

Making a Case for the Establishment of African Investment Court under the AfCFTA

Mmiselo Freedom Qumba

Abstract

This contribution presents a proposal for the establishment of Permanent African Investment Court as a reformative alternative to the traditional Investor-State Dispute Settlement (ISDS) mechanism. The paper is motivated by the widely criticised ISDS mechanism from a broad spectrum of stakeholders and constituencies. It observes that African states have historically been disadvantaged within international investment arbitration landscape. The argument is then advanced that for the AfCFTA to succeed, it must be supported by a dispute settlement mechanism that provides for the adequate balance between investor and state interests. After exploring the current context for dispute settlement on the continent, this paper emphasises the importance of establishing a sound dispute settlement procedure on the continent and argues that a Permanent Investment Court that protects the ability of African nations to promote sustainable development, and public interests should be established under the AfCFTA's Investment Protocol.

Keywords

Permanent African Investment Court – investor-state dispute settlement mechanisms – African Continental Free Trade Area – AfCFTA's Investment Protocol – African courts

1 Contextual Background

Africa is a resource-rich continent with ripe economic opportunities.¹ Africa's rich natural resources include arable land, water, oil, natural gas, minerals,

¹ Raf Custers and Ken Matthyssen, "Africa's natural resources in a global context", *International Peace Information Service* (2009), available at <www.reliefweb.int/sites/reliefweb.int/files/resources/7BD9A86D325E3629C125762C004CAC93-Full_Report.pdf>, accessed 6 July 2021.

forests, and wildlife. The continent holds a huge proportion of the world's natural resources, both renewable and non-renewable. It is home to some 30% of the world's mineral reserves; 8% of the world's natural gas and 12% of the world's oil reserves.² It also has 40% of the world's gold and up to 90% of its chromium and platinum.³ The largest reserves of cobalt, diamonds, platinum, and uranium in the world are in Africa. It holds 65% of the world's arable land and 10% of the planet's renewable internal freshwater resources.⁴ At the same time, the population of the African continent is growing rapidly compared to other regions of the world, presenting a challenge in an increase in the demand for goods and services in the continent.⁵

Regrettably, the economic impact of the Covid-19 pandemic is severe in Africa.⁶ The World Bank has reported that the pandemic continues to take a toll on African lives and has pushed up to 40 million people into extreme poverty. Women, youth, low-skilled laborers, and those in the informal sector remain the most affected by lack of access to social safety nets and income opportunities.⁷ However, the pandemic also presents a unique opportunity for Africa to re-think its development policies. It presents policy options to help African countries to build back better – more inclusive, equitable and sustainable economies post-Covid-19. Countries are encouraged to follow the science and prioritize policies that deliver mutual benefits and co-benefits for social, economic, and environmental resilience – building back better.⁸ To be resilient, Africa's health and economic systems need to be strengthened, absorptive, adaptive, and transformative in their capacity in times of both endogenous and exogenous shocks such as Covid-19. Covid-19 is a pandemic

2 United Nations Environment Programme, *Our work in Africa*, available at <www.unep.org/regions/africa/our-work-africa>, accessed 6 July 2021.

3 *Ibid.*

4 *Ibid.*

5 Joseph J. Bish, "Population growth in Africa: grasping the scale of challenge", *The Guardian*, (11 January 2016), available at <www.theguardian.com/global-development-professionals-network/2016/jan/11/population-growth-in-africa-grasping-the-scale-of-the-challenge>, accessed 6 July 2021.

6 World Bank Group, *World Bank in Africa*, available at <www.worldbank.org/en/region/afr/overview>, accessed 22 July 2021.

7 World Bank Group, *World Bank's Response to Covid-19 (Coronavirus) in Africa*, available at <www.worldbank.org/en/news/factsheet/2020/06/02/world-banks-response-to-covid-19-coronavirus-in-africa>, accessed 6 July 2021.

8 Kevin Chika Urama Faas, "Building Back Better, Policies for building Resilient Economies in post Covid-19 Africa", *African Development Bank Group Opinion Paper (2004)*, available at <www.afdb.org/sites/default/files/building_back_better_in_post_covid-19_africa-kcu_31-08-20-final-isept.pdf>, accessed 6 July 2021.

among pandemics in Africa and it is likely not going to be the last. It has demonstrated that reliance on external institutional capacities and aid for development is risky. African countries and regions need to strengthen their own capacity for early warning systems, policy research, governance, and risk mitigation to secure the welfare of citizens today and tomorrow.⁹

Like most emerging economies, African countries are dependent on foreign direct investment (FDI) inflows.¹⁰ African economies' stability and growth are intricately intertwined with the governments' ability to attract FDI from outside the continent. Again, the COVID-19 pandemic had a significant impact on FDI in Africa as flows to the continent declined by 16% in 2020 to USD 40 billion, from USD 47 billion in 2019. The International Monetary Fund (IMF) report shows that commodity-dependent countries were affected more severely than non-resource-based economies by Covid-19. The challenging environment affected all aspects of FDI. Greenfield project announcements, a measure of investor sentiment and future FDI trends, dropped by 62% to USD 29 billion, from USD 77 billion in 2019. Cross-border mergers and acquisitions (M&As), fell by 45% to USD 3.2 billion, from USD 5.8 billion in 2019. International project finance announcements, especially relevant for large infrastructure projects, plummeted by 74% to USD 32 billion.¹¹ However, there are mitigating factors even as Covid-19 continues to persist. Firstly, "[d]espite projections for only a weak investment recovery in 2021, there are some factors that signal FDI picking up momentum by 2022 and returning to pre-pandemic levels."¹² Secondly, "the implementation of some key projects announced in 2021 and earlier, including those that were delayed due to the pandemic, may support FDI."¹³ Lastly, "the impending finalization of the African Continental Free Trade Area (AfCFTA) Investment Protocol could give impetus to intra-continental investment."¹⁴

9 *Ibid.*, p. 9.

10 FDI is defined as an investment involving a long-term relationship and reflecting a lasting interest and control by a resident entity in one economy in an enterprise resident in an economy other than that of the foreign direct investor. UN Trade and Development, *Definitions and Sources*, available at <www.unctad.org/system/files/official-document/wir2007p4_en.pdf>, accessed 21 November 2024, p. 245; see also, M. Sornarajah, *The International Law on Foreign Investment*, Cambridge University Press, Cambridge, 1994, p. 7: "Foreign direct investment (FDI) 'involves the transfer of tangible or intangible assets from one country to another, which are to be used in the recipient, or host, country to generate wealth under the total or partial control of the owner of the assets.'"

11 UN Trade and Development, *Covid-19 slashes foreign direct investment in Africa by 16%*, available at <www.unctad.org/news/covid-19-slashes-foreign-direct-investment-africa-16>, accessed 6 July 2021.

12 *Ibid.*

13 *Ibid.*

14 *Ibid.*

African countries, the majority of which are developing countries and least developed countries are, at present, importers and, to a much lesser extent among a few of them, exporters of foreign investment, a factor which impacts both their policy and legislative controls over foreign investment.¹⁵ At the same time, without exception, these countries abide by the prevailing orthodoxy that FDI is a major pre-condition for their economic advancement. The increased FDI flows in the pre-Covid 19 era have strengthened the belief among many developing countries, especially African countries, that such FDI flows could help in reducing the resource, technology and foreign exchange gaps that constrain their economic development.¹⁶ While African countries rely on FDI and, often, technical assistance, these countries are sovereign nations that must balance a vast range of different political, social, and economic objectives when seeking outside resources. African countries are responsible to their citizens and have domestic and international mandated obligations that they must fulfil. This is because under customary international law, the autonomy and ability of a State to regulate such inward FDI flows arises out of its sovereignty.¹⁷ As such, there is no right of admission or right to invest in a foreign country. States retain the power, at least theoretically, to determine which foreign investors or investments to allow, under what conditions, and in what sectors.¹⁸

Several African governments continue to struggle to show that they have credible institutional and structural capacity to support FDI. The rule of law scoreboards have found that the judiciaries of some African countries have challenges such as the lack of resources, poor state of the rule of law, and the long delays in concluding cases,¹⁹ with most of the judicial systems dating

15 Victor Mosoti, "Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between", *Northwestern Journal of International Law & Business*, 26 (2005) 1, p. 95.

16 *Ibid.*, p. 96.

17 See Sornarajah, *supra* note 10, p. 83. According to Sornarajah, the right of a State to control foreign direct investment is based on the international law regarding aliens and the right of a State to deny entry to such aliens.

18 Samuel K.B. Asante, "International Law and Foreign Investment: A Reappraisal", *International & Comparative Law Quarterly*, 37 (1988) 3, p. 616. Asante argues that "a state has the right to regulate the entry of foreign capital or investment into its territory. This involves the right to exclude foreign investment or impose conditions on the entry of foreign investment or the acquisition of property by foreign capital or the operations of foreign companies in the territory of the host state, and the exercise of general jurisdiction over such companies."

19 These include the African Peer Review Mechanism (APRM), see <www.aprm-au.org/wp-content/uploads/2014/11/Statute-of-the-APRM.pdf>, accessed 8 July 2021; the 2020 Ibrahim Index of African Governance available at <mo.ibrahim.foundation/iiaag>.

back to the colonial period, and with very little modernization having been made. African courts are notorious for corruption and undue interference. In many countries, judges lack the competence necessary for rendering decisions and are susceptible to political influence. This has led investors to question the impartiality of domestic courts, as well as the division of branches in local governments.²⁰ This inefficiency in the court systems is balanced by low court fees (in comparison to court fees payable in developed jurisdictions), which support access to the courts and litigation as the primary dispute resolution mechanism.²¹ Attempts have been made by the African Union (AU) in terms of which the AU's Agenda 2063 lists as one of its aspirational goals that Africa will "be a continent where democratic values, culture, practices, universal principles of human rights, gender equality, justice and the rule of law are entrenched."²² However, the AU does not propose an independent mechanism that will foster and monitor the development of the rule of law in member states.

The need for such an independent mechanism is urgent especially under the upcoming AfCFTA Investment Protocol. This is because many African countries have shown more willingness to interfere in the private sector than any other regions in the world. There have also been several large stake disputes between private investors and government actors, particularly in the extractive industries where governments play a vital role in project success. In 2020 alone, the cases instituted under the International Centre for Settlement of Investment Disputes (ICSID) which involved Sub-Saharan Africa constituted 15% of the caseload.²³ The majority of new cases involved the oil, gas and mining sector (26%), construction (17%),²⁴ and 17% involving electric power

accessed 8 July 2021, the World Bank's 2016 Worldwide Governance Index (WGI) available at <info.worldbank.org/governance/wgi/>, accessed 8 July 2021.

20 Mmiselo Freedom Qumba, "South Africa's move away from international investor-state dispute: a breakthrough or bad omen for investment in the developing world?", *De Jure Law Journal*, 52 (2019) 1, p. 379.

21 Emilia Onyema, "Reimagining the Framework for Resolving Intra-African Commercial Disputes in the Context of the African Continental Free Trade Area Agreement", *World Trade Review*, 19 (2020) 3, p. 456.

22 African Union, *Agenda 2063: Our Aspirations for the Africa We Want*, adopted 24th Session of AU Heads of State and Government, January 2015, Assembly/AU/Dec.565 (XXIV), available at <au.int/en/agenda2063/aspirations>, accessed 8 July 2021; see also Charles Manga Fombad, "An overview of the crisis of the rule of law in Africa", *African Human Rights Law Journal*, 18 (2018) 1, 228.

23 International Centre for Settlement of Investment Disputes, "ICSID Releases 2020 Caseload Statistics", available at <icsid.worldbank.org/news-and-events/news-releases/icsid-releases-2020-caseload-statistics>, accessed 12 July 2021.

24 *Ibid.*

and other energy.²⁵ Similar trends can be seen at the International Chamber of Commerce (ICC), where in 2017 we saw growth in both number of cases and parties, the number of cases in the region arose from 40 in 2017 to 47 in 2018, representing a 17.5% increase. The number of North African parties increased over the same period, from 55 in 2017 to 60 in 2018. The ICC saw a tremendous spike in the number of cases being brought from the African continent, with a 35.9% increase in the number of cases and a 40.4% increase in the number of African parties appearing before the institution.²⁶ Against this background, this contribution presents a proposal for the establishment of an African Investment Court in the upcoming AfCFTA Investment Protocol. It begins by providing a contextual background of an investment climate within the African continent and it focuses on areas where a great deal of investment can be made. This is followed by an examination of the current rules on dispute resolution as currently drafted under the AfCFTA. This is followed by a discussion on the contemporary international law regime in Africa, its arbitration centres, and the ISDS mechanisms that are put in place by such an investment framework from the country level, to bilateral as well as regional reform initiatives. It argues that, for the AfCFTA Investment Protocol to be successful, it must be supported by a dispute settlement process that strikes the right balance between State and investor interests, ensuring that Africa is an attractive place for investment while at the same time protecting the ability of African nations to promote sustainable development through regulations that defend the public interest and that the African Investment Court is the most appropriate forum to achieve these aims.

2 The Current Dispute Settlement Provisions under the AfCFTA

The AfCFTA was signed in March 2018 and entered into force in May 2019.²⁷ The AfCFTA reflects both Africa's new model of what a trade agreement should look like and aspects of the multilateral legal framework of the World Trade

25 *Ibid.*

26 International Chamber of Commerce, *ICC Arbitration figures reveal new record for awards in 2018*, available at <iccwbo.org/media-wall/news-speeches/icc-arbitration-figures-reveal-new-record-cases-awards-2018/>, accessed 12 July 2021.

27 African Union, *Agreement Establishing the African Continental Free Trade Area*, available at <au.int/en/treaties/agreement-establishing-african-continental-free-trade-area.>, accessed 15 July 2021.

Organization (WTO).²⁸ Phase I, which will liberalize trade in goods and services by 90%, was meant to become fully operational on July 1, 2020, but was delayed by the Covid-19 pandemic to January 2021. The AfCFTA will progressively eliminate tariffs and non-tariff barriers (NTBs) on intra-African trade, making it easier for African businesses to trade within the continent, and benefit from the growing African market. The AfCFTA aims to create a large single African market for goods, services and movement of persons.²⁹ According to the United Nations Economic Commission for Africa, the AfCFTA will cover a market of 1.2 billion people and a GDP of USD 2.5 trillion.³⁰ It has been predicted that the massive economic integration of 55 countries will generate as much as USD 35 billion in increased trade between African countries.³¹ Although intra-regional trade in Africa has been low in both absolute and comparative terms, economists predict that the AfCFTA will boost regional trade by over 50% around USD 34.6 billion.³² This enormous economic potential, however, must be supported by strong dispute settlement.

The AfCFTA seeks to facilitate dispute settlement through a Dispute Settlement Mechanism (AfCFTA DSM) that is administered by a Dispute Settlement Body (DSB) through the Protocol on Rules and Procedures on the Settlement of Disputes (the Protocol).³³ The agreement's mechanism for dispute settlement, which is modeled largely on the WTO Appellate Body, is contained in the Protocol on Rules and Procedures on the Settlement of Disputes

28 Katrin Kuhlmann and Akinyi Lisa Agutu, "The African Continental Free Trade Area: Towards a New Legal Model for Trade and Development", *Georgetown Journal of International Law*, 51 (2020) 4, p. 756.

29 Agreement Establishing the African Continental Free Trade Area, adopted March 21, 2018, 58 I.L.M. 1028, Art. 3 (a), available at <au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf>, accessed 15 July 2021. Pursuant to Article 7 of the AfCFTA, the Phase II Negotiation rounds are designed to address specific protocols on intellectual property rights, investment, and competition policy.

30 United Nations Economic Commissions for Africa, *African Continental Free Trade Area*, available at <archive.uneca.org/publications/african-continental-free-trade-area-questions-answers>, accessed 15 July 2021.

31 Luke Warford, "Africa is Moving Toward a Massive and Important Free Trade Agreement", *The Washington Post*, (14 July 2016), available at <www.washingtonpost.com/news/mon-key-cage/wp/2016/07/14/the-7-things-you-need-to-know-about-africas-continental-free-trade-area/.pdf>, accessed 15 July 2021.

32 United Nations Economic Commissions for Africa, *African Continental Free Trade Area – Questions & Answers*, available at <archive.uneca.org/publications/african-continental-free-trade-area-questions-answers>, accessed 15 July 2021.

33 Agreement Establishing the AfCFTA, Art. 20 (2).

(and accompanying annexes).³⁴ The Protocol thus provides for a rules-based system for settling disputes that is familiar to the State Parties. However, it can be argued that drawing inspiration from the WTO Dispute Mechanism shows a lack of innovation in the drafting of the agreement of the AfCFTA. In fact, this is not the first time that an African trade dispute mechanism has borrowed its architecture from the WTO model. The Tripartite Free Trade Area Agreement between three regional economic communities in Africa – the Common Market for Eastern and Southern Africa, the East African Community, and the Southern African Development Community – preceded the AfCFTA.³⁵ The DSM of the Tripartite Free Trade Area Agreement is also based on the WTO’s Dispute Settlement Understanding (DSU)³⁶ and each of its composite three regional economic communities (RECS) COMESA,³⁷ EAC and SADC have also drawn heavily from the WTO’s DSU.³⁸

The AfCFTA establishes a DSM with the mandate of settling disputes arising between State Parties.³⁹ Like the WTO organ from which it draws inspiration, the Protocol stipulates that the DSB is composed of all representatives of the State Parties.⁴⁰ It has the authority to establish dispute settlement panels and the appellate instance, unsurprisingly called the Appellate Body.⁴¹ Like the WTO’s DSB, it is also empowered to adopt Panel and Appellate Body reports, maintain surveillance of and implement the “rulings and recommendations” of the two adjudicative dispute settlement bodies, and “authorise the

34 Consultations shall be sought in the first instance, after which a dispute may be referred to the Dispute Settlement Body (DSB) requesting establishment of a Dispute Settlement Panel.

35 Olabisi D. Akinkugbe, “Dispute Settlement under the African Continental Free Trade Area Agreement: A Preliminary Assessment”, *African Journal of International and Comparative Law*, 28 (2020), p. 139.

36 Agreement Establishing a Tripartite Free Trade Area among the Common Market for Eastern and Southern Africa, the East African Community and the Southern African Development Community, adopted 10 June 2015, 55 I.L.M. 1033, available at <www.atf.org/na/cms_documents/feb-tftaagreements9june20151740hrs-cleaned.pdf>, accessed 15 July 2021.

37 Kholofelo Kugler and Kelly Nyaga, “What Lessons can the AfCFTA learn from the WTO’s Dispute Settlement Mechanism’s Challenges?”, *Afronomics Law*, (22 December 2020), available at <www.afronomicslaw.org/2020/12/22/what-lessons-can-the-AfCFTA-learn-from-the-wtos-dispute-settlement-mechanisms-challenges/>, accessed 15 July 2021.

38 *Ibid.*

39 Agreement Establishing the AfCFTA, Art. 20.

40 Agreement Establishing the African Continental Free Trade Area, Protocol on Rules and Procedures on the Settlement of Disputes, Art. 5 (2) available at <www.tralac.org/documents/resources/african-union/2162-AfCFTA-agreement-legally-scrubbed-version-signed-16-may-2018/file.html#page=56>, accessed 15 July 2021.

41 *Ibid.*, Art. 5 (3) (a–d).

suspension of concessions and other obligations.⁴² Similar to WTO dispute settlement proceedings, the Protocol provides that every dispute will be initiated by formal consultations.⁴³ If those fail, a panel will be established,⁴⁴ and if parties wish to appeal a panel report they may do so at the Appellate Body of the AfCFTA.⁴⁵ Like the DSU, the Protocol provides that there is a preference for mutually agreed solutions.⁴⁶ It also provides for good offices, conciliation and mediation and for procedures for third parties. The Protocol also contains an arbitration provision that is quite similar to Article 25 of the DSU.⁴⁷ While there is nothing necessarily wrong in the transplantation of dispute systems such as the WTO model, the challenge is that previous similar transplants have failed in practice.

Additionally, the WTO Member States have recently established an appellate mechanism which is known as Multi-Party Interim Appeal Arbitration Agreement (MPIA) in order fill the gap that has been left by the now defunct WTO appeal mechanism.⁴⁸ In terms of Article 25 of the DSU, the MPIA creates an arbitration which currently serves in the place of the WTO appellate review mechanism between the disputing participant.⁴⁹ Most significantly, the Protocol in its Article 19 (4) incorporates negative consensus in the adoption process. It provides that the AfCFTA-DSB may by consensus refuse to adopt a panel report. The provision, however, does not clarify what happens after the panel report has been rejected. Does the matter end there? Does the AfCFTA-DSB perhaps remit the matter back to the panel for reconsideration? Do the parties, on an *ad hoc* basis, decide what happens next? The questions remain unanswered simply because the African states decided to replicate the negative consensus of the WTO regime and transplanted it into the AfCFTA dispute settlement mechanism.⁵⁰

42 *Ibid.*, Art. 5 (3).

43 *Ibid.*, Art. 6 (1).

44 *Ibid.*, Art. 9 (1).

45 *Ibid.*, Art. 20 (1).

46 *Ibid.*, Art. 27 (1).

47 *Ibid.*, Art. 27 (1)–(7).

48 European Commission, *Interim appeal arrangement for WTO disputes becomes effective*, 30 April 2020, available at <trade.ec.europa.eu/doclib/press/index.cfm?id=2143>, accessed 16 July 2021.

49 Dispute Settlement Rules, Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226, Art. 25, available at <www.wto.org/english/docs_e/legal_e/28-dsu.pdf>, accessed 16 July 2021.

50 Kugler and Nyaga, *supra* note 37.

Most fundamentally, the AfCFTA poses serious limitation on the jurisdiction of the AfCFTA DSM system by making reference to “the settlement of disputes arising between state Parties.”⁵¹ The reference to state Parties as possible disputants under the DSM system, essentially removes from its purview, commercial disputes arising from exchanges or trade in goods and services between private actors. This is understandable because (just like any other Free Trade Agreement (FTA)) the AfCFTA deals with public law actors (states) and public law issues (for example, tariffs) relevant to the elimination of barriers to, and the facilitation of trade in goods and services, and investments within the African continent.⁵² The Agreement engages with actions that fall within the jurisdiction of State Parties and their regulatory and fiscal powers. This leaves out the micro-level engagement of private actors who execute the trade in goods and services and make the necessary investments, across the borders of African states.⁵³ A further concern is that the Protocol does not provide more details of either the DSB or the arbitration option, including where and under what rules disputes will be settled using either of these mechanisms. The African Union has made it clear that the Protocol is to be further developed by the Member States, now that the Agreement has entered into force.⁵⁴ While this leaves us with unanswered questions, the ongoing phase II negotiations for the AfCFTA Investment Protocol,⁵⁵ present an opportunity for African countries to reshape and reform their own investment arbitration.⁵⁶ To do so, however, the continent must move swiftly to consider what possibilities

51 Agreement Establishing the AfCFTA, Art. 20 (1); this provision expressly states that the DSM, “shall apply to the settlement of disputes arising between the State Parties.”

52 According to Articles 6 and 7 of the AfCFTA, the Agreement covers trade in goods, trade in services, investment, intellectual property rights, and competition policy, with a protocol for each (including the Protocol on the Rules and Procedures for the Settlement of Disputes) when negotiated to be annexed to the Agreement.

53 Onyema, *supra* note 21, p. 449.

54 Inaugural meeting of the Dispute Settlement Body of the African Continental Free Trade Area, available at <[Afcfta.au.int/en/events/2021-04-26/dispute-settlement-body-aims-settle-trade-disputes-between-member-states](https://www.afcfta.africa/en/events/2021-04-26/dispute-settlement-body-aims-settle-trade-disputes-between-member-states)>, accessed 16 July 2021.

55 Talkmore Chidede, “AfCFTA Phase II and III Negotiations-Update”, *tralacBlog*, (10 February 2021), available at <www.tralac.org/blog/article/15090-AFCFTA-phase-ii-and-iii-negotiations-update.html>, accessed 16 July 2021. Chidede says: “Phase II negotiations were initially scheduled to be concluded by December 2020 and Phase III negotiations to commence immediately after the conclusion of Phase II. This deadline was missed due to the coronavirus pandemic. The AU Assembly has set 31 December 2021 as the deadline for the conclusion of Phase II and III negotiations.”

56 Mmiselo Freedom Qumba, “The exhaustion of local judicial remedies in investor-state dispute settlement: a proposal for the African Continental Free Trade Agreement on Investment Protocol”, *Law, Democracy and Development*, 25 (2021), p. 157.

exist for dispute settlement under the AfCFTA Investment Protocol. While the African Union Member States have not yet concluded the African Continental Free Trade Agreement (AfCFTA) on Investment Protocol, some scholars such as, Rameau,⁵⁷ and Madana,⁵⁸ have argued that the Pan-African Investment Code (PAIC) is well suited to be used in the negotiation of the AfCFTA on Investment Protocol because it seeks to promote mutually beneficial investments for investors and host States and to harmonise intra-Africa trade. From the PAIC one can conclude that there is not yet a clear consensus on whether ISDS is desirable, and if not, the appropriateness of its alternatives continue to be controversial among African countries.

3 Current Investment Dispute Settlement Reform Initiatives within Africa

International investment law is undergoing significant reform within the African Continent and, once again, the AfCFTA could provide a legal basis to rewrite the rules, including those relating to investment dispute settlement, in a way that better integrates the interests of African nations, companies of all sizes, and communities. Currently, the investment policy landscape within Africa is fragmented and, in some cases shifting.⁵⁹ The continent is divided by different languages,⁶⁰ legal systems, cultural influences, and tradition, amongst other factors. Despite the fragmentation, African States have formed different economic blocks to facilitate intra-African investment trades and FDI protections.⁶¹ The 54 independent African countries all have a State sponsored

57 Rose Rameau, "The Pan-African Investment Code as a Model for Negotiation on the Investment Protocol to the Agreement Establishing the African Continental Free Trade Area", *Transnational Dispute Management*, 4 (2021), available at <www.transnational-dispute-management.com/journal-advancepublication-article.asp?>, accessed 26 July 2021.

58 Mouhamadou Madana Kane, "The Pan-African Investment Code: a good first step, but more is needed", *Columbia FDI Perspectives* (2018), available at <academiccommons.columbia.edu/doi/10.7916/D8H14HXV>, accessed 3 July 2021.

59 Kuhlmann and Agutu, *supra* note 28, p. 784.

60 In almost all African countries, one or more language has been adopted as the formal language, with English, French, Portuguese, and Arabic spoken in different states.

61 Mmiselo Freedom Qumba, "Africa and investor-state dispute settlement: Mixed reactions, uncertainties and the way forward", *South African Journal of International Affairs*, 28 (2021) 1, p. 55; see also, Talkmore Chidede, "Investor-state dispute settlement in Africa and the AfCFTA Investment Protocol", *tralacBlog*, (11 December 2018), available at <www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-AfCFTA-investment-protocol.html>, accessed 16 July 2021.

judiciary with clearly defined court hierarchies. In the vast majority of African states, these court structures are contained in their written constitutions, which also provide detailed appeal structures.⁶²

Citizens of African states generally have constitutionally protected rights of access to their national courts to pursue the vindication of their legal rights. However, the timeline for pursuing claims before the courts of most African states is notoriously long,⁶³ with most of the judicial systems dating back to the colonial period, and with very little modernization having been made. Each African state has a different legal system as part of its colonial heritage. The vast majority of the continent was colonized, and the colonizers introduced their own legal systems, laws, and court structures in their colonies. This gave to the different African countries the civil,⁶⁴ or common⁶⁵ law, or Roman–Dutch⁶⁶ legal systems. In some states, the Sharia and customary laws also play central roles in the judicial process and systems.⁶⁷ To add further to the complexity, in some states their supreme courts lack jurisdiction over some types of business laws so that a supranational court determines disputes arising from such business transactions.⁶⁸ This is the position in all 17 OHADA member states,⁶⁹ where the Common Court of Justice and Arbitration (CCJA) is the court of final jurisdiction over all matters falling within the OHADA Uniform Acts. Within Africa, national and regional initiatives, discussed below, have addressed some of these issues. Before considering what type of investment dispute settlement could and should exist, it is vital first to understand what exists on the continent. The following is a brief overview of the existing laws, arbitral institutions and dispute settlement mechanisms utilized in Africa. I begin by examining domestic law reforms. Domestic laws may be considered a good indicator of

62 For some examples, see Part VII of the 1999 Constitution of the Federal Republic of Nigeria (as amended); Chapter 11 of the 1992 Constitution of Ghana; Title VI of the 1990 Constitution of Benin Republic; Chapter 10 of the 2010 Constitution of Kenya; and Part 3 of Chapter 3 of the 2012 Constitution of Egypt.

63 World Bank Group, *Doing Business* 2018, available at <www.doingbusiness.org/data/exploreeconomies/rwanda#enforcing-contracts>, accessed 16 July 2021. One notable exception is Rwanda. According to the World Bank it takes 280 days from the filing of a dispute to the payment of the judgment sum.

64 For example, in the Francophone countries of Benin Republic, Mali, and Cote d'Ivoire.

65 For example, Kenya, Uganda, Ghana, and Nigeria.

66 For example, South Africa.

67 For example, Gambia and Mauritania.

68 Notably, under the OHADA regime with the Common Court of Justice and Arbitration.

69 The 17 OHADA member States are: Benin, Burkina Faso, Cameroon, Central Africa Republic, Chad, Comoros, Congo Brazzaville, Congo, Cote d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Mali, Niger, Senegal, and Togo.

a state's investment policy because they are unilateral, and not a product of negotiations at bilateral and multilateral levels, where the outcome may very well be a compromise between the negotiating parties.

3.1 *Domestic Laws*

Côte d'Ivoire, Egypt, Namibia, and South Africa have all amended their domestic investment laws in the last five years. Tanzania has not amended its investment law but has enacted a series of amendments in other laws related to investment and investor-state dispute resolution, that are illustrative of its approach to reform. This part of the paper is not intended to be a comprehensive review of the laws. Instead, it highlights the salient features of each legal reform to facilitate comparison.

3.1.1 South Africa (2015)

In 2015, the South African government enacted a new legislative framework on investment law, the Protection of Investment Act,⁷⁰ which provided a complete overhaul of the country's investment regime and is aimed at achieving a balance of rights and obligations that apply to all investors.⁷¹ Perhaps the most significant change in the Protection of Investment Act was the removal of ISDS, which stemmed from a challenge by Italian investors to the country's Black Economic Empowerment (BEE) Act,⁷² and the South African government's assessment that the ISDS mechanism mainly focused on narrow issues of economic interests, while matters of national interest were exposed to unpredictable system of international arbitration, which undermined the constitutionality of the state and its space to determine domestic policy.⁷³ The Protection of Investment Act calls for mediation and arbitration supported by the South African Department of Trade and Industry as a recourse in the case of investment disputes, although investors can also use alternative dispute

70 Republic of South Africa, Act No. 22 of 2015: Protection of Investment Act, 15 December 2015. The Protection of investment Act came into effect under the guidance of President Cyril Ramaphosa in July 2018.

71 *Ibid.*, Section 4.

"The purpose of this Act is to –

- (a) protect investment in accordance with and subject to the Constitution, in a manner which balances the public interest and the rights and obligations of investors;
- (b) affirm the Republic's sovereign right to regulate investments in the public interest; and
- (c) confirm the Bill of Rights in the Constitution and the laws that apply to all investors and their investments in the Republic."

72 (*Piero Foresti, Laura de Carli and Others v. Republic of South Africa*), 4 August 2010, Award, ICSID, Case No. ARB(AF)/07/1 (2010).

73 Qumba, *supra* note 20, p. 360.

settlement mechanisms available in the Republic of South Africa through a competent court, independent tribunal, or statutory body.⁷⁴ The South African government may also consent to international investment arbitration between South Africa and the investor's home state subject to the exhaustion of local remedies.⁷⁵ This shows a clear preference for domestic remedies to solve disputes between investors and host states, consistent with the emerging trend.

3.1.2 Egypt (2017)

The landmark Egyptian Investment law which was adopted in 2017 is another example of a domesticated investment law instrument which applies to both domestic and foreign investors.⁷⁶ The law is permeated by sustainable development concerns.⁷⁷ It does so by stating sustainable development as its core objective, and encouraging those domestic and foreign investments that contribute to the country's sustainable development and abide by responsible business conduct standards.⁷⁸ The Egyptian investment Act provides for investment guarantees to foreign investors including fair and just treatment, national treatment, and nondiscrimination and non-arbitrariness in decisions.⁷⁹ These investment guarantees are counter-balanced with investor obligations.⁸⁰

74 Mmiselo Freedom Qumba, "Assessing African Regional Investment Instruments and Investor-State Dispute Settlement", *International & Comparative Law Quarterly*, 70 (2021) 1, p. 214.

75 Protection of Investment Act, Section 13 (5).

76 Arab Republic of Egypt, Law No. 72 of 2017 Promulgating the Investment Law, 31 May 2017, available at <investmentpolicy.unctad.org/investment-laws/laws/167/egypt-investment-law->, accessed 19 July 2021.

77 The sustainable development objective is corroborated by a number of principles that should govern any investment activity in Egypt, i.e., (i) Equality of investment opportunities and non-discrimination and supporting emerging companies, entrepreneurship and micro, small and medium enterprises (MSMEs); (ii) Consideration of the social dimension, public health and environment protection; (iii) Freedom of competition, prevention of monopoly and consumer protection; (iv) Compliance with principles of governance, transparency, prudent management and non-conflict of interests; (v) Maintaining stability of investment policies; (vi) Expedition and facilitation of investors' transactions; (vii) Preserving national security and public interest.

78 Makane Moïse Mbengue, "Africa's Voice in the Formation, Shaping and Redesign of International Investment Law", *ICSID Review – Foreign Investment Law Journal*, 34 (2019) 2, p. 463.

79 Article 3, Egyptian Investment Law No. 72 of 2017:

"All the investments established within the Arab Republic of Egypt shall receive fair and just treatment. The State shall ensure to the foreign investor the same treatment given to the national investor. Under a decree issued by the Cabinet of Ministers, an exception can be made granting the foreign investors a preferential treatment in application of the principle of reciprocity. The invested funds shall not be governed by any arbitrary procedures or discriminatory decisions."

80 *Ibid.*, Arts. 3–8.

As regards investment facilitation, the law further simplifies the procedure for investors to establish themselves in Egypt. It creates the Investor Service Centre to facilitate company incorporation and the issuance of approvals, permits and licences for the set-up or management of investment enterprises and to provide aftercare services, among others.⁸¹ The law contains detailed provisions on dispute resolution, and a foreign investor has several options for dispute resolution including, amicable settlement of the dispute through negotiation, a Grievance Committee, a Ministerial Committee on investment dispute resolution, a Ministerial committee on investment contracts dispute resolution, or through arbitration or mediation as agreed between the investor and the state. The parties may also wish to make use of an arbitration and mediation centre created by law, with its seat in Cairo.⁸²

3.1.3 Namibia (2016)

The Namibia Investment Promotion Act specifies its objectives in its Section 2. It stipulates that its objectives are: “(a) to provide a clear and transparent framework for investment in Namibia; (b) provide for an efficient dispute resolution mechanism involving investment; (c) provide for a mechanism for inter-ministerial coordination on regulatory provisions and incentives and support mechanism for investments; (d) promote sustainable economic development and growth through the mobilization and attraction of foreign and domestic investments” to enhance economic development, reduce unemployment, accelerate growth and diversify the economy and to provide for reservation of certain economic sectors and business activities to certain categories of investors.⁸³ The law contains some investor obligations, including that investors must comply with Namibian law at all times.⁸⁴ The law foresees its incompatibility with other obligations that Namibia may have under bilateral treaties on investment and free trade agreements. It stipulates that Namibia Investment Promotion Act will not be applicable in relation to concessions, advantages in favour of foreign investors that may result from a BIT, free trade agreement, regional and multilateral trade agreement, or State procurement tied to development assistance funds or loans.⁸⁵ Finally on dispute resolution, a foreign investor may choose mediation and the minister responsible

81 *Ibid.*, Art. 21.

82 *Ibid.*, Arts. 82–91.

83 Republic of Namibia, Namibia Investment Promotion Act Law No. 199 of 2016, 31 August 2016, Section 2.

84 *Ibid.*, Section 18.

85 *Ibid.*, Section 20.

for investment would designate a mediator. Alternatively, the foreign investor may make use of domestic courts. The law grants exclusive jurisdiction to the domestic courts, but the minister and investor may agree in writing to arbitration under the Namibian Arbitration Act of 1965.

3.2 *African Bilateral Investment Treaties*

With bilateral investment treaties (BITs), African countries have started to ratify and sign the new generation of investment agreements by moving away from the older generation of BITs. The most critical features of the new generation of BITs is that they are characterized by a more balanced content between investor protection and investor obligations. These new generation of BITs are permeated by sustainable development concerns as well as human rights issues. Some of these innovative approaches can be found in Intra-African BITs.⁸⁶ The most pertinent example of an Intra-African BIT with innovative features is the Morocco-Nigeria BIT.⁸⁷ This BIT provides for a more balanced content between investor protection and investor obligations and makes sustainable development one of its overarching aims. It also contains investor protection standards comparable with those of the traditional BITs. In addition, the BIT limits the scope of that protection only to investments that meet the requirement of its definition. Its definition contains all the elements of the so-called Salini test.⁸⁸ The definition requires investment to contribute to sustainable development of the host state. Furthermore, the definition excludes portfolio investments.⁸⁹ It also contains the fair and equitable treatment standard, despite the controversies associated with this provision. In terms of Article 7 investors are guaranteed customary international law minimum standard of treatment.⁹⁰

The investor protection standards are then recalibrated by a number of provisions dealing with investor obligations in the BIT. From the pre-establishment phase, the investors are required to comply with environmental assessment screening processes and social impact assessment.⁹¹ At the post-establishment

86 Mbengue, *supra* note 78, p. 465.

87 Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, signed 3 December 2016, (awaiting ratification by Nigeria), available at <www.investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download>, accessed 22 July 2021.

88 *Ibid.*, Art. 1 (3).

89 *Ibid.*

90 *Ibid.*, Art. 7.

91 *Ibid.*, Art. 14 (1)-(2).

phase, investors are required to apply the precautionary principle, maintain environmental management and uphold human rights obligations in accordance with core labour and environmental standards as required by the ILO Declaration on Fundamental Principles and the Rights at Work of 1998.⁹² Investors are prohibited from ever engaging in corruption and must meet the national and international standards of Corporate governance.⁹³ Investors must adhere to high levels of socially responsible practices and must apply International Labour Organization Tripartite Declaration on Multinational Investments and Social Policy.⁹⁴ Before initiating an arbitration, any dispute between the parties should be assessed through consultations and negotiations by the Joint Committee. If the dispute cannot be resolved within six months, investors may after the exhaustion of local remedies and domestic courts of host states, resort to international arbitration mechanisms. Finally, the Morocco-Nigeria BIT introduces a somewhat novel provision dealing with the liability of foreign investors who “shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state.”⁹⁵

The more recent BITs signed by African countries demonstrate some level of inconsistency in the substantive provisions of the treaties even within some member states. As already pointed out, these treaties were signed as a reaction to criticism of the older generation of BITs.⁹⁶ Some treaties make reference

92 *Ibid.*, Arts. 1 (3) and 18.

93 *Ibid.*, Arts. 1 (3) and 19.

94 *Ibid.*, Arts. 1 (3) and 24.

95 *Ibid.*, Arts. 1 (3) and 20: “Investors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state.”

96 Agreement between Japan and the Kingdom of Morocco for the Promotion and Protection of Investment, signed 8 January 2020, (Japan–Morocco BIT); Investment Cooperation and Facilitation Agreement between the Federative Republic of Brazil and the Kingdom of Morocco, signed 13 June 2019, (Brazil–Morocco BIT); Agreement between the Government of Burkina Faso and the Government of the Republic of Turkey on Promotion and Protection of Reciprocal Investments, signed 11 November 2019, (Burkina Faso–Turkey BIT); Cabo Verde–Hungary BIT 2019; Agreement between the Government of the Kingdom of Morocco and the Government of the Republic of the Congo on the Reciprocal Promotion and Protection of Investments, signed 30 April 2018, (Morocco–Congo BIT); Agreement between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation, signed 11 April 2018, (Brazil–Ethiopia BIT); Agreement between the Republic of Mali and the Government of the United Arab Emirates Concerning the Reciprocal Promotion and

to sustainable development in their preambular paragraphs, but such provisions are not reproduced within the substantive content of the treaties.⁹⁷ Another BIT refers to the rebalancing of rights and obligations in its preamble.⁹⁸ A vast majority of the BITs make reference to State right to regulate pertaining to safeguarding public health, environment and labour standards.⁹⁹ Such concerns have been repeated in some treaty provisions which encourage investment that should not result in relaxation of safety, health, labour, and environmental standards.¹⁰⁰ Traditional provisions dealing with most favoured nation treatment, national treatment, fair and equitable treatment keep recurring in these BITs. Some BITs sometimes appear with some carve outs and restrictions such as in case of national treatment that is only applicable in “like circumstances” with some indications of what exactly constitute like circumstances.¹⁰¹ Most treaties provide some restrictions with regard to access to investor-State dispute settlement mechanisms.¹⁰² The BITs instead reveal a variety of options for investors including a referral to international arbitration. These provisions range from amicable solution to a choice between domestic courts and international arbitration at ICSID as well as other *ad hoc* arbitration

Protection of Investments, signed, signed 6 March 2018, (Mali-UAE BIT); Agreement between the Republic of Mali and the Government of the Republic of Turkey on the Reciprocal Promotion and Protection of Investments, signed 2 March 2018, (Mali-Turkey BIT); Agreement between the Republic of Rwanda and the United Arab Emirates on the Promotion and Reciprocal Protection of Investments, signed 1 November 2017, (Rwanda-UAE BIT); Agreement between the Republic of Turkey and the Government of the Republic of Burundi Concerning the Reciprocal Promotion and Protection of Investments, signed 14 June 2017 (Burundi-Turkey BIT).

97 Cabo Verde-Hungary BIT, Preambular Paragraph; Congo-Morocco BIT, Preambular Paragraph; Brazil-Ethiopia BIT, Preambular Paragraph; Rwanda-UAE BIT, Preambular Paragraph.

98 Rwanda-UAE BIT, Preambular Paragraph.

99 Japan-Morocco BIT, Preambular Paragraph; Burkina Faso-Turkey BIT, Preambular Paragraph; Cabo Verde-Hungary BIT, Preambular Paragraph; Burundi-Turkey BIT, Preambular Paragraph.

100 Japan-Morocco BIT, Art. 19; Burkina Faso-Turkey BIT, Art. 5; Cabo Verde-Hungary, Art. 2; Brazil-Ethiopia BIT, Art. 16; Mali-UAE BIT, Art. 18; Mali-Turkey BIT, Art. 5; Rwanda-UAE BIT, Art. 9.

101 Japan-Morocco BIT, Art. 3; Brazil-Morocco BIT, Art. 5; Burkina Faso-Turkey BIT, Art. 4; Cabo Verde-Hungary BIT, Art. 4; Congo-Morocco BIT, Art. 3; Brazil-Ethiopia BIT, Art. 5; Rwanda-UAE BIT, Art. 5; Burundi-Turkey BIT, Art. 4.

102 Japan-Morocco BIT, Art. 3; Brazil-Morocco BIT, Art. 5; Burkina Faso-Turkey BIT, Art. 4; Cabo Verde-Hungary BIT, Art. 4; Congo-Morocco BIT, Art. 3; Brazil-Ethiopia BIT, Art. 6; Mali-Turkey BIT, Art. 4.

with UNCITRAL rules.¹⁰³ They restrict access to international arbitration. They provide multiple avenues for settlement of investment disputes by providing administrative and judicial settlement within the territories of the contracting parties.¹⁰⁴ They require the arbitrators to be independent by not affiliating with any government or taking any instructions from any government or organization with regard to matters related to the dispute.¹⁰⁵ Few BITs that African countries have signed with Brazil do not provide for access of investors to ISDS. Instead, they provide elaborate mechanisms for the amicable settlement of disputes between the parties through conciliation, mediation, and negotiation, which can be escalated to state-state arbitration should they be unsuccessful.¹⁰⁶ These examples do not reveal any uniformity in the approach that African states take in negotiating new BITs. Rather, they reveal a diversity of approaches between them.

3.3 *Current Regional Investment Regime*

Besides BITs, since the early years of independence, there has been a growing complex web of regional investment agreements within the African continent.¹⁰⁷ In West Africa, there are three RECs: the West African Economic and Monetary Union (UEMOA), the Mano River Union (MRU) and the Economic Community of West African States (ECOWAS). Central Africa has two groupings: the Economic Community of Central African States (ECCAS) and the Economic Community of Great Lakes Countries (ECGLC). In Eastern and Southern Africa, six groupings co-exist: the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Inter-Governmental Authority on Development (IGAD), the Indian Ocean Commission (IOC), the Southern African Development Community (SADC) and the Southern African Customs Union (SACU). North Africa shares two RECs: the Arab Maghreb Union (UMA) and the Community of Sahel-Saharan States (CEN-SAD). As a consequence, today, of the 55 African countries, 28 retain dual membership, 20 are members of three RECs, the Democratic Republic of Congo belongs to four RECs and six countries maintain singular membership.¹⁰⁸ The RECs

103 Cabo Verde–Hungary BIT, Art. 9; Congo–Morocco BIT, Art. 9; Mali–UAE BIT, Art. 11; Mali–Turkey BIT, Art. 10; Burundi–Turkey BIT, Art. 12.

104 Burkina Faso–Turkey BIT, Art. 10.

105 Japan–Morocco BIT, Art. 16; Cabo Verde–Hungary BIT, Art. 9.

106 Brazil–Morocco BIT, Arts. 19–20; Brazil Ethiopia BIT, Arts. 23–24.

107 “Regional Economic Communities in Africa: A Progressive Overview”, *Gesellschaft für Technische Zusammenarbeit*, (2009), available at <au.int/en/organs/recs>, accessed 26 July 2021.

108 *Ibid.*, p. 9.

adopted investment instruments, in the form of binding and non-binding IIAs which they consider to be more adequate in light of the specific needs of African countries.¹⁰⁹ In particular, the most recent instruments elaborated by COMESA (Subsection *i*), ECOWAS (Subsection *ii*) and SADC (Subsection *iii*) all seek to combine attracting investors and achieving sustainable development objectives.

3.3.1 Common Market of Eastern and Southern Africa (COMESA)

In 2007, COMESA was the first regional investment agreement to propose a well-balanced and sensitive approach to investment regulation in the continent, which establishes COMESA Common Investment Area (CCIA).¹¹⁰ This agreement has not yet entered into force. One of the innovative features of the agreement is the provision on investor obligation.¹¹¹ Article 36 (7) provides that a Member State against whom a claim is brought by a COMESA investor or its investment under this article, may assert as defense, counterclaim, setoff or other similar claims, that the COMESA investor has not fulfilled its obligations under this agreement, including the obligation to comply with all applicable domestic measures. Recently, COMESA has reworked its investment agreement to provide for sustainable development and right to regulate dimensions in its content. The final version was sent to be submitted to the COMESA Committee on Legal Affairs in September 2017.¹¹² Under the new CCIA agreement, the FET standard has been limited to fair administrative and judicial treatment.¹¹³ The text imposes a range of investor obligations concerning social standards, environmental protection, and human rights. Finally, concerning ISDS, the agreement refers disputes to the COMESA Court of Justice (COMESA Court) or to a tribunal constituted under such Court, provided that local remedies have been

109 United Nations Economic Commission for Africa, *Investment Policies and Bilateral Investment Treaties Landscape in Africa: Implications for Regional Integration*, available at <repository.uneca.org/handle/10855/23035>, accessed 26 July 2021.

110 Common Market for Eastern and Southern Africa, Investment Agreement for the COMESA Common Investment Area, signed 23 May 2007, available at <investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3225/comesa-investment-agreement>, accessed 26 July 2021.

111 *Ibid.*, Art. 13: “COMESA investors and their investments shall comply with all applicable domestic measures of the Member State in which their investment is made.”

112 United Nations Conference on Trade and Development, “World Investment Report 2018 – Investment and New Industrial Policies”, p. 90, available at <unctad.org/system/files/official-document/wir2018_en.pdf>, accessed 26 July 2021.

113 One can see an influence of Section of the South African Protection of investment Act of 2015.

exhausted and unless otherwise agreed by the disputing parties by specific written agreement.¹¹⁴

3.3.2 Economic Community of Western African States (ECOWAS)

There are a variety of regulatory investment instrument within ECOWAS.¹¹⁵ Interestingly, the 2008 ECOWAS Supplementary Act provides for traditional standards of investor protection and beyond the intra-ECOWAS investors.¹¹⁶ It provides for the Court of Justice of the Economic Community of West African States (ECCJ) which can function as a default mechanism for the settlement of investor-state disputes under the ECOWAS Supplementary Act.¹¹⁷ In July 2018, ECOWAS adopted the ECOWAS Common Investment Code (ECOWIC), which is yet to enter into force. This new code is to apply to investors of a given ECOWAS member State investing in another member State. On the whole, the ECOWIC contains very similar approaches to the discussed instruments. Typically, the main objective is sustainable development; the definition of an investment is linked to the investment's contribution to the development of the host State; and the otherwise highly popular provision on FET was not included. Additionally, the ECOWIC contains a set of horizontal obligations on broader policy issues, such as environmental protection, labour standards and economic development including anti-corruption that apply to both investors and member State.¹¹⁸

3.3.3 Southern African Development Community (SADC)

The main text for investment regulation within SADC is the 2006 SADC Protocol on Finance and Investment (SADC Investment Protocol).¹¹⁹ However, the SADC member States have elaborated an amended version of Annex I to the SADC Protocol on Finance and Investment, which was finalized in August 2016.

¹¹⁴ Mbengue, *supra* note 78, p. 468.

¹¹⁵ Economic Community of West African States (ECOWAS), Revised Treaty of the Economic Community of West African States (ECOWAS), signed 24 July 1993, 2373 U.N.T.S. 233; ECOWAS, Protocol on Movement of Persons, Residence and Establishment, adopted 29 May 1979; ECOWAS, Energy Protocol, adopted 31 January 2003; ECOWAS Supplementary Act on Investments, adopted 19 December 2008, available at <www.ecowas.int/wp-content/uploads/2015/01/Revised-treaty.pdf>, accessed 26 July 2021.

¹¹⁶ ECOWAS Supplementary Act, Art. 33.

¹¹⁷ Matthew Happold and Relja Radović, "The ECOWAS Court of Justice as an Investment Tribunal", *Journal of the World Investment & Trade*, 19 (2018) 1, p. 95.

¹¹⁸ Mbengue, *supra* note 78, p. 468.

¹¹⁹ Southern African Development Community, Protocol on Finance and Investment, signed 18 August 2006, available at <investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2730/download>, accessed 26 July 2021.

Among the key changes is the deletion of the FET provision and the complete removal of the ISDS mechanism.¹²⁰ Additionally, the amended version limits investment protection to investors of a SADC member State investing in another SADC member State, thereby excluding investors of third States. The 2006 version of this instrument became highly controversial as several investment claims have been filed against SADC member states.¹²¹ The Annex's broad scope recently led a tribunal to deem that it applied to all foreign investors, as well as domestic ones. In addition to the Protocol, the SADC region has also adopted a Model Treaty (SADC Model BIT).¹²² The new SADC Model BIT differs from its first edition by taking a stronger stand in excluding ISDS as it removes it from the actual treaty text. However, upon the request of some SADC members, an appropriate text on ISDS has been annexed to the reviewed model. The commentary to the SADC Model Treaty warns SADC countries about including ISDS in investment treaties.

4 Current Arbitration Framework for Intra-African Investment Disputes

Most BITs signed between African and non-African countries (as well as intra-African agreements) include international arbitration provisions that allow for investment disputes to be instituted before international arbitral tribunals. The most prominent international arbitration mechanism is the one established by the International Centre for the Settlement of Investment Disputes (ICSID). The creation ICSID in 1966 provided an independent dispute settlement forum and offered foreign investors a guarantee that their investments would not be subjected to the political pressures of adjudication in host countries' national courts.¹²³ In practice, investment treaty arbitration allows nationals of contracting states to institute claims against contracting parties

120 Southern African Development Community, Agreement Amending Annex 1 (Co-operation on Investment) of the Protocol on Finance and Investment, signed 17 May 2017, (not yet entered into force), available at <www.tralac.org/resources/by-region/sadc.html#FIP>, accessed 26 July 2021.

121 Mmiselo Freedom Qumba, "Balancing Investor Protection with a State Regulatory Autonomy in the amended SADC FIP", *Obiter*, 42 (2021) 3, p. 626.

122 Southern African Development Community, "SADC Model Bilateral Investment Treaty Template with Commentary", (2012) available at <www.iisd.org/itm/wpcontent/uploads/2012/10/sadc-model-bit-template-final.pdf>, accessed 26 July 2021.

123 (*Gas Natural SA v. The Argentine Republic*), 17 June 2005, ICSID, Decision on Preliminary Questions on Jurisdiction, Case No. ARB/03/10, para. 29.

but does not allow domestic investors to bring claims under this system.¹²⁴ Additionally, the International Chamber of Commerce (ICC) is also one of the most commonly used arbitral institutions. The United Nations Commission on International Trade Law's (UNCITRAL) Rules of Arbitration are commonly used to govern arbitrations administered by other arbitral institutions. Other notable international arbitration institutions include the London Court of International Arbitration (LCIA), the International Centre for Dispute Resolution (ICDR), the Hong Kong International Arbitration Centre (HKIAC), and the Singapore International Arbitration Centre (SIAC).

Recently, there has been an increase in the number of African Arbitration centers which are characterized by varying level of success. One count in 2015, lists 71 of such centres in 39 African countries.¹²⁵ It is not very clear how busy all of these centres are, but for those centres that publish their annual statistics, such as the Cairo Regional Centre for International Arbitration (CRCICA) and the Kigali International Arbitration Centre (KIAC), they have recorded year-on-year increases in their caseload. For example, CRCICA, in the first quarter of 2018, registered 20 new cases against 16 at the same time in 2016; and since its inception in 1979, 1,246 cases have been filed with the centre.¹²⁶ KIAC on its part, has as at beginning of December 2018, registered 97 cases since it opened for business in 2012.¹²⁷ The other major arbitration centres in the continent are Nairobi Centre for International Arbitration in East Africa;¹²⁸ the OHADA in the OHADA region;¹²⁹ the Arbitration Foundation of South Africa in Southern Africa;¹³⁰ the Lagos Regional Centre for International Commercial Arbitration,¹³¹ and the Ghana Arbitration Centre in West Africa.¹³² Thus, Africa

124 Gabrielle Kaufmann-Kohler and Michele Potestà, *Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options*, Springer, 2020.

125 See Emilia Onyema, List of Arbitration Centres in Africa, (May 2016), available at <docs.wixstatic.com/ugd/ef6df1_aof973bbbbb14c7b8d733ba7c58f6aob.pdf>, accessed 19 July 2021.

126 Cairo Regional Centre for International Commercial Arbitration, available at <crcica.org/NewsDetails.aspx?ID=28>, accessed 19 July 2021.

127 This information was provided by Dr Fidele Masengo the Secretary General of KIAC in the recently published KIAC caseload available at <www.kiac.org.rw/IMG/pdf/kiac_growing_caseload.pdf>, accessed 19 July 2021.

128 Nairobi Centre for International Arbitration, available at <ncia.or.ke/>, accessed 26 July 2021.

129 OHADA available at <africanlii.org/catalog/68>, accessed 26 July 2021.

130 Arbitration Foundation of Southern Africa, available at <arbitration.co.za/>, accessed 26 July 2021.

131 Lagos Regional Centre for International Commercial Arbitration, available at <rcical.org/>, accessed 26 July 2021.

132 Ghana Arbitration Centre available at <arbitrationcentreggh.com/>, accessed 26 July 2021.

does not lack arbitration centres. What needs to be interrogated is the experience and effectiveness of the centres in performing their tasks, and how they collaborate (if at all) with each other and share their spaces.

4.1 *African States and ISDS Debates*

The skepticism surrounding the use of ISDS within the African continent continues to grow. Critics of the system have argued that the system is a tool invented by Western countries to impose their power on weaker or emerging economies and that African States have been required to play by the rules of international arbitral institutions. They point out that African States have been required to understand a culture of legal proceedings that was totally external to their domestic legal cultures, and that their participation in the formation of ICSID, for instance, was limited to supporting the institutions when African States appear as respondents in ISDS cases.¹³³ African States have also raised concerns about the traditional ISDS system, including, lack of legitimacy and transparency, exorbitant costs of arbitration proceedings and arbitral awards, as well as inconsistent and flawed decisions. States have also complained that the system allows foreign investors to challenge legitimate public welfare measures of host States before international arbitration tribunals. Governments are concerned about their sovereignty or policy space as they are discouraged from adopting public welfare regulations, resulting in regulatory chill.¹³⁴

The controversies regarding the utility of ISDS mechanisms reached another level in July 2017 when Member States of the United Nations Commission on International Trade Law (UNCITRAL) entrusted its Working Group III with a broad mandate to work on the reform of ISDS. Only three African states have submitted working papers – Mali,¹³⁵ Morocco,¹³⁶ and South Africa.¹³⁷

133 Won Kidane, “The Culture of Investment Arbitration: An African Perspective”, *ICSID Review – Foreign Investment Law Journal*, 34 (2019) 2, p. 420.

134 Chidede, *supra* note 61.

135 United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS)*, Submission from the Government of Mali, (17 September 2019), U.N. Doc. A/CN.9/WG.III/WP.181.

136 United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS)*, Submission from the Government of Morocco, (1 March 2019), U.N. Doc. A/CN.9/WG.III/WP.161.

137 United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of Investor-State dispute settlement (ISDS)*, Submission from the Government of South Africa, (17 July 2019), U.N. Doc. A/CN.9/WG.III/WP.176.

A summary of their submissions is instructive. Mali highlights the challenges faced by developing states because of the imbalance between states which are always the recipients of foreign investment. It notes that this creates an imbalance in the treaties which should be rebalanced. The submission also highlights that developing states lack expertise and preparation and when defending claims, and this could be resolved by developing internal strategies for negotiation and training. Mali also raises concerns about the language used in arbitration, the conduct of the arbitrators and the costs and duration of arbitration.

Morocco outlines the reforms that it has made in its model BIT to rebalance rights and obligations between states. The reforms include provisions for states to make counterclaims, and summary dismissal of frivolous claims. As it notes, Morocco has also introduced limits on the type of disputes that may be submitted to ISDS as well as time limits for making the claims. It also highlights issues that it believes should be discussed in Working Group III, including the cost of arbitration, scrutiny of awards, and the availability of an appellate mechanism.

South Africa for its part, uses its submission to focus on the link between investment and sustainable development. It offers several reform solutions and reiterates its view that states should re-think the ISDS system, including whether it is necessary. It proposes an alternative to the creation of an ISDS system that focuses on sustainable development and calls for an expansion of the discussion in Working Group III to include substantive issues. These submissions have been made by the individual states without support or coordination with other African states. To date, there have been no efforts to coordinate positions and submissions from African states at Working Group III.

4.2 *Amendment of the ICSID Rules*

On 3 August 2018, the International Centre for the Settlement of Investment Disputes (ICSID) announced a series of proposed changes to its rules and invited public comment. ICSID noted that the proposed changes amendments were designed *inter alia* to simplify the rules by improving drafting and language, to reduce time and cost by introducing electronic filing, to require disclosure of third-party funding. The proposed amendments would also give access to ICSID arbitration to regional economic integration organisations through the ICSID Additional Facility and Rules. Notably, the proposed amendments also include a set of rules on mediation. Almost all African states are ICSID states parties. The exceptions are Angola, Eritrea, Ethiopia (signatory state), Equatorial Guinea, Guinea Bissau (signatory state), Libya, Namibia (signatory state), and South Africa. ICSID Member states were invited to give comments on the ICSID Rule Amendment process. Only eight African

states provided comments on the first version of the amendments: Algeria, Democratic Republic of Congo, Mauritius, Morocco, Nigeria, Somalia, Togo, and Tunisia. The African Union also gave comments. No African states or the African Union gave comments on the second version of the rules.¹³⁸

The African Union (AU) expressed its support for extending the ICSID Additional Facility Rules to regional economic international organisations (REIOS) and reiterated the need for diversity in the nomination of arbitrators. It did not appear from its submission, that the AU had coordinated with its member states before making its submission. African states generally supported the introduction of mediation rules, but states varied in their interventions. Mauritius responded only to say that it was in agreement with the proposals. The DRC urged ICSID to propose rules against claims by vulture funds. Nigeria urged ICSID to consider longer timeframes to allow developing states to gather relevant documents. It noted that it would provide further comments on other issues but did not make any further written submissions. Somalia expressed its support for electronic filing, shared its concerns about third party funding, and welcomed the amendment to permit a standalone application for security for costs – not linked to provisional measures. Togo noted that there may be good reasons not to disclose the identity of a third-party funder, and that disclosure should therefore not be systematic. The written contribution of African states to the ICSID Rule Amendment process has been limited in scope and depth and is illustrative of a wider challenge in engaging with ISDS reform as is evident in the UNCITRAL Reform process. This shows that while African states are active in reforming domestic, sub-regional, and regional instruments, they are relatively passive at the global level.

5 A Proposal for African Investment Court as a Way Forward

The ongoing phase II negotiations for the AfCFTA Investment Protocol present an opportunity for African countries to develop a Joint-African position on investment policy. Most significantly, the AfCFTA Investment Protocol represents a new chapter in Africa's endeavors to promote regional integration and competitiveness by overcoming the colonial legacy of fragmentation, while harnessing the benefits of a large integrated market. At this critical moment in the history of the African continent, Africa must demonstrate that it can establish a legitimate forum for the settlement of investment disputes while at the

¹³⁸ All submissions are available at <icsid.worldbank.org/en/amendments>, accessed 26 July 2021.

same time pushing the continent forward with its development agenda. This proposal for the establishment of African Investment Court should be pursued at the unified African continental level rather than at a sub-regional level. This would help avoid the existing problems of fragmentation of investment rules and investment forums in the African continent.

The African Investment Court proposal would be a continental supranational court with its limitations and jurisdictions clearly defined. The jurisdiction of the African Investment Court would be limited to disputes relating to IIAS signed by African countries. In executing its mandate, the court would have to produce its own procedural rules on conciliation, mediation, arbitration, codes of ethics as well as rules on management of the court. Jurisdiction could be based on an agreement among all parties involved to submit certain disputes to the court. As part of the jurisdictional issues, the procedure of the African Investment Court would have to spell out clear and strict timelines. This would ensure that the court administers justice without undue delay. A forum located on the African continent, with knowledge and experience of the local context within which disputes arise, will be crucial in gaining African nations' support. Having the African Investment Court would support access to justice by reducing costs to African countries.

This proposal if adopted, would rest on the principle that private arbitration is a fundamentally inappropriate mechanism to resolve weighty issues of national public policy. The main benefit of this approach is that African judges will be more likely to consider the social, environmental, and labour consequences of investments. This will give them a unique perspective on the reasoning behind why States may take certain policy decisions and allow them to weigh this reasoning with investors' interests. An African Investment Court, for example, would presumably hesitate to find that the South African government had engaged in the indirect expropriation of an asset of a foreign investor if the South African Constitutional Court had determined that the relevant measure did not constitute a "regulatory taking" under section 25 of the South African Constitution. This would in turn, serve the purpose of balancing Africa's sustainable development goals and right to regulate with investment decisions. At the same time, this would be the most significant benefit of having an African investment court with local judges who are familiar with most pressing issues of the continent and vested with contextual awareness.

The establishment of African investment court would be consistent with the calls for a mechanism that fosters the independence and impartiality of judges which can be achieved through tenured appointments. Thus, the judges would be elected by States on a permanent basis, thus saving on costs of searching for potential arbitrators. The architects of African Investment Court

could borrow ideas from the WTO dispute settlement mechanism where members are appointed on a roster for a period of time and cases are allocated in accordance with internal rules. Judges of the African Investment Court would have to be selected from a pool of African expert arbitrators with more than ten years of experience or judges from different African countries. Judges at the African Investment Court should have the expertise that foreign investors would expect of a court of such importance. This diversity of judges from different countries would help reduce the bias and corruption concerns that exist with local courts. It would ensure equitable representation and fair treatment of smaller countries within the court's system.

Similarly, under the European TIPP investment court proposal, judges would be allocated cases randomly, causing disputing parties to lack influence on the three judges hearing their case. This African Investment Court would have to be located in democratically stable economy of the continent with less chances of turmoil or conflict which would impact the court's functioning. In developing a continental court, it is essential to recognize that there are many qualified African nationals (from even the smallest countries with small economies) who have the capacity and expertise to settle complex investment disputes that could serve on a continental court. Utilizing local human capital from across the continent would achieve one of the key purposes of the AfCFTA, namely that local human resources are better utilized to meet local needs. Finally, the African Union member States and AfCFTA would have to commit to enforce the decisions of the court as if it is the highest national courts.