tribunal[22]. In August 2012 the Summit formally suspended the Tribunal for an indefinite period of time and decided to confine the personal jurisdiction of the body to only inter-state disputes in the upcoming amendment[23]. The catalyst for these events has been identified as a series of Tribunal cases relating to unlawful expropriations of agricultural land in Zimbabwe[24]. Out of the 19 judgements the Tribunal handed down before its suspension, 11 concerned Zimbabwe and 8 had to do with unlawful expropriations carried out by the State. The Campbell v Zimbabwe case, was the last judgement handed down by the court.

This matter arose from a provision in Zimbabwe's 2005 Constitution that permitted for the expropriation of certain agricultural land without compensation and with no possibility of domestic judicial review of the expropriation process under the country's infamous land reform regime[25]. This land reform policy predominantly targeted white landowners and facilitated the forced removal of more than 4000 people. The claimants in the in *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe (2/2007) [2008] SADCT 2 (28 November 2008)* case, sought to enforce the States obligations to "respect human rights, democracy and the rule of law" but

[18] SADC Tribunal Protocol Article 32.
[19] De Wet E "The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa" 2013 ICSID Review 2.
[20] De Wet (note 19 above) 3.
[21] De Wet (note 19 above) 3.
[22] De Wet (note 19 above) 2.
[23] De Wet (note 19 above) 3.
[24] De Wet (note 19 above) 3.
[25] De Wet (note 19 above) 4.

more particularly to refrain from such discriminatory practices. Although the SADC to Treaty does not create a right to property it guarantees non-discrimination[26].

The Tribunal consequently made ruling against the Zimbabwean Government, finding that the land reform regime had violated the State's obligation to respect the rule of law and that the policy constituted a discriminatory practice. In response to this unfavorable ruling the Zimbabwean Government challenged the Tribunal's competency. The Government alleged that the Tribunal had been illegally constituted and furthermore that "it would neither appear before nor respond to any suit instituted before the Tribunal and that any prior or future decisions against Zimbabwe were null and void"[27].

Zimbabwe's rejection of this judgement and ultimately of the Tribunals authority amounted to a rejection of the Article founding the Tribunal which also confirmed the binding nature of tribunal decisions. As the Tribunal had no power beyond the reporting of non-compliance to the Summit, it was up to SADC leaders pressure the country into respecting its obligations to the regional group. In accordance with Articles 33(1) and (2) of the Treaty, States were to "impose sanctions on a country which persistently fails without good reason to fulfil obligations assumed under the SADC Treaty[28]." It is highly unfortunate that SADC Member States failed to take action against Zimbabwe due to a lack of political will. The Summit refrained from condemning Zimbabwe's actions or imposing the requisite sanctions and even went on to give in to the country's demands for the suspension of the Tribunal and amendment of the Treaty so as to exclude natural and juristic persons from the jurisdiction of the Tribunal[29]. The Summit furthermore acted in an *ultra vires* manner by suspending the Tribunal as the Treaty invests them with no such power. The suspension of the body furthermore ought not to have had any impact on the decisions that had already been rendered[30].

[26] De wet (note 19 above) 4
[27] De Wet (note 19 above) 14.
[28] The Declaration and Treaty establishing the Southern African Development. Community 1993
[29] De Wet (note 19 above) 15.
[30] De Wet (note 19 above) 15.

4.3.1.2 Amendment to Annex 1 of the SADC Investment Protocol

In terms of the 2016 amendment Article 25, investors may only legal recourse from domestic courts and tribunals[31]. Article 26 however sets out that disputes between State parties shall be resolved "in a manner provided for under the Tribunal Protocol[32]. This ultimately means that the SADC Finance and Investment Protocol only concerns itself with State-State arbitration and that natural and juristic persons many only turn to domestic institutions for legal redress. Following the *Zimbabwe v Campbell* case, South Africa had advocated for such a position to be taken claiming that the "perceived lack of transparency and legitimacy of the international arbitration process, conflicting arbitral jurisprudence, independence of arbitrators and the prohibitive legal costs associated with international commercial arbitration and excessive damages" were unsatisfactory"[33].

It is problematic that the SADC Finance and Investment Protocol even continues to refer to the SADC Tribunal as a plausible dispute resolution channel following the *Zimbabwe v Campbell* case in which the Member States by acquiescing to Zimbabwe's demands agreed that the body was illegitimate. No judges have furthermore been appointed to the Tribunal since its suspension in 2011.

By only allowing SADC investor legal recourse through domestic tribunals and courts the leaders of SADC have displaced their intention to highly guard their right to self-regulation by removing the possibility of third party review of their domestic policies. This would be satisfactory if all the Member States had strong and credible histories of adherence to the rule of law and thus trustworthy judiciaries however the case of Zimbabwe v Campbell has displayed that this is not the situation in all countries.

The definition of investors who may rely on the standards in the SADC FIP is also problematic, as the 2016 amendment narrowed this definition from including "any person who has been admitted to make an investment" to now reading that an investor refers to "a natural or a juridical person of another State Party, in

[31] SADC Agreement Amending Annex 1 (Co-operation on Investment) of the Protocol on Finance and Investment Article 25.

[32] SADC Agreement Amending Annex 1 (Co-operation on Investment) of the Protocol on Finance and Investment Article 26.

[33] Kondo T "A Comparison with Analysis of the SADC FIP before and after Its Amendment "PER / PELJ 2017(20) 2.

accordance with the laws and regulations of the State Party in which the investment is made"[34]. Consequently, this regulation only applies to intra-SADC investments.

The Amendment of the standards of protection contained in the 2016 Amendment are reflective of the desire by SADC States to limit their liability to investors. For example, Article 5(1) of the 2016 Amendment changes the standard of compensation following expropriation from "prompt, adequate and effective" compensation under the 2006 agreement to a more cautious "fair and adequate" standard[35]. The compensation must no longer be promptly paid out which could be fitting within the liquidity crisis being faced in some SADC member States. The Investment host may actually pay out the compensation in annual installments over a three year period or an extend period commonly agreed upon ,in the event of burdensome payments[36].

The Standard of Fair and Equitable Treatment is discarded in the 2016 Amendment perhaps because there no established legal determination of the scope of this standard. Instead now investors are subjected to domestic treatment[37]. Fair and Equitable Treatment has been one of the most commonly evoked grounds for claims against States and SADC States should thus be applauded for the removal of this vague standard of treatment. UNCTAD has even noted that the broad nature of this standard is a risk to even legitimate governmental policy making[38].

It notable that despite the aversion to International Arbitration depicted by SADC Member States in the 2016 Annex, individual States continue to conclude BITS that subscribe to the ISDS system thus depicting severe policy incoherency within the region and further necessitating the harmonization that the AfCFTA could bring though the Investment Protocol. An example of an Agreement entered into by a SADC State includes the Agreement Between the Government of Japan and The

[34] SADC Agreement Amending Annex 1 (Co-operation on Investment) of the Protocol on Finance and Investment Definitions.
[35] SADC Investment Protocol Article 5 2006; SADC Agreement Amending Annex 1 (Co-operation on Investment) of the Protocol on Finance and Investment Article 5(1).
[36] SADC Agreement Amending Annex 1 (Co-operation on Investment) of the Protocol on Finance and Investment Article 5(4).
[37] SADC Agreement Amending Annex 1 (Co-operation on Investment) of the Protocol on Finance and Investment Article 6.
[38] UNCTAD "Fair and Equitable Treatment" at 11-12 http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (accessed 5 November 2019

Republic of Mozambique On the Reciprocal Liberalization, Promotion and Protection of Investments[39].

The policy incoherence within SADC thus encourages forum shopping with foreign investors aligning themselves with States whose policies are not adherent to Annex 1 and so continue to host broad standards of protection as well as subscribe to the ISDS system.

This discussion has highlighted the restrictive nature of the dispute resolution mechanisms contained in the SADC Finance and Investment Protocol. The regulation firstly only applied to SADC investors and goes on to scratch out the possibility of International Arbitration. The demise of the SADC tribunal due to pressure from Zimbabwe has highlighted that the functioning of regional dispute resolution mechanisms is partly reliant on the Member State's political will to ensure the enforcement of decisions as well as to sanction non-Compliance by other Member States.

4.3.2 COMESA

In 2007, COMESA concluded a COMESA Common Investment Area Agreement (CCIA Agreement) which was subsequently revised in 2017[40]. Dispute settlement is addressed in part 3 of the CCIA Agreement.

Investor-state dispute settlement in terms of the CCIA Agreement is available only to COMESA investors. Article 1(4) of the Agreement an investor is "a natural or juridical person of a Member State, making an investment in another Member State, in accordance with the laws and regulations of the Member State in which the investment is made"[41]. A natural person is defined as a person having lawful citizenship in a COMESA Member State whilst a juridical person refers to a legal

[39] The Agreement Between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments (date of signature 17 May 2013, in force 09 December 2013) http://investmentpolicyhub.unctad.org/Download/TreatyFile/636 (Date of use: 5November 2019); Agreement Between the Government of Japan and The Republic of Mozambique On the Reciprocal Liberalization, Promotion and Protection of Investments, (date of signature 01 June 2013, in force 29 August 2014) http://investmentpolicyhub.unctad.org/Download/TreatyFile/3114 (Date of use: 5 November 2019)

[40] COMESA Common Investment Area Agreement 2017.

[41] COMESA Common Investment Area Agreement 2017 Article 1(4).

enterprise that has been duly constituted or organized under the laws of a COMESA Member State[42]. If the juridical person is controlled or owned by a foreign national to the region, the investor must first establish a legally recognized form of business structure, subsidiary or branch in a COMESA Member State[43]. Furthermore, such an investor must comply with an ordinary "substantial business activity" test as it is applied in taxation disputes[44]

According to the CCIA Agreement Article 26 on negotiation and mediation, parties to a dispute are obligated to attempt to resolve their disputes through cordial means during and before the specified cooling off period[45]. A cooling period of no less than 6 months must lapse between the date of notice of intention to initiate a claim and the date a party may initiate the dispute[46]. If the parties are failing to agree on mutually amicable method of dispute resolution during this 6-month time frame, a party to the dispute is obliged to request the assistance of a mediator[47]. If the parties reach mid-way through the cooling off period without agreeing on a mediator, the President of the COMESA Court of Justice shall appoint such a mediator for the Secretariat's list[48]. The mediation process does not alter the cooling off period requirement and if the parties to a dispute accept a mediation ruling it is immediately enforceable between them[49]. This procedure is innovative in that it places Alternative Dispute Resolution at the center of investor-state dispute resolution[50]. It also allows parties time to reconsider their positions before opting for arbitration which could serve to decrease the instances of frivolous litigation[51].

If the negotiation and mediation attempts fail, then arbitration may be instituted in accordance with Article 28 of the CCIA[52]. The parties however must adhere to a prescription period of three years[53].

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[42] COMESA Common Investment Area Agreement 2017 Article 1(4).
[43] COMESA Common Investment Area Agreement 2017 Article 1(4)
[44] COMESA Common Investment Area Agreement 2017 Article 26.
[45] COMESA Common Investment Area Agreement Article 26.
[46] COMESA Common Investment Area Agreement Article 26.
[47] COMESA Common Investment Area Agreement Article 26.
[48] COMESA Common Investment Area Agreement Article 26.
[49] Muchlinski P "The COMESA Common Investment Area: Substantive Standards and Problems in Dispute Settlement" (2010) SOAS University of London Law Working Papers 13.
[50] Muchlinski (note 49 above) 13.
[51] Muchlinski (note 49 above) 13.
[52] COMESA Common Investment Area Agreement Article 28.
[53] COMESA Common Investment Area Agreement Article 28.

The CCIA allows investors a choice of forum when initiating claims against host State's inclusive of, the domestic court of the host State, ICSID arbitration, ICSID Additional Facility Rules or ad hoc arbitration under the UNCITRAL rules or any other arbitration institutions rules[54]. The agreement holds a "fork-in the road" clause which means that once an investor has selected one channel of dispute resolution he may not rescind this decision on the same matter[55].The CCIA makes provision for host States to bring counter claims against investors, either as a defense, right of set-off of as a counter claim[56].

Article 28 establishes "arbitration without privity" which concept stipulates that Each Member State consents to the submission of a claim to arbitration under this Agreement in accordance with its provisions. Each investor, by virtue of establishing or continuing to operate or own an investment subject to this Agreement, consents to the terms of the submission of a claim to dispute resolution under this Agreement if he exercises the right to bring a claim against a Member State under this Agreement[57]. What this means is that each Contracting State to the CCIA makes an individual offer of arbitration which the investor accepts by making the choice to use one of the listed arbitration channels.

The CCIA also makes provision for the home State of a COMESA investor to bring a claim on behalf of its national when "the respondent has breached an obligation under the [CCIA Agreement], and the claimant investor has incurred loss of damage by reason on, or arising out of the breach[58]". This provision appears to be a return to diplomatic protection however given the uncertainty that surrounds this method of dispute resolution mechanism, it is unlikely that this provision will be widely made use of. There is thus no need for prior agreement between disputing parties for arbitration to be used.

The CCIA addresses the concern of lack of transparency in the ISDS system in Article 25 by demanding that all documents related to the arbitration process and open hearings be made publicly available except where it is necessary to protect

[54] COMESA Common Investment Area Agreement Article 28.
[55] COMESA Common Investment Area Agreement Article 28.
[56] Muchlinski (note 49 above) 13.
[57] COMESA Common Investment Area Agreement Article 28.
[58] Muchlinski (note 49 above) 12.

confidential business information[59]. The arbitration process is furthermore open to submissions by friends of the court or *amicus curia,* however this provision operates at the Tribunals discretion[60]. Finally, the Contracting States commit to ensure that all arbitral awards are enforceable in their territory[61].

The lessons that can be drawn from the CCIA include the viability of dispute diffusion through negotiation and mediation rather than arbitration which could avert the exorbitant costs of the arbitral process. The CCIA much like the SADC FIP is only available to intra-regional disputes which could indicate a trend on the continent. The CCIA unlike the SADC FIP however provides clearer guidelines to the definitions of natural and juridical persons. The CCIA continues to subscribe to the international arbitration of investment disputes system however the mandatory cooling off period is a useful innovation to the use of the system. Lastly, the CCIA addresses the transparency concerns of many African States with the ICSID system by mandating the availability of relevant documents. Overall the CCIA displays that it is possible for African countries particularly through their REC's to continue to subscribe to the current ISDS regime which makes use of international arbitration and simultaneously address their concerns with the system.

4.3.3 ECOWAS.

In 2008, the Economic Community of Western African States (ECOWAS) established a model law on investments. This legal instrument came into effect on 19 January 2009. Dispute resolution is addressed in Chapter VIII of this Agreement[62].

An aggrieved party must initiate the dispute resolution process by issuing a notice of intention to the respondent in the matter, however a cooling period of six months is prescribed between the date of such notice and the initiation of any such dispute resolution mechanism[63]. During this cooling off period Member State are obliged to resolve the dispute amicably through the use of conciliation, mediation or any other agreed Alternative Dispute Resolution Mechanism agreed upon by the parties. In the

[59] COMESA Common Investment Area Agreement Article 28.
[60] COMESA Common Investment Area Agreement Article 28.
[61] COMESA Common Investment Area Agreement Article 28.
[62] Supplementary Act ASA/…/…07 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS.
[63] Supplementary Act ASA/…/…07 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS Article 31.

case that the first three months of the cooling off period have expired and no mediator has been selected by parties, a mediator who is from a non-party State to the dispute will be appointed[64]. Member states at their discretion may set up national mediation centers to facilitate the amicable resolution of disputes however this provision is non-obligatory. If at the expiration of the cooling off period no mutually acceptable resolution has been concluded, the aggrieved party may initiate an arbitral process via a national court, any national institution for the resolution of dispute, the relevant national court of the Member State[65]. If the disputing parties fail to agree on the method of dispute settlement to be employed, the dispute shall be referred to the ECOWAS Court of Justice to the exclusion of all other competent bodies[66].

In an effort to balance the rights and investors, Article 18 of the Act provides some scenarios under which an investor shall be precluded from using these dispute resolution channels, or his actions can be used as a defense by a host State in any ensuing dispute resolution processes[67]. For example, where it is declared by a court or competent jurisdiction within the Host State that an investor has breached the Act's Anti-corruption Article, the investor in question shall be precluded from initiating any dispute settlement process established in the Act[68]. Such transgression may also be raised as a jurisdictional objection in any ensuing dispute. In the event that a host State or an intervener in a dispute allege that an investor has failed to comply with his obligations with regards to the carrying out of pre-establishment assessments, the body hearing such dispute shall adjudicate on the materiality of such breach, if proven and its consequent effect on any claim by the investor[69]. Where either a host State or a home State is of the opinion that an investor has breached the Anti-corruption Article or repeatedly failed to meet its Corporate

[64] Supplementary Act ASA/…/…07 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS Article 31.
[65] Supplementary Act ASA/…/…07 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS Article 31.
[66] Supplementary Act ASA/…/…07 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS Article 31.
[67] Supplementary Act ASA/…/…07 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS Article 18.
[68] Supplementary Act ASA/…/…07 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS Article 18.
[69] Supplementary Act ASA/…/…07 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS Article 18.

Governance or Post-establishment obligation and such breach has been brought to the attention of the investor, the home or host State may initiate proceedings before a competent Tribunal in terms of this Act against such an investor[70]. Member States are granted the right to institute a counterclaim where any Provision of the Act has been breached and furthermore, in accordance with the relevant domestic law, a host State, private individual or organization may claim damages under the domestic law of the host or home State where the cause of action arises as a result of the conduct of an investor in breach of his obligations set out in this Act[71].

An investor in this Agreement refers to a company or individual of an ECOWAS Member State or a company that is in the process of making an investment or has already invested in an ECOWAS Member State[72]. This definition is clearly wider than the one contained in both the CCIA and the SADC FIP, as it makes allowance for companies that are not necessarily incorporated in an ECOWAS Member State to seek legal cover[73]. Article 34 declares the openness of all oral hearings however all documents relevant to the dispute resolution process shall only be accessible by the parties to the dispute[74].

This Act's most innovative features include the exclusion from access to dispute resolution of investors who are in breach of their fundamental obligations such as to not engage in corrupt practices as well as to observe corporate governance rules. The region has trough this Act disengaged with international arbitration and recourse may only be sought from member State institutions or the Regional Court. It is interesting that the act allows for private individuals and organizations from either the home or host state to claim damages from the breach of an investor's obligations. It is commendable that all oral submission hearings are open to the public which could increase the perceived and actual transparency of the system.

[70] Supplementary Act ASA/…/…07 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS Article 18.
[71] Supplementary Act ASA/…/…07 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS Article 18.
[72] Supplementary Act ASA/…/…07 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS Article 1.
[73] Supplementary Act ASA/…/…07 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS Article 1.
[74] Supplementary Act ASA/…/…07 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS Article 34.

4.3.4 EAC Model Investment Code

The EAC Model Investment Treaty was adopted in February 2016 and its main purpose is to serve as a guide to Member States of the features they might consider incorporating into their individual domestic laws[75]. The overall aim of the Model is to improve the conditions of doing business in the region as well as to harmonize the binding legal policies and laws within the region[76]. "It seeks to facilitate the adoption of transparent, predictable regulations and laws for investors, especially in matters relating to compensation for loss of investment and dispute settlement mechanisms"[77].

Part three regulates dispute resolution and Article 21 specifically provide that in instances where an investor is alleged to have contravened its obligations under this, agreement or any other relevant domestic or international rules, the body adjudicating any arising dispute shall assess the materiality of such a breach and assess its impacts on the claim made by the investor[78]. A State may also initiate a counterclaim in the event of a breach of any treaty obligation by the investor. Private individuals, organizations my claim damages through civil actions where an investor is alleged to have breached his Treaty obligations.

This Treaty makes primary provision for State- State dispute resolution. It is however encouraged that any ensuing disputes concerning either the application or interpretation of the treaty, be resolved through "consultations, good offices, mediation, conciliation" or any other mutually agreed upon resolution mechanism. If at the expiration of a 6-month period, a dispute remains unresolved it may be referred to an arbitral tribunal[79]. Such tribunal must be approached within 3 years of the arising if the cause of action and will conduct itself in terms of the ICSID or UNICITRAL rules, at the agreement of the parties[80]. All documents relevant to any such arbitration are to be made available to the public with the reduction of sensitive

[75] The East African Community Model Investment Code 2016.
[76] The East African Community Model Investment Treaty 2016 Preamble.
[77] Chidede T "The Right to Regulate in Africa's International Investment Law Regime" LLM Thesis 2017 The University of the Western Cape.
[78] The East African Community Model Investment Treaty Article 21.
[79] The East African Community Model Investment Treaty Article 26.
[80] The East African Community Model Investment Treaty Article 27.

material. All oral submissions shall also be open to the public[81]. Amicus curia shall be granted personal jurisdiction in any arising arbitration matters[82].

It is the preferred approach of the EAC to not include the possibility of Investor-State arbitration but where a State decided to go that route, very stringent propositions have been put forward. Only the most salient features in this regard will be discussed. As is the emerging trend on the continent the amicable resolution of disputes is encouraged before recourse is taken to arbitration. The treaty also provides for a six-month cooling off period. The investor in order to qualify for arbitration must either prove that he has exhausted all domestic remedies or that the relief he seeks may not reasonably be granted through the use of domestic channels. By so appealing for the use of arbitration, the investor waivers his right to pursue relief through the domestic courts or any other institution accept the one he has approached. The arbitration rules available to the investor include the ICSID Rules, ICSID Additional Facility Rules, The UNICITRAL Rules and the East African Court of Justice. The treaty sets out rules aimed at managing arising conflicts of interest by arbitrators. Provision is also made for submissions by non-disputing parties as well as amicus curia, at the discretion of the adjudicating tribunal. Finally the Treaty envisages the creation of an appellate body to review any award granted in the initial arbitration, subject to a separate agreement by the disputing parties.

The most novel feature of this model law is the envisaging of an appellate body. This can be seen as a direct response to the fears of many African States of entrusting matters of national importance to an arbitral body of 3 persons, whose awards can only be challenged in limited circumstances.

4.4 Regional Investment Code

4.4.1 The Pan-African Investment Code

The African Union developed a continental investment code of a non-binding nature. This instrument is known as the PAN-African Investment Code (PAIC)[83]. Among the Code's aims are to rebalance the investment regime that protects and promotes investment on the continent whilst allowing States sufficient regulatory space.

[81] The East African Community Model Investment Treaty.
[82] The East African Community Model Investment Treaty.
[83] African Union Commission [AUC], Draft Pan-African Investment Code (Dec. 2016), https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf [hereinafter Draft Pan-African Investment Code]

In terms of dispute resolutions, States are granted the discretion to subscribe to either investor-state dispute settlement without categorically abandoning the system. It has been said that the PAIC offers a middle ground.

Article 41 regulates State- State dispute resolution and encourages Member States to resolve disputes through alternative dispute resolution methods such as conciliation and mediation[84]. Arbitration under this Code is to be conducted "at any established African public or African private alternative dispute resolution center or the Permanent Court of Arbitration centers in Africa[85]."

Article 42 regulates Investor-State dispute resolution and finds that "disputes arising between investors and Member States under the specific agreements that govern their relations shall be resolved under those agreements[86]." The PAIC also encourages investors and Member States to initially endeavor to resolve their disputes through consultations and negotiations or even non-binding mediation. Should these channels fail and at the expiration of 6 months, parties may resort to the use of arbitration in accordance with the laws of the host state and adhering to any mutual agreements between the parties as well as the exhaustion of local remedies. Where arbitration is made use of, it may be conducted at "any established African public or African private dispute resolution center or Permanent Court of arbitration centers in Africa (or the African Union Court of Arbitration) or African regional court where applicable[87]. This Arbitration will be conducted in accordance with the UNCITRAL rules[88]. According to Article 46, the selection of any one forum of dispute resolution, shall exclude all others. The decision of any particular forum will be deemed as final[89].

The PAIC mirrors the provisions in many regional Codes. A striking feature is its preference for State-State dispute resolution without necessarily ruling out the possibility of ISDS. This is indicative of the compromises that had to be made towards the creation of a code acceptable to 54 States. Where the ISDS system is

[84] Draft Pan-African Investment Code Article 41.
[85] Draft Pan-African Investment Code Article 41.
[86] Draft Pan-African Investment Code Article 42.
[87] Draft Pan African Investment Code Article 42.
[88] Draft Pan-African Investment Code Article 42.
[89] Draft Pan African Investment Code Article 42.

used arbitration can only be conducted in African institutions thereby excluding international institutions but keeping their rule frameworks.

The language of the PAIC through the use of words such as shall and may is reflective of its non-binding nature. At the outset of the negotiation of this Code it was the drafter's intention to establish a binding instrument that would replace the existing framework of intra-African investment agreements. The PAIC is however still of importance as it forms part of the continental Agenda 2063 framework which seeks to establish a "coherent strategic framework for development, whose foundation is the promotion of more inclusive and sustainable growth and serves as an engine for structural transformation on the continent[90]." The PAIC can thus serve as a building block towards the creation of a more binding and comprehensive framework that will give Africa one voice on the matter, through the AfCFTA Investment Protocol.

4.5 Conclusion

This chapter has mapped the most significant and comprehensive regional investment protocols currently in operation within the African continent. Some of the key lessons that can be learnt towards the creation of a continental investment protocol include that firstly, Member States must have the political will to ensure the functioning of any such institutions. This lesson was learnt through the SADC Tribunal's dissolution. Good institutions may exist however if they are not vested with any real enforcement powers and the Member States leaders will not champion implementation amongst each other, these institutions will serve no real purpose.

From the experiences of the CCIA and ECOWAS Act it can be deduced that it is possible for African States to remodel the current ISDS system in order to address their primary grievances, for example by including chapters with strong investor obligations which are furthermore easily enforceable.

The EAC Model treaty as well as the ECOWAS Act and CCIA display the importance of attempting to diffuse disputes through alternative methods such as conciliation, mediation and consultations before the financially taxing arbitration channel is initiated. The compulsory cooling off periods in this Treaties is indicative of African

[90] African Union Agenda 2063: The Africa We Want.

States willingness to avoid arbitration where it is not necessary which is an innovative modification of the ISDS system.

There is no consensus on the continent on the abolition of international arbitration. COMESA envisages the use of International Arbitration seats whereas the other groupings including the PAIC will allow only the use of their arbitration rules but arbitration must take place on the continent for example at the Nairobi Centre for International Arbitration (NCIA), which is not common practice on the continent. There is also a growing trend of using Regional Human Rights Courts as investment tribunals[91].

It appears as though African States through the regional policies have a preference for State-State dispute resolution, allowing ISDS only as an alternative albeit one that is not highly recommended.

The EAC's position on the viability of an appellate mechanism subject to an agreement between the disputing parties is a novel feature not yet witnessed elsewhere on the continent. Much can be learnt from this position in the drafting of the AfCFTA.

Overall, although many common trends can be identified in the policies of these sub-Saharan regional groups, there is not yet a coherent African position, for example on the use of ISDS or the use of international arbitration. This could be the reason behind the PAIC's non-binding nature and attempt to accommodate all positions. In order to harmonize the investment laws on the country the AfCFTA Investment protocol must reconcile these positions and emerge with one policy or risk the fate of the PAIC and become yet another non-binding and merely suggestive document with no real political or legal power. This however requires sensitive negotiations and the making of compromises for the Continents greater good.

[91] Pan-African Investment Code 2016 Article 42.

5. Introduction

Thus far, this research has traced the current investment dispute resolution subsisting on the continent, highlighting the most pertinent reservations held by African States with the system. The aim of this Chapter will now be to forward reform methods that will best address the concerns that have been raised through this research. The key concerns of African States can be briefly summarized as being the high costs of arbitration at an international forum, a lack of consistent arbitral judgments due to the ad hoc nature of International investment arbitration, a lack of transparency in the system and finally the marginalization of African adjudicators within the system.

Nyombi proposes that the AfCFTA negotiators consider replacing the continents several arbitral tribunals with a sole continental investment court[1]. He expects that African States would be open to this as it reflects their common view that private arbitration is not the best channel to settle matters that deal with national public policies[2]. A permanent court would enhance the independence of the ISDS system as the impartiality of judges can be better secured through their set tenures. A permanent court would also be more capable of handing down consistent judgements and would save time from the sometimes complex process of appointing ad hoc arbitrators. Nyombi's proposal is for this court to initially hear investment disputes between AfCFTA members but it could also be worked into future African Investment treaties. Such a structure "would eradicate the foregoing practice where individual countries negotiate complex and confusing BITs, leaving themselves exposed to varying claims"[3].

Before analysing Nyombi's specific proposal this research will analyse the European Union's manifestation of a Permanent Investment Court as it is presented in the EU-Vietnam Investment Protection Agreement. Although this new European system is yet to be tested in practice the provisions agreed upon could serve a viable starting

[1] Nyombi C "A Case for a Regional Investment Court for Africa" (2018) 43 N.C. J. Int'l L. 100.
[2] Nyombi (note 1 above) 100.
[3] Nyombi (note 1 above) 101.

point as well for the AfCFTA. This proposal is currently at the centre of the EU's own ISDS reform agenda. In 2015, the EU announced its intention to replace ISDS through international arbitration channels with a permanent investment court[4]. This court would contain an appellate division and be composed with publicly appointed judges with qualifications akin to those of the members of the WTO's appellate body or the judges of the International Court of Justice[5].

5.1 EU-Vietnam Investment Protection Agreement

On the 30th of June 2019 the EU and Vietnam signed a comprehensive Free Trade Agreement as well as an Investment Protection Agreement[6]. The Investment Protection Agreement creates a permanent, fully independent Investment Tribunal System for the resolution of disputes[7].The dispute resolution chapter of the EU-Vietnam Investment Protection Agreement will thus be studied so as to ascertain the viability of this system for the AfCFTA's own Investment Chapter.

5.1.1The Dispute Resolution Process

Chapter Three of the Eu-Vietnam Investment Protection Agreement address the resolution of disputes, citing negotiation, consultation and mediation as the initial means by which parties shall endeavour to seek the amicable resolution of investment disputes[8]. At expiration of a six month period from the submission of a consultation request, and at least three months have passed since the submission of a notice of intention to submit a claim as provided in Article 3.32, a claimant is permitted to submit a claim to the Tribunal established in Article 3.38[9]. According to Article 3.34 a claimant is prohibited from submitting a claim to the Tribunal if he already has a pending claim before "any other domestic or international court or tribunal concerning the same measure …. and the sae loss or damage unless the claimant withdraws such pending claim[10]". By submitting a claim to the Tribunal a claimant further waives the right to submit the same claim to another tribunal in the

[4] Nyombi (note 1 above) 101.
[5] Nyombi (note 1 above) 101.
[6] European Commission New Archives "EU-Vietnam trade and investment agreements" [assessed at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437 on 1 November 2019].
[7] European Commission New Archives "EU-Vietnam trade and investment agreements" [assessed at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437 on 1 November 2019].
[8] Eu-Vietnam Investment Protection Agreement 2018 Article 3.2.9.
[9] Eu-Vietnam Investment Protection Agreement 2018 Article 3.33.
[10] Eu-Vietnam Investment Protection Agreement 2018 2018 Article 3.38 sub-paragraph 1.

future[11]. A claimant must commence the initial consultation process within three years since he first became aware of the complained measure by the host State or within two years after he ceased to pursue the claim under domestic law but a total of no more than seven years after he first became aware of the measure[12]. An exemption from these prescription periods will be granted where the measure at had impeded the claimant from initiating any of the trigger processes[13]. The exhaustion of local remedies is not listed as a pre-condition for the request for consultation under this Agreement.

5.1.2 Structure or the Dispute Resolution Mechanism

Sub-paragraph 2 of Article 3.8 provides for the composition of the Investment Tribunal, which is to be composed of nine members and "three of the members shall be nationals of a Member State of the Union, three shall be nationals of Vietnam and three shall be nationals of third countries[14]. This number may be increased or decreased by multiples of three, with additional appointments being made on the same basis[15]. The members of the Tribunal shall be appointed for a period of 4 years renewable once[16]. The competent Committee responsible for the installation of these members is inclusive of "the European Commission, the European Court of Justice as well as are the Government of Vietnam or the Prime Minister of Vietnam, an administration, authority or a court[17]. The Tribunal is to hear cases in divisions constituted by three members consisting of one national of a Member State of the European Union, one national from Vietnam and a national from a third country who will also chair the division[18]. The President and the Vice-President of the Tribunal are tasked with arranging the organisational issues surrounding the functioning of the Tribunal and they shall be drawn by lot form the list of Tribunal members who are nationals of third States to the Agreement[19].

With regards to the remuneration of the members of the Tribunal as well as any other costs arising from the functioning of this court, both Parties to the Agreement

[11] Eu-Vietnam Investment Protection Agreement 2018 Article 3.38 sub-paragraph 4.
[12] Eu-Vietnam Investment Protection Agreement 2018 Article 3.38 sub-paragraphs 2 and 3.
[13] Eu-Vietnam Investment Protection Agreement 2018 Article 3.38 sub-paragraphs 6.
[14] Eu-Vietnam Investment Protection Agreement 2018 Article 3.38 sub-paragraph 2.
[15] Eu-Vietnam Investment Protection Agreement 2018 Article 3.38 sub-paragraph 3.
[16] Eu-Vietnam Investment Protection Agreement 2018 Article 3.38 sub-paragraph 5.
[17] Eu-Vietnam Investment Protection Agreement 2018 Chapter 4 Annex 1.
[18] Eu-Vietnam Investment Protection Agreement 2018 Article 3.38 sub-paragraph 5.
[19] Eu-Vietnam Investment Protection Agreement 2018 Article 3.38 sub-paragraph 8.

shall be jointly liable, "taking into account their respective level of development[20]." The arbitrators are to be paid a retainer fee whose cost shall be shared by the Parties[21]. They are also to be paid for each day of work they complete and the adjudicators fees and expenses are to be assumed by the unsuccessful party to the matter, with the possibility of an apportionment between the Parties in exceptional circumstances[22].

Article 3.39 of this Investment Agreement establishes a permanent court of appeal, composed of sis Tribunal members with two being nationals of the Member States of the European Union, two being nationals of Vietnam and two being nationals of third States[23]. The technicalities surrounding the functioning of the appeals Tribunal are similar to those of the Tribunal of first instance particularly with regards to the tenure, financing and organisational structure of the court[24].

5.1.3 Applicable Law and Rules of Interpretation

A notable feature of Article 3.42 is that both the Tribunal and the Appeal Tribunal shall be bound by interpretations of domestic law rendered by the competent courts of the State in question and furthermore that any decision made by the Tribunal on the domestic laws of any State shall not be binding on the courts of that State[25]. The reasoning behind this section may be to ensure that the interpretation of domestic laws is left to the discretion of a body with a holistic understanding of the purpose and purport of domestic laws which is to be applauded however the provision binds the tribunal to decisions that are possibly biased in favour of the Investment Host State which particularly a risk in States with poor rule of law. The ICSID Secretariat is to be the administration body of this Tribunal[26]. Furthermore the ICSID or UNICITRAL rules may be used in the submission of a claim to the Tribunal[27].

5.1.4 Enforcing the ruling

Once a final award has been rendered, such award will be binding between the Parties to the agreement as though it was rendered by a competent court in the

[20] Eu-Vietnam Investment Protection Agreement 2018 Article 3.38 sub-paragraph 15.
[21] Eu-Vietnam Investment Protection Agreement 2018 Article 3.38 sub-paragraph 16.
[22] Eu-Vietnam Investment Protection Agreement 2018 Article 3.38 sub-paragraph 16.
[23] Eu-Vietnam Investment Protection Agreement 2018 Article 3.39.
[24] Eu-Vietnam Investment Protection Agreement 2018 Article 3.39.
[25] Eu-Vietnam Investment Protection Agreement 2018 Article 3.42 sub-paragraph 3.
[26] Eu-Vietnam Investment Protection Agreement 2018 Article 3.38 sub-paragraph 18.
[27] Eu-Vietnam Investment Protection Agreement 2018 Article 3.42.

Party's courts and shall not be subjected to appeal, annulment or any other remedy[28]. Where Vietnam appears as the respondent in a matter however, the recognition and enforcement of an award shall be conducted in terms of the New York Convention of 1958 and in that instance the award may be appealed or challenged through other remedial processes[29]. Only after the expiry of a five year or extended period will final awards in which Vietnam in the respondent be treated as though they have been rendered by a domestic Vietnamese court and will they cease to be reviewable[30]. This provision may have been put in place in recognition of Vietnam's weak judicial institutions which may be unable to sufficiently facilitate the enforcement of the Tribunal's awards.

5.1.5.Preliminary Comments

Although the EU's proposal has been marketed and presented as being a court system the language and formulation of the Tribunal are indicative of it being a permanent Arbitral system. In many ways it continues to mirror the subsisting ISDS system characterised by three arbitrators hearing cases. The fact that the ICSID system will serve as the Secretariat of this body and the ICSID and UNICITRAL rules apply to proceedings is indicative of the EU's proposals close affiliation with the subsisting ISDS system thus not being a departure from the status qou except in name.

The EU proposal issues out supposed "final court awards" but in the case of the Vietnamese Agreement these are to be enforced through the New York Convention of Arbitral Awards, which raises the question of the New York Conventions ability to enforce court awards.

The EU's approach's close affinity with ICSID and UNICITRAL also poses a threat of running up the costs of the functioning of the system due the independent and somewhat exorbitant administration fees of this body.

Ngobeni notes the proposals silence on the Tribunals ability to follow a system of precedents. As one of the main legitimacy concerns with the ISDS system is that of inconsistent judgements by ad hoc tribunals, it is not clear how this concern is lulled

[28] Eu-Vietnam Investment Protection Agreement 2018 Article 3.57.
[29] Eu-Vietnam Investment Protection Agreement 2018 Article 3.57 sub- paragraph 3.
[30] Eu-Vietnam Investment Protection Agreement 2018 Article 3.57 sub- paragraph 4.

in this proposal and as such it will likely continue to subsist[31]. He further notes the proposals inability to address issues of gender representation on the appointment of judges to the court.

5.2 Nyombi's Proposal for a Regional Investment Court

The design of a Regional Investment Court will play a critical role towards its success. AfCFTA negotiators would have to learn from the failings of the SADC Tribunal on how to structure a Court that will withstand the political agendas of Member States. The failures of other multilateral dispute settlement bodies such as the WTO's appellate body's crisis following the USA's refusal to reappoint any judges, could also be useful learning curves with regards to the appointment of judges[32]. A viable modelling structure however is the ICJ. Nyombi's proposal would be constituted as a Tribunal or first instance as well as an Appellate Chamber[33]. This would quell the fear of many African States of the finality of arbitral decisions as any decision could be revisited. This Appellate body could be modelled against the WTO Appellate and would go a long way in ensuring the predictability and consistency of investment judgments[34].

Second to the question of structure, is that of jurisdiction. The jurisdiction of a regional investment court must be based on mutual agreement by contracting parties on a multilateral basis, bilateral treaties, and notifications or on a case by case submission to its jurisdiction[35].

In its functioning, the court would need to establish its own rules of arbitration, conciliation and mediation as well as accompanying codes on ethics and management rules[36]. The REC's on the continent have gone a long way in drafting Africa-specific codes on arbitration practice and a harmonized version of these could serve as the backbone of the Court. In this regard, one recalls ECOWAS's anti-corruption code as well as the code on investor obligations post establishment and their various impacts on the dispute resolution process. The compulsory cooling off

[31] Ngobeni T "A Critical Analysis Of The Security Of Foreign Investments In The Southern African Development Community (Sadc) Region" LLD Thesis 2018 243.
[32] Nyombi (note 1 above) 101.
[33] Nyombi (note 1 above) 101.
[34] Nyombi (note 1 above) 102.
[35] Nyombi (note 1 above) 102.
[36] Nyombi (note 1 above) 102.

periods in several regional investment codes are also called to mind as are the EAC's extensive arbitration rules.

Judges sitting in this proposed African Investment court would have to be publicly appointed on a rotational basis in terms of the AfCFTA's Member States and cases could be assigned on a random basis firstly so that disputing parties play no role in their appointment and also that judicial review of decisions can be facilitated if judges handle different cases[37]. According Article 14(1), Section 3, EU-Vietnam Investment Chapter, once a judge is appointed to a case he would have been prohibited from being affiliated with his government[38]. The arbitrator is further prohibited "from acting as counsel or as party-appointed expert or witness in any pending or new investment protection dispute under this or any other agreement or domestic law"[39]. This could be a useful innovation for an African court so as dissuade judges from having any personal influence or motives in their judgements.

5.2.1 Final Comments on the Court Proposal

Drawing insights from both Nyombi's proposal and the details on the EU's Investment Court System that one can reasonably deduce that Nyombi was inspired by, one can identify some salient features that prove that this mechanism is not well suited for the continent. However before drawing on the weaknesses it is necessary to mention some innovative features of the system. Firstly, it can be argued that the systematic appointment of arbitrators by the Parties in contrast to the ad hoc appointment in the subsisting ISDS system, would give State Parties greater control to the system and this could assist in solving the legitimacy crisis faced by the current ISDS system as discussed earlier. Furthermore, having nationals of the State parties on the adjudicating tribunal as framed in the EUs system would further resolve the legitimacy crisis faced by the ISDS system as now States will be assured that disputes are adjudicated by individuals who understand the sensitivities of not only their laws but also the prevailing socio-economic conditions surrounding investment in the countries. Lastly as African States are concerned by the high costs of the dispute resolution under the prevailing ISDS system, the "loser pays" principle as it is forwarded by the EU could serve to deter frivolous litigators. The fact that Nyombi, suggests the imposition of an appeals body is also a great strength to this

[37] Nyombi (note 1 above) 102.
[38] EU-Vietnam Investment Chapter Article 14(1) Section 3.
[39] EU-Vietnam Investment Chapter Article 14(1), Section 3.

reform proposal as it would allow for easier access to judicial recourse where a party feels that a judgement has been erroneously granted in comparison to the limited circumstances under which cases may be reviewed within the prevailing ISDS system. His proposal like the EU's fails to address the question of how a system of precedent is to be established within the courts functions. As the lack of judicial accountability and the inconsistent awards of the subsisting ISDS system were a critical reason for the call for reform it is notable that this proposal does not address this issue. Nyombi's proposal also mirrors the EU's proposal in that it takes in the name of a court and yet continues to function much like an Arbitration Triibunal.

This writer is however of the overall opinion that this court system is not well suited to the African context. This court system remains biased in favour of large investors who are able to bear the high costs of International Arbitration and the possibility of having to bear the costs of one's opponent in the event of an unsuccessful claim heightens the financial risk to small and medium enterprises which mainly populate African economies. African States would either have to undergo the costly experience of establishing a continental Secretariat for the administration of the courts process or broaden the mandate of one of the existing inter-continental courts such as the "African Court on Human and People's Rights". A key problem with expanding the mandate of an already existing court to administrate investment disputes is that this is a highly specialised field and any such existing court would not possess the necessary competencies. Alternatively, like the EU proposal could host its Secretariat within the ICSID however the cost implications of this are high as has been discussed and the affiliation to the institutional could serve as a reputational risk to the new African body.

Furthermore, because of the State-centric nature of a court system, where arbitrators are appointed by State Parties to the foundational Agreement investors may feel that their interests are side-lined by this heavy Government involvement in the selection of arbitrators[40]. This is of particular concern as the State parties who appoint the judges are also the ones who are responsible for their remuneration which presents an avenue for a conflict of interest unlike in domestic systems where an independent judicial system is responsible for the appointment of judges. Overall this proposal

[40] Fallon R H "The Rule of Law as a concept in Constitutional Discourse (1997) The Columbia Law Review 97:1 2.

appears to take the extensive powers that have historically been granted to investors under the ISDS system and instead of redistributing it fairly between investors and States, places it solely with the State Parties.

5.3 An African Justice Scoreboard

After duly considering the benefits and shortcomings of the subsisting ISDS system, Ngobeni proposes a hybrid system that uses a justice scoreboard in order to determine which States have judiciaries that have strong enough judiciaries and rule of law track-records to hear investor-State disputes which a fair expectation of a fair and equitable ruling being handed down[41].

Ngobeni's proposal stems from due appreciation of the importance of domestic courts in the investor-State dispute resolution process, which have also been endorsed by the UNTCAD[42]. The ICSID Convention too does not exclude the jurisdiction of local courts by allowing that host States may as a pre-requisite to proving consent to the Centre's jurisdiction, require that an investor first exhaust local remedies.

Some of the advantages of using domestic courts include that, it affords foreign and domestic investors equal treatment in terms of the dispute resolution forums available to both classes of investors[43]. It can also be commonly agreed that domestic courts are better suited to interpret domestic legislation which is often the source of investment disputes as domestic legislation is drafted within nation-specific contexts and there are certain nuances that an international tribunal may miscomprehend[44]. Finally, the use of domestic courts encourages the development of the jurisprudence of a country as principles and laws are brought to the court for testing and members of the judiciaries are exposed to a wider range of complex cases. This is essential towards the improvement of a country's ability to protect the rule of law[45].

[41] Ngobeni L "The African Justice Scoreboard: a proposal to address rule of law challenges in the resolution of investor-state disputes in the Southern African Development Community" CILSA 2019 (1) 1.
[42] Ngobeni (note 41 above) 19.
[43] Ngobeni (note 41 above) 10.
[44] Ngobeni (note 41 above) 10.
[45] Ngobeni (note 41 above) 11.

The African Union has historically displayed its endorsement for the use of domestic courts as a forum of first instance[46]. For example, the African Charter states that human rights disputes must primarily be heard by local courts before their referral to the Commission. Furthermore, Agenda 2063 specifically aims to improve the rule of law perceptions of African judiciaries which can only be achieved through the constant use[47]

Portfield infers that the primary exhaustion of local remedies can be advantageous to both the courts of the host State and international arbitral tribunals[48]. In addition to improving the rule of law in host States, the use of domestic courts assists international tribunals by disposing of immaterial facts and narrowing down the dispute to its essence before the tribunal is approached[49]. Domestic courts are also in a better position to understand the relationship between the domestic law of a State and its international law obligations[50].

In terms of international law, which prevailed before the ISDS era, diplomatic protection was only available to an investor after he had exhausted all local remedies[51]. This principle has been enshrined in Article 14 of the ILC Articles on Diplomatic Protection. The basis for this rule was that where a host State was accused of having violated the rights of a foreign investor, that host State must have been given an opportunity to assess the claim within the context of its domestic legal system[52]. Article 15 of the ILC Articles on Diplomatic Protection acknowledge that the prior exhaustion of local remedies may not always be viable for example where "a) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;(b) There is undue delay in the remedial process that is attributable to the State alleged to be responsible[53]."

[46] Ngobeni (note 41 above) 14.
[47] Ngobeni (note 41 above) 15.
[48] Ngobeni (note 41 above) 15.
[49] Ngobeni (note 41 above) 15.
[50] Ngobeni (note 41 above) 16.
[51] Article 14 of the International Law Commission Draft Articles on Diplomatic Protection.
[52] Article 14 of the International Law Commission Draft Articles on Diplomatic Protection.
[53] Article 15 of the International Law Commission Draft Articles on Diplomatic Protection.

Realizing the co-dependence of ISDS and litigation in domestic courts, the retention of both mechanisms is the suggestion Ngobeni makes[54]. A natural question that however arises is how to determine which system to refer a dispute to. In the subsisting regime in which a dispute may be referred to international arbitration on a consensual basis has resulted in some States especially as learnt from the experiences of the ECOWAS and SADC REC's, withholding such consent. Domestic dispute resolution is also not without its shortcomings particularly in States with little reverence to the rule of law. Ngobeni suggests the establishment of a mechanism that will determine when a dispute is to be referred to a domestic court, independently of both the host State and the investor with due regard to the status of the rule of law in such a host State[55].He proposes that the African Union establish an "African Justice Scoreboard" (AJS) to govern the investment framework of the AfCFTA as part of the dispute resolution mechanism[56].

This scoreboard could be employed as an independent determiner of the circumstances under which an investment dispute should be referred to the courts of a host State and when the domestic courts should not be approached even as a court of first instance[57]. This system would differentiate between African countries such as South Africa whose judiciaries are capable of hearing disputes in a neutral and fair manner and those of countries such as Zimbabwe whose judiciaries are subject to the influence of local politics. Existing rule of law scoreboards, have found that some judicial institutions of some SADC Member States, "have challenges such as the lack of resources, poor rule of law, high litigation costs and the long delays in concluding cases[58]." What this means is that the compulsory referral of investment disputes in terms of Annex 1 of the SADC FIP may be prejudicial to investors.

The AJS will be different from traditional rule of law scoreboards in that as a treaty based institution, its declarations will be binding on all Member States and will also confer a legal right of enforcement on investors[59]. Such a scoreboard could be

[54] Ngobeni (note 41 above) 19.
[55] Ngobeni (note 41 above) 19.
[56] Ngobeni (note 41 above) 19.
[57] Ngobeni (note 41 above) 20.
[58] Ngobeni (note 41 above) 20.
[59] Ngobeni (note 41 above) 21.

comparable with the European Justice Scoreboard (EUJS) however the declarations of this scoreboard are not legally binding[60].

The African Peer Review Mechanism is a voluntary institution and is based on self-assessment[61]. Its findings are furthermore not of a binding nature. Its mandate is centered on the monitoring of democracy and political governance, economic governance and corporate governance as well as socio-economic development and not specifically the status of the rule of law[62].

Ngobeni references the Gaffney rule- of law scoreboard towards the structuring of the AJS[63]. The Gaffney model is treaty-based and models sovereign rating systems. The aim of the AJS much like the Gaffney scoreboard would be to "indicate whether there is a significant risk that the courts of a host State would not uphold the rule of law[64]." The Gaffney model also concludes that investment disputes be referred to the domestic courts of a host State unless there is reasonable doubt whether the investor will be given a fair hearing[65]. Schweider believes that this proposal is well suited for the African continent because it could reduce the transactional costs of international arbitration for both investors and the respondent State by providing investors with "reliable, free information regarding the rule of law status in the countries they wish to transact with[66]. States that improve their rule of law ratings will be able to bypass the controversial ISDS system through international arbitration and this possibility could incentive States with poor ratings to improve their positions[67].

In terms of the practical functioning of the AJS, Ngobeni suggests that indicators and correlating weightings be determined[68]. A threshold minimum score should be set in order for a Member States rule of law protections to be deemed satisfactory[69]. If a State achieves score above the minimum threshold, it will be deemed that its

[60] Ngobeni (note 41 above) 21.
[61] Ngobeni (note 41 above) 21.
[62] Ngobeni (note 41 above) 21.
[63] Ngobeni (note 41 above) 22.
[64] Ngobeni (note 41 above) 22.
[65] Ngobeni (note 41 above) 23.
[66] Ngobeni (note 41 above) 22.
[67] Ngobeni (note 41 above) 22.
[68] Ngobeni (note 41 above) 22.
[69] Ngobeni (note 41 above) 22.

judiciary is sufficiently reliable, transparent and able to uphold the rule of law and so an investor is obliged to make use of the domestic courts in dispute resolution[70]. In the event that a State achieves a score below the threshold, it shall be presumed that its judicial system is weak and the investor must be given access to international arbitration[71].

5.3.1 Comments

The AJS treaty must contain a "fork in the road provision to bind investors to the channel they have elected to use[72]. The reviews should be conducted by an independent actor such as a law or audit firm and not a political or State institution so as to ensure that the review process is not circumspect to political interference and the parties conduct the research are professionally accountable[73]. The selected service provider must be appointed for a set non-renewable contract period so that the process is not captured and can be subjected to internal review[74]. It is suggested that the firm be appointed via a public procurement process[75].This system could further assist States in improving their "rule of law" status by indicating areas of institutional weakness and suggesting methods of improvement[76].

A preliminary concern with the institution of an inter-continental justice scoreboard will be in the accessing of the data that will be used towards the calculations of the rankings. States typically will not avail sensitive information concerning the running of their judiciaries particularly where there is low adherence to the principles of the rule of law.

Furthermore, for greater accuracy, the reporting done by member States woud have to be timely, accurate and uniform which would take a high level of inter-state co-ordination.

[70] Ngobeni (note 41 above) 22.
[71] Ngobeni (note 41 above) 22.
[72] Ngobeni (note 41 above) 22.
[73] Ngobeni (note 41 above) 22.
[74] "Ngobeni (note 41 above) 22.
[75] Ngobeni (note 41 above) 23.
[76] Ngobeni (note 41 above) 23.

Another concern with this proposal is that it would require a high degree of political will from African States to collaborate towards the creation and implementation of the scoreboard on national levels. States with low rule of law ratings would also have to give up elements of their Sovereignty by agreeing to the exclusion of their judiciaries. African States are historically known for protecting their regulatory powers and so it is doubtful if they would agree to this.

The continent would also have to convince foreign investors of the credibility and independence of this system and because of persisting stereotypes of the corruptness of African institutions this could be a difficult task.

The matrix used in the formulation of the scoreboard must be broad enough to capture the various level of judicial development on the continent as well as the various legal regimes ranging from Roman-Dutch Law as well as Common Law in Southern Africa to Sharia law North of the Continent.

5.4 Brazil's Approach

Brazil has recently rolled out a new generation of Investment Facilitation Agreements which depart from the traditional ISCID regime named Cooperation and Facilitation Investment Agreements (CFIA's). To date such Agreements have been concluded with Angola, Mexico and Mozambique whilst negotiations are currently underway with Algeria, Chile, facilitate the amicable settlement of disputes between investors and states and offer a final resort to State-State resolution mechanisms as an alternative to the traditional investor –State arbitration process[77].

Unlike the majority of its Latin American neighbours, Brazil has never ratified an investment treaty containing ISDS clauses. In the late 1990's the country signed 14 Bilateral Investment Treaties, however none were ever ratified[78]. The country has maintained its investment attractiveness without having to subscribe to the ISDS

[77] Brauch M "Brazil's Cooperation and Investment Facilitation Agreements with Mozambique, Angola, and Mexico: A Comparative Overview" (2016) in in Rethinking bilateral investment treaties critical issues and policy choices" eds Kavaljit Singh and Burghard Ilge 142.

[78] Vidigal G & Stevens B "Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?" (2018) Journal of World Investment & Trade 148.

system and has in fact continuously ranked among the world's top ten investment destinations.

Brazil's non subscription to the international investment treaty regime does not mean that investors are offered no protection. In 1996 an arbitration law was put in place and contractual arbitration has since been the leading dispute resolution method. Brazil has however followed the developments in the ISDS system closely.

In 2015 Brazil entered into six CFIA's with Mozambique, Angola, Malawi, Mexico, Colombia and Chile as well as a broader agreement with Peru on more or less similar grounds. The country has stated that its goal with the CFIA's is to "create incentives for reciprocal investment through inter-governmental dialogue mechanisms." The system is also aimed at providing an alternative structural model for the amicable resolution of disputes.

The CFIA's present a legal framework through which home State governments can protect the interest of their nationals through direct negotiations or arbitration with the investment host State. The aim of arbitration is to ensure contractual compliance and not necessarily compensating investors for any breaches suffered.The most profound difference between CFIA's and Investment Agreements is that CFIA's do not make provision for ISDS but rather set up a variety of institutions and procedures that are aimed at the prevention of disputes so that they do not escalate into litigious disputes.

5.4.1 Analysis of the Angola- Brazil CFIA

5.4.1.2 Dispute resolution provisions

The main objective of the Angola-Brazil CFIA as stated in Article 1 is to "The object of this Agreement is to facilitate and foster reciprocal investments, with a view to the intensification and increase of business opportunities and activities between the Parties[79]. In Article 4.2 the agreement envisages the creation of a "Joint Committee"

[79] Official Translation of The Brazil–Angola Cooperation and Investment Facilitation Agreement, retrieved from http://www.itamaraty.gov.br/index. php?option=com_content&view=article&id=8520:acordo-brasil-angola-de-cooperacao-e-facilitacao-de-investimentos-acfi-luanda-1-de-abril-de-2015&catid=42&Itemid=280-&lang=pt-B. Article 1.

composed of government representatives from Brazil and Angola whose mandate includes the amicable resolution of any conflicts or questions regarding investments [80]. Article 6 goes on to prescribe the formation of "Focal Points" tasked with the provision of governmental "support to the investments of the other Party in their country[81]. In Brazil the Focal Point shall be established within the Foreign Commerce Chamber (CAMEX), whilst in Angola the State Secretariat for Cooperation of the Ministry of Foreign Relations shall house the Focal Point[82]. The responsibilities of tis Focal Point include the evaluation and where appropriate resolution of complaints and suggestions received by the governments and investors of the other Party, working directly to diffuse disputes, facilitating their resolution in cooperation with the relevant government authorities and in collaboration with any private partners involved[83]. The Focal Point is also responsible for the dissemination of information in a timely manner to the Parties on legal issues related to investments in general or agreed upon projects[84].

In Article 15 the Joint Committee and Focal Points are mandated to work together towards the resolution of disputes[85].In Terms of Article 15.2, any arising dispute must first be assessed through consultations and negotiations as as well as undergo a preliminary examination by the Joint Committee before a party may institute an arbitral proceeding[86].

A Party to this Agreement may initiate proceedings by forwarding to the Joint committee, a question or request of an investor and the Joint Committee will be granted 60days to address this request, which period can be extended by consensus for an additional 60 days where sufficient cause for such postponement is presented. Where ever possible, a representative of the investor as well as representatives of the governmental entities involved in the question at hand, will partially or completely be involved in the bi-lateral governmental meetings. The consultation shall be ended at the will of either Party to the Agreement. Where this consultation or negotiation

[80] Brazil–Angola Cooperation and Investment Facilitation Agreement Article 4.1 and 4.2.
[81] Brazil–Angola Cooperation and Investment Facilitation Agreement Article 5.
[82] Brazil–Angola Cooperation and Investment Facilitation Agreement Article 5.
[83] Brazil–Angola Cooperation and Investment Facilitation Agreement Article 5.
[84] Brazil–Angola Cooperation and Investment Facilitation Agreement Article 5.
[85] Brazil–Angola Cooperation and Investment Facilitation Agreement Article 15
[86] Brazil–Angola Cooperation and Investment Facilitation Agreement Article 15.2

process fails to resolve the dispute at hand, the Parties may resort to arbitration between States to resolve the matter.

5.4.2 Comments

At the core of this system is the creation of a Joint Committee comprising of Governmental agents from each Party State who are responsible for "discussing and sharing investment opportunities, and coordinating the implementation of the cooperation and facilitation agendas"[87]. The Joint Committee together with any subsequent Focal Groups formed are tasked with the prevention, managing and resolution of disputes between states[88]. Focal points serve as contact points of primary instance to foreign investors within the host State. They provide investors with technical support and hear complaints as they arise towards the prevention of formal disputes between the investor and the host State. These Focal points must also collaborate with each other and duly apply the policy directives of the Joint Committee. This system is currently in use in South Korea although through the office of the Foreign Investment Ombudsman[89]. A salient feature of the CFIA's is that host State governments may also engage with the Focal points when disputes arise, giving the State an opportunity to hold investors liable for any damage or breaches they commit[90].

The Angolan CFIA contains a vague arbitration clause that provides that "If it is not possible to resolve the dispute in the terms of paragraph 2 of this Article by a recommendation of the Joint Committee, the Parties may resort to mechanisms of arbitration between States to resolve the abovementioned dispute[91]." This provision clearly fails to detail the arbitration procedure in any detail which is unsatisfactory and vague. If the AfCFTA were to adopt this system of dispute resolution the arbitration procedures would have to be delineated in more detail. The provision further fails to explain whether or not the exhaustion of local remedies is a pre-condition for an investor to gain recourse through this system.

[87] Brauch M (note 77 above) 145.
[88] Brauch M (note 77 above) 145.
[89] Vidgil & Stevens (note 78 above) 487.
[90] Vidgil & Stevens (note 78 above) 487.
[91] Brazil–Angola Cooperation and Investment Facilitation Agreement Article 15(6).

Another potential pitfall with this dispute resolution could appear in the selection of the inter-governmental body assigned to be the focal point, acting more or less like an ombudsman. In the case of Brazil, the country has decided that CAMEX, the Chamber of Foreign Commerce in the Ministry of Economy will hold this position. CAMEX is responsible amongst other functions for the formulation, adoption, implementation and coordination of policies relating to foreign trade and investment[92]. The positioning of this Focal Point in this subsection of the Ministry of Economy may be advantageous as a large number of investor concerns tend to be related to financial issues surrounding the realization of their investment. It may however be necessary for the Member States to investment facilitation agreements to create dedicated task teams with specific competencies in investment policy and law who also have inter-governmental links as not all investor grievances are necessary financial in nature. A more focused task team can also be expected to have faster turnaround times towards the resolution of issues and may also be more accessible to foreign investors due to their limited focus unlike a broad body such as CAMEX.

The CFIA also lacks sufficient detail as to the composition of the inter-governmental Joint Committee. It would be of no use to have committee members which limited investment expertise and who furthermore are unable to initiate high level policy change. A poorly comprised Joint Committee could cripple the entire inter-governmental dispute diffusion process if its members are either unknowledgeable on the subject matter or have no real ability to lobby for more favourable policies when issues arise.

Lastly the resort to State-State arbitration proposed in the CFIA's may be problematic in that an investor must rely on his home State's willingness to take up his claim on his behalf. In the instance of small and medium firms a State may not always be inclined to espouse claims with limited monetary or political value and in the absence of direct access to arbitration for investors, claims in which a home State has no interest will be lost.

[92] Ministry of Economy – Executive Secretariat of the Foreign Chamber of Commerce Website [accessed n 5 November 2019 at http://www.camex.gov.br/sobre-a-camex].

On the whole however this system by overhauling the ISDS system would distil many of the concerns African States have with international arbitration. It is apparent that this dispute resolution system aims to prevent the arising of disputes and as African States have a long history of not litigating against each other, the CFIA model could be on the continent. Each State could create a focal Point within its territory and the Joint Committee could jointly be comprised of all the members to the treaty. As most country's already have Ministry's in charge of investment the creation of a focal point would not be too onerous. A short coming of this proposal for the AfCFTA has to do with the high level of collaboration that would then have to take place between the 54 States represented in the Joint Committee. The day to day functioning of the Focal Points could also be an added expense on the host State that must now collaborate with the State and the investor, hearing disputes and attempting to find solutions. On the whole however this system by overhauling the ISDS system would distil many of the concerns African States have with international arbitration

5.5 Conclusion

The reform proposals considered in this chapter range from completely overhauling the ISDS system through the initiation of intra- African CFIA's, modifying the system by introducing a Justice that will exempt some states from having to provide investors with the possibility of scoreboard international arbitration to more moderate reforms such as Nyombi's Regional investment court that would replace international arbitration seats.

No one reform proposal is without its shortcomings. The idea for a Regional Investment Court is problematic in that, like the SADC Tribunal, such an institution could easily be captured. Furthermore, a variety of regional courts are already in existence on the continent and some are seldom used which could be indicative of the anti-litigious nature of African States. As mentioned earlier, the institution of an Investment court system may further be unsuitable for the African continent as the costs to access such a court and the risk of having costs assigned remain a barrier to small and medium enterprises which are the majority of business entities on the

continent. The court system could also adversely antagonise investors who could be reluctant to have their investment matter arbitrated upon my individuals they have played no role in assigning which is in stark contrast of the norms in international investment arbitration. This is not to suggest that the African court proposal would mirror the EU system in all respects but that particularly the issue of the cost of accessing the court as well as the possibility of being assigned the costs of the opposing party would have to be managed. This proposal is however for the above reasons discarded for the purposes of the AfCFTA Investment Protocol.

The proposal for the institution of a Justice Scoreboard is resource intensive and furthermore requires States to give up some of their regulatory power when adhering to the proposals of the scoreboard on whether or not an investor can demand for international arbitration. The member States must also co-operate towards the extraction of data by granting access to their judicial systems and records for auditing and verification purposes. The data provided by States must be timeous, accurate and uniform. The matrix used in the formulation of the scoreboard must be broad enough to capture the various level of judicial development on the continent as well as the various legal regimes ranging from Roman-Dutch Law as well as Common Law in Southern Africa to Sharia law North of the Continent. Lastly in order for this system to be accepted by investors the scoreboard must be perceived to be independent and credible and this acceptance is beyond the regulatory capacity of Member States.

Finally, the suggestion of intra-African CFIA's would have to be supported by political will and co-operation between African States. This system could also be captured by the politics of the day due to its reliance on inter-State co-operation. African States would further have to improve this model by for example delineating a detailed arbitration procedure to be followed in the event that the dispute cannot be resolved by the preliminary mediation sessions. Furthermore, the correct composition and positioning of the governmental bodies involved is crucial. As mentioned above, the Joint Committee must be staffed with competent and knowledgeable government officials with sufficient decision making influence to ensure the quick turn-around time with regards to policy complaints. The Focal Point must furthermore be accessible, with a clear and delineated mandate unlike Brazil's Focal Point located in

the broader CAMEX. The focal point must also be able to co-ordinate inter-ministerial dialogue with in the Government

6.1 Introduction

The main aim of this research project has been to put forward an Investment dispute resolution mechanism for the continent that is cognisant of the continent's most pertinent concerns with the subsisting ISDS system and thus makes efforts to address them. The predominant reservations held by African States towards the subsisting ISDS regime which is characterised by International Arbitration under the auspices of the ICSID rules and akin International institutions have included, a lack of transparency, inconsistent judgements, high transactional costs and a lack of African representation within the system.

6.2 Summation of Findings

In order to better understand African grievances with the ISDS system, this research began by contextualising African perspectives of ISDS within specific conceptual frameworks. In Chapter two of this research, the pursuit and protection of the rule of law was identified as being the cornerstone of International Arbitration[1]. Despite the contested meaning of this concept it can be commonly agreed that it is characterised by, legal consistency, transparency, accountability to the law and the separation of powers[2]. The creation of International dispute resolution institutions such as ICSID and UNICITRAL were a response to the perceived and actual incompetence's of domestic judiciaries to observe the law[3]. However, if International Investment Arbitration law is viewed through the lens of public law, these International Institutions which have been deemed to be the custodians of the rule of law, too are failing at this task[4]. This is because the use of ad hoc tribunals fails to facilitate the realization a fundamental enablers of the rule of law, namely the separation of powers, legal certainty and predictability[5]. The subsisting ISDS system allows for a handful of arbitrators to rotate between serving as arbitrator, counsel and expert witness, furthermore without binding them by precedent to any decision they make in these various capacities[6]. What can be deduced from this observation is that reform

[1] Schill W S "Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach" (2011) 52 Va. J. Int'l L. 58.
[2] Schill (note 1) 58.
[3] Schill (note 1 above) 58.
[4] Schill (note 1 above) 68.
[5] Schill (note 1 above) 68
[6] Schill (note 1 above) 68.

of the ISDS system should be centred on the ascertainment of a system that can best promote the rule of law and not blind allegiance to International Institutions which face major shortcomings in this regard.

This thesis also framed Investment Dispute resolution as falling within the "Global Economic Order" which are the set of rules that delineate the economic relations between and amongst States[7]. As the prevailing "Global Economic Order" is predominantly shaped by neo-liberalist thinking, one must ascertain how this theory has influenced investment Dispute Resolution[8]. This research concluded that the power imbalance between investors and States n dispute resolution is a by-product of such neo-liberalist thinking which suggest that the State's role must be confined to creating an environment that enables business to thrive, ultimately not over-extending itself into the regulation of business[9]. According to this perspective, the State's role should be to ensure the security of business at all costs[10]. This can be exemplified by the fact that investors alone can initiate proceedings under the ICSID system and the State has limited legal avenues through which to appeal a decision rendered by ad hoc ICSID tribunals[11]. This research project did not aim to provide an alternative to neo-liberal thinking but rather by displaying the inherent bias of the ISDS system as a result of the influence of neo-liberal thinking, propose that if African States wish to rebalance Investor-State power dynamics they must proactively include sections in their Agreements to this effect as it is not natural to the system.

This thesis went on to assess the International Investment Dispute Resolution through the lens of "Third World Perspectives of International Law" as championed by Chimni[12]. Chimni proposes that International Law is instrumental towards the legitimization and sustaining of the inherently unequal relations between the Global North and South particularly in relation to their economic dealings[13]. He thus suggests that the "language of law" plays a pivotal role towards the legitimization of

[7] F Morosini, M Ratton and S Badin "Reconceptualizing International Investment Law from the Global South: An Introduction" eds Fabio Morosini and Michelle Ratton Sanchez Badin. New York: Cambridge University4

[8] Morosini F et el (note 7 above) 6 & 4.

[9] Morosini F et el (note 7 above) 6 & 4.

[10] Morosini F et el (note 7 above) 6 & 4.

[11] Morosini F et el (note 7 above) 6 & 4.

[12] Chimni B S "Third World Approaches to International Law: A Manifesto" (2016) International Community Law Review 8:3 17.

[13] Chimni (note 12 above) 18.

dominant western ideals, which in discourse are often associated with "rationality, neutrality, objectivity and justice"[14]. International Institutions such as the World Bank Group accordingly play a role in ensuring the sustenance of a particular legal culture ideologically, by legitimating the norms that dominant powers seek to advance[15]. Incapable of self-governance or achieving internationally acceptable levels of legal development[16]. This thesis thus concludes that the generic categorization of African States as being incapable to maintain the rule of law and thus internationally acceptable levels of development is unsustainable. The proposed Dispute resolution mechanism must thus be cognisant of the varying levels of judicial capacities of African States without dismissing their capabilities all together.

This thesis went on in Chapter Three, to trace the historical evolution of the ISDS on the continent, specifically through the lens of the establishment of the ICSID Arbitration Centre. This exposition confirmed some of the conceptual framings suggested in chapter two, such as the fact that the ISDS system was created in reaction to the decolonization process and the role of neo-liberal International Financial Institutions in encouraging the adoption of the ISDS regime by third world countries, which further confirms that the system was created in order to promote a neo-liberal agenda[17]. This historical account highlighted that at the core of the ISDS system is and has been the pursuit of a legal regime under which the rule of law will be adhered to. A key finding made in this chapter is that some African countries such as South Africa have managed to disengage with the ISDS regime because their judiciaries are strong enough to foster investor confidence[18].

In Chapter four the leading approaches to investment dispute resolution adopted by REC's in Sub-Saharan Africa were examined so as to ascertain how these groupings have tackled the primary concerns of African States with the prevailing ISDS regime. Common trends emerging from this study include that REC's have for the most part dispelled the use of international arbitration towards the resolution of investment

[14] Chimini (note 12 above) 18
[15] Chimini (note 12 above) 18.
[16] Chimin (note 1 above) 20.
[17] Sornarajah M "The International Law on Foreign Investment" second edition Cambridge University Press 24.
[18] Carim X "International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa" (2016) in Rethinking bilateral investment treaties critical issues and policy choices" eds Kavaljit Singh and Burghard Ilge 52.

disputes to the exclusion of the COMESA grouping[19]. A positive development on the continent has been the emphasis on amicable dispute resolution through conciliation and mediation, which have been made the compulsory channel of first instance in almost all the REC'S[20]. This approach could significantly decrease the cost of arbitration to African States, as now disputes can be resolved without approaching arbitral seats or diffused to only the most pertinent facts before reaching arbitration. A dispute resolution mechanism that focuses on dispute aversion is also more compatible with the overall amicable relations between African states[21]

Another emerging trend emerging from the continent has been the drafting of investment protocols that contain binding obligations on investors whose transgression will either bar an investor from suing the State or negatively influence the claim they bring against the claim[22]. Most notably the EAC model and the ECOWAS Act further grant affected citizens and non-governmental actors a right to sue an investor[23].

In Chapter five, consideration was then granted to two forerunning reform proposals towards the harmonization of investment dispute resolution policies on the continent. Nyombi suggests that the Continent follow the approach that has been adopted by the EU and establish a regional investment court[24]. The shortcomings of this approach include securing funding for this institution from African States and ensuring that it does not meet the demise of the SADC tribunal by becoming a political tool in the hands if African States.

Ngobeni in comparison proposes for the institution of an African Justice Scoreboard that will monitor the rule of law in African States to determine in which instances an investor can and should be exempted from local tribunals due to the reasonable

[19] Supplementary Act ASA/…/…07 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS Article 31

[20] Supplementary Act ASA/…/…07 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS Article 31;

[21] Vidigal G & Stevens B "Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?" (2018) Journal of World Investment & Trade 148.

[22] Supplementary Act ASA/…/…07 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS Article 18.

[23] Supplementary Act ASA/…/…07 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS Article 18.

[24] Nyombi C "A Case for a Regional Investment Court for Africa" (2018) 43 N.C. J. Int'l L. 100.

likelihood that he will be denied a fair hearing in the host State[25]. In the case of States with high rule of law ratings, in Africa these should be allowed to confine investment disputes to domestic tribunals, as there would be a reasonable likelihood that he will be granted a fair hearing[26]. The most notable shortcomings of this approach include convincing African States to be bound by this metric as well as the funding and neutral management of the evaluating system.

Finally, this research assessed the viability of implementing Cooperation and Facilitation Investment Agreements (CFIA's) CFIA between African States with the ultimate goal of establishing an inter-African CFIA that can represent African interests and engage the global economy as a unit[27]. CFIA's as explained earlier in this thesis are well suited to the African context firstly because in addition to maintaining amicable trade relations, African States for the most part have established cordial diplomatic relations and so the resolution and aversion of investment related disputes through diplomatic co-operation is a practical proposal[28]. As trade and investment data and information on the continent is generally hard to acquire, the Joint Committees of these CFIA's could further assist in bridging this knowledge gap in a co-ordinated manner[29]. It has been noted that the co-ordination of 54 African State may be logistically problematic however because most African States have Ministry's responsible for investment the structuring of the Joint committee should not be problematic. A further concern with this proposal is that such a system is dependent on diplomatic indulgences and co-operation and with the context of Africa's occasional volatile diplomatic disputes, the entire system may be jeopardized.

Therefore, within the context of the emergence and subsequent development of the ISDS regime this paper makes this paper suggests that the AfCFTA adopts a hybrid approach to investment dispute resolution that combines Ngobeni's suggestion for the creation of an AJS and the establishment of inter-African CFIA's. The proposals

[25] Ngobeni L "The African Justice Scoreboard: a proposal to address rule of law challenges in the resolution of investor-state disputes in the Southern African Development Community" CILSA 2019 (1) 19.
[26] Ngobeni (note 25 above) 19.
[27] Vidigal G & Stevens B (note 21 above) 149
[28] Erasmus G "The COMESA Court of Justice clarifies important Jurisdictional Issues" (2017) Tralac Blog [accessed at [https://www.tralac.org/discussions/article/12412-the-comesa-court-of-justice-clarifies-important-jurisdictional-issues.html on 19 September 2019].
[29] Vidigal & Stevens (note 21 above) 149.

for the establishment of an AJS and drafting of intra-African CFIA's, fare better than the suggestion for the creation of a regional court particularly because the main focus of the AfCFTA is trade liberalization and not necessarily investment which is dealt with in an ancillary protocol. It is therefore unlikely that the signatory States will be willing to expand their budgets towards the establishment of this institution especially within the context of a wide number of African Tribunals, which are underused. Furthermore, following the SADC Tribunal experience and even the current crisis at the WTO where the United States of America has refused to elect new arbitrators to the dispute panel, a system such as an Investment court is equally susceptible to being captured[30]. This suggestion may be viable for the EU but not necessarily, Africa, which overall, still has weak judicial institution. The proposal for the institution of CFIA's, builds on the work of national institutions.

6.3 Recommendations

6.3.1 Reasons to abandon the ISDS System

By tracing the historical foundations of the prevailing ISDS system, this research exposed that the system was essentially created in order to "bridge a perceived maturity gap in judiciaries around the world" but more specifically to provide investors predominantly from the global North with access to an effective and reliable judicial system through recourse to international investment[31]. Below the writer shall highlight some of the leading reasons as to why the AfCFTA should abandon the prevailing ISDS system. These reasons have been discussed in much detail in Chapter Three of this research project within the context of African experiences with ISDS.

6.3.1.1 Inherent incoherency of the ISDS system

The decentralized and fragmented ISDS system which is characterized by ad hoc arbitration has however, led to inconsistent judgements, diminishing the predictability of the system for both investors and host States and thus undercutting the legitimacy of the entire System[32]. It is of particular concern that in this decentralised system,

[30] McDougall R "Crisis in the WTO Restoring the WTO Dispute Settlement Function" (2018) Centre for International Governance Inovation Discussion Paper 3.

[31] Kidane W "Alternatives To Investor–State Dispute Settlement An African Perspective" Global Economic Governance (GEG) Africa (2018) 4.

[32] Jones D "Investor-State Arbitration: The Problem of Inconsistency and Conflicting Awards" 30 J. Int'l Arb. 561 (2013) 4.

sensitive issues concerning a Sovereign States public policy and right to regulate are adjudicated upon by merely three arbitrators. Therefore, at the core of the ISDS systems legitimacy crisis is its lack of an institutional framework that facilitates judicial accountability whilst exposing National Governments to large lawsuits.

The Cases of *CMS Gas Transmission Co. v. Republic of Argentina, ICSID Case No. ARB/01/8* (CMS v Argentina) and *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic, ICSID Case No. ARB/02/1 (LG&E v Argentina)* provide substantive evidence of the nature by which incoherency can manifest itself in the ISDS system. The legal question at hand in both cases was to establish if the economic situation during the 1992- 2002 financial crisis in Argentina, justified State measures of necessity. Over 40 cases were brought against this country over these measures of necessity[33]. The CMS v Argentina case and LG&E v Argentina case are interesting because the arbitrators came to two divergent conclusions despite being presented with almost identical pleadings[34]. In the CMS v Argentina case the Argentinian Government had enacted an economic recovery plan which included the privatization of a number of State Owned Entities, a currency convertibility law that pegged the Argentine currency to the United States Dollar as well as a law that privatized the gas industry and stringently regulated the transportation and distribution of natural gas[35]. CMS averred that the Argentine Government had breached the US-Argentina BIT with respect to expropriation and the transgression of the fair and equitable treatment clause[36]. The expropriation claim was dismissed however the Argentine Government was found to have breached its obligations on fair and equitable treatment as well as the umbrella clause through the violation of the stabilization clauses it had entered into with CMS[37]. Argentina's defences of necessity and emergence with regard to the extreme economic, social and political crisis that had unfolded during the time was rejected as the situation was not severe enough to constitute necessity[38]. In the *LG&E v*

[33] Jones (note 32 above) 4.
[34] CMS Gas Transmission Co. v. Republic of Argentina, ICSID Case No. ARB/01/8 (CMS v Argentina) and LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic, ICSID Case No. ARB/02/1 (LG&E v Argentina)
[35] CMS Gas Transmission Co. v. Republic of Argentina, ICSID Case No. ARB/01/8.
[36] CMS Gas Transmission Co. v. Republic of Argentina, ICSID Case No. ARB/01/8.
[37] CMS Gas Transmission Co. v. Republic of Argentina, ICSID Case No. ARB/01/8.
[38] CMS Gas Transmission Co. v. Republic of Argentina, ICSID Case No. ARB/01/8.

Argentina which covered the exact same facts, a state of emergency was found to have persisted[39].

The risk of inconsistency inherent to the ISDS system that does not subscribe to the concept of precedent is not to be over-exaggerated. Whilst inconsistency can lead to results that are less predictable, it also provides an opportunity for each case to be heard on its merits. In light of the high costs involved in international investment arbitrations such inconsistency must however be managed for example through the installation of a permanent investment court which can be held accountable for its judgements unlike the ad hoc tribunal system that persists. A court system would also provide the possibility of an appeals body as has been forwarded by the European Union which would allow for the systematic review of judgements in contrast to the limited grounds upon which ICSID tribunal cases can be revisited.

6.3.1.2 Need for a system that is reflective of African States reluctance to initiate formal litigation with International Institutions.

African States are historically known not to prefer to settle disputes through litigation except where the border disputes are concerned[40]. This assertion can be exemplified in the fact that "as of October 2004 no African country had ever participated either as a complainant or a respondent" within the context of the World Trade Organization's Dispute Settlement Unit[41]. Although this is an example from the area of trade law and could be explained as being a result of the continents low trade volumes, it is also telling of the position of African States towards the adversarial resolution of disputes. African States often pursue the use of diplomatic channels towards the amicable resolution of disputes and so the ISDS systems adversarial tribunal system is not well suited to proven African preferences to dispute resolution[42]. The AfCFTA's Investment Protocol thus provides an opportunity for the institution of an inter-governmental system that attempts to mitigate disputes before they escalate and also creates formal channels for the diplomatic resolution of any arising disputes. As has been alluded to earlier, Brazil's CFIA's could be one such solution.

[39] LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic, ICSID Case No. ARB/02/1.

[40] Erasmus G "Alternative Dispute Settlement Procedures for Trade-related Disputes in Africa" Tralac Blog October 2018.

[41] Eduardo Perez, Making WTO's Dispute Settlement practicable for Developing countries, Paper presented at the Graduate Institute of International studies(Geneva) 7th March 2003. 17 [accessed on 5 November 2019].

[42] Erasmus G "Alternative Dispute Settlement Procedures for Trade-related Disputes in Africa" Tralac Blog October 2018.

6.3.1.3 The absence of a direct correlation between International Investment Treaties Subscribing to the ISDS and an increase in FDI

In Chapter Two, attention was drawn to the nature through which in the early years of many Developing States' independence, International Financial Institutions dictated the linearization of foreign investment laws and especially an adoption of the ISDS system as a pre-requisite for financial assistance[43]. In exchange for the surrender of this regulatory autonomy, these States were often assured that they would attract higher inward flows of Foreign Direct Investment[44]. There is however now a common understanding amongst academics as well as this author that there is a weak correlation between a States Subscription to Bilateral Investment Treaties and more specifically the ISDS system and the level of FDI that enters that State[45]. Bilateral Investment Treaties and their predominant endorsement of the ISDS system rather complement broader regulatory certainty[46]. As has been forwarded earlier in this research project, African States should thus approach the Investment Protocol of the AfCFTA as an opportunity to align their investment policies so as to benefit from the economies of scale brought by through enhanced cross-border investment, resulting from coherent laws across jurisdictions.

6.1.3.4 The Marginalized Participation of African States in the ISDS system

A recurring criticism of the ISDS system broadly and the ICSID system in particular by African States, is that of a lack of representation on arbitral tribunals which has resulted in a lack of ownership by African States in the system[47]. Once again the empirical evidence towards this point must be reiterated. For example, evidence emerging from a 2017 ICSID study suggests that from a total of 613 cases that have been registered under the ICSID Convention as well as the Additional Facility rules, 22% have involved an African State however, only in 4% of these cases was an African role player involved in the adjudication process[48]. In hard figures this means

[43] Sornarajah M "The International Law on Foreign Investment" second edition Cambridge University Press 22.
[44] Carim X "International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa" in *Rethinking bilateral investment treaties critical issues and policy choices*" (2016) eds Kavaljit Singh and Burghard Ilge 52. 53.
[45] Carim (note 44 above) 53.
[46] Carrim (note 44 above) 53.
[47] Kidane "The China Factor in the Contemporary ICSID legitimacy debate" (2014) University of Pennsylvania Journal of International Law, Vol. 35, No. 3,Seattle University School of Law Research Paper No. 15-07
[48] Le Bars B " Evolution of Investment arbitration in Africa" (2019) Global Arbitration Review [accesses at https://globalarbitrationreview.com/print_article/gar/editorial/1169359/the-evolution-of-investment-arbitration-in-africa?print=true on 14 August 2019].

that only 90 Africans up until 2017 had engaged with the ICSID arbitration system either as an arbitrator, conciliator or as an ad hoc committee member. In comparison, 979 Western Europeans and 437 North Americans have engaged with the system in these capacities[49]. The ICSID system deals with approximately 60% of all arbitrated investment disputes and so these figures are to a larger extent representative of the state of the industry[50].

6.1.3.5 The High Costs of the ISDS System

A party seeking to lodge an arbitration claim must put down a non-refundable amount of US$25 000[51]. The arbitrators themselves are entitled to a fee of approximately US$3 000 per day that they are occupied with an arbitration which is non-exclusive of travel and subsistence costs[52]. In the case of *Malicorp Limited v. The Arab Republic of Egypt, ICSID Case No. ARB/08/18,* Egyptian Government accumulated costs of up to US$489 000[53].

The possibility of incurring such high costs coupled with the long delays experienced when using the Centre's facilities, in the perspective of African lawyers has a regulatory chill effect on African governments[54].

6.4 Reasons to abandon the Proposal for a Court System

Through an analysis of both the EU proposal for the institution of a permanent investment court system as well as Nyombi's own African perspective on a Regional Investment Court the writer is not of the opinion that this system as it has currently been presented in the Eu's Investment Agreements as well as through academic literature, is suitable for the continent. The reasons for this conclusion will briefly be elucidated upon below however a full discussion on the matter has been presented in Chapter 5 of this research.

The writer primary concern with the court system proposal is that it seeks to remedy the power imbalance between investors and States by placing extensive powers in the hands of States. For example, States will elect the judges to such a court to the

[49] Le Bars B (note 48 above).
[50] Nyombi C "A Case for a Regional Investment Court for Africa" (2018) 43 N.C. J. Int'l L. 68.
[51] Tsietsi T "International Commercial Arbitration: Case Study of the Experiences of African States in the International Centre for Settlement of Investment Disputes" (2013) International Commercial Arbitration 47:2 255
[52] Tsietsi (note 51 above) 264
[53] Tsietsi (note 51 above) 264.
[54] Tsiesti (note 51 above) 264.

exclusion of the investor and whilst it is commendable that such a judge will have greater sensitivities to the jurisprudential reasoning behind a host States policies, it is problematic that the same State that elects these judges will also be responsible for their remuneration. This can be perceived as a potential area of conflict of interest.

The African Investment Court would either need to establish its own secretariat or align itself with experienced ICSID Secretariat which would place its reputation as a system that departs from the subsisting ISDS system at risk. The complexity of having an already established African court play this secretarial role can be understood as stemming from the highly technical and specialized functioning of investment law.

The proposals for a court system as they currently exist further fail to address the issue of how the court system with widely rotating judges would establish and maintain a system of precedent.

6.4.1 Adoption of African Cooperation and Facilitation Investment Agreements (CFIA's)

The primary recommendation of this thesis is for the adoption of an Intra-African Co-operation and Investment Facilitation Agreement drawing lessons from Brazil's experiences whilst not neglecting the experiences already gained by African States through the Regional Economic Communities.

It is apparent that this dispute resolution system aims to prevent the arising of disputes and as African States have a long history of not litigating against each other, the CFIA model could be on the continent. Each State could create a focal Point within its territory and the Joint Committee could jointly be comprised of all the members to the treaty. As most country's already have Ministry's in charge of investment the creation of a focal point would not be too onerous. A short coming of this proposal for the AfCFTA has to do with the high level of collaboration that would then have to take place between the 54 States represented in the Joint Committee. The day to day functioning of the Focal Points could also be an added expense on the host State that must now collaborate with the State and the investor, hearing disputes and attempting to find solutions.

Fore mostly, this proposal presents African States an opportunity to rebalance the inherent power imbalances between them and investors which has been engrained

by neo-liberal thinking. Through the CFIA's, African States will become key role players in investment dispute resolution that is aimed at diffusing potential clashes between investors and States through diplomatic co-operation[55].

Some of the key dictates of the model CFIA's are quite similar to some provisions already in force in African REC's. For example, a key provision of the AFCI is that before a dispute can be referred for arbitration it is to be assessed by means of "consultations mediations and negotiations" and is subject to a pre-emptive examination by the Joint Committee[56]. Both COMESA and ECOWAS propose for the exhaustion of preliminary mediation processes before a dispute can be referred for adjudication[57]. The CFIA's propose that after this preliminary adjudication, the dispute was be litigated or arbitrated through State-State channels. The writer disagrees with this perspective, cautioning that this method of dispute resolution is prone to politicization of issues and furthermore leaves investors at the mercy of their Home States which may not always be willing to take up a claim on their behalf[58]. Much like the ECOWAS Investment Act, the intra-African CFIA could also create a causal link between adherence to labour, environmental and anti-corruption compliance with the ability to seek legal recourse by investors in the event of disputes or a penalty could be incorporated thereof. Such a provision would depict an awareness of the importance on sustainable development on the continent. This intra-African CFIA could then frame the relations of African States with non-African investors by mandating that disputes be addressed amicably through an initial mediation and negotiation phase conducted by the Governmental agencies in charge of trade in both countries. Upon the failure of negotiations and mediation at the expiry of a 6month period the dispute could then be referred for adjudication.

The writer however cautions against the potential pitfalls identified earlier in this study towards the adoption of this proposal. Firstly, the composition of the Joint Committees and Focal Points must be skilfully managed in order to ensure that they fulfil their desired roles. Focal Points are meant to provide meant to be contact points

[55] Brauch M "Brazil's Cooperation and Investment Facilitation Agreements with Mozambique, Angola, and Mexico: A Comparative Overview"(2016) in in *Rethinking bilateral investment treaties critical issues and policy choices*" eds Kavaljit Singh and Burghard Ilge 142.

[56] Brauch (note 55 above) 143.

[57] Supplementary Act ASA/…/…07 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS.and COMESA Common Investment Area Agreement.

[58] UNICITRAL "State–State Dispute Settlement in Investment Treaties Best Practices Series" (2014) 23.

of primary instance between the investor and the Host Government, charged with the preliminary adjudication of investor complaints and concerns towards the amicable resolution of disputes. Towards fulfilling this role, these agencies must be competent within the field of investment law and must be staffed by a multi-disciplinary team cognisant of the various issues that hinder the realization of investments not purely from an economic perspective. The Focal Points must also be a dedicated sub-division not burdened by other governmental mandates and lastly this body must be accessible not only in its physical location but also with regards to its positioning within governmental ranks. Brazils positioning of this body in the generalised CAMEX- chamber of foreign commerce within the ministry of economy is thus not recommended as it is not clear where an investor must direct his communications within this broader department or even the official who spearheads this operation. Similarly, the Joint Committees which are envisaged to be more political in nature must be staffed with members with real policy making influence, who must also be readily available to address queries and who have an understanding of the issues arising in the field of investment law. Having a fast turnaround time is critical to both these entities.

The continent would also have to remedy the other underlying issues identified with this system such as setting out a clear arbitration process in the event of the failure of mediation and negotiation. It is also not suggested that recourse be taken to State-State arbitration due to the heavy reliance investors are then exposed to for the State to take on their claims. As the State has no general duty to espouse the claims of its nationals and so some investors could be indeed left with no right of recourse.

6.4.2 Incorporation of an African Justice Scoreboard

This thesis has already elucidated to the fact that International Arbitration is not the sole method through which to ensure adherence to the rule of law[59]. South Africa's experience has proven that subscription to the dispute resolution system based on International Arbitration, is not critical to attracting investment[60]. However, there are some States such as Zimbabwe that have such poor rule of law track record that the

[59] Schill W "Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach" (2012) 52 Va. J. Int'l L. 58.
[60] Carim (note 46 above) 52.

legitimate fear of expropriation continuous to deter investors with engaging with the government[61]. For countries in this position, granting investors access to external arbitration, is thus a primary means through which investors can be granted reasonable assurances that their rights will be protected. The nature and functioning's of the judiciaries across the continent are clearly not homogenous in nature and so it is advisable that the dispute resolution mechanism that is adopted, be cognisant of these variances. Ngobeni's proposal for the creation of an African Justice Scoreboard that is capable of deciphering the status of the rule of law in African countries. It would serve to solve this problem of differentiating between the capacities of African judiciaries by providing a scientific method of this adjudication between the "rule of law" ratings of States, party to the AfCFTA system[62].

For this Scoreboard to be successful, African States would have to avail their judiciaries to foreign scrutiny. The data they provide towards the adjudication process would have to be accurate and delivered in a timeous manner. The metric of data collection would also have to harmonise discrepancies between incongruous judicial systems such as systems that follow Roman-Dutch Law and systems that follow or are based on Sharia law such as Egypt or Algeria. The formula used towards the calculation of the rankings would not only have to be accurate but would also have to be commonly agreed upon by Member States as well as the International community at large. Lastly African States would have to agree to be bound by the ratings of the scoreboard which may not always be in their favour and thus give up elements of their right to self-regulate investment disputes. It is however hoped this system will firstly encourage States deemed to have weak judiciaries to improve their situation, motivated by the possibility of adjudicating their own investment disputes in the future. The scoreboard is also expected to assist States in identifying areas of weakness. If the scoreboard is incorporated as part of the AfCFTA it will be binding on all States and would thus create a homogenous dispute resolution system for the continent.

In culmination this proposal would address the concern of African States with regards to the power imbalance inherent in the subsisting ISDS system by making

[61] De Wet E "The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa" 2013 ICSID Review 2.
[62] Ngobeni (note 25 above) 19.

State's key role players in the initial negotiation and dispute aversion phase of the dispute resolution phase. This would allow States to remedy complaints before recourse must be taken to the resource intensive international arbitration process. By aiming to distil potential disputes through the Focal Points and Joint Committees, the costs of dispute resolution could also be brought down by eliminating the various legal fees assumed in International Arbitration. The Focal Points and Joint Committees could further be bound to their own legal determinations, which would significantly increase the transparency and predictability of the dispute resolution process. Should the amicable resolution of disputes through this channel fail, Ngobeni's proposal would provide for the use of domestic courts towards the adjudication process by those States which the independent AJS deems competent. The value of the use of domestic courts particularly in ensuring legal predictability has already been discussed at length. For those State's whose judiciaries are deemed to be inappropriate forums for Investment dispute resolution, International Arbitration would remain an available option with the hope that all members of the AfCFTA would be encouraged to improve the status of their judiciaries.

6.5 Conclusion

An emerging trend on the African continent with regards to Investment Dispute resolution appears to be the promotion of alternative dispute resolution as depicted through preliminary mediation and negation processes that must precede any litigation or arbitration[63]. There is great value in this approach particularly with regards to the reduction of dispute resolution costs the aversion of frivolous claims and the resolution of simple matters not necessitating the employ of an arbitrator. This thesis proposes that this system of alternative dispute resolution is a suitable alternative to the subsisting ISDS system on the continent using the formatting of Brazil's CFIA's that are built on diplomatic dialogue towards the resolution of disputes as well as the aversion of disputes before they arise by creating channels of communication between Investors and States. Cognisant of the fact that all disputes cannot be solved through this method, this thesis suggests that the AU develop an African Justice Scoreboard so as indicate which States may then proceed to adjudicate disputes in their domestic courts and those in which an Investor may rightly request for the matter to be adjudicated in by an International forum. It is

[63] Supplementary Act ASA/…/…07 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS.and COMESA Common Investment Area Agreement.

hoped that this Justice Scoreboard will become a key facilitator towards the strengthening of African Judiciaries until all States are deemed capable of adjudicating their own disputes.

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