

**TITLE OF THESIS**

**INVESTOR-STATE ARBITRATION AND AFRICAN STATES: A PROPOSAL FOR A PAN-  
AFRICAN INVESTMENT COURT**

**by**

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**Abstract**

This thesis proposed for the reform of Africa's Investor-State Dispute Settlement (ISDS) landscape through the establishment of a Pan-African Investment Court (PAIC) as a mechanism for the resolution of Investor-State Disputes. This proposal is influenced by the findings of my investigation on the functioning of Investor-State Dispute Settlement (ISDS) through the deployment of Investor-State Arbitration to resolve Investor-State Disputes between African states and foreign investors.

This research is motivated by the criticisms of the Arbitration mechanism by a broad spectrum of constituencies within international investment law. These criticisms are primarily anchored on the legitimacy crises of ISDS, a dissatisfactory notion that denounces the deployment of the private mechanism and privity of contract ingrained investment arbitration framework to resolve publicly-inclined investor-state disputes. Ancillary to this critical holy grail are further dissatisfactions on the practical functionality of investment arbitration in aspects of high volume of cases against developing states, lack of diversity in the appointment of arbitrators and curtailment of sovereignty of host states through the intrusion of provisions of International Investment Agreements on legitimate internal decision-making powers.

Consequently, this thesis investigated the practical functioning of ISDS in African states. After the study of the experiences of Egypt, South Africa and Tanzania; it was found that the legitimacy crises of ISDS also impacts on African states, and does not support their socio-economic and sustainable developmental aspirations. As a remedy, I proposed for a reform to an Investment Court System (ICS) through the establishment of a Pan-African Investment Court (PAIC). An evaluation of this recommendation was conducted that evidenced potential challenges that may mitigate its feasibility, thus leading to the advancement of two secondary reform alternatives vis the reform and retention of the current investor-state arbitration framework and engagement in innovative treaty-making practices by African states.

To the best of my knowledge, this thesis has not been previously submitted in any higher institution or published by another person. The contents of this thesis are my ideas. Where the materials of others were used, due acknowledgement and reference was provided.

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## Chapter One: Conceptual underpinning

### 1.1. Introduction

This chapter shall explore the issues regarding Investor-State Dispute Settlement (ISDS) and examine why some constituencies such as the European Union (EU), have criticised International Investment Arbitration as a mechanism for resolving Investor-State Disputes.<sup>1</sup>

Thus, the rationale behind my proposal for the creation of a Pan-African Investment Court and the contribution of this thesis to literature shall be explained in this chapter.

In exploring and interrogating the reasons behind this thesis, this chapter shall do six things. First and foremost, the motivations underpinning the calls for a court system as a means of resolving investor-state disputes will be examined. This exploration will help in providing information, evidence and support for my proposal. Second, the reasons behind my proposal will be scrutinised to determine any justified basis for it. The evaluation of the reasons behind my proposal for the creation of a Pan-African Investment Court will help evidencing the contribution of this thesis to literature.

Third, this chapter will examine the Foreign Direct Investment (FDI) landscape in Africa. This examination is imperative as it will provide information on the volume FDI inflow and impact of multinational corporations within the African continent. Since this thesis proposes the creation of a Pan-African Investment Court, the examination of the FDI inflow and impact of transnational corporate activities in the continent will show the relationship between foreign investment protection and investor-state disputes. Fourth, the criticisms of international arbitration as a medium of resolving investor-state disputes has elicited reforms from African states. Thus, this chapter will also explore the innovative treaty-making mechanism that have been championed by several African states.

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<sup>1</sup> See generally, European Commission, 'Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations' (2015), Available at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_15\\_5651](https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5651) (Accessed on 23/11/2017), European Commission, 'The EU moves forward efforts at UN on multilateral reform of ISDS' (2019), Available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1972> (17/10/2019) – The EU criticised the ISDS framework as unsuitable for the resolution of investment disputes and proposed a court system. Several defects of the ISDS framework enabled international investment arbitration were identified by the EU through its two papers it submitted to the UN Working Group under the United Nations Commission on International Trade Law (UNCITRAL). The UNCITRAL Working Group were mandated to examine reform of investor-state dispute settlement (ISDS)



Fifth, among the reform measures by African states is the use of Regional Economic Communities (RECs) to advance intra African trade and investments. Thus, the role of these RECs shall also be reviewed in this chapter. In addition, the resolution of investor-state disputes through a private and party led international investment arbitration is one of the criticisms of ISDS, as some commenters argues that international investment disputes are public matters and therefore should be decided through a public framework. Hence, the several moves and calls for a court system. As such, this argument that international investment arbitration is not a suitable framework for resolving investor-state disputes will be interrogated.

Last but not the least, this chapter will evaluate the implications of my proposed Pan-African Investment Court on investment inflow into the continent and the harmonisation of Africa's economic and investment landscape. Furthermore, this discussion will interrogate the feasibility of achieving consensus on Africa's economic and investment harmonisation agenda. This evaluation is important in view of the refusal of some states within the continent to assent to the African Continental Free Trade Area (AfCFTA) agreement. Thereafter, a conclusion which will summarise the theme and discussions of this chapter will be stated.

As a starting point of this thesis, the next subsection of this chapter will examine the fundamental issues and criticism that have attended the international investment arbitration as a mechanism for the resolution of investor-state disputes. As an aspect of ISDS, there are divergent opinions on the prosperity of using international investment arbitration to settle investor-state disputes. Thus, these issues and the reasons behind the calls for an investment court system shall be analysed in the subsection below.

## 1.2. The fundamental issues about International Investment Arbitration

The fundamental issues about investor-state arbitration will be discussed in this chapter. This discussion aims to show the broad issues that have occupied the front burner of issues in investor-state dispute settlement in particular, and international investment law in general. This examination will help to evidence the issues behind my proposal for a reform of the ISDS system through the establishment of a permanent investment court system for Africa.

In the past five years, the idea of an investment court has started to manifest in the EU reform of international investment law.<sup>2</sup> The proposal is motivated by the legitimacy crises of Investor-state dispute settlement (ISDS), an argument that private arbitration is not appropriate for handling matters involving national public policy.<sup>3</sup> This argument is premised on the altar of sovereignty, the idea that sovereign states possess full powers to publicly regulate their domains without external interference. However, the current operation of ISDS has witnessed mounting challenges on the basis of democratic deficit. This democratic deficit is premised on the fact that investor-state arbitration is a private mechanism that is used to settle investor-state disputes, public issues whose outcomes possess wider implications on the domestic matters and living standards of citizens of a state.

With governments empowered by their citizens through elections to superintend the affairs of their country, it is envisaged that such decisions will advance their socio-economic interests. In addition, the concept of sovereignty also portends that governments are the trustees of citizens and therefore must undertake decisions that are lawful and strictly premised on constitutional provisions of the state. However, and in what is considered extra constitutional measures, the functioning of ISDS have faced criticisms for its legitimacy crises on the later of four democratic deficit reasons. First, the secrecy of negotiations of treaties and operation of investor-state arbitration, constrains of treaty provisions on the effective

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<sup>2</sup> See European Union Commission Staff Working Document Report, 'Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)' SWD(2015) 3 final, Available at [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153044.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf) (Accessed on 19/11/2017)

<sup>3</sup>Gus Van Harten, A Case for International Investment Court, Inaugural Conference of the Society for International Economic Law, (16 July 2008), 5-9.

regulation of domestic subjects by future governments of states, obligatory procedures that governments must follow if they intend to regulate domestic issues and enforcement of treaty provisions by foreign states and investors through extra-constitutional and territorial tribunals who may impose financial and economic penalties on sovereign states. Although it can be argued that these paradigms are consequential outcomes of lawfully consummated treaties which therefore renders them legitimate, however, it can be countered that the far reaching implications investor-state arbitration may not have been the intention of contracting states. In any case, the mortgaging of the sovereign right of states to regulate their domains even by future governments are unintended and ancillary outcomes that have contributed to the legitimacy crises of ISDS.

As such, the United Nations Conference on Trade and Development commented that the legitimacy crises of ISDS and concerns of some states is because of ‘deficiencies in the system (e.g. the expansive or contradictory interpretations of key IIA provisions by arbitration tribunals, inadequate enforcement and annulment procedures, concerns regarding the qualification of arbitrators, the lack of transparency and high costs of the proceedings, and the relationship between ISDS and State–State proceedings) and a broader public discourse about the usefulness and legitimacy of the ISDS mechanism’. Hence, it recognised reform measures which are ‘[aimed] at reigning in the growing number of ISDS cases, fostering the legitimacy and increasing the transparency of ISDS proceedings, dealing with inconsistent readings of key provisions in IIAs and poor treaty interpretation, improving the impartiality and quality of arbitrators, reducing the length and costs of proceedings, assisting developing countries in handling ISDS cases, and addressing overall concerns about the functioning of the system’.<sup>4</sup>

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<sup>4</sup> See UNTACD, ‘World Investment Report 2012’ (2012), Available at <https://worldinvestmentreport.unctad.org/wir2012/chapter-3-investment-policy-trends/> (accessed on 28 March 2018)

Consequently, in May 2015, the European Commission announced plans to replace international investment tribunals with a traditional court system.<sup>5</sup> This includes plans for a public investment court system with an appellate mechanism, composed of publicly appointed judges with qualifications comparable to those of members of the World Trade Organisation's (WTO) Appellate Body or judges of the International Court of Justice (ICJ). In fact, chapter 2, section 3, Article 9(2) of the Transatlantic Trade and Investment Partnership (TTIP) Draft Investment Chapter (2015), provides that: "[t]he [...] Committee shall, upon the entry into force of this Agreement, appoint fifteen Judges to the Tribunal.<sup>6</sup> Five of the Judges shall be nationals of a Member State of the European Union, five shall be nationals of the United States and five shall be nationals of third countries." This mechanism has already been incorporated in the EU–Vietnam Draft Free Trade Agreement (2016),<sup>7</sup> and the Comprehensive Economic and Trade Agreement (CETA) Finalised Draft (2016).<sup>8</sup> However, the idea is not new and lessons should be taken from standing initiatives. For example, the Arab Investment Court, created under the Unified Agreement for the Investment of Arab Capital in the Arab States, bolsters over thirty years of jurisprudence.<sup>9</sup>

These reforms are a reflection of the criticisms, led by the international community, that have attended the international arbitration system. Gus Van Harten has expressed concern over investment tribunals by arguing that they “undermine basic principles of democratic representation and accountability” and they are not built to accommodate the quality of review necessary for public law adjudication.<sup>10</sup> Furthermore, the decisions of investment tribunals have a broader impact beyond the parties to the dispute. In reality, Surya Subedi

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<sup>5</sup>See European Commission, 'Investment in TTIP and beyond – the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court' (2015) Concept Paper, Available at [http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.PDF](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF) (Accessed on 22/11/2017)

<sup>6</sup> European Commission, Transatlantic Trade and Investment Partnership between the EU-US <[http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\\_153807.pdf](http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf)> accessed 16 June 2017.

<sup>7</sup> European Commission, EU-Vietnam FTA <[http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154224.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154224.pdf)> accessed 16 June 2017.

<sup>8</sup> European Commission, EU-Canada CETA <<http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter>> accessed 16 June 2017.

<sup>9</sup> The Unified Agreement was signed on 26 November 1980 in Amman, Jordan, and entered into force on 7 September 1981. Walid Ben Hamida, The development of the Arab Investment Court's case law: new decisions rendered by the Arab Investment Court (2014) *International Journal of Arab Arbitration*, 6, 12.

<sup>10</sup> Gus Van Harten, Private authority and transnational governance: the contours of the international system of investor protection. (2005) *Rev Int Political Econ* 12:600, 600.

argues that “the pronouncements that these tribunals make as to the existence or non-existence of an alleged rule of international foreign investment law or the meaning and scope of a rule have wider ramifications and implications for other States as well as for international law as a whole.”<sup>11</sup> In fact, investment tribunals regularly choose the rules that would apply to the dispute and often choose to ignore public international law.

Fundamentally, investment tribunals operate in a hybrid world consisting of private and public law, with broad discretion on the choice of rules.<sup>12</sup> This is why academic commentators such as Garcia-Bolivar argue that “[t]he interpretation of concepts and principles that are peculiar to States and public international law cannot be left to the view of ever changing arbitrators.” Although the enforcement mechanisms and procedural rules were developed in the context of private commercial arbitration, scholars such as Anthea Roberts classify investment arbitration as a public law system. The discontent is anchored on several fronts, especially the inability of host states to effectively regulate and administer their respective countries because of the requirement to balance internal democratic decisions with the right of investors.<sup>13</sup> Hence, the formulation of an investment court system through the many progressive policy reform proposals, are aimed at rebalancing the international investment climate between host states and investors.

African countries have also begun to reform their investment laws and dispute resolution mechanisms to reflect the reform agenda across the world. Since the first intra-Africa Bilateral Investment Treaty (BIT) between Egypt and Somalia was signed in 1982, there have been an

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<sup>11</sup> Surya Subedi, *International investment law: reconciling policy and principle*. (Hart Publishing, 2016) 172.

<sup>12</sup> Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System* (2013) 107 *American Journal of International Law* 45, Anthea Roberts *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority* (2014) 55 *Harvard International Law Journal* 1; ‘Triangular Treaties: The Extent and Limits of Investment Treaty Rights’ (2015) 56(2) *Harvard International Law Journal* 359.

<sup>13</sup> Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No.ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay) .... The company had sued the ground claiming that an anti-smoking legislation aimed at controlling the smoking of cigarette thereby enhancing the health of the citizens have breached its substantive protections granted in the Bilateral Investment Treaty between Uruguay and Switzerland

astronomical rise in such agreements between African states and other countries of the world.<sup>14</sup> African countries have begun to chart a new course for five reasons.

First and foremost, some African states and commentators have argued that investor-state arbitration limits the powers of African governments to make legitimate democratic decisions because of the fear of arbitral actions, anchored on breaches of substantive protections contained in their International Investment Agreements (IIAs).<sup>15</sup> Second, despite consummating several IIAs with other countries, it has been routinely perceived that African states do not command a commensurate volume of FDI inflow into its domain.<sup>16</sup> Third, investment protections guaranteed in IIAs are deemed to have overshot the boundaries of commercial interests and branched into areas of human rights violations and environmental degradation in Africa.<sup>17</sup> Fourth, arguments abound that investor-state arbitration is unsuitable for resolving investor-state disputes involving African states because, some of the states in the continent do not have the capacity to effectively discharge the obligations contained in their investment agreements.<sup>18</sup> This argument is premised on the fact that protections like full security and expropriation are too wide and therefore imprecise as to their boundaries and realm. Thus, Kidane opined that this imprecise form of some substantive protections in IIAs underpins the institution of large volumes of arbitral actions against African states.<sup>19</sup>

Last but not the least, some commentators argue that the structural framework of international investment arbitration is discriminatory against African states, despite commanding a large chunk of global investment agreements.<sup>20</sup> Lending support to this final

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<sup>14</sup> See UNCTAD, "World Investment Report 2020 | International Production Beyond the Pandemic" <<https://unctad.org/webflyer/world-investment-report-2020>> accessed November 23, 2020, at xii, see also chapter [4.6] on African states and innovative treat-making practices

<sup>15</sup> UE Ofodile, "African States, Investor-State Arbitration and the ICSID Dispute Resolution System: Continuities, Changes and Challenges" (2019) 34 ICSID Review - Foreign Investment Law Journal.

<sup>16</sup> See generally, S Franck D., "[Ebook]. Empirically Evaluating Claims about Investment Treaty Arbitration" <<https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=4291&#38;context=nclr>> accessed November 23, 2020.

<sup>17</sup> See generally, OHCHR, "International Investment Agreements (IIAs) and Human Rights" <<https://www.ohchr.org/EN/Issues/Business/Pages/IIAs.aspx>> accessed November 23, 2020

<sup>18</sup> See MM Mbengue, "Somethin' ELSE":1 African Discourses on ICSID and on ISDS—An Introduction" (2019) 34 ICSID Review - Foreign Investment Law Journal.

<sup>19</sup> W Kidane, "The Culture of Investment Arbitration: An African Perspective" (2019) 34 ICSID Review - Foreign Investment Law Journal.

<sup>20</sup> See Transnational Institute. "ISDS in Numbers: Impacts of Investment Arbitration Against African states" <[https://www.tni.org/files/publication-downloads/isds\\_africa\\_web.pdf](https://www.tni.org/files/publication-downloads/isds_africa_web.pdf)> accessed November 23, 2020 – This shows the impact of ISDS against African states. It is this disparity in ISDS costs that underpins the accusations that the system is discriminatory against the continent

reason for instance, scholars have commented that the lack of diversity in the appointment of arbitrators, the use of party-led arbitration to administer public issues like expropriation, the high volume of African states as respondents and payment of arbitral awards, are some pointers to an indirect recolonization of the continent through international investment arbitration.<sup>21</sup>

Consequent upon these developments, this thesis shall generally do five things. First, it proposes the establishment of a Pan-African Investment Court. Similar to the motivations behind the European Union Investment Court System, I propose that a Pan-African Investment Court will be a better mechanism to resolve investment disputes between African states and foreign investors. Second, the feasibility of creating an investment court system in Africa will require the harmonisation of the investment agreements of each state of the continent. Thus, this thesis will explore the propriety of formulating a harmonised and unified African investment architecture. Third, the moves towards a reformed ISDS framework is predicated upon perceived defects of international investment arbitration. As such, these criticisms and perceived deficiencies of international investment arbitration shall be critically analysed. This is intended to highlight the far-reaching ways in which investment arbitral panels have interpreted and applied some investment protection standards such as Fair and Equitable Treatment (FET).<sup>22</sup>

Fourth, this thesis shall investigate and identify the novel treaty-making measures embarked upon by African states, due to their reservations about the perceived intrusive nature of investment treaty protection standards on domestic policy and national sovereignty. Correspondingly, the regional alliances and economic communities which has shaped Africa's economic and investment climate prior to ISDS reform initiatives by the global investment community will be examined. This will enable the analysis of the etymological basis

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<sup>21</sup> See E Onyema, "African Participation in the ICSID System: Appointment and Disqualification of Arbitrators" (2019) 34 ICSID Review - Foreign Investment Law Journal, UNCITRAL, "Working Group III: Investor-State Dispute Settlement Reform"

<sup>22</sup> See UNCTAD. Latest Developments in Investor-State Dispute Settlement" <[https://unctad.org/system/files/official-document/webdiaeia20096\\_en.pdf](https://unctad.org/system/files/official-document/webdiaeia20096_en.pdf)> accessed November 23, 2009, see also the decision in *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22

underpinning my proposal for the creation of a Pan-African Investment Court. Lastly, the structure and benefits of my proposed Pan-African investment court will be investigated. Information on the structure and benefits of my proposed investment court for Africa will enable the proper scrutiny of its feasibility and efficacy.

Sequel to the alleged disparity between the volume of FDI inflow into Africa and the number of IIAs consummated by African states,<sup>23</sup> this introductory chapter will examine this pertinent issues one after the other. Thus, the next subsequent will focus on examining the foreign direct investment landscape of African states in the year 2019. This review is important because, it will show whether the perception that African states are not attracting commensurate FDIs, in contrast to its number of IIAs is accurate. Thus, information from this next subsection will help to validate or dispute this perceived disparity between FDI inflow and number of IIAs by African states.

### 1.3. Foreign Direct Investment in Africa

This subsection shall examine the foreign direct investment flowchart of African states in the year 2019. The reason behind this exploration is to determine the volume of FDI attraction by the continent in 2019 and thus, comment whether the volume of FDI inflow is comparable to the number of investment agreements by African states.

The growing number of IIAs somewhat explains the surge in ISDS claims, which has generated much of the dissatisfaction within the international investment community. The total number of global ISDS claims crossed the 1000 mark in 2019,<sup>24</sup> with a majority of new cases brought under BITs pursuant to investment protection standards such as Fair and Equitable Treatment (FET) and expropriation.<sup>25</sup> However, the historical disparity in investment policy between developed and developing countries seems to have continued. For

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<sup>23</sup> See T Schultz and CG Dupont, "Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study" SSRN Electronic Journal.

<sup>24</sup> See UNCTAD, "World Investment Report 2020 | International Production Beyond the Pandemic" <<https://unctad.org/webflyer/world-investment-report-2020>> accessed November 23, 2020. xii

<sup>25</sup> Ibid. 24 above



example, of the total \$1.54 trillion global FDI stock in 2019, developed countries attracted a three per cent increase to the tune of \$800 billion, whilst developing countries saw a decrease of two per cent to \$685 billion.<sup>26</sup> In addition, the United Nations Conference on Trade and Development (UNCTAD) affirmed that, of the \$1.2 to 1.3 trillion dedicated to investment in sustainable development, 'most of these funds are invested in developed countries in areas such as renewable energy'.<sup>27</sup> Notwithstanding the surge in the contraction of IIAs, especially Bilateral Investment Treaties (BITs), the total FDI inflow into the African continent remains at an abysmal level of \$45 billion in the year 2019.<sup>28</sup> This represents a six point nine per cent share of the global FDI stock of \$1.54 trillion and a ten per cent decrease from the 2018 World Investment Report.<sup>29</sup> More astoundingly, it is forecasted that FDI inflows into the African continent will decrease between twenty-five to forty per cent in 2020 due to several factors such as the impact of the COVID-19 pandemic and low commodity prices.<sup>30</sup> In comparison to the 2019 FDI inflow of \$474 billion for Asia, \$429 billion for Europe, \$164 billion for Latin America and the Caribbean, as well as \$297 billion for North America with much lower investment agreements, it can be argued that African states has not fully harnessed the potentials inherent in the volume of IIAs within its domain. Consequently, the extent to which these IIAs have enhanced and increased FDI inflow remains a subject of academic and expert debate.<sup>31</sup>

The World Investment Report data shows that Africa attracted the least FDI inflow in comparison to other continents in 2019. In fact, Africa's FDI volume of \$45 billion in 2019 is a ten per cent decrease from 2018. In contrast, the European continent witnessed FDI growth rate of eighteen per cent to \$429 billion in 2019, whilst Latin America and the Caribbean saw

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<sup>26</sup> Ibid. 24 above, page 8

<sup>27</sup> See UNCTAD, "World Investment Report 2020 | International Production Beyond the Pandemic" <<https://unctad.org/webflyer/world-investment-report-2020>> accessed November 23, 2020, at xv

<sup>28</sup> Ibid. 27 above, at x

<sup>29</sup> Ibid. 27 above, page 2

<sup>30</sup> Ibid. 27 above, at x

<sup>31</sup> See Mary Driemeier, 'Do Bilateral Treaties Attract FDI? Only a Bit and They Could Bite' (2003) World Bank Policy Research Working Paper 3121 <<http://documents.worldbank.org/curated/en/113541468761706209/pdf/multi0page.pdf>> (accessed on July 5 2017) 1-36, Mahembe Edmore, 'Foreign direct investment inflows and economic growth in SADC countries: a panel data approach' (2014) PhD thesis 1-150 [http://uir.unisa.ac.za/bitstream/handle/10500/14232/dissertation\\_mahembe\\_e.pdf?sequence=1&isAllowed=y](http://uir.unisa.ac.za/bitstream/handle/10500/14232/dissertation_mahembe_e.pdf?sequence=1&isAllowed=y) (accessed on July 2015), United Nations Economic Commission for Africa (UNECA), 'Foreign Direct Investment vs National Champions?: The Role of FDI and Domestic Firms in Catalyzing Structural Transformation in Eastern Africa' Background Paper ECA/SRO-EA/ICE/2014/6 (18th Meeting of the Intergovernmental Committee of Experts (ICE), Kinshasa, 17-20 February 2014)

an increase of ten per cent. Although FDI inflow into Asia and the United States decreased by five and three per cents respectively, however, these regions still attracted higher FDI stock into their domains than African states. These statistics shows that African states attracted less FDI inflows than other continents in 2019. This is despite the increase in the contraction of IIAs, which crossed the 1000 mark in 2019.<sup>32</sup> Developing states and continents have led this upshot of IIAs, and African states have featured prominently as part of the global investment community.

Consequent upon this statistics, the next subsection will review the level of participation of African states in the consummation of International Investment Agreements. In addition, the volume of investor-state disputes by African states and their experiences in the resolution of these disputes will be examined in the next subsection of this chapter. Similarly, to the review of FDI inflow, the next subsection will also be used to show the disparity between FDI inflow and investment agreement consummation by African states.

#### 1.4. Investor-State caseload

This subsection will show the number of investor-state arbitration cases of African states in comparison with states from other continents. It will this help to support or rebut the alleged disparity between investment attraction and investment agreement consummation. In addition, other issues associated with investment arbitration cases of African states will also be discussed in this subsection.

African states are also concerned with this legitimacy crisis of ISDS. Thus, the reform of international investment law has been spurred by allegations that the current ISDS mechanism restricts the powers of states to sufficiently discharge their administrative responsibilities or reverse measures that are inimical to the sustainable development of their states. This concern of decision reversal and investor reprisal is cogently evidenced in the

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<sup>32</sup> See UNCTAD, "World Investment Report 2020 | International Production Beyond the Pandemic" <<https://unctad.org/webflyer/world-investment-report-2020>> accessed November 23, 2020, at xii

aftermath of the peoples' led political transitions in North Africa.<sup>33</sup> In the wake of the peoples' revolution and government transition in Egypt, a foreign investor had made a claim;<sup>34</sup> accusing the new government of Mohammad Morsi that a concession contract which was consummated under the previous regime of Hosni Mubarak, breached its investment law. The investor argued that the enabling law contained a provision of mandatory compensation to them if the states increases the minimum wage.

Furthermore, the past decade has been accompanied by a litany of investor claims for breaches of substantive investment protection standards because of several armed and civil conflicts within the African continent. For instance, the cases of American *Manufacturing & Trading, Inc v. Republic of Zaire* (1997) and *Wena Hotels Ltd v. Arab Republic of Egypt* (2000) were commenced following armed conflict and civil unrests.<sup>35</sup> Thus, investors argued that full protection and security standards which requires the protection of foreign investments was not fully discharged by these countries. Apart from these two claims, other African countries were slammed with claims hinging on full protection and security, a resulting consequence of several years of armed struggle, conflict and civil strife within the continent. For example, Tunisia and Algeria have also faced investor claims on this basis of full protection and security following years of armed conflict and guerrilla warfare within its borders.<sup>36</sup>

These occurrences suggest that investor claims may not only become barriers to the political and economic emancipation of African States in the shadow of any conflict through the litany of financially damaging arbitral, but also capable of infusing a chilling effect on governmental activities and effective administration of African states. On the basis of this impact of IIAs on domestic policy-making, investment agreement provisions such as expropriation and FET

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<sup>33</sup> For example, following the fall of the Mubarak government, an Egyptian court queried and reversed the sale of land by a former tourism minister to a foreign investor for a price below its market value. See Hussain Sajwani, DAMAC Park Avenue for Real Estate Development S.A.E., and DAMAC Gamsha Bay for Development S.A.E. v Arab Republic of Egypt, ICSID Case No. ARB/11/16; see also Jarrod Hepburn and Luke E Peterson, Panels Elected in ICSID Matters involving Moldova, Egypt, and the Central African Republic, IA Reporter (12 January 2012).

<sup>34</sup> Veolia Propreté v. Arab Republic of Egypt (ICSID Case No. ARB/12/15); see Luke E Peterson, French company, Veolia, launches claim against Egypt over terminated waste contract and labour wage stabilization promises" IA Reporter (27 June 2012).

<sup>35</sup> American Manufacturing & Trading, Inc v. Republic of Zaire, ICSID Case No ARB/93/1, Award (21 February 1997) and Wena Hotels Ltd v. Arab Republic of Egypt, ICSID Case No ARB/98/4, Award (8 December 2000).

<sup>36</sup> LESI SpA and ASTALDI SpA v. République Algérienne Démocratique et Populaire, ICSID Case No ARB/05/3, Award (12 November 2008); Lundin Tunisia BV v. Republic of Tunisia, ICSID Case No ARB/12/30, Award (22 December 2015).

have been criticised as tools that limits and impinges on the powers of some governments to administer their states.<sup>37</sup> For instance, Egypt was confronted with nine investor claims in the aftermath of the civil strife in its country on the basis of governmental policies.<sup>38</sup> Such claims therefore constitute a barrier for some African states to make progressive policies in their domains due to fear of investor claims.

The intrusive impact of FET on the internal regulatory powers of most African states is manifestly evidenced in the fact that it is the most potent tool for investor claims actions,<sup>39</sup> thus transforming it into the commonly deployed instrument for protecting the rights and economic interests of foreign investors. For instance, in the case of *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, the investors pre-emptively sought for protection against an attempt to expropriate their investments by the police of Nuweiba. In the ensuing arbitral proceeding, the tribunal reversed the seizure by deciding that the expropriated investment be returned to the claimants as the action of the police breached the full security and protection provisions of the enabling treaty.<sup>40</sup> In view of this far reaching impact of FET on national regulatory spaces, some African states have devise limiting mechanisms through the infusion of innovative clauses in drafting their investment treaties.<sup>41</sup> Through these innovative treaty-making practices; the true meaning, operational scope and applicability of protected substantive standards are explained and clarified by African states. Beyond the ISDS caseload of African states examined in subsection [1.4], there are other alleged issues with International Investment Arbitration. Among them is the alleged problem of inconsistency in the interpretation of provisions of international investment agreements.<sup>42</sup>

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<sup>37</sup> See generally, Kläger, R. (2011). 'Fair and Equitable Treatment' in *International Investment Law* (Vol. 83). Cambridge University Press. 37 *Asa International SpA v. Arab Republic of Egypt*, ICSID Case No ARB/13/23 (Registered 13 September 2013); *Ampal-American Israel Corp. and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11.

<sup>38</sup> Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 255.

<sup>39</sup> Majority of the cases against African states were based on Fair and Equitable treatment, See also, transnational Institute, ISDS in Numbers: Impacts of Investment Arbitration Against African states." <[https://www.tni.org/files/publication-downloads/isds\\_africa\\_web.pdf](https://www.tni.org/files/publication-downloads/isds_africa_web.pdf)> accessed November 23, 2020 – on the majority of IIA provisions against African States

<sup>40</sup> This provision was enshrined in Article 4(1) of the Italy-Egypt BIT, then see the case of *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award (1 June 2009) paras 451–56

<sup>41</sup> On the impact of broad FET provision see Jacob Stone, *Arbitrariness, the Fair and Equitable Treatment Standard, and the International Law of Investment*, (2012) *Leiden Journal of International Law* 25, 82; Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, (2013) *Santa Clara Journal of International Law*, 12(7), 16-31. On African perspective, see Eric De Brabandere, *supra* 25

<sup>42</sup> See Schill, S. (2015). *Reforming investor-state dispute settlement (ISDS): conceptual framework and options for the way forward*. by International Centre for Trade and Sustainable Development (ICTSD) 7 Chemin de Balexert, 1219 Geneva

The operation of international investment arbitration is entirely based on deciding issues through the lenses of the applicable treaty, as well as the Vienna Convention on the Law of Treaties (VCLT). This convention infers that during the interpretation of treaties, the 'ordinary meaning' of the words, the *travaux préparatoire*, any further or prior agreements between the states and the circumstances and language of the conclusion of the treaty must be taken into account.<sup>43</sup> But, evidences suggests that the adherence to this requirement have not been met, as the proliferation of investment treaties has led to differences in the interpretation of texts and cases of the same subject. For example, the decisions of the tribunals in the cases of *CME v. Czech Republic* and *Lauder v. Czech Republic* where related issues were interpreted differently by two different panels has been termed to be 'the ultimate fiasco in investment arbitration'.<sup>44</sup>

Similarly, the lack of a cogent Appeal Mechanism in investment arbitration has also been criticised as one of its limitations.<sup>45</sup> This criticism is pertinent because, the only form of redress and appeal in the arbitration mechanism is limited in scope.<sup>46</sup> Perhaps, this lack of appeal mechanism is because of the well-enunciated principle of finality of arbitral awards. This means that decisions of arbitral finals can only be reversed on limited circumstances.<sup>47</sup> The only second form of redress is the annulment procedure contained in ICSID rules.<sup>48</sup> This allows for the review of cases but only on matters of law and not on questions of fact. Such reviews aim to ascertain if an arbitral panel acted in an ultra vires manner or conformed to

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<sup>43</sup> Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331; Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not yet in force) [1986] 25 ILM 543.

<sup>44</sup> Buffard Isabelle, James Crawford, Gerhard Hafner and Alain Pellet International law between universalism and fragmentation: festschrift in honour of Gerhard Hafner. (BRILL, 2008), 116.

<sup>45</sup> UNCITRAL, 'Stand-alone review or appellate mechanism', (2020), Available at <https://uncitral.un.org/en/appellatemechanism>, Accessed on 23/11/2020

<sup>46</sup> See Gantz, D. A. (2006). An appellate mechanism for review of arbitral decisions in investor-state disputes: prospects and challenges. *Vand. J. Transnat'l L.*, 39, 39.

<sup>47</sup> Laird, I., & Askew, R. (2005). Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System. *J. App. Prac. & Process*, 7, 285, See also Lalive, P. (2008). Absolute finality of arbitral awards. *Revista internacional de arbitragem e conciliação*, 2008.

<sup>48</sup> D. D. Caron, "Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal" [1992] 7(1) ICSID Review 21-56, See also Christoph Schreuer, "From ICSID Annulment to Appeal Half Way Down the Slippery Slope" [2011] 10(2) The Law & Practice of International Courts and Tribunals 211-225

the rules. Inevitably, this inability to provide an appeal mechanism for the review of cases, even when decided incorrectly, has been criticised as one of the limitations of ISDS.

In addition, the one-way style of initiating cases where only investors can commence claims actions against states have been by Van Harten to be unfair.<sup>49</sup> Despite the fact that multinational corporate activities have resulted in abuses of human rights and degradation of the environment,<sup>50</sup> host states cannot commence arbitral actions against foreign investors on the thrust of these impacts. Thus, the investor-state arbitration system is essentially anchored on the whims and caprices of investors. As such, members of arbitral tribunals have been accused of making favourable rulings to investors,<sup>51</sup> so that the system can also be lucrative for them, since they draw their salaries and emoluments from parties to any case.<sup>52</sup>

Furthermore, the ISDS framework have been deemed to be unfavourable to some developing states on the basis of its support for the attraction of foreign direct investments and growth of economies of African states. For example, data from the World Investment Report 2020 of the UNCTAD,<sup>53</sup> showed that despite commanding a large chunk of international investment agreements, the African continent however attracted the least FDI inflow in comparison to other continents in 2019.

The poor performance of the continent in the global distribution of FDIs in 2019 can be generally attributed to five factors. First, there is lack of clarity on substantive provisions such as FET that is agreed by African states with other countries in first generation investment treaties. This opaque nature of the provisions has therefore, exposed African states to litany of investor claims. Second, most African states seems to lack the capacity to effectively discharge obligations like Full Security and Protection contained in their IIAs.

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<sup>49</sup> Gus Van Harten, "Investment treaty arbitration, procedural fairness, and the rule of law" [2010] *International Investment Law and Comparative Public Law*.

<sup>50</sup> John Gerard Ruggie, "Just business: multinational corporations and human rights" [2013] 50(11) *Choice Reviews Online* 50-6287-50-6287, see also Leonard, H. J., 'Pollution and the struggle for the world product: Multinational corporations, environment, and international comparative advantage' (2006) Cambridge University Press.

<sup>51</sup> See Olivia Chung, "The lopsided international investment law regime and its effect on the future of investor-state arbitration" [2006] *Va. J. Int'l L.*, 47, 953.

<sup>52</sup> Susan Franck, *Conflating Politics and Development? Examining Investment Treaty Arbitration Outcomes*, *Virginia Journal of International Law*, Vol. 55, 2014 p. 60-61

<sup>53</sup> See UNCTAD, "World Investment Report 2020 | International Production Beyond the Pandemic" <<https://unctad.org/webflyer/world-investment-report-2020>> accessed November 23, 2020, at x

Third, the continent is not developed enough to attract certain kinds of investments, especially in areas of technology and manufacturing. Fourth, some African states seem to be constrained by institutional and democratic instability, thus are prone to make policies that may breach provisions contained in their investment agreements. Lastly, political and global diplomatic considerations impact on the decision of investors to institute claim actions, especially those category of investors that are influenced by their home states.<sup>54</sup>

Due to the above factors, some commentators argue that African states are therefore more susceptible to arbitral claims actions by investors than states in other continents.<sup>55</sup> Related to this view is the knowledge that, most of these arbitral claims actions against African states are instituted by investors from capital-exporting countries.<sup>56</sup> As such, there are no nationalistic, political and diplomatic considerations that may be taken into account by foreign investors to reduce the volume of arbitral claims against African states. This is in comparison to any alleged breaches of investment agreements by states from developed continents. In the absence of nationalistic reasons on the part of investors, investment arbitration claims are therefore instituted on the basis of economic reasons. On the basis of these reasons, the ISDS system is deemed to be skewed against developing host states like African states because it is not designed to facilitate an even distribution of FDI between capital-exporting and importing-countries.<sup>57</sup>

Consequent upon these reasons, International Investment Arbitration is thus accused of lacking legitimacy and underpins the calls for reforms. African states joined the new wave of reform measures of ISDS through innovative treat-making practices.<sup>58</sup> These reform measures of IIAs are a reflection of the criticisms against international investment arbitration

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<sup>54</sup> See generally, Anthony McGrew, 'Globalization and global politics' [2008] *The globalization of world politics: An introduction to international relations*, 4.

<sup>55</sup> See El-Kady, H., & De Gama, M., 'The Reform of the International Investment Regime: An African Perspective' [2019] 34(2) *ICSID Review-Foreign Investment Law Journal*, 482-495.

<sup>56</sup> See Transnational Institute. "ISDS in Numbers: Impacts of Investment Arbitration Against African states" <[https://www.tni.org/files/publication-downloads/isds\\_africa\\_web.pdf](https://www.tni.org/files/publication-downloads/isds_africa_web.pdf)> accessed November 23, 2020, at 7

<sup>57</sup> Jonathan Klett, 'National Interest vs. Foreign Investment-Protecting Parties Through ISDS' [2016] *Tul. J. Int'l & Comp. L.*, 25, 213.

<sup>58</sup> The innovative treaty-making practices of African states is exploring in detail in chapter [1.5], See Makane Mbengue, "Africa and the Reform of the International Investment Regime: An Introduction" [2017] 28(3) *The Journal of World Investment & Trade*, 371-378.

and the seeming dissatisfaction of African states with the mode and operational scope of the system. Thus, the African continent joined the renewed impetus within the global investment community to achieve a rebalance between host states and foreign investors in investor-state dispute settlement.

Arising from the renewed vigour of African states to recalibrate their investment architectures, the next subsection shall explore the various ways in which some African states and institutions have attempted to achieve this rebalancing objective through innovative treaty-making practices. This review will help to show the contentious provisions in IIAs and how some states and institutions have attempted to recalibrate their investment agreements to incorporate contemporary realities in investor-state arbitration in Africa.

### 1.5. Innovative treaty-making practices of African states

Having evidenced the investor-state caseload of African states, this subsection will examine the innovative treaty-making practices of African states. As I stated in subsection [1.4] above, the novel treaty-making practices of African states was because of the limitations of old-generation investment agreements. This old-generation investment agreements, as opined by some commentators,<sup>59</sup> underpins the high number of investment arbitration cases against African states. African countries have started to embrace the new generation of investment treaties of recent years and are slowly moving away from the European-style lean model BITs, as exemplified by the Morocco - Nigeria BIT (2016).<sup>60</sup> This bilateral investment treaty between Morocco and Nigeria is an example of innovative treaty-making that seeks to rebalance investment powers and rights between investors and host states. This objective is achieved through the clarification of the most contentious provisions in Bilateral Investment

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<sup>59</sup> See UNCTAD, 'Taking Stock of IIA Reform: Recent Developments' [2019] Available at <https://investmentpolicy.unctad.org/publications/1203/taking-stock-of-ii-reform-recent-developments>, (accessed on 23/11/2020) – This reviewed evidenced the impact of old-generation IIAs on the high number of cases

<sup>60</sup> Reciprocal Investment Promotion and Protection Agreement between The government of the Kingdom of Morocco and The Federal Republic of Nigeria (2016)



Agreements (BITs). For example, it abolished the most favoured nation (MFN) treatment by stating that treatments to foreign investors and that of citizens of host states must be equal.<sup>61</sup>

In addition, this BIT clarified the meaning of equal treatment and investors, as well as provides that dispute settlement shall be on a case by case basis.<sup>62</sup> Similarly, the treaty adopted the international customary law standard as the minimum standard of treatment that may be afforded to an investor from any of the contracting states.<sup>63</sup> In a departure from most old-generation BITs, the Morocco-Nigeria BIT clarifies that full security; and fair and equitable treatment (FET) does not create and grant substantive rights to investors. Thus, it provides that an application for claims cannot be beyond as may be reasonably expected from a host state under customary international law standards.<sup>64</sup>

Similarly, the BIT provides that expropriation is permitted especially for public purposes and followed by compensation of the fair market value.<sup>65</sup> In effect, this suggests that the two states are allowed by the treaty undertake measures that may protect the interest of their countries. In addition, this provisions also guarantees the ability of Morocco and Nigeria to make legitimate internal decisions without the fear of breaching the provisions of the treaty. When viewed from the lenses of old-generation international investment agreements, then these provisions in the Morocco-Nigeria BIT is thus an attempt to remedy the legitimacy crises of investor-state arbitration. For example, if the case of Philip Morris vs Uruguay had been decided under this treaty,<sup>66</sup> then Uruguay may not have been in breach of its treaty obligations. This is because, policy measure they undertook was for the protection of the health of their citizens.

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<sup>61</sup> Ibid. 60 above, Article 6(2)

<sup>62</sup> Ibid. 60 above, Article 6(4)

<sup>63</sup> Reciprocal Investment Promotion and Protection Agreement between The government of the Kingdom of Morocco and The Federal Republic of Nigeria (2016), Article 7(1), (2)(b), (4), 23(1)

<sup>64</sup> Ibid. 63 above, Article 7(2)

<sup>65</sup> Ibid. 63 above, Article 8

<sup>66</sup> Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7

Furthermore, and unlike provisions of old-generation BITs, there is no blanket provision for prompt and adequate compensation in the Morocco-Nigeria BIT; as all claims are to be decided on a case by case basis.<sup>67</sup> Perhaps, the most innovative provision of this treaty is the requirement on investors, in the course of their operations to preserve and protect the environment.<sup>68</sup> Towards achieving this obligation, this clause grants discretion to the states to regulate the activities of investors towards the protection of their environment.<sup>69</sup> Similar to other novel provisions of this BIT, the obligation on investors to limit the negative impacts of their activities is a departure from the idea that international obligations cannot be imposed on multinational corporations.<sup>70</sup>

Apart from Morocco and Nigeria, other states within the continent have engaged in innovative treaty-making measures. For example, South African re-enacted its investment law and replaced it with the Protection of Investment Act.<sup>71</sup> Likewise, Tanzania also terminated some of its BITs and also reformed its investment laws with new legislations.<sup>72</sup> Overall, other African states have engaged in similar reform measures and terminated existing BITs which contained provisions that exposed them to high number of ISDS claims.<sup>73</sup>

The underlying information from these innovative treaty-making practice of African states is that the continent is not left behind from similar initiatives within international investment law. In addition, the introduction of novel clauses is an indirect repulsion of old-generation investment agreements by African states. Furthermore, it serves as a signpost that African states are not satisfied with the operation of investor-state arbitration, hence, the reformation

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<sup>67</sup> Ibid. 63 above, Article 8(4)

<sup>68</sup> Ibid. 63 above, Article 13

<sup>69</sup> Reciprocal Investment Promotion and Protection Agreement between The government of the Kingdom of Morocco and The Federal Republic of Nigeria (2016), Article 13(2)

<sup>70</sup> For general conversation on this subject, see Florian Wettstein, 'Multinational corporations and global justice: human rights obligations of a quasi-governmental institution' (2009), Stanford University Press.

<sup>71</sup> Protection of Investment Act 22 of 2015

<sup>72</sup> The Netherlands - United Republic of Tanzania BIT (2001) and Switzerland - United Republic of Tanzania BIT (1965) were terminated by Tanzania

<sup>73</sup> The Morocco - Nigeria BIT (2016), Protection of Investment Act 22 of 2015 and the COMESA Common Investment Area are some of the Model Investment Agreements

of their investment instruments to protect themselves from the legitimacy crises of investor-state arbitration.

Beyond innovative treaty-making practices, African states have also engaged in regional integration to spur the growth of their economies and drive sustainable development. In addition, the regional integration measures of African states are also aimed at harmonising the trade and investments landscape of their members. Thus, regionalism in Africa is also a mechanism that was leveraged upon to drive their investment agendas with the rest of the world. Therefore, the next subsection will examine some of these regional integration measures by African states.

## 1.6. Regionalism in Africa

Having discussed the innovative treaty-making of African states and the reason behind such measures in subsection [1.5.] above, this subsection aims to examine the regional integration efforts by African states. This is intended to show why the states of the continent decided to cooperate on regional basis and how the efforts transformed into broader African economic integration instruments.

At the continental level, African states have extended the scope of the Tripartite Free Trade Area through the creation of a Continental Free Trade Area (CFTA) by fifty-four of the fifty-five member states of the African Union (AU) in 2018.<sup>74</sup> There is a further disposition to transforming the CFTA and create an African Economic Community by 2034.<sup>75</sup> Furthermore, the Pan-African Investment Code (PAIC) which was adopted by Member States of the African Union in 2016 as a non-binding model investment framework seeks to ensure that the advancement of investments and sustainable development within the region are mutually

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<sup>74</sup> Trudi Hartzenberg, 'The AFCFTA – A Free Trade Area and a Flagship Project of the African Union' [2019] EIF's Trade for Development News, Available at <https://trade4devnews.enhancedif.org/en/news/afcfta-free-trade-area-and-flagship-project-african-union> (accessed on 23/11/2020), See also, World Bank, 'The African Continental Free Trade Area' [2020], available at <https://www.worldbank.org/en/topic/trade/publication/the-african-continental-free-trade-area> (accessed on 23/11/2020)

<sup>75</sup> Ilmari Soinen, 'The Continental Free Trade Area: What's going on?' [2014] 3(9) Bridges Africa 4-7

inclusive.<sup>76</sup> All these agreements and alliances are all geared towards enhancing greater economic integration and harmonisation and to drive more investments within the African continent.

In the context of investment law devolvement and economic integration, African States have evidenced the willingness to join the comity of nations in charting a new course for investment policy protection. Thus, there are several progressive policy developments which seeks to reform the African investment landscape. In addition, these policies aim to rebalance the levers of power between the protection of foreign investments and the ability of host states to effectively regulate their territories.

These policy reform proposals are reflected in the various Regional Economic Community (REC) initiatives for economic integration and harmonisation; such as the Southern African Development Community (SADC) protocol on Finance and Investment,<sup>77</sup> East African Community (EAC) Model Investment Code,<sup>78</sup> Common Market for Eastern and Southern Africa (COMESA)<sup>79</sup> with its Common Investment Area (CCIA), the Economic Community of West African States (ECOWAS) Trade Liberalisation Scheme<sup>80</sup> and the Supplementary Act on the Common Investment Rules;<sup>81</sup> which establishes a Free Trade Area (FTA) and common customs union within the West African region.<sup>82</sup> In addition, the Arab Maghreb Union (UMA), Sahel-Saharan States (CEN-SAD) and Intergovernmental Authority on Development (IGAD) are also advancing towards greater economic harmonisation and corporation. Already, member states of the COMESA, SADC and EAC are at advanced stages

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<sup>76</sup> Pan-African Investment Code, 'Draft preamble' 26 March 2016 <http://repository.uneca.org/bitstream/handle/10855/23009/b11560526.pdf?sequence=1> (accessed 5 July 2017) para 8

<sup>77</sup> Southern African Development Community (SADC), 'protocol on Finance and Investment' (2006) [http://www.sadc.int/files/4213/5332/6872/Protocol\\_on\\_Finance\\_\\_Investment2006.pdf](http://www.sadc.int/files/4213/5332/6872/Protocol_on_Finance__Investment2006.pdf) (accessed on July 5 2017) 1-112

<sup>78</sup> See generally; East African Community Legislative, 'Report of the committee on Communication, Trade and Investment in the workshop on Investment policies and strategies in EAC the region' (2015) <http://www.eala.org/new/index.php/key-documents/reports/548-workshop-on-investment-policies-and-strategies-in-the-eac-region/file> (accessed on July 5 2017) 1-20

<sup>79</sup> COMESA, 'Investment Agreement For the COMESA Common Investment Area' (2007) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3092> (accessed on July 5 2017) 1-37

<sup>80</sup> Economic Community of West African States, 'Mid-year Meeting of National Approvals Committees on the ECOWAS Trade Liberalisation Scheme (2011), Accessed on July 5 2017, 1-11

<sup>81</sup> ECOWAS Supplementary Act on the Common Investment Rules (A/SA.3/12/08) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3266> (Accessed on 5 July 2017) 1-25

<sup>82</sup> Trudi Hartzenberg, 'Regional Integration in Africa' (2011) World Trade Organization Economic Research and Statistics Division Staff Working Paper ERS-D-2011-14, 1-17, UNCTAD, 'African Continental Free Trade Area: Policy and Negotiation Options for Trade in Goods' (2016), Imprint: New York/Geneva, UN

towards creating a Tripartite Free Trade Area (TFTA) which will cover and control about fifty-eight per cent of Africa's total Gross Domestic Product (GDP).<sup>83</sup>

On the regulatory front, these RECs framework have been used to regulate and drive investments across the African landscape. Evidencing the progressive reform intention of most African states, treaties of some of the RECs contains novel policy of investment courts mechanisms for resolving investor-state disputes. Leading the departure from traditional BIT provisions is the COMESA CCIA agreement which explained the scope of Fair and Equitable Treatment (FET).<sup>84</sup> The FET provisions is usually one of the major issues of contention in international investment arbitration. In addition, the COMESA CCIA also balanced the locus standi between host states and investors to sue for a claim,<sup>85</sup> as well as granted and clarified Most-Favoured Person (MFN) treatment to COMESA investors.<sup>86</sup> More importantly perhaps, the COMESA CCIA also provided for a court system as an alternative to international investment arbitration in the resolution of disputes.<sup>87</sup>

Similarly, the SADC Protocol on Finance and Investment (Model BIT), changed and clarified some investment agreement provisions such as FET and expropriation. For instance, the Protocol departed from old-generation BIT provisions by expunging MFN treatment and the right of investors to sue in arbitration at First Instance for any dispute,<sup>88</sup> included a demand for the exhaustion of local remedies by investors before approaching investment arbitration,<sup>89</sup> and incorporated a rebalancing attempt by providing exceptions in investor rights for national security purposes.<sup>90</sup> In addition, compensation for any breaches of the

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<sup>83</sup> Organisation of African Unity (Now African Union) Treaty establishing the African Economic Community (AEC) Abuja Treaty 1991 [http://www.wipo.int/wipolex/en/other\\_treaties/text.jsp?file\\_id=173333](http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=173333) (accessed on July 5 2017). Twenty-four Member states of the Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC) and Southern African Development Community (SADC) have signed this agreement as at 10 June, 2015, 'The Continental Free Trade area: Making it work for Africa' (Policy Brief No.44, December 2015), African Union, 'Decision on the Report of the High Level African Trade Committee (HATC) on Trade Issues'

<sup>84</sup> Common Market for Eastern and Southern Africa (COMESA)'s Common Investment Area, Article 14

<sup>85</sup> Ibid. 84 above, Article 22 on General exceptions

<sup>86</sup> Ibid. 84 above, Article 19

<sup>87</sup> Ibid. 84 above, Article 27(iii)

<sup>88</sup> SADC Protocol on Finance and Investment (Model BIT), Article 24(2)(b)

<sup>89</sup> Ibid. 88 above, Article 24 on Settlement of Disputes

<sup>90</sup> Ibid. 88 above, Article 7 on General Exceptions

Protocol was required to be 'fair and adequate' instead of the traditional 'prompt, adequate and effective' provisions in old-generation BITs. Consequently, the provisions of the SADC Protocol and COMESA CCIA are attempts towards rebalancing the right of investors and the power of States to regulate their territorial space.

In the same vein, the ECOWAS treaty instruments provides for the use of the ECOWAS Court of Justice, national courts and tribunals as forums for dispute resolution.<sup>91</sup> In addition, whilst guaranteeing the transfer of assets and investments, the ECOWAS treaty instruments imposes obligations on investors to protect human and people's right.<sup>92</sup> Correspondingly, the non-legally binding East African Community Model Investment Code provides *inter alia*; for the notification of the state through the submission and receipt of an investment dispute certificate from the appropriate national department, before investors could proceed to international investment arbitration.<sup>93</sup>

Oncemore, the engagement of regional integration by African states were attempts to collaborate on economic and investment fronts towards endangering more sustainable development. More fundamentally, these Regional Economic Communities of the African Continent also decided to engage in innovative treaty-making practices in recent years to protect themselves from the legitimacy crises of ISDS. Hence, the introduction of the novel clauses in their investment architectures fostered several reform measures.

Apart from the issues with investor-state arbitration examined in subsections [1.2. – 1.4.) above, another major plank of the alleged deficiency of investor-state arbitration is that it is a private mechanism that is used to settle public matters. Thus, Schill opined that the use of this party-appointed system to settle issues that touches on public policy is wrong and does not incorporate legitimacy, sovereignty and transparency.<sup>94</sup> Therefore, the next subsection

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<sup>91</sup> Economic Community of West African States; Revised Treaty, Articles 15 and 16

<sup>92</sup> Ibid. 91 above, Article 4(g)

<sup>93</sup> Both Uganda and Kenya have provisions for the issuance of certificates for the purposes of the Agreement

<sup>94</sup> Stephan Schill, "Reforming Investor-State Dispute Settlement: A (Comparative and International) Constitutional Law Framework" [2017] 20(3), *Journal of International Economic Law*, 649-672.

shall examine this suggestion that investment arbitration is a wrong framework in settling investor-state disputes.

### 1.7. The publicness of investor-state dispute settlement

Having explored the regional integration efforts of African states in subsection [1.6] above, this part will focus on examine another major issue that have dominated the discussions with investor-state arbitration. This subject is anchored on the fact that investor-state arbitration is a private mechanism which is however, used to settle investor-state disputes that are public matters. This review aims to show the issues generated by this subject and the reason why it does not provide legitimacy in investor-state arbitration.

Investor-state arbitration is a system which functions on a very high level of confidentiality.<sup>95</sup> Perhaps, this confidentiality nature is underpinned by the orthodox confidential position expected from those in commercial and fiduciary relationships. But, for the purposes of investors-state disputes, such confidential argument cannot be justified because, it impacts on the resources of a state and its policy-making obligations.<sup>96</sup> Despite its commercial law origin, ISDS may not be treated as a private affair because, state parties to arbitral proceedings represent their citizens and offset any awards with public funds. Hence, it is a public issue which should incorporate a high level of transparency. As recognised by Sheldon, arbitral tribunals ‘wield enormous power, displacing local courts and making decisions about the rules that govern major portions of host country economies and, by extension, their societies’.<sup>97</sup> These wider implications of arbitral awards are one of the reasons behind the argument that public matters should not be decided through private mechanisms like international investment arbitration. Thus, some commentators such as Anthea Roberts have argued that

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<sup>95</sup> Jan Paulsson and Nigel Rawding, *The trouble with confidentiality* (1995) *Arbitr Int* 11:303, 303.

<sup>96</sup> See generally, European Parliament - Directorate-General for External Policies Police Department: *In Pursuit of an International Investment Court: Recently Negotiated investment chapters in EU Comprehensive FTA in comparative perspective* (2017) Available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/603844/EXPO\\_STU\(2017\)603844\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/603844/EXPO_STU(2017)603844_EN.pdf) (accessed on 23/11/2020)

<sup>97</sup> Sheldon Leader, *Human rights, risks, and new strategies for global investment* (2006) *J Int Econ Law* 9:657, 684.

investor-state disputes cannot be treated as a normal commercial dispute resolution because of this public connotation.<sup>98</sup>

But, the current reality is that investor-state disputes are mainly settled through international investment arbitration, thus a contributor to the legitimacy crises of ISDS. Due to this reason and the other sentiments enunciated in subsections [1.2. - 1.4], there is a renewed impetus towards reforming ISDS by several stakeholders in international investment law.<sup>99</sup> These reasons expressed in support of these reform measures are also the motivations behind my proposal for a change to the court system in the settlement of investment disputes by African states. As such, the next subsection of this thesis will examine my proposed Pan-African Investment Court.

## 1.8. My proposed Pan-African Investment Court

A permanent investment court is one of the two main pathways that have emerged from the global debate on the reform of ISDS.<sup>100</sup> On one hand is the suggestion of keeping the current international investment arbitration framework but reforming it to cure its legitimacy crises. On the other hand, is the proposition for a change of international investment arbitration to an investment court system. In subsections [1.1-1.7] of this thesis, the legitimacy crises and other motivations behind these reform suggestions was evidenced. A cursory review of the literature surrounding these two proposals shows that although a reformed international investment arbitration system may resolve some of these contentious areas, however, it is doubtful whether it will assuage the feelings of dissatisfaction by several states.<sup>101</sup> Within the

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<sup>98</sup> Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System* (2013) 107 *American Journal of International Law* 45, Anthea Roberts *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority* (2014) 55 *Harvard International Law Journal*

<sup>99</sup> Anthea Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration' [2018] 112(3) *American Journal of International Law* 410-432

<sup>100</sup> See UNCTAD IIA Issues Note, *Reforming Investment Dispute Settlement: A Stocktaking* (Mar. 2019), [https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d3\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d3_en.pdf), See also submissions of several countries at, *Investor-State Dispute Settlement Reform: On-line Resources: Submissions and statements*, Submissions and statements received after the resumed 38th session, available at [https://uncitral.un.org/en/library/online\\_resources/investor-state\\_dispute](https://uncitral.un.org/en/library/online_resources/investor-state_dispute) (accessed on 23/11/2020)

<sup>101</sup> See Umair Ghori, 'Investment Court System Or Regional Dispute Settlement: the Uncertain Future of Investor-state Dispute Settlement' (2018) *Bond L. Rev.*, 30, 83 - Discusses the power play in the attempts to find a suitable pathway to resolving investor-state disputes. States may ultimately settle for a particular pathway, however, this is not guaranteed.



context of African states, the suggestion that these reform measures will eliminate all the legitimacy issues also applies because, the problems of ISDS is anchored on the legitimacy crises of ISDS.

My proposed Pan-African Investment Court is inspired by similar developments within the European Union which is tilting towards an investment court system as an alternative to international investment arbitration.<sup>102</sup> Although my proposal is more comprehensive in comparison to the EU version, however, there is evidence that the EU envisages that the court system framework will become a permanent feature of its investment treaties. This evidence is seen in the fact that all existing investment instruments of the EU will be reformed to include an opt-in system similar to the Mauritius Convention.<sup>103</sup> This Convention which enshrines transparency in investor-state arbitration allows an opt-in clause in treaties in which states may confer jurisdiction on any forum of their choice.

As stated in subsections [1.1-1.6) of this chapter, my proposal for a Pan-African Investment Court is because of the legitimacy crises and other alleged deficiencies of international investment arbitration in Africa. Thus, the opt-in system will also feature in drafting a unified investment treaty for the continent as proposed by the EU. Therefore, the operational feasibility of my Pan-African Investment Court will incorporate the amalgamation and unification of the investment treaties of each state within the continent. This unification of Africa's investment agreements and creation of an investment court system in the continent possess a key benefit; it may rebalance the levers of power between African states and investors through the elimination of the legitimacy crises of ISDS. As recognised by Mann and von Moltke, the present arbitration model of resolving investor-state disputes is no

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<sup>102</sup> See European Commission, 'Commission presents procedural proposals for the Investment Court System in CETA' (2019), Available at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2070> (accessed on 23/11/2020)

<sup>103</sup> Lise Johnson, 'The Mauritius Convention on Transparency: Comments on the treaty and its role in increasing transparency of investor-State arbitration' (CCSI Policy Paper, September 2014), United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (the "Mauritius Convention on Transparency") – 'The Convention supplements existing investment treaties with respect to transparency-related obligations'

longer fit for purpose because it 'was not designed to address complex issues of public policy that now routinely come into play in investor-state disputes'.<sup>104</sup>

Consequent upon this presumed benefit a court system, it can be argued that the renewed impetus to reforms and my proposal is an initiative whose time has come. It is timely because some states in Africa have been confronted with costly arbitral claims by investors.<sup>105</sup> Hence, the investment court system have received support from commentators like Subedi and Butler who opined that, a continental dispute resolution mechanism is capable of rebalancing investor-state dispute settlement between investors and states.<sup>106</sup>

Further support for the reform of ISDS on the basis of was reinforced by the United Nations Independent Expert on the Promotion of a Democratic and Equitable International Order Alfred-Maurice de Zayas. In his report which is commonly known as the Zayas Report,<sup>107</sup> the UN Independent Expert argued that international investment arbitration is not compatible with the norms and practises of international law, invalid and also *contra bonos mores*.<sup>108</sup> In addition, Alfred-Maurice de Zayas argued that the investment arbitration form of ISDS attempts at creating a new legal order beyond the Charter of the United Nations.

Beyond the rebalancing of powers through the elimination of the legitimacy crises of ISDS, there are other positive derivatives of my proposal. Among these other benefits is that it will enable host states to effectively regulate their states and make internal democratic decisions

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<sup>104</sup> Howard Mann and Konrad von Moltke, A southern agenda on investment? Promoting development with balanced rights and obligations for investors, host states and home states. International Institute for Sustainable Development, (2005) Winnipeg, Manitoba. <[https://www.iisd.org/sites/default/files/publications/investment\\_southern\\_agenda.pdf](https://www.iisd.org/sites/default/files/publications/investment_southern_agenda.pdf)> accessed 16 June 2017.

<sup>105</sup> See Transnational Institute. "ISDS in Numbers: Impacts of Investment Arbitration Against African states" <[https://www.tni.org/files/publication-downloads/isds\\_africa\\_web.pdf](https://www.tni.org/files/publication-downloads/isds_africa_web.pdf)> accessed November 23, 2020

<sup>106</sup> Nobilette Subedi and Surya Butler, The Future of International Investment Regulation: Towards a World Investment Organisation? *Neth Int Law Rev* (2017) 64: 58

<sup>107</sup> De Zayas Report - [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/RES/30/29](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/RES/30/29) , for further reports - <http://www.ohchr.org/EN/Issues/IntOrder/Pages/Resolutions.aspx>

<sup>108</sup> *Ibid.* 107 above, summary 1.

without the fear of arbitral actions by investors.<sup>109</sup> The freedom of African states to effectively regulate their countries seems impossible because of the fear of arbitral claims by foreign investors.<sup>110</sup> This clipping impact of investment arbitration is also reflected during the negotiation stages of treaties because, developing states are under pressure to agree to unfavourable terms in their urge to attract foreign direct investments.

In addition, an investment court system may infuse more consistency and predictability in the resolution of investor-state disputes.<sup>111</sup> This will be achieved through the deployment of principles of conventional courts such as the doctrine of precedent and infusion of transparency within the dispute resolution process. Although these benefits of my proposal draws support from similar efforts of the European Union and UNCTAD, at the continental level however, it will require the harmonisation of the investment architecture of African states.

At present, this unification objective may be achieved because; African states have shown the willingness towards greater economic corporation through the formulation and signing of the Continental Free Trade Agreement (CFTA). Although the trade component of the African Continental Free Trade Area have been concluded, however, any potential unification of the African investment climate will also require the agreement of all states of the continent.

The review of my proposal have shown that it possess the potential to rebalance investor-state dispute settlement between host states and investors. This will be achieved through the replacement of investment arbitration mechanism with the investment court system. The success of my proposal will however depend on the ability of African states to agree on a new investment treaty. But, with the successful negotiation of the trade component of the African

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<sup>109</sup> See Uché Ofodile, 'African States, Investor-State Arbitration and the ICSID Dispute Resolution System: Continuities, Changes and Challenges' [2020] 34(2) ICSID Review - Foreign Investment Law Journal, 296-364 – on the challenges that confronts African states in investor-state arbitration

<sup>110</sup> See Mavluda Sattorova, 'The impact of investment treaty law on host states: enabling good governance?' (2018) Bloomsbury Publishing.

<sup>111</sup> International Bar Association, 'Consistency, efficiency and transparency in investment treaty arbitration' (2018), Committee Report on Investor-State Dispute Resolution reform

Continent Free Trade Area; it can be argued that reform of the African investment landscape will be achievable.

In view of this relationship between trade harmonisation and investment unification, the next subsection shall review the African Continental Free Trade Area (AfCFTA). This review is important as it examines the level of implementation of this agreement and whether states of the continent are coming together. In essence, this next subsection will help to show whether African states are tilting towards greater economic unification, harmonisation and co-operation.

### 1.9. The African Continental Free Trade Area (AfCFTA) Agreement

The feasibility of my proposed Pan-African Investment Court is contingent upon the ability of African states to agree in unifying their investment treaties. But, the agreement on the trade component of the African Continental Free Trade Area (AfCFTA) agreement seems to offer hope that the continent may also agree on the investment regulatory component. As such, this subsection will examine the AfCFTA to determine its benefits and how the states were able to agree on its terms.

As the name implies, the Continental Free Trade Agreement (CFTA) is aimed at boosting trade and investment within the African continent through the elimination of barriers to trade.<sup>112</sup> African countries are still confronted with obstacles to smooth intra-African trade and these are evidenced in areas of tariffs and visas requirements for movement of goods and persons within the continent. In comparison with other continent of the world, the relatively low intra-African trade according to Mevel and Karingi is due to these barriers to trades.<sup>113</sup>

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<sup>112</sup> UNCTAD, 'The Continental Free Trade Area: making it work for Africa - UNCTAD Policy Brief No. 44' (UNCTAD/PRESS/PB/2015/18)

<sup>113</sup> Simon Mevel and Stephen Karingi, 'Deepening Regional Integration in Africa: A Computable General Equilibrium Assessment of the Establishment of a Continental Free Trade Area followed by a Continental Customs Union' Paper for presentation at the 15th Global Trade Analysis Project Conference, Geneva, 27–29

Consequently, this has resulted in increased poverty, low FDI attraction and non-achievement of the full economic benefits of the continent. Hence, the move towards a CFTA became necessary and was vigorously pursued by the African Union.

The signing of the CFTA has long been the central focus of the AU. During the 6th Ordinary Session of the African Union Ministers of Trade on Declaration on WTO Issues 2010, the ministers decided to hasten the regional integration processes through a recommendation for a Continental Free Trade Area (CFTA) by 2017.<sup>114</sup> Consequently, this proposal for a CFTA was adopted at the 18th Ordinary Session of the Assembly of Heads of State and Government of the African Union, in Addis Ababa, Ethiopia in January 2012. This summit identified and also adopted several priority areas of trade policy, trade finance, trade related infrastructure, trade facilitation, productive capacity, trade information and factor market integration.

Thereafter, negotiations and consultations for the establishment of the CFTA was started at the 26th Ordinary Session of the AU Assembly Heads of State and Government in Johannesburg, South Africa in June 2015. Thus, at the 18th Extraordinary Session of the Assembly of AU Heads of State and Governments in Kigali, Rwanda in March 2018, the Continental Free Trade Agreement created by fifty-four countries of the fifty-five members of the African Union.<sup>115</sup> The establishment of the CFTA agreement also culminated in the approval of the Kigali Declaration and the Protocol on Free Movement of Persons, Right to Residence and Right to Establishment. As at October 2019, fifty-four of the fifty-five states in the continent have signed the agreement, thirty member states have ratified it, whilst

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<sup>114</sup> UNECA, 'African Continental Free Trade Area' (2018) Available at [https://au.int/sites/default/files/documents/33984-doc-qa\\_cfta\\_en\\_rev15march.pdf](https://au.int/sites/default/files/documents/33984-doc-qa_cfta_en_rev15march.pdf), 1-9 (Accessed on 27/06/2018) . See Declaration of the AU Conference of Ministers of Trade 6th Ordinary Session Kigali Declaration on WTO Issues, 6th Ordinary Session; 29 October - 02 November, 2010, Kigali Rwanda, Kigali Declaration on WTO Issues AU/EXP/TD/Decln/1(VI)

<sup>115</sup> AfDB, 'Towards a Continental Free Trade Area: time to revisit the legal and institutional challenges to regional Integration in Africa?'(2017) Available on [https://www.afdb.org/uploads/tx\\_llafdbpapers/Towards\\_a\\_continental\\_free\\_trade\\_area\\_in\\_Africa.pdf](https://www.afdb.org/uploads/tx_llafdbpapers/Towards_a_continental_free_trade_area_in_Africa.pdf) 1-17 (Accessed on 27/06/2018)

twenty-eight members have ratified and deposited their instrument of ratification.<sup>116</sup> The CFTA agreement entered into force on 29<sup>th</sup> April 2019 when twenty-two countries of the continent ratified and deposited their instrument on ratification. The entry into force of the agreement was consequent upon the attainment of the 22-country threshold of ratification and deposition of instrument of ratification as required by Article 23 of the establishing the CFTA.

With the attainment of the minimum ratification and deposition of instrument of ratification requirement, the operational phase of the AfCFTA agreement was therefore launched on the 7<sup>th</sup> of July 2019 in Niamey, Niger Republic.<sup>117</sup> The launch of the operational phase witnessed the adoption of five key instruments of the agreement; The rules of origin, The tariff concessions, The online mechanism on monitoring, The Pan-African payment and settlement system and The African Trade Observatory. These adoptions are crucial steps towards the commencement of trading under the AfCFTA by 1<sup>st</sup> January 2021. The majority signing of this agreement leaves Eritrea as the only country that have not signed it, thus evidencing concerns about its workability and implementation.

In harmonising the African trading landscape through the unification of the trading frameworks of all fifty-four African countries, the CFTA agreement according to the Economic Commission for Africa (UNECA); is capable of boasting intra-African trade by fifty-two point three per cent through the elimination of double tariffs and other barriers to trade within the African continent.<sup>118</sup> Similarly, the agreement when operational would have unified a Gross Domestic Product (GDP) are of more than US\$3.4 trillion and operated by

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<sup>116</sup> The African Continental Free Trade Area Agreement, 'Status of AfCFTA Ratification' [2020] Available at <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html#:~:text=The%20Agreement%20Establishing%20the%20African,deposited%20their%20instruments%20of%20ratification.&text=Ratification%20has%20been%20approved%20by,instruments%20of%20ratification%20is%20pending>, (accessed on 23/11/2020)

<sup>117</sup> See African Union, 'Operational Phase Of The African Continental Free Trade Area Launched' [2019] Available at <https://au.int/en/articles/operational-phase-african-continental-free-trade-area-launched> (accessed on 23/11/2020)

<sup>118</sup> UNECA, 'AfCFTA: an opportunity to boost Africa's economic transformation' (2018) Available at <https://www.uneca.org/stories/afcfta-opportunity-boost-africa%E2%80%99s-economic-transformation> (accessed on 27/08/2018)

1.2 billion people. This will make the AfCFTA the largest trading bloc in the world by number of participating countries, since the advent of the World Trade Organisation (WTO). According to the World Bank, the full implementation of the AfCFTA agreement will reshape the economy of the continent in areas of manufacturing, natural resources and services. In addition, the Bank affirmed that the AfCFTA agreement presents a veritable opportunity for the continent to diversify its economy, attract more foreign direct investments and accelerate economic growth.<sup>119</sup>

This opinion of the World Bank is sequel to its findings on the potential benefits of the AfCFTA agreement. In its report entitled 'The African Continental Free Trade Area: Economic and Distributional Effects',<sup>120</sup> the World Bank evidenced potential positive derivatives of the Agreement in several facets of Africa's economic landscape. For instance, the World Bank presented data which showed that the AfCFTA agreement is capable of reducing poverty and broadening economic inclusion when fully implemented.<sup>121</sup> This will be achieved through a projected increase in exports by \$560 billion, a seven per cent rise in income by \$450 billion by 2035, the lifting of 30 million citizens of the continent out of extreme poverty and a rise in income of 68 million other citizens who lives on less than \$5.50 a day.<sup>122</sup>

In addition, the CFTA will help to boost the income of men and women by ten point five per cent and nine point nine per cent respectively. Similarly, it will also enable the increase in income of skilled and unskilled workers by nine point eight per cent and ten point three per cent within the continent.

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<sup>119</sup> See The World Bank, 'The African Continental Free Trade Area' (2020), Available at <https://www.worldbank.org/en/topic/trade/publication/the-african-continental-free-trade-area> (accessed on 23/11/2020) – the statistics on this paragraph were sourced from the World Bank.

<sup>120</sup> World Bank. 2020. The African Continental Free Trade Area: Economic and Distributional Effects. Washington, DC: World Bank. World Bank. <https://openknowledge.worldbank.org/handle/10986/34139> License: CC BY 3.0 IGO.

<sup>121</sup> Ibid. 120 above

<sup>122</sup> Ibid. 120 above

Due to these increases in income of citizens and exports, it is estimated by the World Bank that the continental agreement will help in reducing extreme poverty across all regions of Africa.<sup>123</sup> For instance, the number of people living in extreme poverty in West Africa is projected to reduce by 12 million, Central Africa 9.3 million, Eastern African 4.8 million and Southern Africa 3.9 million.<sup>124</sup> Concurrently, specific countries with the highest poverty rates in the continent such as Guinea-Bissau will witness a reduction from thirty-seven point nine per cent to twenty-seven point seven per cent, Mali's poverty rate will reduce from fourteen point four per cent to six point eight per cent whilst that of Togo will decline from twenty-four point one per cent to sixteen point nine per cent. Apart from reduction in extreme poverty and economic inclusion within the continent, the AfCFTA agreement will also help to facilitate trade. As data from the World Bank shows, of the estimated \$450 billion rise in income, \$292 billion will be derived from stronger and better facilitation in trade.

Sequel to these projected benefits of the CFTA agreement, it can therefore be argued that when fully implemented, the agreement has the potential to set Africa on the higher ladder of the global economic scale. This view draws support from the UNECA's African Trade Policy Centre (ATPC) and the African Union Commission (AUC) who averred that 'AfCFTA is an opportunity for development in Africa. But it must be wielded by private enterprise. through doing so, businesses can benefit from the great opportunities that the continent has and contribute to its sustainable growth and development'.<sup>125</sup> In addition, the World Bank Global Director of Trade, Investment and Competitiveness, Caroline Freund, agreed that 'creating a single, continent-wide market for goods and services, business and investment would reshape African economies. The implementation of the AfCFTA would be a huge step forward for

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<sup>123</sup> World Bank. 2020. The African Continental Free Trade Area: Economic and Distributional Effects. Washington, DC: World Bank. World Bank. <https://openknowledge.worldbank.org/handle/10986/34139> License: CC BY 3.0 IGO.

<sup>124</sup> Ibid. 123 above

<sup>125</sup> UNCTAD, 'African Continental Free Trade Area: Policy and Negotiation Options for Trade in Goods' (2016) Available at [http://unctad.org/en/PublicationsLibrary/webdite2016d7\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdite2016d7_en.pdf) (Accessed on 27/06/2018)



Africa, demonstrating to the world that it is emerging as a leader on the global trade agenda'.<sup>126</sup>

Further support was adduced on the potential benefits and challenges of the CFTA by the World Bank's Chief Economist for Africa, Albert Zeufack. The Bank's Chief Economist averred that 'The African Continental Free Trade Area has the potential to increase employment opportunities and incomes, helping to expand opportunities for all Africans. The AfCFTA is expected to lift around sixty-eight million people out of moderate poverty and make African countries more competitive. But successful implementation will be key, including careful monitoring of impacts on all workers—women and men, skilled and unskilled—across all countries and sectors, ensuring the agreement's full benefit'.<sup>127</sup>

Perhaps, these projected benefits were the motivations behind the articulation of the objectives of the AfCFTA. Hence its objective is to 'create a single continental market for goods and services, with free movement of business persons and investments, and thus pave the way for accelerating the establishment of the Continental Customs Union and the African customs union, expand intra African trade through better harmonization and coordination of trade liberalization and facilitation regimes and instruments across RECs and across Africa in general, resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes, enhance competitiveness at the industry and enterprise level through exploiting opportunities for scale production, continental market access and better reallocation of resources'.<sup>128</sup> Thus, whilst the current agreement is projected to eliminate tariffs in about ninety per cent of products, as well as the reduction of non-tariff

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<sup>126</sup> Ibid. 123 above

<sup>127</sup> The World Bank, 'Trade Pact Could Boost Africa's Income by \$450 Billion, Study Finds' (2020), Available at <https://www.worldbank.org/en/news/press-release/2020/07/27/african-continental-free-trade-area> (accessed on 23/11/2020)

<sup>128</sup> Ibid. 123 above, at 71

barriers on trade, the states of the continent have also agreed to the liberalisation of the investment sector of the African economic landscape through a unified investment agreement.

Sequel to the projected benefits of the CFTA above, it seems to possess the capacity to reduce poverty and instil economic growth if implemented effectively. However, there are two potential challenges. First, with different levels of economic development, the harmonisation of these economies may create problems of balancing the different needs of states within the continent. As such, the implementation of a single African trade economic powerhouse is an ambition which must be attended with sound strategic management.

Second, the bigger economies in Africa are concerned about the influx of products and citizens from least developed countries in search of greener pastures and better conditions of living. Such influx as argued by countries like Nigeria could present challenges in areas of health care, crime and disease control as well as growth of domestic manufacturing capabilities. Since the freedom of goods and services is central to any trade unification of these economies, immigration may therefore be an albatross to the realisation of a single continental trade economy.<sup>129</sup>

Overall, the agreement of majority of African states to the AfCFTA serves as evidence that countries of the continent are ready to harmonise their trade instruments and cooperate on a unified economic landscape. Although only the trade component of the CFTA have just been agreed, however, the fact that 54 states within the continent were able to agree is a signal that the political and economic impediments that normally precedes multilateral negotiations of this nature can be circumvented by them. Thus, it is submitted that the formula which was deployed to achieve the majority consensus on the AfCFTA can be applied towards the establishment of my proposed Pan-African Investment Court.

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<sup>129</sup> UNCTAD, 'Building the African Continental Free Trade Area: Some suggestions on the way Forward' (2015) Available at [http://unctad.org/en/PublicationsLibrary/dite2015misc1\\_en.pdf](http://unctad.org/en/PublicationsLibrary/dite2015misc1_en.pdf) (Accessed on 27/06/2018)

The exploration of the AfCFTA have also shown the potential benefits and challenges that confronts the establishment of multilateral agreements such as my proposed Pan-African Investment Court. However, and as evidenced by the majority signing of CFTA agreement, such impediments can be surmounted. Notwithstanding the projected benefits of the CFTA however, there remains scepticisms on its feasibility in view of the refusal of Eritrea to assent to it.

Therefore, the next subsection will examine the rationale behind Eritrea's refusal to sign the trade agreement and its implications for Africa's trade and investment integration agenda. The determination of the implications of Eritrea's refusal will aid the understanding of the potential challenges that may confront my proposal for a Pan-African Investment Court.

#### 1.10. Implications of Eritrea's refusal to assent to the AfCFTA agreement

The almost unanimous agreement of African states to the African Continental Free Trade Area (AfCFTA) agreement can be deemed to be a strong signal of African states to cooperate on trade and investment. However, and as stated in subsection [1.9] above, Eritrea is the only country that have refused to sign the trade agreement. Although the refusal of the country can be regarded as insignificant, but, the wider objectives of the African Union in establishing the AfCFTA connotes that all States within the continent should agree to the treaty for its effective implementation. In the light of the refusal of Eritrea to assent to the agreement therefore, it is important to examine the reasons behind their refusal and its implications towards greater trade and economic harmonisation in the continent. In addition, the economic and sustainable development motivations behind the agreement of the trade component of the AfCFTA also drives my proposal for Pan-African Investment Court. As such, the examination of the processes leading to the agreement of the trade component of the CFTA agreement and reasons behind the refusal of Eritrea, will help to show the potential

challenges that lies ahead of my proposition for closer investment cooperation through a Pan-African Investment Court.

Eritrea is a country located within the Horn of African in East Africa, bordered by Ethiopia, Sudan and Djibouti. As at the year 2020, the population of Eritrea is put at 3,546,421. The African Development Bank (AfDB) in its African Economic Outlook (AEO) 2020,<sup>130</sup> reported that the economic climate of the country is positive, with real Gross Domestic Product (GDP) expected to rise to three point nine per cent in 2020 and four per cent in 2021. Similarly, Per capita income is projected to increase from one point eight per cent in 2019 to two point six per cent in 2021. Furthermore, the AfDB report showed that Eritrea's total debt stock is two hundred and forty-eight point nine per cent of its GDP, thus putting the country at risk of debt distress. Its economic activities are concentrated in the areas of mining, agriculture and tourism, whilst main exports are gold and zinc.

As aforementioned in subsection [1.9.] above, Eritrea is the only country within the continent that have not assented to the African Continental Free Trade Area agreement (AfCFTA). With the broader objective of the AfCFTA being the creation of a liberalised economic landscape in Africa, it is imperative that all fifty-five nations of the continent agree to it. As such, the refusal of Eritrea to assent to the trade agreement may present a challenge towards the effective implementation of the trade agreement.

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<sup>130</sup> African Development Bank, 'African Economic Outlook 2020: Developing Africa's workforce for the future' (2020), Available at <https://www.afdb.org/en/knowledge/publications/african-economic-outlook> (accessed on 23/11/2020)

The reason behind the refusal of Eritrea to sign the AfCFTA agreement was adduced by its information Minister, Yemane Meskel. As stated by the Minister, 'In terms of the academic discourse on ACFTA, Eritrea's long-held stance is crystal-clear. First articulated at the 1994 OAU Summit, GOE's pragmatic position transcends abstract platitudes to focus on incremental / achievable results; i.e. nurturing first the building blocs or RECs'.<sup>131</sup> In essence, the refusal of the country is encapsulated by its long-held ideology of regionalism and a 'think small approach' of economic integration. In other words, it can be argued that Eritrea do not believe in the feasibility of the AfCFTA agreement until the Regional Economic Communities (RECs) are strong enough to serve as its foundation.

Despite the argument of Eritrea against the AfCFTA, the majority signing of the treaty and comments from key states suggests that the continent is ready to pursue closer trade and economic cooperation. For instance, South Africa through its Department of Trade and Industry had confirmed that it is 'committed to a co-ordinated strategy to boost intra-Africa trade and to build an integrated market in Africa that will see a market of over a billion people with a GDP of approximately \$2.6 trillion (£1.85tn)'.<sup>132</sup> In the same vain, the President of the Ghana National Chamber of Commerce (GNCC), Nana Appiagyeyi Dankawoso whilst lending support to the trade agreement had opined that 'The free trade area is to help open up new areas to competition and promote innovation. Again, it will create better jobs, new markets and increase investments with greater diversification and risk sharing. Once in place, it will support rule of law and construct shared trade, investment approaches and foster economic integration of the continent'.<sup>133</sup> Similarly, Kenya through its Ministry of Industry,

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<sup>131</sup> See Yemane G. Meskel, 'The reason behind Eritrea's refuse to sign the AfCFTA' (2020), Available at <https://twitter.com/hawelti/status/1288125152555753474?lang=en-gb>, (accessed on 23/11/2020)

<sup>132</sup> Matthew Davies, 'The story behind Africa's free trade dream' (2018) Available at <https://www.bbc.co.uk/news/world-africa-43458294> (Accessed on 27/06/2018)

<sup>133</sup> See Ghanaweb, 'Private sector to help implement continental free trade area' (2020), Available at <https://www.ghanaweb.com/GhanaHomePage/business/Private-sector-to-help-implement-continental-free-trade-area-636630> (accessed on 23/11/2020)

Trade and Cooperatives agreed that the CFTA will liberalise trade and ‘enhance competitiveness at the industry and enterprise level, enhance value addition of products and exploit economies of scale and optimum utilization of resource’ in Africa.<sup>134</sup>

Apart from the refusal of Eritrea to sign the agreement, it is worth noting that big economies in the continent like Nigeria and South Africa also refused to sign the trade agreement at the initial stages of its formulation.<sup>135</sup> The initial refusal of these two countries to approve the trade agreement until recently, borders on concerns about its impact on their local economies, job creation and growth of their manufacturing industries.<sup>136</sup> These concerns, it can be argued, are not totally different from the motivations behind the continued refusal of Eritrea to agree to the CFTA.

The Nigerian government had blamed its initial refusal on the objection of certain aspects of the CFTA agreement by a section of its citizens and business leaders. Its government commented that ‘certain key stakeholders in Nigeria indicated that they had not been consulted, for which reasons they had some concerns on the provisions of the treaty’.<sup>137</sup> These stakeholders are invariably the Nigerian business community and trade unions, especially within its manufacturing sector, who expressed concerns about the stifling of local production as a result of the free movement of goods and services under the auspices of the CFTA. Similarly, the South African government hinged its decision not to sign the AfCFTA on

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<sup>134</sup> See COMESA Regional Investment Agency, 'African Trade Ministers Push for Single Continental Market for Goods and Services Following High Profile Meeting in Rwanda' (2018), Available at <http://www.comesaria.org/news/african-trade-ministers-push-for-single-continental-market-for-goods-and-services-following-high-profile-meeting-in-rwanda.53911.64.html> (accessed on 23/11/2020)

<sup>135</sup> See Neil Munshi, 'Nigeria battles conflicting instincts on Africa free trade zone' (2019), Financial times, Available at <https://www.ft.com/content/f4c32bee-e395-11e9-9743-db5a370481bc> (accessed on 23/11/2020), See also The Economist, 'Why Africa's two biggest economies did not sign its landmark trade deal' (2018), Available at <https://www.economist.com/the-economist-explains/2018/03/29/why-africas-two-biggest-economies-did-not-sign-its-landmark-trade-deal> (accessed on 23/11/2020)

<sup>136</sup> Bassey Udo, 'Understanding the African Continental Free Trade Area Agreement' (2018) Available at <https://www.premiumtimesng.com/business/business-interviews/263441-understanding-the-african-continental-free-trade-area-agreement.html> (Accessed on 27/06/2018)

<sup>137</sup> See Matthew Davies, 'The story behind Africa's free trade dream' (2018) British Broadcasting Corporation, Available at [https://www.bbc.co.uk/news/world-africa-43458294?ocid=socialflow\\_twitter](https://www.bbc.co.uk/news/world-africa-43458294?ocid=socialflow_twitter) (accessed on 23/11/2020)

technical issues which mainly centres on the 'Rules of Origin' component of the agreement. According to its Minister of Trade and Industry, Rob Davies; 'the chapter on the rules of origin is an empty circuit board that needs to be populated. That's also the concern articulated by Nigeria. The AfCFTA cannot become another way in which our continent is going to be flooded by extra-regional products coming in, using some vague partnership with someone in another country, with low levels of value addition'.<sup>138</sup>

Consequent upon these concerns, it can be argued that African states will still have to devise measures to solve the issue of Rules of Origin for a smooth operation of the CFTA. In addition, the other concerns behind the initial refusal of its biggest economies, Nigeria and South Africa will still have to be resolved if the objectives of the agreement will be achieved. This is imperative because the two countries are significant participants in Africa's trade and investment sector. According to the International Monetary Fund (IMF), Nigeria is the biggest economy in Africa with a GDP of \$405 billion whilst South Africa is third with \$295 billion GDP.<sup>139</sup> With economic data from the IMF, World Bank and OECD indicating positive growths by these two countries, it is thus unarguable that their cooperation is important towards the smooth operation of the AfCFTA.

The concerns over Rules of Origin within the AfCFTA is critical towards its workability. According to the World Trade Organisation (WTO),<sup>140</sup> Rules of Origin are sets of criteria and measures used in determining the source of a product. Such determinations are important to ascertain whether a product should be taxed, afforded preferential treatment or Most-

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<sup>138</sup> See eNCA, 'SA didn't sign CFTA for technical reasons: trade minister Davies' (2018), Available at <https://www.enca.com/money/trade-minister-rob-davies-explains-why-sa-didnt-sign-the-cfta> (accessed on 23/11/2020)

<sup>139</sup> See IMF, 'Real GDP Growth' (2020), Available at [https://www.imf.org/external/datamapper/NGDP\\_RPCH@WEO/OEMDC/ADVEC/WEOWORLD](https://www.imf.org/external/datamapper/NGDP_RPCH@WEO/OEMDC/ADVEC/WEOWORLD) (accessed on 23/11/2020)

<sup>140</sup> World Trade Organisation, 'Technical Information on Rules of Origin' (2020), Available at [https://www.wto.org/english/tratop\\_e/roi\\_e/roi\\_info\\_e.htm#:~:text=Definition,to%20the%20rules%20of%20origin](https://www.wto.org/english/tratop_e/roi_e/roi_info_e.htm#:~:text=Definition,to%20the%20rules%20of%20origin) (accessed 23/11/2020)

Favoured Nation (MFN) Treatment. Therefore, since the import of the AfCFTA is to liberalise trade among African states, it is imperative that sources of goods are ascertained towards determining locally produced goods. In addition, Rules of Origin also helps in the harmonisation of customs rules, thereby aiding the formulation of anti-dumping laws, countervailing and safeguard frameworks. These harmonisations are important because, the objectives of the CFTA may be defeated if measures are not formulated to safeguard against the intrusion and saturation of the continent with products manufactured in other jurisdictions. Furthermore, the resolution of the Rules of Origin concerns is important as it will help to resuscitate the local economies of African states in three ways.

First, the effective implementation of Rules of Origin will ensure that only African manufactured products enjoy the free movement of goods and services guarantee under the AfCFTA agreement.<sup>141</sup> Within such regulatory climate, the import and saturation of non-African manufactured products into the continent will be eliminated, thus possessing a rebound effect of increased local manufacturing in the continent. This argument is supported by the data on Africa's export volume and industrial strength in 2019. More than seventy-five per cent of Africa's exports are from extractive products such as solid minerals and oil & gas, whilst less than forty per cent of intra-African trade are from non-extractive industries. This implies that intra-African trade is largely domiciled in the services and non-extractive sectors of the continent's economy.

Towards changing this disparity therefore, it presupposes that the African continent will have to implement an effective monitoring of sources of products into its territory to boast

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<sup>141</sup> UNCTAD, 'Rules of Origin Key to Success of African Continental Free Trade Area' (2020), Available at <https://unctad.org/news/rules-of-origin-key-success-african-continental-free-trade-area> (accessed 23/11/2020)



domestic manufacturing and production. Hence, detailed measures and monitoring of origins of goods can straighten the feasibility of attaining some of the objectives of the AfCFTA.

Second, there is an existing trade imbalance between African States and the rest of the world, especially the developed economies.<sup>142</sup> This trade deficit can be mitigated through the growth of the local manufacturing sectors of African states and effective implementation of AfCFTA agreement. In essence, the rise in African exports can be predicated upon an increase in local manufacturing and effective implementation of the CFTA agreement. Thus, the elimination of increased import of products from other continents through the effective implementation of Rules of Origin within the AfCFTA can boost the volume of exports by African states. Third, some African countries do have individual trade and investment treaties with non-African countries that allows for the free movement of goods and services between them. As such, this free movement of goods and services in the individual agreements, if not well managed and regulated through the effective implementation of the Rules of Origin, will translate into the movement of foreign goods into the African market as a whole.<sup>143</sup> Hence another reason why the subject of Rules of Origin in the CFTA agreement requires further resolution and effective implementation.

Consequent upon the concerns, it is inexplicable that the refusal of Eritrea to assent to the AfCFTA may be justified because it is premised on its national interest. Notwithstanding this seeming justification however, the trade integration of the continent may be jeopardised if all the states do not agree to it. As such, the refusal of Eritrea to sign the AfCFTA agreement represents a challenge towards the attainment of an integrated African trade and investment economy. This challenge of consensus and unanimity in negotiating the trade component of

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<sup>142</sup> Michael Bleaney and David Greenaway, "The impact of terms of trade and real exchange rate volatility on investment and growth in sub-Saharan Africa" [2001] (2)65 *Journal of Development Economics* 491-500

<sup>143</sup> UNCTAD, 'Rules of Origin Key to Success of African Continental Free Trade Area' (2020), Available at <https://unctad.org/news/rules-origin-key-success-african-continental-free-trade-area> (accessed 23/11/2020)

the AfCFTA may also confront my proposed Pan-African Investment Court. On the other hand, however; it also shows that my proposal may still be feasible even without a unanimous agreement by all states of the African continent. But, the lack of unanimity to a multilateral treaty that seeks to unify the trade or investment landscape of Africa can make it difficult to implement.<sup>144</sup> Hence, consensus will be required to achieve the aim of this thesis.

In summary, the refusal of Eritrea to sign the AfCFTA agreement may present challenges towards its implementation. However, this lack of unanimity may not scuttle the implementation of the agreement as fifty-four states of the African continent have assented to it, whilst some of them have proceeded further to ratify and deposit their instrument of ratification. This evidences that African states are ready and willing to unify their economies for sustainable development. Although this commitment towards greater economic integration has been shown, however, it is imperative to examine whether the economic arguments behind the formulation of the AfCFTA will be achieved.

Thus, subsection [1.11] will interrogate whether the Continental Free Trade Area agreement will boost intra-African economic landscape. Essentially, the projected benefits of the treaty will be explored, taking into account the current economic configuration of the continent.

### 1.11. AfCFTA: A panacea or Anathema to boasting intra-African Economic landscape?

As surmised in subsection [1.9.] above, the projected liberalisation of the African trade climate through the AfCFTA will enhance better harmonisation and growth of intra-African

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<sup>144</sup> See Ngaire Woods, 'The challenges of multilateralism and governance' (2000), *The World Bank: Structure and Policies*, 132-156, on the challenges of multilateralism to effective governance and regulation

trade. This will be achieved through the elimination of tariffs and enthrone-ment of free movement of goods, services and persons within the continent. However, the AfCFTA's approach on investment is currently passive as its Protocol on Investment component have not been negotiated and adopted.<sup>145</sup> Although an increase in intra-African trade is desirable in view of the trade imbalance between the states of the continent, however, the conclusion of the trade component of the CFTA still leaves a gap towards a fully integrated continental economy. This is because, unless the investment aspect of the African economy is also harmonised, then the projected benefits of the CFTA may not be achieved.

Since the Protocol on Investment component of the AfCFTA agreement has not been concluded, it can thus be argued that the full potentials of the trade agreement will not be achieved. The premise underpinning this opinion is because, the success of the CFTA agreement will depend on the efforts of African states, private sector operators from the continent and multinational corporations and investors. As averred by El-Kady, the Investment Protocol of the AfCFTA will be a good development for 'the Investment Protocol could result in a "quantum leap" for Africa by effectively modernizing, consolidating, and harmonizing the international legal framework of investment in Africa'.<sup>146</sup>

In addition, the refusal of Eritrea to assent to the trade agreement and unresolved issues relating to Rules of Origin; suggests that the general acceptability of the AfCFTA agreement is already facing challenges. Since the main objective of the trade agreement is to stimulate intra-African trade, however, it can only be feasible if the enabling environment is created for

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<sup>145</sup> This is slated to commence in the second phase of negotiations of the AfCFTA in 2021, see also Talkmore Chidede, 'Substantive issues the AfCFTA Investment Protocol should address' (2020) TralacBlog, Available at <https://www.tralac.org/blog/article/14468-substantive-issues-the-afcfta-investment-protocol-should-address.html> (accessed on 23/11/2020)

<sup>146</sup> See African Union, 'Conditions for Success in the Implementation of the African Continental Free Trade Agreement' (2020), Available at <https://au.int/en/documents/20200209/conditions-success-implementation-african-continental-free-trade-agreement> (accessed on 23/11/2020), See African Union Development Agency-The New Partnership for Africa's Development, 'Conditions for Success in the Implementation of the African Continental Free Trade Agreement' (2020), Available at <https://www.nepad.org/publication/conditions-success-implementation-of-african-continental-free-trade-agreement> (accessed on 23/11/2020), Hamed El-Kady, 'The New Landmark African Investment Protocol: A Quantum Leap for African Investment Policy Making?' (2020), Available at <http://arbitrationblog.kluwerarbitration.com/2020/09/24/the-new-landmark-african-investment-protocol-a-quantum-leap-for-african-investment-policy-making/> (accessed on 04 November 2021)

private and multinational enterprise to thrive. At its current state of development, several African countries does not seem to have the technical competences to produce their needs and that of the continent.

Therefore, cooperation and collaboration with investors from other continents, especially from the developed economies is an essential element that will contribute to the success of the AfCFTA. As such, the attraction of Foreign Direct Investments (FDIs) remains a condition precedent towards the realisation of the full objectives of the trade agreement. But, in view of the legitimacy crises of ISDS and its intrusion on the sovereignty of African states, it is imperative that the continent harmonises and reforms its investment architecture to enable the full realisation of the objectives of the AfCFTA.

Although the investment component of the AfCFTA agreement has not been concluded, however, it does not substantially depreciate the potential of the trade component in stimulating intra-African trade and economic growth. Notwithstanding this opinion however, there remains a need for the reform of Africa's investment regulatory architecture.

The reform of the African investment regulatory landscape is the theme of this thesis, as it argues for the creation of a Pan-African Investment Court. As aforesaid, the reason behind my proposal is for the rebalancing of IIAs in between African states and investors. But, its feasibility will be predicated on the ability of African states to agree on an investment treaty.

As I surmised about the refusal of Eritrea to assent to the trade component of the AfCFTA, the non-achievement of unanimity on the investment aspect will also create problems of implementation. When the investment component of the AfCFTA is negotiated and adopted, complete with a permanent investment court and elimination of the current legitimacy crises of ISDS, it may help to enthrone a fully integrated and harmonised African investment

landscape. Until this is achieved, the AfCFTA will remain an inconclusive economic instrument.

In summary, the African Continental Free Trade Area agreement in its current state will contribute to the growth of the economies of African states. However, it will not resolve other pertinent issues in the economy of African states because it does not include reforms on investments. In effect, there remains a need for African states to commence the second phase of reforms within the context of the AfCFTA agreement. When negotiated and concluded, this second phase of reforms on investment will enthrone a fully integrated economic firmament. Until thence, it can be argued that the prevailing AfCFTA agreement is not a panacea but a strong contributor to Africa's economic growth. This is because, it does not incorporate investment reforms. Sequel to my summary above, the next subsection of this chapter will interrogate whether my proposal for a Pan-African Investment Court will remedy the gap in investment reform in Africa. Having argued in this subsection that African states should also reform their current investment architecture towards better economic growth, the next subsection will focus on interrogating whether my proposal will eliminate the gap in investment regulatory gap in Africa.

#### 1.12. My proposed Pan-African investment court: A timely intervention to boosting the economy of African states?

Having examined whether AfCFTA agreement is the panacea to African's economic growth in subsection [1.11] above, I argued that the economic integration and growth aim of the CFTA will not be fully achieved in its current form. This is because, the CFTA in its current form have only reformed the trade component of Africa's economic environment, with an

intention for investment reforms during the phase two of its implementation.<sup>147</sup> In essence, the intention towards investment reforms is an acknowledgement by African states that the current state of the continent's investment architecture is no longer fit for purpose. The corollary of the discussions in subsections [1.2 – 1.5] above, evidences that African States are active participants in international investment consummation. In addition, the level of cooperation and regional realignments through the RECs in Africa also shows the willingness to greater economic harmonisation and integration within the continent. Furthermore, the innovative treaty-making practices also affirms the intention of African States to depart from first generation IIAs through a reform of its investment treaties.

Thus, this thesis proposes that African states should utilise their renewed economic harmonisation and innovative treaty-making efforts to create a Pan-African Investment Court. My proposed Pan-African Investment Court, complete with a Tribunal of First Instance and an Appellate Tribunal; may help to eliminate the legitimacy crises of ISDS. The establishment of a Pan-African Investment Court will require the integration and unification of the investment instruments of all states of the continent. Such unification will thence transform the continent into a single trading and investment entity akin to the European Union's economic architecture. On this basis, I believe that an integrated African trade and investment landscape, possess the potential to boast the economies of African states.

In summary, whilst my proposed Pan-African Investment Court will not eliminate all the economic problems of the continent, however, its establishment may help in its economic

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<sup>147</sup> See the Preamble of the African Continental Free Trade Area Agreement (Consolidated Text)

growth and sustainable development agenda. Thus, I submit that this proposal is a timely intervention towards the reform of ISDS in Africa. The motivations behind my proposal for have received support from several scholars. According to Garcia-Bolivar, the replacement of International Investment Arbitration with an Investment Court System is necessary because ‘the interpretation of concepts and principles that are peculiar to States and public international law cannot be left to the view of ever changing arbitrators’.<sup>148</sup> In essence, the resolution of investor-state disputes should be handled through a public system, thereby infusing legitimacy and transparency in the dispute resolution process. Similarly, Páez opined that African states have been active players within the international investment law regime as evidenced in the consummation of IIAs with states from other continents.<sup>149</sup> However, the envisaged positive derivatives and correlative impact of this active participation in investment agreement consummation seems elusive. As such, Paz surmised that the ‘cluttered ‘spaghetti-bowl’ of investment regimes’ have not been beneficial to African countries.<sup>150</sup>

Instead of a continuous reliance on the international investment arbitration system with its legitimacy crises, Paz also suggested for a harmonised African investment regulatory instruments to create ‘an African Continental Investment Area (ACIA) as an alternative to the existing investment regime’. The suggested ACIA according to Paz, should mirror some of the provisions of the Regional Economic Areas (RECs) in trade and investment integration in Africa.

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<sup>148</sup> Omar Garcia-Bolivar, ‘Sovereignty vs. Investment Protection: Back to Calvo?’ [2009] 24(2) ICSID Review 464-488

<sup>149</sup> Laura Páez, ‘Bilateral Investment Treaties and Regional Investment Regulation in Africa: Towards a Continental Investment Area?’ [2017] 28(3) The Journal of World Investment & Trade 379-413

<sup>150</sup> Ibid. 148 above

On the subject of rulemaking and regulation in Africa, Mbengue and Schacherer,<sup>151</sup> opined that African states are incrementally moving away from the role of consumers of investment law rules to creators through the Pan-African Investment Code (PAIC) and reforms of the Regional Economic Communities. The role of consumers of investment rules according to Mbengue and Schacherer, was motivated by the desire of African states to attract FDI from developed countries.<sup>152</sup> Thus, they argued that this role of consumers of investment rules underpinned the unequal balance of powers during the negotiation stages of IIAs between African states and developed countries.

Due to the negative experiences of African states as consumers of investment rules, Mbengue and Schacherer averred that this trend is reversing through the innovative treaty-making practices of African states. Therefore, they argued that the PAIC and RECs could provide a useful guide towards in reforming Africa's investment landscape because, the innovative provisions that incorporates salient African realities, remedies legitimacy crises of ISDS and departs from old generation investment agreement can be adapted.

In an effort towards effecting a common investment front, Denters corroborated that African states should not search far too wide, as it possesses several investment regulatory instruments through the RECs that can be adapted to create a new investment regulatory architecture.<sup>153</sup> Most of these regional rules contains novel provisions that assuages the concerns of host states, and as such, could be adapted in investment law reforms in Africa. The integration of the investment rules and regulatory instruments of the continent, according to the Organisation for Economic Co-operation and Development (OECD), will 'boost the flow of foreign investment to and across Africa by simplifying and harmonizing the

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<sup>151</sup> Makane Mbengue and Stefanie Schacherer, 'The 'Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18 *Journal of World Investment and Trade* 414–448

<sup>152</sup> *Ibid.* 151 above

<sup>153</sup> Erik Denters, 'The Role of African Regional Organizations in the Promotion and Protection of Foreign Investment' (2017) 18 *Journal of World Investment and Trade* 449–492



normative environment, and by enhancing the effectiveness and mobility of multinational companies'.<sup>154</sup> In a further affirmation of the need for the reform of Africa's investment landscape, Ofodile recommended that a multilateral treaty should be revisited by African States as it will boost their economies and attract more sustainable development to the continent.<sup>155</sup>

Sequel to the above opinions of scholars and the projected benefits of my proposal, it can be argued that the court system is capable of eliminating the legitimacy crises of international investment arbitration and erase the clipping impact of old generation investment agreements on host states. On the thrust of these academic opinions, it seems that international investment arbitration is may not be reformed to effectiveness. Perhaps, a total denunciation and a paradigm shift towards an investment court system may better serve the economic interests of African states.

To summarise, my proposed Pan-African Investment Court is plausible because the investment court system is a subject that have featured prominently towards the reform of ISDS. Beyond abstract conversation on transitioning to a court system, tangible measures such as the creation of model BITs by African states lends credence to the suggestion, that the regulation of foreign investments may be shifting from investment protection to facilitation.<sup>156</sup> As such, the facilitation of investment and reform of ISDS through the establishment of an investment court is desirable because, it will engender greater economic

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<sup>154</sup> See in general, OECD, 'Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs' (2002), Committee on International Investment and Multinational Enterprises(CIME) Report

<sup>155</sup> Uche Ofodile, 'Africa and the System of Investor-State Dispute Settlement: To Reject or Not to Reject?' (2014) AILA blog

<sup>156</sup> Rukia Baruti, 'Investment Facilitation in Regional Economic Integration in Africa: The Cases of COMESA, EAC and SADC' (2017) 18 Journal of World Investment and Trade 493-529

growth, FDI inflow and ‘should reduce transaction costs and obviate complex administrative procedures’.<sup>157</sup>

Consequent upon the summary that my proposal is a necessary and timely invention towards the reform of ISDS in Africa, this thesis will proceed to succinctly outline the research questions and objectives of my study.

### 1.13. Research Question, its Aim, Objectives and Rationale

Arising from the legitimacy crises of investor-state dispute settlement through the use of international investment arbitration in resolving investor-state disputes, this thesis proposes for the rebalancing of ISDS through the establishment of a Pan-African Investment Court.

This aim is premised on the fact that the current investment arbitration model of investor-state dispute arbitration may no longer effective and fit for purpose. As stated in subsections [1.1 – 1.12], several issues and concerns have been raised by African states about the functioning of investor-state arbitration.<sup>158</sup> Thus, my proposal draws inspiration and strength from these concerns and investment court proposals from other jurisdictions.<sup>159</sup>

Further objectives include the critical investigation of the functional mechanisms of my proposed Pan-African Investment Court. In addition, this thesis will interrogate whether my

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<sup>157</sup> See Gaukrodger, D. and K. Gordon, “Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community”, (2012), OECD Working Papers on International Investment, 2012/03, OECD Publishing. <http://dx.doi.org/10.1787/5k46b1r85j6f-en>, UNCTAD, 'Investor-State Disputes: Prevention and Alternatives to Arbitration' (2010) UNCTAD Series on International Investment Policies for Development, Available at [https://unctad.org/system/files/official-document/diaeia200911\\_en.pdf](https://unctad.org/system/files/official-document/diaeia200911_en.pdf) (accessed on 23/11/2020)

<sup>158</sup> The UNCITRAL Working Group III identified the reasons behind the legitimacy crises of ISDS, and these motivated their proposal for reforms – See UNCITRAL Working Group III, Possible future work in the field of dispute settlement: Reforms of Investor-State dispute settlement (ISDS), Note by the Secretariat, A/CN.9/917, Apr. 20, 2017

<sup>159</sup> The Investment Court System have been proposed by the European Union in its The Comprehensive Economic and Trade Agreement (CETA) with Canada and the now disbanded Transatlantic Trade and Investment Partnership (TTIP) with the United States.

proposal will be feasible and if possible, an exploration of its structure. Furthermore, other issues such as the impact of my proposal on investor's confidence, enforceability and implementation of the decisions of my proposed investment court and impact of a reformed African investment law regime on foreign direct investment inflow will also be examined.

#### 1.14. Aim

In view of the legitimacy crises and dissatisfaction with the international investment arbitration model of investor-state dispute settlement, this thesis aims to do six things.

1. Advance a proposal for the creation of a Pan-African Investment Court (Chapter 6)
2. Explore the legitimacy crises of ISDS and rationale underpinning my proposal for a Pan-African Investment Court
3. Conduct an historical analysis of the devolvement of international investment protection (Chapter 4)
4. Examine the impact of international investment arbitration on the resolution of investment disputes involving African States (Chapter 5)
5. Evaluate the feasibility of my proposed Pan-African Investment Court (Chapter 7)
6. Conclude by drawing the theme of this thesis together (Chapter 8)

### 1.15. Research Questions

To aid in the achievement of the aims, the following research questions shall be focused upon:

1. Should a Pan-African Investment Court be established to settle investment disputes involving African states?
2. What are the motivations behind my proposal for a Pan-African Investment Court?
3. What are the benefits of a rebalanced African Investment regulation framework to African states?
4. Can my proposed Pan-African Investment Court rebalance investor-state dispute settlement and eliminate its legitimacy crises?

### 1.16. Justification of this research

There are four broad reasons behind the conduction of this thesis. First, there are subsisting academic and expert debates regarding the functioning of investor-state dispute settlement. Whilst the current ISDS framework has been criticised for lacking legitimacy by some academics and thus; led to calls for its reform through the use of the Investment Court System to resolve investor-state disputes, others have disagreed; suggesting that a change from

investor-state arbitration to the investment court system will not resolve the legitimacy crises of the ISDS mechanism.

This global debate has been supported and argued for different reasons, all geared towards finding a suitable framework to resolving investment disputes. Although this debate on rebalancing investor-state dispute settlement resonates broadly in international investment law, however, capital-importing countries like African states seem to be mostly impacted by this legitimacy crisis. As such, this thesis is necessary to determine the merits or demerits of the argument that investor-state dispute settlement is beclouded by legitimacy crises.

Second, African states have muted the intention of reforming the investment aspect of its economy in the shadow of conclusion of the trade component of the African Continental Free Trade Area (AfCFTA) agreement. At the core of the intention to reform the investment component of the AfCFTA is to rebalance the power equation between host states and investors. The reason behind this intended reform is not delineated from the wider and global dissatisfaction against international investment arbitration; as some states and experts have re-echoed its legitimacy crises. Therefore, this thesis was necessary towards examining the rationale behind the series of dissatisfaction with investor-state arbitration. Within the context of African states, the allegations against investor-state arbitration as contained in chapters two, four and five of this thesis needed to be investigated through empirical evidence.

My proposal and other calls for the reform of investor-state dispute settlement through the establishment of a Pan-African Investment Court were not supported by sufficient empirical evidence. Therefore, this research was relevant and necessary as it researched the impact of investor-state dispute settlement in selected African states. Therefore, this study provides empirical and economic evidence to justify the assertion that the levers of powers in investor-

state arbitration is unbalanced, and investor-state arbitration is not in the interest of African states. Thus, this thesis provides evidence that shows that African states are not deriving the benefits through investor-state arbitration; thus it can be right to state that foreign investors are more favoured by this system in the resolution of investment disputes.

After the study of the functioning of ISDS in the African continent and specifically; the case study of Egypt, Tanzania and South Africa, the evidence shows that investor-state arbitration constrains African states from making legitimate democratic decisions. In addition, the case study also showed that African states pays so much money as investor-state arbitration awards to foreign investors. In a developing continent like Africa, I argued that these funds could have been redeployed towards the sustainable development of African states. In addition, this thesis also found a disparity between the attraction of foreign indirect investments and volume of international investment agreements by African states. Thus, the data from this thesis supports the view that the investor-state arbitration does not sufficiently boost the economies of African states.

#### 1.17. Significance of this research

This research contributes to literature because the arguments for a Pan-African Investment Court as an alternative to investor-state arbitration will be examined. Similarly, this thesis will provide empirical evidence to support my proposal for the use of the Investment Court System in resolving investor-state disputes. These derivatives are significant because, although there are several literatures that have commented upon the reform of investor-state dispute settlement, however, my proposal is the only research that provides an empirical study of investor-state arbitration and its impact on African states. In addition, recent credible

literature about the creation of a Pan-African Investment Court stopped in 2015, hence places this thesis as the newest authority on the investment court system in the continent.

Similarly, whilst most of the global investment community have realised the deficiencies in the current ISDS Framework, thus underpinning the calls for a shift to an investment court system, however, the several ICS proposals have essentially been at a peripheral level. In essence, there is none that have painstakingly investigated and evaluated the structure and functionality of the ICS in Africa. Thus, my thesis is significant as it fills this gap in literature by providing evidenced-based reasons for the establishment of an Investment Court in Africa. Furthermore, this thesis is important in literature because of the new information on how the investment court system can be established in Africa and its limitations. The broader implication of this knowledge is that other climes and continents that are experiencing the same issues like African states in ISDS can adapt my proposal to transform their investment dispute resolution frameworks.

#### 1.18. Summary of chapter one

This chapter discussed all the issues underpinning the conduction of this thesis. It evidenced credible moves that are championed by African states towards liberalising the trading and investment landscape of African states. Thus, the trade component of the African Continental Free Trade Agreement (AfCFTA) by 54 of the 55 countries in Africa. Whilst the objective of the AfCFTA are innovative, however, the institutional workability and concerns about Rules of Origin (ROO) is a challenge that may scuttle its successful implementation.

Although the AfCFTA is a welcome development in the drive towards the economic emancipation and growth of the African continent, however, the non-incorporation of investment reforms remains its shortcomings. Since Africa remains an emerging economy and depends hugely on the attraction of FDIs and expertise from developed economies, it expedient the AfCFTA agreement should include investment reforms.

Hence, the necessity of the reform of the investment law policies of African states is desirable to protect and preserve their rights to regulate their territories. In consideration of the strong drive towards an investment court system by the global investment community, this thesis argues that Africa should be on margins of investment law devolvement. As such, African states should learn from existing investment regulatory instruments such as the Pan-African Investment Code and Continental Free Trade Area to reform its investment law regime. As for procedure and form, my proposal could adapt some of the features of the Arab Investment Court (AIC) and the International Court of Justice (ICJ). These are institutions that are manned by publicly appointed judges and derives their legitimacy and jurisdiction from a multilateral agreement. The confidence of developed states and investors in an African institution will not wane if there is evidence of balance and fairness in the organisation and operation of the Pan-African Investment Court. With the potential of the continent in extractive minerals and labour force, it is envisaged that investors will continue to operate and submit themselves to an African institution.

Notwithstanding the potential benefits of my proposal, the challenges that confronts its feasibility is recognised. Questions on its jurisdiction and competence remains potent factors that becloud its achievement. For example, the demise of the SADC tribunal following the



decision in the case of *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe*,<sup>160</sup> evidences how weak institutional structures could endanger the creation of my proposal. Despite the outcome of the case and the disbandment of the Tribunal by members of the SADC, it can however be argued that a multilateral investment treaty, accompanied by an investment court, would better serve the socio-economic interests of African states. As contained in the Doha Ministerial Declaration 2001,<sup>161</sup> a rebalanced investment landscape that fairly protects the regulatory rights of host states and investment interest of investors is a plausible antidote to the legitimacy crises of investor-state dispute settlement.

Consequently, the scholarly support towards the investment court system as a remedy to the legitimacy crises of ISDS provides credible motivations to explore the establishment of a Pan-African Investment Court. Thus, my proposal is anchored on the plausibility of this suggested reform pathway. It may be that the investment court system will not resolve the legitimacy crises of ISDS. However, this can only be known through the conduction of a research. Thus, this thesis sets out to accomplish this research necessity. The layout and progressive of this thesis is thus outlined in the next subsection.

### 1.19. Thesis layout

This thesis is comprised of eight substantive chapters. Chapter explained the fundamental issues inherent in investor-state dispute settlement, as it examined the concerns many states and other stakeholders about investor-state arbitration. Thus, issues like the investor-state caseload and the arguments in favour and against investor-state arbitration were explained.

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<sup>160</sup> *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe* (2007) AHRLR 141; (SADC 2007); SADC Tribunal Decision, Case No.SADCT: 2/07 (13 December 2007) [2008] SADCT 2 (28 November 2008); Brigitte Weidlich, "Zimbabwe pulls out of SADC tribunal" (4 September 2009), *The Namibian* available at: <http://www.namibian.com.na/index.php?id=57322&page=archive-read> (Accessed 27/06/ 2018)

<sup>161</sup> WTO Ministerial Conference, Doha Ministerial Declaration, WT/MIN(01)/DEC/1 (20 November 2001) available at: [https://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm) [Accessed 27/06/2018]

Having provided these conceptual information, Chapter two will explain the research methodology deployed in conducting this thesis. It comments on the research approaches and the reasons for using them, and other research methodologies that will not be applied. This chapter will show how the selected methodology helps in achieving the aims of this thesis.

Chapter three will review the issues that have shaped the protection of investments through international investment agreements. In essence, it will examine the subjects that underpins investor-state disputes and other issues that touches on my proposal. Chapter four shall conduct an historical review of international investment protection. Essentially, it focuses on the development of International Investment Agreements and how it has influenced investor-state arbitration. Thus, the innovative treaty-making practices of African states and rationale behind my proposal for a Pan-African Investment Court will be evidenced.

Chapter five will conduct a case study of investor-state arbitration in the African continent. In particular, it focuses on examining the ISDS experience of Egypt, Tanzania and South. The reason behind this case study is to obtain empirical data and information about investor-state arbitration within the continent. Information garnered from this case study will offer validity to the findings and recommendations of this thesis. Thereafter, chapter six will analyse the findings from the case study. This analysis will focus on showing the results of the case study and deploy it to make necessary recommendations.

Chapter seven will conduct an evaluation of the information from the analysis and my proposal. This is to determine the feasibility of establishing my proposed Pan-African

Investment Court. Thereafter, Chapter eight will conclude this research by drawing the theme together. In addition, this last chapter shall advance concluding remarks and recommendation of areas for future research.

## 1.20. Conclusion

This chapter have provided the essential information that will guide the conduction of the research. It examined all the subjects and issues about international investment law and investor-state arbitration. The aim, objectives and research questions of the thesis were also explained. In addition, the significance, justification and rationale behind my proposal for a Pan-African Investment Court were stated. Therefore, the information within this chapter serves as a standpoint for the conduction of the rest parts of this thesis.

Consequent upon the provision of the necessary preliminary information in this chapter, chapter two shall be deployed to explain the research methodologies that will be used in conducting this thesis. Information on the research methods adopted and reasons behind their deployment will be explained. Likewise, other research methods that were discarded and the reasons behind their unsuitability will also be stated. The reason behind the explanation of the research methodologies is to provide valid grounds and direction on how this thesis was conducted. The use of the right methodologies in social science research is important because it will offer valid information on whether the findings are valid. This is because, any findings that is achieved through the wrong methodology may not be accurate.

## Chapter Two: Methodology

### 2.1. Introduction

Having explored the issues that influenced the devolvement of investor-state arbitration in Africa to the current conversation on a Court System in one, this chapter shall focus on examining the research methodologies that will be utilised in conducting this thesis. It aims to discuss the reasons behind their selection and also, an explanation of the methodologies that were not selected.

Legal research is domiciled in the social sciences and this influences the choice of methods in conducting research within the field. Consequently, the selected methodologies are those that will aid in the achievement of the objectives of this research. Thus, the doctrinal and

documentary analysis, Case study and Exploratory design methodologies will be deployed. The choice of these methodologies is because of their suitability to the achievement of the objectives of this thesis. Other methodologies were not used before they are not relevant to the subject of this research.

## 2.2. Doctrinal and documentary analysis

Socio-legal research is steeped in methodologies that explain the impact and effect of law in the society. Thus, among the doctrinal method is one of the methodologies that helps to achieve this objective. Doctrinal methodology is described as the methodological exploration and exposition of the rules and concepts relating of a legal subject.<sup>162</sup> According to Posner,<sup>163</sup> it is ‘the careful reading and comparison of appellate opinions with a view to identifying ambiguities, exposing inconsistencies among cases and lines of cases, developing distinctions, reconciling holdings and otherwise exercising the characteristic skills of legal analysis’. Therefore, this method is deployed in this thesis towards the examination of the contending issues in relation to international investment protection.

Doctrinal methodology derives its origin in the Nineteenth and Twentieth Centuries,<sup>164</sup> when Latin maxims and religious traditional rhetoric dominated legal researchs.<sup>165</sup> According to Hutchinson and Duncan,<sup>166</sup> ‘doctrine’ is derived from the Latin word ‘doctrina’ which

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<sup>162</sup> Emerson Tiller and Frank Cross, 'What is Legal Doctrine?' [2005] 100(1) *Northwestern University Law Review* 517, 517-518, Tim May, *Social Research* (McGraw-Hill Education, London, 2001), Rob VanGestel and Hans-W. Micklitz, 'Revitalizing Doctrinal Legal Research in Europe: What About Methodology?' (2011) EUI Working Paper LAW No. 2011/05, Terry Hutchinson, *Doctrinal research: researching the jury* (2013), In Dawn Watkins, Mandy Burton (Eds.) *Research Methods in Law*. Routledge (Taylor & Francis Group), Abingdon, Oxfordshire, UK, 7-33

<sup>163</sup> Richard Posner, 'The Present Situation in Legal Scholarship' [1981] 90(5) *The Yale Law Journal* 1113-1130

<sup>164</sup> Desmond Manderson and Richard Mohr, 'From Oxymoron to Intersection: An Epidemiology of Legal Research' [2002] 6(1) *Law Text Culture* 159-161

<sup>165</sup> John Kelly, *A Short History of Western Legal Theory* (Clarendon Press, 1992) 89

<sup>166</sup> Terry Hutchinson and Nigel Duncan, 'Defining and describing what we do: Doctrinal legal research' [2012] 17(1) *Deakin Law Review* 83-119

connotes knowledge, instructions and learning. Thus, 'doctrine' is described as the synthesis of the various principles, interpretative guidelines and norms which helps to explain, justifies and makes the law more coherent as part of a larger body of study.<sup>167</sup> Thus, doctrinal is consistent with the legal doctrine of precedent which help in the systematic review of the evolvement of legal concepts that is meant to be futuristically followed and replicated. As opined by Singhal and Malik,<sup>168</sup> doctrinal methodology is used in this thesis to achieve a more predictable and manageable outcome.

Similarly, documentary analysis is utilised in this thesis because of its relevance to the subject under discuss and close relationship with the doctrinal method. As explained by Bowen,<sup>169</sup> documentary analysis is use in the research of data that involves the scrutiny of large volumes of documents. The intent of documentary analysis as a form of qualitative research method is to provide a meaning surrounding a topic. It usually involves the coding of contents of a subject into themes for easy of analysis and interpretation. According to O'Leary,<sup>170</sup> there are three types of documents. These are public records, personal documents and physical evidence.

As the name connotes, public records are documents of a public nature and are official records. These includes government policy statements, reports of international organisations and international agreements. Likewise, personal documents are records of a person's activities and experiences that are documented.<sup>171</sup> Last but not the least, physical evidence are the

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<sup>167</sup> Trischa Mann, *Australian Law Dictionary* (Second Edition, Oxford University Press London 2016)

<sup>168</sup> Ashish Singhal and Ikramuddin Malik, 'Doctrinal and socio-legal methods of research: merits and demerits' [2012] 2(7) *Educational Research Journal* 252-256

<sup>169</sup> Glenn Bowen, 'Document Analysis as a Qualitative Research Method' [2009] 9(2) *Qualitative Research Journal* 27-40

<sup>170</sup> O'Leary, Zina, 'The essential guide to doing your research project' (2014, Sage Publications Ltd, 2nd ed.)

<sup>171</sup> Silverman, D. (Ed.). (2016). *Qualitative research*. Sage.

recorded aspects of a study. Examples of physical evidence are training materials and posters. The reason for the use of documentary analysis is the triangulation that it provides during research. Triangulation is the combination of one or more methodologies or data sources together during research towards providing evidence that enshrines credibility during research.<sup>172</sup>

Reliability of results that documentary analysis infuses in researches is also the reason why it has been applied in this thesis. Reliability of a research is achieved through the provision of valid evidence to support conclusions. Thus, documentary analysis will enable the reliability of this thesis because it involves the scrutiny of large volumes of documents. Since a wide array of documentary sources will be consulted in the course of conducting this research, a method that enables their critical analysis is imperative; hence the selection of documentary analysis. Thus, documentary analysis ensures that the accurate resources for the execution of this research are scrutinised.

This thesis will scrutinise public records and documents such as international investment agreements, official policy documents of host states, United Nations documents and reports, African Union reports and documents and documentary records of other relevant public bodies. Thus, documentary analysis will aid in scrutinising, reviewing and analysing all these documentary records.

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<sup>172</sup> Bush, T., Authenticity in research—reliability, validity and triangulation (2007) *Research methods in educational leadership and management*, 91

### 2.3. Case study

Case study method has been selected because this thesis will conduct a case study of investor-state arbitration experiences of African states. Yin states that case study is particularly important when the subject is about investigation the ‘how and ‘why’ questions of a contemporary phenomenon.<sup>173</sup> According to Yin, case study methodology is useful in ‘an empirical inquiry that investigates a contemporary phenomenon within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident’.<sup>174</sup> Since the creation of an investment court and how it may function is a phenomenon that is a novel phenomenon that is not clearly defined, the achievement of the objective of this proposal will therefore require the case study of the functioning of investor-state arbitration. Information that is garnered from this case study will be used to support or rebut my proposal for an investment court system in Africa.

Yin’s definition of case study methodology mirrors Bromley’s assertion that it is a ‘systematic inquiry into an event or a set of related events [with the aim of describing and explaining] the phenomenon of interest’.<sup>175</sup> The main emphasis here is that case study methodology is a systematic investigation of events. This portends that the evolutionary development of investor-state dispute settlement and international investment agreements shall be investigated to enable the understanding of the issues underpinning this thesis.

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<sup>173</sup> Robert K Yin, *Case study research: Design and methods*, fifth edition (5th edn, HarperCollins eBooks 2013), Donna Zucker ‘How to Do Case Study Research’, (2009) University of Massachusetts- Amherst

<sup>174</sup> Robert Yin, ‘Case study research, design and methods’ (3rd edn, SAGE Publications, Thousand Oaks 2003) 13

<sup>175</sup> Basil D. Bromley, ‘Academic contributions to psychological counselling: I. A philosophy of science for the study of individual cases’ [1990] 3(1) *Counselling Psychology Quarterly* 229-302



There are three types of case studies and these are explanatory, descriptive and exploratory case studies.<sup>176</sup> Explanatory case studies is focused on confirming an already established phenomenon whilst descriptive case studies merely provide a clear description of a phenomenon.<sup>177</sup> Similarly, exploratory case studies are used to explore the existence of a phenomenon such as the impact of investor-state dispute settlement on investor confidence and its relationship with IIAs. This thesis requires an approach that enables the discovery or unearthing of original data and information. Thus, the exploratory case study approach will be used to obtain original data on IIAs and investor-state dispute settlement.

The case study shall comprise of examining the experiences of Egypt, South Africa and Tanzania in investor-state arbitration. This study is necessary because it will help to evidence the impact of investor-state dispute settlement in African states. Findings from the case studies will provide a valid ground upon which my proposed Pan-African Investment Court shall rest upon. These countries have been selected as they represent different regions in that are mostly impacted by investor claims in Africa. In addition, these countries have also featured prominently in innovative treaty-making, thus represents good examples to be studied.

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<sup>176</sup> Gary Thomas, A typology for the case study in social science following a review of definition, discourse and structure, (2011) 17 *Qualitative Inquiry* 511, 515-518.

<sup>177</sup> Zainal, Z. (2017). Case Study As a Research Method. *Jurnal Kemanusiaan*, 5(1). Retrieved from <https://jurnalkemanusiaan.utm.my/index.php/kemanusiaan/article/view/165>

## 2.4. Exploratory design

Exploratory design is used in a research that has not been clearly studied or where there is little or no information regarding a research question.<sup>178</sup> Its objective is to provide an insight about a research problem and understanding of concepts towards conducting later investigations or applied during the preliminary stages of a research. Thus, they are used to gain an understanding of how to proceed with researching a problem in relation to identifying suitable measures for the purposes of gathering relevant information about a study.<sup>179</sup> As such, this design is important in this thesis because, it will enable the gaining of insight and understanding regarding investor-state arbitration.

Similarly, exploration design offers flexibility in a research because it helps to answer all types of questions. In essence, it serves the purpose of guiding a researcher into obtaining relevant information that will enable the progression of a study.<sup>180</sup> This assertion is valid considering that it is suitable for a problem that have not been previously studied. Consequently, it is deployed in this thesis because my proposal for a Pan-African Investment Court is novel, and as such, all the relevant information is not known. Therefore, the deployment of exploratory design will mitigate this information gap by helping to answer all unknown questions about my proposal. Thus, questions surrounding the devolvement of investor-state dispute settlement and my proposed Pan-African Investment Court will be answered through the deployment of this methodology.

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<sup>178</sup> Brandt Eva, 'Designing exploratory design games: a framework for participation in participatory design?' (2004) 1 57-66, In Proceedings of the ninth conference on Participatory design: Expanding boundaries in design, ACM.

<sup>179</sup> Mackay, W. E., Appert, C., Beaudouin-Lafon, M., Chapuis, O., Du, Y., Fekete, J. D., & Guiard, Y. (2007). Touchstone: exploratory design of experiments. In Proceedings of the SIGCHI conference on Human factors in computing systems (pp. 1425-1434). ACM.

<sup>180</sup> Lin, Y., Mistree, F., Allen, J. K., Tsui, K. L., & Chen, V. C. (2004). A sequential exploratory experimental design method: development of appropriate empirical models in design. In ASME 2004 International Design Engineering Technical Conferences and Computers and Information in Engineering Conference (pp. 1021-1035). American Society of Mechanical Engineers.

## 2.5. Excluded methodologies

Beyond the selected methodologies above, there are other legal research methodologies that have been discarded because they will not be useful for the conduct of this thesis. For example, Economic Analysis of Law method was not used because it is concerned with the use of economic occurrences in the society to effect a change in the law.<sup>181</sup> Such method is useful where analogy can be drawn from economic events to show lapses in the law towards making relevant proposals for reform. In addition, Historical Legal Method is only applicable where the etymological origin of a subject is concerned, especially where it is required for the prediction of future occurrences. It is defined by Busha and Harter as ‘the systematic recounting of past events pertaining to the establishment, maintenance, and utilization of systematically arranged collections of recorded information or knowledge’.<sup>182</sup> Since this thesis is not focused on the deploying past events to predict future occurrences or change a system, historical legal research was therefore excluded.

Similarly, Theoretical Conceptualisation Method was not applied in this study. Conceptualisation according to Vincent and Norma aids in the understanding of the relationship between concepts towards forming a theory.<sup>183</sup> Since such evidencing of the relationship between concepts does not form part of the objective of this study, thus,

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<sup>181</sup> Eli Salzberger, 'The Economic Analysis of Law - The Dominant Methodology for Legal Research?!' (2007) University of Haifa Faculty of Law Legal Studies Research Paper No. 1044382, 40, Georgios Tsatsaronis and Michael Winhold, 'Exergoeconomic analysis and evaluation of energy-conversion plants—I. A new general methodology' [1985] 10(1) Energy 69-80

<sup>182</sup> Charles Busha and Stephen Harter, *Research methods in librarianship: techniques and interpretations* (Academic press, New York 1980) 93

<sup>183</sup> Vincent Anfara and Norma Mertz, *Theoretical framework in qualitative research* (Sage Publications, Thousand Oaks CA, London, 2006) 23-25

theoretical conceptualisation was excluded. Leshem and Trafford commented that conceptualisation ‘provides theoretical cohesion to the evidence and conclusions from theory-building research’.<sup>184</sup> Furthermore, conceptualisation is useful in clarifying key areas of a research, and also helps in putting into use all identified interventions and result.<sup>185</sup>

Correspondingly, Law and Economics method was also excluded because, it is concerned with the use of economic analysis to predict the effect and impact of legal rules on the society.<sup>186</sup> Essentially, this method is relevant in linking the state of the law with societal economics in terms of availability of money and creation of wealth. Thus, such helps in effecting necessary changes in the law as a control tool towards stabilising a country’s economy. However, this is not the focus of this thesis and thus was not applied.

## 2.6. Conclusion

This chapter have explored and analysed the research methodologies to be used in conducting this thesis. It sets out the reasons behind the selection of these methodologies towards achieving valid and reliable results. Pivotal to the selection of the methodologies were their suitability to achieving the objectives of this thesis. In addition, other methodologies which were excluded was also explained and the reasons behind their exclusion were state.

Consequently, chapter three will conduct a thematic and chronological exploration of the issues on investor-state dispute settlement in Africa. It is intended to show all the contending

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<sup>184</sup> Shosh Leshem and Vernon Trafford, 'Overlooking the conceptual framework' [2007] 44(1) *Innovations in Education and Teaching International* 93-100

<sup>185</sup> William Trochim, 'Research Methods Knowledge Base' (2002) Cornell University, Earl Babbie, *The practice of social research* (International Thomson Publishing Services, 1998), Barney Glaser, 'Conceptualization: On Theory and Theorizing Using Grounded Theory' [2002] 1(2) *International Journal of Qualitative Methods* 23-38 ... Barney also added that conceptualisation helps for the generation of grounded theory for emerging societal patterns in data research.

<sup>186</sup> Ulen, T. S., 7 *LAW AND ECONOMICS* (1989) *Law and economics*, 19, 201

subjects behind the protection of investment and deployment of international investment arbitration in resolving investor-state disputes.

## **Chapter Three: Thematic and chronological exploration of the evolutionary issues on investor-state arbitration and African states**

### **3.1. Introduction**

The underlying information from chapter one reveals a state of dissatisfaction by African states about the functioning of investor-state dispute settlement. This mechanism is not just deemed to be unfairly skewed in favour of investors, several host states also aver that arbitral institutions such as ICSID do not contextualise local realities in their decision-making.<sup>187</sup> Towards the actualisation of the aims of this thesis, it is pertinent to examine the developmental progression of investment protection and dispute settlement to the contemporary conversation for an Investment Court System. Although the creation of a permanent investment court is the main thrust of this thesis, however, it will also incorporate an evaluation of its feasibility and the incidence of multilateralism as a major plank of its fruition.

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<sup>187</sup> Most states in African like Tanzania and South Africa has reformed their investment regulatory regime to reflect their local realities. See the Protection of Investment Act 2015 and the Morocco-Nigeria Model BIT

Prior to examining the structure of my proposed Pan-African Investment Court, this chapter will be devoted to examining the evolution and devolvement of investor state dispute settlement. In essence, it aims to explain the issues that culminated to the calls for an investment court system.

Whilst this chapter is not a literature review, however, it aims to provide a discussion on the main academic and expert literature on the devolvement of international investment law. This will be anchored on the Twentieth Century developments which was the beginning of International Investment Agreements. Against this background, the broader impact of multinational corporate activities and its relationship domestic policy, sovereignty and independence of states shall firstly be examined.

### 3.2. International Business promotion and protection

The circumstances that underpins contemporary conversation on the best form of regulating international investments and resolving investment disputes, can be traced to some features of international trade and business in the Twentieth Century. This features are contextualised within the dominant idea that shaped the course of transnational trade and investments Twentieth Century. Leading the pack of academic commentaries; Adams Smith in his *Wealth of Nations*,<sup>188</sup> espoused that the growth of international trade is a reflection of free market enterprise and invisible hand.

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<sup>188</sup> Smith, A., *The Wealth of Nations* (1776) (W. Strahan and T. Cadell, London)

In his advocacy for a free market enterprise and the abolishment of restrictions and import inhibitions, Smith recounted that multinational enterprise is a consequence of division of labour.<sup>189</sup> The impact of such division of labour is therefore the concentration of capital and capacity in specific areas, thereby leading to the maximisation of productivity and prosperity of countries. Due to this utility of multinational trade and cooperation, Smith supported the elimination of protectionist policies and quantitative restrictive measures.<sup>190</sup>

Perhaps a reflection of the struggle between local and foreign investors in contemporary free market economies, Smith opined that capitalism is infused with selfishness and self-interest by promoters and managers of corporations.<sup>191</sup> In essence, agents in the course of their stewardship may deviate from the agenda of their principals and focus on the advancement of their own ambitions and interests. Despite this risk however, he still argued for the lifting of restrictions on multinational trade, affirming that local corporations will still support the economies of their home states through an invisible hand.<sup>192</sup> The argument regarding the invisible hand portends that the promotion of self-interest will spur local enterprises to continue the advancement of their trade for their own benefit. Based on this self-interest ideology, local economies and society will also benefit from it. Thus, Smith commented that whilst local investors will still contribute to the growth of their local economies "in the interest only of his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain; and he is in this, as in

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<sup>189</sup> See Lisa Hill, 'Adam Smith, Adam Ferguson and Karl Marx on the division of labour' [2007] 7(3) *Journal of Classical Sociology*, 339-346

<sup>190</sup> *Ibid.* 188 above

<sup>191</sup> *Ibid.* 188 above

<sup>192</sup> See Guy Alchon, 'The invisible hand of planning: Capitalism, social science, and the state in the 1920s' (2014) Princeton University Press.

many other cases, led by an invisible hand to promote an end which is no part of his intention'.<sup>193</sup>

The elimination of barriers to trade and import restrictions leads to the burgeoning of multinational enterprises. The consequences of the boom in the growth of multinational enterprises is the realisation that capitalism leads to increase in productivity and profitability, hence it is assumed as the best vehicle for the promotion of transnational business.<sup>194</sup> However, this growth also leaves in its wake, the problem of control of multinational corporations by the host states. According to Berle and Means,<sup>195</sup> the acquisition of huge capital by corporations due to the dispersed ownership structure of shareholders, transforms these entities into behemoths that becomes uncontrollable by their host states. In consequence, multinational corporations transform from ordinary vehicles for economic acquisition into political entities that intervenes and interferes with local political structures.

Beyond the interference in domestic political structures and policies of host states, big multinational corporations also compete unequally with smaller local industries. The resultant impact of uncontrolled exploitation of resources and interference in domestic policies-making, is a milieu of negative vices by transnational corporations.<sup>196</sup> According to Berla and Means, '[T]he economic power in the hands of the few persons who control a giant corporation is a tremendous force which can harm or benefit a multitude of individuals, affect whole districts, shift the currents of trade, bring ruin to one community and prosperity to

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<sup>193</sup> Adams Smith, 'An Inquiry into the Nature and Causes of the Wealth of Nations', (1776).

<sup>194</sup> Kalyan Sanyal, 'Rethinking capitalist development: Primitive accumulation, governmentality and post-colonial capitalism' (2014) Routledge.

<sup>195</sup> Adolf Berle and Gardner Means, *The Modern Corporation and private property* (New York: Harcourt, Brace & World 1932)

<sup>196</sup> Magnus Blomström and Ari Kokko, 'Multinational corporations and spillovers' [1998] 12(3) *Journal of Economic surveys*, 247-277, the authors showed that multinational corporations could be either positive or negative forces in host states depending on their activity



another. The organizations which they control have passed far beyond the realm of private enterprise - they have become more nearly social institutions'.<sup>197</sup>

Sequel to this negative impact of multinational corporations on the internal politics and policies of host states, there is crises of control and economic advancement ensues between these two constituencies.<sup>198</sup> This problem is contextualised in the fact that host states attempts to regulate and control multinational corporations leads to resistance by the latter and their home countries. With the knowledge that foreign organisations are not mutually exclusive of their home countries, home states deploy several measures to protect the investment of their nationals abroad.<sup>199</sup> Thus, practices of nationalisation, expropriation and enforcement of quantitative restrictions on foreign investments by host states are retaliated by home states of investors through the principle of diplomatic protection.<sup>200</sup>

Therefore, the principle of diplomatic protection can be adduced as the origin of investment protection, although it has gone through an evolutionary journey to the contemporary ISDS. As stated by Vattel,<sup>201</sup> due to the risks of expropriation and nationalisation of assets experienced by foreign nationals, powerful exporting countries deploys diplomatic and military assets to protect their citizens because of the ideology that 'whoever uses a citizen ill, indirectly offends the State, which is bound to protect this citizen'.<sup>202</sup> The consequences of

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<sup>197</sup> Adolf Berle and Gardner Means, *The Modern Corporation and private property* (New York: Harcourt, Brace & World 1932)

<sup>198</sup> Nathan Jensen, 'Democratic governance and multinational corporations: Political regimes and inflows of foreign direct investment' [2003] 57(3) *International organization*, 587-616, examined the attraction of FDIs between democratic and authoritarian regimes and conclude that the former attracts higher FDIs. Of particular relevant here is the element of control within the equation.

<sup>199</sup> See Theodore Moran, 'Transnational strategies of protection and defense by multinational corporations: Spreading the risk and raising the cost for nationalization in natural resources' [1973] 27(2) *International Organization*, 273-287.

<sup>200</sup> James Cable, *'Gunboat Diplomacy, 1919-79: Political Applications of Limited Naval Force'* (2016) Springer.

<sup>201</sup> E. Vattel and J. Chitty, *The Law of Nations: Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* 1st edn (Philadelphia: T. & J.W. Johnson, 1883)

<sup>202</sup> *Ibid.* 201 above

applying these non-standardised measures and the inability of customary international law to effectively resolve investor-state disputes, has culminated to the current global conversation on the reform of ISDS. In the context of African states, the continent has been a major participant in the journey towards the reform of investor-state dispute settlement.<sup>203</sup> These alternative attempts are all geared towards remedying the legitimacy crises of ISDS and are influenced by the impacts of multinational corporate undertakings within their host states.

### 3.3. Impact of multinational corporate activities on environment and society

The subject of creating an investment court for Africa is not isolated from the larger issue of the conduct of multinational corporate activities in their host states. Apart from the African continent, the negative impact of multinational corporate enterprises also resonates globally. Multinational corporations (MNCs) transverse the nooks and crannies of the global economic order in the exploitation and exploration of resources for their economic gains. This globalised conduction of multinational undertakings leaves in its wake, damages to the environment and abuse of human rights. Thus, several host states are inclined to initiate measures to regulate their activities and impose certain international obligations on them.<sup>204</sup>

The impetus to regulate multinational corporations and impose obligations on them is a subject that dates back to the Eighteenth Century, in the shadow of the transformation of the East India Company (EIC) into a military and political institution.<sup>205</sup> Although corporations

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<sup>203</sup> See chapter [4.6] on the innovative treaty-making practices of African states. The early efforts of the Regional Economic Communities (RECs) in Africa also reflected the moves towards reforms.

<sup>204</sup> See Olufemi Amao, 'Corporate social responsibility, human rights and the law: Multinational corporations in developing countries' (2011) Taylor & Francis, on the issues that motivated the regulation of multinational corporations

<sup>205</sup> See Lawson, P., 'The East India Company: A History' (2014), Routledge, William Dalrymple, 'The East India Company: The original corporate raiders', *The Guardian*, 4 March 2015 available at: <https://www.theguardian.com/world/2015/mar/04/east-india-company-original-corporate-raiders> (Accessed on 12/10/2019)

should exist for the promotion of the interest of their shareholders,<sup>206</sup> however, their activities may distort and impact negatively on the environment of their host states.<sup>207</sup> In addition to environmental degradations, MNCs also infringe on the human rights of citizens of host states in the course of their exploitation of resources and maximisation of profit.<sup>208</sup> Due to these debilitating tendencies, the subject of imposing obligations and regulating their activities has lingered since the time of the EIC.

The relationship between the activities of multinational corporations and contemporary conversations on investor state dispute settlement, imposition of obligations and creation of a court system can be contextualised in the negative impacts of unbridled corporate exploitation and exploration on host states. On the basis of environmental degradations, host states may nationalise or expropriate foreign investments. Similarly, issues of human rights abuses influence some decisions of host states in providing less Fair and Equitable Treatment (FET); and full security to foreign investors. Thus, the impact of multinational activities on host states can be adduced as the origin of investment regulation efforts.<sup>209</sup>

Despite the discordant opinions about the merits of international business, some scholars have argued that multinational corporations help in boosting local economies and engendering

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<sup>206</sup> Milton Friedman, "The Social Responsibility of Business is to Increase its Profit", *New York Times Magazine*, 13 September 1970, pp.3–32, 122–124 – on shareholder primacy. See also, Freeman and others, 'Stakeholder theory: The state of the art' (2010) Cambridge University Press – on opposite argument of stakeholder theory

<sup>207</sup> See Thomas Klubock., 'The Early History of Water Wars in Chile: Rivers, Ecological Disaster and Multinational Mining Companies' (2020) *Environment and History*, Hopkins, A., 'Failure to learn: the BP Texas City refinery disaster' (2008) CCH Australia Limited, Broughton, E., 'The Bhopal disaster and its aftermath: a review' [2005] 4(1) *Environmental Health* 1–6, Siegle, L., 'We are what we wear: unravelling fast fashion and the collapse of Rana Plaza' [2014] (Vol. 12), *Guardian Books*, Kadafa, A. A., 'Oil exploration and spillage in the Niger Delta of Nigeria' [2012] 2(3) *Civil and Environmental Research* 38–51, Mullins, C. W., & Rothe, D. L., 'Gold, diamonds and blood: International state-corporate crime in the Democratic Republic of the Congo' [2008] 11(2) *Contemporary Justice Review* 81–99

<sup>208</sup> John Ruggie, 'Just business: Multinational corporations and human rights' (2013) (Norton global ethics series). WW Norton & Company.

<sup>209</sup> See Sean Murphy, 'Taking multinational corporate codes of conduct to the next level' (2004) *Colum. J. Transnat'l L.*, 43, 389.

development through foreign direct investments (FDIs). Similarly, the transfer of knowledge,<sup>210</sup> skills and technological knowhow has been pointed as some of the merits of international business.<sup>211</sup> The resultant effect of these positive contributions of MNCs is the growth of globalisation and enablement of closer relations between states.<sup>212</sup> In spite of the current wave of nationalisation as evinced through the exit of Britain from the European Union, and withdrawal from several multilateral treaties like the Paris Climate Change Accord by the United States, globalisation is still embraced by several countries and supranational bodies like the European Union.<sup>213</sup>

Notwithstanding these positive contributions of MNCs to society however, the pursuit of commercial gain and maximisation of economic influence has resulted in unsavoury tales in their host states and continents of operation.<sup>214</sup> For example, there have been societal and environmental disasters such as the Bhopal gas leak in India, the Rana Plaza disaster in Bangladesh and the Deepwater Horizon oil spill in the Gulf of Mexico.<sup>215</sup> Within Africa, there is the Ogoni oil spillage in the Niger-Delta region of Nigeria, as well as the illegal blood diamonds trade in the Congo and other Central Africa countries.<sup>216</sup> These disasters have by implication, resulted in abuses of human rights like child labour, the deployment of child soldiers and sexual exploitation of women as booties of war.

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<sup>210</sup> Blomström, M., & Kokko, A., 'Multinational corporations and spillovers' [1998] 12(3) *Journal of Economic surveys*, 247-277. See also Magnus Blomstrom, 'Host country benefits of foreign investment (No. w3615), (1991), National Bureau of Economic Research.

<sup>211</sup> Jensen, N. M., 'Democratic governance and multinational corporations: Political regimes and inflows of foreign direct investment' (2003) *International organization*, 587-616

<sup>212</sup> Dana Minbaeva, 'Knowledge transfer in multinational corporations' [2007] 47(4) *Management international review*, 567-593.

<sup>213</sup> Zhang et al., 'US withdrawal from the Paris Agreement: Reasons, impacts, and China's response' [2017] 8(4) *Advances in Climate Change Research* 220-225, Croucher, S., 'Globalization and belonging: The politics of identity in a changing world (2018) Rowman & Littlefield, Coyle, D., 'Brexit and globalisation. Brexit Beckons' (2016) *Thinking ahead by leading economists*, 23-39, Craig Calhoun, 'Populism, nationalism and Brexit (2017), *Brexit: Sociological Responses*, 57-76.

<sup>214</sup> Elisa Giuliani and Chiara Macchi, 'Multinational corporations' economic and human rights impacts on developing countries: a review and research agenda' [2014] 38(2), *Cambridge journal of economics* 479-517.

<sup>215</sup> Kostka et al., 'Hydrocarbon-degrading bacteria and the bacterial community response in Gulf of Mexico beach sands impacted by the Deepwater Horizon oil spill' [2011] 77(22) *Applied and environmental microbiology* 7962-7974, Mariano et al., 'On the modeling of the 2010 Gulf of Mexico oil spill' [2011] 52(1-2) *Dynamics of Atmospheres and Oceans* 322-340, *Ibid.* 86 above

<sup>216</sup> *Ibid.* 207 above

In response to these vices by MNCs, measures are put in place to regulate their activities. The reason behind calls for regulatory measures, it is argued, stems from the unethical disposition of allowing multinational corporations to continue their damage on the environment and human rights without cessation.<sup>217</sup> Thus, attempts were and continues to be made to impose obligations on them through corporate social responsibility (CSR) and other forms international obligations.

In the aftermath of the Second World War, the road towards regulating MNCs and eliminating the disasters caused by them was lunched through the Universal Declaration of Human Rights (UDHR) by the United Nations.<sup>218</sup> The UDHR aims to preserve and protect human rights abuses by mandating that 'every organ of society shall strive by teaching and education to promote respect for these rights and freedoms'.<sup>219</sup> Despite the promises of this Declaration, its voluntary and non-binding nature presents a challenge towards achieving its objectives.<sup>220</sup> Similarly, measures such as the Declaration on the Establishment of a New International Economic Order (NIEO Declaration)<sup>221</sup> and the Charter of Economic Rights and Duties of States were introduced because of the limitations of the UDHR in renewed attempts to regulate multinational corporations.<sup>222</sup> Although these latter instruments restated previous positions regarding foreign agreements, with a departure being provisions

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<sup>217</sup> Jennifer Zerk, 'Multinationals and corporate social responsibility: Limitations and opportunities in international law (2006) 48 Cambridge University Press.

<sup>218</sup> Universal Declaration of Human Rights 1948, Adopted by the United Nations General Assembly through Resolution 217 A (III) at the 183rd plenary meeting in Paris on 10 December 1948

<sup>219</sup> The preamble of the UDHR

<sup>220</sup> Kenneth Abbott and Duncan Snidal, 'Hard and soft law in international governance' (2000) *International organization*, 421-456.

<sup>221</sup> Declaration on the Establishment of a New International Economic Order UNA(01)/R3 Adopted at the 2229th plenary meeting of the United Nations General Assembly, 1 May 1974

<sup>222</sup> Charter of Economic Rights and Duties of States, Adopted by the UN General Assembly through resolution 3281 (XXIX) 1974

on the right of states to regulate foreign investments within their territories, however, they failed to achieve this objective for two reasons.

Firstly, several states especially in Latin America were reluctant to incorporate international law standards as frameworks to regulate multinational companies. The second reason behind their failure is because of its soft law nature. Most international frameworks lack binding authority as they are enforced, if it can be regarded as enforcement; through comity, ethical persecution and diplomacy.<sup>223</sup> Thus, there are no punitive consequences for any breaches by signatory states.

Beyond the above treaties, further attempts were made within the Twentieth Century to develop frameworks to regulate multinational companies. Significant among these developments was the OECD Declaration on International Investment and Multinational Enterprise which was the first major measure that introduced international law standards to regulate MNCs.<sup>224</sup> Among other things, the OECD declaration aimed to liberalise transnational investments and introduced guidelines for business to maximise 'the positive contribution which multinational enterprise can make towards economic and social progress'.<sup>225</sup> With a revision in the year 2011 that incorporated human rights standards, the guidelines were generally acceptable to states as it covered most areas of transnational enterprise like technology, environment and labour rights. In addition, monitoring mechanisms was developed that empowered states to administer and 'contribute to the

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<sup>223</sup> Kamminga, M. T., 'Corporate obligations under international law' (2004) Submission to the Office of the United Nations High Commissioner for Human Rights

<sup>224</sup> OECD Declaration on International Investment and Multinational Enterprise, First adoption by the Governments of OECD Member countries on 21 June 1976 (Revisions in 1979, 1984, 1991, 2000 and 2011)

<sup>225</sup> Ibid. 224 above, Preamble

resolution of issues that arise relating to the implementation of the Guidelines in specific instances'.<sup>226</sup>

Another significant measure that was developed in a bid to regulate MNCs was the United Nations Global Compact which was launched in the year 2000.<sup>227</sup> With over ten thousand members from 130 signatory states, the instrument is the largest voluntary measure that regulates MNCs. Similar to the previous attempts, the Global Compact contains ten principles that covers a wide range of areas such as human and labour rights, environment, anti-corruption, procedure and sanctioning clauses.<sup>228</sup> As encapsulated in its name, the Guiding Principles are simply best practice principles that are expected to be voluntarily complied by MNCs, thus there are no punitive consequences for non-compliance.

Consequent upon these failures and with renewed impetus to prevent abuses of human rights by MNCs, the 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprise with Regard to Human Rights' was formulated under the auspices of the United Nations Sub-Commission on the Promotion and Protection of Human Rights in 2003.<sup>229</sup> This initiative aimed to eliminate the abuse of human rights by MNCs.<sup>230</sup> Despite expressing appreciation for the work of the Sub Commission for their efforts in drafting the framework as it contained useful elements and ideas for consideration, the UN however

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<sup>226</sup> See OECD Guidelines, 'Implementation Procedures' (2008), Part II, pp.27-33

<sup>227</sup> United Nations Global Compact Basic Guide, 'Communication on Progress' (2012) available at: [https://www.unglobalcompact.org/docs/communication\\_on\\_progress/Tools\\_and\\_Publications/COP\\_Basic\\_Guide.pdf](https://www.unglobalcompact.org/docs/communication_on_progress/Tools_and_Publications/COP_Basic_Guide.pdf) (Accessed 23/11/2020).

<sup>228</sup> United Nations, 'The Ten Principles of the UN Global Compact' (2000), Available at <https://www.unglobalcompact.org/what-is-gc/mission/principles> (accessed on 23/11/2020)

<sup>229</sup> Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights: draft Norms / submitted by the Working Group on the Working Methods and Activities of Transnational Corporations pursuant to resolution 2002/8

<sup>230</sup> Ibid. 229 above, Preamble

averred that it had no legal standing. Further significant effort to remedy the gap in the regulation of MNCs was through the framework developed by the Special Representative of the Secretary-General (SRSG) of the United Nations, John Ruggie in 2005. The SRSG was mandated to resolve the problem between multinational enterprise and human rights. This led to the development of conceptual principles that was premised on three pillars; protect, respect and remedy.<sup>231</sup> Despite the promises of this Ruggie Framework, it however suffered from the deficiencies of the previous efforts; a lack of enforcement mechanism as they are all voluntary and soft law.

The soft law nature and voluntary compliance method of regulating MNCs has therefore left a gap on how to control them. This subject of control has resulted in uncontrolled exploitation with its attendant consequences on host states. In Africa, the negative consequences of lack of enforcement mechanism of these codes has led to damages to the environment and abuses of human rights.<sup>232</sup> Within the sphere of foreign investments, multinational companies have transformed into powerful entities that distort the social and political demography of their host states. Thus, they intrude on the regulatory powers and internal policy-making measures of African States. For example, states like Egypt, South Africa, Libya, Tanzania, Nigeria and Congo faced arbitral actions from multinational companies for policy decisions that were made by their governments.<sup>233</sup> When viewed from the lens of legality, some of these investment decisions may have covertly been championed by multinational companies

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<sup>231</sup> United Nations, 'Guiding Principles on Business and Human Rights' (2011), Available at [https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf) (accessed on 23/11/2020) - 'The United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework", was developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The Special Representative annexed the Guiding Principles to his final report to the Human Rights Council (A/HRC/17/31), and includes an introduction to the Guiding Principles and an overview of the process that led to their development. The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011'

<sup>232</sup> See Osabuohien, E. S., Efobi, U. R., & Gitau, C. M., 'External intrusion, internal tragedy: environmental pollution and multinational corporations in Sub-Saharan Africa (2013) In Principles and strategies to balance ethical, social and environmental concerns with corporate requirements. Emerald Group Publishing Limited.

<sup>233</sup> See ICSID, 'The ICSID caseload - statistics 2020-2 (2020) at 24 – on Africa's share of ISDS cases



through their involvement in internal decision-making of states. Despite such interferences, the MNCs resort to international arbitration and file claims when these African states, complemented by their weak institutional structures, cancels any investment agreements for the greater good of their citizens.

Sequel to this gap in developing a mechanism that will hold MNCs accountable for the wrongs committed by them, several academics has differed on the way forward. Whilst some have commented that the soft law measures are no longer fit for purpose, thereby calling for punitive approaches, others have disagreed; opining that multinational corporations cannot bear international obligations.<sup>234</sup> The latter view argues that states are the only bearers of responsibilities to protect their territories as sovereign entities. In addition, the idea of imposing international obligations on MNCs have been argued as inimical to the progressive business, especially since shareholder primacy proponents believe that the essence of conducting business is to make profit and not to engage in extraneous activities like corporate social responsibility.<sup>235</sup> Similarly, Thirarungrueang argued that the imposition of CSR as an international responsibility on corporations will be difficult to implement due to the divergence in development between emerging economies and develop states.<sup>236</sup>

On the thrust of these arguments, it is evident that these international frameworks failed because of lack of enforcement mechanisms to hold MNCs accountable for the wrongs that they commit. This failure to devise an international minimum standard is also evident in the

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<sup>234</sup> See Phillip Blumberg, 'Accountability of multinational corporations: the barriers presented by concepts of the corporate juridical entity' *Hastings Int'l & Comp. L. Rev.*, 24, 297, See also generally, Elisa Morgera, 'Corporate accountability in international environmental law' (2020) 2 Oxford University Press.

<sup>235</sup> Milton Friedman, 'The Social Responsibility of Business is to Increase its Profits' (1970), *The New York Times Magazine* 1-6

<sup>236</sup> See in general Kunnawee Thirarungrueang, 'Rethinking CSR in Australia: Time for Binding Regulation?' [2013] 55(3) *International Journal of Law & Management* 173

early generation International Investment Agreements. The futility of these international treaties to hold MNCs accountable, it can be argued, is the reason behind the continuous degradation of the environment and abuse of human rights in the pursuit of corporate enterprise. But, such regime of ineffectiveness cannot be allowed to continue unabated. Hence, new generation investment agreements such as Bilateral Investment Agreements (BITs) included innovative clauses that imposed obligations on MNCs. For example, Article 24(1) of the Nigeria-Morocco BIT, expects investors to ‘strive to make the maximum feasible contributions to the sustainable development of the Host State and local community through high levels of socially responsible practices’, and ‘Where standards of corporate social responsibility increase, investors should strive to apply and achieve the higher level standards’.<sup>237</sup>

Similarly, the COMESA CCA contains rights and more importantly, obligations which investors are expected to adhere and execute, and these covers human rights, anti-corruption and environmental protection.<sup>238</sup> The inclusion of novel clauses in model BITs and other IIAs is therefore a recognition of the debilitating impact of transnational corporate activities on corporations. Furthermore, it is a reinforcement of the ineffectiveness of first generation investment agreements and international customary law to effectively checkmate the activities of multinational corporations.

Consequent upon the information in chapter one that investor-state disputes arises from the dissatisfaction of MNCs on policy and legitimate decisions taken by African states, the need

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<sup>237</sup> Morocco – Nigeria BIT (2016), Article 24(3)

<sup>238</sup> See COMESA CCA – Article 7(1)(3) and Article 22(c)

to develop standardised methods of regulating them is therefore necessary and required for the Continent. Based on this, innovative treaty-making measures should continue to be embraced by African states if their legitimacy to superintend their states will not be eroded by the intrusive nature of MNCs. In addition, this necessity reinforces the argument that African states must own the adjudicatory arm of investor-state disputes resolution towards incorporating domestic realities.<sup>239</sup> The development of this adjudicatory arm is the theme of this thesis towards better regulation of multinational corporate investments.

### 3.4. Arbitral tribunals and investment dispute resolution

Sequel to the failure of public international law to equitably settle investment disputes between African states and foreign investors, the investor-state dispute settlement mechanism was therefore deployed as standardised method of resolving investor-state disputes.<sup>240</sup> Although investment disputes are public matters, the recourse to arbitration was inevitably an action of last resort in view of the ineffectiveness of public international law.

Despite the promises of investor-state disputes as a means of administering over three thousand international investment agreements, however, the system has been beclouded by criticisms of inequality and unfairness against capital-importing continents like Africa.<sup>241</sup> Many states within the African and Latin American continents have voiced their objection on

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<sup>239</sup> Chrispas Nyombi, 'Towards a New World Economic Order: Proposal for a Pan-African Investment Court' (2018) Emilia Onyema "Rethinking the Role of African National Courts in Arbitration" Wolters Kluwer Law & Business.

<sup>240</sup> Ben Juratowitch, 'The Relationship between Diplomatic Protection and Investment Treaties' [2008] 23(1) ICSID Review - Foreign Investment Law Journal, 10–35, See also the Ruling of the ICJ in Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)

<sup>241</sup> See Gus. Van Harten, Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law, in International Investment Law and comparative public law (Thomas Wälde & Stephan W. Schill eds., Oxford University Press, 2010)

the functioning of ISDS, opining that the system is pseudo colonialism as most arbitral awards are in favour of foreign investors.<sup>242</sup>

This dissatisfaction of capital-importing states against investor-state arbitration have precipitated the calls for an investment court system.<sup>243</sup> The criticisms against investor-state arbitration as a means of resolving investment disputes are premised on four broad but interrelated reasons. These reasons are:

1. The high number of ISDS claims against host states
2. The inconsistent interpretation and decision-making of IIAs by arbitral tribunals
3. The limitation of the regulatory powers of host states
4. The lack of diversity in the constitution of arbitral tribunals

### 3.5. The high number of ISDS claims against host states

Investor-state dispute cases are instituted on the basis of legitimate expectations and substantive protections in international investment agreements. Globally, the number of these cases have eclipsed the one thousand mark, with a majority of them brought within the

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<sup>242</sup> See Rachel Wellhausen, 'Recent Trends in Investor–State Dispute Settlement' [2016] 7(1) *Journal of International Dispute Settlement*, 117–135 – on the trends and motivations behind the dissatisfaction of both continents, Sachet Singh and Sooraj Sharma, 'Investor-State Dispute Settlement Mechanism: The Quest for a Workable Roadmap' (2013) *Merkourios-Utrecht J. Int'l & Eur. L.*, 29, 88.

<sup>243</sup> See Chrispas Nyombi and Mortimer, 'Towards a new world economic order: proposal for a world investment court' (2019) 3 *Journal of business law* (London) 200–222

last decade and on the altar of clauses like FET and expropriation.<sup>244</sup> According to the UNCTAD, the number of publicly known ISDS cases as at 1<sup>st</sup> January 2020 is one thousand and twenty-three.<sup>245</sup> Within this number, African states and other developing continents have feared worse with a larger chunk of arbitral actions.<sup>246</sup> As opined by Eric De Brabandere,<sup>247</sup> this high number of ISDS cases, mostly against developing states, is a reflection of the provisions of old generation BITs and are ineffective in protecting the interests of host states. Thus, investors leverages on the non-imposition of obligations on them and the eagerness of developing states to attract FDIs, to ensure that old generation investment agreement provisions were favourable to them at the consummation stages. Hence, innovative treaty- making mechanisms and imposition of obligations on investors has been pursued with vigour in recent years.<sup>248</sup>

In regards to the percentage share of the cases, evidence from the ICSID investor-state dispute settlement caseload, shows that developing states were defendants in over sixty per cent of the cases administered by ICSID as at December 2019.<sup>249</sup> The geographical distribution of these cases shows that Sub-Saharan Africa were the third most litigated continent at fifteen per cent, behind South America's twenty-three per cent and Eastern Europe & Central Asia's twenty-six per cent. Further distribution of the cases evidences that Middle East & North Africa were impacted by eleven per cent, Western Europe had eight per cent, North America (Canada, Mexico & U.S.)'s share is four per cent while South Asia and Pacific saw seven per cent.<sup>250</sup> Arising from this geographical distribution of the cases, it is

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<sup>244</sup> UNCTAD, "World Investment Report 2020 | International Production Beyond the Pandemic" <<https://unctad.org/webflyer/world-investment-report-2020>> accessed November 23, 2020, at 110

<sup>245</sup> UNCTAD, 'World Investment Report 2020 International Production Beyond the Pandemic' (2020), Available at [https://unctad.org/system/files/official-document/wir2020\\_en.pdf](https://unctad.org/system/files/official-document/wir2020_en.pdf) (accessed on 17th October 2020)

<sup>246</sup> See chapter [1.4] on investor-state caseload, pp. 110, 128

<sup>247</sup> Eric De Brabandere, Fair and Equitable Treatment and (Full) Protection and Security in African Investment Treaties Between Generality and Contextual Specificity, *JWT* 18 (2017) 530, 536

<sup>248</sup> For instance, several developing states such as South Africa have enacted new investment laws that reformed their old treaties through the introduction of novel clauses

<sup>249</sup> See ICSID Caseload - Statistics, Issue 2020-1 at 12

<sup>250</sup> *Ibid.* 249 above

evident that an aggregation of the percentage cases of Sub-Saharan and North Africa will average a twenty-six percentage share of the global ICSID administered cases. In contrast, the percentage share of Western Europe and North America, regions that are classified as developed states, is twelve per cent; thus evidences a huge disparity between African states with those of other continents.

Similarly, the UNCTAD investment report 2020 shows that there have been one thousand and twenty-three ISDS cases since the year 1987, with six hundred and seventy-four concluded, as of January 1<sup>st</sup> 2020.<sup>251</sup> This figure excludes the confidential cases that are not publicly disclosed, settled or discontinued. Within this number, one hundred and twenty countries and one economic group have been respondents in at least one or more cases. Likewise, seventy-one cases, of which information on thirty-nine were publicly disclosed, were decided substantively in 2019.<sup>252</sup> The outcomes show that fourteen of the thirty-nine which hinged on jurisdictional grounds were majorly in favour of states. Thus, while nine were thrown out by arbitral tribunals for lack of jurisdiction, five were accepted and upheld.<sup>253</sup> Therefore, with over fifty per cent of the cases that were initiated on jurisdictional grounds resolved in favour of states, it can be argued that the claim of bias of investment arbitration against host states is unfounded.

But, the UNCTAD report also showed that of the Twenty-five cases that were decided on their merits in 2019, fourteen were in favour of investors while eleven were dismissed in favour of host states. Some of the amounts awarded in favour of investors showed that USD

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<sup>251</sup> UNCTAD, World Investment Report: International production: A Decade of Transformation ahead. 2020, Imprint: Geneva, United Nations, pp. 110.

<sup>252</sup> See UNCTAD, 'Investor-State Dispute Settlement cases pass the 1,000 mark: Cases and outcomes in 2019, Available at <https://unctad.org/system/files/official-document/diaepcbinf2020d6.pdf> (accessed on 07 July 2021), pp. 1

<sup>253</sup> Ibid. 251 above, pp. 111, 129

7.9 million was awarded to the investor in *Magyar Farming and others v. Hungary*, USD4 billion in *Tethyan Copper v. Pakistan* and USD 8.4 billion in *ConocoPhillips v. Venezuela*.<sup>254</sup> As such, this disparity in favourable decisions between states and investors, as well as the huge awards in favour of the latter are further pointers that host states are prone to lose more cases that are not encumbered by technicalities.

In a further reinforcement of the argument of the imbalance of ISDS against host and developing states, the UNCTAD investment report 2020 also shows that seventy per cent of the fifty-five publicly disclosed cases that were commenced in the year 2019 was instituted by investors from developed countries.<sup>255</sup> Although these 2019 cases were brought against thirty-six countries and the European Union as an economic grouping, however, eighty per cent were instituted against developing states and transition economies, with investors from the UK and US commencing seven arbitral actions respectively.<sup>256</sup> While the EU was confronted with its first arbitral action, states like Mexico, Colombia, Peru and Spain were confronted with three claims respectively.

On investment agreements that were litigated upon, the ICSID Caseload statistics<sup>225</sup> evidences that BITs occupied the largest chunk with over sixty per cent, contractual investment cases were sixteen per cent, the Energy Charter had nine per cent, National investment law saw nine per cent, NAFTA had three per cent, Dominican Republic-United States-Central America Free Trade Agreement were one per cent and Other Treaties were also two per cent.

When viewed from the lenses of volume of global FDI attraction at Nine point four per cent and GDP contribution at thirty-eight point six per cent for African states in 2019,<sup>257</sup> then the

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<sup>254</sup> Ibid. 250 above, Chapter III Recent Policy Developments and Key Issues, pp. 111, 129

<sup>255</sup> UNCTAD, 'Investor-state dispute settlement cases pass the 1,000 mark: Cases and outcomes in 2019' (IIA Issue Note July 2020)

<sup>256</sup> Ibid. 255, pp. 111, see also ICSID Caseload - Statistics, Issue 2020-1 at 11

<sup>257</sup> Ibid. 255 above

imbalance in ISDS cases against the continent is put into proper perspective. For example, Asia attracted thirty point eight per cent of the global FDI inflow in 2019 and this contributes twenty-nine point six per cent to the GDP of the economies of its continent, Latin and South America attracted fifteen point one per cent and fifteen point two per cent of the global FDIs respectively.<sup>258</sup> However, these latter regions have lower comparative IIA consummation to Africa. As such, the imbalance in FDI attraction, contribution to GDP and number of arbitral claims suggests that African states have valid grounds to be dissatisfied.

Due to this imbalance between the number of investor-state dispute cases against host states in general and African states in particular, vis-à-vis the inflow of FDIs, it is therefore clear that the continent should formulate measures to limit its exposure to investor arbitral claims. Towards achieving this objective, African states have begun piecemeal engagement in innovative treaty-making practices through the insertion of protectionist clauses in its new generation investment agreements. These are reflected in the COMESA CCIA, Morocco-Nigeria Model Bit 2016 and South Africa's Protection of Investment Act 2015.<sup>259</sup> Some of the novel clauses includes provisions for the preliminary review of cases prior to ascension to investment arbitration as provided in part four of the Morocco-Nigeria.<sup>260</sup> This part of the agreement also provides for the establishment of a Joint Committee to midwife the administration of the treaty.

Similarly, and in a novel departure from old generation BITs, the Morocco-Nigeria BIT also provides for the assessment of any investment dispute through consultations and negotiations by a Joint Committee of both states before ascension to investment arbitration.<sup>261</sup> This

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<sup>258</sup> UNCTAD, 'Investor-state dispute settlement cases pass the 1,000 mark: Cases and outcomes in 2019' (IIA Issue Note July 2020)

<sup>259</sup> See chapter [1.5] on innovative treaty-making practices

<sup>260</sup> See Article 26 of the Morocco-Nigeria BIT 2011 on Disputes Prevention

<sup>261</sup> Ibid. 260 above – Article 4



exhaustion of local remedies clause is an opportunity for the informal resolution and assessment of merits of a case before the commencement of arbitral proceedings. Furthermore, other non-binding Alternative Dispute Settlement (ADR) measures such as mediation and conciliation are also captured in some of these new generation investment agreements.

It is anticipated that innovative treaty-making practices will eliminate the legitimacy crises of ISDS and reduce the high volume of investment arbitration cases against African states. Despite the promises of these innovative treaty-making initiatives however, evidence shows that the status quo has remained. For example, of the one thousand and twenty-three ISDS cases as at 1<sup>st</sup> January 2020, the report of the UNCTAD shows that African states were involved in one hundred and eleven of them as respondents.<sup>262</sup> In contrast, African states were claimants in just sixteen cases.<sup>263</sup> When compared with the USD 45 billion worth of FDI inflow into the continent within the same period, it shows an unequal volume of arbitral cases and FDI attraction. Therefore, the necessity for a change in policy direction and regulation of Africa's international investment dispute architecture cannot be overemphasised. This summary remains appropriate despite the fact that Latin American states were respondents in a higher number of cases because,<sup>264</sup> they attracted more FDI inflow in comparison to their relative low number of IIAs within the same period.

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<sup>263</sup> UNCTAD, 'Investment Dispute Settlement Navigator' (2020), Available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/advanced-search> (Respondents) and <https://investmentpolicy.unctad.org/investment-dispute-settlement/advanced-search> (claimants), (accessed on 23/11/2020)

<sup>264</sup> UNCTAD, 'Investment Dispute Settlement Navigator' (2020), Available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/advanced-search> (Respondents) and <https://investmentpolicy.unctad.org/investment-dispute-settlement/advanced-search> (Claimants). Latin America have been respondents in Two hundred and thirty-three and claimants in just Twenty-three cases. But, the UNCTAD investment flow charts shows that they attracted more FDI than African states, despite having similar number of IIAs.

Towards rebalancing the African investment regulatory space therefore, it can be argued that a change to an investment court system is desirable as the legitimacy crises of ISDS is not serving the interests of African states. The formulation of an Investment Court System will incorporate local realities and instil legitimacy in investment dispute resolution through a publicly agreed codified and unified investment treaty. In addition, it will also limit the continent's exposure to high investment dispute claims whilst promoting the continuous attraction of foreign investment. Furthermore, it will rebalance the skewed appointment of arbitrators, thereby resolving the diversity problem of ISDS.

My proposal draws support from similar initiatives in other jurisdictions. For example, there is a provision for an Investment Court System (ICS) in the EU-Canada Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada.<sup>265</sup> In section F on Resolution of investment disputes between investors and states in the CETA, it is stated that, 'an investor of a Party may submit to the Tribunal constituted under this [agreement]'.<sup>266</sup> Furthermore, in addition to mediation and consultation, it provided that, 'An investor may only submit a claim pursuant to [a dispute] if the investor delivers to the respondent, with the submission of a claim, its consent to the settlement of the dispute by the Tribunal in accordance with the procedures set out [in the agreement]'.<sup>267</sup> Similarly, the agreement also provides for review of awards of the tribunal of First Instance by stating that 'An Appellate Tribunal is hereby established to review awards rendered'.<sup>268</sup>

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<sup>265</sup> European Commission, 'Commission presents procedural proposals for the Investment Court System in CETA' (2019), Available at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2070> (Accessed on 08 October 2019)

<sup>266</sup> Article 8.18, EU-Canada Comprehensive Economic and Trade Agreement

<sup>267</sup> Ibid. 266 above, Article 8.22

<sup>268</sup> Ibid. 266 above, Article 8.28

These provisions in the CETA for a tribunal and formalised structures are clear signals that several jurisdictions, including developed countries whose nationals have been more successful in investment arbitration, are also dissatisfied with the system. Indeed, countries like France, Finland and Austria have buttressed the need for a court system by arguing for a Unified Patent Court, which is akin to an investment court, as a means of resolving intra-EU BIT issues.<sup>269</sup> Nonetheless, the experiences of European states also underpin their proposal for an EU Investment Court System. According to the UNCTAD,<sup>270</sup> five European states are among the twelve highest respondents' states between 1987-2019. Correspondingly, twenty-three EU states recently assented to the termination of intra-EU BITs in response to the decision in the Achmea case,<sup>271</sup> which held that the inclusion of ISDS in intra-EU BITs were unlawful.<sup>272</sup> Consequent upon these experiences of some EU states in ISDS, it is evident that the motivations behind my proposal are also experienced in other jurisdictions.

Overall, the statistics on ISDS cases as analysed in this section shows a disproportionate number of cases against host, developing and African states in comparison to other jurisdictions. Although the data shows that host states have won more cases, however, their high exposure to ISDS claims is one of the reasons behind the dissatisfaction with the current investment arbitration system. In addition, the relative number of cases that have been won by investors have exposed host states to the payment of huge monetary awards, hence, the continuous operation of the arbitration system cannot be justified. Furthermore, the areas that have been litigated the most are economic areas where African states holds comparative advantage, thus, remains susceptible to investment arbitration claims. As such, it is necessary

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<sup>269</sup> See Vanessa Naish & Elizabeth Reeves 'The future of ISDS in the EU: leaked non-paper reveals proposal for EU-wide investment agreement' Herbert Smith Freehills LLP, 31 May 2016

<sup>270</sup> UNCTAD, 'Investor-state dispute settlement cases pass the 1,000 mark: Cases and outcomes in 2019' (IIA Issue Note July 2020)

<sup>271</sup> Slovak Republic v. Achmea B.V. (Case C-284/16)

<sup>272</sup> Ibid. 270 above, pp. 4

that African states should not insulate itself from the novel reform devolvments in international investment law; as the accumulation of a huge number of ISDS cases, in comparison to low FDI inflow, does not serve the sustainable developmental interests of the continent.

### 3.6. The inconsistent interpretation and decision-making of IIAs by arbitral tribunals

As a general rule, international treaties are interpreted under the guidance and auspices of the Vienna Convention on the Law of Treaties (VCLT).<sup>273</sup> At the core of the VCLT is to ensure certainty and coherence in the interpretation of international agreements and treaties between states,<sup>274</sup> hence it embodies rules and procedures on the drafting, definition and interpretation of treaties. Thus, in Section Three: Article thirty-one on interpretation of treaties, the Convention provides that ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. In such interpretation, the Convention also explains that ‘Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning’.<sup>275</sup>

Since investment agreements are international treaties, it is expected that their interpretation will be guided by the above provisions of the VCLT and therefore; enshrine certainty and

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<sup>273</sup> United Nations, 'Vienna Convention on the law of treaties (with annex)' (1969) No. 18232, There is also the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations which aims to govern agreements between states and international organisations. However, this latter instrument is not yet in force.

<sup>274</sup> See Sinclair, I. M., & Sinclair, I. R., 'The Vienna Convention on the law of treaties' (1984) Manchester University Press.

<sup>275</sup> Ibid. 273 above, Article 32 on supplementary means of interpretation

coherence in investor-state arbitration. But, this has not been the case as the system is beclouded by 3,284 IIAs with its differing provisions and objectives. This volume of IIAs has therefore led to difficulties and inconsistencies in interpretation by ad hoc arbitral panels. For instance, the decisions in the cases of *CME v. Czech Republic*<sup>276</sup> and *Lauder v. Czech Republic*<sup>277</sup> are vivid examples of this inconsistency in interpretation, despite being cases of similar factual issues. This inconsistency in the interpretation of IIAs has been described as the ‘the ultimate fiasco in investment arbitration’.<sup>278</sup>

Ultimately, some of the reasons behind the inconsistency in arbitration can be ascribed to the ad hoc nature of the panels and lack of precedent in the resolution of investor-state disputes. As evidenced in the *CME* and *Lauder* cases,<sup>279</sup> an investor who invested through a company had instituted claims in a different forum under the United Nations Commission on International Trade Law (UNCITRAL) Rules, whilst the company also made claims in a different forum under the International Centre for Settlement of Investment Disputes (ICSID) convention. This elicited different arbitral awards, thus creating difficulties in enforcement.

In view of the risk of inconsistent interpretation of investment agreements, perhaps, a remedy would have been the inclusion of a comprehensive appeal process that will allow for a review of arbitral awards. However, there is no Appeal Mechanism as the finality of awards is a

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<sup>276</sup> *CME Czech Republic B.V. v. The Czech Republic*, (1976) UNCITRAL

<sup>277</sup> *Ronald S. Lauder v. The Czech Republic*, (2001) UNCITRAL

<sup>278</sup> Buffard Isabelle, James Crawford, Gerhard Hafner and Alain Pellet *International law between universalism and fragmentation: festschrift in honour of Gerhard Hafner*. (BRILL, 2008), 116

<sup>279</sup> *CME Czech Republic B.V. v. The Czech Republic*, (1976) UNCITRAL, *Ronald S. Lauder v. The Czech Republic*, (2001) UNCITRAL

fundamental principle of arbitration.<sup>280</sup> The investor-state arbitration framework only allows appeals in limited circumstances. For instance, the ICSID convention allows for annulment proceedings to be commenced about decisions of the tribunals of first instance on questions of law only and not of fact.<sup>281</sup> Thus, reviews are not based on the substantive issues but rather on the procedural application of the rules of the Convention. Some of the permitted grounds for annulment proceedings includes corruption, irregular constitution of a panel, *ultra vires*, wrong application of a fundamental rule and non-provision of basis and reason for an award.<sup>282</sup> Evidently, the annulment proceedings can therefore be described as cosmetic; since a review will not examine the substantive issues behind a case. In fact, the permission of annulment proceedings under the ICSID convention can be regarded as conciliatory since other forums like the UNCITRAL Model Law on International Commercial arbitration do not permit a review under whatsoever guise.<sup>283</sup>

The absence of an Appeals Mechanisms is therefore one of the shortcomings of investor-state arbitration. Several commentators have criticised this gap in the system, opining that the right to appeals is a fundamental aspect of dispute resolution.<sup>284</sup> This is more exacerbated by the one-way method of instituting proceedings in arbitration which permits only foreign investors to commence arbitral claims. Despite the participation of states in the selection of forums and appointment of arbitral panel members, however, this exercise of their party autonomy rights is not enough without the ability to commence proceedings themselves.

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<sup>280</sup> Ian Laird, Rebecca Askew, 'Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System' (2005) *J. App. Prac. & Process*, 7, 285.

<sup>281</sup> Section 5, Article 52(1), ICSID Conventions, Regulations and Rules 2006, ICSID/15

<sup>282</sup> *Ibid.* 280 above, (a-e)

<sup>283</sup> See Article 34(2), UNCITRAL Model Law on International Commercial arbitration

<sup>284</sup> See United Nations Commission on International Trade Law, 'Possible reform of investor-State dispute settlement (ISDS): Appellate mechanism and enforcement issues' (2020) Draft Working Paper 1-19, Available at [https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state) (Accessed on 06/08/2020), Roberts, A., 'Incremental, systemic, and paradigmatic reform of investor-state arbitration' [2018] 112(3) *American Journal of International Law* 410-432

Moreover, the retinue of resolved cases shows a disproportionate success rate in favour of foreign investors. In the absence of an appeals mechanism, host states are thus left with no choice than to accept all decisions, no matter how manifestly unjust and incorrect.

This high success rate of investors in investor-state arbitration, it can be argued, is an oblique way of sustaining the confidence of investors in the system and maintaining the inflow of income by arbitrators. Essentially, the accusation of bias against investor-state arbitration is an issue that touches on several misdemeanour including corruption. More importantly, the absence of an Appeals Mechanism to review the substantive issues in dispute, prevents the chance of a second scrutiny on the decisions of arbitral tribunals.

This absence is unlike the Investment Court System which will incorporate a Tribunal of First Instance and an Appellate Tribunal. Thus, the issue of inconsistency in the interpretation of investment treaties is one of the criticisms of ISDS and has shaped its devolvement since the early Twentieth Century. Inevitably, it ranks high among the reasons behind the reform of investor-state arbitration.

### [3.7. The limitation of the regulatory powers of host states](#)

As stated in subsection one above, one of the negative impacts of multinational corporation is their intrusive nature in the internal affairs and policy-making obligations of host states. As a developing continent, Africa is still confronted with the challenge of instability and weak

institutional structures.<sup>285</sup> This spectacle is evidenced through the political upheaves, protests and instability that elicits reversals and changes in policies. However, these changes in policies results to arbitral claims as investors regard them as breaches of substantive protections in IIAs.<sup>286</sup> Due to this risk of arbitral claims from investors, African states are constrained from making legitimate socio-economic decisions in their states.

This problem is exemplified through arbitral claims that ensued after the Arab Spring political revolutions in North Africa, armed conflicts and civil unrests in other parts Africa. For instance, in the case of *Veolia*,<sup>287</sup> an investor argued that a stabilisation provision in an agreement which was reversed by the then new Egyptian president Mohammed Morsi, in the aftermath of the toppling of the Mubarak regime, required the government to compensate them for the increase in minimum wage. Similarly, the cases of *American Manufacturing & Trading, Inc v. Republic of Zaire*<sup>288</sup> and *Wena Hotels Ltd v. Arab Republic of Egypt*<sup>289</sup> were a direct correlation of armed insurrection and civil conflicted within the continent.

In the *American Manufacturing & Trading* case, an investor claimed for USD21.50M but was awarded USD 9.00M on the basis of full security when the military of the host state invaded and looted their investment. This is despite the fact that the state did not send the soldiers and had no capacity to provide the expected full security due to armed conflict. Similarly, the investor in *Wena Hotels Ltd.* claimed for USD62.80M but was awarded

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<sup>285</sup> Gadong Dalyop, 'Political instability and economic growth in Africa' (2019) 13 *International Journal of Economic Policy Studies*, 217–257

<sup>286</sup> Engela Schlemmer, 'An Overview of South Africa's Bilateral Investment Treaties and Investment Policy' [2016] 31(1), *ICSID Review - Foreign Investment Law Journal* 167–193, on how policy reversals exposures states such as South Africa

<sup>287</sup> *Veolia Propreté v. Arab Republic of Egypt* (ICSID Case No. ARB/12/15)

<sup>288</sup> *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1

<sup>289</sup> *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4



USD8.00M for a change of ownership in a hotel that was owned by the Egyptian government. This is despite the fact that that the decision of the state was in the best interest of its citizens and country. Just recently, Nigeria was taken to investment arbitration for an oil and gas contract that was seemingly consummated by a previous government. The investor argued that Nigeria did not execute its side of the agreement, hence was awarded USD9.98BN as compensation.<sup>290</sup> This case is still ongoing as the Nigerian government has appealed this award in the conventional courts; arguing that the contract was consummated illegally and also that the investor reneged on its side of the agreement.

The corollary of these examples is clear; African states cannot make legitimate democratic decisions without the risk of costly arbitral actions by investors. Further examples abound which shows that FET is the most litigated clause by investors.<sup>291</sup> Fair and Equitable Treatment provisions in IIAs are more difficult to ascertain by states because there is no objective standard in assessing them.<sup>292</sup> It rests entirely the on subjectivity of arbitral panels; hence African states have been confronted with several claims about FET. For example, Egypt and Uganda are still confronted with four pending arbitral claims that hinges on this clause. Indeed, FET and Full Security has been argued to be the most potent provision to safeguard and secure foreign investments in international investment law.<sup>293</sup> For instance, in *Waguhi Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*,<sup>294</sup> the state was

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<sup>290</sup> See William Clowes, 'Nigeria Seeks Bank Documents to Overturn \$9.6 Billion P&ID Case' (2020) Bloomberg, Available at <https://www.bloomberg.com/news/articles/2020-04-28/nigeria-seeks-bank-documents-to-overturn-9-6-billion-p-id-case> (accessed on 20/08/2020), Karin Strohecker and Libby George, 'UK judge to allow Nigeria to appeal ruling on \$9 billion P&ID case' (2020) Reuters, Available at <https://www.reuters.com/article/us-nigeria-arbitration/uk-judge-to-allow-nigeria-to-appeal-ruling-on-9-billion-pid-case-idUSKBN1WB1VZ> (Accessed on 20/08/2020)

<sup>291</sup> See the North African cases of *LESI SpA and ASTALDI SpA v. République Algérienne Démocratique et Populaire*, ICSID Case No ARB/05/3, Award (12 November 2008) and *Lundin Tunisia BV v. Republic of Tunisia*, ICSID Case No ARB/12/30, Award (22 December 2015).

<sup>292</sup> Ioana Tudor, 'The fair and equitable treatment standard in the international law of foreign investment' (2008) Oxford University Press on Demand – Discussed extensively on FET provisions, their scope and differing interpretations

<sup>293</sup> Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 255

<sup>294</sup> *Waguhi Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15

ordered to return the expropriated property of the investors on the basis of Full Security and protection as contained in Article 4(1) of the Italy-Egypt BIT.

On the thrust of these cases therefore, it has been shown that the intrusion of foreign investors on the regulatory powers of host states is an issue that confronts investor-state arbitration. Similar to high volume of cases and inconsistent interpretation of IIAs; the curtailment of regulatory powers of governments have also contributed to the calls for the reform of ISDS. As aforesaid, African states are not left behind in these reform efforts through their engagement in innovative treaty-making practices. Despite such reform endeavours however, the continent is still limited by lack of ownership of the adjudicator and interpretive aspects of investor-state dispute settlement. Hence, Eric De Brabandere commented that the states of the continent ‘do not generally deviate from existing conceptions of FET and [by extension, other provisions of old general treaties], in the sense that there does not seem to be any Africa-specific conception of the FET and [by extension, other provisions of old general treaties], standards of treatment’.<sup>295</sup> Thus, a total departure from the piecemeal reforms of ISDS is necessary and this can be achieved through a Pan-African Investment Court.

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<sup>295</sup> Eric De Brabandere, Fair and Equitable Treatment and (Full) Protection and Security in African Investment Treaties Between Generality and Contextual Specificity, *JWT* 18 (2017) 530, 538

### 3.8. The lack of diversity in the constitution of arbitral tribunals

Lack of diversity is also another topical issue that has featured predominantly in the evolutionary journey of international investment law. As a party appointed ad hoc system, investor-state arbitration has been criticised for lack of diversity in gender, experience and geographical membership of arbitral panels.<sup>296</sup> According to Bjorklund and others,<sup>297</sup> lack of diversity is an issue that confronts arbitration globally. In consequence, they affirmed that it has negatively impacted on ISDS as it ‘affects the real and perceived legitimacy of the system’; and thus leads to accusations of arbitrator bias.

Without admitting this view on face value, the statistics on origin of arbitrators evidences that they are disproportionately from the Global North. Despite some semblance of reforms, gender deficit remains a reoccurring decimal in the constitution and make-up of arbitrators in investor-state arbitration.<sup>298</sup> Lack of diversity is also further evidenced within the Global North itself, as only a handful of experienced arbitrators are appointed within its fold. Although lack of diversity may be a consequence of the party autonomy principle inherent in commercial agreements and treaties, however, this argument may be untenable because; the appointment of arbitrators to adjudicate on cases from jurisdiction where they have no knowledge of its local realities cannot be supported on the basis of party autonomy.

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<sup>296</sup> Franck and others, 'The diversity challenge: exploring the invisible college of international arbitration' (2014) *Colum. J. Transnat'l L.*, 53, 429.

<sup>297</sup> Bjorklund and others, 'The Diversity Deficit in International Investment Arbitration' [2020] 21(2-3) *The Journal of World Investment & Trade* 410-440

<sup>298</sup> *Ibid.* 297 above

On gender diversity or lack of it; a study by Langford, Behn and Lie showed that among the twenty-five most influential arbitrators that only two are women.<sup>299</sup> Within this number, twenty-two; representing eighty-eight per cent of the total number are either from the European or North American continent. The other three are from New Zealand, Costa Rica and Chile respectively. There are no women arbitrators from the African and Asian continents whilst an insignificant twenty-two per cent are from three other continents.

Beyond the most influential women arbitrators, evidence on overall representation of women arbitrators in investor-state arbitration also shows a disproportionate inclusion of women. Thus, whilst earlier studies at the turn of the Twenty-First Century put the percentage of women that have adjudicated on ICSID cases at between three per cent to seven per cent,<sup>300</sup> recent research in the year 2017 puts the representation percentage at eleven per cent.<sup>301</sup> Within this number, two women accounts for fifty-seven per cent of all cases and twenty-five have superintended in eighty-six per cent of all cases, thus buttressing the lack of gender diversity in the system.<sup>302</sup> In cases registered under the ICSID Convention and Additional Facility Rules in particular, women have contributed only twelve per cent of arbitrators, conciliators and ad hoc committee members whilst men make up the remaining eighty-eight per cent between the period 1966-2020.<sup>303</sup>

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<sup>299</sup> Malcolm Langford, Daniel Behn & Runer Hilleren Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20 *Journal of International Economic Law* 301, 313

<sup>300</sup> See Susan Franck, 'Empirically Evaluating Claims about Investment Treaty Arbitration' (2007) 86 *NCL Rev.* 1, Gus Van Harten, 'The (Lack of) Women Arbitrators in Investment Treaty Arbitration' (2012) 59 *FDI Perspectives*, Lucy Greenwood and Mark Baker, 'Is the Balance Getting Better? An Update on the Issue of Gender Diversity' (2015) 31 *Arbitration International* 413, Michael Waibel and Yanhui Wu, 'Are Arbitrators Political? Evidence from International Investment Arbitration' (2017) Working Paper 2017

<sup>301</sup> Taylor St. John and others, 'Glass Ceilings and Arbitral Dealings: Gender and Investment Arbitration' (2018) *PluriCourts Working Paper*

<sup>302</sup> Daniel Behn, Malcolm Langford and Laura Létourneau-Tremblay, 'Empirical Perspectives on Investment Arbitration: What do We Know? Does it Matter?' (2020) 22 *Journal of World Investment and Trade*

<sup>303</sup> ICSID, 'The ICSID caseload - statistics 2020-2' (2020)

On the issue of geographical diversity, which is particularly relevant to this thesis, the situation is not different. As at August 2018, sixty-five per cent of the six hundred and ninety-five sole arbitrators that have adjudicated on arbitration cases were from capital-exporting countries. Likewise, thirty-three per cent were from Latin America and the Caribbean while just two per cent were from Sub-Saharan Africa.<sup>304</sup> In cases registered under the ICSID Convention and Additional Facility Rules specifically, Africa has contributed only two per cent of arbitrators, conciliators and ad hoc committee members, in contrast to forty-seven per cent from western Europe and twenty per cent from North America respectively.<sup>305</sup>

Overall, the contribution of just two per cent of appointments by Africa from 1966-2020 puts the subject of lack of diversity in the constitution of arbitral panel members into proper perspective. In addition, the appointments given to arbitrators from capital-importing countries are from respondent states,<sup>306</sup> thus alluding to the fact that foreign investors do not patronise non-Western arbitrators. Further areas of lack of diversity are also evident in terms of age, nationality, professional capacity and linguistic training as they are factors that shapes appointments and reappointment of arbitrators.<sup>307</sup>

Lack of diversity is also prevalent on reappointment of arbitrators. Studies on reappointments also shows similar pattern of events; that most cases are decided by a select group of arbitrators. Thus, Bjorklund and others reported that out of the over seven hundred and sixteen arbitrators that have been involved in investor-state arbitration cases, three hundred

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<sup>304</sup> Daniel Behn, Malcolm Langford & Maksim Usynin, 'Does Nationality Matter? Arbitrator Background and Arbitral Outcomes' (2020) ESIL Annual Conference - Agora 10: Questioning Universality in International Regimes 1-22

<sup>305</sup> ICSID, 'The ICSID caseload - statistics 2020-2' (2020)

<sup>306</sup> Ibid. 304 above, at 37

<sup>307</sup> Susan D. Franck et al, 'The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration' (2015) 53 Colum J Transnatl L 429

and seventy-seven of this number have been reappointed.<sup>308</sup> Similarly, of the three thousand, five hundred and nineteen arbitral appointments that have been consummated, about ten per cent have been appointed once. In contrast, fifty other arbitrators have received one thousand, seven hundred and ten appointments. Evidently, a situation where fifty arbitrators handled nearly fifty per cent of arbitral cases shows that the field is not level for first time entrants in ISDS.

Consequent upon these statistical information, it is clear that lack of diversity is very much reflected in ISDS, hence it has formed part of the evolutionary journey of international investment law. Apart from gender diversity, a cursory review of appointment of arbitrators from Africa shows a huge disparity between appointments and volume of cases against African states. For example, whilst two per cent of sole arbitrators appointed up to August 2018 are from Sub-Saharan Africa, however, African states have been respondents in fifteen per cent of the over one thousand ISDS cases within the same period under review.<sup>309</sup>

This disparity in the constitution of arbitral panels thus underpins why lack of diversity have been an issue in the development of ISDS and international investment law. These criticisms of bias, whether real or imaginative, has also been a permanent feature in literature cited as a corollary for lack of diversity in the appointment of arbitrators.<sup>310</sup> In contextualising the legitimacy concerns of ISDS because of lack of diversity, Bjorklund and others opined that it is based on normative and sociological variables.<sup>311</sup> In essence, this legitimacy concerns are

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<sup>308</sup> Bjorklund and others, 'The Diversity Deficit in International Investment Arbitration' [2020] 21(2-3) *The Journal of World Investment & Trade* 410-440

<sup>309</sup> Bjorklund and others, 'The Diversity Deficit in International Investment Arbitration' [2020] 21(2-3) *The Journal of World Investment & Trade* 410-440

<sup>310</sup> Andrea Bjorklund, 'The Legitimacy of ICSID', in Nienke Grossman et al. (eds), *Legitimacy of International Courts* (Cambridge 2018), Susan Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' [2005] 73(4) *Fordham Law Review* Ford

<sup>311</sup> *Ibid.* 310 above

hinged on whether the exercise of powers to determine public issues can be justified, as well as the perceptions about the exercise of such powers. Thus, Bjorklund explained that, ‘a sound normative justification is likely to improve perceptions about the exercise of sociologically legitimate authority, while strong perceptions about the legitimacy of a system may improve how well authority is exercised, reinforcing the system’s normative legitimacy’.<sup>312</sup>

Overall, the data above provides vivid evidence on why lack of diversity has led to questions of fairness, bias and legitimacy of the ISDS framework. Although this notion may not be justified on normative variables, however, perception of participants in the system are important and must be eliminated to restore confidence in the settlement of investment disputes. Within the context of Africa, the statistics also reinforces the objection for the continued utilisation of investor-state arbitration for the resolution of investor-state disputes. Their two per cent contribution to the global pool of arbitrators, in contrast to the volume of IIAs consummated and FDI attraction, may not be justified. Hence, the need for a reform of Africa’s investment dispute settlement system.

Overall, the four issues examined in this subsection clear shows some of the main reasons behind the dissatisfaction of African states and other critical stakeholders in international investment law. It evidences that the moves towards a reformed investor-state dispute settlement are anchored on the experiences of states in the current investor-state dispute settlement. Within the context of Africa, any reform attempts will certain include some form

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<sup>312</sup> Andrea K. Bjorklund, ‘The Legitimacy of ICSID’, in Nienke Grossman et al. (eds), *Legitimacy of International Courts* (Cambridge 2018)

of integration of their economic instruments. Therefore, this thesis will progress to examine if African states are ready to come together and engaging in multilateralism.

### 3.9. Multilateralism and regional integration in Africa

As stated in chapter one, there are compelling reasons for economic integration and harmonisation within Africa. Among these reasons is the aim of reforming and rebalancing investor-state dispute settlement. Beyond the creation of an Investment Court System, the engagement in innovative treaty-making practices is also integral to the building of inclusive growth and sustainable development.<sup>313</sup> As re-echoed by the UNCTAD, the “[New generation]’ policies place inclusive growth and sustainable development at the heart of efforts to attract and benefit from investment’.<sup>314</sup> As such, Africa may not eliminate the problems of multinational corporations and lack of diversity in ISDS without reforming its investment instruments to reflect domestic realities. These are irreducible minimums that must be achieved if a rebalance of rights will become a reality. Therefore, innovative treaty-making should mitigate the salient ills that mortgages Africa’s passive participation in the attraction of FDIs.

Towards achieving this rebalancing agenda, ‘at the national level, there should be a transformation of investment polices into developmental strategies that incorporates sustainable development objectives. At the international level, there is a need to strengthen the developmental dimension of (IIAs), balance the rights and obligations of States and

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<sup>313</sup> See generally, Suzanne Spears, 'The quest for policy space in a new generation of international investment agreements' [2010] 13(4) *Journal of International Economic Law*, 1037-1075.

<sup>314</sup> UNCTAD, 'Investment Policy Framework for Sustainable Development [2012 Edition]' (UNCTAD/DIAE/PCB/2012/5) Available at [https://unctad.org/system/files/official-document/diaepcb2012d5\\_en.pdf](https://unctad.org/system/files/official-document/diaepcb2012d5_en.pdf) (accessed on 23/11/2020)



investors, and manage the systemic complexity of the IIA regime. New generation ‘investment policies further incorporate innovative investment promotion and facilitation mechanisms’.<sup>315</sup> All these points to the notion that sustainable development can be achieved through innovative treaty-drafting and closer economic ties among states.

Economic integration has also been a permanent feature of the devolvement of international investment law, especially since the advent of IIAs. Beyond the standardisation of mechanisms for the settlement of investment disputes, the era of new generation treaties also witnessed renewed impetus at economic harmonisation and integration in international investment law. Globally, the onset of the twenty-first Century saw the emergency of multilateral organisations like the United Nations, the World Trade Organization, the European Union (EU), the North American Free Trade Agreement (NAFTA),<sup>316</sup> the Energy Charter, the African Union (AU) and the Arab league among others. Whilst some of these are political and diplomatic institutions that enabled the consummation of economic treaties, others like the EU are both political and economic institutions.

As part of these renewed vigour to closer economic collaboration through the consummation of continental and international treaties, Africa also showed commitment to intra-economic cooperation through regional integration and multilateralism. These collaborative and harmonisation efforts are encapsulated in the various Regional Economic Communities (RECs) and continental agreements like the Treaty Establishing the African Economic Community<sup>317</sup> and the Pan-African Investment Code (PAIC). In addition, the continent under

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<sup>315</sup> UNCTAD, Investment Policy Framework for Sustainable Development (2015) 3, Available at [https://unctad.org/system/files/official-document/diaepcb2015d5\\_en.pdf](https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf), (accessed on 23/11/2020)

<sup>316</sup> Recently replaced by the United States–Mexico–Canada Agreement (USMCA)

<sup>317</sup> Treaty Establishing the African Economic Community (Adopted in June 03, 1991, Abuja Nigeria)

the auspices of the African Union, recently agreed and signed the African Continental Free Trade Area (AfCFTA), reported to be the biggest trading block in the world.

In regards to the RECs, several states within the continent belong to regional groups which serves as vehicles for greater economic corporation and advancement. Among these regional groups are the Arab Maghreb Union (UMA) and the Community of Sahel–Saharan States (CEN-SAD) in North Africa; COMESA and EAC in East Africa; SADC, the Inter-Governmental Authority on Development (IGAD), Indian Ocean Commission (IOC) and the Southern African Customs Union (SACU) in Southern Africa; Economic Community of Great Lakes countries (ECGLC) and ECCAS in Central Africa and ECOWAS, the Mano River Union (MRU) and the West African Economic and Monetary Union (UEMOA) in West Africa. The objectives of these RECs includes the facilitation of trade and investment within their subject regions.<sup>318</sup> Towards achieving the objectives of these instruments, it is accompanied by treaty clauses that enables free trade and certain concessions on investments.

The facilitation of regional economic integration by the RECS have been instrumental in extending the frontiers of multilateralism within the continent.<sup>319</sup> This is true to the extent that over nine-four per cent of African states belong to more than one REC and only six states have one group as its only membership. Similarly, Twenty-eight states belong to at least two RECs and Twenty other states belong to three RECs; with the Democratic Republic of Congo

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<sup>318</sup> Their objectives are contained in the preamble of each treaty

<sup>319</sup> See Teshome Mulate, 'Multilateralism and Africa's Regional Economic Communities' (1998) 32 J. World Trade 115

consummating the membership of four RECs.<sup>320</sup> The significance of this convergence in membership is that African states have not only engaged in regionalism, but also shown willingness to engage in multilateralism through the consummation of intra-African treaty agreements. This is exemplified through the agreement on the Tripartite Free Trade Area (TFTA) by the EAC, SADC and COMESA.<sup>321</sup> With a membership of twenty-seven states, the TFTA aims to among other things ‘promote economic and social development of the Region, harmonised trade’, as well as to ‘progressively eliminate tariffs and Non-Tariff Barriers to trade in goods’.<sup>322</sup> This agreement effectively covers a trade area that controls about fifty-eight per cent of the total Gross Domestic Products (GDP) of Africa.

Sequel to the benefits these regional trading blocks, the continental initiatives were part of efforts to extend the frontiers of regionalism into closer continental ties. Thus, the Treaty Establishing the African Economic Community (Also known as the Abuja Treaty), was one of the first efforts that aimed to ‘promote economic, social and cultural development and the integration of African economies in order to increase economic self-reliance and promote an endogenous and self-sustained development’.<sup>323</sup> This treaty encompassed specified organs like the heads of state and government, an economic and social commission, a court of justice, parliament and specialised technical committees.<sup>324</sup> Thus, the Abuja treaty can be regarded as the starting point to the current Continental Free Trade Area (CFTA) agreement. In effect, it is on the thrust of these continental trade liberalisation efforts that my proposed Pan-African Investment Court is built upon.

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<sup>320</sup> United Nations Economic Commission for Africa (ECA), Assessing Regional Integration in Africa V: Towards an African Continental Free Trade Area (ECA 2012) 3 <[www.unece.org/fileadmin/DAM/trade/TF\\_JointUNRCsApproach/ECA\\_RegionalIntegrationInAfrica.pdf](http://www.unece.org/fileadmin/DAM/trade/TF_JointUNRCsApproach/ECA_RegionalIntegrationInAfrica.pdf)> accessed 23 November 2020.

<sup>321</sup> 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 2015

<sup>322</sup> See Article 4 on general objectives and Article 5 on specific objectives of the Tripartite Free Trade Area

<sup>323</sup> Treaty Establishing the African Economic Community, Article 4 on objectives

<sup>324</sup> *Ibid.* 323 above, Article 7

Similar to the Treaty Establishing the African Economic Community, the Draft Pan-African Investment Code (PAIC) was another trade initiative that was launched by the African Union in 2016. It possesses similar objectives like the Abuja treaty but deviated through a recognition of ‘the need for a comprehensive guiding instrument on investment for all [states of the continent]’.<sup>325</sup> In addition, the PAIC also acknowledged ‘the growing importance of trade and investments for the growth and development of Africa’, as well as ‘the desire of Member States to promote an attractive investment climate and expand trade and investments for long-term development’.<sup>326</sup> Furthermore, continental integration was also the motivation behind the PAIC as it affirmed that ‘the vision for regional integration and development is to strengthen the regional market, create wealth in Africa, and enhance competitiveness through increased production, trade and investment flows in African countries’.<sup>327</sup>

Perhaps, the strongest evidence of further willingness of African states to economic harmonisation is the agreement on the trade component of the Continental Free Trade Area (CFTA) by fifty-four of the fifty-five states in Africa. The agreement which was built upon the Tripartite Free Trade Area (TFTA), the Abuja treaty and PAIC covering a GDP area of US\$2.5 trillion, will be the biggest trading block in the world. Since my proposal aims to create similar economic instruments as the PAIC and Abuja Treaty but on investment dispute resolution, the challenges that confronts the trade component of the AfCFTA would have to be resolved for my proposal to be feasible. These challenges according to the International Monetary Fund (IMF) includes; the problem of absorbing the RECs and their role in AfCFTA, the need to have a strong secretariat to administer the new system, the process of managing the political aspects of the agreement without jeopardising its economic objectives

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<sup>325</sup> See Preamble, Draft Pan-African Investment Code

<sup>326</sup> Ibid. 325 above

<sup>327</sup> Ibid. 325 above

and the need to ensure that the CFTA does not becloud trade liberalisation with other states outside the continent.<sup>328</sup>

Overall, regional and continental integration have featured strongly in the development of investment dispute resolution in Africa. The several measures by African states in creating regional and continental institutions shows that Africa have been active participants in multilateralism. These institutions focused on strengthening the economic integration of the continent towards promoting sustainable development. Therefore, these institutional developments and earlier attempts towards court systems in Africa shall be examined in the next subsection. This is to enable the evaluation of these attempts to determine how far they fared in investment dispute resolution in the continent.

### 3.10. Institutions and court system in Africa

My proposal for a Pan-African investment court with an accompanying multilateral treaty, is not the first attempt at instituting an investment court system in Africa. The evolutionary journey of investment dispute resolution and international investment law in Africa, had culminated in the creation of institutions. However, due to the failure of these institutions, the African investment regulatory landscape have included investor-state arbitration as a mechanism for resolving investor-state disputes. Despite the failures of the past attempts however, the impetus to create further institutions and regulatory frameworks have not waned.

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<sup>328</sup> Abrego and others, 'The African Continental Free Trade Area: Potential Economic Impact and Challenges' (2020) International Monetary Fund staff discussion note, No. 20/04

For instance, in creating the Organisation of African Unity (OAU) in 1963, the continent firmly showed its intentions towards Africa's economic, trade and investment harmonisation. As contained in the charter establishing the OAU, it aimed 'to rid the continent of the remaining vestiges of colonisation and apartheid; to promote unity and solidarity amongst African States; to coordinate and intensify cooperation for development; to safeguard the sovereignty and territorial integrity of Member States and to promote international cooperation'.<sup>329</sup>

Arising from the formation of the OAU which was transformed into the current African Union (AU), the willingness towards both regional and continental trade amalgamation began in earnest, thus leading to the current proposals for an investment court system. In effect, majority of the earlier efforts at economic cooperation were focused on trade, thus leaving investment and dispute resolution to international frameworks.

In continuation of its role in galvanising support for economic cooperation, the attempts at creating an investment court system in Africa was championed by the Regional Economic Communities. However, the SADC's tribunal was the only court system that became a reality prior to its suspension.<sup>330</sup> The SADC tribunal was created through the Protocol on the Tribunal in the Southern African Development Community. It was agreed by SADC member states in the year 2000, with official ratification in November 2005 at Windhoek, Namibia. The tribunal which operated and functioned according to the Protocol on Tribunal and the

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<sup>329</sup> See the Preamble of the OAU, now the African Union

<sup>330</sup> This was suspending in the aftermath of the decision in *Mike Campbell v. Zimbabwe* (Case No SADCT 2/07)

Rules of Procedure had jurisdiction on all matters contained in the Treaty of the Southern African Development Community and the Protocol on the Tribunal. As contained in Part III of the Protocol on jurisdictions, these includes the interpretation of the treaty, protocols and subsidiary instruments of the SADC and other matters and agreements that the tribunal may have specifically been conferred with jurisdiction.<sup>331</sup> Apart from jurisdiction, the Protocol also explained the organisation and composition of the tribunal, its rules of procedure and methods of enforcement.

Based on the jurisdiction conferred on it by the Protocol on Tribunal and the Rules of Procedure, the tribunal adjudicated upon a number of cases within the intervening period before its demise. But, so many of the cases that were brought before the tribunal were based on human rights issues and expropriation of private property without compensation. For example, in *Barry L.T. Gondo and Others v. Zimbabwe*,<sup>332</sup> the tribunal held that articles 4(c) and 6(1) of the SADC Treaty imposed an obligation on member states to protect the human rights of its nationals. Thus, the lack of effective remedy within the national law of Zimbabwe to enable the enforcement of the decision of a local court, that the human rights of the respondents were violated by the state was declared incompatible with treaty law. Similarly, the tribunal in *Cimexpan v. Tanzania* ruled that an allegation of torture and international delinquency wherein the state sought to deport the respondents could not be granted, as the allegation could not be substantiated.<sup>333</sup> The tribunal further ruled that the respondents had not exhausted local remedies, thus did not find the state guilty.

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<sup>331</sup> SADC Protocol on Tribunal and the Rules of Procedure - Part III

<sup>332</sup> SADC (T) 05/2008, Decision of 9 December 2010, (Case no. 5 of 2008), For the full facts of the case, see Ashimizo Afadameh-Adeyemi, 'Barry Gondo & 8 Others v The Republic of Zimbabwe, SADC (T) 05/2008' Case review.

<sup>333</sup> *United Republic of Tanzania v Cimexpan (Mauritius) Ltd and Others (SADC (T) 01/2009) [2010] SADCT 5* (11 June 2010), For the full facts and decision, Southern African Development Community: Tribunal-United Republic of Tanzania v Cimexpan (Mauritius) Ltd and Others (SADC (T) 01/2009) [2010] SADCT 5 (11 June 2010). SAFLII, Available at <http://www.saflii.org/sa/cases/SADCT/2010/5.html> (Accessed on 18/12/2019)

Likewise, the SADC tribunal also adjudicated on the case of Mike Campbell (Pvt) LTD and Others v. Zimbabwe,<sup>334</sup> wherein the applicant company sought the stoppage of possession of an agricultural land that was acquired by the state. The company contended that the acquisition was in breach of article 28 of the Protocol on Tribunal and rule 61 (2) – (5) of the Rules of Procedure of the SADC Tribunal. Among other things, the tribunal found that the disbandment of the applications to access local Zimbabwean courts to seek remedy was unlawful and also, that the applicants were discriminated against on the basis of race. Furthermore, it was held that the applicants deserved fair compensation on the compulsory acquisition of their land by the state on what amounts to expropriation.

Consequent upon these decisions and especially the Mike Campbell (Pvt) LTD and Others v. Zimbabwe case, the continuous existence of the SADC tribunal was challenged by various states. As may be expected, Zimbabwe which was confronted with several claims led the pack, arguing that the tribunal was operating beyond the limits of its powers and jurisdiction. Critical to these challenges is the argument that the sphere of the tribunal was limited to investment disputes and not on human rights matters.<sup>335</sup> Thus, the stage was set for a review of the operational processes and competence of the court and culminated to its suspension in 2010. However, the Summit of Heads of State and Government of the SADC agreed in 2012 to resuscitate the court but will limit its competence specifically on the interpretation of its Treaty and Protocols, as well as the settlement of investor-state disputes. Thus in 2014, nine of the member states agreed on a revised protocol to that effect.

Based on the demise of the SADC tribunal, it is evident that the rational underpinning its extinction is the lingering issue of imposing human rights obligations on multinational

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<sup>334</sup> Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe (2/2007) [2008] SADCT 2 (28 November 2008)

<sup>335</sup> Erika de Wet, 'The rise and fall of the tribunal of the Southern African development community: implications for dispute settlement in Southern Africa' [2013] 28(1) ICSID review, 45-63.



corporations. As examined in subsections [2.2 – 2.3], this subject has been an age-long issue that contends on achieving a balance between the promotion of corporate activities and preservation of human rights. In addition, the suspension of the SADC tribunal showcases the realm of political instability towards the creation of institutions in Africa. Thus, my proposed Pan-African Investment Court must be formulated in a way that will mitigate these challenges that confronted the SADC tribunal for it to become a reality.

### 3.11. Conclusion

This chapter has shown that the evolution of investment law and dispute resolution system in Africa have been impacted and influenced by the local realities of the states. These influences are however not different from the issues that also shapes the conversation in other capital-importing continents such as Latin America. Thus, the negative impacts of multinational enterprise on the environment and infringement of human rights precipitated the devising of mechanisms to regulate them. These regulatory measures are essentially because of the failure of first generation treaties to effectively checkmate the negative consequences of multinational enterprise. Thus, African states joined the global efforts at finding suitable frameworks to regulate MNCs.

Similarly, the interpretation of international investment agreements and other ancillary multilateral rules also shaped the development of international investment law. Since first generation treaties failed to checkmate the negative impacts of multinational corporations and resolve investor-state disputes, the global investment landscape were left with international investment arbitration as the investment dispute resolution framework. Although this system has continued to function, however, its procedures have been challenged by several stakeholders within international investment law. Investor-state

dispute settlement framework has been criticised as biased in favour of foreign investors who are majorly from capital exporting, powerful western states. Incidental to these criticisms is because of the use of investor-state arbitration as a resolution mechanism in investor-state dispute settlement.

Correspondingly, multilateralism and regional integration have also been a permanent feature of the evolutionary journey of international investment law in Africa. The continent also engaged in creating institutions such as the African Union (AU) and Regional Economic Communities to drive economic liberalisation and integration. The development of investment law in Africa also witnessed the advent of court systems. Despite the demise of these court systems such as the SADC tribunal, the continent has continued its drive towards better investment regulatory landscape through innovative treaty-making and intention to reform negotiate the investment reform component of the AfCFTA. Due to the influences of the RECs, there were renewed impetus towards a continental wide collaboration, therefore leading to the formulation of the African Continental Free Trade Area (AfCFTA).

Overall, this chapter evidences that the evolutionary history of international investment law is has culminated to the current conversation on the reform of investor-state dispute settlement. Thus, my proposal for a Pan-African Investment Court is underpinned by the ambition to reform and rebalance the power equation between host states and investors in the settlement of investment disputes in Africa. Furthermore, it is necessitated by the need to foster more development in Africa through the formulation of treaties and institutions that harmonise the investment landscape of African states towards more sustainable development.

Stemming from the historical analysis on the issues that shaped and influenced the development of international investment law and regulatory framework in Africa, the next chapter will be devoted to conducting an historical analysis of investor-state dispute

settlement devolvement. This will entail the investigation of the development of international investment law and investment protection. Thus, the trajectory of development of investment protection up to the international investment agreements generation shall be examined. It intends to provide a background to the issues that have influenced my proposal for a Pan-African Investment Court.

## **Chapter Four: Historical evolution of International Investment Protection**

### **4.1. Introduction**

Towards fulfilling the objective of this research which argues for the creation of a Pan-African Investment Court to replace the current Investor-State Arbitration in the resolution of investor-state disputes in Africa, it is pertinent to conduct a review of previous efforts and attempts at deploying the court system for settlement of investment disputes. This review will provide an historical account of investment dispute regulation and resolution, and how these have metamorphosed into the current investor-state arbitration. Thus, it begins with a brief discussion on pre-international investment agreement period. However, the main focus will be the examination of the post-investment agreement period which was the commencement point of investor-state arbitration.

This chapter will also examine the regulatory instruments that have been deployed by African states towards the regulation of investments in the continent. Thus, investment regulatory measures like the efforts of the Regional Economic Communities of African states, the consummation of International Investment Agreements, the Pan-African Investment Code and the recently concluded African Continental Free Trade Area (AfCFTA) shall be

examined. This exploration will incorporate a review of the economic motivations behind these measures and how they functioned towards achieving trade and investment liberalisation in Africa. This entails that the functionality of first-generation investment agreements and the innovative regulatory approaches embarked upon by African states will be explored, to determine the issues that influenced their development. Thereafter, a discussion on the collapse of these measures and motivations behind a recourse to arbitration will suffice. At the core of this chapter is the exploration of the limitations of previous attempts at resolving investor-state disputes, their shortcomings and the rationale underpinning my proposal for an investment court system in Africa.

This examination of the role of the courts is important because it will not just evidence the gains and failures of previous attempts, but shall provide valid grounds behind my proposal. As such, it will feature a comparison of the investment arbitration and court system frameworks to determine the impact of both mechanisms on investment dispute resolution in Africa. In addition, this chapter will examine whether multilateralism is the way forward for the African Continent in its quest for inclusive economic growth in trade and investment.

Overall, conclusive reasons on the failure of the previous attempts at using the court system to settle investment disputes and how to avoid them shall be examined. Ultimately, this chapter will provide reasons that will answer the argument on whether investor-state arbitration should be replaced with a Pan-African Investment Court.

## 4.2. From Diplomatic Protection to International Investment Agreements: The historical role of the courts in international investment protection

The evolution of investment protection into the current moves for a court system have been tumultuous. This is because, several attempts to devise suitable regulatory measures that can be agreed by all constituencies within the international investment firmament have been explored. The objective of these attempts has remained the protection of foreign investments through the deployment of equitable mechanisms that will guarantee fair and peaceful resolution of disputes. The evolutionary trajectory of international investment protection frameworks can be divided into three periods. These are Foreign investment protection pre - 1945, Foreign investment protection post - 1945 and the contemporary International Investment Agreement period. Whilst the two previous periods centred on the use of gun-boat diplomacy to settle investment disputes, the international investment agreement era is the standardised form of investor-state dispute settlement. This standardisation is a reflection of the dissatisfaction with diplomatic protection which entailed the use of brute force and military might to avenge the wrongful treatment of a citizen and their investments by capital-exporting countries.

Although these periods prior to the IIA era can be regarded as the beginning of investment protection, however, a deep discussion about this era is not particularly relevant to the subject of this thesis. The pre-IIA era is too remote to the aims of this thesis because, investor-state arbitration became an international investment dispute resolution mechanism through the advent of investment agreements such as Bilateral Investment Treaties (BITs).

### 4.3. The onset of Investor-State Arbitration

The dissatisfaction with the practice of diplomatic protection and gun-boat diplomacy underpinned the need for a standardised method of investment regulation and protection. Due to the impact of decolonisation which saw weaker states staking their claim for independence in all facets of their activities,<sup>336</sup> the idea of a justifiable means of investment protection was therefore a task that confronted stakeholders within the investment community. Thus, with increased independence of states and their stake for sovereignty, as well as the boom in economic activities; capital-exporting countries were forced into formulating a new regulatory regime and international economic order. The need for a new investment protection and dispute resolution mechanism was desirable, especially with the unacceptance of diplomatic protection by capital-importing states. Diplomatic protection was deemed by these less developed states as pseudo colonisation.<sup>337</sup> Thus, issues of sovereignty and nationalism became a dominant subject because capital-importing states feared that powerful multinational investors interfered in their internal affairs.<sup>338</sup> These contending factors therefore motivated the development of formalised investment regulation and protection mechanisms.

Stemming from the need to achieve a regulatory framework that will instil trust between both capital-exporting and importing-countries, investor-state arbitration re-emerged from its extinction in early the Twentieth Century.<sup>339</sup> However, the new wave of arbitral tribunals was different from pre-international investment agreements attempts at deploying the court system to settle investment disputes.<sup>340</sup> This difference is contextualised in the fact that the

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<sup>336</sup> David S Landes, *The wealth and poverty of nations: Why some are rich and some so poor* (Abacus 1998), Renata Brazil-David, 'Harmonization and Delocalization of International Commercial Arbitration' (2011) *J. Int'l Arb.*, 28, 445.

<sup>337</sup> M Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2017)

<sup>338</sup> Dean M Hanink, *The International economy* (J. Wiley 1994)

<sup>339</sup> See Michael P. Reynolds, "The Jaffa Jerusalem Railway Company Arbitration 1922" (1991) 6 *Arab Law Quarterly* 215-223

<sup>340</sup> V.V. Veeder, 'The 1921-1923 North Sakhalin Concession Agreement: The 1925 Court Decisions Between the US Company Sinclair Exploration and the Soviet Government' (2002) 18 *AI* 185

post-1945 arbitral tribunals incorporated the right of foreign investors to claim for wrongful acts done to their investments. Although investors did not have full confidence in investment arbitration as a means of resolving disputes, however, they nonetheless viewed it as a better antidote to local courts.<sup>341</sup>

In recognition of lack of a formalised international framework to protect investments, the risk of expropriation by the newly independent states, and with little prospects of achieving justice through domestic courts; foreign investors demanded for the inclusion of international investment arbitration and choice of law clauses in contractual agreements to serve as buffer and mitigating tools against these risks.

International investment arbitration was ultimately cemented as a means of resolving investor-state disputes through the ratification of the New York Convention on the Recognition of Foreign Awards (1958).<sup>342</sup> This treaty recognised the enforcement of foreign arbitral awards in local jurisdictions except in certain circumstances. Although the New York Convention allows foreign investors to obtain remedy for wrongful acts done to their investments by host states. However, it was and remains beclouded by the principle of state immunity which prohibits the confiscation of assets of states in other jurisdictions.<sup>343</sup> Despite the inclusion of investor-state arbitration in IIAs, the system is still confronted by the pseudo colonialism arguments and tussle over the control of resources by capital-exporting states and newly independent states.

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<sup>341</sup> A.A. Shalakany, "Arbitration and the Third World: A Plea for Reassessing Bias under the Specter of Neoliberalism" (2000) 41 HILJ 419

<sup>342</sup> New York Convention on the Recognition of Foreign Awards 1958

<sup>343</sup> See Hazel Fox and Philippa Webb, "The law of state immunity" (2013) OUP Oxford.



This is because, the latter constituency viewed the control of investments in their domains as pseudo colonialism by capital-exporting countries. This tussle was however resolved by the United Nations Commission on Permanent Sovereignty over National Resources Resolution 1803, which affirmed that 'the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the wellbeing of the people of the State concerned'.<sup>344</sup>

On the thrust of this United Nations' instrument, foreign investments were to be superintended and administered through both domestic and international law. This was succinctly captured in paragraph four of the resolution which commented that 'Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication'.

Despite this seeming compromise of appropriate compensation for capital-exporting states and full control and sovereignty over national resources to the newly independent states, it

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<sup>344</sup> S.M. Schwebel, 'The Story of the UN's Declaration on Permanent Sovereignty Over Natural Resources' (1963) 49 ABAJ 463,

is unarguable that the age-long disagreement on the best measures of regulating and settling investments between the two constituencies has remained. Although the UN Resolution aimed to mitigate these through the insertion of the two clauses, however, the clauses are concerned with post-independence resources.<sup>345</sup> Thus, the non-incorporation of the pre-independence resources acquired by capital-exporting states through practices like Treaties of Capitulation remained a thorny issue. Hence, these international treaties were also confronted with opposition regarding how the pre-independence resources of newly created countries will be managed. As such, the search for a consensus and suitable investment dispute settlement mechanism continued, especially with the non-incorporation of pre-independence resources within the United Nations Resolution in 1803.

This search culminated to the creation of The International Centre for Settlement of Investment Disputes (ICSID) as a neutral forum to settling investor-state disputes. The utility and operation of the ICSID is therefore examined in the next subsection to ascertain whether it solved the problem of trust and neutrality in the settlement of disputes between host states and foreign investors.

#### 4.4. The International Centre for Settlement of Investment Disputes (ICSID)

The contentions over the control of post-independent resources of states, the standard of protection accorded to foreign investments and the form of dispute settlement underpinned the creation of The International Centre for Settlement of Investment Disputes (ICSID). ICSID is not a permanent arbitral tribunal, but rather a Convention that provides an ad hoc framework for the settlement of disputes between host states and foreign investors from

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<sup>345</sup> United Nations, General Assembly resolution 1803 (XVII) of 14 December 1962, "Permanent sovereignty over natural resources" – See section on applicable resources

signatory states. It was created by the General Council of the World Bank in 1965, and its objective is to create 'an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it'<sup>346</sup>

In facilitating the settlement of investment disputes, the neutrality of ICISD which is devoid of domestic and political interference is one of its main derivatives. As expressed in the ICSID Convention, the ascension of cases to ICSID must be unanimously agreed by contracting parties, [such a party] must be between a contracting state and the national of another contracting state, such dispute must be of a legal nature and ultimately, the dispute must be related to investment from a signatory host state.<sup>347</sup>

In essence, the ICSID Convention aims to formalise investor-state dispute settlement and eliminate some of the criticisms of diplomatic protection and the earlier treaties in three ways. First, the ICSID convention applies the principle of decolonisation by ensuring that dispute settlement is devoid of local political interference and deployment of local laws. Although foreign investments are regulated through local laws, but, any dispute arising from thence is settled through the provisions of the New York Convention. As expressed in the Convention, 'The tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable'.<sup>348</sup> Thus, domestic laws are completely

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<sup>346</sup> See Part III of the ICSID Convention

<sup>347</sup> Article 26 also allows for party autonomy. Thus, expressed election by parties to ICSID grants the Convention exclusive jurisdiction

<sup>348</sup> Art.42(1), Convention On The Settlement Of Investment Disputes Between States And Nationals Of Other States International Centre For Settlement Of Investment Disputes

alienated from dispute settlement proceedings as even annulment proceedings arising from binding awards are also adjudicated solely on the provisions of the ICSID Convention.

Second, espousal rights enshrined in diplomatic protection that enables only states to bring claims on behalf of their nationals are eliminated under the ICSID convention. In contrast, foreign investors can bring claims proceedings against host states as long as such investor is a national of a signatory state to the ICSID convention. The explanation of nationals of another contracting state under art.25(1) means that foreign firms could invest in another state on the basis of an international treaty rather than being subject to local laws.

This ensures that foreign companies are not subject to local company law regulations, which in the contrary could transform them into local companies. Furthermore, the ICSID also formulated 'Additional Facility Rules' mechanism which enables companies to bring claims against states that are not signatories to the Convention.<sup>349</sup> Although national law is deployed in any 'Additional Facility' proceedings, however, these proceedings can only be conducted in states that are party to the Convention.<sup>350</sup>

Despite the establishment of ICSID and the New York Convention as a multilateral forum for the protection of investments and settlement of disputes, the investment architecture was still bereft of substantive international rules on investment. Hence, several attempts like the Draft Convention on the Protection of Foreign Property by The Organisation for Economic

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<sup>349</sup> See *Compañía de Aguas del Aconquija, & Compagnie Generale des Eaux v Argentina* (ICSID Case No. ARB/97/3), E.Gaillard and Y. Banifatemi (eds), *Annulment of ICSID Awards and IAI International Arbitration Series No.1* (New York: Juris Publishing, 2004), on how domestic interference is not allowed as even issues of Annulment are handled by ICSID ad hoc commissions.

<sup>350</sup> Article 19, the Convention of the Settlement of Investment Disputes 1965

Co-operation and Development (OECD),<sup>351</sup> Charter of Economic Rights and Duties of States,<sup>352</sup> Declaration on the Establishment of a New International Economic Order (NIEO Declaration),<sup>353</sup> and the Commission on Transnational Corporations by the United Nations Economic and Social Council (ESC) were proposed but rejected over some of its terms.<sup>354</sup> The failures of these initiatives reminisced the criticisms of diplomatic protection, disagreements on the standard of protection accorded to foreign investments and level of compensation to be paid for damages.

Perhaps, the limitation of these latter treaties is not surprising because, the ascension to ICSID is primarily state-led through their contraction to the New York Convention. This grants rights and protection to their citizens, hence exposes the dispute settlement process to indirect political, economic and diplomatic considerations. It suggests that even payments of compensation could be beclouded by these extraneous risks of state involvement, thus subjecting the dispute resolution process to the risk of undue interference by the states.

This state-led mechanism is clearly against the principles of delocalisation, privity and freedom of contractual negotiation. Thus, the advent of international investment arbitration was intended to formalise the dispute resolution procure, but, failed to eradicate the tussle between capital exporting and capital-importing countries on the best form of investment protection and dispute resolution. This failure was a result of lack of substantive rules on investment

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<sup>351</sup> Draft Convention on the Protection of Foreign Property (1968) 7 ILM 117

<sup>352</sup> Charter of Economic Rights and Duties of States", GA Res 3281, 12 Dec. 1974, (1975) 14 ILM 251

<sup>353</sup> Declaration on the Establishment of a New International Economic Order, GA Res 3201, 1 May 1974, (1974) 13 ILM 715

<sup>354</sup> See P. Muchlinski, *Multinational Enterprises and the Law*, 2nd edn (Oxford: Oxford University Press, 2007)

In the shadow of the failure of the efforts towards formulating a substantive regulatory framework for the protection of international investment, and with the risk of high expropriation due to the increase in socialist political ideologies by most European and South American states, capital-exporting countries were therefore confronted with the increased need to invent better and more agreeable mechanisms for the protection of investments. Hence, the advent of International Investment Agreements led by the Bilateral Investment Treaties (BIT) between the Federal Republic of Germany and Pakistan in 1959.

#### 4.5. The advent of Bilateral Investment Treaty system

The entrance of Bilateral Investment Treaties (BITs) into the investment regulatory architecture was due to the failure to achieve consensus on the best form of protecting and promoting investments in the previous international treaties. This disagreement is reflected in the criticisms of the previous treaty efforts such as diplomatic protection, ICSID Convention and NIEO Declaration. The disagreements on substantive methods of regulating investments was assuaged by the advent of International Investment Agreements which contained provisions that eliminated the contentious issues in previous treaties.

For example, the Germany–Pakistan BIT (1959) contained measures like a clear definition of investment, prohibition of discriminatory practices against investors and their investments, willingness to provide full security, compensation and aid in the transfer of capital and ultimately, provision for an arbitral tribunal and state-led dispute settlement under the

supervision of the International Court of Justice (ICJ).<sup>355</sup> In essence, the inclusion of these provisions in the Germany-Pakistan BIT and a clear commitment to investor-state arbitration differentiated BITs from earlier efforts like Treaties of Friendship, Commerce, and Navigation where were informal arrangements.

Due to the provision of these substantive grounds which enshrined legitimate expectations in investment protection, the investment dispute resolution architecture was embraced by both capital-exporting and capital-importing countries as a better vehicle for the regulation of international investments. Hence, about one hundred BITs were consummated by the year 1979, with an astronomical consummation of thirty-nine BITs between 1970 and 1974. The embrace of modern BITs as an attractive form of investment protection, it can be argued, is because of its incorporation of investor-state arbitration and inclusion of substantive protections.<sup>356</sup>

As could be deduced from the discussion on the historical devolvement of investor-state dispute settlement, although the previous efforts contained arbitral tribunals as dispute settlement mechanisms, however, they contained a clause that required the concurrence of both host states and investors before cases can proceed to arbitration. Evidently, host states would never agree to this clause since they are parties to the disputes. This infringes on the principle of *Nemo iudex in causa sua*. Without a clear commitment to investor-state arbitration and the delocalisation of the dispute settlement process, the earlier efforts suffered a crises of

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<sup>355</sup> See Article 11(2), Germany-Pakistan BIT 1959

<sup>356</sup> See Indonesia-Netherlands BIT 1968 – This was the first BIT that incorporated Investor-State arbitration with qualification as the previous BITs only contained substantive grounds like MFN and national treatment. However, the Chad-Italy BIT 1969 was the first that contained Investor-State arbitration without qualification, hence can be regarded as the beginning of modern BITs.

confidence from investors, irrespective of the provision for investment arbitration as the dispute resolution mechanism.

In contrast, modern BITs contains provisions that directly adopts investor-state arbitration and the ascension to the ICSID Convention without the consent of host states. This means that investor-state arbitration can suffice as a settlement mechanism through a treaty such as BITS or a foreign law without prior contractual agreement between an investor and host state.

Clauses and terms contained in BITs received legitimate affirmation in the year 1985 when the ICSID tribunal confirmed that Egypt's foreign investment law granted jurisdiction to ICSID. This was closely followed by the first award of the Convention when its tribunal adjudicated on a case concerning the arbitration clause of the Sri Lanka-UK BIT 1980. From thence, investor-state arbitration became normalised as the mechanism for the protection of investments and settlement of disputes arising from thence.

#### 4.6. African states and innovative treaty making practices

As an attractive form of investment regulation and resolution of disputes for damages to the investment of foreigners after its legitimisation in the year 1958, the Bilateral Investment Treaty (BIT) instrument witnessed an astronomical growth in the intervening years post-1980. For instance, with the increased scramble for investments and economic development, the number of BITs that were concluded between developed and developing economies



peaked at one hundred and sixty-five by the year 1987.<sup>357</sup> With a full embrace that led to the consummation of these treaties between developing states, the number of BITs ballooned to one thousand, eight hundred and fifty-seven towards the end of the 1990s.<sup>358</sup>

Currently, the United Nations Conference on Trade and Development (UNCTAD) report shows a total of two thousand, eight hundred and ninety-seven BITS globally, with two thousand, three hundred and forty of them in force.<sup>359</sup> The increase at the twilight of the late Twentieth Century was essentially caused by globalisation, which enhanced the interconnection of global trade and investments. In addition, the rise of productive apparatuses of hitherto developing states like China witnessed a shift and rebalance of global economic and productive power, therefore leading capital-exporting countries to seek investment relationships with the hitherto weaker economies.

Towards complementing the protections provided by BITs, the twilight of the Twentieth Century also witnessed the creation of complimentary trade and investment instruments and treaties like the World Trade Organisation (WTO), The Energy Charter Treaty (ECT) and the General Agreement on trade in Services (GATS). The GATS was a continuation 'The Uruguay Round' of trade negotiations of 1986-1994.<sup>360</sup> Due to further substantive protections provided by these latter developments and especially the ICSID Convention, the resistance to international investment arbitration from developing states in Africa, Asia and

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<sup>357</sup> See UNCTAD International Investment Agreement Navigator

<sup>358</sup> Examples of these BIT consummations between developing and developed states includes El Salvador-France (1978), Costa Rica-UK (1982) and Colombia-Germany (1965) among others

<sup>359</sup> United Nations Conference on Trade and Development (UNCTAD), 'International Investment Agreements Navigator' (2020) Available at <https://investmentpolicy.unctad.org/international-investment-agreements/by-country-grouping> (accessed on 02/02/2020)

<sup>360</sup> See T. Stewart, "Trade Related Investment Measures" in T. Stewart (ed.), *The GATT Uruguay Round: A Negotiating History* (Boston: Kluwer Law International, 1994)

Latin America waned. Hence, the opposition to the minimum standard of treatment and the Calvo doctrine were abandoned in favour of economic liberalisation and the dispute settlement measures contained in the ICSID Convention.

African states have remained active participants in the devolvement of investor-state dispute settlement, economic liberalisation and harmonisation that have emerged in the shadow of the legitimisation of investor-state arbitration and acceptance of international investment agreements at the turn of the Twenty-First Century. The states of the African Continent have evidenced greater impetus in the consummation of international investment agreements and economic corporation amongst themselves.

Leading the progressive devolvement of Africa's investment laws was the Regional Economic Communities (RECs) of the continent. Among these investment instruments by the RECs are the Economic Community of West African States (ECOWAS)' Trade Liberalisation Scheme and Supplementary Act on the Common Investment Rules, the East African Community (EAC)'s Model Investment Code, the Southern African Development Community (SADC)'s Protocol on Finance and Investment, the Common Market for Eastern and Southern Africa (COMESA)'s Common Investment Area, the Community of Sahel-Saharan States (CEN-SAD)'s treaty establishing a Common Investment Area, the Arab Maghreb Union (UMA) and the Intergovernmental Authority on Development (IGAD).<sup>361</sup>

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<sup>361</sup> See chapter [1.5] on Innovative treaty-making practices of African states

These RECs share similar objectives which is anchored on the liberalisation and enhancement of trade and investment. Thus, their treaties contain novel clauses that will aid in the achievement of this objective. For example, the COMESA Common Investment Area agreement explained the scope and meaning of Fair and Equitable Treatment (FET), enshrined a balance of treatment between host states and foreign investors, explained the scope of Most Favoured Person (MFN) treatment and ultimately, proposed for an investment court system. These are clear departures from old-generation BITs that did not explain the scope of these principles, hence necessitating the high volume of investor-state arbitration claims against African states.

Similarly, the SADC Protocol on Finance and Investment (Model BIT) also departed from first-generation IIAs by changing the scope of FET, eradicated the unfettered right of investors to proceed to investor-state dispute settlement through the inclusion of an obligatory exhaustion of local remedies clause, expunged the Most Favoured Nation (MFN) treatment and clarified the purview of full security. In addition, the SADC investment instrument also clarified that compensation will be 'fair and adequate' rather than the traditional 'prompt, adequate and effective'.

Concurrently, the ECOWAS investment instruments demands for the use of the ECOWAS Court of Justice as the forum of first instance before an approach to international arbitration. Although capital and assets transfer are guaranteed by ECOWAS, however, investors are also obligated to ensure the protection of human and labour rights. In relation to the EAC Model Investment Code, it demands for the permission of host states through a submission

of a request to the government and obtaining of investment dispute certification, before the referral of a case to investor-state arbitration.

Correspondingly, The Republic of South Africa cancelled some of its investment agreements with countries like Switzerland, Denmark and Spain and totally replaced its investment law with a new Protection of Investment Act (2015). A further evidence of Africa's innovative treaty-making efforts and willingness to collaborate on investment is evidenced through the creation of the Pan-African Investment Code (PAIC).<sup>362</sup> The PAIC aimed to ensure greater economic harmonisation, investment promotion and protection within the African continent.

Correspondingly, the new Morocco-Nigeria Model BIT (2019) was innovative with the explanation of certain clauses in several areas. Firstly, the BIT clarified that investment is an asset that will contribute to its sustainable development over the period of time. It also explains the scope of FET which has been a contentious area in international arbitration. Due to the uncertainty on the breadth of FET in old-generation BITs, investors have relied and exploited this gap with relative ease and successes. Towards mitigate this risk of increased arbitral actions on the basis of the FET clause, the Morocco Model BIT explained the conducts that will constitute a breach of FET. Towards preserving the sovereignty and right of the host state to regulate its affairs, this BIT also explained the sort of state polices that will be deemed a breach of FET provisions. Furthermore, although the right of the state to expropriate was retained as contained in old-generation BITs, however, the Morocco-Nigeria Model BIT went further to explain the acts of the state that may be regarded as indirect or legitimate expropriation.

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<sup>362</sup> Pan-African Investment Code, "Draft preamble" (26 March 2016), para.8 available at: <http://repository.uneca.org/bitstream/handle/10855/23009/b11560526.pdf?sequence=1> (Accessed 04/02/2020).

In another departure from old-generation investment agreements, the BIT imposes obligation on investors not to engage in corruption, terrorism or money laundering, and to conduct their investment activities in alliance with the host state's international obligations in the areas of human, environmental and labour rights. Furthermore, disputes are expected to be reviewed by a Joint Committee between the host state and investors at first instance, which suggests that the exhaustion of local remedies is required. Last but not the least, there is the provision for the jurisdiction of local tribunals where issues are expected to be adjudicated. In essence, there are local two-layer settlement measures of joint committee and tribunals, with the latter mirroring an investment court system.

Arising from these provisions, it is evident that the Morocco-Nigeria Model BIT imposes obligations of corporate social responsibility relating to the protection of the environment, respect to human rights and engagement of social impact assessment of their activities and corporate governance. These are novel clauses that answers the questions on whether multinational corporations can be imposed and bear international obligations. Similarly, these clauses preserve the regulatory powers of host states to regulate multinational corporations and make policies that will protect their citizens and countries. These regulatory powers are safeguarded in the area of environmental and social impact assessments obligations; which compliance is determined by the host states. As such, arbitral cases of environmental impacts and degradation will be determined by tribunals through the lens and reports of host states. These provisions are clearly in contrast to old-generation BITs which circumvented the

powers of host states to regulate their domains, even when such issues hinged on human rights abuses and the wellbeing of their citizens.<sup>363</sup>

In the global investment firmament, African states have consummated five hundred and thirty-one international investment agreements (IIAs) as at March 2019, with five hundred and seventeen of this being BITs.<sup>364</sup> In addition, states of the African continent have consummated a further three hundred and sixty-seven investment agreements that are not yet in force. Similarly, about forty-three states within the continent has formulated investment laws that focuses specifically on the promotion and protection of investment. Among this number, Twenty-nine of these investment laws provides investors with the option of international arbitration as a remedial forum for the resolution of any disputes. Correspondingly, forty-nine out of the fifty-four countries have contracted or signed up to the ICSID convention. Furthermore, the commitment of African states towards economic harmonisation, integration and investment promotion in reflected in their innovative treaty-making and investment promotion initiatives like the creation of the RECs.

Perhaps, the most ambitious signal of the African continent to economic liberalisation, attraction of foreign direct investments and promotion of investments is the signing and ratification of the African Continental Free Trade Area (AfCFTA) agreement in 2018.<sup>365</sup> The AfCFTA aims to create a free trade area that will integrate African trade and investment

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<sup>363</sup> See the case of Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay) where a legitimate law for the protection of the health of the citizens of Uruguay was deemed to be a breach of the country's investment law and legitimate expectation guarantees to the investor.

<sup>364</sup> United Nations Conference on Trade and Development (UNCTAD), 'Investment Policy Hub' (2020) Available at <https://investmentpolicy.unctad.org/international-investment-agreements> (accessed on 02/02/2020)

<sup>365</sup> African Union, 'Agreement Establishing the African Continental Free Trade Area' (Adopted March 21, 2018 and entered into force May 30, 2019). Available at <https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area>

architecture, thereby creating a single continental investment and trading area. Among its core objectives is to integrate the economies of the fifty-five member African Union into a single continental trade and investment area. This will be achieved through the creation of a single market for goods and services, free movement of persons and investments and leading to the creation of a single customs and monetary union.

Similar to the European Union, the AfCFTA will cover a market area of 1.2 billion people and with a combined Gross Domestic Product (GDP) of over US\$3.4 trillion. Presently, fifty-four of the fifty-five member states of the African Union countries have signed this agreement, whilst thirty have ratified it as at October 2019. Sequel to the projected growth of the African population and productivity, the AfCFTA agreement further aims to diversify the African economic landscape and ultimately, lead to the creation of a single African trade and investment powerhouse.

Corporation on investment also forms the core of the AfCFTA since just the trade component of the AfCFTA have been concluded. As a developing continent, the agreement aims to achieve uniformity in investment laws and regulation similar to the concluded trade component. Thus, as it aims to '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', it also focuses on creating a 'comprehensive Protocol on Trade in Goods will deepen economic efficiency and linkages, improve social welfare, progressively eliminate trade barriers, increase trade and investment with greater opportunities for economies of scale for the businesses of State Parties'.

# AfCFTA

## Towards the African Continental Free Trade Area

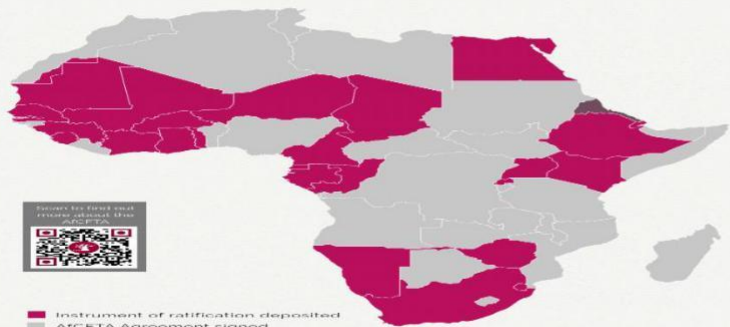
The African Continental Free Trade Area (AfCFTA) Agreement entered into force on 30 May 2019 for the 24 countries that had deposited their instruments of ratification with the African Union Commission (AUC) Chairperson. This date marked 30 days after the 22nd instrument of ratification was deposited, as stipulated in Article 23 of the AfCFTA Agreement.

On 7 July 2019, at an Extraordinary Summit of the African Union, the operational phase of the AfCFTA Agreement was officially launched.

### AfCFTA Ratification Barometer



### Which countries have ratified the AfCFTA Agreement?



Country	Date*
Kenya	10 May '18
Ghana	10 May '18
Rwanda	26 May '18
Niger	08 Jun '18
Chad	01 July '18
eSwatini	01 July '18
Guinea	01 July '18
Uganda	28 Nov '18
Côte d'Ivoire	18 Dec '18
South Africa	10 Feb '19
Sierra Leone	29 Apr '19
Mali	Feb '19
Senegal	Apr '19
Namibia	Feb '19
Congo, Republic	10 Feb '19
Togo	Apr '19
Mauritania	11 Feb '19
Djibouti	Feb '19
Egypt	8 Apr '19
Ethiopia	10 Apr '19
The Gambia	16 Apr '19
Saharawi Republic	29 Apr '19
Zimbabwe	24 May '19
Burkina Faso	29 May '19
São Tomé & Príncipe	27 June '19
Gabon	7 July '19
Equatorial Guinea	7 July '19
Mauritius	8 Oct '19
Cameroon	31 Oct '19**
Angola	28 Apr '20**

\* Date on which the AfCFTA instrument of ratification was deposited with the AUC Chairperson

\*\* Date on which ratification was approved



**Figure 1:** Graphic representation of the [AfCFTA](#)

In summary, the statistics on the consummation of international investment agreements by African states shows that the continent have been prominent participants in the devolvement of investor-state arbitration. Similarly, there is evidence that intra-African cooperation have also been pursued by states of the continent through the concluded trade component of the African Continental Free Trade Area (AfCFTA) agreement. The corollary of the innovative-treaty-making of the continent is that, African states can resolve any political impediments towards closer economic ties. Therefore, since my proposal will require the integration of the investment architecture of African states, it can be argued that it may be feasible as there is evidence of willingness towards a harmonised African economic landscape.

Consequent upon this summary, the next subsection will examine the benefits of an integrated African economic landscape. In essence, it aims to answer the question on the rationale behind my proposal for closer investment harmonisation through a Pan-African Investment Court.

#### 4.7. African states and benefits of economic integration

Arising from the innovative treaty-making practices of African states, it is imperative to determine whether there are inherent benefits in the reform measures of its economic landscape as exemplified by the AfCFTA, and deepening of investment cooperation in continent. A response to this poser could be in the affirmative that multilateralism is the way forward for African states.

As stated by the UNCTAD,<sup>366</sup> 'Development-oriented regionalism can contribute to spearheading Africa's achievement of development goals, the building of resilience to external financial and economic crises and the fostering of inclusive growth. It can have spill-over benefits in terms of helping foster peace, security and political stability on the continent'.<sup>367</sup> The import of the comment suggests that the harmonisation of the economies of African countries will help in boasting of intra-African trade, investment and development. Similarly, the United Nations Economic Commission for Africa (UNECA) commented that the AfCFTA possess several benefits for the continent because it will 'leverage Africa's economic size, drive Africa's industrialization, help Africa feed Africa, taking advantage of Africa's market growth, diversifying Africa's trade, producing jobs for Africa's youth, supporting women traders and cohering Africa's trade policy'.<sup>368</sup>

With a huge youthful population and imbued with so much extractive mineral resources, these benefits have however remained elusive because of the fragmented nature of their

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<sup>366</sup> United Nations Conference on Trade and Development, 'The Continental Free Trade Area: Making it work for Africa' (2020), Available at [https://unctad.org/en/PublicationsLibrary/presspb2015d18\\_en.pdf](https://unctad.org/en/PublicationsLibrary/presspb2015d18_en.pdf) (accessed on 04/02/2020)

<sup>367</sup> United Nations Conference on Trade and Development, 'The Continental Free Trade Area: Making it work for Africa' (2020), Available at [https://unctad.org/en/PublicationsLibrary/presspb2015d18\\_en.pdf](https://unctad.org/en/PublicationsLibrary/presspb2015d18_en.pdf) (accessed on 04/02/2020)

<sup>368</sup> In a document jointly prepared by the African Trade Policy Centre (ATPC) of the United Nations Economic Commission for Africa (ECA) and the Department of Trade and Industry (DTI) of the African Union Commission (AUC), 'African Continental Free Trade Area Questions and Answers'(2020), Available at [https://www.unece.org/sites/default/files/uploaded-documents/ATPC/updated\\_q\\_a\\_21jan2020.pdf](https://www.unece.org/sites/default/files/uploaded-documents/ATPC/updated_q_a_21jan2020.pdf) (accessed on 04/02/2020)

investment and trade policies. This is despite the fact that the among the objectives of the AfCFTA includes ‘commitments on customs cooperation and mutual administrative assistance, trade facilitation, technical barriers to trade, sanitary and phytosanitary standards, and trade transit’.<sup>369</sup> Therefore, it can be reiterated that an integrated economy will help in turning around the economy of the continent for sustainable development.

The enhancement and growth of investment is also another benefit that may materialise through an integrated African economy. As affirmed by UNECA, Africa’s underinvestment will be eliminated as international investors will be ‘linking up with African businesses and contributing inputs, intermediate goods and supportive services, thereby adding sufficient value-addition or transformation into the continent’.<sup>370</sup> Thus, a liberalised trade and investment climate will reduce underinvestment in Africa. The attractive of more foreign direct investment into the continent is more imperative because, Africa currently accounts for just two point eight per cent of the global investment stock, despite accounting for seventeen per cent of the world’s population and consumption of higher volume of IIAs than other continents.

Overall, there is evidence that an integrated African economy will augur well for African states. If the integrated economy of the European Economic Area is taken as an example, then it can be claimed that Africa will also witnessed increased economic growth due to the liberalisation of its economic landscape. Notwithstanding these positive derivatives of an integrated African economic environment, it is inexplicable that the integration of disparate

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<sup>369</sup> See the Preamble of the AfCFTA Agreement

<sup>370</sup> United Nations Conference on Trade and Development, 'The Continental Free Trade Area: Making it work for Africa' (2020), Available at [https://unctad.org/en/PublicationsLibrary/presspb2015d18\\_en.pdf](https://unctad.org/en/PublicationsLibrary/presspb2015d18_en.pdf) (accessed on 04/02/2020)

and sovereign states will not be easy. Therefore, the next subsection will evaluate the feasibility of achieving an integrated African economy. It is important to ascertain the plausibility of African economic integration towards demining the challenges that lies ahead of its occurrence.

#### 4.8. Feasibility of achieving the benefits of an integrated African economy

With the volume of international investment agreements, Regional Economic Communities, innovative model investment instruments and the African Continental Free Trade Agreement; there is no doubt that African states have partaken in the progressive devolvement of international investment regulatory and dispute resolution framework. In particular, the innovative clauses in these new-generation investment instruments aims to rebalance investor-state arbitration.

They seek to achieve this rebalance through the inclusion of clauses that protects host states and guarantees their powers to regulate their domains. Furthermore, this new investment instruments also seek to curb the negative impacts of multinational corporate activities through the imposition of obligations on multinational corporation. As afforested, the benefits of an integrated and harmonised African economy have been affirmed by several scholars and institutions. In investment protection and promotion however, the thorny issue remains whether Africa is open and ready for business. In essence, is multilateralism the way forward for Africa?

Stemming from the consummation of innovative BITs and other investment instruments between African states, the critical role of the RECs in driving regional integration and the signing of the Continental Free Trade Agreement; there are clear signs that African States are ready to close ties and cooperate on trade facilitation and investment promotion. However, on the basis of the current economic and investment regulatory landscape, it can be argued that Africa's hopes of attracting more FDI into its fold may be elusive without an integrated economic landscape.

Despite the acceptance and growth of investment arbitration, it is unarguable that the lingering problem on how to achieve a balanced international investment regulatory framework remains a major issue in international investment law. Thus, the forces that contended against diplomatic protection and the tribunals of the Eighteenth Century has continued to this day. Although investor-state dispute settlement has eliminated some of the criticisms of diplomatic protection, however, the high volume of innovative treaty-making practices and the questioning of the alleged legitimacy crises of investor-state arbitration; are signals that a balanced and agreeable investment regulatory firmament has not been achieved.

Since the formation of the Asian-African Legal Consultative Organization (AALCO) which led to the creation of the first BITs in the 1980s, to the United Agreement for the Investment of Arab Capital in the Arab States which culminated to the creation of the Arab Investment Court and the Lome III and Lome IV Conventions by Africa, to The Organisation of African, Caribbean and Pacific States (ACP); African and Asian states has never agreed unanimously on the level of protection that should be accorded to foreign investments through the investor-state arbitration and international investment agreement framework.

These institutions have always debated on the best form of protection to be according to investment. Thus, three models of investment agreement were debated upon on whether the highest or reduced form of protections should be accorded to foreign investments. In the shadow of the negotiations on the standard of protection that should accorded to foreign investments, majority of the states settled for the highest standard of treatment and protection; thereby leading to its embrace by many of them. Perhaps, it is due to this blanket acceptance that underpinned the contents of first-generation treaty. This is because, they did not define the meaning of the clauses such as FET and expropriation. Without the explanation of the scope of treaty provisions, investors utilised the opportunity to commence costly claims actions against capital-importing states like African States.

Arising from the losses suffered from arbitral claims, some developing and developed states are not just embarking on innovative treaty making practices, but also advancing proposals for a new form of investment regulation and dispute settlement system. For instance, Bolivia challenged some BIT provisions in a constitutional court, leading to the country's total withdrawal from the ICSID Convention in the year 2007. Similarly, Argentina questioned the legality of investor-state arbitration, whilst Ecuador has also challenged the *locus standi* of the ICSID Convention in 2007. Furthermore, after heightened challenge of some of the provisions of the tripartite North American Free Trade (NAFTA), the United States led the moves that culminated to its disbandment. Hence, the NAFTA has been replaced with the United States–Mexico–Canada Agreement (USMCA). It is noteworthy that the replacement of NAFTA with the USMCA contains eleven clauses that focused on the promotion and protection of investment.

These denouncements and innovative treaty-drafting practices suggests that that both developed and developing states are dissatisfied the contemporary investment regulatory and adjudicatory framework. This dissatisfaction is not without support as some scholars have argued that despite the inherent benefits of investor-state arbitration, however, it possesses it is reminiscent of diplomatic protection and neo-colonialism of the Ninetieth Century. Similarly, investor-state dispute settlement is increasingly viewed with suspicion as arguments are advanced, that arbitration is not a suitable resolution framework for disputes that dwells on public issues like the regulation of health, provision of security and payment of awards from public money.

Furthermore, the processes leading to the contraction of IIAs have also been questioned, with some scholars opining of an unequal balance of power between developed and developing states during the negotiation stages. Fundamentally, the calls for the reform of investor-state dispute settlement through the formulation of an Appeal Mechanism is a further affirmation of its legitimacy crises. Furthermore, prior to the innovative treaty-making practices of the late Twenty-First Century, the balance of obligations in IIAs had been asymmetrically against host states as old-generation treaties did not impose obligations on investors.

Sequel to this analysis, it is submitted that African states are not immune from the legitimacy crises of investor-state dispute settlement. Although the states of the continent have shown evidence and commitment to working together, and inherent benefits exists in these multilateral efforts; however, it is my opinion that the full benefits of these efforts will not be

achieved until the continent owns the adjudicatory arm of international investment law. Thus, I argue that African states will fare better and enhance the growth of their economies through the rebalancing of their investor-state dispute settlement framework; through the creation of a Pan-African Investment Court. As aforesaid, this argument draws inspiration from similar motivations behind the European Union Court System proposals as encapsulated in the defunct Trans-Atlantic Trade and Investment Partnership (TTIP) between the EU and United States, and the EU-Canada Comprehensive Economic and Trade Agreement.

#### 4.9. Conclusion

The protection of foreign investments has witnessed a tumultuous history to the contemporary IIAs and investor-state dispute settlement era. This history is replete with the practices of diplomatic protection of aliens abroad by their states. Due to the brute force measures deployed through this practice, the protection of investments through gunboat diplomacy was opposed by capital-importing countries especially in Latin America. This opposition forced capital-exporting countries to devise other acceptable measures for investment protection. Thus, fraternal treaties were consummated in parts to solve the problem of diplomatic protection. Despite the inclusion of tribunals within these measures, disagreement continued as to the level of protection that should be accorded to foreign investments. Thus, arguments on whether an international minimum standard should be accorded to investments lingered until the Twentieth Century, which saw the emergence of international investment agreements and investor-state dispute settlement as a supposed panacea to the problems.



Despite the positive derivatives of ISDS, it has failed to be the consensus panacea that was envisaged due to the disagreements on its scope and implementation mechanism. As such, most capital-importing countries have continued to denounce the investor-state arbitration framework as pseudo colonialism. Hence, several states in Latin America and fundamentally relevant to this thesis, states of the African continent have engaged in innovative treat-making practices, regional and continental economic cooperation and harmonisation. This has contributed to the formulation of an African Continental Free Trade Area (AfCFTA) agreement by fifty-four of the fifty-five states of Africa. The aim is to collaborate on trade and investment that will transform the continent into the biggest free trade area in the world.

There are inherent benefits in this economic cooperation efforts because, it will aid the growth of Africa's economy and enhance sustainable development across the continent. However, I argued that the ambition of African states to spur the growth of their economies and achieve sustainable development through greater trade and investment integration cannot be fully achieved without owning the adjudicator arm of international investment law. This is because, the current investor-state arbitration model has not been in the best interest of the continent. This conclusion is supported by some evidence underpinning the dissatisfaction of capital-importing states against the current international investment regulatory architecture.

Therefore, I argued that the recalibration of investment instruments to reflect African local contexts and exigencies, and the new wave of reform measures being undertaken by African states should culminate with the creation of a Pan-African Investment Court. Until this is achieved and as further evidences may show; I argue that the current dissatisfied experiences of African states in investor-state arbitration will continue.

My proposal for a Pan-African Investment Court remains a suggestion at this stage because of the potential challenges that lies of its establishment. Prior to initiating its theoretical structure, it is pertinent to firstly examine whether the alleged legitimacy crises of investor-state dispute settlement are valid. Towards determining the accuracy of the alleged defects of ISDS, it is therefore imperative for a study of the experiences of African states. It is after a review of Africa's experiences in investor-state arbitration that evidence may be gathered and deployed to firmly support my proposal.

Therefore, chapter five will conduct a case study of the experiences of African states in investor-state dispute settlement. It shall review the practical cases that have been faced by African states, the reasons behind their commencement and their outcomes. Although this review will mainly focus on the case study of investor-state arbitration of Egypt, Tanzania and South-Africa, however, the operation of investor-state dispute settlement within the continent in general will also be examined. In the preceding chapters, several scholarly arguments have been made on why African states should abandon investor-state arbitration and deploy the investment court system in its investor-state dispute settlement, however, the next chapter shall evidence whether these shortcomings which all contributes to the legitimacy crises of ISDS are actually true.

## **Chapter Five: Case studies of Investor-State Dispute Settlement and some African States**

## 5.1. Introduction

African states cannot move towards a different investor-state dispute settlement system without an appraisal of the functionality of the current investor-state arbitration model. As such, Africa's journey in international investment arbitration will have to be told within the lens of decided cases. Hence, this chapter shall conduct a case study of Africa's experiences in investor-state arbitration. In particular, the case study shall focus on the investment arbitration experiences of Egypt, Tanzania and South Africa. The case study of the investor-state arbitration caseload vis-à-vis the experiences of African states in investor-state dispute settlement will provide empirical evidence to support or rebut my arguments for a Pan-African Investment Court. Similarly, the volume of investment inflow and by extension, direct benefits arising from the signing of international investment agreements will also be examined in this chapter. This exploration will similarly, aid to ascertain whether the continuous reliance on investor-state arbitration in the settlement of investor-state dispute is good for African states.

Within this circumstance, my proposal that African states should move towards an Investment Court System can only be justified by empirical evidence. Thus, the findings of this case study will either justify or delegitimise the proposal of this thesis.

## 5.2. Investor-state dispute landscape of selected African states

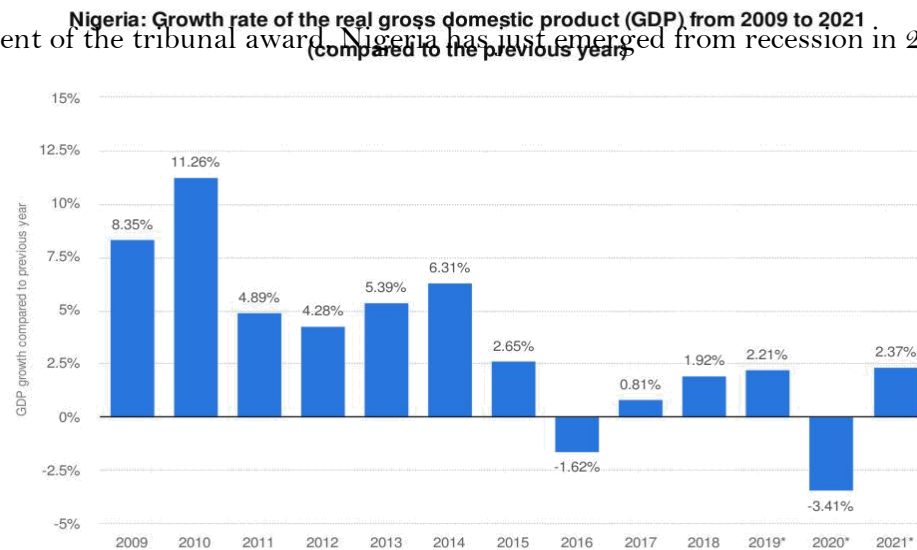
The standard of treatment and investor-state arbitration caseload experienced by African states have contributed to the growing scepticism of the continent towards investment arbitration model of ISDS. In recent times, some states within the continent have either totally abdicated from investor-state arbitration or reformed their investment instruments to protect themselves from investor claims. For instance, South Africa through its Protection of Investment Act, 2015 (Act No. 22 of 2015) have departed from investor-state arbitration except in exceptional circumstances. Similarly, Tanzania had in April 2019 terminated its Tanzania-Netherlands BIT 2001 because, the BIT curtailed the regulatory powers of the government of Tanzania, contained provisions that was akin to the rejected international minimum standard and also, was incompatible with subsequent domestic laws of Tanzania that required exhaustion of local remedies and local arbitration courts as forums for the resolution of any disputes.

Furthermore, Nigeria was recently confronted with an arbitration claim by an investor for a contract that was never executed. The Nigerian state was slammed with a \$6.6 billion arbitration award in favour of the investor, Process & Industrial Developments Ltd of Ireland. This judgement which touches on a purported granting of an energy contract to the investor was awarded in 2013, but had accrued an interest of \$9bn by 2019. A London court had ruled in 2019 that the investor can enforce the arbitral judgement through the seizure of assets of the host state Nigeria. This case is despite the fact that the investor did not even attempt to execute the contract beyond cosmetic efforts. However, the investor went ahead to investment arbitration, alleging that the Nigeria government reneged to obey their own part

of the contract, hence made it impossible for them (i.e. investors) to honour their own contractual obligations.

In its ruling, the tribunal agreed with the investors that Nigeria breached a legitimate expectation contained in the enabling treaty, despite the fact that the investor executed just about ten per cent of the contract. It is worthy of note that the contractual consummation processes were deemed illegal by the Nigerian government, who alleged that its signing did not follow proper procedures, were shrouded in secrecy and infused with bribery by rouge officials of its government.

In a milieu where political instability and lack of strong institutional structures holds sway, it is possible that the arguments of the Nigerian government is accurate. The circumstances of the arbitral award us such that it was decided during the throes of Nigeria’s relapse into economic recession in 2013. By the time the investors had approached the London court for the enforcement of the tribunal award, Nigeria has just emerged from recession in 2016.



Source  
IMF  
© Statista 2020

Additional Information:  
Nigeria; IMF

Figure 2 source: [Statista](#) – A representation of Nigeria’s economic growth rate

As can be seen from figure 2 above, throughout the period of 2013 till date which is within the period of the investment dispute with Process & Industrial Developments Ltd, Nigeria’s economy only grew beyond five per cent twice. In terms of demographic data and socio-economic development, the World Bank Human Capital Index 2018 shows that Nigeria occupies the lowest rungs of the ranking, with a poor position of one hundred and fifty-two among one hundred and fifty-seven surveyed countries.<sup>371</sup> Similarly, the country occupies the bottom six in quality and level of education and health among the countries of the world, with a spending of one point seven per cent of its GDP being less than the average four point seven per cent in Sub-Saharan Africa. Furthermore, Nigeria occupies the last position in Oxfam’s Commitment to Reducing Inequality Index among the comity of nations.<sup>372</sup> As such, the World Bank commented that Nigeria requires development in several sectors of its developmental indices.

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<sup>371</sup> World Bank, ‘ Human Capital Index’ (2018) Available at <https://www.worldbank.org/en/country/nigeria/overview> (accessed on 06/02/2020)

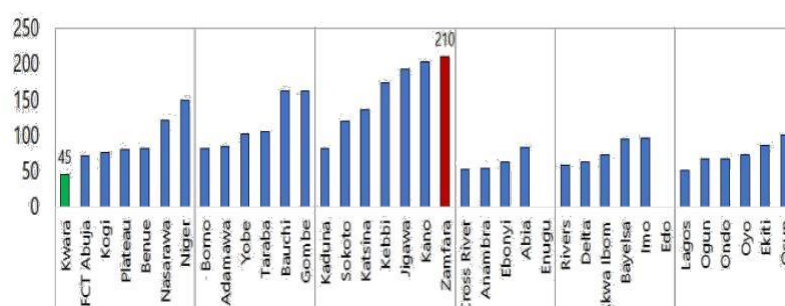
<sup>372</sup> OXFAM International, ‘Fighting inequality in the time of COVID-19: The Commitment to Reducing Inequality Index 2020’ (2020), Available at <https://www.oxfam.org/en/research/fighting-inequality-time-covid-19-commitment-reducing-inequality-index-2020> (Accessed on 23/11/2020)

According to the World Bank, ‘the country [Nigeria] continues to face massive developmental challenges, which include the need to reduce the dependency on oil and diversify the economy, address insufficient infrastructure, and build strong and effective institutions, as well as governance issues and public financial management systems. Inequality in terms of income and opportunities has been growing rapidly and has adversely affected poverty reduction. The North-South divide has widened in recent years due to the Boko Haram insurgency and a lack of economic development in the northern part of the country. Large pockets of Nigeria’s population still live in poverty, without adequate access to basic services, and could benefit from more inclusive development policies. The lack of job opportunities is at the core of the high poverty levels, of regional inequality, and of social and political unrest in the country’.<sup>373</sup>

Concurrently, the International Monetary Fund (IMF) Country Report 2019 shows that Nigeria is beclouded by education deficit and also possess one of the highest infant mortality rates in the world.<sup>374</sup>

### Under-Five Mortality Rate

(Deaths per 1000 live births)



<sup>373</sup> World Bank, ‘Human Capital Index’ (2018) Available at <https://www.worldbank.org/en/country/nigeria/overview> (accessed on 06/02/2020)

<sup>374</sup> Ibid. 373 above

These damning indices indicates that Nigeria requires urgent need for a turnaround because, as further captured by the IMF, ‘Education and health outcomes in Nigeria are among the weakest worldwide and are deteriorating in some parts of the country. Access to education is highly unequal across states and individuals’ income and gender. Regional differences in health outcomes are vast. Estimations from a micro-founded general equilibrium model suggest that narrowing gaps in education between boys and girls and between individuals at different parts of the income distribution would boost productivity, decrease income inequality, and narrow gender gaps in labor force participation rates and earnings’.

‘Closing the gender gap in years of schooling in each income quintile alone would boost long-term GDP by five per cent, with much higher effects for more ambitious scenarios that also include anti-discrimination policies. Improving health outcomes, in particular for children, will support education outcomes and boost productivity of the labor force. Increased and regular funding for the education and health sector will be critical for supporting a range of reforms that includes all tiers of government’.<sup>375</sup>

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<sup>375</sup> See - IMF Country Report No. 19/93; March 13, 2019. Available at file:///C:/Users/oa129/Downloads/1NGAEA2019002.pdf(accessed on 07/02/2020)



Despite this damning comments from the World Bank, IMF, AfDB and other institutions about Nigeria's economic situation and negative developmental indicators, the tribunal still went ahead to award a huge sum of over \$6bn to an investor that did not execute the contract. In fact, within the period that the investor claimed for the recognition of the award, the Nigerian government was financing part of its budget with loans from financial institutions like the African Development Bank (AfDB). As I surmised in chapter one, the lack of consideration of these local realities have therefore, been one of the criticisms of the investment arbitration model of investor-state dispute settlement.

In effect, the requisition on Nigeria, with its negative economic and developmental data, to pay an arbitral award of \$9 billion, could not have been within the contemplation of the host state and the investors during the consummation of the contract. Likewise, it could also not have been in the imagination of the state parties to the investment agreement, that whilst the investment of their nationals are expected to be protected in Nigeria, that such humongous sum should be awarded against Nigeria. Whilst this Nigerian case is not one of the three countries that will be examined in this case study, however, it is an example of Africa's experience in investor-state arbitration.

Beyond this Nigerian case, chapter [1.4.] on investor-state caseload shows that African states have been confronted with more arbitral cases than other continents, despite receiving the lowest volume of the global investment inflow in 2019. As at December 2020, there were one thousand and twenty-three investor-state disputes globally,<sup>376</sup> with most of them coming

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<sup>376</sup> UNCTAD, "World Investment Report 2020 | International Production Beyond the Pandemic" <<https://unctad.org/webflyer/world-investment-report-2020>> accessed November 23, 2020

under the expropriation and FET clauses.<sup>377</sup> Most of the claims within this number, estimated at over sixty per cent, were brought by investors against developing states, especially countries of the African continent.

Similarly, ICSID investor-state dispute settlement caseload 2020 shows that the total number of cases under its Convention and Additional Facility framework since 1966 to December 2019 is seven hundred and forty-five. In addition, other cases which were not instituted under the Convention but administered by ICSID are one hundred and twelve within the past decade.<sup>378</sup> In the year 2019 alone, there were thirty-nine total cases that were administered under the ICSID Convention and sixteen non-ICSID cases but administered by the institution. The percentage of the investment instrument upon which these disputes were instituted shows that BITs occupied the largest chunk with sixty per cent, contractual investment cases sixteen per cent, the Energy Charter saw nine per cent, National investment law was eight per cent, NAFTA was three per cent, Dominican Republic-United States-Central America Free Trade Agreement was one per cent and Other Treaties had three per cent. From these percentage demarcations, it is obvious that the area in which African states are mostly involved are BITs, which occupies the largest chunk of the investment instruments upon which cases are adjudicated by ICSID.

In terms of the geographic distribution of these cases administered by ICSID, Sub-Saharan Africa is affected by fifteen per cent, Middle East & North Africa is eleven per cent, Eastern Europe & Central Asia twenty-six per cent, South America twenty-three per cent, South &

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<sup>377</sup> UNCTAD, "World Investment Report 2020 | International Production Beyond the Pandemic" <<https://unctad.org/webflyer/world-investment-report-2020>> accessed November 23, 2020

<sup>378</sup> ICSID, "The ICSID caseload - statistics 2020-2 (2020)"

East Asia & the Pacific seven per cent, Western Europe eight per cent, Central America & the Caribbean six per cent and North America four per cent respectively. Arising from these demographic distribution, it is again obvious that the African continent is affected by about twenty-six per cent of the total cases at ICSID.<sup>379</sup>

Similarly, there is a clear evidence that the regions that are mostly impacted by ISDS are the continents of capital-importing states. In the appointment of arbitrators for instance, whilst the capital-exporting states have the lowest volume of ICSID cases, they however, possess the highest amount of Arbitrators, Conciliators and ad hoc Committee Members.<sup>380</sup> Correspondingly, whilst states like South Africa and Ecuador have two and seven arbitrators respectively, the United States and France have two hundred and thirty-six and two hundred and forty-two in that order. In total, just about two per cent of all arbitrators and conciliators are from Africa states. With the knowledge that the dissatisfaction in the operation of ISDS by African states is based on the premise that arbitral awards are skewed against them in favour of foreign investors who are nationals of capital-exporting countries, it has been argued that the success of investors and attractiveness to this model is because of this inequality in the appointment of arbitrators.

On investment inflow on the basis of and IIAs, African states also lags behind in comparison to other regions of the world. According to the World Investment Report 2020 of the United Nations Conference on Trade and Development,<sup>381</sup> Africa attracted just zero point four per

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<sup>379</sup> All the information and data in this chapter are contained in the ICSID caseload – statistics 2020-2(2020) above

<sup>380</sup> ICSID, "The ICSID caseload - statistics 2020-2 (2020)

<sup>381</sup> UNCTAD, "World Investment Report 2020 | International Production Beyond the Pandemic" <<https://unctad.org/webflyer/world-investment-report-2020>> accessed November 23, 2020

cent of the global foreign direct investment (FDI) inflow in the year 2019, despite having one of the highest volumes of international investment agreements.

In contrast, the other continents with less than two per cent of the global IIAs had better comparative FDI inflows into their region in 2019. For example, Asia attracted twenty-four point nine per cent of FDIs in 2019 and Latin America and the Caribbean attracted three point two per cent of the global FDIs respectively.<sup>382</sup> On this evidence, it is clear that African states attracted the least FDI inflow among all the developing continents of the world, except Ocean which had zero point one per cent. When contrasted with the volume of international investment agreements consummated, then the abysmal performance of the African continent is put into proper perspective.

These economic indices have served as one of the reasons adduced by some scholars that years after the defeat of diplomatic protection and use of international arbitration, Africa states are still beclouded by the unequal distribution of global FDI stock and investor-state arbitration cases. Hence the increasing calls, which includes my proposal, for African states to change from investment arbitration to Investment Court System in its investor-state dispute settlement mechanism. As aforesaid, there must be cogent evidences and reasons behind my suggestion for Africa to change to an Investment Court System. Therefore, the specific experiences of Egypt, Tanzania and South Africa shall be examined and evidences deployed to buttress and support my proposal for a Pan-African Investment Court.

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<sup>382</sup> Information and data on this page are contained in the ICSID caseload and World Investment Report – 373 and 374 above

### 5.3. Case study of investment arbitration claims against Egypt

The Arab Republic of Egypt is a country in Northern African with its political capital in Cairo.<sup>383</sup> Its origin can be traced to circa 3000 BC when there was a unification of the upper and lower Egypt. There were long periods of wars and consequents until 1882 when the country was taken over by Great Britain. Thereafter, Fuad I became the king of the country and then gaining independence in 1922, although the influence of the British was still evident until the 1950s. It occupies a surface area of 1 million sq. km (386,874 sq. miles), with a population of about 83.9 million. It has a life expectance of 72 years for men and 76 years for women and its main language is Arabic and main religions being Islam and Christianity.

In economic terms, Egypt is an emerging economy with a lower economic index. As at 2018, Egypt's GDP stood at 250.9 billion USD. This GDP figure is due to the growth of the Egyptian economy in the past three years with a GDP growth rate of five point six per cent by the fiscal year ending 2019.<sup>384</sup> It has a budget to GDP deficit of eight point one per cent and unemployment rate stands at ten point three per cent.

Over the years, Egypt has been a prominent feature in international investment arbitration both in the contraction of IIAs and participation in arbitral claims. Starting with the former, the country signed the Convention on the Settlement of Investment Disputes treaty, the establishing treaty of The International Centre for Settlement of Investment Disputes (ICSID) in the year 1971,<sup>385</sup> entered into force in June 1972 and had its first case in 1984.<sup>386</sup> Within the intervening period, Egypt has been confronted with several investment arbitration claims, with most of them instituted between the years 2011 - 2018. The peaking

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<sup>383</sup> See BBC, 'Egypt country profile' (2020), Available at <https://www.bbc.co.uk/news/world-africa-13313370> (accessed on 24/11/2020), for all information on the biodata of Egypt

<sup>384</sup> African Development Bank, 'African Economic Outlook 2020: Developing Africa's workforce for the future' (2020), Available at <https://www.afdb.org/en/knowledge/publications/african-economic-outlook> (accessed on 23/11/2020) - Other economic data on Egypt are contained in this Economic Outlook of the AfDB

<sup>385</sup> This was consummated through the Egypt Presidential Decree No.90/1971

<sup>386</sup> SPP v Arab Republic of Egypt (1984)

of these investment claims against Egypt between 2011-2018 may not be surprising because, this was the period that the state experienced political instability and regime change through the Arab spring that swept across the Arab world. This uprising led to the toppling of several governments in North Africa including Tunisia and Algeria.

Since the ascension of Egypt to ICSID in 1984 to March 2020, the state has participated in forty-five publicly known ISDS cases.<sup>387</sup> While Egypt have been claimants in five cases in which four were against other developing states, it has however been respondents in forty others. Within this number, twenty-two of them were filed between the years 2012 to 2020, the intervening period after the Arab spring protests which led to the toppling of the regime of the then President of Egypt Hosni Mubarak in 2011. However, it should be noted that only about thirteen of the cases were consequential outcomes of the Arab spring.<sup>388</sup> As one of the highest signatories to the ICSID convention, having contracted one hundred and fifteen BITs since the year 1966, fourteen Treaties with Investment Provisions (TIPs) and twenty-two Investment Related Instruments (IRIs); most of the cases against Egypt have come under its consent to ICSID.

These investment agreements contain different clauses and provisions, particularly the BITs wherein about sixty-three, amounting to sixty-five per cent confers jurisdiction to the ICSID Convention.<sup>389</sup> Thus, the arbitral claims against the state are mostly contingent upon the regulatory and domestic policies of the Egyptian government that impacts on its BIT provisions. Consequently, the state is the fourth highest respondent party in investment

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<sup>387</sup> UNCTAD Investment Policy Hub, 'Investment Dispute Settlement Navigator' (2020), Available <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/62/egypt/respondent> (accessed on 28 July 2020)

<sup>388</sup> Ahmed Bakry, 'After 48 Years at ICSID (1972-2020): An Overview of the Status of Egypt in ICSID Arbitrations' (2020), Kluwer Arbitration Blog, Available at <http://arbitrationblog.kluwerarbitration.com/2020/03/15/after-48-years-at-icsid-1972-2020-an-overview-of-the-status-of-egypt-in-icsid-arbitrations/> (accessed on 28 July 2020)

<sup>389</sup> Ibid. 387 above

arbitration behind Argentina with fifty-six cases, Venezuela with forty-nine and Spain with thirty-nine cases respectively.

In the forty-five claims that Egypt has been the respondent, a majority of them were based on the old-generation BITs of Egypt, hence a justification for its engagement in innovative treaty-making practices as evidenced through the introduction of novel clauses in the Egypt - Mauritius BIT. A cursory analysis of these cases against Egypt shows that twenty-eight, amounting to seventy per cent of the forty cases were commenced by investors from capital-exporting countries, with about thirty-two per cent of them mainly premised on provisions of first-generation investment agreements like the Egypt – United States and Egypt – United Kingdom BITs. In contrast, only twelve which accounts for thirty per cent of the cases were commenced by developing states from the Middle East.<sup>390</sup>

For example, in *Sajwani v. Egypt*, an Egyptian court challenged and pronounced a reversal of the sale of a land that was sold to a foreign investor because it deemed that the transaction had been conducted below the market price of the land. Likewise, in *Veolia Proprete v. Egypt*.<sup>391</sup> another foreign investor challenged the minimum wage increase of the Mohammad Morsi government which replaced the Mubarak government on the argument that the previous government had made a stabilisation provision in its concession agreement with the investor. This latter case can be premised on legitimate expectations clauses that are routinely the basis of contention in ISDS.

On the treaty provisions that have been challenged by investors,<sup>392</sup> about seventy-eight per cent were on direct or indirect expropriation, about seventy-one per cent dwelled on Fair and

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<sup>390</sup> UNCTAD Investment Policy Hub, 'https://investmentpolicy.unctad.org/investment-dispute-settlement/country/62/egypt/respondent' (2020), Available at https://investmentpolicy.unctad.org/investment-dispute-settlement/country/62/egypt/respondent (accessed on 28 July 2020)

<sup>391</sup> ICSID Case No. ARB/12/15 International Investment Agreement (June 25, 2012)

<sup>392</sup> See Ahmed Bakry, 'After 48 Years at ICSID (1972-2020): An Overview of the Status of Egypt in ICSID Arbitrations' (2020), Kluwer Arbitration Blog, Available at <http://arbitrationblog.kluwerarbitration.com/2020/03/15/after-48-years-at-icsid-1972-2020-an-overview-of-the-status-of-egypt-in-icsid-arbitrations/> (accessed on 28 July 2020)

equitable treatment (FET), Full protection and Security is sixty-four per cent, Denial of justice is fifty per cent whilst Most favoured nation treatment (MFN) was challenged in twenty-eight per cent of the cases respectively. Similarly, discriminatory measures and minimum standard of treatment were challenged in twenty-one per cent and fourteen per cent of the cases. Perhaps, the fact that expropriation, FET and Full security have been challenged in most of the cases may not be surprising because, they are the most litigated areas in investment arbitration in general.

As may be recognised, issues that concerns expropriation and FET are however, the areas that deals with the good governance and wellbeing of citizens of host states. With the non-explanation of the full ramifications of these clauses in first-generation investment agreements, investors routinely utilise this ambiguity to commence all manner of arbitral cases against host states.

On the economic sectors that have mostly been challenged; Egypt's mining, oil and gas sectors accounts for over twenty per cent, whilst the tourism sector accounts for about seventeen per cent of the cases. Issues raised in these sectors have peaked at over eighty-six per cent since the 2011 Egyptian Revolution. In respect of the amounts awarded,<sup>393</sup> Egypt have been on the receiving end of over USD 22.760 billion worth of arbitral claims since its ascension to ICSID.<sup>394</sup> Unsurprisingly perhaps, USD21.638 Billion of this amount have also

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<sup>393</sup> See Ahmed Bakry, 'After 48 Years at ICSID (1972-2020): An Overview of the Status of Egypt in ICSID Arbitrations' (2020), Kluwer Arbitration Blog, Available at <http://arbitrationblog.kluwerarbitration.com/2020/03/15/after-48-years-at-icsid-1972-2020-an-overview-of-the-status-of-egypt-in-icsid-arbitrations/> (accessed on 28 July 2020)

<sup>394</sup> Further data and information available at the UNCTAD, "World Investment Report 2020 | International Production Beyond the Pandemic" <<https://unctad.org/webflyer/world-investment-report-2020>> accessed November 23, 2020, ICSID, 'The ICSID caseload - statistics 2020-2 (2020), ICSID, 'UNCTAD Investment Policy Hub, 'Investment Dispute Settlement Navigator' (2020), Available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/62/egypt> (accessed on 06/06/2021)



been filled after the 2011 Arab Spring, with one investigator claiming as much as USD15 billion in one case.<sup>395</sup>

In the forty arbitral cases against Egypt as at December 2020,<sup>396</sup> twelve are still pending, eleven were settled between investors and the state's Committee for the Settlement of Investment Contracts Disputes, ten were decided in favour of the state, five were upheld in favour of the investors, one was discontinued while one was decided in favour of neither party without any liability. The total amount paid out by Egypt on the five cases which were all decided in favour of investors from capital-exporting countries is USD 2.125 billion. On the five cases where Egyptian investors have commenced arbitral claims between the years 2000-2019; two have been decided in favour of the state, one have been settled, one remains pending while there is no available data on one of them.

Despite the seemingly imbalance of investor-state arbitration against host states, however, the statistics on the Egyptian experience clearly shows that the state has won more cases than investors. However, that is not the crux of the matter. The main problem is the huge sums of money that have been paid to investors on the basis of legitimate decisions undertaken by the Egyptian government. The corollary therefore, is that investor-state arbitration through the clauses in investment agreements have become a pseudo tool that intrudes on the internal decision-making powers of states. If the arbitration system continuous to be deployed in the resolution of investor-state disputes, it could totally extinguish the legitimate right of sovereign states to pilot their affairs. In addition, the arbitral claims against Egypt are premised on public subjects that are resolved through private arbitration measures. But, the resolution of what are clearly public matters through such private arbitral mechanism do not

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<sup>395</sup> See Ahmed Bakry, 'After 48 Years at ICSID (1972-2020): An Overview of the Status of Egypt in ICSID Arbitrations' (2020), Kluwer Arbitration Blog, Available at <http://arbitrationblog.kluwerarbitration.com/2020/03/15/after-48-years-at-icsid-1972-2020-an-overview-of-the-status-of-egypt-in-icsid-arbitrations/> (accessed on 28 July 2020)

<sup>396</sup> UNCTAD Investment Policy Hub, 'Investment Dispute Settlement Navigator' (2020), Available <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/62/egypt/respondent> (accessed on 28 July 2020)

ensure transparency and legitimacy. With governments functioning at the behest of their citizenry and on the altar of rule of law, such private arrangements cannot be justified when evaluated through the lens of legitimacy and sovereignty.

Similarly, states contract IIAs for increased economic growth through the attraction of FDIs, and not to be perpetually inundated with investment claims or the curtailing of their regulatory powers. According to the UNCTAD, of the total USD 45 billion FDI inflow into Africa in the year 2019, a figure that was a decrease of ten per cent from the USD 46 billion in the year 2018, Egypt was the highest recipient of the total stock, with a ten point seven per cent increase from the previous year to USD 9 billion.<sup>397</sup> This increase in FDI attraction ensured that the state ranked as the fourth best host economy in the continent.

On this basis, it can be argued that the state is reaping the positive impact of IIAs and indeed, supports the argument of commenters like Bakry, who opined that ‘there is no relationship between a respondent state’s development status and the outcome in investment arbitration’.<sup>398</sup> However, when contrasted with the fact that Egypt has the fourth highest number of BITs, it can be claimed that its FDI inflow is not commensurate with the volume of investment agreements contraction. More importantly, the fact that the country paid out USD 2.125 billion in arbitral awards, in addition to other payments that were not publicly stated through settlements, is a pointer that any gains garnered through the inflow of FDIs are offset through investment arbitral award payments.<sup>399</sup>

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<sup>397</sup> the UNCTAD, “World Investment Report 2020 | International Production Beyond the Pandemic” <<https://unctad.org/webflyer/world-investment-report-2020>> accessed November 23, 2020 at 12, 30

<sup>398</sup> See Ahmed Bakry, 'After 48 Years at ICSID (1972-2020): An Overview of the Status of Egypt in ICSID Arbitrations' (2020), Kluwer Arbitration Blog, Available at <http://arbitrationblog.kluwerarbitration.com/2020/03/15/after-48-years-at-icsid-1972-2020-an-overview-of-the-status-of-egypt-in-icsid-arbitrations/> (accessed on 28 July 2020)

<sup>399</sup> All data and information here were sourced from the UNCTAD, “World Investment Report 2020 | International Production Beyond the Pandemic” <<https://unctad.org/webflyer/world-investment-report-2020>> accessed November 23, 2020, ICSID, 'The ICSID caseload - statistics 2020-2' (2020), ICSID, 'The ICSID caseload - statistics 2020-2' (2020), UNCTAD, 'International Investment Agreements Navigator' (2020)

Furthermore, when viewed from the lens of governmental duty to its citizens vis-à-vis the sustainable developmental ambitions of Egypt, it can be claimed that the arbitration mechanism of ISDS has not served the country well enough, and indeed, may not have satisfied the purposes behind their contraction of its IIAs. As aforesaid, the rationale underpinning the consummation of investment agreements is to serve as tools for economic growth and sustainable development of states. Therefore, when evidential realities of huge arbitral awards and costs are at variance with this objective, then the continuous deployment of the arbitration mechanism as a means of resolving investor-state disputes may no longer be justified.

More pertinently, Egypt have several competing socio-economic needs that its arbitral payments could help to remedy or eliminate. For example, according to the International Monetary Fund (IMF) World Economic Outlook published in April 2020,<sup>400</sup> Egypt's economy only grew by two per cent, with an unemployment rate of ten point three per cent. Similarly, the country's inflation rate is put at five point nine per cent. With a negative debt to GDP ratio of minus four point three per cent, leading to a net borrowing of minus seven point seven per cent of GDP; it is clear that Egypt possess urgent socio-economic needs that the arbitral payments could have been more usefully applied.

The limiting of regulatory powers of host states through the substantive protections in IIAs is also evident in Egypt's experiences. In regards to decided cases, an examination of some of

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<sup>400</sup> African Development Bank, 'African Economic Outlook 2020: Developing Africa's workforce for the future' (2020), Available at <https://www.afdb.org/en/knowledge/publications/african-economic-outlook> (accessed on 23/11/2020)

them reveals the nature and far reaching implications of the arguments of investors. For example, in *International Holding Project Group v. Egypt*,<sup>401</sup> the investor filed a claim due to the cancellation of a contract to build a new city in Cairo invoked under the Egypt – Kuwait BIT 2001. Likewise, *Tantalum International Ltd. v. Egypt* is a dispute that centred on mining issues,<sup>402</sup> while *Future Pipe International v. Egypt* was concerned with the distribution of water and clearance of sewage and based on the Netherlands - Egypt BIT 1996.<sup>403</sup>

Whilst some other cases are still pending at investment arbitral tribunals and could be decided either in favour or against Egypt, however, the summary of all them points to direct challenges on the powers of the Egyptian government to make legitimate democratic decisions for the good of their country. In essence, such arbitral claims that questions the regulatory powers of host states impacts on the effectiveness of governance, thus at variance to the enhancement of sustainable development objectives that underpins the contraction of IIAs. Further cases like *Wena Hotels*,<sup>404</sup> brought under the auspices of the Egypt–UK BIT 1975 where the investor’s claims of expropriation were granted, and *Siag* where the investor was successful for a land reclamation by the government; are reinforcements of how investment agreement provisions and investor-state arbitration impacts on effective governance of Egypt in particular and host states in general.<sup>405</sup>

These prevailing discussion provides empirical evidence and supports the view that, the high rise of investors’ claims against Egypt is precipitated by investors who uses provisions of

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<sup>401</sup> *International Holding Project Group and others v. Arab Republic of Egypt* (ICSID Case No. ARB/18/31)

<sup>402</sup> *Tantalum International Ltd. and Emerge Gaming Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/18/22)

<sup>403</sup> *Future Pipe International B.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/17/31)

<sup>404</sup> *Wena Hotels Ltd v Egypt* ICSID Case No.ARB/98/4, Arbitral Award of 8 December 2000

<sup>405</sup> *Waguib Elie George Siag and Clorinda Vecchi v Egypt* ICSID Case No.ARB/05/15, Arbitral Award of 1 June 2009

IIAs and domestic occurrences, no matter how remote, as façade to commence arbitral claims. This is particularly instructive in the Wena Hotels case where the tribunal held that, ‘In sum, the Tribunal concludes that Egypt breached its obligations under Article 2(2) of the IPPA by failing to accord Wena’s investments in Egypt ‘fair and equitable treatment’ and ‘full protection and security’. Even if the Egyptian Government did not authorize or participate in the attacks, its failure to prevent the seizures and subsequent failure to protect Wena’s investments give rise to liability. The Tribunal also finds that Egypt’s actions amounted to an expropriation—transferring control of the hotels from Wena to EHC without ‘prompt, adequate and effective compensation’ in violation of Article 5 of the IPPA’.

The ruling in the Wena Hotels case is not an isolated decision as further cases also directly challenged the ability of the Egyptian state to effectively govern its territory, especially in the shadow of the Arab Spring and change of government in the year 2011. For example, in Damac,<sup>406</sup> the new Egyptian government had cancelled and convicted the investor in absentia for buying a land below the market value. Likewise, in Indorama,<sup>407</sup> the annulment of a privatised industrial asset by the government was challenged. Similarly, in Bawabet Al Kuwait,<sup>408</sup> an investor challenged the right of the new government to withdraw from establishing an intended free trade zone. Likewise, in Fenosa, an investor filed a claim against Egypt for supplying gas to its country against its exporting agreement with the investor.<sup>409</sup> Although Egypt argued that the gas supply was an act of necessity because, it was the only way of maintaining the stability and security of the state; the tribunal still found in favour of the investor.

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<sup>406</sup> Hussain Sajwani, Damac Park Avenue for Real Estate Development S.A.E., and Damac Gamsha Bay for Development S.A.E. v. Arab Republic of Egypt (ICSID Case No. ARB/11/16)

<sup>407</sup> Indorama International Finance Limited v. Arab Republic of Egypt (ICSID Case No. ARB/11/32)

<sup>408</sup> Bawabet Al Kuwait Holding Company v. Arab Republic of Egypt (ICSID Case No. ARB/11/6)

<sup>409</sup> UNIÓN FENOSA GAS, S.A. v. ARAB REPUBLIC OF EGYPT ICSID Case No. ARB/14/4

Arising from the investigation of Egypt's experiences in investor-state arbitration, the mixed results of the arbitral claims shows that investment arbitration do not contemplate local realities and regulatory powers of host states. Although the contraction of investment agreements has led to increased FDI attraction to African states, however, the Egyptian experience shows that inclusion and use of investor-state arbitration as the mechanism for the resolution of investor-state disputes in IIAs; stifles government control and internal regulation of host states. In any case, all the arguments underpinning these investment arbitral claims are premised on breaches of legitimate expectations and substantive protections in the treaties. But, the local circumstances and realities of Egypt, a country that was just emerging from political turmoil and revolution were not taken into account by most of the arbitral tribunals. With the evidence that over seventy per cent of the cases were commenced in the immediate aftermath of the Egyptian revolution, it therefore behoves that the non-contemplation and consideration of this reality in the dispute settlement processes can be deemed unfair and unjustifiable.

#### 5.4. Case study of investment arbitration claims against Tanzania

Tanzania is also another country that have experienced several investor-state arbitration issues in investor-state dispute settlement. United Republic of Tanzania is a country in the East of Africa. It became a country through the unification of the defunct Tanganyika and Zanzibar in 1964. It has a population of 55.5 million people and occupies a surface area of 945,087 sq. km (364,900 sq. miles). Its major languages are English and Swahili, whilst main

religions are Christianity and Islam. Life expectancy is put at 63 years for men and 67 years for women and the unit of its currency is the Tanzanian shilling.<sup>410</sup>

Economically, the African Development Bank (AfDB),<sup>411</sup> reported that Tanzania had a negative GDP growth in 2019 at six point eight per cent, down from seven per cent in the year 2018. Its major sources of income are mining, agriculture, tourism, construction, manufacturing and services. Inflation rate decreased from three point six per cent in 2018 to three point three per cent in the year 2019. The country's fiscal deficit which is majorly caused by external debt was two per cent of its GDP in the year 2019, an increase from one point three per cent in 2018. Its debt to GDP ratio stood at three point four per cent in the year 2019, a rise from three point three per cent in 2018.<sup>412</sup>

Tanzania has consummated IIAs such as BITs with other countries that contains investment provisions. Information from the UNCTAD,<sup>413</sup> shows that the country has consummated twenty BITs and other investment related instruments (IRIs) since its ascension to ICSID in 1992. Within these agreements, the country signed five of them between 2011 to 2013, perhaps necessitating why the UNCTAD identified it as a top investment destination in 2014. The opening of its investment space attracted several investors and this led to a progressive in the attraction of foreign direct investments. Thus, The World Bank statistics shows that

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<sup>410</sup> See BBC, 'Tanzania country profile' (2020), Available at <https://www.bbc.co.uk/news/world-africa-14095776>, (accessed on 23/11/2020), for all biodata on Tanzania

<sup>411</sup> African Development Bank, 'African Economic Outlook 2020: Developing Africa's workforce for the future' (2020), Available at <https://www.afdb.org/en/knowledge/publications/african-economic-outlook> (accessed on 23/11/2020)

<sup>412</sup> All data and information here were sourced from the UNCTAD, "World Investment Report 2020 | International Production Beyond the Pandemic" <<https://unctad.org/webflyer/world-investment-report-2020>> accessed November 23, 2020, ICSID, 'The ICSID caseload - statistics 2020-2 (2020)', ICSID, 'The ICSID caseload - statistics 2020-2 (2020)', African Development Bank, 'African Economic Outlook 2020: Developing Africa's workforce for the future' (2020), Available at <https://www.afdb.org/en/knowledge/publications/african-economic-outlook> (accessed on 23/11/2020)

<sup>413</sup> UNCTAD, 'International Investment Agreements Navigator' (2020), Available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/222/tanzania-united-republic-of> (accessed on 23/11/2020)

Tanzania experienced sustained economic growth of six to seven per cent within the last decade. One FDI inflow, the country attracted \$1.1 billion worth of investments in 2019, a five per cent increase from the year 2018 and a zero point nine per cent share of the total \$7.8 billion of FDIs that flowed into East Africa in 2019.

Although these FDI inflows into the country are good for its economy and development, when, when contrasted with investment arbitral awards payments by the country, it evidences a disparity between investment attraction and positive contribution of investor-state arbitration to the country.

Since its ascension to ICSID, Tanzania have been inundated with six cases as a respondent state. It can be argued that these indices are relatively high when compared with the country's twenty BITs, an economic growth rate of six to seven per cent within the last ten years and specifically, the attraction of \$1.1 billion of FDI inflow in 2019. Beyond the economic arguments, a cursory review of further operational impacts of investor-state arbitration in Tanzania, shows its curtailing effects on domestic regulatory and policy-making powers. For instance, in *Biwater v. Tanzania*,<sup>414</sup> a joint venture water and sewage infrastructure project between an agency of the state and the investors was terminated by the state, because of unsatisfactory execution of the contract by the investor.

The investor claimed for illegal expropriation on the basis that the cancellation of the contract was a negation of the BIT between Tanzania – United Kingdom. In the ensuing arguments, the state claimed that the provision of a clean and safe water system to its citizens was a fundamental human right and therefore, the cancellation of an agreement on the basis of

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<sup>414</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22



human rights should not be deemed a breach. In its ruling, the tribunal held that Tanzania had breached the provisions of the BIT, although it refused to award the requested damages to the investor.

Onemore, this decision in Biwater is another example of the far depth of BIT provisions, and the extent in which investors are ready to argue in the protection of their investments. Despite the fact that the water and sewage infrastructure project was for the provision of social amenities that borders on human rights, the investor successfully argued on a breach of the provisions of the BIT. Similar to the experience of Egypt, this case also evidences how arbitral panels will give pre-eminence to contractual and BIT provisions above fundamental human rights and the powers of the state to legislate and regulate their territories.

Likewise, in *SCB v. Tanzania*,<sup>415</sup> the investor claimed for damages for an issue that can be argued to be outside the purview of the Tanzania state. A loan agreement that was contracted by a subsidiary of the investor and a company under the control of the Tanzanian state to generate electricity, was regarded by an investment tribunal as indirect expropriation, not in conformity with FET and national treatment, and therefore contravened the Tanzania – UK BIT. In the same vain, this case evidences how investors may invoke the provisions of BITs and approach arbitral tribunals for purely private commercial issues.

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<sup>415</sup> *Standard Chartered Bank v. United Republic of Tanzania* (ICSID Case No. ARB/10/12)

Correspondingly, in *Agro EcoEnergy and others v. Tanzania*,<sup>416</sup> the cancellation of a sugar and ethanol contract by the state, because it will impact negatively on wildlife have been challenged by the investors under the Tanzania – Sweden BIT. Although this case is still ongoing, however, it is another example of the non-consideration of any other factors except strict adherence to BIT provisions, even when the act of the state was in public interest. Furthermore, in *Sunlodges v. Tanzania 2018*,<sup>417</sup> the investor is claiming damages of around \$30 million for the seizure of a cattle farming land by the government towards the building of a power station and cement factory. Administered under the UNCITRAL rules and still pending, whilst the government argues that the building of the power station and cement factory is for public interest reasons and therefore not a breach of the Tanzania – Italy BIT, the investor contends that it is an act of illegal expropriation and against FET.

In all these reviewed cases against Tanzania; a common refrain can be deduced. The issues rests on a contention between the powers of the state to make decisions in the interest of its citizens and the disagreement of investors on those decisions. In further cases like *Saab v. Tanzania 2019*<sup>418</sup> and *Symbion Power and others v. Tanzania 2019*<sup>419</sup> which are still pending, the subject of the disputes bears remarkable resemblance to the other cases against the Tanzanian states. These issues and as seen in Egypt and other African states, have therefore led to the questioning of investor-state arbitration and the realm IIA provisions in African states.

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<sup>416</sup> *Agro EcoEnergy Tanzania Limited, Bagamoyo EcoEnergy Limited, EcoDevelopment in Europe AB, EcoEnergy Africa AB v. United Republic of Tanzania* (ICSID Case No. ARB/17/33)

<sup>417</sup> *Sunlodges Ltd (BVI) and Sunlodges (T) Limited v. The United Republic of Tanzania* (PCA Case No. 2018-09), (accessed on 05/02/2020)

<sup>418</sup> *Ayoub-Farid Michel Saab v. United Republic of Tanzania* (ICSID Case No. ARB/19/8)

<sup>419</sup> *Paul D. Hinks, Symbion Power Tanzania Limited and Richard N. Westbury v. United Republic of Tanzania* (ICSID Case No. ARB/19/17)

Due to these instances of what amounts to external intervention of the regulatory powers of the Tanzanian government through the instrumentality of investor-state arbitration, the Tanzanian government set out to reform its investment regulatory regime. Hence, it terminated its BIT with the Netherlands in 2018, and enacted model national investment laws in efforts to protect itself from unjustifiable arbitral actions.

For example, the government formulated and enacted three legislations that fundamentally changed its investment laws, especially in areas of mining, oil and gas and other natural resources. These laws are the Natural Wealth and Resources (Review and Re-Negotiation of Unconscionable Terms) Act 2017, the Written Laws (Miscellaneous Amendments) Act 2017 and the Natural Wealth and Resources (Permanent Sovereignty) Act 2017. Among the reasons adduced by the government for the cancellation of the BIT and enactment of these laws was because of the far reaching impact of investment arbitration on domestic policy. Thus, the reform of the laws are attempts to have greater control of its natural resources and state.

To reflect the new inclination of the Tanzanian government to have greater control over its state, novel clauses were inserted into the new investment laws to mitigate the wide realm of investor-state dispute settlement. For instance, section 6(2)(i) of the new Review and Re-Negotiation of Unconscionable Terms Act somewhat delegitimises investor-state dispute settlement by providing that '[any provision that puts] the state to the jurisdiction of foreign laws and fora is deemed to be unconscionable', and therefore, will be renegotiated or not be honoured. This essentially removes investor-state dispute settlement as the mechanism for the resolution of investor-state disputes from the investment laws of the country.

Similarly, section 11(2) of the Permanent Sovereignty Act prohibits the settlement of disputes emanating from Tanzania's natural resources sector through international arbitration. It states that 'disputes arising from extraction, exploitation or acquisition and use of natural wealth and resources shall be adjudicated by judicial bodies or other organs established in the United Republic and in accordance with laws of Tanzania'.

In effect, Tanzanian law will be applied as section 11(3) expressly comments that, 'judicial bodies or other bodies established in the United Republic and application of laws of Tanzania shall be acknowledged and incorporated in any of the natural resources areas under dispute'. Thus, whilst the Review and Re-Negotiation of Unconscionable Terms Act indirectly delegitimises foreign laws such as the ICSID Convention, this latter law expressly prohibits the application of any foreign forum in the resolution of disputes arising from the extractive sectors of its economy.

Sequel to these legislations, it can be argued that Tanzania has essentially extricated itself from the grip of investor-state arbitration. This can be regarded as not just a show of dissatisfaction about the investment arbitration system, but an affirmation of a need for the formulation of a new mechanism of investor-state dispute settlement.

Further reasons behind these actions of the Tanzania government were predicated upon its belief that, international arbitral forums such as the ICSID, are special purpose vehicles to protect the interest of investors and by extension, advance the interest of their states of origin. Evidently, the response of the government in formulating new investment laws is reminiscent

of the renewed impetus of most African states at enacting model BITs and investment instruments to protect their states from the huge claim filings against them.

### 5.5. Case study of investment arbitration claims against South Africa

South Africa is another state that have experienced the adverse impacts of investor-state arbitration. The Republic of South Africa is a country in Southern Africa with a population of 50.7 million people. It occupies a surface area of 1.22 million sq. km (470,693 sq. miles) with 22 major languages. Its major religions are Christianity, Islam and Indigenous beliefs, with the Rand as its unit of currency. Life expectance is 53 years for men and 54 years for women. Three former British colonies of Orange Free State, Cape and Natal and the Boer republics of Transvaal merged together to form the Republic of South Africa in 1910.<sup>420</sup>

Due to the practice of Apartheid which saw the segregation of its population according to race, South Africa's economy was therefore exclusively controlled by the white elites. Until the end of Apartheid in yea1994 and the election of Nelson Mandela as its president, majority of the means of economic activity including mining which is the mainstay of the country's economy, was the exclusive preserve and control of white people.

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<sup>420</sup> See BBC, 'South Africa country profile' (2020) Available at <https://www.bbc.co.uk/news/world-africa-14094760> (accessed on 23/11/2020), for all biodata on South Africa

According to the African Development Bank (AfDB),<sup>421</sup> the South African economy experienced a negative growth of zero point seven per cent in 2019, a decrease from zero point eight per cent in 2018. Agriculture and mining is the biggest sectoral contributors to the country's economy with four point eight per cent and one point seven per cent in the year 2018.<sup>422</sup> There were also growths in the business services, real estate, manufacturing and transport sector, averaging one point six per cent contributions to the South African economy. Fiscal deficit grew to four point three per cent in 2019, an increase from four point two per cent in 2018. The country's foreign debt stood at six point three per cent of its GDP, whilst domestic debt is estimated to be fifty-five point six per cent of the GDP. Similarly, unemployment rate increased from twenty-six point five per cent in year 2016 to twenty-seven point one per cent by 2018, with youth unemployment rising from fifty-one per cent in 2016 to fifty-four point seven per cent in 2018. With a low skilled population, the country's poverty rate is put at fifty-five point five per cent, a figure that represents one of the highest poverty rates in the world.

In relation to international investment agreement consummation,<sup>423</sup> South Africa has signed fifty investment agreements, beginning with the Agreement for the Promotion and Protection of Investment with the United Kingdom (1994). After the signing of this first treaty, the country embarked upon the aggressive consummation of several IIAs as part of its Growth, Employment and Redistribution strategy (GEAR), a policy that aimed to rebuild the country and accelerate economic growth in the shadow of Apartheid. Thus, it signed several

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<sup>421</sup> African Development Bank, 'South Africa Economic Outlook' (2020), Available at <https://www.afdb.org/en/countries/southern-africa/south-africa/south-africa-economic-outlook> (accessed on 23/11/2020)

<sup>422</sup>

<sup>423</sup> All data and information on investment were sourced from the UNCTAD, "World Investment Report 2020 | International Production Beyond the Pandemic" <<https://unctad.org/webflyer/world-investment-report-2020>> accessed November 23, 2020, ICSID, 'The ICSID caseload - statistics 2020-2 (2020)', ICSID, 'The ICSID caseload - statistics 2020-2 (2020)', UNCTAD, 'International Investment Agreements Navigator' (2020), Available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/222/tanzania-united-republic-of> (accessed on 23/11/2020)

agreements with countries like the Netherlands, Switzerland and Germany. Relatively small to its ownership of fifty BITs, South Africa have been confronted with just two investment arbitration cases.

As explained by Schlemmer,<sup>424</sup> the first case involved a Switzerland company that claimed that South Africa failed its obligation to full protection and security under the Switzerland – South Africa BIT. The properties of the investors had been vandalised by South African citizens during a protest. Despite the fact that the protesters were not sent by the government, who had done taken all necessary measures to protect the properties of the investors; the tribunal still found that the government failed in upholding the full protection and security clause.

The second case is the *Foresti v. South Africa*,<sup>425</sup> which was brought under the BLEU (Belgium-Luxembourg Economic Union) - South Africa BIT (1998).<sup>426</sup> This case was challenged the Mineral and Petroleum Resources Development Act by some Italian investors. Stemming from the white ownership of most economic resources during the Apartheid era, the Mineral and Petroleum Resources Development Act aimed to rebalance the ownership of these economic resources, to enable the majority black population own a stake within the country's economy. Thus, the legislation prompted the divestment of ownership stakes in the mining, natural resources and corporate sectors. Thereafter, the investor claimed in arbitration for expropriation, FET, Minimum standard of treatment and National treatment to the tune of \$375M. Ultimately, this case was settled and discontinued with no public information on the amount that was paid by the South African government.

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<sup>424</sup> Engela Schlemmer, 'An Overview of South Africa's Bilateral Investment Treaties and Investment Policy' [2016] 31(2) ICSID Review - Foreign Investment Law Journal 167–193

<sup>425</sup> Piero Foresti, Laura de Carli and others v. Republic of South Africa (ICSID Case No. ARB(AF)/07/1)

<sup>426</sup> BLEU (Belgium-Luxembourg Economic Union) - South Africa BIT (1998)

Similar to the experiences of the other African case studies, the South African experience is another example of how provisions of BITs were invoked to challenge the legitimate exercise of sovereign power in the administration of the internal affairs of a host state. In this particular instance, South African were made to bear vicarious liability for damages arising from an unauthorised protest. In addition, the arguable rationale effort to mitigate the ills of apartheid through the redistribution of ownership of economic assets, was also met with investor-state arbitration claim.

In the aftermath of these investor actions, the South African government engaged in innovative treaty-making through the enactment of the Protection of Investment Act 22 of 2015. In addition, it terminated some of its BITs with states like the Netherlands, Spain, Germany and Switzerland among others. At the core of the Protection of Investment Act is the 'the protection of investors and their investments'.

However, this objective of the law can be regarded as a façade because, it certainly reduces the right of investors and the investment dispute resolution mechanism in the country. For instance, section 12 of the Act allows the government or emanation of the state to take such actions that will aid in, 'redressing historical, social and economic inequalities and injustices, achieving the progressive realisation of socio-economic rights; or protecting the environment and the conservation and sustainable use of natural resources'. In addition, section 12(2) informs that the state, 'may take measures that are necessary for the fulfilment of the Republic's obligations in regard to the maintenance, compliance or restoration of international peace and security, or the protection of the security interests, including the financial stability of the Republic'. These new provisions, it can be argued, were direct



responses to the two investment arbitration claims against the country. This is because, it reformed clauses and areas in its investment law instruments that was invoked by investors to challenges their domestic policy-making powers.

Furthermore, the new Protection of Investment Act 22 of 2015 reformed the country's investor-state dispute settlement landscape by granting the state a right of first refusal on investment arbitration in any disputes. Thus, section 13(1) demands mediation within the state as the first point of resolving any disputes. Thereafter, section 13(4) comments that investors may also elect to approach local courts or tribunals for resolution and more importantly, section 13(5) affirms that the state 'may consent to international arbitration in respect of investments covered by this Act, subject to the exhaustion of domestic remedies'.

There was also further reform of the Full security clause, perhaps in an attempt to avoid the scenario of the Switzerland investor case. The provision of Full security was qualified in section 9 of the Act; explaining that the state will provide such level of security as given to nationals, and as may be expected under customary international law, but 'subject to available resources and capacity'. As may be evident, the qualifications of right of first refusal prior to any approach to investment arbitration, subjection of full security to national considerations and customary international law, state capacity and available resources; will enable South Africa to protect itself from indiscriminate arbitral actions on the basis of full security.

Prior to these reforms, several stakeholders in South Africa had expressed concerns about investor-state arbitration. For instance, the then Minister of Trade and Industry of South

Africa had commented that 'Investor-state dispute resolution that opens the door for narrow commercial interests to subject matters of vital national interest to unpredictable international arbitration is of growing concern to constitutional and democratic policy-making. In short, international jurisprudence is no substitute for multilateral cooperation to strengthen global governance in the area of investment policy'.

As may be recognised, this concern is not different from the criticisms of other African and Latin American states; that years after the defeat of diplomatic protection and replacement with investor-state dispute settlement, however, the anticipated objectives underpinning the selection of the latter remains elusive. Thus, there is increasing consensus, especially among developing states, that investor-state arbitration has transformed into a tool against good democratic governance and decision-making in Africa. Thus, the several initiatives which includes my proposal, for a new system of investor-state dispute settlement in Africa.

Apart from the studied experiences of Egypt, Tanzania, South Africa; and a review of the pending arbitral case of Nigeria, it is pertinent to also examine the payments costs of investor-state arbitration against African states. Such review will similarly provide an insight into the functioning of investment arbitration in the continent.

#### 5.6. Investor-state arbitration payment costs in Africa

Beyond the studied countries above, other facts about the operation of investor-state arbitration in Africa suggests that this mechanism may not be in the interest of African states. For example, since the first investor-state arbitration case against the Democratic Republic

of Congo in 1993,<sup>427</sup> African countries have faced a raft of investor actions, especially within the last six years where investment arbitration cases have surpassed the previous twenty years. Since the year 2011, there have been a minimum of six arbitral cases against African states per year. As at December 2019, twenty-eight countries in the continent have faced a total investor-state arbitration case profile of one hundred and six.

Three countries namely Algeria, Egypt and Libya accounted for over fifty-one per cent of them. There are thirty-eight pending cases, twenty-two cases have been decided in favour of African states, twenty other cases were decided in favour of investors, nineteen other cases were settled and seven were discontinued. In percentage terms, the settled cases and those decided in favour of investors amounts to sixty-four per cent of the total cases, whilst African states have prevailed in just thirty-six per cent of them.

In terms of payment costs, the total claims amount filled by investors since 1993 is US\$55.5 billion. But, this figure may be higher because information about the settled cases are not publicly disclosed. The details of some of the cases shows a system that allows investors that make huge monetary claims against struggling African states. For example, Egypt and Algeria were slammed with \$15 billion each in some of the cases, whilst the claims in more than ten cases had been US\$1 billion. However, publically available information on the amounts the two states agreed or were ordered to pay is put at US\$4.6 billion.

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<sup>427</sup> All data and information on ISDS cost in the continent were sourced from the UNCTAD, "World Investment Report 2020 | International Production Beyond the Pandemic" <<https://unctad.org/webflyer/world-investment-report-2020>> accessed November 23, 2020, ICSID, 'The ICSID caseload - statistics 2020-2 (2020)', ICSID, 'The ICSID caseload - statistics 2020-2 (2020)', UNCTAD, 'International Investment Agreements Navigator' (2020), Available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/222/tanzania-united-republic-of> (accessed on 23/11/2020)

To put it in proper perspective, this figure is thrice and twice more than the GDP of some countries like Gambia and Central African Republic (CAR).<sup>428</sup> Similarly, it is equivalent to the gross total of development money that was received by Ethiopia in 2018. In fact, in the case of *Unión Fenosa vs Egypt*, the state was made to pay US\$ 2 billion as a compensation. In a continent where there is a high level of unemployment and beclouded with the highest poverty rate in the world; the payment of such humungous amounts on the basis of substantive protections in IIAs may not be justified.

The states of origin of some of the investors behind the claims in this case study is often cited by the critics of investment arbitration to buttress their argument that the mechanism is imbalanced against African states. For instance, twelve investors were from the United States, ten are Italians, nine were the United Kingdom and Netherlands respectively, eight are nationals of Luxembourg and seven were Belgium and France in that order. In total, over eighty per cent of the investors that have been instituted cases against African countries are from capital-exporting countries, with Europe constituting seventy per cent and the United States contributing eleven per cent. The treaties invoked shows that over one hundred cases were on the basis of bilateral investment treaties whilst the rest were on other IIAs.

The economic sectors impacted upon by these claims are areas where the Africa continent have comparative advantage such as mining. With several states from the continent being signatories to the ICSID Convention, seventy-four point five per cent of the cases have been

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<sup>428</sup> All data and information here were sourced from the UNCTAD, "World Investment Report 2020 | International Production Beyond the Pandemic" <<https://unctad.org/webflyer/world-investment-report-2020>> accessed November 23, 2020, ICSID, 'The ICSID caseload - statistics 2020-2 (2020)', ICSID, 'The ICSID caseload - statistics 2020-2 (2020)', UNCTAD, 'International Investment Agreements Navigator' (2020), Available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/222/tanzania-united-republic-of> (accessed on 23/11/2020), UNCTAD, Investment Trends Monitor (2020), Available at [https://unctad.org/system/files/official-document/diaeiaif2020d1\\_en.pdf](https://unctad.org/system/files/official-document/diaeiaif2020d1_en.pdf) (accessed on 23/11/2020)

decided on the basis of the treaty. In terms of investment attraction, the UNCTAD Investment Trends Monitor published in January 2020 shows that there a total global foreign direct investment of \$1.54 trillion in 2019, an increase from \$1.3 trillion in 2018.<sup>429</sup> From this figure, North America received \$297 and \$297 billion inflows in 2019 and 2018, Europe saw \$429 and \$364 Billion in 2019 and 2018, Asia attracted \$474 and \$499 Billion in 2019 and 2018, Latin America and the Caribbean had \$164 and \$149 Billion in 2019 and 2018 whilst Africa attracted \$45 and \$51 Billion in 2019 and 2018.

Arising from these figures, it is clear that despite having the highest concentration of IIAs, second highest number of investor-state disputes behind Latin America and one of the highest payment awards; Africa attracted the lowest volume of FDIs in the years 2018 and 2019. Thus, it evidences that the several IIAs consummated by African states have not translated into huge attraction of foreign investments. As such, it can be argued that the continuous deployment of investor-state arbitration in the settlement of investor-state disputes cannot be justified. Although Ndikumana and Verick affirmed a relationship between the attraction of FDIs and improvement of domestic investment and employment,<sup>430</sup> however, the evidence of this opinion on Africa's domestic socio-economic indices does not align.

## 5.7. Conclusion

This case studies of the impact of investor-state in Africa evidences that the continent has are limited by the substantive protections in its IIAs and risk of arbitral claims by investors for

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<sup>429</sup> UNCTAD, Investment Trends Monitor (2020), Available at [https://unctad.org/system/files/official-document/diaeiainf2020d1\\_en.pdf](https://unctad.org/system/files/official-document/diaeiainf2020d1_en.pdf) (accessed on 23/11/2020)

<sup>430</sup> Ndikumana, L., & Verick, S., 'The linkages between FDI and domestic investment: Unravelling the developmental impact of foreign investment in Sub-Saharan Africa' [2008] 26(6) Development Policy Review 713-726

legitimate domestic decisions. In addition, it was evidenced that the high concentration of IIAs within the continent have not translated to a commensurate attraction of foreign direct investments by African states. Although FDI enables sustainable development in host states, however, the socio-economic indicators of African states remain poor. This evidences that the investor-state arbitration framework does not serve the interest of African states. Similarly, the evidences suggest that the operation of international investment agreements in Africa have mortgaged the democratic exercise of powers by states. This intrusion of investment agreement provisions in the internal decision-making of African governments has resulted to a huge number of investor-state arbitral claims against African states.

Furthermore, the evidence also shows that cases instituted by foreign investors, who are predominant nationals of capital exporting countries, have mostly been resolved in their favour and huge sums of money paid by African states. Therefore, evidence from this case study supports the opinion that the continuous use of investor-state arbitration in investor-state dispute settlement in African may not be justified.

Having examined the experiences of some African states and a wide review of the impact of investor-state arbitration in the continent in this chapter, the next chapter shall analysis the general findings. This analysis will enable the determination of the findings of this thesis and thereby, advance appropriate recommendations.

## Chapter Six: Analysis of findings

### 6.1. Introduction

The reform of investor-state dispute settlement has occupied the front burner of academic and expert discuss within the last decade. This prominence has been shaped by the functioning and impact of investor-state arbitration, the ISDS mechanism that is deployed in resolving investor-state disputes. The development of the ISDS framework of resolving investor-state disputes was aimed at remedying the deficiencies of diplomatic protection.

After five decades since the consummation of first BIT between Germany and Pakistan however, arguments abound on whether the investment arbitration system have enabled a regime of fair determination of investor-state disputes.

Whilst some constituencies have supported the investment arbitration mechanism, others have disapproved of its impact on host states, opining that the current investor-state dispute settlement mechanism is beclouded by legitimacy crises. This have underpinned calls for a reform of ISDS. The theme of this thesis evidences that I belong to the latter group who argue that ISDS should be reformed; recommending a replacement of investor-state arbitration with a Pan-African Investment Court. Towards an evidential support to my proposal, it was pertinent to conduct a case study on the impact of investor-state arbitration in Africa. This task was the theme of Chapter five.

Having conducted an impact assessment of investor-state arbitration in chapter five, this chapter will focus on analysing its findings and make necessary recommendations. The findings will thus provide evidence that will be deployed to support my recommendations.

## 6.2. Findings

Evidences from the case study shows that investor-state dispute settlement have not served the economic and sustainable developmental interests of African states. The study finds that International Investment Agreements (IIAs), especially its Bilateral Investment Treaty (BIT) variant, have not achieved the objectives behind their contraction by African states. IIAs are contracted to serve as instruments that aids the attraction of Foreign Direct Investments



(FDIs) are attracted into states for sustainable development. As recognised by Moran,<sup>431</sup> there is a correlation between investment inflow and societal development.

The resultant sustainable developmental paradigm is a consequence of the transfer of capital, skill and technical knowledge as well as innovation through FDIs. Globally, countries are grouped into developed, developing and underdeveloped states depending on their levels of economic and technical advancement. For instance, the European and North American continents are classified as developed continents because of their levels of economic and technical development. In contrast, the African continent which is still sipping from the impacts of colonialism is classified as developing and therefore, requires large volumes of FDI inflow in its quest for economic emancipation and sustainable development.

### 6.3. Egypt

Starting with Egypt, the study found that the political crises of 2011-2016 destabilised the country and therefore, saw the revocation of several contracts. These revocations, as stated by the Egyptian government, was in the interest of its citizens. However, some of the decisions impacted on the legitimate expectations of foreign investors who filled investment claims for legal and illegal expropriation, FET and national treatment. But, this thesis also showed that perhaps, some of the investors simply took advantage of the Egyptian political crises to fill investment claims to extricate themselves from contracts and investments that were not performing well. Similarly, findings from the study also showed that Egypt has been active in the consummation of IIAs as it has signed ninety-eight BITs, with some of them

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<sup>431</sup> Moran, T. H., 'Foreign direct investment and development' (2012) *The Wiley-Blackwell Encyclopedia of Globalization*.

containing investment provisions. Perhaps, it is due to the contraction of several BITs and the political developments in the country, that underpinned Egypt's position as the fourth highest respondent in arbitral cases. In addition, maybe it is because of the contents of old-generation treaties that led to the success of investor claims and payment of huge arbitral payments by Egypt.

Despite the signing of several treaties, information garnered from the study also shows that Egypt's socio-economic developmental indices remain low just like most states in Africa. For example, it is confronted with unemployment rate of ten point eight per cent and budget deficit of eight point three per cent. Similarly, the study showed no evidence of a relationship between the high number of BITs signed by Egypt and increased attraction of foreign direct investments. Although it has maintained a consistent economic growth rate, however, the country has not attracted the highest volume of FDI inflow into the African continent since ascension to ICSID. Such statistic therefore buttresses the suggestion that investments agreements do not wholly determine the volume of FDI inflows into a country.

Taken as a whole, the cases that were filled against Egypt centred on the decisions of their government after the fall of the regime of Hosni Mubarak. However, these arbitral challenges of governmental decisions were a consistent variable and occurrence in all three studied states. Whilst some of the challenges centred on the direct reversal of contractual obligations as seen in *Sajwani v. Egypt*, others touched on the increase of minimum wage for citizens as was the case in *Veolia Proprete v. Egypt*.

Furthermore, the study found that although Egypt attracted \$9 Billion in FDI inflows in 2019 and how won more cases in ISDS, however it paid out \$ 2.125 billion arbitral awards to investors. This figure which may be higher as some of the information on some cases are not disclosed, shows that the country paid one point nine per cent of its FDI inflow in 2019.

Overall, the findings also support that suggestion that Egypt's experiences in investor-state arbitration has not been positive. Similarly, the case study also showed that the positive contributions of IIAs and investor-state arbitration are less than the negatives. Furthermore, the case study also found that investor-state arbitration and IIAS is a clipping instrument against legitimate governmental decision in Egypt. The rationale behind such clipping effect, it was also found, was because of the provision of old-generation BITs.

#### 6.4. Tanzania

In relation to Tanzania, the case study found that although the country witnessed improved economic performances in recent years, however, its experiences in investor-state arbitration is not positive. These problems are contextualised in the reduction of inflation from three point six per cent in 2018 to three point three per cent in the year 2019, and a decrease in debt to GDP ratio from three per cent in 2018 to three point four per cent in the year 2019. It has performed well in economic growth as it has consistently grown between six to seven per cent in the past ten years. In 2019, the country attracted \$1.1 billion dollars of foreign direct investment. The study shows that manufacturing, agriculture, mining, tourism and services are the main drivers of its economy.

The case study also showed that Tanzania ascended to ICSID in 1992 and since then, it has signed Twenty BITs and other investment related instruments (IRIs). Similar to the experiences of other African countries, Tanzania have been beset by investors actions based on the provisions of IIAs such as the Tanzania – UK BIT. The study about the experiences of Tanzania found that the country was also challenged in investment arbitration over domestic policy by the government. For example, in *Biwater v. Tanzania*, an investor challenged the decision of the government to cancel a water project aimed to provide clean and drinkable water to citizens. The investors contented that the decision was against FET provisions in the enabling treaty. This argument of the investors was without consideration of the explanation of the government that, the cancellation was in the public interest as the provision of clean water is a fundamental human right and an obligation it owes to its citizens.

Consequent upon the several challenges of legitimate domestic decisions of the state by investments, the case study found that Tanzania expressed dissatisfaction with investor-state arbitration, hence enacted new national investment laws that qualified BIT provisions. Thus, it has followed the examples of other African states by enacting model BITs that reduces that will protect the country from investor-state arbitration. In addition, it was evidenced that the investment agreement areas that were mostly invoked by investors includes FET, full security and protection, national treatment and expropriation. Similar to the findings about Egypt, the study on Tanzania showed that the power of the government to make decisions for its people is clipped through the instrumentality of investor-state arbitration. Investors are ready, no matter the subject of the decision of the governments; to challenge and place contractual agreements above all other issues including human rights.

## 6.5. South Africa

The findings about South Africa's experiences is not different from the other studied two countries. Although the country has faced less investment arbitration cases than Egypt and Tanzania, however, the forces that limits the full application of governmental powers are also evident in the country. The decisions of the South African government that was challenged in investor-state arbitration can be anchored on the desire of the state, to equalise the disparity in economic power in the aftermath of Apartheid. That attempt was premised on the reason that such a redistribution would help in the restoration of national unity and societal cohesion. In the estimation of the investors however, these were no justifiable reasons.

Whilst South Africa had small foreign debts and an economy that witnesses consistent growth, but, the study found that it is beclouded by high unemployment of over ten per cent. This means that the problem of the then government would focus on growing the economy and improving the economic situation of its citizens. The attempts to achieving this objective were however challenged by investors. For instance, in *Foresti v. South Africa*, there was a challenge of the Mineral and Petroleum Resources Development Act which was enacted by the government to divest ownership stakes in natural resources.

In response to this challenge, the study found that the government was dissatisfied with the intrusive nature of investor-state arbitration. Therefore, they engaged in innovative treaty-making by enacting the Protection of Investment Act 2015 which qualified the provisions of its investment agreements like FET and expropriation. More importantly, investor-state

arbitration was removed as the ISDS mechanism for the resolution of disputes in preference to the use of local tribunals.

#### 6.6. Findings of other African experiences in investor-state dispute settlement

Beyond the case studies of Egypt, Tanzania and South Africa, the impact of investor-state arbitration in some other African states in general was also examined. Findings from the review showed that some other states within the continent also experienced the intrusiveness of investor-state arbitration on domestic policy. For example, it was found that Nigeria is currently battling to vacate an order of a London court which granted the right of an investor, Process and Industrial Developments Ltd (P&ID) of Ireland, to seize the offshore assets of the country because of an arbitral award that has not been paid since 2012.<sup>432</sup> Again, the contract that underpinned the arbitral award was consummated during the regime of former President Jonathan of Nigeria. The new government from a different political party argued that the contract with the Irish investor was illegally contracted by officials of the former regime.

Similarly, other African states like Libya, Tunisia and Congo were also found to have been confronted with the same situations as the case study countries. They have also paid huge amounts of money as compensation to foreign investors for arbitral awards. In the case of Libya and Tunisia, they also faced regime changes like Egypt through the Arab spring. Thus, the case study shows that regime changes and consequential policy reversals are among the reasons behind the high volume of investor-state arbitration cases in Africa. Thus, it evidences that political instability is a contributor to high investor-state disputes in Africa.

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<sup>432</sup> Kit Chellel, 'Nigeria's Battle Over \$9 Billion Lawsuit Spreads to Ireland' [2019] Bloomberg, Available at <https://www.bloomberg.com/news/articles/2019-09-25/nigeria-s-battle-over-9-6-billion-lawsuit-spreads-to-ireland> (accessed on 09/06/2020)

Furthermore, this thesis also found that the high number of IIAs signed by Africa countries have not translated to a bigger share of global FDI inflows, registering just \$45 and \$51 Billion worth of investments in 2019 and 2018. When compared to the FDI ratio of other continents with lesser number of IIAs, it buttresses the argument that the number of IIAs does not have commensurate impact in the attraction of FDIs in Africa. Despite this non-alignment of IIAs with the attraction of FDIs, it was found that some African states have paid huge arbitral awards to investors. Furthermore, this thesis also found that over eighty per cent of the investors that filed claims against African states are from Capital exporting states, thereby supporting the argument that investor-state arbitration has fast developed into an indirect colonialism. Overall, the findings of this thesis supports the arguments that investor-state arbitration does not support the economic and sustainable development interest of African states. Hence, it is time for the continent to move towards a different investor-state dispute settlement mechanism.

### 6.7. My proposal for a Pan-African Investment Court

The findings of this thesis shows that investor-state arbitration limits the powers and ability of African governments to make decisions for the good of their countries. Governments are the legal power-welding authority within a state. In the aftermath of elections where the people provide sovereignty to elected governments, the state therefore derives legitimacy to make decisions on behalf of the people. These decisions include the ability to determine contractual obligations on behalf of the people.

Although investor-state arbitration is domiciled in commercial and contractual obligations, with its fiduciary relationship nature; however, the reality remains that the determination of investor-state disputes should not be approached from the lens of commerce and contract alone. Treaty obligations have fast developed into limitation tools against the exercise of legitimate state power because, and as aptly captured by Verdross, the decisions arising from treaty obligations have become ‘contra bonos mores which restrict the liberty of one contracting party in an excessive or unworthy manner or which endanger its most important rights’.<sup>433</sup>

Without doubt, the limitation of democratic exercise of power by investment agreements have been evidenced by the findings of this thesis. The findings show that the indirect curtailing of governmental powers by investor-state arbitration in Africa may be self-inflicted. In the ambition to attract FDIs, most developing states agree to all kinds of investment agreements without exercising due diligence to ascertain the depth and width of their functionality. In consequence, it has been argued that African states should not allege bias in the functionality of investor-state arbitration because, they exercised their freedom of contracts by agreeing to the provisions of investment agreements without coercion.

On the basis of the exercise of freedom of contract and party autonomy, the functional tools of IIAs and investment agreements entails the recalibration of domestic social, economic and political apparatus to support their implementation. However, such recalibration of domestic apparatuses puts African states at risk of arbitral claims because, the legitimate exercise of state power will certainly be at variance with some treaty provisions.<sup>434</sup> As such, it is

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<sup>433</sup> Alfred Verdross, 'Forbidden Treaties in International Law', (1937) *American Journal of International Law* 31(4) 571

<sup>434</sup> Joost Pauwelyn, *At the edge of chaos? Foreign investment law as a complex adaptive system, how it emerged and how it can be reformed.* (2014) *ICSID Rev* 29:372–418, p. 372



imperative that African states devise another dispute resolution mechanism in investor-state dispute settlement.

Lack of transparency in the resolution of public issues through a private mechanism is also another issue that was found in this thesis. Investor-state disputes are certainly public issues since the legitimacy of the state is derived through the citizens. As such, arbitral awards are paid the tax of citizens. Thus, investor-state arbitration is at variance with democratic governance because, among its core principles are transparency, legitimacy and right of citizens to know the activities of their governments. Therefore, and as succinctly stated by Garcia-Bolivar, 'the interpretation of concepts and principles that are peculiar to States and public international law cannot be left to the view of ever changing arbitrators'.<sup>435</sup>

Furthermore, this thesis found a lack of diversity and inclusion in the selection of the arbitrators that administer investor-state disputes, as only a select club of arbitrators adjudicate the myriad of cases. This is compounded by the fact that most of these arbitrators are from capital-exporting states, thereby providing support to the argument that investor-state arbitration is an indirect diplomatic protection. This practice has also been criticised by scholars such as Franck,<sup>436</sup> who opined that 'the current system of handling public matters through a private few of arbitrators does not instil confidence in the system'. This is because, it raises the suspicion of partiality of the ISDS system. Hence, academics like Saffer and Farhadi agreed that lack of diversity in the appointment of arbitrators is one of the legitimacy crises of the current investor-state dispute settlement framework.<sup>437</sup>

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<sup>435</sup> Omar Garcia-Bolivar, 'Sovereignty vs. Investment Protection: Back to Calvo?' (2009) 24(2) ICSID Review 464

<sup>436</sup> Franck, S.D., 'The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decisions' [2005] 73 Fordham Law 1521

<sup>437</sup> Luis Saffer and Amir Farhadi, 'ISDS In The TPP: Is The Recent Uproar In The US Merited? – Part I', (November 4, 2016) p 3

Consequent upon these findings of this thesis, it is my submission that the rebalancing of powers between investors and host states, the economic emancipation and sustainable development of African states cannot be achieved without its ownership of the adjudicatory arm of international investment law. Hence, this thesis calls for the establishment of a Pan-African investment court in the continents investor-state dispute settlement framework. The creation of an Investment Court System for Africa as a replacement for investor-state arbitration and as supported by the findings of this thesis, will not only rebalance the investor-state dispute settlement architecture; but also enable the full achievement of Africa's economic growth and sustainable development.

This recommendation is not isolated from the wave of arguments and global efforts aimed at deploying the Investment Court System in investor-state dispute settlement. The calls towards a court system is a reflection of the realisation that investor-state arbitration is no longer fit for purpose, especially for developing jurisdiction like Africa states. This is because and as shown by the findings of this thesis, it has transformed into a tool that serves the interest of investors to the detriment of host states.

Re-echoing these criticisms and sentiments for a change, Mann and Von Moltke affirmed that the current ISDS system 'was not designed to address complex issues of public policy that now routinely come into play in investor-state disputes'. Similarly, Subedi and Butler agreed that a move towards an investment court system will rectify the legitimacy crises that

confront investor-state dispute settlement because, a court system will restore the confidence the host states in investor-state dispute settlement.

Furthermore, Alfred-Maurice de Zayas of United Nations Independent Expert on the Promotion of a Democratic and Equitable International Order supported the court system proposal in his report;<sup>438</sup> commenting that ‘Conflicting agreements or arbitral awards are incompatible with international ordre public, and may be considered contrary to provisions of the Vienna Convention on the Law of Treaties and invalid as *contra bonos mores*’. This publicness of investment disputes was re-echoed by Anthea Roberts who concurred that the investor-state dispute settlement cannot be relegated to private law domain because, state liability and compensation for damages are public law matters.<sup>439</sup>

## 6.8. Exploration of the features of International Court Systems

Having advocated for a Pan-African Investment Court in investor-state dispute settlement, my proposal draws support from other developments and earlier attempts towards an Investment Court System. Among these attempts are the World Trade Organisation (WTO) Dispute Settlement System, the International Court of Justice (ICJ), the Arab Investment Court (AIC), The Common Court of Justice and Arbitration (CCJA) of the Organization for the Harmonization in Africa of Business Law (OHADA), the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the disbanded EU-United States Transatlantic Trade and Investment Partnership (TTIP).

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<sup>438</sup> United Nations, 'Report of the Independent Expert on the promotion of a democratic and equitable international order' [2015] Available at <https://digitallibrary.un.org/record/803449?ln=en#record-files-collapse-header> (accessed on 07/02/2020)

<sup>439</sup> Anthea Roberts, Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System (2013) 107 *American Journal of International Law* 45, Anthea Roberts State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority (2014) 55 *Harvard International Law Journal*

Since these international institutions possess dispute resolution mechanisms, this thesis will examine their procedures to determine areas of similarity with my proposed Pan-African Investment Court. Whilst some of them deploys the tribunal system in the settlement of disputes, others have recommended for the investment court system with pronounced structures and functioning mechanisms. Thus, the review of these institution will enable the adaptation of any features that will aid in the establishment of my proposal. This examination will include an evaluation of their strengths and weakness towards incorporating the former into my proposal.

### 6.9. WTO Dispute Settlement System (DSS)

The World Trade Organization (WTO) was established in 1995 as a successor to the General Agreement on Tariffs and Trade (GATT) which was formed in the wake of the Second World War in 1947. The creation of the GATT followed series of trade negotiations, known as 'Rounds', that culminated to the Uruguay Round of Multilateral Trade Negotiations (Uruguay Round), launched in 1986. 'The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations' was signed in 1994 in Marrakesh Morocco, thus leading to the establishment of the WTO.<sup>440</sup> The aim of the WTO since the Uruguay Round, remains the assurance and stability of international trade through certainty and consensus in rules of global trade. Since its inception, the WTO has consummated agreements in areas like reduction of tariffs, anti-dumping laws and non-tariff measures. Similarly, financial services,

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<sup>440</sup> WTO, 'Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations' (1994) Available at [https://www.wto.org/english/docs\\_e/legal\\_e/03-fa\\_e.htm#:~:text=Final%20Act%20embodying%20the%20results%20of%20the%20Uruguay%20Round%20of%20Multilateral%20Trade%20Negotiations&text=The%20acceptance%20and%20entry%20into,5.](https://www.wto.org/english/docs_e/legal_e/03-fa_e.htm#:~:text=Final%20Act%20embodying%20the%20results%20of%20the%20Uruguay%20Round%20of%20Multilateral%20Trade%20Negotiations&text=The%20acceptance%20and%20entry%20into,5.) (accessed on 09/11/2019)

tariff-free trade in information technology products and indeed the liberalisation of the global economy, have also been negotiated and agreed by one hundred and sixty-four member states and twenty-two negotiating membership governments.

Further objectives of the WTO ranges from ensuring certainty in rules of trade, fair conduction of trade and settlement of disputes arising therefrom. The boosting of exports and economies of states and the creation of a non-discriminatory international trading architecture also forms part of its aims. According to the WTO, by 'administering trade agreements, acting as a forum for trade negotiations, settling trade disputes, reviewing national trade policies, building the trade capacity of developing economies and cooperating with other international organizations'; it's one hundred and sixty-four member states and twenty-two negotiating membership governments accounts for nine-eight per cent of global trade.<sup>441</sup> This structure and functions of the WTO dispute settlement system are important towards the creation of my proposed Pan-African Investment Court because, the former is a multilateral institution that is composed of several states and possess a dispute settlement system on trade. These are variables that are similar to my proposed court investment court system.

Critical to the proper functioning of the WTO dispute settlement framework is its 'Understanding on Rules and Procedures Governing the Settlement of Disputes' (DSU). The DSU which functions on the altar of consensus sets out the ways and procedures in which

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<sup>441</sup> See WTO data, available at <https://data.wto.org/> (accessed on 09/08/2019), World Trade Organisation, 'How the WTO is organized' (2019) Available at [https://www.wto.org/english/thewto\\_e/whatis\\_e/inbrief\\_e/inbr\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm) (accessed on 09/08/2019)

disputes and trade conflicts are resolved.<sup>442</sup> In resolving disputes through the DSU, the institution also has a 'rules of conduct' that are applied. Accordingly, and as provided in the DSU, the WTO operates a three-stage dispute settlement mechanism.<sup>443</sup> These three stages are 'consultations between the parties, adjudication by the Panel and, if applicable; by the Appellate Body prior to implementation of a decision.'<sup>444</sup> There could be a possibility of countermeasures in the event of failure by the losing party to implement a ruling'.

The process of a dispute settlement is a first instance hearing by a panel established on the request of a party to a dispute, an Appellate Body that reviews the decision of the panel and ultimately, a final adoption of the reports of both the Panel and Appellate Body by the Dispute Settlement Body (DSB). Whilst the consultation stage is the preliminary stage of filing complaints and deployment of negotiation and mediation by the parties towards achieving an amicable resolution of complaints, the consideration of the dispute by the panel and appeals arising therefrom can be regarded as the main litigation stages of the dispute settlement process.

The DSB functions as the administrative organ and indeed, the supreme body that ratifies the reports from the earlier three stages. This role of the DSB as the supreme organ can be understood within the context of its membership, as it is composed of representatives of all member states of the WTO. As such, it does not just ratify the reports of the two litigation

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<sup>442</sup> WTO, 'Understanding on Rules and Procedures Governing the Settlement of Disputes' (1995) Available at [https://www.wto.org/english/docs\\_e/legal\\_e/28-dsu\\_e.htm](https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm) (accessed on 09/11/2019)

<sup>443</sup> WTO, 'Dispute Settlement: Rules of Conduct' (96-5267) WT/DSB/RC/1, Available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/rc\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/rc_e.htm) (Accessed on 09/11/2019)

<sup>444</sup> See Article 4 of the WTO's DSU

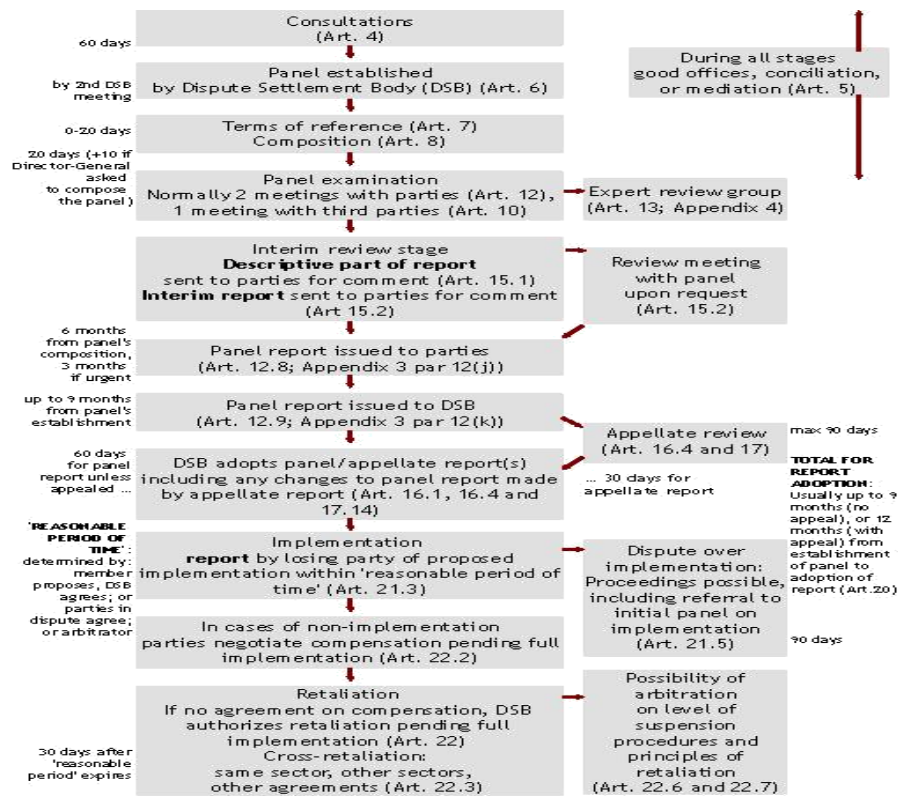
bodies, but also ensures compliance and implementation of the decisions and reports of the Panel and Appellate body.

Since the objective of the WTO is the facilitation of trade among several countries, it is important that its dispute settlement system mechanism encourages and incorporates amity and fraternity. As such, the focus of the institution on the settlement of disputes is through friendly consultations and negotiations as the first stage of the process. As emphasised by the institution, the invoking of the dispute settlement system should be a measure of last resort as members are encouraged to explore good judgement as to the merits of their case. Thus, '[A] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred'.<sup>445</sup> In effect, 'Each Member [shall] undertake to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member'.<sup>446</sup> In the same vein, 'Good offices, conciliation or mediation' are also encouraged by the WTO in the dispute resolution process.

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<sup>445</sup> See Article 3(7), 'General Provisions' of the Dispute Settlement Understanding of the WTO

<sup>446</sup> Article 3(2), General Provisions of the Dispute Settlement Understanding of the WTO



The stages of the [WTO dispute settlement system](#) at a glance.

As a measure of last resort when fraternal mechanisms fails, consultation is the first stage of the WTO's dispute settlement system. This begins with a notification to 'the DSB and the relevant Councils and Committees by the Member which requests consultations'.<sup>447</sup> As affirmed, the aim of the consultation stage is to deploy diplomatic and fraternal measures like good offices, conciliation and mediation to resolve the dispute. If all these fails and as provided in Article 6 of the DSU, the DSB shall set up a panel to hear the case in issue.

The constitution of the panel which serves as the second stage of the dispute settlement system is made with terms of reference for their consideration.<sup>448</sup> Prior to this constitution, the complaining member state is obligated to provide a summary of the complaints, areas of

<sup>447</sup> Article 4(4), Dispute Settlement Understanding of the WTO

<sup>448</sup> Article 7, of the Dispute Settlement Understanding of the WTO



dissatisfaction and legal basis for the constitution of the panel.<sup>449</sup> Thereafter, a panel of three members is constituted by the WTO secretariat on the concurrence of the disputing parties.<sup>450</sup> If the parties disagree with the appointment by the secretariat, then the WTO director-general may unilaterally constitute a new panel. Since the secretariat is composed of all member states, it can therefore be theoretically assumed that the appointment of a panel is made by the states or disputing parties.<sup>451</sup>

In reviewing the complaints, the role of the panel is to examine the issues in the light of the WTO agreement and advise the DSB whether the measures undertaken by a member state complies with its provisions. Within this process, evidence or submissions may be collected from other member states who can apply as third parties.<sup>452</sup> Thereafter, the panel will make a report and forward it to the DSB for their consideration. Since the WTO thrives on consensus, the report may be accepted or rejected by the DSB. Any of the decisions taken by the DSB is final and shall be binding on the disputing parties.<sup>453</sup>

Although the adoption or rejection of a report of the Panel by the DSB is binding on the disputing parties, however, they may elect to appeal the decision to the Appellate Body.<sup>454</sup> The Appeal body consists of seven permanent members who are divided in groups of three. Their function is to consider questions of law about the decision of the Panel. Unlike the Panel stage of a dispute, third parties can only feature through the invitation of parties to the dispute. Similar to conventional appellate courts, the Appellate Body may alter the report and

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<sup>449</sup> Article 6(2), Dispute Settlement Understanding of the WTO

<sup>450</sup> Article 8(2), Dispute Settlement Understanding of the WTO

<sup>451</sup> See Articles 7,8 and 11 on composition and responsibilities of the panel

<sup>452</sup> Article 10(3)(4) DSU of the WTO

<sup>453</sup> Article 16, DSU of the WTO

<sup>454</sup> See Article 17 of the DSU

decision of the Panel and thereafter, forward same to the DSB for a consensus adoption or rejection. In several instances, the reports of both the Panel and Appellate Body have always been adopted by the DSB.<sup>455</sup>

Remedies for a decision of contravening the provisions of the WTO agreement by either the Panel or Appellate body is, an order to comply with the provisions. However, the defaulting state will determine ways in which it can achieve remedy to comply with the WTO agreement. The enforcement of the decisions and determination of compliance, which is expected to be swift, is the duty of the DSB. However, if the defaulting state is unable to comply on time, an extended 'reasonable period of time' will be granted. But, the complaining member state is not guaranteed that the loss suffered will be remedied before the expiration of an extended 'reasonable period of time'.

Penalty for non-compliance is the 'suspension of concessions' by the DSB. This connotes that the complaining member state will stop undertaking the obligations of the WTO to the defaulting state.<sup>456</sup> The suspension of concessions is expected to equate to the level of damage or loss suffered by the complaining Member state. In contrast to the remedial norm in investor-state arbitration, there is no monetary compensation under the WTO dispute settlement system. Similarly, this system does not allow corporations to commence cases as obligations are owed by a state to another. This is unlike investor-state dispute settlement where investors are the only entity allowed to institute arbitral actions against states.

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<sup>455</sup> Article 17(4) of the DSU

<sup>456</sup> See Article 22 of the DSU of the WTO

Overall, Article 23 of the DSU provides guidance on how this multilateral system can be strengthened by all members as it mandates that, ‘When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of [the DSU] Understanding’.<sup>457</sup>

Consequent upon the review of the WTO dispute settlement system, it can be said that the WTO operates a quasi-court system as it infuses certain aspects of ADR and a tribunal. For example, whilst there is a provision for ADR frameworks like mediation, there is also a Panel and an Appellate body which are judicial in nature and form. More importantly and similarly to my proposal, there are several organs that ensures that the WTO dispute settlement system functions effectively. For instance, there are laid down rules on the functions of the WTO secretariat, appointment of panel members, procedures for the adjudication of disputes and compliance. Therefore, the creation of my proposed Pan-African Investment Court shall adopt some of the features of this system.

#### 6.10. Evaluation of the WTO dispute settlement system

In adopting some of the features of the WTO dispute settlement system towards achieving the aims of this thesis, the weaknesses and criticisms that of the WTO framework shall be examined and taken into account. Among the weaknesses of the WTO dispute settlement system is the problem of implementation. As stated by Clough,<sup>458</sup> the problem of

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<sup>457</sup> Article 23(1) DSU

<sup>458</sup> Clough, M., 'The WTO dispute settlement system-a practitioner perspective' (2000) *Fordham Int'l LJ*, 24, 252

implementation and compensation for any contravention by a state is one of the weaknesses of the mechanism because, the system of ‘suspension of concessions’ and ‘bringing the measure into compliance’, does not provide effective remedy to the losses incurred by states.

In addition, Clough informed that the duration of implementation of decisions of the Panel and Appellate Body is too long, and being that the cases in issue are commercial; the long duration of implementation is therefore not good for business as time is of essence in commercial undertakings. Furthermore, the WTO dispute settlement system has recently been challenged by the blockage of the United States to initiate the process of filling the vacant positions on the Appellate body, thus leading to the argument that this might result to the extinction of the system.<sup>459</sup> The ability of a state to block actions of the institution is a reflection of its consensus practice on issues.<sup>460</sup>

This Appellate body appointment crisis certainly possess the potential of crippling the WTO dispute settlement system. Although the business of the Panel of First Instance may still continue in the absence of an Appellate Body, however, it could limit the compliance and implantation of decisions of the Panel because of the unavailability of Appellate body to exercise their rights to appeal.

Similarly, the weaknesses identified by Reich,<sup>461</sup> and the reform proposals he proffered regarding the WTO DSS will also be considered in adapting some of the organs of the

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<sup>459</sup> Bown, C. P., and Keynes, S., 'Why Trump shot the sheriffs: The end of WTO dispute settlement 1.0.' (2020) *Journal of Policy Modeling*, Davey, W. J., 'The WTO dispute settlement system: the first ten years' [2005] 8(1) *Journal of International Economic Law* 17-50.

<sup>460</sup> See Fiorini, M., HOEKMAN, B. M., MAVROIDIS, P. C., Saluste, M., & Wolfe, R., 'WTO dispute settlement and the appellate body crisis: insider perceptions and members' (2019) revealed preferences., Bown, C. P., 'The 2018 trade war and the end of dispute settlement as we knew it. *Trade War: The Clash of Economic Systems Endangering Global Prosperity*' (2019) 21-32

<sup>461</sup> Reich, A., 'The effectiveness of the WTO dispute settlement system: A statistical analysis' (2018) In *Transnational Commercial and Consumer Law* (pp. 1-43). Springer, Singapore, Abbott, R., 'Are developing countries deterred from using the WTO dispute settlement system? Participation of developing countries in the DSM in the years 1995-2005' [2007] (No. 01/2007). ECIPE working paper.

institution in creating my proposed investment court system. In his assessment of the effectiveness of the WTO DSS, Reich corroborated the need for reforms in some of its operational procedures. This is because, it seems that the confidence of states in the WTO dispute settlement system is waning. For instance, Reich confirmed that ascension to the WTO dispute settlement has reduced from an average of thirty-seven point eight per cent per annum within the first five years of its formation, to nineteen per cent in the last thirteen years. Perhaps, this reduction in the utilisation of the system is because of its ineffectiveness to provide appropriate remedy to developing and least developed states such as African states.

The ineffectiveness of the WTO dispute settlement system to developing states is buttressed by the statistics on its usage. As evidenced by Reich; in the period covering January 1, 1995 and December 31, 2016, the WTO has processed five hundred and seventy-three consultations requisitions and three hundred and fifty dispute settlement decisions. This shows a reduction from thirty-seven point eight cases per year between 1995-1999 to nineteen cases per year between 2007-2016. Within this number however, the United States and European Union are the biggest users by four to five times more than the nearest users. In total, four of the ten most active users; which accounts for over sixty per cent of the total cases are from developed countries.

Overall, developed countries dominate the usage statistics despite commanding less than twenty-five per cent, of the total one hundred and sixty-one members of the WTO. In essence, developed states have made an average of fifty-seven point four per cent of all consultations requests, panel requests and reports. In the same vein, they account for sixty-two point seven per cent of all appellate body reports. In contrast, developing states which account for fifty-

three per cent of membership of the WTO have made fewer requests. The statistics indicate that developing states have made an average of forty-two point five per cent of all consultations requests, panel requests and reports. Similarly, they have made just thirty-seven point three per cent of all appellate body reports.

Correspondingly, the disproportionate use of WTO dispute settlement system is evidenced by the statistics of usage by least developed countries. Despite the fact that this demography constitutes twenty-two per cent of members, however, they account for just zero point seventeen per cent of all consultation requisitions, panel requests and reports within the period under review. In essence, least developed states have submitted just one single case of consultation request. When contrasted with their percentage of membership at twenty-two per cent and share of global trade at just five point seven per cent in 2019, it shows that their participation in the WTO system is abysmally low.

Furthermore, the data on state participation as respondents; evidences that developed states are also the most active actors. According to the data from the WTO World Trade Statistical Review 2020, developed states have been respondents in fifty-nine per cent of all consultation requests, sixty-four point seven per cent of all panel requisitions and sixty-eight point six per cent of all panel reports. In addition, they also account for seventy per cent of Appellate body reports.

The prevailing data above is a confirmation that developed states are the active users of the WTO dispute settlement system, both as complainants and respondents. In a world where

all countries consummate trade and investment, dispute settlement systems should however be calibrated to be all-embracing and participatory. The reasons behind the low participation of developing and least developed states are many and they represent the weaknesses of the system.

First among these reasons is the high cost of the administrative procedures in litigating at the WTO dispute settlement system.<sup>462</sup> With a three-way step of filing a complaint, litigating at the Panel, Appellate body stages, and thereafter ensure enforcement through the compliance panel; most least developed and developing states do not have the resources to pursue these processes to the latter. In addition, they do not also have the technical knowledge and internal experts within the WTO that can pursue their cases to successful conclusion. Furthermore, the length of concluding a case and also ensuring compliance is too long, burdensome and time consuming. As such, these demography of countries do not have the necessary manpower and resources to successfully approach the system.

Indeed, African states communicated this structure and cost concern during the negotiations on the Dispute Settlement Understanding in 2002. Through the proposal by the Permanent Mission of Kenya on behalf of the African Group, member states from the continent stated among other things that 'African Members, many of them being least-developed country Members, have not been active participants in the WTO dispute settlement system (DS). This diminutive participation is not because they have never had occasion to want to enforce their rights, or the obligations of other Members, but due to structural difficulties of the DS.

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<sup>462</sup> See Francois, J. F., Horn, H., & Kaunitz, N. (2007). Trading profiles and developing country participation in the wto dispute settlement system, Wolff, A. W., 'Problems with WTO dispute settlement' (2001) 2 Chi. J. Int'l L., 417.

An equitable outcome of the negotiations must include solutions that will clearly facilitate and support the full participation of African Members in the DS'.<sup>463</sup>

Another reason behind the usage deficit of developing states is the political and economic costs of confronting a developed and powerful state in a litigious WTO dispute settlement. Since most African states are either least developed or developing countries, and therefore requires the continuous attraction of FDIs and political support from developed states; any confrontation with this latter group may be harmful to the economic interests of African states. For example, the targeting of the United States in a dispute settlement may lead to a cut in aid and political support to a developing country. Such retaliatory consequences of instituting dispute settlement cases therefore deter developing states from using the system.

Last but not the least, traders from less developed and developing states may not be sophisticated enough to recognise the very complex provisions of the GATT and WTO agreements.<sup>464</sup> As such, they may not understand when these provisions have been breached and what measures to undertake in seeking redress through their home governments. This lack of synergy between traders and developing states is therefore a contributor to the abysmal usage of the WTO system by these category of countries.

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<sup>463</sup> WTO Dispute Settlement Body, Special Session, 'Negotiations on the Dispute Settlement Body', Proposal by the African Group, TN/DS/W/15 25 September, (02-5136) 2002

<sup>464</sup> See Horn, H., Mavroidis, P. C., & Nordström, H., 'Is The Use Of The WTO Dispute Settlement System Biased?' (1999). DP2340, Busch, M. L., & Reinhardt, E., 'The WTO dispute settlement mechanism and developing countries' (2004) Trade Brief, Swedish International Development and Cooperation Agency.



Compliance to the decisions is also another challenge that confronts the WTO dispute settlement system. As aforesaid, the compliance procedure of the organisation is encapsulated in its Article 21.1, which provides that 'Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members'. Despite this provision however, compliance has been far from prompt. In between the reference period 1995-2016, the WTO compliance panel has issued thirty-six reports. Within this number, only three have been fully complied with by the respondent state, about three reports have witnessed partial compliance whilst thirty-three others have not been complied at all. This equates that nine-two per cent of the WTO compliance reports in the period under review have not been complied and implemented.<sup>465</sup>

Perhaps, a major reason behind the compliance deficit is the propensity of respondent and defaulting states to file appeals as a means of delaying and elongating the dispute settlement. This presupposes that time constraint is also another deficiency of the WTO settlement system. As argued in this thesis, time is of essence in commercial undertakings. This time also includes the process and speed of resolving a dispute through the system.<sup>466</sup> As a matter of fact, the United States and European Union occupies the top two positions in the invocation of suspension of concessions at over eighty per cent,<sup>467</sup> a procedure that is invoked by complainant states against respondent states for non-compliance with an award.

In contrast to their share of global trade and disputes settlement cases against them, the compliance rate of developed states to decisions emanating from the WTO dispute settlement

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<sup>465</sup> See do Amaral Júnior, A., Pires, L. M. D. O. S., & Carneiro, C. L. (Eds.), 'The WTO Dispute Settlement Mechanism: A Developing Country Perspective' (2019) Springer., There were about 56 consultations within this period, but did not get to the point of constitution of a panel as they were settled. There are further ongoing cases post 2016

<sup>466</sup> Jackson, J. H., Hudec, R. E., & Davis, D., 'The Role and Effectiveness of the WTO Dispute Settlement Mechanism [with Comments and Discussion]' (2000, January), In Brookings Trade Forum (pp. 179-236). Brookings Institution Press, Elsig, M., Pauwelyn, J., & Bernauer, T., 'Dispute settlement mechanism—Analysis and problems' (2012) In The Oxford Handbook on The World Trade Organization.

<sup>467</sup> Ibid. 466 above

system is low. This evidences that the WTO is weak in holding powerful nations accountable. This opinion is supported by the conclusions of Butler and Hauser,<sup>468</sup> that the WTO system incentives a losing party to appeal and delay the dispute process because of the time it affords them. In addition, the scholars affirmed that the weak implementation process as enumerated in this this subsection, continuous to be an intractable weakness that confronts the dispute settlement framework.

A potential challenging issue that confronts this system is the role of Regional Trade Agreements (RTAs) within the Dispute Settlement Mechanism (DSP). The evaluation of this potential clash is imperative because, my proposed Pan-African Investment Court will function in a continent with several Regional Economic Communities (RECs), complete with their own dispute settlement mechanisms. This portends that a review on how the WTO system have functioned alongside the RTAs is necessary in view of the aims of this thesis.

Towards this end, Salles averred that the WTO system is not negatively impacted by the existence of the RTAs.<sup>469</sup> Thus, Gao and Lim contended that it is cost effectiveness, efficiency and legitimacy of each system influences its selection by states.<sup>470</sup> Overall, the scholars concluded that given the high number of cases which could have been handled by the RTA-DSMs but rather processed through the WTO DSS, it means that most states are susceptible to approach the WTO rather than the RTA-DSMS.

Consequently, the coexistence of the WTO DSS and the various RTA-DSMs evidences that my proposed Pan-African Investment Court can coexist with the various dispute settlement

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<sup>468</sup> Büttler, M., & Hauser, H., 'The WTO dispute settlement system: A first assessment from an economic perspective' [2000] 16(2) *Journal of Law, Economics, and Organization*, 503-533.

<sup>469</sup> Luiz Eduardo Salles, 'Is the settlement of Trade Disputes under Regional Trade Agreements undermining the WTO dispute settlement mechanism under the integrity of the world trading system?' (2015) 2 *QIL*

<sup>470</sup> Gao, H., & Lim, C. L., 'Saving the wto from the Risk of Irrelevance: The wto Dispute Settlement Mechanism as a 'Common Good' for rta Disputes' [2008] 11(4) *Journal of International Economic Law*, 899-925.

mechanisms of the Regional Economic Communities in Africa. In any case, the positive derivatives of the RECs will be incorporated within the Pan-African Investment Court. Thus, their utility may no longer be necessary since my proposal seeks to unify and harmonise the continent's investment dispute settlement frameworks.

Despite the merits of this system, evidences suggest that it may become obsolete unless it is reform. Some commentators have opined that the opposition of the United States to agree on the appointment of the members of the Appellate body, is a broader global trade way and nationalistic approaches to globalisation.<sup>471</sup> This spectacle therefore reinforces the need for a Pan-African Investment Court that will accommodate the economic interests of African states. In creating the Investment Court System in Africa however, the identified perils of compliance, cost of litigation and speed of dispensing cases that beclouds the WTO dispute settlement system will be taken into account. This is to enable the formulation of a workable and effective Investment Court System that will enshrine progressive and innovative ways of resolving investor-state disputes in Africa.

### 6.11. The International Court of Justice

As stated in chapter four of this thesis, the aftermath of the First World War forced the Comity of Nations to formulate better and more amicable ways of resolving disputes among States. Since diplomatic protection, treaties of friendship, commerce and navigation, as well as the Permanent Court of International Justice (PCIJ),<sup>472</sup> could not prevent the outbreak of

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<sup>471</sup> See Sacerdoti, G., 'Solving the WTO Dispute Settlement System Crisis: An Introduction' [2019] 20(6) *The Journal of World Investment & Trade*, 785-791, McRae, D., 'What is the future of WTO dispute settlement?' [2004] 7(1) *Journal of International Economic Law*, 3-21, González, A., & Jung, E., '20-1 Developing Countries Can Help Restore the WTO's Dispute Settlement System' (2020), Peterson Institute for International Economics, Policy Paper 1-15

<sup>472</sup> This was established through Article 14 of the Covenant of the League of Nations (The old format of the UN)

the First World War, the International Court of Justice (ICJ) was established in 1945 as a successor to the PCIJ. Through the adoption of the Statute of the PCIJ and Article 92 of the UN Charter,<sup>473</sup> the ICJ became the principal judicial organ of the United Nations. Headquartered in The Hague, The Netherland; the ICJ borrowed some of its operational frameworks from the defunct PCIJ in areas like constitution and number of judges, jurisdiction and other administrative mechanisms.

Just as the WTO dispute settlement system is based on the provisions of the DSU, the ICJ operates based on Charter of the United Nations, the Statue and Rules of the court. These provisions of the UN sets out the functioning guidelines and duties of the court; organisation, competence, procedures and the internal functioning. It is composed of fifteen judges elected for a period of nine years, whilst the president and vice president are decided by the judges for a period of three years. Where there are five vacancies, elections are conducted every three years to fill them. Eligibility for election as a judge of the ICJ is on the recommendation of member states and such persons must have been qualified to be elected to judicial positions in their respective states. Unpeaceable integrity capital, high moral worthiness and expertise in judicial processes are some of the qualities expected from candidates to the bench of the ICJ. Election of judges are conducted simultaneously by two of the organs of the United Nations; the General Assembly which is made up of all Member States of the United Nations and the Security Council. Successful candidates must obtain absolute majority from the two organs to emerge as judges of the ICJ.

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<sup>473</sup> United Nations Charter 1945, Available at <https://www.un.org/en/charter-united-nations/index.html> (accessed on 06/11/2019)

In addition to the basic texts of the court, it must be noted that issues are resolved through customary international law. As provided in Article 38(1) of the UN statute, the court decides issues through international conventions and customs, especially those that is recognised by disputing states, general principles of law that are recognised by civilised nations and the subsidiary deployment of highly qualified individuals and experts. In deploying customary international law however, cases are decided on the basis of *ex aequo et bono*; which is on equitable terms if the parties to a dispute consent to it.

Apart from the full composition of the court, chambers of three judges and Special Chambers may be constituted to hear certain cases like issues relating to the environment. For example, cases like Land, Island and Maritime Frontier<sup>474</sup> and Gulf of Maine<sup>475</sup> were heard by Special Chambers. Judgements and decisions of the Chambers are admitted as judgements of the ICJ. The office of the judge of the ICJ is permanent as the statute clear states that, 'No member of the Court can be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions'.<sup>476</sup> These conditions as spelt out in Articles 16 and 17 of the UN Statue, are rules that bares judges from 'exercise[ing] any political or administrative function, or engage in any other occupation of a professional nature' or 'participat[ion] in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity'.

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<sup>474</sup> The Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras), Nicaragua intervening, ICJ Reports 1993

<sup>475</sup> The Delimitation of Maritime Boundary in the Gulf of Maine Area (Canada v. United States), ICJ Reports 1984

<sup>476</sup> See Article 18, ICJ statute, Available at <https://www.icj-cij.org/en/statute> (Accessed on 08/11/2019)

On jurisdictions, the ICJ possess two types of competences. Firstly, it possesses jurisdiction over contentious issues that are submitted by member states. Another jurisdiction of the court are matters that are referred to it by the UN through any of its organs like the General Assembly and Security Council. Similar to conventional courts, referred matters from the UN mostly borders on questions of law and interpretation of the UN statue. The ICJ also entertains *voi die* matters known as Incidental jurisdictions. Incidental jurisdictions refer to instances where the locus and competence of the court is questioned. In contrast, Mainline jurisdictions refer to questions on the competence of the court to render binding decisions. In essence, whilst the former are preliminary issues, the latter is concerned with substantive matters and the judicial standing of the court to entertain matters before it.

Diplomatic protection also features prominently at the ICJ through the principle of jurisdiction *Rationae Personae*.<sup>477</sup> Although ascension to the court is consummated by member states, however, states can sponsor disputes on behalf of their nationals. As such, corporations in a trade or investment disputes may seek remedy at the court through their states. In regards to nationals with dual citizenship, the rules of the court provide that such persons may be represented by states where they have a stronger link. Prior to the deployment of diplomatic protection however, the concerned citizen is obligated to exhaust local remedies as a condition precedent before ascension to the ICJ.

Assumption of jurisdiction or basis for *locus standi* of the court to entertain cases are achieved through several ways. First and foremost, states can consummate a compromise to confer

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<sup>477</sup> Article 34(1), ICJ statue

legitimacy to the court to hear their cases.<sup>478</sup> Second, the ICJ may be selected as a forum to resolve disputes through the insertion of a jurisdictional clause in a treaty. As clearly stated in the statute of the court, ‘The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force’.<sup>479</sup> Similarly, Optional clauses wherein states willingly recognise the legitimacy of the court as a compulsory forum for the resolution of their disputes is another procedure of assenting to the superintendence of the ICJ. This is provided in Article 36(2) of the statute that, ‘The States Parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement in relation to any of the States accepting the same obligations, the jurisdiction of the court in all legal disputes.....’.<sup>480</sup>

Furthermore, jurisdiction is also assumed by the court through the doctrine of *Forum Prorogatum*. This doctrine is where a state, that may not be a signatory to the statute, impliedly confers jurisdiction on the court. In essence, this jurisdiction occurs where conducts suggest a concurrence to the legitimacy of the court to administer some matters even after the case has been initiated. For instance, the court argued in the *Corfu Channel case* that the Albanian state, who was not a signatory to the statute, would have been entitled to object to the unilateral initiation of the case by the United Kingdom.<sup>481</sup>

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<sup>478</sup> Such as the agreement conferring jurisdiction in the Gabcikovo-Nagymaros Project (Hungary v. Slovakia) case, ICJ Reports, 1997, p. 7

<sup>479</sup> Article 36(1), ICJ statute

<sup>480</sup> See Article 36(2)

<sup>481</sup> ICJ Reports 1947-48, pp. 4 and 27, Corfu Channel Case (United Kingdom v. Albania); Assessment of Compensation, 15 XII 49, International Court of Justice (ICJ), 15 December 1949, available at: <https://www.refworld.org/cases,ICJ,402398c84.html> [accessed 21 May 2020]

However, Albania indicated its recognition of the legitimacy of the court to hear the matter, therefore precluding itself from objecting to the jurisdiction of the court. Likewise, states may confer jurisdiction on the court either *conditionally or unconditionally*. This jurisdiction as explained in Article 36(3) of the statute contemplates the principle of reciprocity, where states may make declarations as to the conditions it aims to approach its recognition of the court. However, it is made clear in the statute that such recognition 'is not a limitation of the jurisdiction accepted but a condition as to the operation of the declaration itself'.<sup>482</sup>

Once the ICJ assumes jurisdiction, it adopts and applies the protocols of conventional courts such as representations on behalf of the state and the adducing of evidence. Third parties may also apply as witnesses to help the court arrive at a judgement. Judgements may be given by the court based on the evidence before it or jurisdiction may be declined, especially when the subject matter may have been resolved through the conduct of the defendant state. Once a decision or judgement is made by the court, it is binding on the parties.

The enforcement powers is derived from the enabling Charter of the United Nations which confers legitimacy on the ICJ. Since Article 93(1) of the UN Charter explains that, 'All Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice', this obligates that 'Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party'.<sup>483</sup> All member states or signatories to the ICJ statute are therefore expected to comply because 'If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may,

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<sup>482</sup> See Hudson, M. O., 'The Permanent Court of International Justice: 1920-1942' (1943) New York: The Macmillan Company

<sup>483</sup> Article 94(1), UN Charter



if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment'.<sup>484</sup> As such and similar to the WTO dispute settlement system, multilateralism is the cornerstone of the International Court of Justice.

## 6.12. Evaluation of the International Court of Justice

The review of the effectiveness of the ICJ is imperative because, it will help to identify its strengths and weaknesses. Thus, the findings of the evaluation will be deployed in formulating my proposed Pan-African Investment Court.

As an international institution that is tasked with the resolution of inter-state disputes, the International Court of Justice is also confronted with several challenges like the WTO dispute settlement system. One of the critical issues that confronts the ICJ is the problem of jurisdiction. The compulsory jurisdiction of the court and the propensity of the permanent members of the United Nations Security Council, to decline this compulsion is a direct challenge on the influence of the court. This jurisdictional challenge of the court is encapsulated in Article 36(Para. 2) of the Charter which states *inter alia* that,

'the State parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a) the interpretation of a treaty; b) any question of international law; c) the existence of any fact

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<sup>484</sup> Article 94(2), UN Charter

which, if established, would constitute a breach of an international obligation; d) the nature or extent of the reparation to be made for the breach of an international obligation’.

The import of this provision is that the ICJ is infused with several jurisdictional powers and can assume jurisdiction as it deems fit. Without a clear single framework on jurisdiction therefore, powerful states and particularly, the permanent members of the UN Security Council have challenged this compulsory jurisdiction, thereby declining the jurisdiction of the court in certain issues.<sup>485</sup> Another problem that confronts the court is its procedure of election and re-election of the judges.<sup>486</sup> The election process is through a nomination by the Security Council and thereafter, an election by the general assembly. In such a situation, it is clear that members of the Security Council will have an overbearing influence on who emerges as a judge. This certainly will impact on the independence and impartiality of the judges. The process of re-election is no less devoid of risk of external influence. The re-election process is attended with the canvassing of votes by the home states of the judges through covert and overt means. In a milieu where high stake politicking and diplomatic tools are deployed, the independence of judges who are re-elected may not be guaranteed.<sup>487</sup>

Similarly, the ICJ is faced with the issue of conflict of interest due to the role of the permanent members of the security council. The members of the security council are entitled to have at least one of their candidates as a judge, and also deposited with the enforcement powers of the judgements of the court. In Article 94(2) of the UN Charter, it is stated that ‘If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by

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<sup>485</sup> See Ogbodo, S. G., 'An overview of the challenges facing the international court of justice in the 21st century' (2012) *Ann. Surv. Int'l & Comp. L.*, 18, 93, Llamzon, A. P., 'Jurisdiction and compliance in recent decisions of the International Court of Justice' [2007] 18(5) *European Journal of International Law*, 815-852.

<sup>486</sup> See Posner, E. A., 'The decline of the international court of justice' (2004) *U Chicago Law & Economics, Olin Working Paper*, (233).

<sup>487</sup> See Posner, E. A., & De Figueiredo, M. F., 'Is the International Court of Justice Biased?' [2005] 34(2) *The Journal of Legal Studies*, 599-630

the Court, the other party may have recourse to the Security Council which may, if it deems necessary, make recommendations, or decide upon measures to be taken to give effect to the judgment’.

This provision thus possesses the potential to endanger the efficacy of the court as the security council members who may be parties to a dispute, are also empowered with its enforcement. In addition, they also have self-appointed judges that sits on the bench of the court. This may therefore encumber them from ensuring that the processes of the court are transparent and fair. Furthermore, this situation also impacts on the enforcement of judgements as the security council members could deploy their veto powers to defeat any judgement of the court. The intricate involvement of members of the security council is therefore concerning. This is because, the independence and partiality arbitral panels is one of the criticisms that also confronts investor-state arbitration.

In the same vain, the practice of allowing parties to a dispute to nominate *ad hoc* judges to sit on the panel is another problem with the ICJ. Although this practice which is captured in Article 31 of the statute of the court,<sup>488</sup> is an attempt to enshrine fairness, transparency and democracy into the system, however; it also serves as its weakness. This is because, evidences show that judges of the same nationality with a party to a dispute, have always voted for their nationals during decision-making. Oncemore, there is a risk of conflict of interest in such a scenario.

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<sup>488</sup> Article 31, Para 1 states that 'Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court'. Then Article 31, para continues that '[i]f the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5'. Thereafter, Article 31(3) states that '[i]f the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article'.

Despite these deficiencies of the ICJ however, the prevailing academic opinion suggests that it have functioned successfully in the last six decades, but in need of reforms in the challenging areas referenced above.<sup>489</sup> Its relative success can be premised on the substantial compliance and enforcement of its decisions.<sup>490</sup> Notwithstanding this relative compliance and success however, the entanglement of the court with matters of investor-state dispute settlement have been questioned.<sup>491</sup> Nevertheless, the substantial compliance of the decisions of the ICJ, suggests that apart from the identified weaknesses above; the court still retains the trust of the global community.<sup>492</sup> Thus, some of its structures which has enabled this substantial compliance will be adapted in the formulation of my proposed Pan-African Investment Court.

### 6.13. Arab Investment Court

The Arab Investment Court (AIC) is a dispute resolution forum created under the Unified Agreement for the Investment of Arab Capital in the Arab States.<sup>493</sup> This agreement which was signed in 1980 and amended in 2013, regulates multinational corporations and resolves investment disputes among its member states. A majority of the signatories to the League of Arab States are its members, including several states from North Africa. Thus, Egypt, Tunisia, Libya and Algeria are part of its member states.

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<sup>489</sup> See Ogbodo, S. G., 'An overview of the challenges facing the international court of justice in the 21st century' (2012) *Ann. Surv. Int'l & Comp. L.*, 18, 93; Llamzon, Bonafé, B. I., 'Establishing the existence of a dispute before the International Court of Justice: Drawbacks and implications' (2017) *Questions of International Law*, 45 on establishing the existence of a dispute at the ICJ

<sup>490</sup> Jones, H. L., 'Why Comply: An Analysis of Trends in Compliance with Judgments of the International Court of Justice since Nicaragua' (2012), *Chi.-Kent J. Int'l & Comp. L.*, 12, 57.

<sup>491</sup> See Bernasconi-Osterwalder, N., & Brauch, M. D., 'Is "Moonlighting" a Problem?: The Role of Icj Judges in ISDS' (2017) Winnipeg: International Institute for Sustainable Development.

<sup>492</sup> Greenwood, C., 'The Role of the International Court of Justice in the Global Community' (2010) *UC Davis J. Int'l L. & Pol'y*, 17, 233.

<sup>493</sup> League of Arab States, 'Unified Agreement for the Investment of Arab Capital in the Arab States' (1982) *Economic Documents*, No. 3 (Tunis: League of Arab States)

The objectives of the Unified Agreement for the Investment of Arab Capital in the Arab States is similar to other multilateral agreements. It aims to engender greater economic cooperation, trade and investment harmonisation and sustainable development among its members. Thus, it is aimed at ‘strengthening overall Arab development and Arab economic integration and providing a suitable investment climate to stimulate Arab economic resources in the field of joint Arab investment’. In essence, this agreement seeks to stimulate investment growth throughout the Arab world through a multilateral agreement. Evidently, this agreement is reminiscent of other treaties such as the CETA and AfCFTA.

As a multilateral institution that seeks to stimulate common investments arrangement among its member states, the Unified Agreement for the Investment of Arab Capital in the Arab States; contains rules and regulations on common investment, protections and minimum standards of regulating foreign investments within its areas of jurisdiction. As such, the treaty guarantees substantive protections and legitimate expectations such as expropriation, Fair and Equitable treatment (FET),<sup>494</sup> Free transfer of capital and revenues,<sup>495</sup> MFN treatment, National treatment<sup>496</sup> and fair compensation for damage to investments.<sup>497</sup>

Beyond these protections, the treaty provides for an Investment Court System as a mechanism for resolving investment disputes. Thus, in addition to conciliation and arbitration,<sup>498</sup> the treaty also provides for the Arab Investment court. It is stated in Article 28 that, ‘Until such time as the Arab Court of Justice is established and its jurisdiction

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<sup>494</sup> League of Arab States, ‘Unified Agreement for the Investment of Arab Capital in the Arab States’ (1982) Economic Documents, No. 3 (Tunis: League of Arab States), Article 15

<sup>495</sup> Ibid. 494 above, Article 8(2)

<sup>496</sup> Ibid. 484 above, Article 5

<sup>497</sup> Ibid. 494 above, Article 10(1) and 11

<sup>498</sup> Ibid. 494 above, Article 4

determined, the Arab Investment Court shall be established'. The AIC is the forum for the resolution of disputes under the agreement as Article 25 provides that 'Disputes arising from the application of this Agreement [the treaty] shall be settled by way of conciliation or arbitration or by recourse to the Arab Investment Court'.

The AIC is innovative from the WTO dispute settlement system and ICJ because, the Unified Agreement Treaty confers exclusive jurisdiction on all matters pertaining to the functioning of the Institution. This is reflected in Article 30 of the treaty which states that 'Where an international Arab agreement setting up an Arab investment or any agreement related to investment within the scope of the League of Arab States stipulates that a matter or dispute should be referred to international arbitration or to an international court, the parties involved may agree to regard it as being within the jurisdiction of the Court'.

Further to the exclusive jurisdiction of the AIC, the Treaty also allows for freedom of selecting a forum which includes the local courts. Thus, it is contained in Article 31 that 'The Arab investor may have recourse to the courts in the State where the investment is made according to the rules of jurisdiction within such State in the case of matters which fall within the jurisdiction of the Court'. In recognising the use of local courts however, the Treaty contains a Fork-in-the-Road (FITR) clause which provides that 'Where the Arab investor brings an action before one authority, he must refrain from so doing before the other'. Similar to the *lis pendens* rule in intra-European commercial litigation, the FITR debars the commencement of cases of similar nature in two different courts until the court that is first seized dispenses with the matter.

In a further affirmation of the superiority of the AIC to the domestic courts and other ADR measures, Article 32 of the Treaty affirms that ‘Where there is a conflict of jurisdiction between the Court and the courts of a State Party, the decision of the Court on the matter shall be final’.

On membership of the court, it is composed of ‘five judges and several reserve members’ from different nationalities and appointed by the Economic Council of the League of Arab States. The judges who shall be specialists in legal matters are appointed for a term of three years and may be renewed. Each state party shall be involved in the nomination.<sup>499</sup> But the status of the court itself is permanent. In relation to judgement and enforcement, it is stipulated in Article 34 that ‘Judgements shall have binding force only with regard to the parties concerned and the dispute on which a decision is given’. Similar to the finality of awards in arbitration, the Unified Agreement Treaty also provides that ‘Judgements shall be final and not subject to appeal’.<sup>500</sup> The enforcement of the judgement of the AIC is an obligation on the state parties, thus the Treaty demands that ‘A judgement delivered by the Court shall be enforceable in the States Parties, where they shall be immediately enforceable in the same manner as a final enforceable judgement delivered by their own competent courts’.<sup>501</sup>

Since the existence of the AIC, it has processed and administered several cases on investment disputes in line with the provisions of the Unified Agreement for the Investment of Arab

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<sup>499</sup> AIC statute, Article 28

<sup>500</sup> AIC statute Article 34

<sup>501</sup> AIC statute, Article 34(3)

Capital in the Arab States. For example, in *Tanmiah v Tunisia*,<sup>502</sup> was a dispute between a Saudi Arabian investor and the Tunisia. The case in issue bordered on a breach of contract and performance of the obligations contained in the Unified Agreement Treaty. The AIC found among other things, that it had jurisdiction to entertain such matters. This is because, it was an issue on whether the investor satisfied the meaning of ‘investor and investment’ as contained in the Treaty.

Likewise, in *Munira v UAE*,<sup>503</sup> the court declined competence over a case of expulsion of the claimants because, their restaurant business did not qualify as investment as contained in the Treaty. This decision was on the determination that the investment did not involve the transfer of capital. In addition, the AIC found that the violation of a drug law of the UAE entailed that the expulsion was necessary in the interest of the state. Further cases that have been decided by the courts includes *Lido Hotel v Egypt*,<sup>504</sup> *Said Al Khoury v The Arab League*<sup>505</sup> and *Horizon Tourism Company v Egypt*.<sup>506</sup> All these cases involved the interpretation of the provisions of the Unified Agreement treaty.

However, the decision in *Mohamed Abdulmohsen v Libya* can be deemed an arbitral award.<sup>507</sup> An investor from Kuwait was awarded the sum of USD \$930 million as payment for damages against the state for a contractual infringement. The enforcement of this award was successful

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<sup>502</sup> AIC decision 12 October 2004

<sup>503</sup> *Munira Abdelhafedh and Rashed Mustapha v United Arab Emirates*, AIC decision 30 August 2006

<sup>504</sup> *Lido Hotel Jizza v Egyptian Minister of Finance*, AIC decision 21st August 2007

<sup>505</sup> *Said Al Khoury in his capacity as Chairman of Consolidated Contractors Company v. The Arab League*, AIC decision 6 December 2010

<sup>506</sup> *Horizon Tourism Company v Egypt*, decision of the AIC, 27 April 2011

<sup>507</sup> *Mohamed Abdulmohsen Al-Kharafi & Sons Company v Libya*, AIC Decision 22 March 2013



through a local court in Egypt. This case therefore exemplifies the complimentary nature of arbitration with the AIC, and how both forums can coexist in investment dispute resolution.

In summary, the Arab Investment Court is another example of a court system that is used to resolve investment disputes arising from a multilateral agreement. The AIC is particularly instructive because, it has functioned and enjoyed jurisprudence for over three with measurable level of success. Apart from the finality of awards without an option for appeal, the structure and functioning of this court is suitable for the purpose of creating my proposed Pan-African Investment Court. Prior to adapting some of its structure however, a critical appraisal of this court system will be conducted. This will enable the evaluation and determination of its promises and perils.

#### 6.14. Evaluation of the Arab Investment Court

The Arab investment court have enjoyed considerable superlative acclaim in the resolution of investment disputes. In its over three decades of existence, the court has been touted a model for innovative dispute settlement with its hybrid of arbitration and a court system.<sup>508</sup> Despite its considerable success, an evaluation of its structure shows a continued perception that the Investment Court System remains a work in progress. As argued by Hamida,<sup>509</sup> ‘[We] expect the Arab Investment Court to develop a true, dynamic and modern regional investment law. Its Judges and Commissioners should frame a coherent investment law doctrine and an Arab investment discipline without dominant national coloration’.

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<sup>508</sup> See Bungenberg, M., & Reinisch, A., 'From bilateral arbitral tribunals and investment courts to a multilateral investment court: options regarding the institutionalization of investor-state dispute settlement' (2020) Springer Nature pp.22

<sup>509</sup> Hamida, W. B., 'The First Arab investment court decision' [2006] 7(5) The Journal of World Investment & Trade, 699-721.

In essence, this view speaks to the fact that multilateral investment court systems must be devoid of partisanship and perceived to be all inclusive. Consequent upon the fact that investment courts will be deployed to settle disputes with foreigners, it suggests that doctrinal coherence and transparency in the appointment of the judges must be followed to retain confidence in the system.

Relative to the AIC, some of these criticisms of Hamida may have been resolved through an amendment to its statute in 2013.<sup>510</sup> Despite the amendments, however, the deployment of Article 37 of the Riyadh Convention, which is akin to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, may be questionable. This is because, whilst the judgement of the court is not an arbitral award, but, the deployment of a Convention in enforcing the judgements of the court may be confusing.

Nevertheless, the AIC have functioned well so far because of its level of compliance. In fact, the domestic courts are disposed to affirming the judgement of the AIC as seen in *Mohamed Abdulmohsen v Libya*,<sup>511</sup> where an Egyptian domestic court affirmed the ruling of the AIC. Consequent upon this evaluation, some of the features of the AIC will be adapted in creating my proposed Pan-African Investment Court because, it has been effective in the resolution of investor-state disputes in Arab states. Beyond dispute resolution, its functioning preserves the interests of the member states as local realities are incorporated within its Treaty.

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<sup>510</sup> See Hasaan, A. A., 'The 2013 Amendments to the Arab Investment Agreement' [2019] 34(1) ICSID Review-Foreign Investment Law Journal, 107-135.

<sup>511</sup> *Mohamed Abdulmohsen Al-Kharafi & Sons Company v Libya*, AIC Decision 22 March 2013

### 6.15. The European Union court system proposal

In the past few years where innovative treaty-making has gathered momentum with several proposals on the reformation of investor-state dispute settlement, the European Union (EU) have also been at the forefront of this endeavour. Their participation also mirrored the innovative approaches of African states through the EU's proposal for an Investment Court System (ICS).

The European Union's proposal was made through some of its investment agreements such as the defunct Transatlantic Trade and Investment Partnership (TTIP) with the United States, and the Comprehensive Economic and Trade Agreement (CETA) with Canada. Whilst the former have been abandoned due to the withdrawal of the United States, the latter has been concluded and provides for an Investment Court System as the investor-state dispute settlement mechanism.

The structure of the EU Investment Court System proposal mirrors some of the features of the WTO's dispute settlement system, the ICJ's dispute resolution framework and the Arab Investment Court. For example, the EU Investment Court System aims to have a permanent tribunal for the settlement of investment disputes. Unlike investor-state arbitration, the EU ICS proposal will have publicly appointed judges with secured tenure. In fact, and as affirmed by the European Commission, the EU aims to replace investor-state arbitration with the Investment Court system, which will incorporate some procedures of existing tribunals like the Arab Investment Court.

The EU Investment Court System proposal contains similar provisions like the afore-discussed systems on the composition of the judges, enforcement of judgements, rules of procedure and an enabling Treaty upon which the court shall draw legitimacy. Thus, in chapter 2, section 3, sub section 4, Article 9(1)(2) on draft chapter on investment of TTIP, a Tribunal of First Instance was established. Furthermore, the composition of judges was explained, as it was provided that ‘The [...] Committee shall, upon the entry into force of this Agreement, appoint fifteen Judges to the Tribunal. Five of the Judges shall be nationals of a Member State of the European Union, five shall be nationals of the United States and five shall be nationals of third countries’. This framework has since been incorporated into other EU investment agreements with a court system provision such as the EU–Vietnam Draft Free Trade Agreement and Comprehensive Economic and Trade Agreement.

In contrast to the Arab Investment Court, the EU court system is infused with an Appeals Mechanism. As contained in Article 10(1) of the TTIP Draft proposal, ‘A permanent Appeal Tribunal is [hereby] established to hear appeals from the awards issued by the Tribunal. Similar to the composition of the Tribunal of First Instance, the appellate tribunal is ‘composed of six Members, of whom two shall be nationals of a Member State of the European Union, two shall be nationals of the United States and two shall be nationals of third countries’.

A reaffirmation of the disposition of the EU to using court systems to resolve investment disputes is found in the EU-Vietnam Draft Free Trade Agreement which states that ‘A permanent Appeal Tribunal is [hereby] established to hear appeals from the awards issued

by the Tribunal'.<sup>512</sup> Sequel to these provisions, the structure of the EU court system is innovatory as it also aims to eliminate the legitimacy crises of investor-state arbitration. In addition, the creation of an Appeals Facility is an emulation of the other tribunals like the AIC and WTO dispute settlement system. This means that decisions of the Tribunal of First Instance can be appealed and reviewed in the same way as conventional court systems. In fact, there are further member state motivations underpinning the creation of a permanent Appeals Mechanism that will function alongside its investment court system.<sup>513</sup>

In summary, the EU court system proposal which incorporates an Appeals Facility is a further affirmation that the investor-state arbitration mechanism is no longer fit for purpose even for capital-exporting countries. Thus, the dissatisfaction against the system is not limited to the African states or capital-importing states alone. The decision of the EU to propose for an ICS provides further support to my proposal in this thesis. More importantly, some of the features and structure of the EU Investment Court proposal will be adapted in the formulation of my proposed Pan-African Investment Court.

## 6.16. Evaluation of the European Union court system proposal

In contrast to the WTO dispute settlement system, the ICJ and the Arab investment court; the EU Court System is just a proposal and therefore have not been implemented. Thus, there

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<sup>512</sup> Chapter 8, section III, Article 13(1) EU-Vietnam Draft FTA

<sup>513</sup> See the deliberations at the Council of the European Union, General Secretariat, Trade Policy Committee, Intra-EU Investment Treaties: Non-paper from Austria, Finland, France, Germany and the Netherlands, 7 April 2016, p. 5, para 12

are no indices to evaluate its effectiveness. Despite being a proposal however, it has been subjected to academic and expert scrutiny towards establishing its promises and perils.<sup>514</sup>

Much of the opinion on the EU Investment Court System proposal, as may be expected, borders on uncertainty on whether the proposal will provide a remedy to the legitimacy crises of Investor-state dispute settlement.<sup>515</sup> For example, Alvarez recognised that although the proposed replacement of arbitral panel members with permanent judges is an innovative feature of the ICS, however, other reforms merely embraced innovative treaty-making recommendations that have been developed within the paradigm of investor-state arbitration.<sup>516</sup> Thus, he contended that ‘While these innovations certainly promise to fix some of the concerns, which ISDS has never been able to address in a satisfactory manner, such as the lack of legitimacy, predictability and consistency, it may also be the source of new challenges and issues that need to be assessed and weighed properly’.

Similarly, Titi argued that despite the innovative nature of the proposed ICS, however, she recognised that the proposed is faced by several challenges.<sup>517</sup> These challenges are encapsulated in that the ISDS framework functions on over 3000 IIAs, which have overall functioned to some success. Thus, a wholesome change to an Investment Court System will pose the challenge of securing the concurrence of several countries and the investment

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<sup>514</sup> See Lévesque, C., 'The European Commission Proposal for an Investment Court System: Out with the Old, In with the New?' (2017), *Second Thoughts: Investor State Arbitration between Developed Democracies*, Issam Hallak, 'Multilateral Investment Court: Overview of the reform proposals and prospects' (2020), European Parliament Policy Briefing

<sup>515</sup> For example, Reinisch, A., 'Will the EU's proposal concerning an investment court system for CETA and TTIP lead to enforceable awards? —the limits of modifying the ICSID Convention and the nature of investment arbitration' [2016] 19(4) *Journal of International Economic Law*, 761-786, examined the issue of recognition of judgements and enforcement

<sup>516</sup> Juan Miguel Alvarez, 'How Innovative Is the EU's Proposal for an Investment Court System: A Comparison between ICS and Traditional Investor-State Dispute Settlement' (2020), European Union Law Working Papers, No. 43

<sup>517</sup> Titi, C., 'The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead' (2016), *Transnational Dispute Management*, 1, 2017.

community. In addition, and similar to the ICJ, the Investment Court System proposal could be infused with political interference, because the balance of power will essentially be in favour of states through the appointment of judges.

Furthermore, although the Court of Justice of the European Union have recently ruled that the proposed ICS in CETA is compatible with EU law,<sup>518</sup> however, Koeth argued that these legal challenges against the inclusion of the ICS in the CETA is a signal that ‘this new proposal has not convinced those who are to profit most from it. Nor has it changed hostile public opinion in a number of EU countries’.<sup>519</sup>

Overall, the effectiveness or otherwise of the EU Investment Court System proposals are presumptive. However, with a proposed structure that is reminiscent of the Arab Investment Court and operational mechanism of the International Court of Justice; it can be argued that the EU Investment Court System proposal could be successful.

## 6.17. The Common Court of Justice and Arbitration

The Common Court of Justice and Arbitration (CCJA) is a critical institution of the Organization for the Harmonization in Africa of Business Law (OHADA).<sup>520</sup> The Organization for the Harmonization in Africa of Business Law is a supranational organisation of seventeen countries within Central and West Africa.<sup>521</sup> It was established through the

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<sup>518</sup> Opinion 1/17 of the Court of Justice of the European Union

<sup>519</sup> Koeth, W., 'Can the Investment Court System (ICS) save TTIP and CETA?' (2016) European Institute of Public Administration.

<sup>520</sup> Organisation pour l'Harmonisation en Afrique du Droit des Affaires." Traité relatif à l'Harmonisation en Afrique du Droit des Affaires art. 3(1), Oct. 17, 1993, 4 Journal Officiel de l'OHADA 1 (Nov. 1, 1997) - OHADA Treaty <http://www.ohada.com/traite.html>

<sup>521</sup> Membership includes - Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, the Democratic Republic of Congo, Ivory Coast, Gabon, Guinea Conakry, Guinea Bissau, Equatorial Guinea, Mali, Niger, Senegal and Togo.

OHADA Treaty in 1993 and was reviewed in 2008.<sup>522</sup> The organisation also operates on commonly agreed frameworks known as the 'Revised Uniform Act on Commercial Companies and Economic Interest Groups (Revised Uniform Act)'.

Similar to the other multilateral organisations such as WTO, the objectives of OHADA is focused on advancing economic growth and development within its member states. This is firmly stated in the general provisions of the Treaty that 'the object of the present Treaty is to harmonise business law in the States Parties by the elaboration and adoption of simple modern common rules adapted to their economies, by setting up appropriate judicial procedures, and promoting arbitration as a means of settling contractual disputes'.<sup>523</sup> The OHADA Treaty aims to achieve these objectives through harmonised rules of business that is simple, clear, coherent and uniform in all member states. Its supranationality is akin to the European Union as the CCJA is a superior court of record over local courts.

As a multilateral Institution, OHADA possess five organs and these are; the Heads of states and governments of contracting parties, the Council of ministers, the Common Court of Justice and Arbitration (CCJA), the Regional High Judiciary and the Permanent secretary. All these institutions are critical to the proper functioning of the organisation and derives their legitimacy from the Treaty establishing the Institution. On procedure, the Revised Uniform Act and Rules and Decisions of the OHADA also aids its proper functioning. Among the areas that are covered in the Revised Uniform Acts includes general commercial law, bankruptcy law, commercial companies and economic interest groups law, arbitration law, together with the Rules of Arbitration of the Common Court of Justice and Arbitration (the

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<sup>522</sup> Amended treaty on the harmonization of business law in Africa, Treaty of 17 October 1993 signed at Port-Louis, amended by the treaty of 17 October 2008 done at Quebec

<sup>523</sup> Ibid. 522 above – Title 1, General provisions



CCJA Rules) and other commercial areas of economic activity. As a supranational organisation, the principle of uniformity lies at the core of its effective functioning.

In all the organs of the OHADA, the most relevant to this thesis is the Common Court of Justice and Arbitration (CCJA). Among the functions of the CCJA is to provide opinion on the Revised Uniform Acts of the OHADA,<sup>524</sup> 'ensure the uniform interpretation and application of the Treaty, its rules of enforcement as well as Uniform Acts and decisions'<sup>525</sup> adjudicate on appeals from lower and domestic courts of member states, appointment of arbitrators to sit on cases arising from agreements with arbitration clause<sup>526</sup> and ratification of arbitral awards amongst other functions.<sup>527</sup> Cases referred to the CCJA is decided on its merits and therefore not sent back to lower courts for retrial. A cursory review of these functions evidences that, similar to the structure of the Arab Investment Court, the CCJA also operates a hybrid dispute settlement system through the infusion of tribunal and arbitration.

On the operations of the court, it draws legitimacy from the OHADA Treaty, in addition to supplementary procedures by the Council of Ministers. Thus, Articles 31-40 of the treaty provides guidance on the structure, rules and procedures of the court. Within this light, Article 31 of the CCJA provides a minimum of nine judges and this may be increase by the

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<sup>524</sup> Amended treaty on the harmonization of business law in Africa, Treaty of 17 October 1993 signed at Port-Louis, amended by the treaty of 17 October 2008 done at Quebec, Title 2, Article 6

<sup>525</sup> The Common Court of Justice and Arbitration of the Organization for the Harmonization in Africa of Business Law statute, Title 3, Article 13

<sup>526</sup> Ibid. 525 above, Title 4, Article 21

<sup>527</sup> Ibid. 525 above, Article 24

Council of Ministers on a need basis. The term of office is seven years which is non-renewable and judges shall be selected from people of legal knowledge in member states.

Towards assuring the independence of the judges, Article 34 of the OHADA Treaty demands that members 'shall solemnly take oath to faithfully perform their functions with total impartiality' as well as a guaranteed tenure through an irrevocable clause.<sup>528</sup> Whilst its headquarters is in Abidjan Ivory Coast, the court can however sit and function in any member state on an ad hoc basis, thus ensuring that no single state may intrude on its independence due to the permanence of location. Similarly, to the ICJ procedure, the judges are at liberty to appoint their leadership to the offices of Preside and Vice President,<sup>529</sup> who shall in turn appoint the Registrar-in-Chief of the Court.<sup>530</sup>

#### 6.18. Evaluation of the Common Court of Justice and Arbitration

The underlying commentary about the OHADA CCJA evidences that it has achieved relative success since its inception. Incidental to the success of the CCJA is ascribed to the enabling OHADA treaty which harmonised the business laws of the member states.<sup>531</sup> As part of this harmonisation, the Revised Uniform Acts and its supranational nature reduces operational bureaucracy in structure and decision-making. Furthermore, the incorporation of local courts as Tribunals of First Instance, allows for disputes to be resolved within the completion of local realities. As I commented, the non-incorporation of domestic African realities in investor-state arbitration is one of its weakness, and underpins the unsatisfactory nature of arbitral decisions to African states.

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<sup>528</sup> Amended treaty on the harmonization of business law in Africa, Treaty of 17 October 1993 signed at Port-Louis, amended by the treaty of 17 October 2008 done at Quebec, Article 36

<sup>529</sup> Ibid. 528 above, Article 37

<sup>530</sup> Ibid. 528, above, Article 39

<sup>531</sup> Renaud Beauchard and Mahutodji Jimmy Vital Kodo, 'Can OHADA Increase Legal Certainty in Africa?' (2011) Justice&Development Working Paper Series 65989, World Bank

Despite the relative success of the CCJA, the OHADA court system is also challenged just like the other WTO and AIC dispute settlement systems. These challenges can be collectively warehoused within the Treaty framework rather than the court itself. For instance, there remains a lack of legal certainty within the OHADA region due to differences in the implementation of the OHADA treaty and Revised Uniform Acts.<sup>532</sup> Although there is semblance of harmonisation of business laws, however, the aggregation of different national laws into Revised Uniform Acts presents a problem of implementation.

Perhaps, a major challenge that confronts the CCJA is the chilling effect to enforce decisions against member states.<sup>533</sup> As a court which resolves disputes between states and investors, the method of enforcing its decisions should be certain and fair. But, the OHADA Treaty seems to be more susceptible to enforce decisions against private entities and its member states. Notwithstanding these challenges however, Fagbayibo argued that 'legal harmonisation comes with some added benefits, chief of which include political stability, economic growth, a secure legal environment, and a boost in investor confidence. In spite of its inherent limitations, the OHADA experiment is an optimistic pointer to the feasibility of legal harmonisation in Africa'.<sup>534</sup>

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<sup>532</sup> Fombad, C. M., 'Some reflections on the prospects for the harmonization of international business laws in Africa: OHADA and beyond' [2013] 59(3) *Africa Today*, 51-80.

<sup>533</sup> See Dickerson, C. M., 'The OHADA Common Court of Justice and Arbitration: Exogenous forces contributing to its influence' (2016) *Law & Contemp. Probs.*, 79, 63.

<sup>534</sup> Fagbayibo, B., 'Towards the harmonisation of laws in Africa: is OHADA the way to go?' [2009] 42(3) *Comparative and International Law Journal of Southern Africa*, 309-322.

### 6.19. Structure of my proposed Pan-African Investment Court

Consequent upon these evaluations of the WTO dispute settlement system, the International Court of Justice, the Arab investment court, the European Union Investment Court System and the OHADA Common Court of Justice and Arbitration; the structure and functioning methods of these investment dispute settlement systems have been evidenced. These evaluations have also shown the differences between these dispute settlement systems with investor-state arbitration.

Sequel to the knowledge that my proposal is motivated by the legitimacy crises of ISDS, the functioning of the evaluated investment dispute settlement systems in this chapter have shown areas that can be drawn upon to formulate my proposed Pan-African Investment Court.

Towards achieving the aims of this thesis therefore, it is imperative to articulate the information from these evaluations to create a multilateral Pan-African Investment Court, that will assuage the concerns of African states, as well as promote investor confidence within the continent. It is necessary to ensure that my proposal will be agreeable to both constituencies because, a new Pan-African Investment Court with no existing case law or precedent requires delicate crafting, structure and clear operational measures to avoid the pitfalls of previous attempts like the SADC tribunal. Thus, the evaluations of the existing court systems like the AIC and OHADA CCJA; provides a good platform to adapt some of its features in the creation my proposed court. Thus, issues of jurisdiction, appointment of judges and enforcement are some of the concepts that will be considered in this structure of my proposed Pan-African Investment Court.

## 6.20. Jurisdiction of my proposed court

On jurisdiction, my proposed Pan-African Investment Court will derive legitimacy from a multilateral Treaty similar to other multilateral courts. For instance, The Arab Investment Court derives its authority from the Unified Agreement for the Investment of Arab Capital in the Arab States,<sup>535</sup> the OHADA CCJA functions on the authority of the OHADA Treaty<sup>536</sup> while the ICJ is premised on the United Nations Charter.<sup>537</sup> Thus, the treaty based system is the principal and common authority upon which existing multilateral court systems derives their legitimacy. The African continent can transform the Pan-African Investment Code (PAIC) into a treaty. The new treaty will be formulated in a way that will recognise the legitimacy of existing IIAs of member states and those that will opt-in. Thus, my proposed Pan-African Investment Court will adapt some specific features of these multilateral institutions. Thus, the new harmonised investment law should be fashioned in line with the trade component of the AfCFTA. This will ensure that investors in Africa operates with certainty of a single regulatory framework

The Treaty that will govern my proposed Pan-African Investment Court will assume compulsory jurisdiction over all investment cases within the continent as practised by the ICJ and AIC.<sup>538</sup> As garnered from the evaluation of the ICJ, the compulsory recognition of the jurisdiction of the Pan-African Investment Court will eliminate forum shopping and competing jurisdiction. In addition, it will enshrine consistency and certainty within the court system. Similar to the ICJ, my proposed court will have a practice procedure and rules that will govern the administrative functions of the secretariat. The formulation of these rules and

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<sup>535</sup> See Chapter VI, Article 25 on The Settlement of Disputes of the Unified Agreement for the Investment of Arab Capital in the Arab States

<sup>536</sup> See Article 3 and 56 of the Amended treaty on the harmonization of business law in Africa

<sup>537</sup> See Chapter III, Article 7 on Organs of the United Nations Charter

<sup>538</sup> See Article 36, Statue of the Court of the International Court of Justice, Article 29 of the Unified Agreement for the Investment of Arab Capital in the Arab States

practice procedures should not be difficult as the secretariat can adapt some of the procedures of the Pan-African Investment Code, the trade component of the AfCFTA agreement, the ICJ and AIC for guidance purposes. As advocated by Gabrielle Kaufmann-Kohler and Michele Potestà, my proposal will adopt an opt-in system which is similar to the Mauritius Convention.<sup>539</sup> Kaufmann-Kohler and Potestà acknowledged that ‘the Mauritius Convention could provide a useful model if States wish to pursue such broader reform initiatives at a multilateral level’.<sup>540</sup> This opt-in system will allow third party states to be subject to the treaty, thereby accord jurisdiction on my Pan-African Investment Court for its investment disputes. In addition, all existing investment treaties involving African states can be renegotiated and amended to recognise the jurisdiction of the court over any disputes. Therefore, and as its name connotes, my Pan-African Investment Court is an African-led hybrid investment dispute settlement forum. But, it possesses universal application on any investments and investors of African origin similar to the ICJ, AIC as well as the OHADA CCJA, and as may be conferred on it by any state through the opt-in mechanism similar to the Mauritius Convention.<sup>541</sup>

On the system of settlement, my Pan-African Investment Court will mirror the procedures of the OHADA CCJA and AIC by operating a hybrid of an investment court and arbitration. This will ensure that investors exercise their party autonomy by electing to select the mechanism and forum for the settlement of disputes. However, the 'Fork-in-the-Road' (FITR)

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<sup>539</sup> United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (the "Mauritius Convention on Transparency") – This treaty allows states to accept and denounce its accession to it at any time, Lise Johnson, *The Mauritius Convention on Transparency: Comments on the treaty and its role in increasing transparency of Investor-State arbitration* (CCSI Policy Paper, September 2014).

<sup>540</sup> Gabrielle Kaufmann-Kohler and Michele Potestà., *Can the Mauritius Convention serve as a model for the reform of Investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? Analysis and roadmap*, Geneva Center for International Dispute Settlement (3 June 2016) 98

<sup>541</sup> See Article 3 on Reservations, Article 7 on Signature, ratification, acceptance, approval, accession and Article 11 on Denunciation of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (the "Mauritius Convention on Transparency")

clause as practiced by the AIC should be incorporated into the system. This will ensure that investors are estopped from commencing dispute settlement action in court and at arbitration. Despite this structure however, the use of arbitration can only be a measure of last resort.

### 6.21. Appointment of adjudicators

On the constitution of judges, the judges of the court will be publicly appointed. As discussed in chapter [3.4.4.], the procedure of investor-state arbitration which allows party autonomy in the appointment of arbitral panel members does not guarantee fairness. Similarly, lack of diversity in the appointment of judges is one of the reasons why members of arbitral panels are accused of bias as well as challenges to their integrity and independence.<sup>542</sup> Towards eliminating this problem, the judges of my proposed Pan-African Investment Court will have a rotating guaranteed tenure. A transparent and democratic method of appointing the judges will ensure that they are insulated from political interference. As evidenced in chapter [6.10.], political interference in the appointment of judges to the bench of the ICJ is one of the reasons why the system is perceived to be weak and not independent.

As such, the tenure of the judges will simply adopt the procedure of the CCJA and ICJ. The former has a minimum of nine judges who are selected and appointed by the Council of Ministers of the OHADA, whilst the ICJ is staffed by fifteen judges; who are selected appointed by the United Nations Security Council and ratified by the General Assembly. Thus, the minimum number of judges to the bench of my proposed court will be seven whilst the maximum number will be fifteen that will sit on the Pan-African Investment Court.<sup>543</sup> Since lack of diversity in the constitution of judges is one of the criticisms of investor-state

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<sup>542</sup> Bjorklund and others, 'The Diversity Deficit in International Investment Arbitration' [2020] 21(2-3) The Journal of World Investment & Trade 410-440

<sup>543</sup> See Article 28 the Unified Agreement for the Investment of Arab Capital in the Arab States, Chapter 1 on Organisation of the Court of the Statute of the Court of the International Court of Justice

arbitration, the selection process of the judges to the bench of my proposed Pan-African Investment Court will incorporate the AIC system, whereby no two judges are from the same member state and with a clear process of re-election.

The judges to the bench of my proposal will sit for seven years with an option of renewal. This will ensure that experienced judges are able to sit a maximum of fourteen years on the bench of the court, which is also in tandem with most democratic offices in Africa that is between four to eight years. In making these appointments, emphasis will be placed on diversity and geographical balance to ensure that at least one judge must come from the six regions in the continent. In addition, the judges will be drawn from both the developing and least developed economies of Africa.

The maximum fifteen judges can be divided into groups of three judges each to sit simultaneously towards meeting up to increased demand of dispensing cases quicker. This is important as the time of concluding cases is also one of the criticisms of the WTO system. As such, the AIC system which provides a decision within two years will be adopted within the rules and practice directions of my proposed Pan-African Investment Court.

The assignment of cases to the judges will be at random and coordinated by the secretariat, thus eliminating the involvement of parties to a dispute in the adjudication process. This method will also insulate the judges from selecting cases that they will adjudicate upon. This will ensure that the challenges of conflict of interest and pollution of the dispute settlement process as the case in investor-state arbitration will be eliminated. High moral ethics and legal expertise, educational qualification, high integrity capital and sound knowledge of the law shall be irreducible minimums required from prospective judges.



On the judgements of the court, the lack of an Appellate mechanism is one of the criticisms of ISDS.<sup>544</sup> The current annulment proceedings of investment arbitration are just a judicial review framework that reviews the procedural legitimacy of the decisions,<sup>545</sup> whilst an appeals chamber examines the correctness of the decision. These are not enough in such technical and valuable commercial investor-state disputes. A platform that allows for a second review of decisions is desirable to ensure that mistakes are corrected and all decisions justifiable.

Towards eliminating this deficiency, my proposed Pan-African Investment Court shall be composed of a Tribunal of First Instance and an Appellate body as obtainable in the WTO's DSS, OHADA's CCJA and the ICJ's review mechanism.<sup>546</sup> It is anticipated that this structural proposal will enshrine consistency, predictability and certainty in investor-state dispute settlement. More importantly, disputing parties will be reassured of fairness in the adjudication of their cases, thereby remedying the perception of bias which is one of the criticisms of investor-state arbitration. The successes of the WTO dispute settlement system, OHADA's CCJA, are predicated upon the availability of an Appellate body which reviews the decisions of the Tribunal of First Instance. The importance of the Appellate body is more imperative in the face of the current opposition of the United States to the reconstitution of the Appellate body of the WTO.

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<sup>544</sup> See European Union, 'Possible Reform of Investor-State Dispute Settlement (ISDS) Appellate Mechanism and Enforcement Issues' (2020), Available at [https://trade.ec.europa.eu/doclib/docs/2020/november/tradoc\\_159043.pdf](https://trade.ec.europa.eu/doclib/docs/2020/november/tradoc_159043.pdf) (Accessed on 28 July 2020)

<sup>545</sup> See Professor Yarik Kryvoi and British Institute of International and Comparative Law, 'Empirical Study: Annulment in ICSID Arbitration' (2021), Available at <https://www.biicl.org/publications/empirical-study-annulment-in-icsid-arbitration?cookieset=1&ts=1635191706> (accessed on 19 July 2021)

<sup>546</sup> See Article 61 of the Statute of the Court of the International Court of Justice, Article 34 the Unified Agreement for the Investment of Arab Capital in the Arab States, World Trade Organisation, 'The process — Stages in a typical WTO dispute settlement case' (2020), Available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c6s1p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm) (accessed on 28 July 2020)

## 6.22. Funding mechanism

On funding, the contracting member states and those states that elects to opt-in to the treaty establishing my proposed Pan-African Investment Court will bear the cost of running it through statutory contributions that will be included in the treaty. This mode of funding is similar to other international organisations. For example, the European Union suggested in its Multilateral Investment Court proposal that ‘the contracting parties would in principle finance the court’, taking into account ‘the number of employed judges, size of the secretariat and number of contracting parties’.<sup>547</sup> Similarly, the funding of the WTO’s Dispute Settlement Body is derived from the statutory contributions of member’s contributions to the WTO and Appellate body secretariats.<sup>548</sup> Since my proposed court shall be under the auspices of the African Union, funding shall therefore be channelled through the African Union secretariat.

The amounts to be paid by each contracting member state can be determined through the adoption of the WTO procedure. The contributions of members of the WTO are determined through the percentage share of each ‘member state’s international trade in goods, services and intellectual property rights’ for five preceding years. However, there is also a minimum payment of ‘0.015 per cent for Members whose share in the total trade of all Members is less than 0.015 per cent’.<sup>549</sup> As such, contracting members to my Pan-African Investment Court will be mandated to pay for its running according to their percentage share of African trade. Member states that are not signatory to the treaty but may want to utilise the opt-in system, will be required to pay ‘0.015 per cent for Members whose share in the total trade of all

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<sup>547</sup> European Commission, ‘A Multilateral Investment Court’ (2017), Available at [https://trade.ec.europa.eu/doclib/docs/2017/september/tradoc\\_156042.pdf](https://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf) (accessed on 28 July 2021)

<sup>548</sup> See for example World Trade Organisation, ‘WTO Secretariat budget for 2021’ (2021), Available at [https://www.wto.org/english/thewto\\_e/secret\\_e/budget\\_e.htm](https://www.wto.org/english/thewto_e/secret_e/budget_e.htm) (accessed on 27 July 2021)

<sup>549</sup> See The WTO: Secretariat and Budget, ‘Members’ contributions to the WTO budget and the budget of the Appellate Body for the year 2002’ (2021), Available at [https://www.wto.org/english/thewto\\_e/secret\\_e/contr02\\_e.htm](https://www.wto.org/english/thewto_e/secret_e/contr02_e.htm) [accessed on 28 July 2021]

Members is less than 0.015 per cent' as practiced by the WTO.<sup>550</sup> This latter funding procedure will also be applicable to members who decides to opt-in and therefore do not have prior five-year trade with African states.

My proposed court will be domiciled in Addis-Ababa Ethiopia, which also houses the headquarters of the African Union and other critical African institutions.

### 6.23. Enforcement Procedure for signatory and non-signatory states to the treaty

On enforcement, the decisions of the court shall be enforced in two ways. First and foremost, there will be a clause in the establishing treaty of the Pan-African Investment Court that will require signatories to the charter to recognise the decisions of the court as binding and similar to judgements of their domestic courts. Such recognition will therefore obligate signatory states to execute the judgements of the court in the same measure as decisions of their domestic courts.

Second, mindful of insufficient strong institutions in some African states that can hold powerful governments to account in respecting the decisions of the court, admitting the potential risk to enforcement of procedure one above for non-state parties to the treaty, and recognising the lack of uniform framework in enforcing decisions of multilateral institutions and courts; another route to enforcing the judgements of the Pan-African Investment Court will be through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). As contained in Article One of the Convention, it 'apply to the recognition and enforcement of arbitral awards made in the territory of a State other than

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<sup>550</sup> See The WTO: Secretariat and Budget, 'Members' contributions to the WTO budget and the budget of the Appellate Body for the year 2002' (2021), Available at [https://www.wto.org/english/thewto\\_e/secre\\_e/contro2\\_e.htm](https://www.wto.org/english/thewto_e/secre_e/contro2_e.htm) [accessed on 28 July 2021]

the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought'.<sup>551</sup>

In enforcing arbitral awards however, the Convention requires that 'Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards'.<sup>552</sup>

Clearly, the above provisions of the New York Convention apply to arbitral panels. However, its Article I(2) also provides that '[The] term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted'.<sup>553</sup> As such, successful parties to a dispute can approach domestic courts to recognise the judgements of my proposed Pan-African Investment Court as decisions of 'permanent arbitral bodies'.<sup>554</sup> This recognition of awards as 'permanent arbitral bodies' will therefore allow for some form of state control regarding enforceability as espoused in Article V of the Convention.<sup>555</sup> In any case, my proposed court is one end of a hybrid judicial and arbitral mechanism, hence, the dual enforcement suggestions of a treaty clause and the provisions of the New York Convention. This proposition for recognition

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<sup>551</sup> See Article 1, United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)

<sup>552</sup> Ibid. 551 above, Article III

<sup>553</sup> Article 1(2), United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)

<sup>554</sup> For example, in *Al-Kharafi v Libya* (Judgment No. 39 of 130 JY, 3 June 2020), the Cairo Court of Appeal in Egypt reviewed and annulled the decision of the Arab Investment Court on public policy grounds and fundamental errors in the interpretation of the Unified Treaty for the Investment of Arab Capital in the Arab States and application of the Egyptian arbitration law. This means that domestic courts may recognise decisions of arbitral tribunals and review it on procedural grounds.

<sup>555</sup> On circumstances upon which the Recognition and enforcement of the award may be refused

through the New York Convention is feasible because, it has since been applied in the decision of the Iran-US Claims Tribunal whose outcome was enforced through the New York Convention.<sup>556</sup>

In regards to enforcement for non-signatory states, investors from these states would have relied upon an IIA, either an investment treaty or a national investment law, to invest within the African continent. No matter which form of instrument that investors relies upon to invest in another state, it will contain a provision for accession to an international forum for the settlement of disputes, subject to the exhaustion of local remedies as may be provided. Thus, such dispute settlement provision in the treaty will certainly be an international tribunal, a practice that is underpinned by the delocalisation of investment dispute settlement.<sup>557</sup> A vivid example of this provision is contained in South Africa's domestic investment law which permits access to an international tribunal if the contracting state consents to it.<sup>558</sup>

Therefore, on the basis of access to an international tribunal for the settlement of disputes as well as a concomitant procedure for the enforcement of decisions of the tribunal as may be provided by an establishing charter, a non-signatory state will thus be bound by the customary framework that is deployed to enforce decisions of international tribunals. Within this context, the enforcement procedure will invariably be through Article I(2) of the New York Convention which recognises awards that are made by 'permanent arbitral bodies'. Similarly, and as aforesaid on jurisdiction, nationals of a non-signatory state may be subject to the jurisdiction of my Pan-African Investment Court through an opt-in mechanism as practiced by the International Court of Justice and the Mauritius Convention.<sup>559</sup> The election

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<sup>556</sup> See US State Department, 'Iran-U.S. Claims Tribunal' (2021), Available at <https://www.state.gov/iran-u-s-claims-tribunal/> (accessed on 28 July 2021)

<sup>557</sup> See Paulsson Jan, 'Delocalisation of international commercial arbitration: when and why it matters' [1983] 32(1) *International & Comparative Law Quarterly*, 53-61.

<sup>558</sup> Section 13(5), Protection of Investment Act No. 22 of 2015

<sup>559</sup> See Article 36, Statue of the International Court of Justice, Articles 7 and 11 of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration

to utilise this latter mechanism will consequentially subject investors from non-signatory states to the normal enforcement procedures of my proposed court for signatory states as their decision to opt-in will connote an implicit agreement to be bound by its decisions.

#### 6.24. Potential sanctions for non-compliance with decisions of the court

A major issue that confronts international law is the problem of compliance to obligations and decisions of international tribunals by states.<sup>560</sup> This problem is a reflection of the absence of punitive or hard law measures to enforcing state obligations to international treaties and conventions. In view of the soft law procedure of regulation where customary international norms are the main methods of enforcing international treaties, states that abdicates from their obligations or disobeys decisions of international tribunals, may not be subject to any punitive measures,<sup>561</sup> a circumstance that is a direct correlation of sovereignty of states as espoused in the United Nations Charter.<sup>562</sup>

Thus, diplomacy and comity are the customary persuasive ways of ensuring that states do not disregard their international obligations. Despite the economic leverage in the guise of sanctions that are routinely deployed by majority of the Global North against disobedient states, the inadequacy in the methods of enforcing international treaties remains a problem that confronts international law. As such, my proposed court is not insulated or immune from this problem of compliance to international obligations.

In formulating compliance measures for the Pan-African Investment Court therefore, the customary international law procedures that are deployed in enforcing other international

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<sup>560</sup> Abram Chayes and Antonia Chayes, 'Compliance without enforcement: State behavior under regulatory treaties' (1991) *Negot J* 7, 311–330

<sup>561</sup> Pierre-Marie Dupuy, 'Soft law and the international law of the environment' (1990), *Mich. J. Int'l L.*, 12, 420.

<sup>562</sup> See Article 2(1) of the United Nations Charter

treaties will feature prominently. This means that signatories to my proposed court shall be expected to comply and abide by its decisions as customary in international law, and contained in the Vienna Convention on the Law of Treaties.<sup>563</sup> In addition, the consequential effect of the recognition of my proposed court through the New York Convention means that state parties to the Convention will recognise its decisions and enforce it in their jurisdictions. Thus, any investor or state that fails to comply with the decisions of the court may be subject to measures such as reciprocity and the seizure of its offshore assets by state parties to the New York Convention.<sup>564</sup>

Notwithstanding this compliance procedure, perhaps it is worth restating that the customary international law method of compliance has always remained inadequate in enforcing international treaties, as some states still refuses to comply. For example, the decision of the arbitral tribunal in the case of Yukos vs Russia,<sup>565</sup> has remained unfulfilled because of the refusal of the latter to accede to the decision. The implication of sovereignty of states portends that any state that refuses to pay for awards of tribunals, will not be coerced to comply beyond the use of diplomacy and reciprocity. In addition to assets seizure, other potential reciprocal measures for non-compliance with awards will include sanction and retorsions; practices and procedures that are customary for remedying internationally wrongful acts by states.<sup>566</sup>

### 6.25. Sanctions for non-compliance with awards through reciprocity

Despite the potential for the seizure of offshore assets of states that do not comply with the decisions of the court, the stalemate in compliance with the decision of the arbitral tribunal

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<sup>563</sup> The 'Pacta sunt servanda' rule in Article 26 means that 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

<sup>564</sup> Robert Keohane, 'Reciprocity in international relations' [1986] 40(1) International organization 1-27.

<sup>565</sup> Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-04/AA227

<sup>566</sup> Natalino Ronzitti, 'Coercive diplomacy, sanctions and international law' (2016), Martinus Nijhoff Publishers.

in the case of *Yukos vs Russia*, reinforces the risk of non-compliance in investor-state dispute settlement. As reiterated by Paris and Ghei, this compliance problem that confronts international obligations is due to the fact that international law '[exists] in a state of nature, because there is no overarching legal authority with compulsory jurisdiction to enforce agreements'.<sup>567</sup> Thus, the principle of reciprocity has therefore ranked among the tools that are deployed to mitigate disobedience to international agreements and ensure that states abide by their international commitments.

As remarked by Keohane, the unpredictable and anarchic nature of international relations has ensured that obedience to international agreements cannot be contingent on divergences in balance of powers, hierarchical authority nor centralised enforcement, but on some form of cooperation. Such cooperation must however be consistent with guiding rules of international law such as sovereignty and self-defence.<sup>568</sup> Reciprocity is situated within this realm, hence Zoller described it as 'a condition theoretically attached to every legal norm of international law'.<sup>569</sup> In essence, reciprocity is a principle that smitten the risk of disobedience to obligations in international relations through the recognition of interdependence of states, interests and benefits. Conversely, it also exposes states and provides a doctrine of notice to the consequential impacts of any non-compliance to international agreements by state parties. As such, it is the concession of advantages and privileges for mutual benefits and effective regulation of relations between states. Hence, reciprocity is deployed as a countermeasure to international wrongful act and to bring a state party to an international treaty to compliance. On the basis of this moderating role of reciprocity in the relationship of states in international law, it shall also feature as a device to ensure compliance to the decisions of my proposed Pan-

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<sup>567</sup> Francesco Paris and Nita Ghei, 'The role of reciprocity in international law' [2003] *Cornell Int'l LJ*, 36, 93.

<sup>568</sup> Robert Keohane, 'Reciprocity in international relations' [1986] 40(1) *International organization* 1-27.

<sup>569</sup> Elizabeth Zoller, *Peacetime Unilateral Remedies* (Dobbs Ferry, N.Y.: Transnational, 1984) p. 15



African investment law. Its deployment as an enforcement and compliance mechanism will be drawn from its different contexts and shall be premised on creating ‘an environment in which States support one another for short- or long-term advantage through the balancing of rights, duties and interests’. As such, with the peaceful settlement of disputes being one of the cardinal aims of international law as espoused through ‘[The] Declaration on Principles of IL concerning Friendly Relation and Co-operation among States,<sup>570</sup> the use of reciprocity as a de-centralised mechanism to counter potential challenges of acceptance to the awards of my proposed Pan-African Investment Court is important, especially in the face of the seeming ineffectiveness and belligerent nature of centralised methods of enforcing international obligations.

Consequently, sanctions and retorsions shall be treaty based reciprocal tools that may be deployed as countermeasures for non-compliance to awards of my proposed court. Sanctions are described as ‘consequences of an [internationally] wrongful act, unfavourable to the offender’,<sup>571</sup> and routinely deployed to punish another party for non-compliance with an obligation. Although its unilateral deployment by a state may be considered unlawful in international law, however, they are normally provided in treaties for deterrence and reparation purposes. Based on the inclusion of sanctions as a reciprocal measure for non-compliance in the treaty establishing my Pan-African Investment Court, they shall therefore become lawful countermeasures. A deterring sanction that will be provided in the treaty will be the incursion of interests on the principal sum for the duration of non-payment by a ‘losing’ state or investor.

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<sup>570</sup> See preamble of the Declaration on Principles of IL concerning Friendly Relation and Co-operation among States in accordance with the Charter of the United Nations, 31 March to 1 May 1970.

<sup>571</sup> See Hans Kelsen, *Principles of International Law*, 2nd ed., R. W. Tucker, ed. (New York, Holt, Rinehart and Winston, 1966), p. 22.

Similarly, retorsion is another reciprocal countermeasure that will be used to enforce the decisions of the court and mitigate challenges of compliance. They are hostile but lawful measures which are aimed at depriving a disobedient party to international obligations from enjoying the benefits and advantages of the treaty.<sup>572</sup> Therefore, retorsion measures that will be deployed for any compliance will include the suspension of the treaty to the non-compliant state party, embargoes on the investment of its nationals within the African jurisdiction and potential approach to domestic courts for the seizure of the assets of the investor.

This proposed structure of the Court has been made whilst taking into account the criticisms of investor-state arbitration. It is therefore my expectation that this proposed multilateral structure is a feasible formula that will remedy the legitimacy crises of investor-state dispute settlement. It draws support from the argument of Gus van Harten that states should endeavour 'to support a multilateral code that would establish an international court with comprehensive jurisdiction over the adjudication of investor claims'.<sup>573</sup>

Most importantly, my proposed court will maintain and apply precedent to assure consistency and incorporate local African realities in their judgements. This incorporation of domestic realities suggests that issues of human rights abuses, environmental protection, right of governments to make legitimate decisions shall be encapsulated within the enabling Treaty. This should adapt the OHADA Treaty which exempts the adjudication of matters on domestic policy of its member states. Such contemplation of domestic realities will secure the sovereignty of African states and prevent the litany of investor-state arbitration cases against them.

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<sup>572</sup> See Math Noortmann, 'Enforcing international law: from self-help to self-contained regimes' (2016) Routledge.

<sup>573</sup> Gus Van Harten, *Investment treaty arbitration and public law*, p. 180

## 6.26. Conclusion

This chapter analysed the findings of this thesis. This analysis examined the African investor-state dispute settlement landscape. In particular, the states of Egypt, Tanzania and South Africa were studied towards determine the operation and impact of investor-state arbitration in their jurisdictions. In addition, the experiences of other countries such as Nigeria were reviewed to show the wider implications of investor-state arbitration in Africa.

It found that investor-state arbitration has transformed from being a tool for economic development, to a reactionary mechanism that limits the legitimate exercise of democratic power by African States. The three sampled states were sued at international investment arbitration because of legitimate decisions of their governments. This finding is not an isolated case. It conforms to contemporary opinion that investor-state arbitration is no longer fit for purpose, hence other systems like the European Union have proposed for an Investment Court System. Consequent upon this analysis, I proposed for a Pan-African Investment Court as a panacea to the legitimacy crises of investor-state dispute settlement. Furthermore, this thesis found that the negative impact of investor-state arbitration is higher than its positive derivatives to the interests of African states.

This chapter also evaluated existing court systems like the International Court of Justice, the Arab Investment Court and the European Union Investment Court proposals. This evaluation enabled the identification of their strengths and weaknesses. The strengths were

adapted in formulating the structure of my proposed court whilst the weaknesses were avoided.

Consequently, the next chapter shall conduct a full evaluation of my proposed Pan-African Investment Court. Issues as to its effectiveness, workability and whether the Investment Court System is the solution to the legitimacy crises of investor-state dispute settlement will be interrogated in chapter seven.

## **Chapter Seven: Evaluation of my proposal and Recommendations**

### **7.1. Introduction**

Having proposed a Pan-African Investment Court in Chapter five, this chapter will evaluate my proposal to determine its efficacy. Thus, questions on its promises and perils, the risks of a harmonised economic landscape in African, and whether investors will accept the deployment of a domestic multilateral forum in resolving investment disputes shall be examined. In what is a novel proposal, the idea of reforming investor-state dispute settlement with its over 3000 IIAs to a new dispute resolution mechanism may be difficult to implement. Therefore, this chapter will also examine the implementation procedure of my proposal vis-à-vis the existing dispute settlement systems in Africa.

In addition, this chapter will explore whether African states are willing to collaborate and harmonise their economies towards a single investment treaty. This is imperative because of the divergent national interests and developmental stages of African states. Furthermore, although African states possess similar investment and economic variables, but; there remains differences in several aspects. Thus, this chapter will consider the probability of harnessing and aggregating the fragmentations for a united African economic firmament.

Overall, despite the novel promises of my proposal for an Investment Court System in Africa, the questions remain whether it can be feasible. In essence, although the AIC and OHADA CCJA have functioned to relative success, however, the question of adapting some of their features to formulate Pan-African Investment Court remains unanswered. Hence, this chapter will evaluate the feasibility of transposing some of their features into my proposal.

## 7.2. Benefits of my Pan-African Investment Court proposal

Prior to evaluating my proposal, it is pertinent to examine its potential benefits in the light of my proposed structure in chapter six. As I remarked in chapter [6.7], the renewed impetus behind my proposal is necessitated by the legitimacy crises of investor-state dispute settlement. The identified deficiencies include lack of transparency, high cost and length of litigation, intrusion in the domestic policy-making of host states, inability of states to institute

claims, lack of diversity in the appointment of arbitrators, inconsistency in decision making and the deployment of private measures to adjudicate on public issues.<sup>574</sup>

Sequel to these problems, this thesis evidenced that capital-importing continents like Africa are most impacted upon by these shortcomings of investor-state arbitration. Thus, the idea of the Investment Court System has resonated strongly within the international investment community as a remedy to these issues in investor-state dispute settlement.

I argued in this thesis that my proposal will remedy the criticisms and legitimacy crises of ISDS. This opinion is supported by several academics, experts and organisations. For instance, Mortimer and Nyombi argued that ‘The culmination of a streamlined dispute settlement process in the form of harmonised substantive rules under a multilateral treaty, a World Investment Organisation, a World Investment Court and an appellate body, could help to infuse legitimacy in international investment law’.<sup>575</sup> Similarly, the European Commission in their proposal for an Investment Court System contended that ‘International investment rules and international investment dispute settlement have a role to play in encouraging and retaining investment. So it’s in the EU’s interest to ensure that the resolution of investment disputes operates effectively on an international level’.<sup>576</sup>

Furthermore, the UNCITRAL Working Group III and Professor Bungenberg also affirmed that an Investment Court System will boost global investments, enshrine a fairer regime of

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<sup>574</sup> See the report of the UNCITRAL working group: A/CN.9/930/Rev.1 - Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session - Part I, A/CN.9/930/Add.1/Rev.1 - Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session - Part II

<sup>575</sup> Nyombi, C., & Mortimer, T., 'Towards a new world economic order: proposal for a world investment court' (2019) 3 *Journal of Business Law* 200-222.

<sup>576</sup> European Commission, 'Trade for All: Towards a more responsible trade and investment policy (2015), Available at [https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf) (Accessed 20/12/2019)

investor-state dispute settlement through 'greater substantive coherence, predictability, and legal certainty, which would contribute to the acceptance of investment decisions'.<sup>577</sup>

Within the context of Africa, these benefits of an investment court system will also be achieved. However, there are some benefits that are specifically applicable to the African continent in the light of the issues and findings of this thesis. First, the Pan-African Investment Court will limit and even eliminate investor's access to investment arbitration against African states. This thesis found that African states have one of the highest volumes of cases in investor-state dispute settlement, resulting to the payment of huge money to investors. This high volume of caseload and payments are however, not commensurate to the level of investment attraction within the continent. Thus, this disparity in award and high volume of caseload will be reduced since investment disputes will be resolved within Africa.

As evidenced in chapter five, most of the cases against African states were based on breaches that hinges on domestic policies that aimed to protect human rights, environment and legitimate good governance. Therefore, a reformed investor-state dispute settlement framework, complete with a Treaty and a Pan-African Investment Court will exclude litigations in environmental and human rights matters. A good example of this practice is captured in the OHADA Treaty which prohibits investor actions on these subjects. In addition, the COMESA CCIA and South Africa's Model investments law also incorporates

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<sup>577</sup> See UNCITRAL Working Group III: Investor-State Dispute Settlement Reform 2020, Bungenberg, M., & Reinisch, A., 'From bilateral arbitral tribunals and investment courts to a multilateral investment court: options regarding the institutionalization of investor-state dispute settlement' [2020] (p. 222). Springer Nature.

corporate social responsibility and the deployment of local forums for the settlement of issues that relates to human rights and the environment.

Second, a harmonised African investment climate will engender more development within the continent. As evidenced in chapter [5.6], African states have paid huge amount of money to investors. These are funds that could have been redirected by African states to develop their countries. Therefore, my proposed court will lead to a reduction in monetary awards to investors.

Third, local African realities will be taken into account and cases that hinges on domestic policy will be dismissed. This will ensure that African governments are not limited in legitimate decision-making. As such, issues like the protection of human rights and preservation of the environment can be legitimately administered by states without the risk of investor action in arbitration or branded as a hostile investment destination. The implication of being regarded as an unfriendly investment destination could be a reduction in the inflow of FDIs and consummation of mutual agreements with capital-exporting countries for sustainable development.

Last but not the least, a harmonised African investment climate possesses the prospects of increasing intra-African investment and attraction of FDIs. The creation of a Pan-African Investment Court will be complemented with a unified investment treaty. Such a united front on investment will therefore enshrine certainty and commonly agreeable terms across the continent. This will consequently lead to better understanding and affinity on investment, thus resulting to an increase in the consummation of more intra-African investment. Closely



related to this benefit is the protection that a unified African investment landscape will provide for the smaller economies within the continent. As shown in chapter [6.6], most countries in Africa relies on FDI inflow to stimulate their economies. On this basis, they are somewhat constrained to consummate all kinds of investment agreements no matter its risk of intruding on the policy-making powers of their governments. Thus, a harmonised investment policy will provide a safe ground for these smaller economies to be protected through a continent wide Treaty that will be negotiated through the input of the bigger economies and experts within the region.

### 7.3. Acceptability question of my Pan-African Investment Court to investors

Despite the positive derivatives of my proposal, it must however be formed in way that will be acceptable to investors. As I remarked in [chapter], one of the challenges of this proposal is its acceptability to investors. It is simply not easy to discard investor-state arbitration that have operated for several decades and functioned relatively well with a new investment court system. Thus, this endeavour is infused with the issue of its acceptability to investors. This is more pertinently considering the lack of strong institutions in Africa and unstable legal framework that can withstand political pressures and interference. Hence, investors must be assured and guaranteed of full independence and fairness if an African led investor-state dispute settlement framework can be acceptable to them. Thus, the functional procedure of my proposal regarding investor confidence must be clarified.

Within this light, it is pertinent to note that investors are also not entirely satisfied with the current ISDS framework, especially since states have won more cases than them. As such, they are somewhat also impacted by some of the deficiencies of the current system and

therefore desires some reforms that may include a new ISDS mechanism. This is because, some of the cases that have been lost by investors may actually have been wrong decisions. However, they will require some strong convincing to accept any reform proposal that is somewhat localised such as a Pan-African Investment Court.

Therefore, the main persuasive element that will be presented to investors is the assurance of independence and fairness of the court, as well as the protection of their investment interests. Within this premise, a reformed ISDS framework through the investment court system in African will be beneficial to investors in similar fashion as host states. For example, consistency of interpretation of treaty provisions will lead to better predictability of the dispute settlement process, thereby ensuring that investors will not waste their money and time in pursuing frivolous cases.

In addition, the two-tier structure of this proposal will avail investors further opportunity to appeal decisions of the Tribunal of First Instance, an element that is not available in investor-state arbitration. This scope for appeal will also remedy the perception of dissatisfaction and bias by investors for some of the cases that they have lost. Similarly, the utilisation of full-time adjudicators who are technically knowledgeable in legal matters will enhance better decision-making for investors, thus eliminating the loss of seemingly reasonable disputes. Furthermore, investors will become more aware of the local realities concerns of African states, thereby ensuring their business undertakings do not conflict with them. In this guise, African states will no longer perceive investors as agents of capital-exporting capitals and deploys investment treaty provisions as a façade to make undeserved profits through the institution of investor-state disputes.

Overall, it is anticipated that the presentation of these benefits to investors will be persuasive enough for them to utilise their party autonomy and confer jurisdiction to the court. Perhaps,

a further huge attractive ingredient will be the veritable investment climate of the African continent. As a developing and virgin continent with several investment opportunities and profit-making potential, the requirement for an African-led dispute settlement system as a condition-precedent for investing in some aspects of the continent's economic landscape will further solidify other persuasive features to investors.

#### 7.4. Drawbacks of my Pan-African Investment Court proposal

Notwithstanding the enumerated benefits in chapter [7.2], the establishment of my proposed Pan-African Investment Court is however faced with several disadvantages. These disadvantages are domiciled in the idea of having a common investment treaty and dispute resolution mechanisms in a continent of fifty-five states. Thus, this ambition for a uniform investment treaty is capable of producing unintended consequences.

First, a major drawback is that my proposal may distort Africa's investment landscape for the least developed states. At present, there is no coherent policy towards protecting smaller economies from the large scale negotiation of a single investment treaty. In such a negotiation, an aggregate or average estimation of the interest of the continent will be the basis for any agreement. Thus, the peculiar investment climate of each individual country will not be solely considered or taken into account. This therefore has the potential to produce divergent investment outcomes in each country. Thus, the least economically developed states may be affected negatively.

Second, innovation and distinctiveness in investment policies will be curtailed through a common investment treaty and dispute resolution mechanism in Africa. This is because, differences in investment policies leads to healthy competition and rivalry among states in any geography. However, through a Pan-African Investment Court, the distinctive investment variable of each state of the continent will be lost, because of the amalgamation of the different IIAs of the states. In chapter [1.5.], It was shown that several African States such as South Africa, Nigeria and Morocco have been active participants in innovative treaty-making. These departures from first-generation investment agreements were precipitated by peculiar domestic circumstances and impact of investor-state arbitration in each state. However, the formulation of a single investment treaty will curtail such distinctive initiatives because, all the states will aggregate their unique investment instruments towards creating a unitary continental investment treaty.

Third, African states are at different levels of economic and infrastructural development. Thus, my proposal which will incorporate a harmonised investment landscape may lead to regression in economic and infrastructural development. Overall, these potential drawbacks of my proposal are all contextualised in the challenges of multilateralism. In essence, the question on whether states are inclined to globalisation or nationalisation have remained a contentious subject in global affairs. Therefore, the next subsection will attempt to explore this challenge of global integration.

## 7.5. Challenges of multilateralism and investment court system in Africa

Despite the benefits and drawbacks of my proposal, there broader challenge of multilateralism may hamper its achievement. The challenge of multilateralism is contextualised in the difficulty of transforming and replacing decades old international investment agreements and investor-state arbitration jurisprudence with an untried mechanism of an Investment Court System. Whilst this challenge resonates broadly within international investment law, it is particularly imperative in a capital-importing, politically unstable and developing continent like Africa. As recognised by several commentators, these challenges that confronts the establishment of an investment court system are enormous, thus requiring delicate crafting to surmount. For instance, the Kingdom of Bahrain in their official submission to the UNCITRAL Working Group III on the reform of ISDS raised some concerns on the efficacy of a permanent investment court. The kingdom argued that ‘While Bahrain endorses many of the criticisms of ISDS, it has reservations as to whether a permanent investment court system would adequately address the main flaws of the system, A permanent court might even create new problems’.<sup>578</sup>

As such, the Kingdom categorised the potential problems that may militate against the creation of an investment court into seven different but interrelated issues. First, an investment court system possesses the risk of politicising the appointment of judges. In chapter [1.12], I surmised that lack of transparency and diversity in the appointment of

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<sup>578</sup> See UNCITRAL, 'Possible reform of investor-State dispute settlement (ISDS): comments by the Kingdom of Bahrain' (2019), Available at [https://uncitral.un.org/sites/uncitral.un.org/files/uncitral\\_wg\\_iii\\_bahrain\\_submission\\_31\\_july\\_2019.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/uncitral_wg_iii_bahrain_submission_31_july_2019.pdf) (accessed on 13/12/2019) at 11, see also Gabrielle Kaufmann-Kohler & Michele Potestà, The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards: CIDS Supplemental Report (CIDS – Geneva Center for International Dispute Settlement 2017), [http://www.uncitral.org/pdf/english/workinggroups/wg\\_3/CIDS\\_Supplemental\\_Report.pdf](http://www.uncitral.org/pdf/english/workinggroups/wg_3/CIDS_Supplemental_Report.pdf)

arbitral panels one of the criticisms of ISDS. However, in attempting to eliminate this problem through an investment court system, the appointment of judges will thereby become the exclusive preserve of contracting states to the treaty.

Although the UNCITRAL Working Group III in their attempt to proffer a solution to this risk had commented that ‘[w]hen appointing adjudicators to the standing mechanism, the contracting parties would be expected to appoint objective adjudicators, rather than ones that are perceived to lean too heavily in favour of investors or states, because they are expected to internalize not only their defensive interests, as potential respondents in investment disputes, but also their offensive interests, i.e. the necessity to ensure an adequate level of protection to their investors. They will therefore take a longer term perspective’. But, this attempt to achieve a balance of power between states and investors through this palliative opinion by UNCITRAL can be deemed theoretical. This is because, the balance of power will practically be in favour of states since they are the appointing authorities. This suggests that state parties to a dispute will essentially have their appointed judges as adjudicators of their cases without the input of investors. This will inevitably, reincarnate the transparency and fairness problem that confronts the investor-state arbitration. It therefore becomes a case of replacing one problem with another.

Within the context of Africa, this risk of politicisation of the appointment of judges is higher. The continent is renowned for political instability, corruption and interference of its leadership class in the internal affairs of institutions. For instance, the failure of the SADC tribunal in the aftermath of the decision in *Mike Campbell (Pvt) Ltd and Others v Republic*

of Zimbabwe,<sup>579</sup> exemplifies how political interference impacts on the building of strong institutions in Africa. In addition, the appointment of judges by states who also pays for their remuneration presents the problem of conflict of interest, transparency and impartiality of the judges.

Furthermore, political interference could also emerge in the reappointment of judges as practiced in the WTO framework. States that do not like some judges may deploy their political and economic goodwill to lobby other friendly countries to oppose a reappointment. More importantly perhaps, the exclusive appointment of judges without the input of investors will remove party autonomy and the freedom of contract principle which is fundamental in commercial rules and dispute resolution.<sup>580</sup>

The Geneva Center For International Dispute Settlement (CIDS), in their attempt to remedy the risk of politicisation of appointment of judges recommended that prospective judges, 'should be comprised of competent members, having the expertise and experience to discharge their functions, their composition as a whole should reflect high standards of diversity, representative of those for whom these bodies renders justice; and be endowed with strong guarantees of independence both institutionally (or structurally) and individually for the concrete exercise of each member's adjudicatory functions. These requirements must be

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<sup>579</sup> Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe

<sup>580</sup> See also Gabrielle Kaufmann-Kohler & Michele Potestà, The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards: CIDS Supplemental Report (CIDS – Geneva Center for International Dispute Settlement 2017), [http://www.uncitral.org/pdf/english/workinggroups/wg\\_3/CIDS\\_Supplemental\\_Report.pdf](http://www.uncitral.org/pdf/english/workinggroups/wg_3/CIDS_Supplemental_Report.pdf) at 34

circumscribed in such a manner that they best contribute to the quality and fairness of the justice rendered and the legitimacy of the adjudicatory body'.<sup>581</sup>

Despite the merits of this suggestion by the CIDS however, it still leaves the question as to the criteria to be deployed in selecting 'competent' judges and the representative group that should be allowed to nominate a judge. In addition, if representative groups are allowed to nominate judges on the bench of the investment court; it can be argued that their independence remains questionable due to the risk of control by the representative groups. Therefore, unless my proposal is accompanied by strong safeguards in the appointment of judges by African states, then the feasibility of achieving its objectives will be a mirage.

Second, there is the risk of re-emergence of conflict of interest and this would have to be managed if the court will be effective. In chapter [2.4.4.] I showed that issues of conflict of interest in the appointment and reappointment of judges is one of the criticism of the current investor-state dispute settlement mechanism. However, the EU investment court proposals in CETA<sup>582</sup> and TTIP,<sup>583</sup> provides for the disciplining of judges by the President of the Tribunal of First Instance and Appellate Court. By granting this power to a sole authority in the President, such practice will not enshrine the anticipated independent of judges within the court system.

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<sup>581</sup> CIDS Supplemental Report, 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards' (2017) at 3, See also UNCITRAL Working Group III, Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS), Note by the Secretariat, A/CN.9/917, Apr. 20, 2017

<sup>582</sup> See Article 8.27 on constitution of the Tribunal of The Comprehensive and Economic Trade Agreement

<sup>583</sup> See Article 11(5) on ethics of the Transatlantic Trade and Investment Partnership (TTIP)



Closely related to conflict of interest is the subject of issue of diversity. Oncemore, lack of diversity and overconcentration of arbitrators from capital-exporting states is one of the criticisms against ISDS. However, the proposals for an investment court system tends to concentrate the appointment of judges within tightly defined margins. For example, the EU in Art. 8.27(6) CETA provided that ‘The Tribunal shall hear cases in divisions consisting of three Members of the Tribunal, of whom one shall be a national of a Member State of the European Union, one a national of Canada and one a national of a third country. The division shall be chaired by the Member of the Tribunal who is a national of a third country’.

Similarly, the method of appointing judges as provided in Art. 3.39(8) of the EU-Vietnam FTA provides that ‘The Appeal Tribunal shall hear appeals in divisions consisting of three Members of whom one shall be a national of a Member State of the Union, one a national of Vietnam and one a national of a third country. The division shall be chaired by the Member who is a national of a third country. Furthermore, the proposed Pan-African Investment Court in this thesis provides for the appointment of judges from signatories to the treaty of the court. This structure of appointment of judges remains contentious as to whether it is representative enough of diverse interests.

In supporting this arrangement and towards mitigating the risk of collusion and conflict of interest by the judges of the court, the EU Commission averred that ‘a strengthened code of conduct making explicit the prohibition that judges also act as legal counsel in investment dispute cases’,<sup>584</sup> shall be enacted to regulate the judges. Furthermore, the Commission

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<sup>584</sup> See European Commission, 'Reading Guide to the Draft text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP)' (2015), Available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1365> (accessed on 23/11/2020)

remarked that ‘judges of Investment Tribunal and members of the Appeal Tribunal would be prohibited from taking on work as legal counsel on any investment disputes and would be subject to strict ethical rules’.<sup>585</sup> Thus, the Commission expressed confidence that this formula and method of appointing the judges will be successful as it argued that ‘Taken together, the elements proposed for the operation of the Investment Tribunal, are an effective way to insulate judges from any real or perceived risk of bias’.<sup>586</sup>

Although these proposals represent some moves at broader inclusions of a wide spectrum of constituencies in the appointment of judges, however; other commentators remain sceptical that it will enshrine enough diversity that will be acceptable to all interest groups. For example, the American Bar Association in their contribution to the EU Investment Court System proposal intimated that, ‘[C]ommentators have raised concerns that the selection of judges will be carried out in a political fashion and carries the risk of the treaty parties appointing individuals, who, whilst independent, are more likely to be sympathetic to the interests of the State Respondents. This may lead to the perception that the Investment Court is biased for the State Respondent’.<sup>587</sup>

Thus, the Association argued that the diversity question has not been properly addressed in TTIP because, ‘[t]here are no express guidelines that members comprise diverse persons’.<sup>588</sup> As such, they concluded that ‘[t]he Investment Court is not large enough to ensure there is a representative from each of the members of the EU’. Consequently, this lack of adequate diversity and inclusion in the proposed method of appointing the judges will have to be addressed to ensure the effective functioning of my proposed Pan-African Investment Court.

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<sup>585</sup> See European Commission, 'Reading Guide to the Draft text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP)' (2015), Available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1365> (accessed on 23/11/2020)

<sup>586</sup> Ibid. 585 above

<sup>587</sup> American Bar Association Section of International Law, 'Investment Treaty Working Group Task Force: Report on the Investment Court System Proposal' 24 (Oct. 14, 2016)

<sup>588</sup> Ibid. 587 above

Third, the cost of litigation in the Tribunal of First Instance and Appellate court is another problem that confronts the establishment of the investment court. At the moment and as examined in chapter three, the cost and length of concluding cases in investor-state arbitration ranks among the criticism of investor-state dispute settlement. With the knowledge that the Investment Court System is operationally similar to conventional courts, the cost of concluding a case may become even higher. This is because, parties to a case will hire lawyers whilst the judges will be paid throughout the duration of their tenure. When the bureaucratic and case management fees are included within the equation, then the cost of managing the entire processes in the investment court may outweigh the costs of concluding cases in investment arbitration.

The problem of increased cost is particularly relevant in relation to the Appellate Court. As recognised by the International Bar Association, '[T]he existence of an appeal mechanism will likely result in a greater number of challenges brought against arbitral awards, which would cause additional costs and delays in the dispute resolution process. As a result, States will be forced to increase the resources they allocate to defending investment-treaty claims, to the detriment of their domestic expenditures'.<sup>589</sup> Thus, this issue is a potential problem that may inhibit the effective establishment of my proposal.

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<sup>589</sup> International Bar Association, 'Consistency, efficiency and transparency in investment treaty arbitration: A report by the IBA Arbitration Subcommittee on Investment Treaty Arbitration' (2018), Available at [https://www.ibanet.org/LPD/Dispute\\_Resolution\\_Section/Arbitration/Default.aspx](https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx) (Accessed on 06/01/2020)

Fourth, ISDS have been accused of lacking precedent and therefore, unable to foster standing body of laws to correct defective decisions. This is particularly imperative as the ICSID Annulment Proceedings only provides limited scope for appeals and does not guarantee substantive body of precedent. *Stare decisis* is a principle that enables consistence in legal jurisprudence as courts are able to adapt past and historical judgements in decision-making. Therefore, proponents of the investment court system such as the European Union and myself argues that our Investment Court System proposals will incorporate the doctrine of precedent.<sup>590</sup> This will eliminate the consistency and predictability vacuum of investor-state arbitration.

Notwithstanding the optimism I have expressed in this thesis and other proponents of the Investment Court system regarding consistency and predictability, Burgstaller however cautioned that, '[T]he idea that an investment court would increase consistency was premised on the assumption that the court would be ruling on the basis of a common investment treaty. The opposite was true, however, and no matter how great the court's efforts to be consistent in its decision making, it would inevitably be frustrated by the large number of different international investment treaties it would have to apply and the diverse substantive standards laid down in those treaties. Any attempt to achieve widespread consistency would thus first require a convergence of procedural and substantive rules, which was unlikely in the short term as the international community had divergent views on the subject'.<sup>591</sup>

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<sup>590</sup> See also Markus Burgstaller, *Investor-State Arbitration in EU International Investment Agreements with Third States'* (2012) LIEI 39 at 221, Mersch et al., 'The New Challenges Raised by Investment Arbitration for the EU Legal Order' (2019), European Central Bank Legal Working Paper Series, Lévesque, C., 'The European Commission proposal for an Investment Court System: out with the old, in with the new?' (2016), *Investor-state arbitration series paper No. 10* - September 2016

<sup>591</sup> Bahrain Chamber for Dispute Resolution and the Arbitration Institute of the Stockholm Chamber of Commerce, *Salient Issues in Investment Arbitration*, Report on Panel 1: Should investment disputes be submitted to international arbitration or to a permanent

In view of this challenge of capacity to enshrine consistency, the establishment of my Pan-African Investment Court can only be feasible if these concerns are resolved. To mitigate this challenge, the structure of my proposal is formed in a way that will unify the several IIAs of African states into a single investment treaty. Beyond this recommendation however, African states must also evidence concrete measures towards multilateralism. As affirmed in chapter [1.9], the conclusion of the trade component of the African Continental Freed Trade Area (AfCFTA) agreement is a signal of the willingness of the continent to economic cooperation.

Last but not the least, there is a problem of enforcement of the decisions of my proposed court in third party states. This can be deemed to be the most important challenge because, the overall essence of dispute resolution is to compensate a party for the wrongful acts of another party. As remarked by the CIDS regarding enforcement in arbitration, the ‘Enforcement of [Investment court decisions] Awards is crucial for the overall effectiveness of the system and largely depends on the characterization of the [Investment court decisions] as arbitration or court. If the [Investment court’s] decisions cannot be deemed as arbitral in nature because of the body’s predominant court-like features, the chances of enforcement would be significantly reduced’.<sup>592</sup>

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investment court? Comments by Markus Burgstaller, Available at <https://www.bcdr-aaa.org/report-on-panel-1-should-investment-disputes-be-submitted-to-international-arbitration-or-to-a-permanent-investment-court/> (Accessed on 23/01/2020)

<sup>592</sup> Gabrielle Kaufmann-Kohler & Michele Potestà, Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap (CIDS – Geneva Center for International Dispute Settlement 2016), Available at [http://www.uncitral.org/pdf/english/CIDS\\_Research\\_Paper\\_Mauritius.pdf](http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf) (Accessed on 06/10/2020) at 52, See generally Richard Frimpong Oppong & Lisa C. Niro, 'Enforcing Judgments of International Courts in National Courts' [2014] 5(2), *Journal of International Dispute Settlement*, pp. 334–371

Consequently, the risk of enforcement will also confront my proposal because, the legitimacy of its enforcement have been premised on the New York Convention as obtainable in investor-state arbitration. Perhaps, this subject of enforcement has been contemplated in this thesis as the structure of my proposed Pan-African Investment court incorporates the New York Convention as the enforcement treaty. Although this problem of enforcement has been evaluated in this thesis, however, subjecting judgements of my proposal to the New York Convention will expose it to the lingering problem of enforceability of international conventions. The soft law nature of international conventions leaves it with no punitive and retributive consequences for any disobedience from a state.

Sequel to the identification of these potential challenges that confronts my proposal, it raises the question whether the establishment of a Pan-African Investment Court is the solution to the legitimacy crises of investor-state dispute settlement or it just requires a reform. Therefore, this question will be examined in the next subsection to determine the best way forward.

#### [7.6. An investment court system or reform of international investment arbitration?](#)

Consequent upon the challenges that confronts the feasibility of an investment court system, several commenters have averred their reservations about the feasibility of the Investment Court System. The opponents of the Investment Court System believe that the legitimacy crises of investor-state dispute settlement are not enough to warrant the proposals towards

an Investment Court System. The reason has been adduced that the proposed Investment Court System is simply a modification of investor-state arbitration because, it still retains the criticism of the current framework. For example, Reinisch argued that despite the potential merits of the permanent investment court system, however, the departure from several years of party led investment arbitration to a new judicial apparatus of investment court system will be infused with several institutional challenges as currently obtained in arbitration.<sup>593</sup>

This view has drawn support from several commentators who argue that the deficiencies of ISDS is systematic and therefore will not be remedied through the establishment of a new investment dispute resolution mechanism. For instance, Ning in his review of the EU investment court system proposal affirmed that ‘While the EU’s proposal of a two-tier court system could to some extent address the concern of correctness, its main purpose is to achieve coherence and consistency.

Ultimately, despite the fundamental importance of treaty text, correct interpretations mainly depend upon competent and qualified adjudicators that effectively comply with interpretative cannons. Therefore, the key factor to a successful [Multilateral Investment Court] MIC would be to attract sufficient expertise. In other words, detailed rules and procedures of appointment, reappointment and assessment of judges are of vital importance to gain confidence from both states and investors. Moreover, the judicialization of ISDS would cut

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<sup>593</sup> See generally, August Reinisch, Will the EU’s Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? —The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration, (2016)19-4 Journal of International Economic Law, 761-786; Freya Baetens, The European Union’s Proposed Investment Court System: Addressing Criticisms of Investor-State Arbitration While Raising New Challenges, (2016) 43 Legal Issues of Economic Integration, 367-384.

off the potential commercial link between the arbitrator and the appointing party, but could also raise a series of other concerns'.<sup>594</sup>

On the basis of Ning's opinion therefore, Rush concurred that the solution to the criticisms of ISDS is the reform of its legitimacy crises and not a total departure from investor-state arbitration to a permanent investment court mechanism. According to Rush, whilst some of the criticisms against ISDS may be justified, however, the disagreement regarding the specific issues of inconsistency of arbitral awards, length and cost of arbitral proceedings and alleged impartiality of autonomously appointed arbitrators 'will be perpetuated rather than reformed' in an Investment Court System. Thus, he contended that '[The] appointment of fixed adjudicators raises concerns regarding their experience and diversity. While an Appellate Tribunal may lend itself to more consistent awards through *stare decisis*, arguably the length and cost of proceedings could in fact be exacerbated, especially once the submission of third party briefs in the form of *amici curiae* is taken into account'.<sup>595</sup>

Consequent upon these concerns, several reform proposals have been adduced as a better approach to achieving consistency and legitimacy in investor-state dispute settlement. A major plank of these reform initiatives is the reform proposals by the United Nations Conference on Trade and Development (UNCTAD). Perhaps, the reason behind the formulation of these reform proposals of investor-state dispute settlement by the UNCTAD is motivated by a belief that a change to an investment court system may not remedy the legitimacy crises of ISDS. Therefore, the next subsection will review these reform proposals

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<sup>594</sup> Ning, H., & Qi, T., 'Multilateral Investment Court: The Gap Between the EU and China. The Chinese Journal of Global Governance' [2018] 4(2), The Chinese Journal of Global Governance 154-175.

<sup>595</sup> See generally Rush, T., 'An Investment Court System: Perpetuating or Reforming the Legitimacy Crisis in Investor-State Arbitration?' (2019) Uppsala Universitet



by the UNCTAD to determine whether my proposal for a Pan-African Investment Court is not necessary in the search for legitimacy in investor-state dispute settlement.

### 7.7. Evaluation of the UNCTAD ISDS reform proposals

Apart from the support for an Investment Court System, the recommendations for the reform of investor-state dispute settlement by the UNCTAD is an acceptance of the legitimacy crises of ISDS. Consequently, the UNCTAD have proffered five reform measures which includes the recommendation of a 'standing tribunal'.<sup>596</sup> These five reform approaches are: Limited ISDS, Unreformed ISDS mechanism, Improved ISDS procedure, Standing ISDS tribunal and No ISDS. These recommendations shall be examined in detail to determine their merits.

The first of these reforms by the UNCTAD is the limitation of ISDS cases through innovative treaty drafting. This proposition envisages the limitation in scope of clauses contained in IIAs. Thus, it evinces that the inclusion of obligatory exhaustion of local remedies by investors before proceeding to investor-state dispute settlement will eliminate the litany of cases against host states. In support of this reform pathway, Porterfield affirmed that the exhaustion of local remedies will aid the decisions of arbitral panels through the provision of information on the internal laws of host states that are argued in domestic remedial forums.<sup>597</sup>

Furthermore, Schreuer opined that the internal tribunal laws in developed jurisdictions are similar to the standard of decisions of investment arbitral panels; thus the exhaustion of local

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<sup>596</sup> U.N. Conference on Trade and Development, Reform of Investor-State Dispute Settlement: In Search of a Roadmap, IIA Issue Note No.2 (June 2013)

<sup>597</sup> Matthew Porterfield, Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Has Come? (2015) 41(6) YaleJ. Int'l. L. Online

remedies will be helpful if such cases thereafter proceed to international investment arbitration.<sup>598</sup>

Despite the merits of this proposal, it is however infused with two problems. First and foremost, innovative treaty drafting, limitation in scope and exhaustion of local remedies; are already in practise in several national investment laws. For instance, the South African Protection of Investment Act, the Natural Wealth and Resources (Review and Re-Negotiation of Unconscionable Terms) Act of Tanzania and model BITs like the Morocco - Nigeria BIT (2016) all contain novel provisions in an attempt to limit their exposure to investor-state arbitration.

Notwithstanding this inclusion of exhaustion of local remedies and other novel clauses in new-generation investment agreements, the high volume of investor-state disputes have remained, Thus, suggesting that this reform proposal will not be the solution to the problem. In any case, any suggested reform pathway must be aimed at rebalancing the power equation between host states and investors so that investor confidence in Africa will remain high. Therefore, national investment laws and BITs ought to be drafted in equilibrium terms of striking a balance between the preservation of internal sovereignty and continuous attractions of investors.

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<sup>598</sup> Christoph Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' [2005] 4(1) *The Law & Practice of International Courts and Tribunals* 1-17

Essentially, investment agreements must continue to serve as a force for good in the attraction of investments and advancement of sustainable development. Unless expressly agreed by both investors and host states, it is argued herein that innovative treaty drafting practices and exhaustion of local remedies may not be the solution to the problems inherent in ISDS, especially in relation to the its limitation of the regulatory space of host states.

This argument is supported by Tan and Bouchenaki, who expressed reservations about the feasibility and effectiveness of exhaustion of local remedies in jurisdictions where there are no legal certainty like Africa.<sup>599</sup> Since some African states do not have developed, viable and strong institutions; the exhaustion of local remedies will be encumbered by enforceability and fairness issues. For example, in the aftermath of the *Mike Campbell and Others v. Republic of Zimbabwe* case<sup>600</sup> by the Southern African Development Community (SADC) Tribunal, Zimbabwe refused to recognise the decision and withdrew its consent to the court. This culminated to disagreements by signatory states to the tribunal, thereby leading to its disbandment by the SADC.

At the core of the disagreement were essentially political pressures and state suspicions, subjects that are delineated from the case in issue. Furthermore, exhaustion of local remedies will draw purely commercial and contractual issues into the domestic political realm. Such instances will therefore distort the *nemo iudex in causa sua* rule and raises questions of fairness, independence and impartiality.

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<sup>599</sup> Liang-Ying Tan & Amal Bouchenaki; Limiting Investor Access to Investment Arbitration - A Solution without a Problem? In *Reshaping the Investor-State Dispute System: Journeys for the 21st Century*, (Jean E. Kalicki & Ann Joubin-Bret eds., 2015) 250—53

<sup>600</sup> SADC (T) No. 2/2007

The limiting of investor's approach to ISDS will presumably incorporate the exemption of certain sectors of a country's economy and imposition of obligations on investors before benefiting from certain incentives. In the opinion of the UNCTAD, this denial of benefit may include limitation of waivers to investors, only on the precondition of evidencing certain accomplishments like engagement in corporate social responsibility or the creation of jobs within the host state. Oncemore, this suggestion may not be feasible because, it is reminiscent of innovative treaty-drafting.

In fact, some of these clauses are already included in new-generation investment laws and BITs of some states. For example, the Cameron-Turkey BIT limits the scope of claims regarding real estate and form of settlement of issues arising from the sector.<sup>601</sup> Similarly, Article 29.4(c) of the SADC Model BIT equally limits the right of investors to make claims arising from certain disputes by providing that investors commit to a 'clear and unequivocal waiver of any right to pursue and/or to continue any claim relating to the measures underlying the claim made pursuant to [the enabling] Agreement, on behalf of both the Investor and the Investment, before local courts in the Host State or in any other dispute settlement forum'.<sup>602</sup>

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<sup>601</sup> See Article 4(c), AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF TURKEY AND THE GOVERNMENT OF THE REPUBLIC OF CAMEROON CONCERNING THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS, Available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/597/download> (accessed on 08/02/2020)

<sup>602</sup> Article 28(3) SADC Model BIT, Available at <https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf> (Accessed on 20/07/2019)

Furthermore, the COMESA Common Investment Area (CCIA Agreement) defined substantial investment to include number of jobs created and its effect on the local community.<sup>603</sup> Crucially, any limitation of certain sectors of the economy of the host state may dissuade investors from investing in such as state, as it may be labelled as an unfriendly investment destination.

The seeming unsuitability of limitation to ISDS and exhaustion of local remedies is also challenged within the context of imposing obligations on investors. At the core of capitalism is the free pursuit of enterprise and deployment of unique skills to invest with an economy of a state. Thus, the idea of imposing obligations on international investors have been a contentious and impractical issue in international business. As I examined in chapter [2.3], the increase in the abuse of human rights and negative impact of corporate exploitation on the environment, have led to the imposition of international obligations on multinational corporations.<sup>604</sup> However, such attempts have been challenged on the basis that, multinational companies are not justiciable entities that may undertake obligations.

The limitation of ISDS also includes the introduction of a time limit in the pursuance of investor claims and a Fork-in-the-Road (FITR) clause. Reminiscent of the time embargo in civil cases in conventional courts, the thrust of this suggestion is that a limitation period for pursuing any claims will stop the resurrection of old cases by investors and exposing host states to unceasing claim actions. A FITR clause will estop investors from approach investor-

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<sup>603</sup> See definitions and Article 19 of the COMESA Common Investment Area (CCIA Agreement), Available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3092/download> accessed on 20/07/2019

<sup>604</sup> See United Nations, 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (2011) A/HRC/17/31, Available at [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) (Accessed on 18/06/2019)

state arbitration because, they would have waived this right the inclusion of the clause in the enabling treaty. Thus, a FITR clause will enable contracting states to freely choose the forum for the resolution of investor-state disputes. Choices of forums may include options for the application of domestic courts and conciliation, thereby limitation the exposure of African states in investor-state dispute settlement.

Oncemore, there are provisions that functions like a FITR clause in some new-generation treaties. For instance, Article 28(3) of the COMESA Common Investment Area Agreement, stops an investor from dual investment claims. This is achieved through the provision that permits an investor to select only one dispute resolution forum, and ‘that election shall be definitive and the investor may not thereafter submit a claim relating to the same subject matter or underlying measure to other for adjudication’.<sup>605</sup>

Correspondingly, the limitation to ISDS proposal will also be contentious because, legal certainty and freedom to litigate is a critical component of capitalism, as it serves as surety to investors over their investments. Therefore, the inclusion of limitation clauses in investment agreements may dissuade some investors from investing in Africa. This is exacerbated by the lack of strong intuitions and legal certainty in Africa; variables that may discourage investors from trusting local forums as avenues for the resolution of disputes. Since political instability is prevalent within the continent, limitation clauses may not instil investor confidence, thus posing a risk to the continuous attraction of investments into the continent.

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<sup>605</sup> Article 28(3), COMESA Common Investment Area (CCIA Agreement)

Third, the UNCTAD proposed the joint interpretation of the provisions of IIAs by representatives of contracting states.<sup>606</sup> This is geared towards assisting tribunals in determining the meaning of treaty clauses and true intentions of the contracting states, rather than leaving it to arbitrators who are not experts in investment matters and dispute resolution. Despite the merits of this proposal however, its feasibility is questionable for two reasons.

First and foremost, the idea of allowing representatives of states to interpret the provisions of IIAs will lead to a stalemate as each party will aim to protect their interests. More importantly, the idea of delocalisation of arbitration is to ensure that neutral parties and forums administer investor-state disputes for fairness and equity purposes.<sup>607</sup> Therefore, the invitation of state representatives in the interpretation of treaty provisions will distort delocalisation principles.

Furthermore, state interpretation of provisions of IIAs is already part of contemporary innovative treaty-making practices because, some new-generation investment agreements contains such clauses. For instance, the SADC Model BIT provides that there shall be, 'joint decision of the State Parties, each acting through its representative designated for purpose of this Article, declaring their joint interpretation of a provision of this Agreement, shall be binding on any tribunal, and any decision or award issued by a tribunal must apply and be consistent with that joint decision'.<sup>608</sup> Despite the inclusion of this provision in model BITs

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<sup>606</sup> See UNCTAD, 'Interpretation of IIAs: What States Can Do' (2011) IIA Issues Note No. 3

<sup>607</sup> See Saghir Z, Nyombi C., 'Delocalisation in international commercial arbitration: a theory in need of practical application' [2016] 27(8) International Company and Commercial Law Review 269-276

<sup>608</sup> Article 29(2), SADC Model BIT

however, the legitimacy crises of ISDS has persisted, thus suggesting that this interpretative proposal will not provide effective remedy to the problem.

Correspondingly, the fourth recommendation of UNCTAD is the consolidation of related claims to reduce cost and time. In regards to the feasibility of this proposal, it is argued herein that it will suffer the same fate as the earlier recommendations because, it is already incorporated in some new-generation investment agreements. For example, Part Five, Chapter 29 of the SADC model BIT on dispute settlement provides that, 'Where two or more claims have been submitted separately to arbitration under this Article and the claims have a question of law or fact in common and arise out of the same underlying measure or measures or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties...'.<sup>609</sup>

Since lack of transparency and the publicness of investment disputes is one of the reasons behind the legitimacy crises of ISDS, the UNCTAD also recommended the infusion of transparency into the process by granting public access to the arbitral proceedings. Similarly, this suggestion envisages the elimination of privity by incorporating third parties such as civil society organisations in the dispute resolution process. Reminiscent of the other reform proposals, this recommendation have also been incorporated in some first-generations IIAs. For instance, Article 28(5) of the COMESA CCA mandates that, 'All documents relating to a notice of intention to arbitrate, the settlement of any dispute [through ISDS], the initiation of an arbitral tribunal, or the pleadings, evidence and decisions in them, shall be available to

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<sup>609</sup> Article 29.18(a), SADC Model BIT



the public'.<sup>610</sup> Likewise, the SADC Model BIT requires that state parties should, 'promptly publish, or otherwise make publicly available, its laws and regulations of general application as well as international agreements that may affect the investments of Investors of the other State Party'.<sup>611</sup>

The recommendation for the involvement of the public possess positive benefits. Beyond the knowledge of the proceedings, the public could instil more fairness in arbitral outcomes by providing vital or expert information through *amicus curiae*. However, some novel investment agreements have also incorporated *amicus curiae* as part of their provisions. For example, Article 28(8) of the COMESA CCIA provides that, 'arbitral tribunals shall be open to the receipt of *amicus curiae* submissions'.<sup>612</sup> Likewise, the SADC Model BIT provides that arbitral tribunals, 'shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party'.<sup>613</sup>

In the same vein, the UNCTAD also recommended the incorporation of other forms of alternative dispute resolution (ADR) mechanism such as mediation to resolve ISDs. The argument in favour of this proposal is that ADR measures like conciliation and mediation are better alternatives to a somewhat litigious process like investment arbitration. But, some modern investment agreements have already included ADR clauses in their treaties. For instance, the SADC Model BIT in providing for mediation demands that, 'after submission of the Notice of Intent, the Investor or the Host State may request mediation of the dispute, in

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<sup>610</sup> Article 28(5), COMESA CCIA

<sup>611</sup> Article 29.17(a), SADC Model BIT

<sup>612</sup> Article 28(8), COMESA CCIA

<sup>613</sup> Article 29.15, SADC Model BIT

which case the other disputing party may agree to such mediation'.<sup>614</sup> Concurrently, the COMESA Common Investment Area agreement also allows for mediation by providing that, 'where no alternative means of dispute settlement are agreed upon, a party shall seek the assistance of a mediator to resolve disputes during the cooling-off period'.<sup>615</sup> Furthermore, the Pan-African Investment Code also recommends disputes to be settled 'through consultations and negotiations, which may include the use of non-binding third-party mediation or other mechanisms'.<sup>616</sup>

The fraternal settlement of investment disputes through negotiation or mediation may enshrine more amity in the dispute resolution process. However, this proposal also suffers the same weakness as its contemporaries. The problem with this suggestion is that, the mediation mechanism does not preclude the deployment of other ADR measures such as arbitration. Thus, foreign investors could exercise their party autonomy and select arbitration as the framework for resolving any disputes. In addition, the use of mediation in any agreement will not inspire investor confidence as consent to arbitration enshrines full neutrality in dispute settlement. Furthermore, mediation may expose states to the risk of foreign interference in their domestic affairs because, home states of investors may be involved in such procedure.

The introduction of an Appeals mechanism is another reform measure that have been proposed by the UNCTAD. According to Tams,<sup>617</sup> this proposal aims to alleviate wrong

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<sup>614</sup> Article 29.3, SADC Model BIT

<sup>615</sup> Article 26.4, COMESA CCIA

<sup>616</sup> Article 42(1)(b), Pan-African Investment Code 2016

<sup>617</sup> Christian Tams, 'An Appealing Option? A Debate about an ICSID Appellate Structure' (2006)40 *ESSAYS IN TRANSNATIONAL EcON. L.*, No. 57

decisions at the Tribunal of First Instance through a review. An appeals tribunal will also enshrine precedents that will be followed in future cases of similar nature. This reform measure envisions that members of the arbitral tribunals will be permanently appointed by member states and expected to make fairer and justifiable decisions.

Once more, an Appeals Mechanism may not resolve the legitimacy crises of ISDS. This is because, the international investment architecture is composed of thousands of investment agreements with different clauses and objectives. Therefore, an Appeals Mechanism will not conveniently assimilate and aggregate these agreements to review judgements and create precedents. In addition, an Appeals Mechanism will necessitate the amendment of the ICSID Convention which, according to Supnik,<sup>618</sup> will be impossible because of the difficulty in achieving consensus from the high number of signatory states. Furthermore, other challenges that will confront an Appeals Mechanism is on how the membership of the Appellate Body will be constituted. In essence, questions on whether the panel members will be appointed or elected, the IIAs that will be subject to the jurisdiction of the appellate panel, and whether it applies to the ICSID Convention remains unresolved. Ultimately, the establishment of an Appeals Mechanism will entail a comment on whether ICSID's annulment procedure and review role of national courts will be eliminated.

Overall, the UNCTAD proposals for the reform of ISDS may also not be a panacea to the legitimacy crises of ISDS. Therefore, it can be argued that the investor-state arbitration mechanism may not be reformable. In any case, most new-generation investment agreements such as the COMESA Common Investment Area and SADC Model BIT that have

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<sup>618</sup> Kate Supnik, 'Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law' (2009) 59 DUKE L. J. 343-76

incorporated these recommendations remains untested. Whilst the former is not functional, the latter is not binding; thus leaving African states with the question on how to reform its investor-state dispute settlement landscape. Similarly, despite the motivations behind these reforms, the failure of the SADC backed tribunal in the shadow of *Mike Campbell Ltd & others v. Zimbabwe* case, is a further affirmation that the UNCTAD proposals for reform may not be the solution to the legitimacy crises of investor-state dispute settlement.

## 7.8. Recommendations

The information from the case studies in chapter five and findings in chapter six, as well as the evaluation of these findings in chapter seven; have provided a veritable platform to make recommendations as necessary. The case studies in chapter five showed that several African states have been confronted with arbitral actions by foreign investors on the basis of clauses contained in their International Investment Agreements. For example, Tanzania, South Africa and Egypt have faced many arbitral actions; leading to the embarking of innovative treaty-making practices by them. In addition, Nigeria and several other states within the African continent are also currently witnessing arbitral actions by foreign investors. As evidenced in chapter [5.6], these arbitral actions were commenced despite the abysmal economic growth and attraction of foreign direct investments by African states. As I argued in this thesis, the high consummation of IIAs by African states should ordinarily translate to a reasonable high attraction of FDIs.

However, and as evidenced by the findings and evaluations in subsections [5.6] and [6.6], the experiences of African states on ISDS caseload and economic growth are not equal to their volume of IIA contraction. On this basis therefore, I advance the three recommendations of a Pan-African Investment Court, the reform and retention of the investor-state arbitration

and engagement in innovative treaty-making by African states. The advancement of the latter two recommendations does not delegitimise the primary proposal of this research, but, have been made solely on the premise of pragmatism and outcomes of my evaluation of the findings of this research. This evaluation should potential challenges that may prolong or even hamper the feasibility of my proposed court, hence, the need to propose further reform options. Thus, whilst my proposed court can be deemed as a longer term initiative, however, proposals to revamp aspects of the existing arbitration system are short term measures that can be implemented.

### 7.9. The creation of a Pan-African Investment Court

The information contained in chapter three of this thesis evidences that multinational corporate activities are necessary variables that is desired by all nations of the world. In a developing continent like Africa, the attraction of foreign direct investments is even more pertinent. Despite the positive contributions of FDI's into the African economic landscape, it was as shown in chapter three that some negative vices such as abuses of human rights, degradation of the environment and intrusion into the domestic policy-making of African states abounds. Towards eliminating these vices, the summary of chapter three connotes that novel clauses will continue to be included in International Investment Agreements that are consummated by African states. In addition, chapter three also shows that the objective of maintaining competitive advantage and maximisation of profit by multinational corporations, elicits a struggle between them and host states regarding the impact of their activities.

Thus, the search for suitable dispute resolution mechanisms will continue to be part of international investment law reform. In the context of international investment protection,

the corollary of chapter three is that African states and foreign investors have oscillated between arbitration and the court system in settling investment disputes. Since the turn of the Twentieth Century however, the growth of IIAs have also seen the rise of investment arbitration as the forum for investment dispute resolution. But, and as shown in chapter three, several developing continents have expressed concerns about the legitimacy crises of arbitration.

Within the context of African states and as evidenced in chapters two, five and six; the legitimacy crises of investor-state dispute settlement have also resonated broadly. Thus, there is evidence that African states have been confronted with a high number of ISDS claims, inconsistency in the interpretation of provisions of IIAs by arbitral tribunals, the limitation of the regulatory powers of African states and lack of adversity in the constitution of arbitrators. In addition, the large volume of IIA consummation by African states have not translated to increased attraction of FDIs. All these limitations and legitimacy crises of investor-state dispute settlement tilts the balance of powers in favour of investors.

Consequently, this thesis recommends for the rebalancing of the investor-state dispute settlement landscape in Africa through the creation of a Pan-African Investment Court. As stated in subsection [6.7], the use of the Pan-African Investment Court to resolve investor-state disputes may be a solution to the legitimacy crises of investor-state dispute settlement as domestic African realities will be incorporated in decision-making.

As contained in in subsection [7.2.], my proposed Pan-African Investment Court will benefit the continent in boasting its economy. With the proposed structure of the court in subsection

[6.19], the resolution of investment disputes which are public matters will thence be decided through a public forum of an Investment Court System. Furthermore, the information contained in subsection [7.2.] supports the fact that a Pan-African Investment Court, complete with the integration of the IIAs of African state will aid in boosting the economies of the African states. Overall, the conclusion of the trade component of the African Continental Free Trade (AfCFTA) agreement, is a signal that African states are ready to collaborate and integrate for the common economic good of the continent. Thus, the establishment of a Pan-African Investment Court which mirrors the trade component of the AfCFTA is realisable

#### 7.10. Reform and retain Investor-State Arbitration

Despite the potential realisation of my proposed Pan-African Investment Court as recommended in subsection [7.2.], it is however evident that some challenges may prolong its feasibility. In the evaluation conducted in chapter seven and especially in subsections [7.3.] and [7.4.], the drawbacks and challenge of multilateralism were examined. The summary of my evaluation in chapter seven suggests that, my proposal can be deemed as a long term measure and may even be difficult to implement, thus necessitating another recommendation of reforming and retaining investor-state arbitration.

As I posited in chapter seven, the challenge of weak institutional structures and political instability within the African continent could make the objective of a unified investment treaty and my proposed Pan-African Investment Court unachievable. The failure of the SADC tribunal in the shadow of the decision in *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe*<sup>566</sup>

is a veritable example of how weak institutional structures could inhibit the realisation of my proposal.

Within such circumstance, African states can explore the option of retaining investor-state arbitration mechanism but reform it through the suggested pathways by the United Nations Conference on Trade and Development as explained in subsection [7.6.]. This recommendation does not eliminate the potential of my proposed court, however, it is adduced here as a short term measure while the establishment of the court is clearly a long term measure. Although these reform pathways may not entirely remedy the legitimacy crises of investor-state dispute settlement, however, they could eliminate some of the more contentious areas such as the non-incorporation of domestic African realities.

This reformation and retention recommendation is more imperative since, the trade component of the AfCFTA agreement was not unanimously agreed by all states of the continent. In fact, most the of the states that have signed the agreement have thus far, failed to ratify and deposit their instrument of ratification. This therefore reinforces the argument that the negotiation of the Protocol on Investment will be more herculean. Thus, this challenges of multilateralism may encumber the realisation of my proposed Investment Court System. Therefore, the reformation and retention of the current investor-state dispute settlement framework is the most feasible way out.

#### 7.11. Engagement in innovative treaty-making practices

The evaluations in this chapter shows that both the establishment of a Pan-African Investment Court and reformation of the current investor-state dispute settlement framework are confronted with challenges. Thus, it is possible that both options may not be feasible in the objective of rebalancing eliminating the legitimacy crises of ISDS framework.



As contained in subsections [7.3. – 7.6.], there is a risk that my proposed Investment Court System may tilt the balance in favour of host states, whilst a reformed investor-state dispute settlement may retain some of the legitimacy crises and remain in favour of investors.

Towards achieving a semblance of equity and amity therefore, another recommendation is that African states should actively pursue more innovative treaty-making practices. As contained in subsection [1.5.], several African states have already embarked upon innovative treaty-making practices. This allows for the introduction of novel clauses in their IIAs that protects them from undue arbitral actions through the incorporation of domestic realities, and exemption of certain aspects of their economy from investment arbitration. In addition, innovative treaty-making practices also allows for the imposition of obligations such as corporate social responsibility undertakings and human rights protection clauses.

As such, and in case of the failure to realise the creation of my proposed Pan-African Investment Court or the retention and reformation of International Investment Arbitration, African states should engage in treaty-making activities by introducing clauses that will recognise and remedy the legitimacy crises of international investment arbitration. This will ensure that both investor-state arbitration and a Pan-African Investment Court Systems will be incorporated as forums for the settlement of investment disputes under specified circumstances.

### 7.12. Conclusion

The evaluation of my proposal for the establishment of a Pan-African Investment Court in resolving investor-state disputes in this chapter have shown the challenges of achieving this aim. This chapter evidenced that the idea of multilateralism and an integrated African investment landscape is challenged by both political and economic factors. For example, weak political and institutional structures, as well as lack of even development of the economies of African states may prevent a unanimous agreement on a unified investment treaty and creation of an Investment Court System. Despite these perils however, information within this chapter however shows that, African states will benefit enormously from a unified investment treaty and a Pan-African Investment Court as a mechanism to resolving investor-state disputes. Among the benefits is the incorporation of domestic African realities in deciding disputes emanating from investments.

Consequent upon these dilemma, I evaluated the proposition that the legitimacy crises of investor-state dispute settlement may be eliminated through series of reforms. Thus, the reform proposals of the United Nations Conference on Trade and Development (UNCTAD) were reviewed. Despite its seeming merits, I found that these reform proposals are also confronted with several challenges of workability and therefore, may not remedy the problem. This is more especially as some of the reform pathways such as the exhaustion of local remedies as proposed by UNCTAD, are already included in some new-generation investment agreements of African states. Thus, the continuous existence of the legitimacy crises of investment arbitration suggests that the reform proposals by UNCTAD may not be an effective remedy.

Sequel to these findings from my evaluations in this chapter, I proposed three recommendations. First, I proposed for the creation of a Pan-African Investment Court as a mechanism for resolving investor-state disputes. This recommendation was sequel to the findings of my case studies in chapter five and evaluations in chapter six. Second, I recommended as an alternative, the reformation and retention of the current investor-state arbitration model, in case my proposal for an Investment Court System fails. Last but not the least, I recommended that African states should engage in innovative treaty-making practices if the first two recommendations are not achieved.

Consequent upon this evaluation and adducing of necessary recommendations, this research have successfully achieved the objectives which were outlined in chapter one. Thus, the next chapter shall conclude this thesis, drawing its theme together. In addition, chapter eight will also include the significance of this thesis and a closing remark from me.

## **Chapter Eight: Conclusion and Closing Remarks**

### **8.1. Introduction**

This conclusion aims to tie the theme of this thesis together. In particular, it seeks to state some concluding remarks and possible areas for future research. At the onset of this thesis in chapter one, four questions were asked. These are:

(1) Should a Pan-African Investment Court be established to settle investment disputes involving African states?

(2) What are the motivations behind my proposal for a Pan-African Investment Court?

(3) What are the benefits of a rebalanced African Investment regulatory framework to African states?

(4) Can my proposed Pan-African Investment Court rebalance investor-state dispute settlement and eliminate its legitimacy crises?

These questions have been answered in the various chapters of this thesis. My overall conclusion is that a Pan-African Investment Court should be created and used to settle investor-state disputes within the African continent. In addition, I found and evidenced that the motivations behind my proposal is the legitimacy crises of investor-state dispute settlement due to the use of investor-state arbitration to settle investor-state disputes.

Furthermore, the evidence contained in this thesis, especially in chapters five and six; supports my conclusion that African states will experience economic growth through the creation and use of a Pan-African Investment Court. This will be achieved through the elimination of the ingredients that underpins the exposure of African states to investor-state arbitration, and the amalgamation of the African investment and economic landscape. However, there is insufficient evidence to support my opinion that a Pan-African Investment Court will totally eliminate the legitimacy crises of investor-state dispute settlement.

Although there is evidence that it may help to remedy some of the contentious aspects of investor-state arbitration, however, there is a potential risk that the reforms could tilt the balance of powers in favour of host states. Thus, the anticipated rebalancing of investor-state

dispute settlement may not be achieved. Hence, I advanced two further reform options. These are:

1. Reform of the current investor-state dispute settlement framework
2. Engagement in more innovative treaty-making practices by African states.

## 8.2. Concluding Remarks

My proposal for the deployment of a Pan-African Investment Court in the resolution of investor-state disputes in Africa is a reflection of the historical issues pertaining to the protection of foreign investments. Stemming from Treaties of Friendship, to diplomatic protection and the current formalised international investment agreements regime; the formulation of suitable means of protecting foreign investments and resolving disputes emanating from same, is a conversation that will continue to dominate and resonate within international investment law. Investment decisions are risks which are undertaken by foreigners with the objective of making returns from them. Although desirous of these investments, host states and governments who derives legitimacy from their citizens; are also obligated to make decisions and superintend over the affairs of their states in the interest of the citizens.

As such, disputes and disagreements will remain a feature of this relationship between host states and investors. In the context of Africa, evidence from this research suggests that the volume of investor-state disputes will remain high and the continent is likely to be confronted with arbitral actions if it retains the current arbitration mechanism. This assertion is supported by the knowledge that arbitral actions by foreign investors tends to be higher in respect of developing continents due to political instability, weak institutional structures,

legal uncertainty and periodic uprisings. Thus, investors seem to be confronted with more risk of breaches of substantive protections in enabling IIAs by host states. On the other hand, however, some investors may be tempted to take advantage of these limitations in Africa to institute undue arbitral actions against African states. In addition, the negative impacts of multinational corporate activities such as environmental degradation and human rights abuses could spur African states to make decisions to protect its citizens and state.

Consequently, the formulation of a suitable investment dispute resolution framework that will be acceptable to investors and African states is desirable. Although international investment arbitration is the current mechanism that is deployed in settling investor-state disputes, however, the evidence shows that African states are not satisfied with this system; my proposal for a Pan-African Investment Court. Despite the fact that my main recommendation could help in eliminating the legitimacy crises of ISDS, but, there is also sufficient evidence to suggest that this anticipated objective may not be achievable due to the challenges that confronts it.

Therefore, my ancillary recommendations of implementing the reform proposal of the UNCTAD and engagement in innovative treaty-making practices by African states may suffice if my proposal fails to materialise. Notwithstanding my assertion here, I should state that the identified challenges that confronts my proposed Pan-African Investment Court is surmountable. Thus, the challenges those not invalidate its functionality and efficacy.

### 8.3. Theoretical implications

This study has furthered the conversation about the reform of investor-state dispute settlement. In several ways, this reform conversation and more specifically, the contemporary subject of replacing international investment arbitration with an investment court system have been extended with empirical evidence about its African context. In addition, the economic implications of Africa's continued reliance on international investment arbitration have been investigated, with a result that suggests that African states will be better served through a permanent investment court.

Furthermore, a related outcome of this research is the information on how the political structures and other internal circumstances of African states could make or mar its ability to attract much need foreign direct investments. More importantly perhaps, this thesis has provided the structural framework of an investment court system in Africa, its challenges and potential benefits. Thus, it serves as a novel document that can be adapted by governments and policy makers to strengthen and boost the economic potentials of African states.

### 8.4. Recommendations for future research

This study encountered 2 practical challenges that may require further research in the future. First, three states were used as the case study. In an African continent of fifty-five countries, the study of three countries may not offer sufficient indication and experiences in ISDS. Thus, the extent in which international investment arbitration impacts on each specific country may be different, more especially since investor-state disputes are based on individual investment agreements. As such, future researchers may consider studying more countries from each region of the continent. This will provide a better view or assumption of the operation of investor-state arbitration within the continent.

Secondly, this thesis focused on the impact of investor-state arbitration in African states. My proposal for a Pan-African Investment Court was mainly contingent on economic and political factors. However, there may be other variables that contributes to alleged breaches of investment agreements by host states. Correspondingly, it may be that some of the arbitral actions instituted by foreign investors are based on corporate factors. Therefore, future researchers may investigate whether other factors beyond instability, curtailing of legitimate decision-making by states and economic costs, are influencers of the legitimacy crises of ISDS.