REDEFINING INVESTMENT DISPUTE RESOLUTION MECHANISMS IN THE AFCFTA: ADDRESSING AFRICAN CONCERNS AND PROMOTING INTRA-AFRICAN INVESTMENT.

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A thesis submitted in partial fulfilment of the academic requirements for the award of the degree Master of Laws (LLM) in International Economics and Business Law at Kigali Independent University.

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DECLARATION

I, Mrs. **Nikuze Naima,** a student at Independent University of Kigali (ULK), in Public International Law, hereby declare that this dissertation titled "**REDEFINING INVESTMENT DISPUTE RESOLUTION MECHANISMS IN THE AFCFTA: ADDRESSING AFRICAN CONCERNS AND PROMOTING INTRA-AFRICAN INVESTMENT**" is my own work and it has not been submitted anywhere else. However, authors and researchers whose work was referenced have been acknowledged as indicated in references.

Signature……

Nikuze Naima

Date ……

Done at Kigali

APPROVAL

It is certified that the work incorporated in this thesis, entitled "Redefining Investment Dispute Resolution Mechanisms in the AfCFTA: Addressing African Concerns and Promoting Intra-African Investment"", submitted in partial fulfilment of the requirements for the Master's degree in International Economic and Financial Law, University of Kigali (ULK), is being carried out by Mrs. Nikuze Naima under my guidance and supervision.

Dr. ZIKAMABAHARI Jean de Dieu

Supervisor' signature

ABSTRACT

On the 7th of July 2019, 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 5 scholars. In a final analysis a plausible model for the harmonisation of Investor-State Dispute Resolution for the continent will be forwarded.

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Nikuze Naima

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

ICSID: The International Centre for Settlement of Investment Disputes

ISDS: Investor State Dispute Resolution

NIEO: New International Economic Order

PAIC: Pan African Investment Code

RECs: Regional Economic Communities.

SADC: Southern African Development Community

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CHAPTER ONE: GENERAL INTRODUCTION

1.1.INTRODUCTION

The AfCFTA is the world's largest free trade area bringing together the 55 countries of the African Union (AU) and eight (8) Regional Economic Communities (RECs) to create a single market for the continent. The aim is to enable the free flow of goods and services across the continent and boost the trading position of Africa in the global market.[1]

As part of its mandate, the AfCFTA is to eliminate trade barriers and boost intra-Africa trade. In particular, it is to advance trade in value-added production across all service sectors of the African Economy. The AfCFTA will contribute to establishing regional value chains in Africa, enabling investment and job creation. The practical implementation of the AfCFTA has the potential to foster industrialization, job creation, and investment, thus enhancing the competitiveness of Africa in the medium to long term.[2]

The AfCFTA entered into force on May 30, 2019, after 24 Member States deposited their Instruments of Ratification following a series of continuous continental engagements spanning since 2012. It was launched at the 12th Extraordinary Session of the AU Assembly of Heads of State and Government in Niamey – Niger, in July 2019. The commencement of trading under the AfCFTA was in January 1, 2021.[3]

It is a high ambition trade agreement, with a comprehensive scope that includes critical areas of Africa's economy, such as digital trade and investment protection, amongst other areas.

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[1] Congressional research service retrieved at https://sgp.fas.org/crs/row/R47197.pdf accessed on 20/09/202.
[2] AU summit 2023: Powering trade through AfCFTA.
[3] Article 3 AGREEMENT ESTABLISHING THE AFRICAN CONTINENTAL FREE TRADE AREA.

By eliminating barriers to trade in Africa, the objective of the AfCFTA is to significantly boost intra-Africa trade, particularly trade in value-added production and trade across all sectors of Africa's economy.

The AfCFTA agreement, in Part 2, Article 3 sets out three broad objectives as follows:

(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".[4]

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

[4] AGREEMENT ESTABLISHING THE AFRICAN CONTINENTAL FREE TRADE AREA , article 3 retrieved at https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf accessed on 07/09/2023.

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.[5] 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 intraAfrican trade, it also seeks to create a unified trade policy for the African Continent as well as for its dealings with other role players in the global economy.[6]

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.[7]

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)".[8]

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

[6] 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.

[7] 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 9 Sept 2023].

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

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 different African scholars, 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.[9] 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.

1.2 Background of the study

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."[10] The mobilization of both domestic and foreign resources has thus become a key concern of legislators, statesmen and the business community worldwide. "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".[11] 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

[9] Mbengue (note 11 above) 371.
[10] Sornarajah M "The International Law on Foreign Investment" second edition Cambridge University Press 7.
[11] Nyombi C "A Case for a Regional Investment Court for Africa" (2018) 43 N.C. J. Int'l L. 68.

higher per capital incomes.[12] 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".[13]

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.[14] 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 African continent," in an effort to alter the exponential decline in investment into Africa. [15]

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". [16]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

[12] Mbengue M "Special Issue: Africa and the reform of the International Investment Regime" (2017) Journal of
World Investment and Trade 18 372
[13] Carim X "International Investment Agreements and Africa's Structural Transformation: A Perspective fromSouth Africa" in Rethinking bilateral investment treaties critical issues and policy choices" (2016) eds Kavaljit
Singh and Burghard Ilge 52.
[14] Nyombi C "A Case for a Regional Investment Court for Africa" (2018) 43 N.C. J. Int'l L. 68.
[15] 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 12 August 2023].
[16] Sornarajah (note 14 above) 250.

between himself and the host state.[17] Judiciaries in the Global South and particularly Africa have a perceived history of lacking independence and of fostering corrupt practices.[18] 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.[19] 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 Problem Statement

The research problem to be tackled by this research project is to ascertain how viable is the proposal to establish an African Justice scoreboard Permanent Regional Investment Court or adopt domestic courts as the primary dispute resolution mechanism for investor-state disputes within the AfCFTA. The first reference to a dispute settlement mechanism is mentioned in Article 4(f) of the AfCFTA agreement - which provides for specific objectives. It reads:

For purposes of fulfilling and realizing the objectives set out in Article 3, State Parties shall:

establish a mechanism for the settlement of disputes concerning their rights and obligations.[20]

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[17] Sornarajah (note 14 above) 250.
[18] 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.
[19] Sornarajah (note 14 above) 250.
[20] Agreement establishing the AfCFTA, Article 3.

Part VI of the Agreement under Article 20 specifically addresses this declaration as it stipulates:

"(1) A Dispute Settlement Mechanism is hereby established and shall apply to the settlement of disputes arising between State Parties.

(2) The Dispute Settlement Mechanism shall be administered in accordance with the Protocol on Rules and Procedures on the Settlement of Disputes.

(3) The Protocol on Rules and Procedures on the Settlement of Disputes shall establish, inter alia, a Dispute Settlement Body." [21]

The settlement of disputes under the African Continental Free Trade Area (AfCFTA) will be governed by the Protocol on the Settlement of Disputes. However, the historical development of the Investor-State Dispute Settlement (ISDS) system, which transplanted the model of commercial-style arbitration to resolve both contract-based and treaty-based disputes, has led to criticism and challenges.

Originally, the ISDS system was designed to handle mostly investment contract disputes, but in practice, the majority of cases (over 70%) are based on investment treaties. Critics argue that the ISDS mechanism interferes with a country's right to regulate and may lower regulatory standards, impacting genuine regulatory activities.[22]

The current reliance on ISDS by African countries is influenced by the economic framework, which involves importing from foreign states and dealing with multinational companies.

[21] AGREEMENT ESTABLISHING THE AFRICAN CONTINENTAL FREE TRADE AREA, article 3 retrieved at https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf accessed on 07/09/2023.

[22] 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.

However, the system's extensive costs, lack of African representation in international arbitral tribunals, and perceived power imbalance in favour of investors have raised concerns among African states.

As negotiations progress towards adopting an Intra-African Investment Protocol under the AfCFTA, global discussions on ISDS reform have been rekindled, with the European Union proposing an Investment Court System. Many African countries recognize the need for the ISDS system to attract foreign investment but have reservations about its practice, considering the lack of widely trusted and independent judiciaries.[23]

The research will examine how African Regional Economic Communities (RECs) have balanced investor and state rights and obligations in dispute resolution. It will also assess the significance of the Pan-African Investment Protocol. Overall, the study aims to provide insights into the challenges and potential alternatives for resolving investment disputes within the context of Africa's economic integration and the AfCFTA.

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.[24]

[23] Investment Treaty news retrieved at https://www.iisd.org/itn/en/2022/12/26/afcfta-protocol-on-investment-was-concluded/ accessed on 12 August 2023.
[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.

1.4 Research questions

The research questions are as follows:

1. What are the fundamental challenges and reservations associated with the existing Investor-State Dispute Settlement (ISDS) framework for African nations that demand urgent attention?

2. What strategies have African Regional Economic Communities (RECs) and the African Union (AU) employed in shaping their approaches to Investor-State Dispute resolution, and how have these strategies impacted the region's investment climate and economic development?

3. How can the implementation of legal mechanisms and institutional mechanisms contribute to the development of more effective and transparent dispute resolution processes?

1.5 Objectives of the Research

1.5.1 GENERAL OBJECTIVE

The general objective of this research is to conduct a comprehensive legal analysis of investment dispute settlement mechanisms in the AfCFTA addressing concerns and promoting intra-Africa investment. This research aims to Investigate the evolution of the ISDS (Investor-State Dispute Settlement) system to identify the perceived power imbalance favouring investors and its core causes, explore how African Regional Economic Communities (RECs) have addressed African concerns within the ISDS system and assess their successes and failures in doing so, examine the Pan-African Investment Code's potential as a model for the AfCFTA (African Continental Free Trade Area) Investment Protocol and assess the feasibility of establishing an African Investment Court and evaluate the proposal

for an African Justice Scoreboard, which would determine the appropriateness of using domestic courts on a case-by-case basis.

1.5.2 SPECIFIC OBJECTIVES

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:** This would involve tracing the origins of ISDS, examining its evolution over time, and identifying key factors that have contributed to the perception that investors wield disproportionate power. Some factors contributing to this imbalance may include the wording of investment treaties, arbitration mechanisms, and the role of arbitrators who often have a background in corporate law.

b) **Explore how African REC's have addressed African concerns with the ISDS system, evaluating their successes and failures:** This entails examining the strategies and policies adopted by African RECs to address concerns about the power imbalance within ISDS. Successes and failures in this context could relate to the ability of African RECs to negotiate better terms in investment agreements, the effectiveness of dispute resolution mechanisms, and whether these efforts have resulted in fairer outcomes for African states.

c) **Examine the Pan-African Investment Code so as to ascertain its viability as a model for the AfCFTA Investment Protocol:** the research aims to assess the viability of the Pan-African Investment Code as a potential model for the AfCFTA Investment Protocol. This involves a detailed examination of the provisions and principles outlined in the Pan-African Investment Code and an analysis of how well it aligns with the goals and objectives of the AfCFTA.

d) **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:** The research will also analyse the proposal for a Justice Scoreboard, which would assess the appropriateness of using domestic courts on a case-by-case basis. Factors to consider include the independence and capacity of domestic courts in African countries and their ability to handle complex investment disputes fairly.

1.6 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. This system thus emerges as 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.[25] 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. [26]

[25] UNCITRAL and ICSID reforms.
[26] COMMON Market for Eastern and Southern Africa.

1.7 Research Methodology

In order for the researcher to address the legal issues described in the problem statement and attain the objectives of this study, different techniques and methods were employed in this research project.

1.7.1. Research techniques

As far as research techniques are concerned, in order to collect data about the subject, this study was carried out by using the documentary technique which helped the researcher to read various related international instruments, domestic laws, case laws, library books, online books, journal articles, and any other useful materials as well as from electronic sources**.**

1.7.2. Research methods

After having gathered mentioned sources, the findings were selected using; exegetic method which has been useful in gathering information especially by interpreting different legal provisions from various relevant legislations. The other important method for this research is analytical method which was used to analyse different elements of data collected. Synthetic method is another one used for structuring data collected so as to improve coherency of the work.

1.9 Structure of the Study

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 ISDS system on the African continent so as to contextualize the concerns of African states with the current system.

Chapter three will analyse the challenges faced by African countries due to the ISDS Chapter four 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 five we will look the way forward of the institutional and legal dispute mechanism in the African Continental Free trade Area. Finally, chapter Six will offer a conclusion and 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.

CHAPTER TWO: CONCEPTUAL AND THEORETICAL FRAMEWORK

Investor-State Dispute Settlements (ISDS) is a mechanism in investment and trade agreements that allows foreign companies to settle disputes with the hosting country through arbitration.[27]It is intended to protect foreign companies against expropriation or discrimination on the basis of nationality. [28]More than 2,700 bilateral or multilateral investment treaties include the ISDS mechanism. From 1987 through the present, investors have initiated approximately 1,000 ISDS cases against 117 countries.[29]Investors have litigated the vast majority of these cases within the past fifteen years. More than 600 cases were resolved either on the merits or jurisdictional grounds.[30]A statistical breakdown shows that ISDS arbitration tribunals decided 36% of cases in favour of the state and 29% in favour of the investor, the parties settled 23% of cases, the investor discontinued 10% of cases, and arbitration tribunals found in 2% of cases a treaty breach with liability for the state but no damages attributable to the investor.[31]Common allegations in ISDS cases involve seizures or nationalization of investments; termination or nonrenewal of contracts, licenses, and permits; state harassment through improper criminal prosecution or wrongful detention;

This research is situated within a comprehensive conceptual framework that delves into three critical dimensions: the rule of law, the global economic order, and a Third World Approach to International Law. Each of these dimensions offers essential insights into the complexities surrounding Investor-State Dispute Settlement (ISDS) mechanisms, particularly within the context of Africa.

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[27] ISDS: Important Questions and Answers, OFF. OF THE U.S. TRADE REPRESENTATIVE (March 2015), https://ustr.gov/about-us/policy-offices/press-office/blog/2015/march/isds-important-questions-and-answers-0
[28] Idem
[29] Fact Sheet on Investor-State Disp. Settlement Cases in 2018, UNITED NATIONS CONF. ON TRADE AND DEV. [UNCTAD], 1, (2019), https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d4_en.pdf
[30] UNCTAD Report supra note 4
[31] Id. at 67

2.1 Conceptual framework

2.1.1 Investment

Investment is a purchase of goods which is future-oriented, aimed at earning income in the future or creating wealth in the future[32]An investment always concerns the outlay of some resource today—time, effort, money, or an asset—in hopes of a greater payoff in the future than what was originally put in. For example, an investor may purchase a monetary asset now with the idea that the asset will provide income in the future or will later be sold at a higher price for a profit.[33]

2.1.2 ADR

Alternative dispute resolution (ADR) refers to the different ways people can resolve disputes without a trial. Common ADR processes include mediation, arbitration, and neutral evaluation. These processes are generally confidential, less formal, and less stressful than traditional court proceedings.[34] ADR often saves money and speeds settlement. In mediation, parties play an important role in resolving their own disputes. This often results in creative solutions, longer-lasting outcomes, greater satisfaction, and improved relationships.[35]

2.1.3 Investor-State Dispute Settlement (ISDS)

is a legal mechanism allowing an investor from one contracting state to an international investment agreement to bring a claim against another contracting state in which it has made an investment (also known as the host state), because relying on the national courts of the host country to enforce obligations in an investment agreement is not always easy, may be

[32] CLEARTAX retrieved at https://cleartax.in/g/terms/investment accessed on 25/09/2023
[33] Investopedia available at https://www.investopedia.com/terms/i/investment.asp accessed on 02/10/2023
[34] NY.COURTS.GOV
[35] NY.COURTS.GOV

time-consuming or may even be impossible. ISDS was created to reduce the political risks related to rapidly increasing foreign investment, and make the commitments made by host states in investment treaties more easily enforceable.[36]

2.1.4 Intra-African investment

Refers to investments made by entities, whether they are individuals, businesses, or governments, within the African continent. These investments involve the allocation of capital, resources, or assets from one African country into another African country's economy. In other words, it signifies economic activities where the source and destination of the investment are both located within the boundaries of different African nations.

2.1.5 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.[37] 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". [38]

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

[36] European Parliament briefing retrieved at https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/545736/EPRS_BRI%282015%29545736_EN.pdf accessed on 25/9/2023

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

[38] Fallon (note 52 above) 2.

legal transparency" .[39] 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 to guarantee adherence to the rule of law. [40]

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. 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. According to this perspective, this system may serve as a threat to "State sovereignty" and ultimately to "national self-determination". [41]This research forwards a perspective of investment dispute resolution for the continent that is best able to promote and facilitate the rule of law.

[39]INTERNATIONAL LAW ASSOCIATION SYDNEY CONFERENCE (2018) "RULE OF LAW AND INTERNATIONAL
INVESTMENT LAW" 8.
[40] Schill (n54 above) 68.

[41] 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. 5

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.

2.1.6 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".[42] 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.[43]

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 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. 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

[42] 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.
[43] INTERNATIONAL LAW ASSOCIATION SYDNEY CONFERENCE (2018) "RULE OF LAW AND INTERNATIONAL
INVESTMENT LAW" 8.

has limited legal avenues through which to appeal a decision rendered by ad hoc ICSID tribunals.[44]

2.1.7 A Third World Approach

Investor- state dispute resolution can also be conceptualized through the lens of a "Third World Approach of International Law". Scholars 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. 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.[45]

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". 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. 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.

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[44] F Morosini, M Ratton and S Badin "Reconceptualising International Investment Law from the Global South: An Introduction" eds Fabio Morosini and Michelle Ratton Sanchez Badin. New York: Cambridge University 4.

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

Overall this perspective calls for the critical investigation of the origins of the ISDS system towards the development of a system that addresses the concerns and needs of the African continent.[46]

2.2 Theoretical framework

The theoretical framework for this research is grounded in the concepts of regional economic integration, investment law harmonization, and the evolving landscape of investment dispute resolution mechanisms in Africa. The integration of African economies through the establishment of Regional Economic Communities (RECs) aimed to leverage "economies of scale" to collectively address the challenges and barriers to investment on the continent.[47]

2.2.1 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 channels46. 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. These tribunals which consisted of two 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.

[46] Chimni B S “Third World Approaches to International Law: A Manifesto” (2016) International Community
Law Review 8:3 17.
[47] 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].

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, accordingly, in 1899 at The Hague Peace Conference, the Convention of the Pacific Settlement of International Disputes was established.

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" In 1922 the International Chamber of Commerce for the first time adopted rules of arbitration and the following year established the Court of Arbitration 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 Chamber of Commerce. [48]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. [49]

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, 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

[48] Geneva Protocol 1923
[49] About ICSID – World Bank.

and political instability. In addition to these fears, investors were also sceptical of seeking recourse in the local courts of developing countries, more so, when the host government was the respondent in the matter, 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.[50]

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. 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. [51]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".

The Convention is only applicable to States which have ratified the Convention. 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" The institution is composed of a Secretariat, the Panel of Conciliators and the Panel of Arbitrators. [52] States rarely make requests for conciliation and this procedure has been invoked only nine times in the history of the Centre.

[50] Foreign direct investment for development
[51] Corruption in international arbitration- ICSID
[52] UNCTAD – Internationa investment agreement.

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. [53]

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. The Convention does not apply to Additional Facility Proceedings and Contracting Parties to the Convention are not bound automatically to the Additional Facility Rules. [54]

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. 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. 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. [55]

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 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."

[53] Arbitration and conciliation Act.
[54] Dispute settlement Washington convention.
[55] Approaches to solving territorial conflicts.

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 an arbitrator and the third is appointed jointly by the two-party selected arbitrators unilaterally."[56]

The arbitration process begins with the lodging of an arbitration request by the claimant to the Secretary General of the Centre. After the matter is registered, the other party to the dispute is duly notified and provided with a copy of the claim. The arbitral tribunal which hears the matter is typically composed of three arbitrators.

Each party appoints 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, the award is final and binding.[57] 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 reinterpretation of the agreement in question under article 50. Failing this, Article 54 binds the Contracting State parties to recognize these awards s binding.

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.[58]

2.2.2 African Experiences of International Arbitration

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

[56] Dispute settlement the Washington convention.
[57] Chapter 387- Arbitration act.
[58] Ground of annulment in ICSID award.

Namibia, and Guinea-Bissau although some of these States have signed but not ratified the Agreement. African States currently make up 31% of the membership of the Centre. 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.[59]

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.[60]

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.

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.[61] Typically, cases involving African States have emerged from the mining, hospitality, telecommunications, oil exploration, commercial farming and power generation sectors.

[59] International commercial arbitration.
[60] Investment arbitration in Africa
[61] IMF E Library.

2.2.3 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 in the adjudication process.

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.[62]

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.[63] 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. [64]

[62] ICSID caseload statistics- special case- Africa (May 2017)
[63] ItaLAW cases retrieved at https://www.italaw.com/cases/1651 accessed on 23/08/2023
[64] Background paper on annulment pg.87

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". [65]

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. 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. [66]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. [67]Although there are some countries that are up-to date on panellist 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 nominate qualified individuals and if non-exist, some resources must be expanded towards the training and grooming of suitable individuals.[68] In most cases, African countries after selecting non-African arbitrators will go on to seek representation by non-African lawyers.

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

[65] Draft code of conduct for adjudicators in investor-state dispute settlement.
[66] The International Centre for Settlement of Investment Disputes retrieved at https://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partB-section04.htm accessed on 23/08/2023
[67] History of ICSID Convention volume II
[68] Data base of ICSID Panels

consistently. [69]The more common use of American lawyers by African Governments is indicative of a lack of confidence in local litigators.[70]

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.[71] Some individuals believe that non-African lawyers hired by African States can sometimes exert influence on their clients, encouraging them to choose arbitrators from outside of Africa whom they are more acquainted with.[72]

The cost of ICSID Convention membership is yet another major concern of African States partly in light of their predominantly fragile economies.[73] 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. [74]

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."

[69] Development in African registration retrieved at https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2018/article/developments-in-african-arbitration accessed on 23/08/2023
[70] Alternative dispute resolution in Africa retrieved at https://africacenter.org/publication/alternative-dispute-resolution-in-africa-preventing-conflict-and-enhancing-stability/ accessed on 24/08/2023
[71] Development in African arbitration retrieved at https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2018/article/developments-in-african-arbitration accessed on 23/08/2023
[72]Development of African arbitration.
[73] History of the ICSID Convention
[74] International Centre for Settlement of Investment Treaty Article 17

[75]Such decision shall form part of the award.[76] A party seeking to lodge an arbitration claim must put down a non-refundable amount of US$25 000. 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.[77]

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.[78]

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.[79] However, two arbitrators went on to resign and so another tribunal had to be constituted five months later. 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. Although delays of this nature are not peculiar to the ICSID arbitration system alone, they could be mitigated through the use of domestic courts.[80] 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. [81]In 2015, South Africa cancelled all its existing investment treaties, now investment including all dispute resolution are regulated by domestic laws and courts. [82]This paradigm shift has not negatively affected the countries investment prospects in any

[75] International Centre for Settlement of Investment Treaty 1966 Article 61.
[76] International Centre for Settlement of Investment Treaty Chapter 1.
[77] ICSID schedule of fees (2023)
[78] Development of African arbitration.
[79] Italaw retrieved at https://www.italaw.com/cases/3308 accessed on 23/08/2023
[80] 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
[81] Carim (note 89)
[82] Carim (note 89) above

significant way and the Department of Trade and Industry is of the opinion that there is no direct correlation between investment agreements and increased investment flows. [83]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. [84]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. [85]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. [86] 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." [87]These proceedings were ultimately dismissed at the claimant's request but this case still highlighted an investor's ability to strong hold a State into not following a developmental agenda in favour legislation that best serves the investor.[88]

[83] Carim (note 89 above)53
[84] Carim (note 89 above) 52
[85] Foresti v. South Africa (2007) Piero Foresti, Laura de Carli and others v. Republic of South Africa (ICSID Case No. ARB (AF)/07/1).
[86] Foresti v. South Africa (2007) Piero Foresti, Laura de Carli and others v. Republic of South Africa (ICSID Case No. ARB(AF)/07/1)
[87] Foresti v. South Africa (2007) Piero Foresti, Laura de Carli and others v. Republic of South Africa (ICSID Case No. ARB(AF)/07/1)
[88] Foresti v. South Africa (2007) Piero Foresti, Laura de Carli and others v. Republic of South Africa (ICSID Case No. ARB (AF)/07/1).

CHAPTER III: Challenges in the Investor-State Dispute Settlement (ISDS) Framework for African Nations"

INTRODUCTION

Developing states may have reservations about the international arbitral process. They indeed actually do encounter serious practical difficulties and problems in the use of these processes in their international economic relations and transactions.[89] However, it must also be admitted that most reservations usually expressed by these states are justified and deserve serious, sincere and honest consideration, allowing that some reservations about arbitration and ADR in the developing states are exacerbated by a general ignorance of, and lack of knowledge and information about how the processes work and of their potential and practical utility as means for efficiently and cost-effectively resolving disputes.[90] Most of the solutions for some of the problems and difficulties, which developing states normally encounter in this area, are within their power (within the power of any developing state), to assuage. The incontesible fact (a reality) however is that, in the contemporary international economic order, arbitration and ADR are both inevitable and indispensable, especially for developing economies or those States with economies in transition. [91]What, in any event, should not be tolerated, is allowing, especially, arbitration to be used as an instrument of blackmail or oppression against those in quest of economic and social advancements and progress.[92]

One of the first things investors would want to check before becoming involved in any cross-border project is whether the country's legal and regulatory environment is favourable to such project.

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[89] An overview of international arbitration retrieved at https://www.international-arbitration-attorney.com/wp-content/uploads/Overview-of-International-Arbitration.pdf accessed on 23/09/2023
[90] Investor–State Disputes: Prevention and Alternatives to Arbitration.
[91] An overview of international arbitration.
[92]The law of arbitration.

This is because a contractual document cannot unilaterally modify or override the provisions of a law or the country's constitution. The Foreign Investment Advisory Service (FIAS), [93]a joint facility of the World Bank, Multilateral Investment Guarantee Agency (MIGA) and the International Finance Corporation (IFC) helps developing and transition-economy governments design initiatives to attract foreign direct investors. [94]FIAS found growing concerns and frustration among governments and investors about the difficulties in successfully implementing private infrastructure projects. Delays in project start-ups, contract cancellations, and legal disputes have frequently overshadowed success stories and efficiency gains.[95]

Generally, dispute resolution mechanisms are broadly divided into two: adjudicatory and consensual. Thus the dispute resolution mechanisms adopted in resolving disputes range from adjudicative processes in which a determination is made by a third party (e.g. judge, arbitrator [96]and expert determination) to consensual processes in which a neutral third party assists the parties in reaching a resolution which is agreed rather than imposed (e.g. mediation, conciliation, facilitation, med-arb, expert appraisal, dispute resolution board).[97]The consensual processes are usually referred to as Alternative Dispute Resolution (ADR).Over time all these methods have achieved varying degrees of success. However, we must be able to establish a nexus between a dispute and process so as to determine which process fits a particular dispute.[98]

[93] Foreign Direct Investment for Development.
[94] International Finance Cooperation.
[95] See Alternative Dispute Resolution Services in West Africa: A Guide for Investors: Commercial Law Development Program, 2003
[96] Arbitration and Dispute Resolution Practice (4th edn, Sweet & Maxwell 2003), and E Akpata. The Nigerian Arbitration Law in Focus (West African Book Publishers Ltd 1997
[97] Henry Brown and Alan Marriott, ADR Principles and Practice (3rd edn, Sweet & Maxwell 2011); Susan Blake, Julie Browne and Stuart Sime, A Practical Approach to Alternative Dispute Resolution
[98] Art 1(3) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985 as adopted in 2006.

3.2. African experiences with international arbitration

Developing countries face several challenges within the WTO Dispute Settlement System. This section discusses these challenges to understand the perspective of African countries on the factors that limit their utilization of the system.

3.2.1 The Choice/Appointment of International Arbitrators by Parties.

Despite there being individuals with the relevant knowledge, skill and experience needed for international dispute resolution and the institutions, which specialize in, or are devoted to, facilitating alternative dispute resolution (ADR), there has been a general tendency by parties to a dispute doing business in Africa to go back to their home turfs to appoint arbitrators. This is further complicated by the fact that most disputants prefer to appoint their non-nationals as arbitrators in international disputes, thus resulting in instances where even some Africans go for non-Africans to be arbitrators. This is so because parties are given the autonomy to appoint their arbitrators, conciliators or representatives and cannot be forced to accept the choice of arbitrator involuntarily unless under very limited and special circumstances. Arbitration is intended to be a voluntary process. However, it is not uncommon to see parties disagree on the appointment of an arbitral tribunal or attempt to obstruct the appointments to delay the arbitration[99].This factor thus portrays Africa to the outside world as a place where there are no arbitrators with sufficient knowledge and expertise to be appointed as international arbitrators.

[99] Lew, J., 'Comparative International Commercial Arbitration', 237, [London: Kluwer Law International, 2003]

3.2.2 Lack of or Inadequate Legal and Institutional Framework/Capacity on Arbitration

There have been inadequate legal regimes and infrastructures for the efficient and effective organization and conduct of international arbitration in Africa. Some African states have for a long time lacked an established legal framework on international arbitration.[100]The existing one annexed arbitration to court, a factor that cannot promote international commercial arbitration. The existing provisions if any barely mentioned international arbitration with a specified framework on the same. Some of those states may also not be parties to all or some important multilateral treaties relevant to international dispute resolution.

This has denied the local international arbitrators the fora to showcase their skills and expertise in international commercial arbitration. For instance, the arbitration law in South Africa is not drafted along the UNICITRAL model law lines and varies substantively with laws in other jurisdictions[101]. Another example of a country with archaic arbitration laws is Tanzania, whose Principal Arbitration Act was enacted on 22 May 1932. It is also not drafted in line with UNCITRAL model law.[102]

These two jurisdictions are an example of the situation in some African countries and this discourages foreigners from seeking arbitration services in Africa. There exists a challenge on the capacity of existing institutions to meet the demands for ADR mechanisms introduced by the constitution as well as handling the commercial arbitration matters.

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[100] Amazu A. Asouzu, 'Some Fundamental Concerns and Issues about International Arbitration in Africa' Available at http://www.mcgill.ca/files/isid/LDR.2.pdf

[101] UNCITRAL Model Law on International Commercial Arbitration (1985)

[102] Arbitration in Africa, August 2011, South Africa, Available at http://www.nortonrosefulbright.com/files/south-africa-25761.pdf

[103]Much needs to be done to enhance their capacity in terms of their number, adequate staff and finances to ensure that they are up to task in facilitation of ADR.

3.2.3 Varying Cultures between Disputants

Non-African disputants have always been wary of the African international commercial arbitrators especially where one of the disputants is African due to cultural differences. These differences may be in reference to economic, political and/or legal developments thus creating varying opinion of issues, prejudices and conflicts of interests especially in international economic relations. Some may seek to subject their dispute to another arbitrator who may not share a culture with either of the disputants but one aware of international best practices in arbitration.[104]

3.2.4 Perception of Corruption/ Government Interference

At times governments are also perceived to be interfering with private commercial arbitration matters. For instance, the government may try to influence the outcome of the process especially where there are its interests at stake and put forward the argument of grounds of public policy. The Global Corruption Barometer 2013 is the world's largest public opinion survey on corruption. This hinders the expansion of the scope of international commercial arbitration as the view is propagated that justice is impossible to achieve in Africa.

[103] Arbitration in Africa, August 2011, South Africa, Available at http://www.nortonrosefulbright.com/files/south-africa-25761.pdf

[104]See Russell J. Leng and Patrick Regan, 'Social and Political Cultural Effects on the Outcome of Mediation in Militarized Interstate Disputes', Available at http://cdp.binghamton.edu/papers/socialeffects-full.pdf

3.2.5 Endless Court Proceedings

Sometimes matters will be appealed all the way to the highest court on the law of the land in search of setting aside of awards. Parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending.[105] This delays finalization of the matter as well as watering down the perceived advantages of arbitration and ADR in general. This can only be corrected through setting up tribunals or courts with finality in their decisions and operating free of national courts interference.

3.2.6 The Challenge of Arbitrability

Arbitrability is used to refer to the determination of the type of disputes that can be resolved through arbitration and those which are the domain of the national courts. It deals with the question of whether specific classes of disputes are barred from arbitration because of the subject matter of the dispute.[106]Courts often refer to "public policy" as the basis of the bar.[107]

The challenge arises when a matter that is arbitrable in one jurisdiction fails the test of arbitrability in a different jurisdiction. Arbitrability may either be subjective or objective. National laws often restrict or limit the matters, which can be resolved by arbitration. Subjective arbitrability refers to a situation where states or state entities may not be allowed to enter into arbitration agreements at all or may require a special authorization. [108]Objective arbitrability refers to restrictions based on the subject matter of the dispute.

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[105] Kariuki Muigua, Role Of The Court Under Arbitration Act 1995: Court Intervention Before, Pending And Arbitration In Kenya, Kenya Law Review (2010), Available at http://www.kenyalaw.org/klr/index.php?id=824

[106] Laurence Shore "Defining 'Arbitrability'-The United States vs. the rest of the world", New York Law Journal, 2009, available at http://www.gibsondunn.com/publications/Documents/Shore-DefiningArbitrability.pdf, Accessed on 15th October, 2023

[108] Available at www.paneurouni.com/files/sk/fp/ulohy.studentor/2rocnikmgr/arbitrability-studentsversion.pdf, Accessed on 8th November, 2023

Certain disputes may involve such sensitive public policy or national interest issues that it is accepted that they may be dealt only by the courts, for instance criminal law.[109]

According to the United Nations Conference on Trade and Development's (UNCTAD's) World Investment report 2019, forward-looking international investment agreements' reform is well under way and involves countries at all levels of development and from all geographical regions, and with almost all the treaties concluded in 2018 containing a large number of reform features. [110]Some of the reforms are sustainable development-oriented, meant to take into account the sustainable development goals and aspirations.[111]

The UNCTAD's Reform Package for the International Investment Regime sets out five action areas which include: safeguarding the right to regulate, while providing protection; reforming investment dispute settlement; promoting and facilitating investment; ensuring responsible investment; and enhancing systemic consistency.[112]UNCTAD's World Investment Report 2019 has also pointed out that Investor–State arbitration continues to be controversial, spurring debate in the investment and development community and the public at large. As such, it has identified five principal approaches which have emerged from IIAs signed in 2018: (i) no ISDS, (ii) a standing ISDS tribunal, (iii) limited ISDS, (iv) improved ISDS procedures and (v) an unreformed ISDS mechanism. In these principal approaches to ISDS, used alone or in combination[113]:

[109] Katarína Chovancová, Arbitrability, Extract, page 1, Institute of International and European Law, Available at http://www.paneurouni.com/files/sk/fp/ulohy-studentov/2rocnikmgr/arbitrability-students-version.pdf Accessed on 2nd October, 2023
[110] United Nations Conference on Trade and Development, World investment report 2019: Special economic zones. UN, 2019, p. 104
[111] Ibid,p.104
[112] Ibid,p.104
[113] United Nations Conference on Trade and Development, World investment report 2019: Special economic zones. UN, 2019, p. 106.

(I)No ISDS:

The treaty does not entitle investors to refer their disputes with the host State to international arbitration (either ISDS is not covered at all or it is subject to the State's right to give or withhold arbitration consent for each specific dispute, in the form of the so-called "case-by-case consent") (four IIAs entirely omit ISDS and two IIAs have bilateral ISDS opt-outs between specific parties).[114]

(ii)Standing ISDS tribunal:

The treaty replaces the system of ad hoc investor–State arbitration and party appointments with a standing court-like tribunal (including an appellate level), with members appointed by contracting parties for a fixed term (one IIA).[115]

(iii)Limited ISDS:

The treaty may include a requirement to exhaust local judicial remedies (or to litigate in local courts for a prolonged period) before turning to arbitration, the narrowing of the scope of ISDS subject matter (e.g. limiting treaty provisions subject to ISDS, excluding policy areas from the ISDS scope) and/or the setting of a time limit for submitting ISDS claims (19 IIAs).[116]

(iv)Improved ISDS procedures:

The treaty preserves the system of investor–State arbitration but with certain important modifications. Among other goals, such modifications may aim at increasing State control over the proceedings, opening proceedings to the public and third parties, enhancing the

[114] World investment report 2019: Special economic zones. UN, 2019, p. 106.
[115] World investment report 2019: Special economic zones. UN, 2019, p. 106.
[116] World investment report 2019: Special economic zones. UN, 2019, p. 106.

suitability and impartiality of arbitrators, improving the efficiency of proceedings or limiting the remedial powers of ISDS tribunals (15 IIAs).[117]

(v)Unreformed ISDS mechanism:

The treaty preserves the basic ISDS design typically used in old-generation IIAs, characterized by broad scope and lack of procedural improvements (six IIAs). Following the above highlighted approaches, countries therefore have a number of options to choose from while negotiating their IIAs with foreigners. They can settle on the approach that most favours their domestic interests while participating in international investments development.[118]

[117] Ibid , p.106
[118] Ibid ,p.106

CHAPTER 4: REGIONAL ATTEMPTS TOWARDS A COMMON DISPUTE RESOLUTION REGIME

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. 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.[119] 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. [120]Within the context of Africa's several small and fragmented economies, regional integration is expected to "create wider economic space for growth.[121] 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".[122] 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.

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

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

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

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

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.[123]

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.

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

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. [124]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 favourable investment climate. [125]

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.[126] All domestic frameworks are envisaged to align with the regional standard.[127] Article 27 of Annex 1 further laid down the obligation of States to provide investors with access to domestic courts, judicial and administrative tribunals or any other competent authority towards the resolution of disputes arising from an investment.[128] 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. 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

[124] SADC Investment Protocol on Finance and Investment 2006.
[125] SADC Investment Protocol on Finance and Investment Preamble 2006.
[126] SADC Investment Protocol Annex 1 Article 19 2006.
[127] SADC Investment Protocol Preamble
[128] SADC Investment Protocol Annex 1 Article 27 2006.

Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules". [129]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.[130] 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". [131]Furthermore, the Tribunal had personal jurisdiction over inter-State disputes as well as disputes arising between natural or juristic persons and State.[132]

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". [133]SADC Member 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. [134]

[129] SADC Investment Protocol Annex 1 of 2006.
[130] SADC Investment Protocol Annex 1 of 2006.
[131] SADC Tribunal Protocol Article 32
[132] SADC Tribunal Protocol Article 32.
[133] SADC Tribunal Protocol Article 32
[134] SADC Tribunal Protocol Article 32.

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. During this time, the terms of office of the Tribunal judges were not renewed and open vacancies were not staffed. 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.[135] 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. [136]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. [137]The catalyst for these events has been identified as a series of Tribunal cases relating to unlawful expropriations of agricultural land in Zimbabwe. 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.[138]

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. [139]

This land reform policy predominantly targeted white landowners and facilitated the forced removal of more than 4000 people.

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[135] 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.
[136] De Wet (note 114 above) 3
[137] De wet (note 114) 3
[138] De wet (note 114) 3
[139] De wet (note 114) 4

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 more particularly to refrain from such discriminatory practices.[140] Although the SADC to Treaty does not create a right to property it guarantees non-discrimination.

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.[141] In response to this 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". [142]

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."[143] 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

[140] De wet (note 114) 8
[141] De wet (note 114) 12
[142] De wet (note 114) 15
[143] The Declaration and Treaty establishing the Southern African Development. Community 1993

amendment of the Treaty so as to exclude natural and juristic persons from the jurisdiction of the Tribunal.[144] 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. [145]

4.2.2 COMESA

In 2007, COMESA concluded a COMESA Common Investment Area Agreement (CCIA Agreement) which was subsequently revised in 2017.[146] 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". [147]A natural person is defined as a person having lawful citizenship in a COMESA Member State whilst a juridical person refers to a legal enterprise that has been duly constituted or organized under the laws of a COMESA Member State. [148]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. Furthermore, such an investor must comply with an ordinary "substantial business activity" test as it is applied in taxation disputes.[149]

[144] De Wet (note 19 above) 15.
[145] De Wet (note 19 above) 15.
[146] COMESA Common Investment Area Agreement 2017.
[147] COMESA Common Investment Area Agreement 2017 Article 1(4)
[148] COMESA Common Investment Area Agreement 2017 Article 1(4)
[149] COMESA Common Investment Area Agreement 2017 Article 26

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.[150]

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. 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. [151]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. [152]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. [153]This procedure is innovative in that it places Alternative Dispute Resolution at the center of investor-state dispute resolution. [154]It also allows parties time to reconsider their positions before opting for arbitration which could serve to decrease the instances of frivolous litigation. [155]

If the negotiation and mediation attempts fail, then arbitration may be instituted in accordance with Article 28 of the CCIA. The parties however must adhere to a prescription period of three years. [156]

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

[150] COMESA Common Investment Area Agreement Article 26.
[151] COMESA Common Investment Area Agreement Article 26.
[152] COMESA Common Investment Area Agreement Article 26
[153] Muchlinski P "The COMESA Common Investment Area: Substantive Standards and Problems in Dispute Settlement" (2010) SOAS University of London Law Working Papers 13.
[154] Muchlinski (note 132 above) 13
[155] Muchlinski (note 132 above) 13.
[156] COMESA Common Investment Area Agreement Article 28.

Facility Rules or ad hoc arbitration under the UNCITRAL rules or any other arbitration institutions rules. [157]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.[158] 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.[159]

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.[160] 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". [161]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.

[157] COMESA Common Investment Area Agreement Article 28.
[158] COMESA Common Investment Area Agreement Article 28.
[159] Muchlinski (note132 above) 13
[160] COMESA Common Investment Area Agreement Article 28.
[161] Muchlinski (note132 above) 12

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 confidential business information. [162]The arbitration process is furthermore open to submissions by friends of the court or amicus curia, however this provision operates at the Tribunals discretion. Finally, the Contracting States commit to ensure that all arbitral awards are enforceable in their territory.[163] 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.

[162] COMESA Common Investment Area Agreement Article 28.
[163] COMESA Common Investment Area Agreement Article 28.

4.2.3 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. [164]

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.[165] 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 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. [166]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.[167] 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. [168]

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[164] Supplementary Act ASA/…/…07 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS.
[165] Supplementary Act ASA/…/…07 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS Article 31.
[166] Supplementary Act ASA/…/…07 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS Article 31.
[167] Supplementary Act ASA/…/…07 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS Article 31.
[168] Supplementary Act ASA/…/…07 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS Article 31.

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.[169] 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. [170]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.[171] 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 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.[172] 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.[173]

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

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.[174] 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.[175]

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. [176]

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.

4.2.4 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.[177] 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

[174] Supplementary Act ASA/…/…07 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS Article 1.
[175] Supplementary Act ASA/…/…07 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS Article 1.
[176] Supplementary Act ASA/…/…07 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS Article 34.
[177] The East African Community Model Investment Code 2016.

within the region.[178] "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".[179]

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. [180]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.[181] 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.[182] All documents relevant to any such arbitration are to be made available to the public with the reduction of sensitive material. All oral submissions shall also be open to the public. Amicus curia shall be granted personal jurisdiction in any arising arbitration matters.[183]

[178] The East African Community Model Investment Treaty 2016 Preamble
[179] Chidede T "The Right to Regulate in Africa's International Investment Law Regime" LLM Thesis 2017 The University of the Western Cape.
[180] The East African Community Model Investment Treaty Article 21
[181] The East African Community Model Investment Treaty Article 26.
[182] The East African Community Model Investment Treaty Article 27.
[183] The East African Community Model Investment Treaty.

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 novelist 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.

4.3 Regional Investment Code

4.3.1 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). [184]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. 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.[185] 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." [186]

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." The PAIC also encourages investors and Member States to initially endeavour to resolve their disputes through consultations and negotiations or even non-binding mediation. [187]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

[184] 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]
[185] Draft Pan-African Investment Code Article 41.
[186] Draft Pan-African Investment Code Article 41.
[187] Draft Pan-African Investment Code Article 42.

state and adhering to any mutual agreements between the parties as well as the exhaustion of local remedies.[188] Where arbitration is made use of, it may be conducted at "any established African public or African private dispute resolution centre or Permanent Court of arbitration centers in Africa (or the African Union Court of Arbitration) or African regional court where applicable. [189]This Arbitration will be conducted in accordance with the UNCITRAL rules. 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.

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 used arbitration can only be conducted in African institutions thereby excluding international institutions but keeping their rule frameworks. [190]

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."

[188] Draft Pan-African Investment Code Article 42.
[189] Draft Pan-African Investment Code Article 42.
[190]Draft Pan-African Investment Code Article 42

[191]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.

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

CHAPTER FIVE: EFFECTIVENESS OF THE CURRENT DISPUTE RESOLUTION REGIME OF THE AFRICAN CONTINENTAL FREE TRADE AREA.

5.1 INTRODUCTION

Article XXIV of the General Agreement on Tariffs and Trade (GATT) defines a free trade area as 'an agreement among a group of two or more customs territories in which the duties and other restrictive regulations of commerce are eliminated on substantially all trade between constituent territories in products originating in such territories.[192]' The Protocol on Rules and Proceedings on the Settlement of Disputes is one of the integral mechanisms provided by the African Continental Free Trade Area agreement for ensuring that its objective is met by creating a framework for dispute resolution. According to Article 1(e) of the Protocol on Rules and Procedures on the Settlement of Disputes, dispute 'means a disagreement between State Parties regarding the interpretation and/or application of the Agreement in relation to their rights and obligations.[193]

5.2. THE PROTOCOL ON RULES AND PROCEDURES ON THE SETTLEMENT OF DISPUTES

The Protocol on Rules and Procedures on the Settlement of Disputes is one of the protocols that have been finalized under the agreement establishing the African Continental Free Trade Area. Its purpose is to ensure that dispute settlement process is transparent, accountable, fair, predictable and consistent with the provisions of the Agreement. This Protocol is made according to Article 20 of the agreement establishing the African Continental Free Trade Area. It reads,

[192] General agreement on Tariff and Trade.
[193] Agreement establishing the AfCFTA.

1. A Dispute Settlement Mechanism is hereby established and shall apply to the settlement of disputes arising between State Parties.

2. The Dispute Settlement Mechanism shall be administered in accordance with the Protocol on Rules and Procedures on the Settlement of Disputes.

3. The Protocol on Rules and Procedures on the Settlement of Disputes shall establish, inter alia, a Dispute Settlement Body. [194]

The Dispute Settlement Mechanism is central to providing security and predictability to the African regional trading system. It preserves the rights and obligations of State Parties under the agreement. And agreement here includes the African Continental Free Trade Area treaty, its protocols, annexes and appendices. Thus, disputes could arise from an infringement of the rights provided for in any of these instruments.[195] Article 5 of the Protocol establishes the Dispute Settlement Body. The body is composed of representatives of the State Parties and has the authority to establish Dispute Settlement Panels (DSP) and an Appellate Body, to adopt the reports of the panel and appellate body, to maintain surveillance of implementation of the rulings and recommendations of the panel and appellate body, and to authorize the suspension of concessions and other obligations under the African Continental Free Trade Area agreement. The Protocol provides for four ways for the resolution of disputes, they include: consultation, good offices, conciliation and mediation, panel and appellate body, and arbitration.[196]

[194] Agreement establishing the AfCFTA
[195] Godstime Nwaeze retrieved at file:///C:/Users/hp/Downloads/SSRN-id4312074.pdf accessed on 27/09/2023
[196] Article 5 , Agreement establishing the AfCFTA

5.2.1 CONSULTATIONS

Consultations is created under Article 7 of the Protocol on Rules and Procedures on the Settlement of Disputes. It requires that a State Party that has a dispute with another State Party may request for consultations with the State Party by notifying the Dispute Settlement Body in writing. The said notification should indicate the reasons for the request, the issues and the legal basis of complaint. The State Party to which the request is made shall reply to the request within ten days, unless otherwise mutually agreed, after the date of its receipt. Thirty days, or ten days in case of perishable goods, after the receipt of the request, the respondent State Party shall also enter consultations in good faith, with an aim to reaching a mutually satisfactory solution. [197]If any party does not reply to a request for consultations, or the State Parties do not reach a satisfactory settlement, then the complaining party may refer the case to the Dispute Settlement Body for the establishment of a panel. In the same vein, if a State Party that is not a party to a dispute considers that it has substantial trade interest in the consultations, that State Party may, within ten (10) days of the circulation of the request for consultations, request the Parties to the dispute to be joined in the consultations.[198] Consultations is confidential and without prejudice to the rights of any State Party in any further proceedings. The advantage of consultations is that the disputing State Parties are given the opportunity to dialogue and reach a mutually satisfactory solution.

5.2.2. GOOD OFFICES, CONCILIATION AND MEDIATION

Good offices are a dispute resolution procedure whereby a third party brings the conflicting parties together without participating in the negotiation. This is unlike mediation, where the conflicting parties submit their dispute to the third party who facilitates the negotiation

[197] Article 7 , Agreement establishing the AfCFTA
[198] Godstime Nwaeze above pg3.

process. Conciliation, on the other hand, is an alternative dispute resolution process whereby the parties to a dispute use a conciliator, who meets with the parties both separately and together in an attempt to resolve their differences.[199]

Good offices, conciliation and mediation are provided under Article 8 of the Protocol, and just like consultations, the proceedings are confidential and do not prejudice the rights of the State Parties in any future proceedings. Good offices, conciliation and mediation may begin and be terminated at any time by the State Parties to the dispute but not before a consultation request. However, when there is a request for good offices, conciliation and mediation after a request for consultation, then the complaining State Party has to wait for the good offices, conciliation and mediation to run its sixty days before a request for the establishment of a panel can be made.

The complaining party may request for the establishment of a panel during the sixty (60) day period, if the State Parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.[200] In another instance, the State Parties may consent to continue with the procedures for good offices, conciliation or mediation while the panel process proceeds. The merit of good offices, conciliation and mediation is that the involvement of a disinterested and independent person can help the disputants reach a common ground.[201]

[199] Article 8 agreement establishing the AfCFTA
[200] Godstime Nwaeze note above.
[201] Godstime Nwaeze note above.

5.2.3. ESTABLISHMENT OF PANEL AND AN APPELLATE BODY

A complaining State Party may, if consultations fail to resolve the dispute, request for the establishment of a panel. Upon such request, the Dispute Settlement Body will convene to set up a panel within ten days of the meeting of the Dispute Settlement Body. The panel shall consist of three or five members when there are two or more disputing parties respectively. For the purpose of constituting a panel, the Secretariat of the AfCFTA is mandated to establish and maintain an indicative list of individuals (considered and approved by the Dispute Settlement Body) who are willing and able to serve as panellists.[202]

Every State Party nominates to the Secretariat two persons for inclusion in the list, indicating their area of proficiency relevant to the Agreement. They serve in an individual capacity, not as government representatives. Thus, they are not allowed to receive instructions or be influenced by State Party in matters before them. After the establishment of the panel, the disputing State Parties will submit their arguments, and if there is a third party having substantial interest in the matter, it will also forward their written submission upon notification and approval by the Dispute Settlement Body.[203]

All the deliberations of the panel, including information filed by the parties are confidential. However, a party may elect to disclose a statement of its position to the public. Similarly, the opinions expressed in the panel report by the individual panellists are anonymous. The final report is considered, adopted and signed at a meeting of the Dispute Settlement Body convened for that purpose unless a party formally notifies the Dispute Settlement Body of its

[202] Agreement establishing the AfCFTA.
[203] Godstime Nwaeze note above .

decision to appeal, or the Dispute Settlement Body decides by consensus not to adopt the report. [204]

In the event of an appeal by either State Party, a standing Appellate Body of seven persons is established by the Dispute Settlement Body to hear such appeal. An appeal shall be limited to issues of law covered in the report of the panel. An appellate body report shall be adopted by the Dispute Settlement Body and unconditionally accepted by the parties to the dispute unless the Dispute Settlement Body decide by consensus not to adopt the appellate body report within thirty (30) days following its circulation to the State Parties. This adoption procedure is without prejudice to the right of State Parties to express their views on an appellate body report.[205]

The decision of the Dispute Settlement Body is final. The proceedings of the appellate body is confidential and opinions expressed in the report by individuals serving on the appellate body are anonymous. The major function of the panel is to make an objective assessment of the facts of the matter before it, and check for conformity with the provisions of the Agreement and make findings to help the Dispute Settlement Body to reach decision through recommendations and rulings. [206]

5.2.4. ARBITRATION

Article 27(1) of the Protocol provides that State Parties to a dispute may resort to arbitration and shall agree on the procedures to be used in the arbitration proceedings. Arbitration is a form of alternative dispute resolution that resolves disputes outside the judiciary.

[204] Idem
[205] Agreement establishing the AfCFTA
[206] Idem

The Protocol envisages the use of arbitration in three instances, namely: to settle disputes between State Parties, determine a reasonable period for implementation of panel rulings and recommendations, and determine whether the level of concessions is commensurate with the nullification and impairment caused. [207]

5.2.4.1. ARBITRATION AS A FORM OF DISPUTE ADJUDICATION

The Protocol sets out arbitration as an alternative to dispute resolution by the panel and appellate body. Unlike the panel and appellate body proceedings which are compulsory once initiated, the mutual consent of the State Parties involved in the dispute is required to arbitrate under the African Continental Free Trade Area agreement. [208]The State Parties are free to determine the arbitration procedure, and this makes this system more flexible. However, State Parties are barred from simultaneously invoking other forms of dispute resolution once they have referred a dispute for arbitration.

The agreement to employ arbitration must be notified to the Dispute Settlement Body. The parties have autonomy in the arbitration process, and a third party may become a party to the proceedings through the mutual consent of the parties to the dispute. The arbitral award must be notified to the Dispute Settlement Body for enforcement and the parties are required to abide by it.[209]

5.2.4.2. ARBITRATION TO DETERMINE A REASONABLE TIME PERIOD FOR IMPLEMENTATION OF PANEL RULINGS AND RECOMMENDATIONS

The Protocol provides that arbitral awards should be enforced in the same way as recommendations and rulings issued by panel and appellate body.

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[207] Article 27, agreement establishing the AfCFTA.
[208] Godstime Nwaezi note above.
[209] Godstime Nwaezi note above.

The defaulting party may seek an extension of time to allow them comply with the decision reached in the arbitration proceedings. There are three ways through which the time period for implementation of panel rulings and recommendations can be determined.[210] It could be through a mutual agreement of the parties in dispute, through a time period proposed by the defaulting State Party and approved by the Dispute Settlement Body, or through a binding arbitration within ninety (90) days after the date of adoption of the rulings and recommendations. Apart from resorting to arbitration as an alternative to other forms of dispute resolution under the African Continental Free Trade Area, the third option is another way arbitration is employed under the treaty, which is for the purpose of deciding the time frame within which the rulings and recommendations of the panel and appellate body may be implemented. [211]

5.2.4.3 ARBITRATION TO DETERMINE WHETHER THE LEVEL OF SUSPENSION OF CONCESSIONS IS COMMENSURATE WITH THE NULLIFICATION AND IMPAIRMENT

The Protocol sets out the measure to be followed when a State Party fails to abide by the rulings and recommendations either immediately or within the reasonable time granted when immediate compliance is not feasible. According to the Protocol, this measure also applies to the enforcement of arbitral awards. Thus, a State Party that fails to comply with the arbitral awards may furnish a voluntary compensation to the aggrieved State Party. [212]The aggrieved party may also seek approval from the Dispute Settlement Body to suspend concessions or other obligations towards the defaulting State Party.

[210] Agreement establishing the AfCFTA.
[211] Nwaezi note above.
[212] Agreement establishing the AfCFTA

These measures envisaged by the Protocol are temporary remedies pending compliance by the defaulting State Party with the rulings and recommendations.[213] To initiate the suspension of concessions, it is very necessary that such suspension is commensurate to the negative effects of the nullification or impairment caused by the defaulting State Party. And if a State Party is aggrieved by the level of suspension, they may refer the matter to arbitration. This is the third scenario where arbitration may be employed, and it has to be limited to ascertaining whether the level of suspension is equivalent to the extent of nullification or impairment. [214]

5.3 WHO CAN ACT AS AN ARBITRATOR?

The Protocol is silent on the qualification to be appointed as an arbitrator in the African Continental Free Trade Area dispute but some requirement could be inferred from general practice and the requirements for listing on the indicative list or roster of individuals on the Dispute Settlement Body. [215]

Article 10(c) of the Protocol provides that, Individuals listed on the roster shall; (a) have expertise or experience in law, international trade, other matters covered by the Agreement or the resolution of disputes arising under international trade agreements; (b) be chosen strictly on the basis of objectivity, reliability and sound judgment; (c) be impartial, independent of, and not be affiliated to or take instructions from any Party; and (d) comply with a code of conduct to be developed by the Dispute Settlement Body and adopted by Council of Ministers.[216]

[213] Nwaezi note above.
[214] Nwaezi note above.
[215] Nwaezi note above.
[216] Article 10 , agreement establishing the AfCFTA

5.4 THE EFFECTIVENESS OF THE DISPUTE RESOLUTION REGIME

The dispute resolution mechanism of the African Continental Free Trade Area agreement is robust as it allows for every possible means for the resolution of disputes between or among member states. However, this holistic dispute resolution framework may not necessarily translate to effective practical application.[217] The essential purpose of the African Continental Free Trade Area agreement as outlined under Article 3 is to: (a) create a single market for goods, services, facilitated by movement of persons 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 liberalized 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; (d) lay the foundation for the establishment of a Continental Customs Union at a later stage; (e) promote and attain sustainable and inclusive socio-economic development, gender equality and structural transformation of the State Parties; (f) enhance the competitiveness of the economies of State Parties within the continent and the global market; (g) promote industrial development through diversification and regional value chain development, agricultural development and food security; and (h) resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes. [218] Given that individual business owners and firms constitute the majority of stakeholders/participants in trading across the continent, and who will be instrumental in meeting the targets of the African Continental Free Trade Area framework; it is rather unfortunate that the Protocol on Rules and Procedures on the Settlement of Disputes is not all-embracing in application.

[217] Nwaezi note above.
[218] Agreement establishing the AfCFTA

The Protocol is limited to State Parties excluding individual business owners. That is, the obligation that member States commit to under the AfCFTA are to other member States, and not to legal and natural persons that are the conveyors of cross-border business activities.[219] This State-State dispute resolution could be costly and time-consuming and may not be sustainable for business and commercial activities which thrive on rapidity.

Although a State Party could pursue cases on behalf of its non-state actors, they may not always be willing to do so, and every of this instance is a setback to the ideals of the AfCFTA. Even when a State Party has successfully pursued, it is the home State that is the beneficiary of the claim. All over Africa, communities depend on the people that keep small businesses running. They also offer jobs and the promise of a livelihood, as SMEs are responsible for an estimated 80% of jobs across the continent.[220]This contribution comes with disputes of different kinds, contractual or any violation of the AfCFTA, and they need to be resolved if the objective of the treaty will be reasonably met.

5.4.1 Institutional Investor state dispute settlement mechanisms in the Africa

African countries have, in recent times, raised concerns about the traditional investor-state dispute settlement (ISDS) system including lack of legitimacy and transparency, exorbitant costs of arbitration proceedings and arbitral awards as well as inconsistent and flawed decisions. [221]Countries have also complained that the system allows foreign investors to challenge legitimate public welfare measures of host states before international arbitration tribunals.

[219] Nwaezi note above.
[220] Ngozi Megwa, Unlocking SME Potential through the Power of Emerging Technology (African Business, April 5, 2022)
[221] Nwaezi note above.

Governments are concerned about their sovereignty or policy space as they are discouraged governments from adopting public welfare regulations, resulting in regulatory chill.[222]

Consequently, African governments have responded in many ways to ISDS and international investment law in general. For instance, SADC member states recently amended the Annex 1 to the Protocol Finance and Investment to, inter alia, remove ISDS by international arbitration, and rather require the use of domestic courts and tribunals. South Africa has enacted a legislation (Protection of Investment Act 22 of 2015) which limits ISDS to mediation or arbitration via domestic courts, tribunals or statutory bodies. Tanzania has recently enacted legislations which exclude ISDS arbitration.[223]

Concerns over ISDS system are not in Africa only. The UNCITRAL has established a Working Group on ISDS reform, the European Commission proposes the establishment of a multilateral investment court, and the UNCTAD has initiated a campaign on reforming the existing international investment agreements. Some governments (e.g. Bolivia, Ecuador and Venezuela) have withdrawn from or denounced the ICSID Convention – a multilateral treaty regulating ISDS. Even developed countries are concluding the investment treaties with no or limited ISDS mechanisms. [224]The Comprehensive and Progressive Agreement for Trans-Pacific (TPP-11) and the United-States-Mexico-Canada Agreement (New NAFTA) are good references. It is fair to say, that the ISDS debate has run its course.

[222] Nwaezi note above.
[223] Nwaezi note above .
[224] UNCTAD , reforming the international investment regime.

5.4.2 DOMESTIC LAWS ON INVESTMENT PROTECTION

Most of African countries are parties to or continue to conclude BITs (with internal or external partners) allowing investors to directly submit (or subject to exhaustion of local remedies) their investor-state dispute claims to traditional international arbitral tribunals including, inter alia, the ICSID, the UNCITRAL, the International Chamber of Commerce (ICC), the International Court of Arbitration (ICA), the Permanent Court of Arbitration (PCA), the International Court of Justice (ICC), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), or the London Court of International Arbitration (LCIA).[225]

Countries (e.g. South Africa, Namibia and Tanzania) have adopted national investment and related laws omitting or limiting ISDS provisions.

The most well-known example is South Africa's Protection of Investment Act 2015 (the Act). First conceived in the late 2000s, this Act finally came into force in July 2018. The Act seeks to shift the resolution of investor-state disputes away from arbitration in favor of mediation and the South African courts. Transitional provisions in this Act provide that existing investments made under BITs 'will continue to be protected for the period and terms stipulated in the treaties', but that those investments made after the termination of the treaties and before the promulgation of the Act will be governed by general South African law. [226]Subject to the consent of the South African state, the Act also permits state-to-state arbitration between South Africa and a foreign investor's home state. Even then, this mechanism is only available after the investor has exhausted all the available domestic remedies and after obtaining the state's express consent to arbitrate.

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[225] Tralac blog retrieved at https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html accessed on 28/09/2023

[226] Investment policy hub retrieved at https://investmentpolicy.unctad.org/investment-laws/laws/157/south-africa-investment-act accessed on 28/09/2023

Whether this new dispute resolution mechanism truly strikes a better balance between the interests of host state and the investor has been questioned by some commentators, and will be tested in the coming years.[227]

South Africa is not the only African jurisdiction to have modified its local legislation in order to restrict access to investment arbitration in the international forum. The 2016 Namibia Investment Protection Act provides for either mediation or recourse to local courts. While international investment arbitration is still possible, that is only where a specific arbitration agreement has been signed between the state and the investor.[228] In 2017, Egypt's new legislation provided for the creation of a new local institution – the Egyptian Arbitration and Mediation Centre – that would be in charge of administering investment disputes. In August 2018, the Ivory Coast modified its investment protection regime with a new Investment Code. The dispute resolution mechanism is novel and may provide a model for other West African states. The Investment Code provides that disputes first be subject to mediation under the UNCITRAL Rules and then for investment arbitration under the rules of the OHADA Court of Justice and Arbitration. All these developments contribute to the Africanisation of investment arbitration.[229]

African regional economic communities have adopted diverse ISDS approaches. For example, the SADC Finance and Investment Protocol and ECOWAS Supplementary Investment Act do not grant ISDS but rather make provision for investors to use local remedies.

[227] Investment policy hub retrieved at https://investmentpolicy.unctad.org/investment-laws/laws/157/south-africa-investment-act accessed on 28/09/2023
[228] Global arbitration review
[229] OECD Library , Legal Framework for investment.

The COMESA Common Investment Agreement incorporates ISDS arbitration through the COMESA Court of Justice, African arbitration tribunals, as well as ICSID and UNCITRAL arbitral tribunals. This means that countries who belong to more than one of these RECs subscribe different ISDS regime.[230]

Furthermore, the Pan-African Investment Code adopted by the African Union member states as a guiding instrument provides for arbitration through African arbitration institutions governed by UNCITRAL Arbitration rules UNCITRAL subject to applicable laws of the host state or consent of the disputing parties, and subject to exhaustion of local remedies.[231]

It appears African countries have different approaches to ISDS depending on who they are dealing with. This leaves one wondering what approach the African countries will adopt in the AfCFTA Investment Protocol (to be negotiated in the phase II of AfCFTA negotiations).[232]

[230] Tralac blog retrieved at https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html accessed on 28/09/2023

[231] Tralac blog retrieved at https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html accessed on 28/09/2023

[232] Idem.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

This chapter presents the linking between the findings of the previous chapters in the form of a detailed framework. It highlights the conclusions and recommendations of the research study and the contribution the study seeks to make.

6.1. GENERAL CONCLUSION

This research is titled the "Redefining Investment Dispute Resolution Mechanisms in the AfCFTA. Addressing African Concerns and Promoting Intra-African Investment". The main aim of this research project has been to put forward an Investment dispute resolution mechanism for the continent that is cognizant 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 characterized 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.

Summary of findings:

6.2. 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.

6.3. 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. It is of particular concern that in this decentralised system, 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.

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. 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.

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. 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. 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. In the LG&E v Argentina which covered the exact same facts, a state of emergency was found to have persisted.

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.

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

In exchange for the surrender of this regulatory autonomy, States were often assured that they would attract higher inward flows of Foreign Direct Investment.

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. Bilateral Investment Treaties and their predominant endorsement of the ISDS system rather complement broader regulatory certainty. 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.

6.5. 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. 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. In hard figures this means 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. 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.

6.6 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. 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. 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.

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.

V.2 RECOMMENDATIONS

Africa has quietly, but very effectively, been one of the most innovative forums for investment arbitration over the years. The most recent developments in treaty drafting contribute to a coming of age of Africa in the field of investment protection.

African states have responded to the criticism that bilateral investment treaties are weighted too heavily in favor of investors by ensuring that new treaties impose obligations on investors, in particular with regards to the protection of environmental and corporate social responsibility obligations.

In order to ensure proper trade governance, the rule based dispute settlement mechanism should be recognized and utilized by African countries. The proposed recommendations can allow African countries embrace and participate effectively in the DSM under the AFCFTA framework.

1. Majority of African countries do not pursue trade remedies because of the costs implications. For instance, due to the technicality of the trade regimes the existence of domestic investigation authorities is necessary to assess trade violations. However in Africa only Egypt and South Africa have functional trade remedies authorities. Kenya is in the process of setting up its trade remedies authority. Nevertheless, such a body or a structured functional department within the trade ministry that has the capacity and technical skill-set can allow African countries to pursue claims and trade remedies in a rule-based framework.

2. An African Justice Scoreboard

Considering the pros and cons of the current system for resolving disputes between investors and states, there's a suggestion to create a new approach. This approach would involve using a 'justice scoreboard' to decide which countries have strong legal systems and a track record of fairness. These countries would be the ones to handle investor-state disputes, ensuring a fair and just outcome. This idea comes from recognizing the importance of local courts in resolving these disputes, a concept supported by the United Nations Conference on Trade and Development (UNCTAD) and the International Centre for Settlement of Investment Disputes (ICSID). In fact, the ICSID Convention allows host countries to require investors to try local remedies before turning to international arbitration. Using local courts offers several advantages. It treats both foreign and domestic investors equally, providing a level playing field for dispute resolution. Local courts are also better equipped to interpret local laws that often trigger investment disputes, as these laws are tailored to each country's specific context. Moreover, involving local courts helps develop a country's legal expertise as judges handle a wider range of complex cases, ultimately strengthening the rule of law. This principle underscores the importance of giving host countries a chance to address foreign investors' grievances through their legal systems.

Recognizing the interdependence of investor-state dispute settlement (ISDS) and domestic court litigation, the proposal is to retain both mechanisms. However, a crucial question arises: how to determine when to use each system? The current practice of referring disputes to international arbitration on a consensual basis has led to some countries, especially in regional economic communities like ECOWAS and SADC, withholding their consent. Domestic dispute resolution also has its shortcomings, particularly in countries with weak rule-of-law traditions.

To address this issue, the proposal suggests creating an 'African Justice Scoreboard' (AJS) under the African Union to govern the investment framework of the African Continental Free Trade Area (AfCFTA). This scoreboard would independently assess the rule-of-law situation in each host country and determine whether a dispute should go to domestic courts or international arbitration. This system aims to ensure fairness and efficiency in resolving investment disputes within Africa." Traditional rule of law assessments has found that some judicial institutions in certain Southern African Development Community (SADC) Member States face challenges like limited resources, weak rule of law, high legal costs, and lengthy case delays. This means that forcing investment disputes to follow the SADC FIP's Annex 1 may not be fair to investors. The proposed African Justice Scoreboard (AJS) would be different from regular rule of law scoreboards. As a treaty-based institution, its decisions would be binding on all Member States and give investors a legal right to enforce them. This proposal could benefit the African continent by reducing the costs of international arbitration for both investors and respondent states. It offers investors reliable, free information about the rule of law status in countries they want to do business with. States that improve their rule of law ratings might avoid the controversial ISDS system, motivating poorly-rated states to improve. To make the AJS work, there should be a minimum score threshold to deem a Member State's rule of law protections satisfactory.

If a state exceeds this threshold, its judiciary is considered reliable and transparent enough to uphold the rule of law, so investors should use domestic courts for disputes. States falling below the threshold are seen as having weak judicial systems, giving investors access to international arbitration.

3.The need for the establishment of a legal advisory centre under the AU-AFCFTA similar to the Advisory Centre on WTO Law. The centre can conduct periodic trainings on technical trade issues and build capacity of trade analysts or specialists working within governments to understand how to pursue their government's rights and obligations under the rule based framework. Funding for such an organization could be through the African Union by all member countries.

4. Exclusivity of the AfCFTA dispute resolution:

Only state parties have access to resolution of disputes under the AfCFTA Dispute Settlement Body (DSB), i.e., the 55 member states of African Union (AfCFTA, Article 20(1)). In this context, member states refer to other member states of the African Union that have ratified or acceded to the AfCFTA and for which the AfCFTA is in force (AfCFTA, Article 1 (v)). Private parties do not, in their own right, have access to AfCFTA dispute settlement mechanisms. However, most trade transactions involve private entities, and home States may be willing to protect their rights in order to ensure certainty and predictability. In this sense, private parties will only be protected if their home State is a party to the AfCFTA, and in cases where the home State is willing to bring a claim.

There is also need to strengthen private sector- government engagement in trade relations. The private sector is the main stakeholder in international trade as they are directly and actively engaged in trade, while governments facilitate the environment for trade and

investments. Thus, the private sector should play a pivotal role in trade governance. Under the Tripartite Free Trade Area an online complaint system for Trade Barriers was created where private parties may lodge their complaints on trade barriers online[233] to be administered by the domestic relevant officials. However, the system lacks accountability domestically and simply acts as a notification mechanism.

Under the European Community the petition rights for individual private enterprises are under Article 133 EU Treaty, which allows participation of commercial interests and trade associations. Also, the European Community trade barrier regulation section 301 gives petition rights to private entities. Such entities can urge the European Community to investigate foreign trade barriers and institute claims before the WTO.[234]

Legal frameworks such as these within the AFCFTA or in domestic trade regulations will act as tools that ensure African governments utilize the rule based DSM to address the trade concerns raised by the private sector.

The establishment of a framework that allows for private trade related claims for investor state disputes. The AFCFTA should consider Investor States Disputes Settlement in its framework. The DSM of the AfCFTA already bars its forum to private entities for settling trade disputes. The trend taken up by African countriesis preference for state to state dispute settlement and the exhaustion of local remedies rather than ISDS.

The phase two of the AFCFTA negotiations is ongoing and the Protocol of Investment will be negotiated in this phase.

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[233] www.tradebarriers.org The mechanism was created to under the Tripartite Free Trade Area forthe identification, removal and monitoring of non-tariff barriers by Member states.

[234] Kristin Bohl , Problems of developing country access to WTO dispute Settlement , 9 Chi Kent J. Int'l and company law 131 (2023) 157

Member states should, therefore, make a conscious decision to provide a framework for ISDS in which investors will find security and have the confidence to invest in the Continental Free Trade Area as it has been adopted in other FTA's such as the CPTPP and CETA.[235]

Areas of further research

There is need for further research in the following areas:

a) How private sector engagement in Africa for trade can create accountability through policy, domestic and international law.
b) How an independent court system works in a contemporary modern free tradeagreement as a dispute settlement system for investor state trade disputes
c) The shift in dispute settlement under bilateral investment treaties in Africa-

   The inter-state investment trade disputes and the delicate balance between sovereignty and the protection of investors rights

[235] Comprehensive Economic and Trade Agreement, the FTA between EU and Canada provides forISDS in its Investment chapter as an independent court system.

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