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WESTERN CAPE

TOWARDS A REGIONAL INVESTMENT DISPUTE SETTLEMENT SYSTEM- AN AFRICAN PERSPECTIVE

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A mini- thesis submitted in partial fulfilment of the requirements for the degree of Master of Laws (LLM) in International Trade, Investment and Business Law the Department of Mercantile Law & Labour Law,

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DECLARATION

I declare that towards a regional investment dispute settlement system- an African perspective has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

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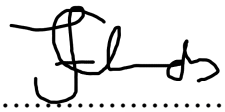
Signature: 

Date: 15 December 2017

Supervisor: Professor Riekie Wandrag

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Date: .....

DEDICATION

This research is dedicated to my parents Mr Chinembiri Chandaengerwa, Rudo Chandaengerwa and my future children. I am truly grateful for all your support and encouragement.

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KEYWORDS

Foreign investment

International investment agreements

International Centre for Settlement of Investment Disputes

Bilateral investment treaties

International investment agreements

Investment dispute settlement

Investor state dispute settlement

Continental Free Trade Area

Tripartite Free Trade Agreement

European Union- Canada Comprehensive Free Trade Agreement

Southern Africa Development Community Finance and Investment Protocol

Pan African Investment Code

ABBREVIATIONS

BITs	Bilateral investment treaties
CCIA	COMESA Common Investment Area
CERDS	Charter of Economic Rights and Duties of States
CETA	European Union- Canada Comprehensive Free Trade Agreement
CFTA	Continental Free Trade Area
COJ	Court of Justice
COMESA	Common Market of Eastern and Southern Africa
EAC	East African Community
ECOWAS	Economic Community of West African States
FCNs	Friendship, Commerce and Navigation treaties
FTAs	Free Trade Agreements
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Dispute
IIAs	International investment agreements
ISDS	Investor state dispute settlement
MAI	Multilateral Agreement on Investment
NIEO	New International Economic Order

OECD	Organisation for Economic Co-operation and Development
PAIC	Pan African Investment Code
RECs	Regional Economic Communities
SADC FIP	Southern Africa Development Community Finance and Investment Protocol
SADC	Southern Africa Development Community
TFTA	Tripartite Free Trade Agreement
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNECA	United Nations Economic Commission for Africa

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CHAPTER ONE

INTRODUCTION

1.1. RESEARCH BACKGROUND

Foreign investment was believed to have been fostered by states signing bilateral investment treaties (BITS) and multilateral investment treaties as a way of protecting investors. The proliferation of such agreements has been exponential over the past century.[1] Unlike trade, the regulation of investment is largely fragmented as no comprehensive multilateral accord exists. International investment flows are protected by a disintegrated system of approximately 3328 international investment agreements (IIAs) and 300 free trade agreements (FTAs) with investment chapters.[2] These agreements include binding provisions on the standards of protection for the foreign investors, such as national treatment, fair and equitable treatment, and liberal repatriation of funds. The most fundamental feature of IIAs is that investors can assert their rights against host counties directly before transnational arbitration tribunals.[3]

The convergence of trade and investment law has led to the gradual progression of the international investment dispute settlement system.[4] This is even more so, because of the onset of investment chapters in trade agreements. However, the issues arising from the current investment dispute settlement regime have caused a lag in the signing of major trade agreements. These issues are not new but they have been brought to the fore because of the merging of trade and investment in one agreement. [5]

[1] Wegen G 'Dispute settlement and arbitration' (1985) 59 *Transitional Legal Policy* 59 66.
[2] Berger A 'Do We Really Need a Multilateral Investment Agreement?' (2013) *German Development Institute* 3; World Investment Report – UNCTAD (2017) 111.
[3]Anders A 'The world needs a multilateral investment agreement' *Peterson Institute for International Economics.*
[4]Alford RP 'The convergence of international trade and investment arbitration' (2013) *Scholarly Works.* Research 1072 38.
[5] Alford RP 'The convergence of international trade and investment arbitration' (2013) *Scholarly Works.* Research 1072 38

The dispute settlement system flows in one way as only the investor is granted rights to institute a claim against the host state should they breach any clause contained in the treaty.[6] These IIAs do not extend the same right to institute claims for host states. It was largely believed that the essence of the investment protection for any host state was economic development, which consisted of huge concessions made by the state to its sovereignty.[7]

The settlement of international investment disputes has largely been regulated by treaties and contracts. There are three crucial clauses contained in BITs that set the course for the resolution of an international investment dispute. These clauses are the dispute settlement clause which would pertain to the interpretation of the treaty and most likely call for compulsory arbitration. The second clause provides for dispute settlement machinery, which laws would be applied.[8] Finally a clause that is controversial and aptly termed the 'umbrella clause', which obliges the state to observe certain terms towards the investor. The interpretation of these clauses has proved to be very contentious and this inordinately led to a rise in the number of investment disputes.[9]

The investment dispute settlement system has always been segmented with the minimum international standards being interpreted and applied differently in various jurisdictions.[10] Traditionally investment disputes were within the jurisdiction of domestic courts. Before the onset of the current investor state dispute settlement (ISDS) system in the mid-twentieth century,

[6] Sornarajah M' *The International Law on Foreign Investment'* 3ed (2010) 276.
[7] Sornarajah M' *The International Law on Foreign Investment'* 3ed (2010) 313.
[8] Wegen G 'Dispute settlement and arbitration' (1985) 59 *Transitional Legal Policy* 59 67.
[9] Berger A 'Do We Really Need a Multilateral Investment Agreement?' (2013) Development Institute.
[10] Anders A 'The world needs a multilateral investment agreement' *Peterson Institute for International Economics*; Berger A 'Do We Really Need a Multilateral Investment Agreement?' (2013) *German Development Institute.*

investment disputes that failed to be resolved through diplomatic dialogue or through the municipal court system remained unsettled.[11] The alternative which was largely untenable was that the investor would have to seek intervention from their home state through espousal of the claim. The investor's home state would then bring the claim to the host state through diplomacy or threat of use of force.[12] These methods left investors mostly unprotected because of the perceived lack of impartiality of municipal courts and the injured investor's home state that was under no obligation to espouse the claim.[13]

The main problem with investment is there is no overarching set of rules.[14] The issue that developing countries mainly, African developing countries have, is that the current investment regime was formulated by developed countries.[15] Concomitantly the investment dispute resolution is found within this fragmented westernized investment law regime. During the period after World War 1, investment disputes were referred for arbitration as use of force was no longer permitted.[16] In 1965, a convention on the settlement of investment disputes between states and foreign investors was concluded. This resulted in the establishment of the International Centre for Settlement of Investment Disputes (ICSID), an international arbitration institution for the settlement of international investment disputes. This was spearheaded by the World Bank with a system which was designed specifically for investment disputes, as will be discussed in greater detail in chapter 2.[17] Not all countries

[11] Sornarajah M' *The International Law on Foreign Investment'* 3ed (2010) 21.
[12] Johnson OT & Gimblett T. "From Gunboats to BITs: The Evolution of Modern International Investment Law," (2011) *Yearbook on International Investment Law and Policy* 657.
[13] Sornarajah M' *The International Law on Foreign Investment'* 3ed (2010) 320.
[14] Sauvant K 'The *evolving international investment law and policy regime: Ways forward.* Available at http://e15initiative.org/wp-content/uploads/2015/09/E15_no14_Investment_final_REV_x1.pdf (Accessed 27 November 2016).
[15] Sauvant K 'the regulatory framework for investment: where are we headed?' (2011) *Research in Global Strategic Management, Volume 15,* 413.
[16] Johnson OT & Gimblett T. "From Gunboats to BITs: The Evolution of Modern International Investment Law," (2011) *Yearbook on International Investment Law and Policy* 659.
[17] Schreuer C *'The World Bank/ICSID Dispute Settlement Procedures'* available at http://www.univie.ac.at/intlaw/wordpress/pdf/66_icsid.pdf (accessed 29 March 2017).

are parties to ICSID and even those that are members can agree to oust the jurisdiction of the ICSID tribunal.[18] Investment as a result is largely regulated by IIAs and agreements between private investors and governments. The dispute settlement method is chosen by the parties to the agreement. This further exacerbates the problems with the investment dispute settlement system as parties are free to choose institutional arbitration or ad hoc arbitration. This results in a lack of consistency, with the majority of awards being handed down by independent and differently constituted tribunals.[19]

[18] Scheuer C 'Investment treaty arbitration and jurisdiction over contract claims – the Vivendi I case considered' in Weiler T (ed.) *International investment law and arbitration*: leading cases from the ICSID, NAFTA, bilateral treaties and customary international law (2005) 294.

[19] Nilsson A & Engelsson O 'Inconsistent award in investment treaty arbitration; is an appeals court needed? *Journal of International arbitration* (2013) 565.

1.2. RESEARCH PROBLEM

The main question to be answered in this research is whether the current foreign investment dispute settlement system is legitimate enough to address the developmental issues faced by African countries. Is the current foreign investment dispute settlement system inclusive of the unique issues faced by African governments which are often found on the receiving end of huge damages claims? A comprehensive study of the current international investment dispute settlement regime is required to address these issues. A follow up question would be whether the foreign investment dispute settlement system was designed with African nations as host states in mind. What are the current issues being faced by the foreign investment dispute settlement system? What improvements can be made? How can these improvements be made in the African context?

1.2.1.Research objectives and aims

The research seeks to review the existing foreign investment dispute settlement system. The issues that have already been highlighted by several scholars and the rampant call for reform in investment dispute settlement will be examined. Lessons will be drawn from the current foreign investment dispute settlement system with special attention being paid to the tribunal set up by the Comprehensive Economic and Trade Agreement (CETA) between Canada and Europe. The main aim of the research is to present an analysis of the current investment dispute settlement regime, with particular focus on the issues faced by African countries. The mini thesis will conclude with proposals for reform in the investment dispute settlement regime, specifically by capacitating existing arbitral institutions in Africa and eventually creating an African Regional investment dispute settlement system housed within the Continental Free Trade Area (CFTA). The research will conclude with proposals for the incorporation of investment chapters in the Tripartite Free

Trade Area (TFTA) and CFTA and the structure of an investment dispute settlement system for the African region.

The research objective is broken down into the following aims:

i. To provide an assessment of the current international investment dispute settlement system in the African context.
ii. To identify and analyse the issues faced within the current investment dispute system.
iii. To critically analyse the solutions that have been proffered for the current investment dispute settlement system and whether these can be applied on the African continent.
iv. To propose suggestions for an African Regional investment court.

1.3. SIGNIFICANCE OF THE PROBLEM

The legal basis of the current investment dispute settlement regime is very multiplex, while many of the other international law dispute settlement mechanisms are anchored in well-defined treaty frameworks. Investment dispute settlement is spread across dispute resolution provisions contained in over 3000 IIAs, in other international conventions notably the ICSID Convention, the New York Convention and arbitration rules.[20]

The call for reform in the investment dispute settlement system has largely been about the far-reaching implications of ISDS.[21] This is the most prominent issue amongst a myriad of issues. There are also issues to do with the contradictions between arbitral awards leading to inconsistent interpretation of investment protection standards and unpredictability of decisions.[22] The difficulties arising from these issues are that they not only apply on a global level but also regionally as each continent has different development agendas. There has been an increase in the number of cases involving ISDS.[23] These investment disputes have generated strong debate amongst stake holders as the policy implications are far reaching as they encompass areas such as environment or public health.[24] This is even more concerning for African states as most countries are recipients of foreign direct investment. The crux of the current investment regime is protection of investments, this was the original design, and the system is rigged in favour of investors.[25] This is where the issues arise as African states have

[20] Gaukrodger, D & Gordon K "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", *OECD Working Papers on International Investment*, (2013) .
[21] Carim X 'International investment agreements and Africa's structural transformation: A perspective from South Africa' *South Centre Investment Policy Brief,* Issue No 4 (August 2015) 5.
[22] Sornarajah M' *The International Law on Foreign Investment*' 3ed (2010) 320.
[23] Laborde G 'The Case for Host State Claims in Investment Arbitration' *Journal of international dispute settlement* 97.
[24] Berger A 'Do We Really Need a Multilateral Investment Agreement?' (2013) German Development Institute.
[25] Mann H 'Reconceptualising international investment law: its role in sustainable development' *Lewis & Clarke Law Review* Vol 17 (2013) 534.

development considerations while trying to balance the flow of investments. Over 95 governments have faced challenges under ISDS of which 60 per cent were developing countries. In the African context 25 per cent of all reported investment disputes involve extractive industries which are vital for the development of African economies. [26]

Among the issues faced in the current investment dispute settlement regime is the independence of arbitrators, the time it takes for a matter to conclude and the cost of proceedings.[27] This mini-thesis contributes to the current debate on the legitimacy of the investment dispute settlement issues by considering the numerous developmental problems faced by African governments in the face of huge damage claims. When they face investment disputes and they have damages claims awarded against them, it is not an ideal situation. Foreign investment disputes are fundamentally about the right of governments to change policy in the face of an agreement that binds them not to do so. There are other factors that need to be considered when granting awards which cannot be done by a panel of arbitrators that most likely would have been selected from an international law firm with no inclination of the development issues faced by such governments. The suggestions to be made are the establishment of a regional court on the African continent which would be easier to establish because regional trade agreements are generally easier to negotiate than attempting to establish an international permanent court of investment. The tribunal established by CETA will serve as a prime example of how a regional court can be established and housed in the framework of the CFTA which is still being negotiated.[28]

[26] Carim X 'International investment agreements and Africa's structural transformation: A perspective from South Africa' *South Centre Investment Policy Brief,* Issue No 4 (August 2015) 6.
[27] Köppen A & d'Aspremont J, Global Reform vs Regional Emancipation: The Principles on International Investment for Sustainable Development in Africa, 6:2 *ESIL Reflection*.
[28] European Commission- A future multilateral investment court, available at http://europa.eu/rapid/press-release_MEMO-16-4350_en.htm (accessed 20 December 2016).

1.4. METHODOLOGY

The research will be a desktop study, as the research will be largely based on library research and internet sources. Primary resources will include the book by Sornarajah 'The International Law on Foreign Investment', the Investment chapter in CETA, the Common Market for Eastern and Southern Africa (COMESA) Investment Code and the Southern African Development Community (SADC) Finance and Investment Protocol (FIP). The CETA Tribunal provides a good comparator because it is housed in a trade agreement with an investment chapter, in a similar manner to the proposals made for the housing of the African tribunal in the CFTA. Secondary sources will include journal articles, internet sources, position researches and other scholarly material.

1.5. CHAPTER OUTLINE

1.5.1.Chapter One

This is the introduction which has provided the background to the problem and research problem. It also included research objectives, research aims, significance of the problem, the methodology adopted by the paper and the outline of the chapters.

1.5.2.Chapter Two

The history of the investment dispute system and its origins. It is important to understand the context wherein the customary international law was fashioned and where it originated. It will also examine how these practices were implemented on the African continent. It will analyse the organisations which house investment disputes, particularly the International Centre for Settlement of Investment Disputes (ICSID), which was formed for the sole purpose of settling investment disputes.

1.5.3.Chapter Three

This will provide an analysis of the current investment dispute settlement system and the issues that it faces will be provided. The proposed solutions to investment disputes will be examined regarding the CETA and whether it offers the ultimate solution which can be implemented on the African continent. The new approach to investment protection that is introduced by CETA shows a clear break from the investor state dispute settlement.

1.5.4.Chapter Four

This will examine the current investment dispute settlement mechanisms in Africa and the existing legal framework such as the SADC FIP, Pan African Investment Code together with a critique of the COMESA Investment Dispute Settlement system.

1.5.5.Chapter Five

This will be a conclusion with suggestions for the gradual implementation of a regional court of investment firstly through the TFTA then the CFTA.

CHAPTER TWO

2. THE EVOLUTION OF THE INTERNATIONAL INVESTMENT DISPUTE SETTLEMENT SYSTEM

2.1. INTRODUCTION

This chapter will examine the history of international investment law as a whole, where the law originated from and how the dispute settlement system came about. It is prudent to provide an overview of the complete history of international investment law as the international investment dispute settlement system was created within its context, and largely as a result of different norms. The political context in which the international investment regime was formulated has shaped the resultant rules fundamentally. These principles still resonate within the modern principles, structures, agreements and dispute resolution system.[29]

The foundations of international law and the resultant international investment law as it is understood currently lie firmly in the development of western culture and political organisation.[30] Due to the growth of European notions of sovereignty, the independent nations required an acceptable method whereby relations between states could be conducted in accordance with commonly accepted standards of behaviour, and international law filled the gap.[31] The consequent evolution of the international investment law regime was a process whereby one view, mainly the European imperialist, one became entrenched. The capital exporting nations were solely concerned with the protection of investment.[32] This brings to the fore the settlement of

[29] Sornarajah M' *The International Law on Foreign Investment'* 3ed (2010) 21; Miles K '*The origins of international investment law: empire, environment and the safeguarding of capital'* (2013)3.
[30] Shaw MN '*International Law'* 5ed (2003) 13.
[31] Shaw MN '*International Law'* 5ed (2003) 13.
[32] Miles K '*The origins of international investment law: empire, environment and the safeguarding of capital'* (2013) 7.

investment disputes. Wherein again the regime created was based on notions and ideologies of Western nations. Developing countries have long been eager to reduce what they regard as the privileges accorded to capitalist states by international law and international investment law. Developing countries lay great emphasis upon the sovereignty and independence of states and resent the economic influence of the West. The Western nations, on the other hand, have wished to protect their investments and nationals abroad and provide for the security of their property.[33]

The historical evolution of international investment law needs to be thoroughly investigated as the repercussions of the system have greatly influenced the current status quo.[34] The origins of the international investment system and dispute settlement will inform the current issues faced in these systems.

The chapter is divided into four parts, the history of international investment law, the history of international investment disputes, the history of international investment disputes in Africa and the legal framework of investment dispute settlement.

[33] Shaw MN '*International Law'* 5ed (2003) 733. Any significant growth in the number of unresolved investment disputes could be highly detrimental to the future of FDI flows throughout the world, and such disputes could also cause strains in diplomatic relations between governments. As a consequence, investment dispute settlement procedures will take on greater importance, and the existing system of institutional arrangements will be under much more detailed and critical scrutiny.

[34] Miles K '*The origins of international investment law: empire, environment and the safeguarding of capital'* (2013) 7.

2.2. THE HISTORY OF INTERNATIONAL INVESTMENT LAW

2.2.1. The Pre- Colonial Period

International investment law originated from European nations as they transformed their regional policies to protect property into international investment law applicable to property owned in their previous trading partners.[35] Fundamental to the protection of foreign investment is the concept of property.[36] An international minimum standard for the treatment of aliens and their property was developed as part of international customary law. This entailed a higher standard of protection than that available to the locals of the host state.

The Latin nations believed that aliens should be given equal treatment with nationals. The development of this approach was based on the increasing resentment of the domination of Western states. The Latin American states felt, in particular, that the international minimum standard concept had been used as a means of interfering in their internal affairs. Accordingly, the Calvo doctrine was formulated. This was a reiteration of the principle of non-intervention together with the assertion that foreign investors were entitled only to the same rights as the nationals of the host nation.[37]

[35] Miles K '*The origins of international investment law: empire, environment and the safeguarding of capital*' (2013) 7.

[36] M Sornarajah *The Clash of Globalisations and the International Law on Foreign Investment* The Simon Reisman Lecture in International Trade Policy 8. The hegemonic power seeks to universalise the concept of property that it favours through the instrumentality of international law. There is a clear project to foster onto the international regime, as the centrepiece of foreign investment protection, a theory of absolute protection of foreign investment that sits uneasily with the constitutional systems that are recognised in the different parts of the world.

[37] Sornarajah M' *The International Law on Foreign Investment'* 3ed (2010) 19; The Calvo Doctrine was incorporated into agreements between Central and South American countries and advanced on occasion in diplomatic correspondence with the United States and European countries From gunboats

The alternative view required that aliens be treated in accordance with customary international law, which was inordinately higher than the national standard. This was called the Hull doctrine, it stated that when foreign property was expropriated the injured investor was entitled to prompt, adequate, and effective compensation.[38] This was motivated by the developed nation's concern that the standards of treatment provided to nationals in a host state may be low and therefore unacceptable.[39] Nationals had to seek redress for grievances exclusively in the domestic arena[40]

Both these views were based on the idea that the law should be designed to further the free movement of trade and investments across state boundaries.[41] However the Latin American states were generally too weak during this period to withstand the demands of the Western powers that injuries to foreign nationals be remedied according to the Western conception of international law.[42] The Hull – rule thus prevailed and was taken up in later IIAs.

[38]Hackworth G, *Digest of international law,* Vol. 3,659; This requirement of full compensation for expropriation was most clearly articulated in the 1930s when it was challenged by the government of Mexico. Mexico confiscated various properties between 1915 and 1940.The United States, whose nationals suffered from these acts of expropriation, sought compensation for its affected citizens. In response to the takings by Mexico, the American Secretary of State, Cordell Hull, put forth what has become the leading formulation of the full compensation standard.

[39]Sornarajah M' *The International Law on Foreign Investment'* 3ed (2010) 19; The developed states of the West have argued historically that there exists an 'international minimum standard' for the protection of foreign nationals that must be upheld irrespective of how the state treats its own nationals, whereas other states maintained that all the state need do is treat the alien as it does its own nationals (the 'national treatment standard').

[40] Shaw MN '*International Law'* 5ed (2003) 734.

[41] Sornarajah M' *The International Law on Foreign Investment'* 3ed (2010) 19.

[42]Johnson OT & Gimblett T. "From Gunboats to BITs: The Evolution of Modern International Investment Law," (2011) *Yearbook on International Investment Law and Policy* 657.

2.2.2. The Colonial Period

In the eighteenth and nineteenth centuries, investment largely took place in the context of colonial expansion. These investments did not need specific protection as the colonial legal systems were integrated with those of the imperial powers. The imperial system gave sufficient protection to the investments which went into the colonies [43] One aspect of this protection was to ensure that colonial legal systems were changed in order to accommodate European notions of individual rights of property and freedom of contract. The power to lobby for laws that protected foreign owned property would have been enormous as it was the major trading companies which had first established colonial power in the states that were later integrated into the imperial system.[44]

The imperial system ensured the protection of the investment within the system, there was no need for the growth of a separate system of law for the protection of foreign investments.[45] Where investments were made in areas which remained outside of the imperial system, territories were established into which the jurisdiction of the state did not extend, so that trade and investment could be facilitated.[46]The United States of America (USA) began to conclude bilateral treaties of Friendship, Commerce and Navigation (FCNs), the purpose of which was to establish trade relations with its treaty partners. These treaties had provisions guaranteeing absolute protection of property. They also required payment of compensation for expropriation and guaranteed most favoured nation and national treatment with respect to the right to engage in certain business activities in the territory of the other party.

[43] Sornarajah M' *The International Law on Foreign Investment'* 3ed (2010) 19. 'Power was the final arbiter of foreign investment disputes in this early period. The use of force to settle investment disputes outside the colonial context was a frequent occurrence.' Johnson OT & Gimblett T. "From Gunboats to BITs: The Evolution of Modern International Investment Law," (2011) *Yearbook on International Investment Law and Policy* 657.
[44] Sornarajah M' *The International Law on Foreign Investment'* 3ed (2010) 20.
[45] Sornarajah M' *The International Law on Foreign Investment'* 3ed (2010) 20.
[46] Sornarajah M' *The International Law on Foreign Investment'* 3ed (2010) 19.

Occasionally, they even provided limited protection for repatriation of funds. It is clear that the main focus was on establishing commercial relations and protecting property, as opposed to investment.[47] The FCNs were limited in scope and the protection afforded was weak, because there was no means of enforcement. Therefore, a blend of diplomacy and force were the primary means of protecting investment.[48]

During the nineteenth century the western economies began to expand rapidly, this caused heavy capital outflow especially towards the developing countries.[49] This resulted in substantial areas of developing economies falling within the ownership and control of western corporations.

[47] Vandevelde K. '*A Brief History of International Investment Agreements'* International Law and Policy 160.
[48] Vandevelde K. '*A Brief History of International Investment Agreements'* International Law and Policy 161.
[49] Shaw & Malcolm 'International *Law'* 5ed (2008) 738.

2.2.3. The Post-Colonial Period

The post-colonial era began with the end of the second world war and continued until the collapse of the Soviet Union.[50] The use of force to coerce the settlement of disputes continued even after the Second World War and into the post-colonial period. Capital exporting countries, which operated outside the colonial context which provided inherent protection, were keen to devise legal justification for pursuing the claims of their nationals and for the use of force if such use became necessary.[51]This was the advent of IIAs as we now know them. There were three specific events that shaped the structure and content of IIAs during that period.[52]

To begin with, there was a reaction to the severe economic depression that had preceded the war as a result of the protectionist policies of the 1920s.[53]This is what is believed to have led the consensus in 1947 to the conclusion of the General Agreement on Tariffs and Trade (GATT'), which resulted in a multilateral agreement. This shift of trade agreements from bilateral to multilateral set in motion consecutive rounds of negotiations aimed at worldwide trade liberalisation.[54] A separate treaty, the Havana Charter, which was intended to create the International Trade Organisation, which would have included some investment never entered in to force.[55] Therefore, entry into force of the GATT created a major multilateral organization with competence over trade, but not investment. Investment

[50] Sornarajah M' *The International Law on Foreign Investment'* 3ed (2010) 20.
[51] Sornarajah M' *The International Law on Foreign Investment'* 3ed (2010) 20.
[52] Vandevelde K. '*A Brief History of International Investment Agreements'* International Law and Policy 160;
[53]Vandevelde K *'A Brief History of International Investment Agreements'* International Law and Policy 161; International investment law as late as the period immediately following the Second World War has been characterized as "an ephemeral structure consisting largely of scattered treaty provisions, a few questionable customs, and contested general principles of law." Salacuse J &. Sullivan N, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain,* Harvard International Law .Journal. 67, 68.
[54] General Agreement on Tariffs and Trade (GATT), 1947.
[55] Ellsworth PT *'The Havana Charter: Comment'* The American Economic Review Vol. 39, No. 6. 1270.

would need to be treated outside the GATT framework, which to a large extent meant separately from trade.[56]

This prompted the post-war FCNs which included some innovations. They extended protection in treaties from individuals to corporate entities, as earlier agreements had protected individuals only.[57] In essence, the current treaty-based protection of investment that reflects the Euro-American consensus is nothing new. What these post war FCNs introduced was the inception of the dispute resolution provisions in what would later be BITs.[58]

These agreements not only included a dispute resolution provision but they also contained a clause consenting to the jurisdiction of the international court of justice (ICJ) over disputes involving the interpretation or application of the agreement.[59] This inclusion of a dispute resolution provision seemingly solved the problem that a host state could not be subject to the jurisdiction of an international tribunal without its consent. Foreign investors still needed to exhaust local remedies, however to persuade their home state to espouse their claim before pursuing a remedy under the ICJ.[60]

The succeeding major event that shaped the international investment regime of the post-colonial period was the process of decolonisation that began after the war. This led to the creation of a great deal of newly independent but economically undeveloped countries.[61] These developing states were viciously defensive of their independence and regarded foreign investment as a form of neo-colonialism because it involved foreign control over the means of

[56] Vandevelde K. '*A Brief History of International Investment Agreements'* International Law and Policy 161.
[57] Walker H '*Modern Treaties of Friendship, Commerce and Navigation,'* Minnesota Law Review 42.
[58] Johnson OT & Gimblett T. "From Gunboats to BITs: The Evolution of Modern International Investment Law," (2011) *Yearbook on International Investment Law and Policy*
[59] Vandevelde K. '*A Brief History of International Investment Agreements'* International Law and Policy 164; Salacuse J *'Towards a New Treaty Framework for Direct Foreign Investment '*Journal of Air Law and Commerce.
[60] Vandevelde K. '*A Brief History of International Investment Agreements'* International Law and Policy 165.
[61] Rubins & Kinsella *International investment, political risk and dispute resolution. A practitioner's guide* (2005) 159.

production.[62] Many developing countries closed their economies to new foreign investment and began to expropriate existing investment. Amidst the radical economic and political transformation these developing countries would seek to form agreements with other developing countries where needed.[63] However, when various developing countries gained independence, they began to be influenced by the nationalisation measures taken by the Soviet Union after the success of the communist revolution. Foreign owned properties were under threat of expropriation in these developing countries due to this influence and call for nationalisation.[64]

Therefore, the third event that shaped the investment law regime was the emergence of the socialist bloc led by the Soviet Union.[65] Immediately after the war, the communist states commenced substantial expropriations including foreign-owned assets. While doing this, they also encouraged developing nations to also do the same as they viewed economic relations with the developed countries as exploitative. The communist nations advocated for state regulation as the best path to economic development rather than liberalisation of the market as advanced by western nations.[66]

In 1974, the General Assembly adopted the Declaration of the New International Economic Order (NIEO), which stated that nations have "full permanent sovereignty" over their natural resources and other economic

[62] Vandevelde K. '*A Brief History of International Investment Agreements'* International Law and Policy 166; Salacuse J &. Sullivan N*, Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain,* Harvard International Law .Journal 74-75.
[63] Rubins & Kinsella *International investment, political risk and dispute resolution. A practitioner's guide* (2005) 160.
[64] Shaw MN ' *International Law*' 5ed (2008) 738
[65] Vandevelde K. '*A Brief History of International Investment Agreements'* International Law and Policy 167.
[66] Vandevelde K. '*A Brief History of International Investment Agreements'* International Law and Policy 168; What was articulated by the developing states was a set of rules that was highly sovereignty-centred and emphasised the right of the newly independent developing states to restructure their economies. This, they sought to accomplish through nationalisation of foreign property, unhindered by rules of international law that emphasised sanctity of contract and property and required the payment of the full value of the property as compensation—a requirement that newly independent countries could hardly meet.'

activities.[67] This eventually led to the Charter of Economic Rights and Duties of States (CERDS) in 1974. The Charter stated that expropriation was allowed for nationalisation and that compensation could be paid, not that it must be paid, and that the amount of compensation would be based on municipal law, rather than international law.[68] This seemed to restate the Calvo doctrine, quit befitting since the Mexican President had introduced the motion.[69]

This prompted a response from the developed nations against the threat of uncompensated expropriation through proliferation of BITs.[70] Despite the fact that the first BIT had been signed in 1959, they had not gained popularity until this period.[71] These new BITs were remarkably uniform in content and contained several distinctive features.[72] The primary features of the BITs are that they dealt exclusively with investment. They were also in the beginning phases negotiated principally between a developed and a developing country. The underlying assumption was that the agreement would protect the

[67] Gilman N *The New International Economic Order: A Reintroduction* Humanity Journal available at http://humanityjournal.org/wp-content/uploads/2015/03/HUM-6.1-final-text-GILMAN.pdf (accessed 13 March 2017).

[68]Article 2, Charter of Economic Rights and Duties of States General Assembly, 1974.

[69] Charter of Economic Rights and Duties of States General Assembly resolution, 3281(XXIX) available at http://legal.un.org/avl/ha/cerds/cerds.html (accessed 13 March 2017).

[70]Salacuse J *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries* The International Lawyer 657; Vandevelde K. '*A Brief History of International Investment Agreements'* International Law and Policy 169; 'Germany was the first to conclude such an agreement. Having lost its foreign investment as a result of its defeat in the Second World War, Germany was especially sensitive to the political risks to which foreign investment was exposed. In 1959, Germany concluded the first two bilateral investment treaties, one with Pakistan and the other with the Dominican Republic. Other Western European countries quickly followed Germany's lead. France concluded its first BIT in 1960, Switzerland in 1961, the Netherlands in 1963, Italy and the Belgium-Luxembourg Union76 in 1964, Sweden77 and Denmark in 1965, and Norway in 1966.'

[71]Salacuse J *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries* The International Lawyer 657; Vandevelde K. '*A Brief History of International Investment Agreements'* International Law and Policy 169; 'In 1959, Germany concluded the first two bilateral investment treaties, one with Pakistan and the other with the Dominican Republic. Other Western European countries quickly followed Germany's lead. France concluded its first BIT in 1960, Switzerland in 1961, the Netherlands in 1963, Italy and the Belgium-Luxembourg Union76 in 1964, Sweden77 and Denmark in 1965, and Norway in 1966.'

[72] Salacuse J &. Sullivan N, Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain, *Harvard International Law .Journal* 73; United Nations Conference on Trade and Development (UNCTAD), bilateral investment treaties in the mid-1990s available at https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjEqfiliJzTAhXrL8AKHXF7ADYQFggaMAA&url=http%3A%2F%2Functad.org%2Fen%2Fdocs%2Fiteiia20065_en.pdf&usg=AFQjCNHfG0eHuPUon3pTBJYF06egljjGfw&sig2=LT0KVqM8Ph4ZXXEYSObO_A (accessed 7 March 2010).

investment of the developed country in the territory of the developing country.[73]

In the wake of globalisation and liberalisation of markets, competition for foreign investment arose, spurred on by the success of the Asian nations particularly the success of China. Developing countries began falling over each other in their enthusiasm to court foreign investment.[74] Similar to the modern FCNs, the BITs contained a clause for investment dispute settlement between the parties. This was a slightly different clause to that contained in the FCNs, whereas the FCNs had provided for submission of disputes to the ICJ the BITs provided for submission of disputes to an ad hoc arbitral tribunal.[75]

A prime example of a dispute settlement clause contained in a FCN was Article XXIV of the 1956 Nicaragua-United States Treaty of Friendship, Commerce and Navigation (the FCN Treaty).[76] Paragraph 2 of that provision provides:

> "Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other specific means."

[73] Salacuse J *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries* The International Lawyer 661.
[74] Salacuse J *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries* The International Lawyer 672.
[75] Rubins & Kinsella *International investment, political risk and dispute resolution. A practitioner's guide* (2005) 419; The BIT between the United States and Ecuador, art. VII:
Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), except to the extent modified by the Parties or by the arbitrators, shall govern. Available at https://www.state.gov/documents/organization/43558.pdf (accessed 8 March 2017).
[76] Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, Nicaragua – USA 7 UNTS 3 (entered into force May 25, 1958).

When Nicaragua invoked this clause, it caused a violent reaction by the USA as they notified the UN Secretary General of their termination of their adherence to the optional regime under Article 36(2) of the ICJ Statute.[77]

The innovations contained in BITs dispute resolution provision seemingly solved the problem that a host state could not be subject to the jurisdiction of an international tribunal without its consent. In the BIT between the USA and Ecuador, the evolution contained is evident. Disputes could now be submitted by either party to an arbitral tribunal. However foreign investors still needed to exhaust local remedies and to persuade their home state to espouse their claim before pursuing a remedy under the ICJ.[78]

[77] Reisman M, *"The Other Shoe Falls: The Future of Article 36(1) Jurisdiction in the Light of Nicaragua*" The American Journal of International Law 162.
[78] Vandevelde K. '*A Brief History of International Investment Agreements'* International Law and Policy 165.

2.3. THE DEVELOPMENT OF AN INTERNATIONAL INVESTMENT DISPUTE SETTLEMENT SYSTEM

The western nations had long established a dispute settlement mechanism during the eighteenth and part of the nineteenth century namely the threat or use of force on behalf of their nationals, however this was rarely an end in itself.[79] As the nineteenth century progressed, arbitration was encouraged through the various mixed claims tribunals.[80] The model for investment dispute settlement in the modern era was provided by the ad hoc tribunals which were set up by Great Britain and the United States to resolve the claims of their respective nationals.[81]This prototype, or variations of it, became the standard for later mixed claims commissions.[82]

The adoption of the Convention for the Pacific Settlement of International Disputes at The Hague greatly advanced international investment dispute settlement. Arbitration was recognised as the most effective and equitable, means of settling disputes which diplomacy has failed to settle. Chapters II and III of the treaty went on to establish, respectively, a Permanent Court of Arbitration at The Hague and arbitral procedures to govern its operation. [83]

[79] Sornarajah M' *The International Law on Foreign Investment'* 3ed (2010) 23.
[80] Dolzer & Stevens *Bilateral Investment Treaties* (1995) 123; Sornarajah M' *The International Law on Foreign Investment'* 3ed (2010) 23.
[81] Johnson OT & Gimblett T. "From Gunboats to BITs: The Evolution of Modern International Investment Law," (2011) *Yearbook on International Investment Law and Policy* 653.
[82] Johnson OT & Gimblett T. "From Gunboats to BITs: The Evolution of Modern International Investment Law," (2011) *Yearbook on International Investment Law and Policy* 659 ; The functions and limits of arbitration and judicial settlement under private and public international law," 18 *Duke Journal of Comparative & International Law* 259 (2008), pp. 266–271
[83] Convention for the Pacific Settlement of International Disputes (1899) available at https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/1907-Convention-for-the-Pacific-Settlement-of-International-Disputes.pdf (accessed 8 March 2017).

After World War I there was a renewed interest in arbitration as a means of dispute settlement. A more consistent and coherent jurisprudence concerning the treatment of alien property began to emerge from the decisions of a variety of arbitral institutions.[84] The treaty of Versailles set the peace terms between Germany and the allied powers and contained several important provisions on dispute settlement including that of investments. The treaty established mixed arbitral tribunals which were tasked with resolving private disputes between nationals of Germany and the allies. This eventually led to the creation of the Permanent Court of Justice.[85]

As there had been an increase in disputes between private parties, in 1923, the League of Nations adopted the Geneva Protocol on arbitration clauses, in which the parties agreed to recognise the validity of arbitration agreements between private parties.[86] The International Chamber of Commerce followed suit by adopting rules of arbitration in 1922 and consequently established its Court of Arbitration the following year.[87] Subsequently in 1927 the Geneva Convention for the Execution of Foreign Arbitral Awards, was adopted by the League of Nations, contracting States agreed to enforce arbitral awards made in conformity with the 1923 Protocol.[88]

As more BITS were signed, it began the thrust of public international law into the private realm. Private persons mostly under the auspices of ICSID and the UNCTAD rules were tasked with deciding the fate of nations and making decisions that were often against public policy. Thus the tussle for the right to regulate began; this will be discussed in more detail in Chapter 3.

[84]The Treaty of Versailles, 1919.
[85] Johnson OT & Gimblett T. "From Gunboats to BITs: The Evolution of Modern International Investment Law," (2011) *Yearbook on International Investment Law and Policy* 658.
[86]Geneva Protocol, 1923: Protocol on arbitration clauses available at https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-6.en.pdf (accessed 13 March 2017).
[87] United Nations Conference on Trade and Development, Dispute settlement*: International commercial arbitration* (2005)21.
[88] Geneva Convention on the Recognition and Enforcement of Foreign Arbitral Awards, September 26, 1927.

2.4. THE LEGAL FRAMEWORK OF INVESTMENT DISPUTE SETTLEMENT

It is interesting to note that the Conventions that are codified and currently in existence express the developing nations' views however they do not have enough power to enforce the CERDS or the NIEO. The international investment dispute settlement regime is seemingly based on a system which relies exclusively on the private power of multinational corporations to exploit arbitration, a tool once within the realm of private, consensual dispute resolution.[89]These western nations have also empowered the creation of a body of rules that give effect to these arbitral processes.[90] These rules that have been built up over the years through the manipulation of weak sources of international law have become the foundation of international investment law.

[89] Miles K '*The origins of international investment law: empire, environment and the safeguarding of capital*' (2013) 7.
[90] M Sornarajah '*The Clash of Globalisations and the International Law on Foreign Investment*' The Simon Reisman Lecture in International Trade Policy 13

2.4.1. Domestics Courts of the host state

The default position, in the absence of an agreement under customary law is that the injured investor must seek remedy in the host nation's domestic court.[91] This is the position taken by the developing countries and it is clearly expressed in the CERDS and NIEO.[92] These two conventions are still in force but have somehow been taken out of existence by the use of BITs which include consent to arbitration and provide for investor state dispute settlement. African countries particularly reflect this position in their regional investment instruments which shall be discussed in greater detail in Chapter 4.

The exhaustion of domestic remedies was a requirement and technically remains one in the absence of an agreement stating otherwise. However, given the current situation where investor state dispute settlement is contained in the agreements, particularly the BITs, it is not a requirement that local remedies be exhausted.[93]

An interesting clause that may result in an investment dispute being adjudicated in a domestic court is termed the 'fork in the road' clause. This provision provides that an investor must elect which forum they would prefer to bring the claim in, with the option of a domestic court or an international tribunal. Once this choice is made, it is final and the investor will not have recourse to any other forum.[94]However most certainly investors are not inclined to bring claims in domestic courts, especially in African nations where they fear bias.

[91] Dolzer R & Schreuer C *Principles of International Investment Law* (2008) 214.
[92] Article IV (e) of the UN Declaration on the establishment of New International Economic Order ; Article 2(b) of the Charter
[93] Article 26 of the International Convention on the settlement of Investment disputes.
[94] Sornarajah M' *The International Law on Foreign Investment'* 3ed (2010) 438.

Over and above BITs, foreign investors often have contracts with host states that govern their investments. These contracts will contain forum clauses which will give jurisdiction to the host state's domestic courts. This created a problem because when disputes arose investors would invoke the treaty provisions allowing for the jurisdiction of an international tribunal, while the host states relied on the forum clauses in the contract. This has led to a number of arbitration cases with conflicting views, these shall be discussed in more detail in Chapter 3.[95]The situation is further exacerbated by the fact that some treaties have jurisdiction over all investment disputes stretching out to contract claims.

[95] Sornarajah M' *The International Law on Foreign Investment'* 3ed (2010) 276.

2.4.2. Diplomatic Protection

A state that elects to take up one of its national's claims through diplomatic protection espouses the claim against another state and takes it up in its own name. This remedy although still available is dependent on the injured investor's nation; it is exclusively within their discretion whether a claim can be espoused or not.[96] This remains an untenable option as the protection even once given can be taken away. Negotiations between the states can be fruitless and when it reaches this level, the investor's nation may escalate the matter to the ICJ. [97] In many instances investors no longer require this protection as they have direct access through ISDS. The interrelationship between investment protection treaties and the background rules of customary international law remains relevant, it has been curtailed by some agreements. For example, Article 27(1) of the ICSID Convention states explicitly that, for ICSID proceedings, the ISDS regime replaces the diplomatic protection regime: "No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention…'.[98] The role of diplomatic protection is also in the enforcement of arbitral awards from ISDS.[99] Article 27(1) of the ICSID Convention also provides a place for diplomatic protection in the ISDS system. The language quoted above continues: '…unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute." As more states fail to abide by and comply with awards rendered in the ISDS regime, there may be a role for diplomatic protection as a supplement to ISDS regime.

[96] Dolzer R & Schreuer C *Principles of International Investment Law* (2008) 211.
[97] Dolzer R & Schreuer C *Principles of International Investment Law* (2008) 212.
[98] Dolzer R & Schreuer C *Principles of International Investment Law* (2008) 213.
[99] Dolzer R & Schreuer C *Principles of International Investment Law* (2008) 213.

2.4.3. Institutionalised Arbitration

2.4.3.1. ICSID

ICSID was the brainchild of Aaron Broches, the General Counsel of the World Bank.[100] It was formally adopted within the framework of the World Bank in 1965 and came into force on 14 October 1966. The motivation behind its creation was the provision of satisfactory legal infrastructure for the promotion of international private investment.[101] This would be by providing effective procedures for impartial settlement of disputes rather than by seeking multilateral agreement on investment which had already failed.[102]The Convention was designed to facilitate dispute settlement through conciliation and arbitration by the establishment of the International centre for the settlement of investment disputes (ICSID). This is the responsible body for settlement of investment disputes between states and nationals from other contracting states.[103]

ICSID provides standard clauses that can be used by the parties and detailed rules of procedure. This system also allows for the selection of arbitrators and the conduct of the proceedings. The centre also provides venue and all administrative work is done by them.[104] The jurisdiction of ICSID only extends to nationals whose states are parties and states that are party to the Convention.[105]

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[100]Schreuer C *The ICSID Convention: A Commentary* 2ed (2009) 10; This initiative carried forward a more general one for the protection of international investment that had begun in the Organisation for European Economic Co-operation (now the Organisation for Economic Co-operation and Development) in the late 1950s and that ended in the production in 1962 of the OECD Draft Convention on the Protection of Foreign Property.

[101] The International Chamber of Commerce followed suit by adopting rules of arbitration in 1922 and consequently established its Court of Arbitration the following year.[101]

[102] Schreuer C *The ICSID Convention: A Commentary* 2ed (2009) 10.

[103] Article 1 of the Convention for the International Settlement of Investment Disputes, 1966.

[104] Dolzer R & Schreuer C *Principles of International Investment Law* (2008) 223.

[105] Article 25 (1) of the Convention for the International Settlement of Investment Disputes, 1966.'The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by

The institutionalisation of arbitration through ICSID introduced key features in international investment law which have now become somewhat jus cogens.[106] State immunity was restricted as the Convention is self-contained. It is independent of the interference of any body; no domestic court can stay, compel or set aside an award.[107] ICSID awards are binding and final and cannot be subjected to review unless they meet very narrow conditions.[108] All awards are to be enforced as a final judgement of a domestic court in all states party to the Convention.[109]

that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.'

[106] Dolzer R & Schreuer C *Principles of International Investment Law* (2008) 223.

[107] Dolzer R & Schreuer C *Principles of International Investment Law* (2008) 223; Schreuer C *The ICSID Convention: A Commentary* 2ed (2009) 10.

[108] Article 53 of the Convention for the International Settlement of Investment Disputes, 1966.

[109] Article 54 of the Convention for the International Settlement of Investment Disputes, 1966.

2.4.3.2. ICSID Additional Facility

The ICSID Additional Facility was created on September 27, 1978. It offers arbitration, conciliation, and fact-finding services for certain disputes that fall outside the scope of the ICSID Convention.[110] It is open to a state and a foreign national, one of which is not an ICSID member state or a national of an ICSID member state to subject them to the jurisdiction.[111] Arbitration or conciliation of disputes is not governed by the ICSID Convention; it is only the Additional Facility rules which apply. The drawback with this is that the ICSID Convention is not applicable even to the awards issued by the Additional Facility; therefore, enforcement of the award may be problematic. The applicable law for the enforcement of awards rendered by the Additional Facility is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.[112]

[110] Article 54 of the Convention for the International Settlement of Investment Disputes, 1966.
[111] Article 2 of the Additional Facility Rules provides : 'The Secretariat of the Centre is hereby authorized to administer, subject to and in accordance with these Rules, proceedings between a State (or a constituent subdivision or agency of a State) and a national of another State, falling within the following categories'.
[112] Dolzer R & Schreuer C *Principles of International Investment Law* (2008) 225.

2.4.3.3. UNCITRAL

The United Nations Commission on International Trade Law (UNCITRAL) rules on Commercial Arbitration, 1976 were created specifically for commercial disputes, but they are used for investment disputes at times.[113] These rules do not provide a system to administer proceedings like ICSID, they merely provide rules which can be applied under any existing institution. It is up to the parties to provide the administrative framework and they may create an ad hoc tribunal anywhere.[114]

UNCITRAL has taken a positive step by creating rules for transparency in arbitral proceedings, particularly investment treaty arbitration.[115] The rules on transparency apply in relation to disputes arising out of treaties concluded prior to 1 April 2014, when parties to the relevant treaty, or disputing parties, agree to their application. The rules also apply in relation to disputes arising out of treaties concluded on or after 1 April 2014 , when ISDS is initiated under the UNCITRAL Arbitration Rules, unless the parties otherwise agree.[116] These rules are also available for use in investor-state arbitrations initiated under rules other than the UNCITRAL Arbitration Rules, and in ad hoc proceedings.[117] These rules have been cemented by the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, which entered into force on 18 October 2017.[118] The Convention is an instrument by which parties to investment treaties concluded before 1 April 2014 express their consent to apply the UNCITRAL rules on transparency. This convention supplements existing investment treaties with respect to transparency-related obligations.

[113]Resolutions adopted by the General Assembly 40/72. Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law: 'Recognizing the value of arbitration as a method of settling disputes arising in international commercial relations'.
[114] Dolzer R & Schreuer C *Principles of International Investment Law* (2008) 228.
[115] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014).
[116] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014).
[117] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014).
[118] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (the "Mauritius Convention on Transparency").

2.4.3.4. The International Chamber of Commerce

This is an arbitral institution that was founded in 1919 with its seat in Paris. It was initially started as a chamber where dialogue was encouraged among stakeholders. It has evolved into machinery that advances the interests of private businesses.[119] The ICC provides guidance and administrative assistance for individual cases.

2.4.3.5. The London Court of International Arbitration

This was previously the London Chamber of Arbitration which had been established in 1892. It was designed to deal with purely commercial disputes but its reach has extended to investor-state dispute settlement. It has its own set of rules but if requested it can apply UNCITRAL rules.

2.4.3.6. The Permanent court of Arbitration

As stated in the previous section, this court was established by the Convention on Pacific settlement of international disputes. Despite the name this is not a court but it administers and facilitates arbitration and conciliation. Unlike the ICJ, the Permanent Court of Arbitration has no sitting judges: the parties themselves select the arbitrators. The sessions of the Permanent Court of Arbitration are held in private and are confidential. The Court also provides arbitration in disputes between international organisations and between states and international organisations.[120]

[119] https://iccwbo.org/chamber-services/world-chambers-federation/history-chamber-movement/ (accessed 13 March 2017).
[120] http://www.haguejusticeportal.net/index.php?id=311 (accessed 13 March 2017).

2.4.4. Ad hoc arbitration

If arbitration is not supported by a particular arbitration institution, it is referred to as ad hoc arbitration. Ad hoc arbitration requires an arbitration agreement that regulates a number of issues. These include the selection of arbitrators, the applicable law and a large number of procedural questions.[121]

The institutionalisation of the right of autonomous recourse to a remedy in the treaties has resulted in the creation of an investment protection regime which does not cater to the interests of developing countries at all.[122] Too much power is handed over to multinational corporations and shrewd counsel to devise means to check against the ability of states to respond to economic or other situations that pose harm to the social interests of the people. To that extent, the charge that the current investment dispute settlement mechanism serves the interests of multinational corporations exclusively is well made out.[123]This task is made easy by the existence of a permanent specialist arbitral institutions, such as ICSID, which facilitate disputes for parties to the Convention.[124]

[121] Dolzer R & Schreuer C *Principles of International Investment Law* (2008) 225.
[122] M Sornarajah '*The Clash of Globalisations and the International Law on Foreign Investment*' The Simon Reisman Lecture in International Trade Policy 16.
[123] M Sornarajah '*The Clash of Globalisations and the International Law on Foreign Investment'* The Simon Reisman Lecture in International Trade Policy 16.
[124] M Sornarajah '*The Clash of Globalisations and the International Law on Foreign Investment'* The Simon Reisman Lecture in International Trade Policy 13.

2.5. INVESTMENT DISPUTE SETTLEMENT IN AFRICA

The regulation of foreign investment in Africa like the rest of the world is scattered across several treaties and even some RTAs. Therefore, it follows that the investment dispute settlement system is governed by the same agreements. It must be noted that investment regulations that are to be discussed in this thesis, largely govern inter-African investments. It has already been seen that African nations as part of the developing states hold no power in the negotiation of BITS which resultantly govern the investment and the dispute settlement system.[125]

Ofodile posits that while African countries appear to be mute on the on-going debate about the investment dispute settlement system, these countries have not been particularly silent on the substance of the debate and are critical of the current system.[126] Ofodile argues that, the position of countries in Africa can be gleaned from their approach to the settlement of investment disputes at the sub-regional level, particularly in Eastern and Southern Africa. This is evidenced by the IIAs for the COMESA Common Investment Area (CCIA) and in the SADC FIP as these represent attempts by some countries in Africa to introduce features in the settlement of investment disputes that will transform the traditional approach.[127]

[125] M Sornarajah '*The Clash of Globalisations and the International Law on Foreign Investment*' The Simon Reisman Lecture in International Trade Policy 9; Developed countries often drafted BITs then gave them to developing nations for signature, which they signed with little to no changes.

[126] Ofodile U *'Africa and the System of Investor-State Dispute Settlement: To Reject or Not to Reject?'* available at http://blogaila.com/2014/10/12/africa-and-the-system-of-investor-state-dispute-settlement-to-reject-or-not-to-reject-uche-ewelukwa-ofodile/ (accessed 13 March 2017).

[127] Ofodile U *'Africa and the System of Investor-State Dispute Settlement: To Reject or Not to Reject?'* available at http://blogaila.com/2014/10/12/africa-and-the-system-of-investor-state-dispute-settlement-to-reject-or-not-to-reject-uche-ewelukwa-ofodile/ (accessed 13 March 2017).

It has been noted that even when African states have become party to the relevant treaties, there remains the perception that their courts cannot be relied on to apply the text correctly or in good faith.[128] Further to that the national legal frameworks are viewed as not conducive for the constitution of arbitral tribunals and to conduct arbitration, permitting the local court to interfere unduly in arbitral proceedings.[129] Africa is home to multiple institutional arbitration centres such as the Cairo Regional Centre for International Commercial Arbitration (CRCICA). Although most centres host commercial arbitration matters, it has been observed that much more needs to be done to enhance their capacity in terms of the number and quality of arbitrators, adequate staff and finances to ensure that they are up to task in facilitation of investment arbitration.[130] There have been inadequate legal regimes and infrastructure for the efficient and effective organization and conduct of international commercial arbitration in some of the African countries with some countries still having archaic laws.[131] This has denied the local international arbitrators the fora to display their skills and expertise in international commercial arbitration since disputants shun the local arbitral institutions, if any, for foreign institutions.[132] There is need to ensure that African countries review and harmonise their arbitration laws so as to ensure that arbitration institutions emerge across Africa.[133]

By formulating their own investment rules, African nations are beginning to control their destiny in the development of international investment law. They have adopted investment instruments which they consider to be more adequate in light of the specific needs of African countries. The current agreements that are being drafted seek to attract foreign investment and to

[128] McLaughlin JT, "Arbitration and Developing Countries," The *International Lawyer*, Vol. 13, No. 2. 212.
[129]McLaughlin JT, "Arbitration and Developing Countries," The *International Lawyer*, Vol. 13, No.212.
[130] Muigua Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya 14.
[131] Muigua K, „Promoting International Commercial Arbitration in Africa", 14.
[132] Muigua K, 'Reawakening Arbitral Institutions for Development of Arbitration in Africa' 23.
[133] Muigua K, 'Reawakening Arbitral Institutions for Development of Arbitration in Africa' 23.

achieve sustainable development objectives.[134] It is pertinent to state the African position after having discussed the history of the investment dispute settlement system. It becomes apparent that African states have largely been spectators in the development of the investment dispute settlement system, this has now started to change with the onset of inter-African investment agreements. The succeeding chapter will focus on the issues in the current investment disputes settlement regime particularly those faced by African states.

[134] Mbengue M '*The quest for a Pan-African Investment code to achieve sustainable development'* Bridges Africa Volume 5 (2016).

2.6. CONCLUSION

In the modern era it is discouraging to see that international investment law does not consider the intentions behind countries' behaviour, merely the practice and sense of legal obligation. The view that there should be automatic dispute settlement at the instance of a foreign investor has already clashed with the sovereignty centred approach that limits the right of the foreign investor to the tribunals of the host state[135]

Although the standard of protection of foreign investment is currently based on the Hull formula and it could, at one time, lay claim to the status of customary international law, it can no longer be said to represent a binding international legal norm. A cursory glance at the African instruments on investment will show their stance is geared toward the Calvo doctrine, despite signing BITs which contradict this position. This resultant change is the result of disagreement between developed and developing countries as to the validity of the Hull Rule. Developing countries particularly African states taken as a group are generally importers of investment, while most of the outward foreign investment is made from developed countries.[136]

On the one hand, the capital-exporting countries require some measure of protection and security before they will invest abroad and, on the other hand, the capital-importing countries are wary of the power of foreign investments and the drain of currency that occurs, and are often stimulated to take over such enterprises.[137] The imposition of an absolute notion of property through

[135]M Sornarajah '*The Clash of Globalisations and the International Law on Foreign Investment'* The Simon Reisman Lecture in International Trade Policy 7.
[136]Guzman AT '*Explaining the Popularity of Bilateral Investment Treaties: Why LDCs Sign Treaties That Hurt Them*' available at http://www.jeanmonnetprogram.org/archive/papers/97/97-12-III.html; The onset of the NAFTA has altered this position as developed countries have recently become recipients of investment.
[137] Shaw & Malcolm ' *International Law'* 5ed (2008) 738.

investment treaties sits uneasily with the internal constitutional systems of the large majority of the states of the world. It would amount to an affront to the right of states to organise their economies on any system they prefer.[138]

The general view among developing countries is that they should have the freedom to decide policies on foreign investment. This is a freedom that to a large extent has been denied by the increasing treaty practice that seeks to bind developing countries to the neo-liberal prescriptions. The international law, has been developed by the capital exporting countries to tie the developing countries to neo-liberal viewpoints.[139]

The whole international investment regime is based on western ideologies that have been imposed on developing nations.[140]It is interesting to note that the United States in its formative years, as an importer of European capital, had experiences like those which developing countries presently have, and took stances not dissimilar to those developing countries now take.[141]

African nations are coming to the fore through promulgation of investment provisions in the regional trade agreements. They have essentially spelled out the nature of investment that is wanted in the region, which is investment that is sustainable and fosters development. The resultant investment dispute settlement regime has received widespread backlash, as it has failed to address the issues faced by countries such as inconsistent decisions. As developing nations African states cannot afford to have huge damage claims awarded against them. More so because there are so many developmental

[138] M Sornarajah *The Clash of Globalisations and the International Law on Foreign Investment* The Simon Reisman Lecture in International Trade Policy 11

[139]M Sornarajah '*The Clash of Globalisations and the International Law on Foreign Investment'* The Simon Reisman Lecture in International Trade Policy 26

[140] Sornarajah M' *The International Law on Foreign Investment'* 3ed (2010) 20; It was in the relations between the United States, still a fledgling power, and its Latin American neighbours that the need for the development of an international law relating to foreign investment played a role during the period prior to the Second World War.63 These developments have dictated the course of the law for a considerable period of time. In the foreign investment relations between the United States and the Latin American states, one sees the clash between the idea that an alien investor should be confined to the remedies available in local law to the citizen and the idea that he must be accorded the treatment according to an external, international standard.

[141] Sornarajah M' *The International Law on Foreign Investment'* 3ed (2010) 20.

issues that plague African states. Issues arise when states have to balance the rights of an investor against the public policy and developmental concerns, these issues shall be discussed in greater detail in Chapter 3.

CHAPTER 3

3. THE CURRENT ISSUES IN INVESTMENT DISPUTE SETTLEMENT

3.1. INTRODUCTION

There is growing discontent with the current investment dispute settlement system. The issues faced by this system have been informed by the history as illustrated in Chapter 2. This hegemonic system of investment dispute resolution created by imperial powers as a way to protect investments has become a creature even the developed countries have lost control of. This is evidenced by the resistance that the EU has faced with acceptance of the CETA Tribunal and ISDS provisions in FTAs.[142] Developing countries have slowly realised that there really is no plausible link between foreign direct investment flow and the signing of BITS.[143] There is now a realisation of the impact that BITs have on public policy.

When reform of the current investment regime is mentioned it largely speaks to the reform of the investment dispute settlement system and application of the investment protection standards. The bedrock of the international investment regime is investment protection which entails fair and equitable treatment, protection against expropriation and payment of compensation as the standards of protection.[144] The lack of uniformity in the application of these standards in arbitration tribunals has created issues for African host nations as their public policy has often been challenged.[145] These very

[142] Biel E & Wheeler M 'The Uncertain Future of the European Investment Court System' available at http://www.yjil.yale.edu/the-uncertain-future-of-the-european-investment-court-system/.
[143] Salacuse J &. Sullivan N, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain,* Harvard International Law .Journal; See UNCTAD, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*. UNCTAD Series on International Investment Policies for Development, New York and Geneva: United Nations, 2009.
[144] M Sornarajah *The Settlement of Foreign Investment* Disputes (2000)77.
[145] M Sornarajah '*The Clash of Globalisations and the International Law on Foreign Investment*' The Simon Reisman Lecture in International Trade Policy 13.

standards of protection have become the basis of numerous investment disputes. Instead of bringing the anticipated development, African nations have had to pay out huge damages claims to the detriment of their poor population. The existence of such an expansive network of rights means that, when difficulties arise, there is a patchwork of mechanisms to resolve the investment disputes.[146] The growth of international investment arbitration is attributable to investor approval with the system, as it is a claimant-investor driven system. In other words, dissatisfaction with the status quo is coming primarily from the respondent side of the dispute i.e. the host states.[147] For developing country host states it is even more daunting as they do not have the resources to defend the claims or to settle the claims.[148] Currently ICSID reports that 25 per cent of investor dispute claims are against African countries.[149]

The lack of precedent raises issues as to whether vital issues that concern a nation should be decided by arbitration tribunals that consist of foreigners of whatever reputation, who are unconcerned with the impact of their decisions on communities that they have had little experience of.[150] More so in the case of African countries whose public policy decisions impact on millions of livelihoods.

[146] Franck S D 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 *Fordham L Rev* 1523

[147] Behn D 'Legitimacy, evolution, and growth in investment treaty arbitration: empirically evaluating the state-of-the-art' *Georgetown Journal of International law* 364.

[148] M Sornarajah The *Settlement of Foreign Investment* Disputes (2000)78.

[149] ICSID – The ICSID caseload –Issue 2 2017 10.

[150] Franck S D 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 *Fordham L Rev* 1533 ; 'This has been happening with great frequency as far as developing countries have been concerned for over decades. But now that it is affecting the relatively rich countries. Hence, issues are being raised as to the appropriateness of three foreigners, over whom there is no check, deciding on issues of vital concern to political communities on the basis of largely commercial principles.'

Governments find themselves at the mercy of private investors who have brought them to task over largely public policy issues and regulation.[151] The lack of a multilateral approach and fragmented nature of the resolution of investment disputes makes it a complex area. Forum shopping and tribunal hopping has occurred often.[152]

This chapter explores the multiplex of problems faced by the current investment dispute settlement system and the proffered solutions. This chapter will analyse whether these solutions would be applicable to developing countries, particularly African nations. It would be amiss to speak of the investment dispute resolution system without taking examining the main bone of contention, which is ISDS. The first part of the chapter will examine this phenomenon as a whole and then the particular issues arising from this system will be analysed in subsequent parts. The chapter will then focus on issues specific to developing countries, particularly African states and the solutions proffered for the current legitimacy crisis.

[151] Wells LT 'Backlash to investment arbitration: three causes' in Waibel M et al (eds) *The backlash against investment arbitration: perceptions and reality* (2010) 344.
[152] Reinisch A' The issues raised by parallel proceedings' in Waibel M et al (eds) *The backlash against investment arbitration: perceptions and reality* (2010) 114.

3.2. OVERVIEW OF THE INVESTOR -STATE DISPUTE SETTLEMENT

ISDS is a phenomenon that was introduced by BITs and IIAs, as reflected in the previous chapter. This was largely so that capital exporting countries could protect their investments without states having to be involved and therefore removing political risk.[153] ISDS is when a nation grants private investors the right to bring suit against the sovereign in the case of a breach of treaty rights. BITS extend substantive rights to investors of treaty partners, these rights are protected by the procedural rights which allow for the private investor to bring claims against the sovereign in case of breach of its obligations.[154]

Unlike conventional arbitration, investment treaty arbitration is non-reciprocal in nature. Only investors can institute claims under an investment treaty, states have no recourse except through counter-claims.[155] Essentially, the system removes the customary international law duty to exhaust domestic remedies before proceeding to an international claim against a state. However, unlike national or international courts that otherwise resolve these types of claims, investment treaty arbitration does not incorporate certain institutional safeguards of judicial independence such as secure judicial tenure, objective methods of appointment of judges to specific cases, and restrictions on outside remuneration of the judge. There is also no appeal mechanism, save for a few exceptional cases where an award may be annulled under ICSID.[156]

[153]Salacuse J 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' *The International Lawyer* 657.

[154] Vandevelde K. *'A Brief History of International Investment Agreements'* International Law and Policy 169.

[155] Wells LT 'Backlash to investment arbitration: three causes' in Waibel M et al (eds) The backlash against investment arbitration: perceptions and reality (2010) 340.

[156] G Van Hearten 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' *Osgoode Hall Law Journal* Volume 50 Issue 1 (2012) 228.

The most frequently used mode of investment dispute settlement is arbitration through ICSID, which accounts for over 60 per cent of the cases brought worldwide.[157] When it comes to investment arbitration, the problems are not uniform.[158] There are numerous candidates willing and in most cases qualified to sit as arbitrators; and the process is, in general, believed to be efficient. Other problems however do arise. One is that many arbitrators are drawn from the ranks of practitioners. Naturally they have to avoid the usual problem of conflict of interest, but this may not always be observed. Some claim, for instance, that there is a conflict of interest if one is sitting as an arbitrator in a case where a particular point arises, when another member of the same law firm is also arguing about the same point as counsel in a different case.[159]

Recently, there has been debate over the question of the transparency of proceedings between states on the one hand, and private investors on the other, and the somewhat related question of participation in the proceedings by third parties.[160] Investment arbitration between States and companies or individuals has tended to follow the model of private law arbitration, including to a large extent its secrecy.[161] It has to be acknowledged that investor-state disputes are not the same as international commercial disputes nor are the mechanisms in which they are often settled.[162] As a form of privatised dispute resolution, investment arbitration has empowered investors, and their home states, to argue that host states should be disciplined for breach of investment treaty standards. This is an illustration, for Sornarajah, of how 'private power

[157] The ICSID Caseload – Statistics (Issue 2017-2) available at
[158] Wells LT 'Backlash to investment arbitration: three causes' in Waibel M et al (eds) *The backlash against investment arbitration: perceptions and reality* (2010) 341.
[159] Franck S D 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 *Fordham L Rev* 1552.
[160] Kawharu A 'Participation of non-governmental organisations in investment arbitration as amici curae' in Waibel M et al (eds) *The backlash against investment arbitration: perceptions and reality* (2010) 284.
[161] Article 48(5) of the ICSID Convention 1985 'The Centre shall not publish the award without the consent of the parties.'
[162] Maniruzzaman M, 'A Rethink of Investor-State Dispute Settlement', Kluwer Arbitration Blog, May 30 2013, available at http://kluwerarbitrationblog.com/2013/05/30/a-rethink-of-investor-state-dispute-settlement (accessed 23 April 2017).

can be used to formulate norms with claims to be principles of international law'. [163]

From early on, ICSID adopted the practice of publishing information about what cases had been brought, between whom, and what stage procedurally they were at. However, Article 48(5) of the ICSID Convention provides that the award itself may not be published without the consent of both parties.[164] This still leaves the most vital part of the dispute out of the public eye.

Overlapping, or even conflicting, jurisdiction can also give rise to its own problems. These problems of overlapping or conflicting jurisdiction, or of inconsistent decisions, are not confined to the plethora of international tribunals: there can also be overlaps of jurisdiction or inconsistent decisions between municipal courts on the one hand, and international tribunals on the other.[165] The lack of a review method or appeal mechanism exacerbates this problem, as when faulty decisions are handed down especially by ad hoc tribunals then the parties have no recourse.[166]

[163]M Sornarajah The *International Law on Foreign Investment* (2010)62.
[164] Mendelsohn M 'International *dispute settlement: developments and challenges'* Revue helle-nique de droit international 61 RHDI 463 2008 468.
[165] Mendelsohn M 'International *dispute settlement: developments and challenges'* Revue helle-nique de droit international 474.
[166] Wells LT 'Backlash to investment arbitration: three causes' in Waibel M et al (eds) The backlash against investment arbitration: perceptions and reality (2010) 342.

3.3. CURRENT ISSUES IN INVESTOR STATE DISPUTE SETTLEMENT

3.3.1. SUBSTANTIVE ISSUES

3.3.1.1. APPLICATION OF THE BIT STANDARDS

The basis of most ISDS claims has been some substantive rights contained in BITS and IIAs. The issue arising is that there is a broad interpretation of investment protection provisions.[167] Some public international law rights have been articulated for the first time in investment treaties such as the right to fair and equitable treatment and a nation's obligation to observe its commitments. Tribunals have applied these standards differently and made divergent findings on liability, this will be illustrated in the Czech cases below. Rather than creating certainty for foreign investors and sovereigns, the process of resolving investment disputes through arbitration is creating uncertainty about the meaning of those rights and public international law.[168]

This had led to a series of inconsistent decisions. For example, in the Société Générale de Surveillance S.A (SGS) cases, SGS provided customs services to governments, such as Pakistan and the Philippines, under service contracts. There were problems under those contracts. SGS brought a claim against Pakistan under the Swiss/Pakistan treaty alleging a violation of the so-called umbrella clause;[169] likewise, SGS brought a claim against the Philippines for a violation of a textually similar umbrella clause in the Swiss/Philippines BIT.[170] The issue for both tribunals was whether the umbrella clause transforms a breach of contract into a breach of treaty. Essentially, one tribunal said "yes" and the other said "no." In this instance it is clear that both cases were based on the same agreement with almost identical facts but the tribunals still came to opposing decisions. The substantive issues are

[167] Horn N 'Arbitration and the protection of foreign investment: concept and means' 'in Arbitrating Foreign Investment disputes 2004 Volume 19 17.
[168] Horn N 'Arbitration and the protection of foreign investment: concept and means' 'in Arbitrating Foreign Investment disputes 2004 Volume 19 17.
[169] SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13.
[170] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6.

beyond the scope of this thesis; the focus is on the problems created by the procedural rules in terms of which substantive issues are decided.

3.3.2. PROCEDURAL ISSUES

3.3.2.1. INCONSISTENT DECISIONS

Inconsistent decisions generally arise under three typical circumstances. First, different tribunals can come to different conclusions about the same standard in the same treaty as in the Czech cases below.[171] Secondly, different tribunals organised under different treaties can come to different conclusions about disputes involving the same facts, related parties, and similar investment rights. These types of cases will typically involve investments that have been structured to take advantage of multiple investment treaties so that, when a dispute arises, claims can be brought by related corporate entities under different treaties.[172] Finally, different tribunals organised under different investment treaties will consider disputes involving a similar situation and similar investment rights, but will come to opposite conclusions.[173] This issue arose out of a dispute between a British project company, held jointly by a British and a German company, and the Republic of Tanzania over a concession to operate the water and sewerage services of Tanzania's capital, Dar es Salaam.[174] Tanzania cancelled a contract in 2005 on the grounds that Biwater had failed to deliver promised services. Biwater initiated at first proceedings in the United Kingdom in terms of the UNCITRAL rules. The company alleged Tanzania violated the terms of its contract with Biwater. In January 2008, the tribunal deciding the case ruled that Biwater should actually pay US$8 million to Tanzania. Biwater also filed suit at ICSID, where it sought to enforce the terms of the Tanzania – United Kingdom BIT.[175] In July 2008, the ICSID panel ruled for Biwater, but refused to grant any damages.

[171] Reinisch A' The issues raised by parallel proceedings' in Waibel M et al (eds) *The backlash against investment arbitration: perceptions and reality* (2010) 116.
[172] Kreindler RH 'Parallel proceedings: A practitioner's perspective' in Waibel M et al (eds) *The backlash against investment arbitration: perceptions and reality* (2010) 130.
[173] Reinisch A' The issues raised by parallel proceedings' in Waibel M et al (eds) *The backlash against investment arbitration: perceptions and reality* (2010) 116.
[174] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22.
[175] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22.

The surge in the number of investment arbitrations and the strategic structuring of investments to create claims under multiple investment treaties increase the likelihood of inconsistent decisions.[176] To begin with, there is an increased risk of politicising the oversight of arbitral awards. As issues of public policy come to the fore there is a real possibility that national courts will be tempted to use local law to vitiate an award.[177] Second, because of the lack of uniformity and the fragmented nature of the oversight, clever investors will strategically pick forums to favour their interests. This inadvertently leads to the issue of forum shopping.[178] Since enforcement proceedings may be brought in any jurisdiction where there are assets belonging to the state party, the possibility of going to different fora encourages dissatisfied parties to forum shop for the best result thereby promoting inefficiency.[179] This essentially means the burden on host governments is greatly increased as they must be compliant with all BITS towards all investors or risk having a dispute invoked through any BIT through the most favoured nation clause[180]. This was illustrated in the 'Czech cases'.[181] This adds to the lack of legitimacy

[176] Wells LT 'Backlash to investment arbitration: three causes' in Waibel M et al (eds) The backlash against investment arbitration: perceptions and reality (2010) 344.

[177] Wells LT 'Backlash to investment arbitration: three causes' in Waibel M et al (eds) The backlash against investment arbitration: perceptions and reality (2010) 345.

[178] Reinisch A' The issues raised by parallel proceedings' in Waibel M et al (eds) *The backlash against investment arbitration: perceptions and reality* (2010) 116.

[179] Reinisch A' The issues raised by parallel proceedings' in Waibel M et al (eds) *The backlash against investment arbitration: perceptions and reality* (2010) 118.

[180] Reinisch A' The issues raised by parallel proceedings' in Waibel M et al (eds) *The backlash against investment arbitration: perceptions and reality* (2010) 118.

[181] The "Czech cases", (*CME/Lauder v. the Czech Republic)* and the approximately 40 cases against Argentina and arising from the same events demonstrate the increasing complexity of fora decisions. In these cases, the Czech Republic was subject to two different UNCITRAL proceedings concerning certain governmental measures with regard to a local company that owned a TV license. The claims were brought almost simultaneously by the ultimate controlling shareholder, an American investor, Lauder, under the US-Czech Republic BIT in London and by a Dutch company, the CME Czech Republic, which held shares in the local company under the Netherlands-Czech Republic BIT in Stockholm. The Czech Republic prevailed against Lauder, but was ordered to pay a substantial compensation to CME. The Lauder Tribunal acknowledged the potential problem of conflicting awards, noting *"*that damages [could] be concurrently granted by more than one court or arbitral tribunal…" Nevertheless, it reasoned that "the second deciding court or arbitral tribunal could take this fact into consideration when assessing the final damage". The CME Tribunal addressed the ramifications of the parties' parallel proceedings but found no bar to adjudicating the same dispute:

"The Czech Republic did not agree to consolidate the Treaty proceedings, a request raised by the Claimant (again) during these arbitration proceedings. The Czech government asserted the right to have each action determined independently and promptly. This has the consequence that there will be two awards on the same subject which may be consistent with each other or may differ. Should two different Treaties grant remedies to the respective claimants deriving from the same facts and circumstance, this does not deprive one of the claimants of jurisdiction, if jurisdiction is granted under the respective Treaty. A possible abuse by Mr. Lauder in

in investment dispute settlement, when parties have all options available and are able to choose the optimal one.

pursuing his claim under the US Treaty as alleged by the Respondents does not affect jurisdiction in these arbitration proceedings".

3.3.2.2. TRANSPARENCY

The lack of transparency in investment dispute settlement has raised uproar as sovereign nations are accountable to the citizenry that has placed them in power. Mendelsohn believes there are two main reasons the issue of secrecy has been contentious. The first is that it is thought constructive to the development of precedent in investment, if the parties and the arbitrators have the benefit of previous tribunals' considerations on the same issue for quite often the issues are the same, or at least similar. This would supposedly solve the issue of inconsistent decisions. The second argument is that the issues involved in investment disputes are not purely private. For one thing, the state itself is a public entity. Moreover, the ramifications of the outcome are of great interest to the nationals of the host state.[182]

Arguments against transparency, usually motivated by multi-national corporations are that, commercial confidentiality could be jeopardised.[183] This does not seem to be a strong argument however, what should be borne in mind is that lack of transparency has another advantage. If the dispute is carried on in the full glare of the public, or even if the parties know that the awards, and perhaps even the pleadings, are going to be published, they are less likely to reach a settlement or even to consider changing their position. Instead, they will want to justify conduct that they know is not justifiable, and the host State may be afraid of not being thought to have defended the national interest with sufficient vigour.[184] Therefore, the arguments in favour of greater transparency are not all one sided.

[182] Mendelsohn M 'International *dispute settlement: developments and challenges'* Revue helle-nique de droit international 471.
[183] Kawharu A 'Participation of non-governmental organisations in investment arbitration as amici curae' in Waibel M et al (eds) *The backlash against investment arbitration: perceptions and reality* (2010) 284.
[184] Mendelsohn M 'International *dispute settlement: developments and challenges'* Revue helle-nique de droit international 61 RHDI 463 2008 471.

The pressure for transparency is even more from self-appointed amici curiae. The entity seeking to intervene might be another company, a local government body, or a non-governmental organization from the host country or from some other country or countries.[185] There is minimal access to the pleadings and evidence, there is little opportunity for amici curiae participation, and often the decisions themselves are confidential and not made available to the public. Given the public nature of the rights at issue, parties are disseminating more awards and, in limited instances, tribunals permit third parties to participate in the dispute process.[186] It has been argued that intervention of this type inevitably complicates and protracts arbitral proceedings.[187] For one thing, the principal parties, the investor and the host State, can find themselves fighting on more than one front, and mainly because of this, proceedings are inevitably prolonged. Intervention is also likely to increase the contentiousness of the proceedings.[188] The benefits of third-party intervention are not necessarily all one way. Nevertheless, there has been a groundswell in favour of allowing it. Recently, ICSID has heeded to the call for third party participation and amended its own Arbitration Rules to permit it where, and to the extent, that the tribunal thinks it appropriate.[189]

The issue of transparency and public availability of awards is improving slightly but continues to present significant challenges. Part of the problem stems from the decentralised and largely non-institutionalised structure of investment treaty arbitration. There is no single institution that can provide

[185] Kawharu A 'Participation of non-governmental organisations in investment arbitration as amici curae' in Waibel M et al (eds) *The backlash against investment arbitration: perceptions and reality* (2010) 284.
[186] Yannaca-Small Improving the System of Investor-State Dispute Settlement", *OECD Working Papers on International Investment* 2006/01, OECD Publishing available at http://dx.doi.org/10.1787/631230863687 .
[187] Kawharu A 'Participation of non-governmental organisations in investment arbitration as amici curae' in Waibel M et al (eds) *The backlash against investment arbitration: perceptions and reality* (2010) 284.
[188] Kawharu A 'Participation of non-governmental organisations in investment arbitration as amici curae' in Waibel M et al (eds) *The backlash against investment arbitration: perceptions and reality* (2010) 284.
[189]ICSID (Arbitration Rules, Rule 37(2)), 2006.

a collective registry of all cases; they remain scattered among a number of institutions.[190] As investment arbitration is based upon a model of commercial arbitration where there are strong presumptions of confidentiality, even though a state which is by and large a public entity, is involved, the dispute resolution process is not transparent. The recent addition to the UNCITRAL rules to include rules for transparency targeted for investment dispute has been welcomed.[191]

[190] Behn D 'Legitimacy, evolution, and growth in investment treaty arbitration: empirically evaluating the state-of-the-art' *Georgetown Journal of International law* 413.
[191] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014).

3.3.2.3. COMPOSITION OF THE TRIBUNAL

In order to ensure the legitimacy of investment arbitration, decision makers who will be safeguarding the interpretive determinacy must themselves be recognised as legitimate. There are three main issues that plague the legitimacy of arbitrators in international investment dispute settlement. The first issue is that of impartiality. Sornarajah has quipped that, by imposing arbitrators' preferred solutions to resolve investment disputes, the "only general principle that seems to be indicated by these awards, if it could, indeed, be dignified by the term, principle is that the big boy always wins."[192]Arbitrators are likely to interpret substantive protections generously when claimants are from capital exporting states such as the United States of America, the United Kingdom and France and take a more restrictive approach when investors are from elsewhere.[193] Arbitrators are believed to be biased towards the appointing party which is usually a multinational from a western nation.[194]

The second issue is a perceived lack of independence. This commonly arises due to the fact that there are often relationships between the arbitrator and one party or its lawyer.[195] There are criticisms that the choice of arbitrators is biased in the favour of the investors because they most likely come from a community of lawyers from metropolitan law firms who more often than not

[192] M Sornarajah *The International Law on Foreign Investment* (2010) 62;' 'indicates not only the power of multinational corporations to create law but also the existence of avenues through which international law can be used as an instrument of private power through weak sources of law such as the awards of arbitral tribunals and the writings of highly qualified publicists. The role of the latter, who are but individuals with partialities to certain views either because they believe firmly in them or because it is lucrative to do so, requires a view of international law not as a scientifically neutral discipline but as a manipulable device which serves the interests of power.'

[193] G Van Harten, *Sold down the Yangtze: Canada's Lopsided Investment Deal with China* (Toronto: International Investment Arbitration and Public Policy, 2015) at 121.

[194] Crina Baltag 'Blind appointments and international arbitrators' 25 November 2016, available at http://kluwerarbitrationblog.com/2016/11/25/blind-appointments-and-international-arbitrators/ (accessed 5 May 2017).

[195] Park WW 'Arbitrator integrity' in Waibel M et al (eds) *The backlash against investment arbitration: perceptions and reality* (2010) 194.

decide in favour of the investors.[196] This is made evident by the self-described think tank, which is said to be funded by international arbitration firms and their clients, the European Federation for Investment Law and Arbitration (EFILA), which sprung up in 2014 with the sole purpose of blocking serious reform of investment arbitration.[197] Investment treaty reforms should always tilt in the direction of protecting investor rights after all, they write, the main purpose of investment agreements is to protect rights.[198] This is worrying to say the least as those responsible for defining and expanding the field of investment arbitration seem to have pre-conceived notions.[199] However on the other side, Behn argues that the uneven distribution of claimants and respondents has led to the perception that investment treaty arbitration is biased in favour of large companies from developed states against the less powerful developing states hosting their investments.[200] This might seem to be the case but a valid case of bias has been made, as the pool of arbitrators is often made of the same lawyers from international law firms who act as both parties in different instances.[201]

This leads to the third issue which does not affect all of the respondents as it is an epidemic of developing nations or rather the lack of representation of developing nations' own candidates as arbitrators. The list of arbitrators is made up of 68 per cent of arbitrators from Western Europe and North America and only 2 per cent from Sub Saharan Africa.[202] The majority have no notion

[196] Wells LT 'Backlash to investment arbitration: three causes' in Waibel M et al (eds) *The backlash against investment arbitration: perceptions and reality* (2010) 344.

[197] [197] EFILA final response to the EU Commission's consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)" 7 December 2014) available at http://efila.org/wp-content/uploads/2014/07/EFILA_TTIP_final_submission.pdf.

[198] EFILA final response to the EU Commission's consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)" 7 December 2014) available at http://efila.org/wp-content/uploads/2014/07/EFILA_TTIP_final_submission.pdf

[199] S David 'The Paranoid Style of Investment Lawyers and Arbitrators: Investment Law Norm Entrepreneurs and their Critics (October 6, 2015)'available at SSRN: https://ssrn.com/abstract=2670118 (accessed 20 April 2017).

[200] Behn D 'Legitimacy, evolution, and growth in investment treaty arbitration: empirically evaluating the state-of-the-art' *Georgetown Journal of International law* 368.

[201] David S 'The Paranoid Style of Investment Lawyers and Arbitrators: Investment Law Norm Entrepreneurs and their Critics (October 6, 2015)'available at SSRN: https://ssrn.com/abstract=2670118 (accessed 20 April 2017).

[202] ICSID – The Caseload Statistics, issue 2 2017.

of the developmental issues that plague developing countries.[203] To entrust public policy issues and decisions of sovereigns to a tribunal that more often than not consists of three white males that are of western origin is disheartening. The rigid views and political bias is inherent as the panel has no notion of the developmental issues and is likely to reach a decision in favour of the investor with high damages award to the detriment of the poor of the developing nation.[204]

This is unsustainable and has caused uproar but the voice of the developing nations is not so powerful. It is interesting to note that the shoe is now falling on the other foot as developed countries are now starting to feel the pinch of adverse investment arbitral awards. Until now investment treaties have been reciprocal only in theory and not in fact, leading to mostly developing countries being the respondent in investment disputes.[205]

[203] Salacuse J W 'Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain' in Horn N (ed.) *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal* Aspects (2004)
[204] Wells LT 'Backlash to investment arbitration: three causes' in Waibel M et al (eds) *The backlash against investment arbitration: perceptions and reality* (2010) 344.
[205] M Sornarajah *The International Law on Foreign Investment* (2010) 24.

3.3.2.4. FORUM SHOPPING

This section examines issues related to forum shopping and multiple and parallel proceedings which causes the multiplicity of proceedings. As a result of the larger number of BITs currently in place, and the increasing of production and investment, investors seeking to pursue claims for damages often have a choice of fora. This is through different arbitration regimes or of arbitration or a national court. Corporations are reported to begin structuring their transactions in such a way as to be able to benefit from the provisions of different BITs. Investors are sometimes able to claim breaches of different BITs and to seek relief through different arbitration proceedings under each of the invoked treaties in respect of a single investment and regarding the same facts, which could lead to parallel proceedings and potentially conflicting awards. This result is due to the fact that many, if not most BITS, protect not only investments made by nationals, individuals and corporations of one state directly into the other state, but also investments made indirectly through a company established in one party but controlled by an investor in a non-party. Investors who are minority shareholders may be able to bring claims too. A particular company may have minority shareholders of various nationalities. Hence, the host state may face multiple arbitrations under different BITs in relation to essentially the same set of facts.[206]

The process throughout which one of the parties to a dispute attempts to bring a claim before the forum most advantageous to him or her is referred to as "forum shopping".[207] In the case of investment arbitration, forum shopping has a different meaning and application. On the one hand, the foreign investor is directed by the investment treaty to a specific arbitration option or set of

[206] Yannaca-Small, K. (2006), "Improving the System of Investor-State Dispute Settlement", *OECD Working Papers on International Investment* OECD Publishing available at http://dx.doi.org/10.1787/631230863687 .
[207] Reinisch A' The issues raised by parallel proceedings' in Waibel M et al (eds) *The backlash against investment arbitration: perceptions and reality* (2010) 115.

options, i.e. local courts, ICISD arbitration or ad hoc arbitration. This is evidenced by the Biwater case mentioned above. This creates an opportunity for forum shopping very different from the traditional private international law one. On the other hand, a foreign investor and related parties may engage in forum shopping in combination with treaty shopping, to enlarge the choice of forum beyond the options provided by the specific BIT, or even to bring the same facts into parallel or multiple proceedings.[208] The most graphic examples of this phenomenon are the CME/Lauder v. the Czech Republic cases. There are inherent consequences to this issue which include inconsistent decisions and the cost of multiplicity of proceedings.[209]

[208] B Cremades & D Cairns, "The Brave New World of Global Arbitration" *3 Journal of World Investment* 173. "It seems likely that investor-State arbitral tribunals will have to develop doctrine similar to *lis pendens* and *forum non conveniens* to confront the issue [of duplication of claims and double recovery by investors] in the near future".

[209] Reinisch A' The issues raised by parallel proceedings' in Waibel M et al (eds) *The backlash against investment arbitration: perceptions and reality* (2010) 114.

3.4. ISSUES THAT AFFECT DEVELOPING COUNTRIES

As the major net importers of global capital, developing nations have borne the brunt of defending the growing number of investment treaty claims.[210] Together with developmental issues that they face, there are additional issues that they face with the current investment dispute settlement system.

3.4.1. EXPERTISE

Financial and administrative barriers which plague the majority of developing nations hinder them from properly defending investment claims. On top of that they also do not have the legal expertise within their government service to defend investment treaty claims. As a consequence, most developing nations are forced to hire one of a handful of international law firms who charge the same premium market rates that wealthy individual investors and corporations pay for their services.[211] Meanwhile, developing nations who cannot hire outside counsel are left to contend with scattered and incomplete legal resources with no organised legal assistance from the international community.[212] When faced with overwhelming challenges nations are forced to hire lawyers. A cursory glance at published awards will show how most governments are represented by their attorney general together with an international law firm. For example in the ICSID case Border Timbers Limited and Others v. Zimbabwe, the country was represented by the attorney general and a Parisian law firm Kimbrough & Associates.[213] This leads to the next issue of cost of proceedings.

[210] Gottwald E 'Levelling the playing field: is it time for a legal assistance centre for developing nations in investment treaty arbitration? *American University International Law Review* 239.
[211] Gottwald E 'Levelling the playing field: is it time for a legal assistance centre for developing nations in investment treaty arbitration? *American University International Law Review* 239.
[212] Gottwald E 'Levelling the playing field: is it time for a legal assistance centre for developing nations in investment treaty arbitration? *American University International Law Review* 256.
[213] ICSID Case ARB/10/25.

3.4.2. COSTS

Research by the OECD indicates that the average legal and arbitration costs are around US$8 million per case.[214] The largest cost component is the expense incurred by each party for their own legal counsel and experts (about 82 per cent of the cost of an ISDS case). Arbitrator fees average about 16 per cent of costs and institutional costs payable to organisations that administer the arbitration and provide secretariat are low, generally amounting to about 2 per cent of the costs.[215]

Defending investment claims poses a number of challenges for developing nations, including the cost of proceedings. There is also the possibility of a large adverse award, coupled together with the regulatory chill which hinders a state's freedom to regulate.[216] Currently the Zimbabwean government is in breach of an award issued against it by ICSID to the tune of US$230 million and legal costs awarded in the amount of US$10.7 million together with US$53,000 in experts' fees.[217] Trying to achieve a balance with a Gross Domestic Product per capita of US$ 908.80 is a stark example of the developmental issues African states face.[218] The wave of investor lawsuits has far-reaching implications for developing nations' freedom to regulate in the public interest. Investors have turned to investment treaty arbitration to challenge a wide variety of government measures in a number of sensitive areas.[219]

[214] Gaukrodger D & Gordon K (2012), "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment 19

[215] Gaukrodger D & Gordon K (2012), "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment 19.

[216] Gottwald E 'Levelling the playing field: is it time for a legal assistance centre for developing nations in investment treaty arbitration? *American University International Law Review* 252.

[217] Border Timbers Limited and Others v. Zimbabwe ICSID Case ARB/10/25.

[218] https://tradingeconomics.com/zimbabwe/gdp-per-capita (accessed 25 September 2017).

[219] Gottwald E 'Levelling the playing field: is it time for a legal assistance centre for developing nations in investment treaty arbitration? *American University International Law Review* 254.

An emerging and disturbing trend is developing, that of third party financing. By involving a funder, the claimant may attract the necessary resources and expertise in litigating or arbitrating the claim. In return, the funder is promised a part of the proceeds if the claim is successful.[220] The motivation was the high value of arbitration claims, the perceived finality of awards, and the relative ease of enforcement of awards.[221] Such 'third-party funding' of ISDS claims has been expanding quickly as financing such claims has proven to be very lucrative. Third-party financing reduces litigation costs to the corporations themselves, making it easier, and thus encouraging them to sue. Foreign corporations typically do not have to declare receiving third-party funding for an ISDS case. Not surprisingly then, the ISDS claims-financing industry is booming as different types of investors have been attracted by and drawn into financing lawsuits, treating ISDS claims as speculative assets.[222]

[220]Van Boom W 'Third-Party Financing in International Investment Arbitration' Available from: https://www.researchgate.net/publication/255698907_ThirdParty_Financing_in_International_Investment_Arbitration (accessed 9 September 2017).

[221] http://kluwerarbitrationblog.com/2017/07/17/whose-line-credit-anyway-third-party-funding-issues-arbitration/ (accessed 25 September 2017).

[222]Sundaram JK '' Dispute Settlement Becomes Speculative Financial Asset'' 19 April 2017 available at http://www.ipsnews.net/2017/04/dispute-settlement-becomes-speculative-financial-asset/ (accessed 3 May 2017).

3.5. THE PROFFERED SOLUTIONS

Legitimacy depends in large part upon factors such as determinacy and coherence, which can in turn produce predictability and reliability. Related concepts such as justice, fairness, accountability, representation, correct use of procedure, and opportunities for review also impact on conceptions of legitimacy.[223] When these factors are absent investors and governments cannot anticipate how to comply with the law and plan their conduct accordingly, thereby undermining legitimacy. There are two possible approaches to the issues faced in investment arbitration. The first approach is evolutionary: investment treaty arbitration is experiencing adolescent "growing pains," but its overall structure is sound and many of the particular legitimacy challenges facing this system of adjudication can be resolved over time.[224] The second approach is revolutionary: investment treaty arbitration is off the rails and its overall structure is so deeply flawed that no tweaks or reforms to the system can correct its fundamental legitimacy deficits.[225]

There are problems with the current system, with the application of the BIT standards equally for all countries. One solution that has been posed is the adoption of contextual standards. These contextual standards entail creating a more equitable system that prevents investors from getting an unfair windfall, built on the economic inequalities that justify the application of the differentiation principle to developing countries.[226] Outside of international investment law, contextual and differential standards are used to create

[223] Behn D 'Legitimacy, evolution, and growth in investment treaty arbitration: empirically evaluating the state-of-the-art' *Georgetown Journal of International law* 368.
[224] European Federation for Investment Law and Arbitration *Task Force Research regarding the proposed international court system* (2016) 23; Schill S 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach' *Journal of international law*.
[225] Sornarajah M 'An International Investment Court: panacea or purgatory?'(2016) *Columbia FDI Perspectives* 1;The African Union 'The negotiation of the CFTA' available at https://www.au.int/en/newsevents/30316/2nd-meeting-continental-free-trade-area-negotiating-forum-cfta-nf (accessed 27 March 2017).
[226] Schill S 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach' *Journal of international law*.

greater equity in international agreements. This need for equitable treatment is justified by two realities. First, in addition to any international obligations, developing countries face extremely pressing issues such as severe poverty and a dire need to raise their standard of living.[227] Second, developing countries have less capacity to comply with strict substantive obligations under international law. This inability stems from various factors: a lack of capital and other resources; a lack of technological experience to develop, implement, and monitor new projects; legislative drafting inexperience; a lack of regulatory or administrative expertise to implement laws; and a population that is primarily concerned with its standard of living.[228] This was demonstrated in the Schlaefer case against the government of South Africa. A private Swiss investor invoked the terms of the Swiss-South Africa BIT, where he alleged that the government had failed to provide the requisite standard of protection. He had experienced poaching theft and vandalism at his game reserve. The presiding tribunal held the government liable for failing to provide protection and security as envisaged in the BIT.[229] This is a clear lack of comprehension of the plight of the country, South Africa experiences poaching and theft at very high rates. The standard of protection envisaged by international law is too high for developing countries that are prone to incidents of theft and vandalism. International agreements with contextual or differential standards reflect the principle that states with varied resources and capabilities should be subject to equally varied and equitable requirements and obligations.[230] Adopting contextual standards in BITs would acknowledge that while developing countries need foreign investment, they also have critical priorities outside of a specific BIT that may affect their ability to undertake extensive investment obligations. Contextual standards would also recognize that when developing countries do take on investment

[227] Alexander EA 'Taking Account of Reality: Adopting Contextual Standards for Developing Countries in International Investment Law' *Virginia journal of international law* 828.
[228] Alexander EA 'Taking Account of Reality: Adopting Contextual Standards for Developing Countries in International Investment Law' *Virginia journal of international law* 828.
[229] This case is not reported.
[230] Alexander EA 'Taking Account of Reality: Adopting Contextual Standards for Developing Countries in International Investment Law' *Virginia journal of international law* 829.

obligations, they will have greater difficulty in complying because of a lack of development in various areas.[231]

African governments are attempting to move to sustainable development, this is reflected in regional investment agreements which will be discussed in detail in Chapter 4. This transformational objective requires legal frameworks that harness the flow of foreign direct investment. Currently IIAs are structured in a manner which restricts the policy space of states. The international investment regime as it stands shows bias towards the investor, over a state's right to regulate in the public interest. What is required is an afro-centric investment protection framework to achieve appropriate balance. This could possibly be complemented by an African based investment center.[232]

3.5.1. MULTILATERAL AGREEMENT ON INVESTMENT

Various authors have suggested that a MAI would address all of the issues currently affecting the investment regime.[233] The content of an MAI is relatively easy to outline because of the many existing treaties with investment protection. One source is the numerous, rather similar BITs. Another source is the investment chapters in FTAs, notably the North American Free Trade Agreement (NAFTA). A third source is the lengthy draft MAI negotiated by the OECD (1998).[234] Although it would be relatively easy to draft an agreement, it is the agreement of the parties that would be difficult. The failure of the OECD

[231] Alexander EA 'Taking Account of Reality: Adopting Contextual Standards for Developing Countries in International Investment Law' *Virginia journal of international law* 830.
[232] Carim X 'International investment agreements and Africa's structural transformation: A perspective from South Africa' *South Centre Investment Policy Brief,* Issue No 4 (August 2015
[233] Dolzer R & Schreuer C *Principles of International Investment Law* (2008) 222; Sornarajah M 'An International Investment Court: panacea or purgatory?'(2016) *Columbia FDI Perspectives* 1; The African Union 'The negotiation of the CFTA' available at https://www.au.int/en/newsevents/30316/2nd-meeting-continental-free-trade-area-negotiating-forum-cfta-nf (accessed 27 March 2017)
[234] Reinisch A' The issues raised by parallel proceedings' in Waibel M et al (eds) *The backlash against investment arbitration: perceptions and reality* (2010) 118

draft MAI is a fair indication that states do not take investment agreements lightly, they would still like the autonomy to be able to decide how investments are conducted in their territories.

Dispute settlement falls into two categories, state-state procedures and investor-state procedures, and is the most complicated and controversial issue. There is no commonly agreed system for dispute resolution but multiple alternatives exist. Two-thirds are handled by ICSID and its additional facility. Other arbitration alternatives are the Stockholm Chamber of Commerce, the Permanent Court of Arbitration in The Hague, the International Chamber of Commerce, or ad hoc resolution.[235] A unified system of dispute settlement would most certainly go a long way to creating consistent standards of investment law and precedent, making the system more legitimate.

3.5.2. CONSISTENCY

There is no coherent system for addressing inconsistencies across the investment treaty network and there is no uniform mechanism to correct inconsistent decisions. A patchwork of mechanisms was inherited from international commercial arbitration, but these neither permit review of the merits nor correction of legal errors. Instead, there are narrow options to review awards to address procedural deficiencies. One of the main advantages for the creation of an appellate mechanism advanced by its proponents is consistency.[236] Consistency and coherence of jurisprudence create predictability and enhance the legitimacy of the system of investment arbitration. The inconsistent decisions based on the same or similar facts rendered for instance in the CME v Czech Republic and Lauder v Czech

[235] Behn D 'Legitimacy, evolution, and growth in investment treaty arbitration: empirically evaluating the state-of-the-art' *Georgetown Journal of International law* 368.

[236]Yannaca-Small, K. (2006), "Improving the System of Investor-State Dispute Settlement", *OECD Working Papers on International Investment* 2006/01, OECD Publishing. Available at http://dx.doi.org/10.1787/631230863687 . 1546

Republic cases have attracted widespread attention.[237] There is no guarantee that the inconsistencies would have been avoided, if these awards had been submitted subsequently to an appeal. The chances for consistency

would however be reinforced by the existence of a common appeals body which would handle not only ICSID awards, but also awards rendered by other ad hoc arbitral tribunals. The notion of consistency has been viewed to go beyond the situation when two panels constituted under different agreements deal with the same set of facts and give conflicting opinions or reach a different conclusion.[238] It might also encompass coherence of interpretation of basic principles which may underlie differently worded provisions in particular agreements and therefore might enhance the development of a more consistent international investment law.[239] The development of consistent international legal principles needs to be balanced by respect for the intent of the parties to specific agreements. Even where the intent of the countries may differ in some respects in relation to similar provisions in their investment agreements, it was argued that, there is value in encouraging consistency in interpretation across the agreements of a particular country or countries where the intent of the parties do not differ.[240]

The UNCITRAL Rules, the ICSID Convention, and the Additional Facility Rules, do not have any provision allowing for consolidation of claims. However, there have been some recent cases filed at ICSID in which the parties agreed to have their claims against a particular state consolidated. In order to avoid inconsistencies in the findings of different tribunals, parties could also appoint the same arbitrators.[241]

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[237] *CME/Lauder v. the Czech Republic.*

[238] Reinisch A' The issues raised by parallel proceedings' in Waibel M et al (eds) *The backlash against investment arbitration: perceptions and reality* (2010) 121.

[239] Reinisch A' The issues raised by parallel proceedings' in Waibel M et al (eds) *The backlash against investment arbitration: perceptions and reality* (2010) 118

[240] Yannaca-Small, K. (2006), "Improving the System of Investor-State Dispute Settlement", *OECD Working Papers on International Investment* 2006/01, OECD Publishing. Available at http://dx.doi.org/10.1787/631230863687 .

[241] Yannaca-Small, K. (2006), "Improving the System of Investor-State Dispute Settlement", *OECD Working Papers on International Investment* 2006/01, OECD Publishing. Available at http://dx.doi.org/10.1787/631230863687 ; The first multilateral agreement in force which provided for

3.5.3. APPELLATE MECHANSM

An appellate mechanism could provide a more uniform and coherent means for challenging awards.[242] It would provide for rectification of legal errors and possibly serious errors of fact. Another possible advantage is to dispel public concern that awards affecting important public policy issues and interests could be enforced despite serious error.[243] This could enhance support for investor-state arbitration at a time of growing numbers of cases. One set suggests building an internal review mechanism in each investment treaty so that an institution, such as a regional tribunal on investment, can issue interpretive guidance. Another group recommends the establishment of an independent appellate body to review the awards of arbitral tribunals.[244]

One survey has noted that binding arbitration has reached its "tipping point".[245] It is also noteworthy that the settlement rate of investor-state disputes at ICSID before any final award is rendered is estimated approximately at 30 per cent-40 per cent percent. It points in the direction that there is a good prospect of investor-state dispute settlement by mediation which needs to be explored further. In response to the growing desire to switch alternative dispute resolution, namely mediation, well-known institutions

consolidation of claims was ***NAFTA.*** Its Article 1126 provides that where a Tribunal established under this Article is satisfied that claims submitted to arbitration have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, order that the Tribunal assume jurisdiction over and hear and determine together, all or part of the claims; or assume jurisdiction over and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others

[242] Vicuna FO 'New dispute settlement procedures' (1999) 31 Transitional Legal Policy 59.

[243] Schreuer C "The Future of Investment Law" in Manoush H. Arsanjani, Jacob Katz Cogan, Robert D. Sloane, and Siegfried Wissner (eds.) *Looking to the Future: Essays on International Law in Honour of Michael W. Reisman* 788.

[244] *Munir Maniruzzaman, 'A Rethink of Investor-State Dispute Settlement', Kluwer Arbitration Blog, May 30 2013, available at* http://kluwerarbitrationblog.com/2013/05/30/a-rethink-of-investor-state-dispute-settlement *(accessed 23 April 2017)*

[245] Schreuer C "The Future of Investment Law" in Manoush H. Arsanjani, Jacob Katz Cogan, Robert D. Sloane, and Siegfried Wissner (eds.) *Looking to the Future: Essays on International Law in Honour of Michael W. Reisman* 788

such as the OECD and the International bar association have taken the initiative to propagate such an alternative.[246]

3.6. LESSONS TO BE DRAWN FROM CETA

> "With our proposals for a new Investment Court System, we are breaking new ground. The new Investment Court System will be composed of fully qualified judges, proceedings will be transparent, and cases will be decided on the basis of clear rules. In addition, the Court will be subject to review by a new Appeal Tribunal. With this new system, we protect the governments' right to regulate, and ensure that investment disputes will be adjudicated in full accordance with the rule of law."[247]

These were the words of First Vice-President Frans Timmermans on the proposal for an investment court system in the CETA negotiation.

Now the investment court system, despite criticism is firmly embedded in the EU-Canada Comprehensive Economic and Trade Agreement CETA of 2016.[248] It stems from an investment chapter fully dedicated to the establishment of an investment court system. The establishment of this court system basically addresses all the current issues facing the investment dispute settlement regime. The approach in CETA institutionalises the resolution of investment disputes and foresees that disputes be solved by a Tribunal of first Instance and an appeal tribunal to review possible errors of law. Under this approach,

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[246] *Munir Maniruzzaman, 'A Rethink of Investor-State Dispute Settlement', Kluwer Arbitration Blog, May 30 2013, available at* http://kluwerarbitrationblog.com/2013/05/30/a-rethink-of-investor-state-dispute-settlement *(accessed 23 April 2017)*

[247] European Commission - Press release 'Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations' Brussels, 16 September 2015 available at http://europa.eu/rapid/press-release_IP-15-5651_en.htm (accessed 25 November 2016).

[248] Establishment of a multilateral investment dispute settlement system December 2016, Canada – EU Discussion paper available at http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155267.12.12%20With%20date_%20Discussion%20paper_Establishment%20of%20a%20multilateral%20investment%20Geneva.pdf (accessed 29 April 2016).

both instances are composed of Tribunal Members appointed by the two trade agreement partners, with the objective of increasing the legitimacy, effectiveness and independence of the dispute settlement system.[249]

From the outset CETA establishes parties' right to regulate; the preamble reaffirms and states that the right to regulate is protected.[250] This echoes the regional African investment instruments, which will be discussed fully in Chapter 4. Art. 8.9 (1) merely 'reaffirms' this already existing balance. The following paragraph offers some improvement, but it cannot properly be construed as a carve out for decision making in the public interest. The formulation of this article is declarative and not legally enforceable. It is merely a guideline for arbitrators. Contrary to public statements by the parties, these provisions therefore fail to effectively limit claims that challenge public policy measures. To protect the right to regulate, the parties should have introduced a carve out or a binding principle to guide interpretation.[251]

The investment chapter seeks to address one of the core criticisms of ISDS - the lack of independence and bias towards investors of ISDS arbitrators. This is done by altering the selection process of CETA tribunal members. Tribunal members will be randomly selected from a roster of 15 individuals, appointed

[249] Establishment of a multilateral investment dispute settlement system December 2016, Canada – EU Discussion paper available at http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155267.12.12%20With%20date_%20Discussion%20paper_Establishment%20of%20a%20multilateral%20investment%20Geneva.pdf (accessed 29 April 2016).

[250] RECOGNISING that the provisions of this Agreement preserve the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity; RECOGNISING that the provisions of this Agreement protect investments and investors with respect to their investments, and are intended to stimulate mutually-beneficial business activity, without undermining the right of the Parties to regulate in the public interest within their territories.
Further the interpretive statement states that 'CETA preserves the ability of the European Union and its Member States and Canada to adopt and apply their own laws and regulations that regulate economic activity in the public interest, to achieve legitimate public policy objectives such as the protection and promotion of public health, social services, public education, safety, the environment, public morals, social or consumer protection, privacy and data protection and the promotion and protection of cultural diversity.'

[251] Joint analysis of CETA's Investment Court System (ICS) Prioritising Private Investment over Public Interest available at http://epha.org/wp-content/uploads/2016/07/Joint-Analysis-CETA-ICS-1.pdf (accessed 1 May 2017).

by the CETA Joint Committee.[252] The selection process is a step in the right direction however CETA still does not guarantee sufficient independence because tribunal members are still incentivised and the selection system is not transparent leaving a lot to be desired.[253]

One of the most important aspects of this agreement was the introduction of an appellate mechanism which was exuberantly welcomed.[254] However missing in the agreement is this appellate mechanism's overall functioning and procedures, appointment of members or their remuneration. The mechanism is heralded for increasing the legitimacy of the system, yet these fundamental elements are yet to be defined by the CETA Joint Committee.[255]

The chapter also contains considerable improvements on transparency. It is based on, and goes further than the UNCITRAL transparency rules. Hearings, exhibits and submissions would be made available to the public, and civil society stakeholders can make amicus curiae submissions.[256] However, CETA does not offer possibilities for third party intervention. Rights and mechanisms for third-party intervention are vital for local populations, who are directly affected in cases relating to environmental permits for mining or infrastructure projects.[257]

[252] Articles 8.27, 8.28 & 8.30 of CETA 2016.
[253] Joint analysis of CETA's Investment Court System (ICS) Prioritising Private Investment over Public Interest available at http://epha.org/wp-content/uploads/2016/07/Joint-Analysis-CETA-ICS-1.pdf (accessed 1 May 2017).
[254] Article 8.28 of CETA 2016.
[255] Joint analysis of CETA's Investment Court System (ICS) Prioritising Private Investment over Public Interest available at http://epha.org/wp-content/uploads/2016/07/Joint-Analysis-CETA-ICS-1.pdf (accessed 1 May 2017).
[256] Article 8.36 of CETA 2016; the *Biwater* Tribunal was the first ICSID Tribunal to permit amicus participation under the new Rules. The Tribunal's extensive discussion of the points raised by the amici, and its reference to the usefulness of the amicus submission, affirmed the active role amici are expected to play in investment arbitration, and vested third-party participation with additional institutional legitimacy (beyond that conferred by the Rules themselves). Notably, in this instance, the amici did not confine themselves to broad policy considerations, as the Tribunal's initial decision to allow their participation suggested. Rather, they addressed several substantive issues, including, inter alia, the possibility that BGT's bid for the project was artificially (and unsustainably) low with an eye to renegotiation at some future point.
[257] Joint analysis of CETA's Investment Court System (ICS) Prioritising Private Investment over Public Interest available at http://epha.org/wp-content/uploads/2016/07/Joint-Analysis-CETA-ICS-1.pdf (accessed 1 May 2017).

It can be gleaned from CETA that it would seem to address all the major issues currently plaguing the international investment dispute resolution regime. The establishment of a permanent court with independent arbitrators is the beginning of precedent in investment law. Although the CETA tribunal is said to have its drawbacks such as giving a lot of discretion to the joint interpretive committee to decide on issues that should be clearly defined in the agreement such as the appeal mechanism leaves a lot to be desired. However, it is a step in the right direction and what remains to be seen is the actual functioning of the court, where many lessons could be drawn from.

3.7. CONCLUSION

Even if treaties can be rescinded on relatively short notice, established investments continue to take advantage of treaty protections for ten to fifteen years, on average, into the future. Even denunciations of the international convention governing investment disputes (ICSID) will not have quite the desired effect for established investments. Such methods, Schreuer writes, are not likely to give rise to "quick and decisive results."[258] However this is a step in the right direction as perceived by the South African Department of Trade and Industry which, in a reaction to adverse arbitral decisions undertook a wholesale review of its BIT framework, observing that the current model of investment treaty, borrowed from the United Kingdom, did not serve well South Africa's constitutional project of societal reconciliation in the face of apartheid's legacy of economic inequality.[259]

One suggestion has been the incorporation of an investment advisory centre as a permanent institution, fashioned after the WTO advisory centre;[260] it would go a long way in assisting developing nations. CETA represents an important and radical change in investment rules and dispute resolution. It lays the basis for a multilateral effort to develop further this new approach to investment dispute resolution into a Multilateral Investment Court. This is an improvement and shows that some institutions are making headway in an attempt to legitimise the investment dispute regime. With institutions like the ICC already responding to the issue of costs, the latest amendment to the ICC arbitration rules deals largely with expediency and costs, it is indeed a step in the right direction.[261]

[258] Schreuer C "The Future of Investment Law" in Manoush H. Arsanjani, Jacob Katz Cogan, Robert D. Sloane, and Siegfried Wissner (eds.) *Looking to the Future: Essays on International Law in Honour of Michael W. Reisman* 794.

[259] South Africa, Department of Trade and Industry, "Bilateral Investment Treaty Policy Framework Review: Government Position Paper" (June 2009) .

[260] Gottwald E 'Levelling the playing field: is it time for a legal assistance centre for developing nations in investment treaty arbitration? *American University International Law Review* 260.

[261] https://iccwbo.org/publication/arbitration-rules-and-mediation-rules/

The issues faced by developing countries more so African nations are unique. The sentiments echoed in African regional investment instruments mirror those developed by CETA. However, they continue to sign BITs, which contradict the inter-African instruments on investment, despite the fact that the instruments may only apply on a regional level. There are many issues which need to be considered when addressing issues in investment dispute settlement for African nations. As stated above they suffer untenable bias at the hands of arbitrators, of which tribunals are made up mostly of European and American white males. For a multilateral investment court system to work for African nations it must be a solution that addresses the concerns facing these states. Therefore, contextual and differential standards all recognize the vast differences that currently exist between countries and the effect that these differences have on countries' priorities and capabilities.[262] The current blanket application of the law in investment tribunals does not achieve a fair result as developing countries are subject to differential treatment in most other aspects in international law except for investment law. Under contextual standards, the realities of an individual country will determine the expectations of full protection and security, fair and equitable treatment, and other substantive obligations. The requirements of international investment law will thus be based on a sliding scale. More developed countries with greater capacity to protect investments will be held to a higher standard. Conversely, a developing country less capable of providing protection will have its behaviour judged against a standard based on its own development.[263] A thorough examination of the existing African regional investment instruments will be done in the next chapter to reflect the sentiments of African nations.

[262] Alexander EA 'Taking Account of Reality: Adopting Contextual Standards for Developing Countries in International Investment Law' *Virginia journal of international law* 823.

[263] Alexander EA 'Taking Account of Reality: Adopting Contextual Standards for Developing Countries in International Investment Law' *Virginia journal of international law* 827.

CHAPTER FOUR

THE FOREIGN INVESTMENT DISPUTE SETTLEMENT REGIME IN AFRICA

4.1. INTRODUCTION

It has been proved in the preceding chapters that African nations had no control over the resultant investment dispute settlement regime. It was in essence a system imposed and consequently inherited from their colonial masters. As the foundational assumption that BITs would improve the developing world's ability to attract foreign investment has increasingly come under scrutiny and a critical mass of investment treaty arbitration decisions and awards became publicly available for review, critical inquiries about the legitimacy of the system as a whole began to emerge.[264] The historical record on the formation of ICSID is unambiguous and suggests that the participating African nations overwhelmingly believed that a reputable international dispute settlement mechanism would alleviate Africa's problem of attracting foreign investment.[265] Investment in Africa has largely been governed by BITs, with over 900 agreements in force. Between 1972 and 2014, Africa has been recorded as participating in 111 cases representing about one fifth of all those documented, which are treaty-based.[266] In all, 68 cases have resulted in an award, have been settled or have been discontinued and are considered concluded, while 43 cases are pending, some dating as far back as 2004. [267]

[264] Schreuer C "The Future of Investment Law" in Manoush H. Arsanjani, Jacob Katz Cogan, Robert D. Sloane, and Siegfried Wissner (eds.) *Looking to the Future: Essays on International Law in Honour of Michael W. Reisman* 794.
[265] Gottwald E 'Levelling the playing field: is it time for a legal assistance centre for developing nations in investment treaty arbitration? *American University International Law Review* 260.
[266] UNECA Investment agreements landscape in Africa' October 2015.
[267] UNECA Investment agreements landscape in Africa' October 2015.

However African regional groupings have their own set of investment instruments which represents a true reflection of their interests. These instruments consist of rules on the treatment and protection of foreign direct investment contributions to the investment climate.[268] Some regions include voluntary principles while other regions include rules with effective state to state dispute settlement mechanisms. The important point is that a distinction is made between investment provisions in regional treaties and domestic laws.[269] The provisions may at times apply to both regional and extra-regional investors.[270] The overriding role of dispute settlement bodies in regional integration initiatives is to foster predictability, transparency, accountability and participation of all member states as well as individuals conducting business in them.[271]

This chapter will examine the current investment instruments contained in the regional groupings with focus on the dispute settlement mechanisms therein. There will be particular focus on legal framework such as the SADC FIP, the Pan African Investment Code (PAIC) and COMESA, as these are the instruments that have direct influence on the Tripartite Free Trade Area (TFTA) and the subsequent Continental Free Trade Area (CFTA). An analysis of the COMESA Investment Dispute Settlement system will be provided to highlight the issues faced in Africa.

[268]Brower CN, A Study of Foreign Investment Law in Africa: Opportunity Awaits available at http://www.arbitrationicca.org/media/7/82088225980224/brower__daly_a_study_of_foreign_investment_law_in_africa.pdf (accessed 21 June 2017).
[269] Paulewyn J, "At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed", *ICSID Review*, Vol. 29, No. 2(2014) 378.
[270] COMESA Investment Report 2012, 35.
[271]Siziba C, 'Trade Dispute Settlement in the Tripartite Free Trade Area', *World Trade Institute* Working Paper No. 02/2016 3.

4.2. THE AFRICAN UNION

Currently the African Union (AU) has no instrument that addresses investment directly. However article 19 of the AU Constitutive Act provides for three specific financial organs to be created, the African Central Bank, African Investment Bank and African Monetary Fund.[272] The role of these institutions is to implement the economic integration called for in the 1991 Treaty Establishing the African Economic Community. The AU is yet to materialise the above named institutions, however the AU has started drafting the Continental Free Trade Area (CFTA), which is likely to include an investment chapter.

It is encouraging that the AU is undergoing institutional reform. This provides an opportunity for member states to determine how the AU can be reformed so that the CFTA can be better institutionalized and implemented.[273] Cognisance is taken of the myriad of regional investment agreements that have emerged in the African context due to the proliferation of regional economic communities (RECs).[274] Within West Africa, there are three RECs: the West African Economic and Monetary Union, the Mano River Union, and the Economic Community of West African States.[275] Central Africa has two groupings: the Economic Community of Central African States, the Economic and Monetary Community of Central Africa, and the Economic Community of Great Lakes Countries.[276] In the Eastern and Southern African sub-regions, six groupings coexist: the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Inter-Governmental Authority on Development, the Indian Ocean Commission, the Southern Africa Development Community (SADC), and the Southern African Customs

[272] African Union Constitutive Act
[273] Economic Commission for Africa *Assessing Regional Integration in Africa VIII: Bringing the Continental Free Trade Area About* (2017) 121.
[274] Mbengue M 'The quest for a Pan-African Investment Code to promote sustainable development' ICSTD Bridges Africa volume 5, issue 5 – June 2016.
[275] https://www.au.int/web/en/organs/recs (accessed 15 June 2017).
[276] https://www.au.int/web/en/organs/recs (accessed 15 June 2017).

Union.[277] North Africa shares two RECs, namely the Arab Maghreb Union and the Community of Sahel-Saharan States.[278]

Today, in this complex mosaic, 28 countries retain dual membership, 20 are members of three RECs, the Democratic Republic of Congo belongs to four RECs, and six countries maintain single membership.[279] Focus will be on the PAIC as the proposed guiding instrument for the region as a whole, as it is likely to be included as the investment chapter in the CFTA[280] Secondly an analysis of the TFTA as the instrument leading into the CFTA and one that merges different regional economic groupings. COMESA, EAC and SADC will also be assessed as the regional economic groupings that have come together for the TFTA.

[277] https://www.au.int/web/en/organs/recs (accessed 15 June 2017).
[278] https://www.au.int/web/en/organs/recs (accessed 15 June 2017).
[279] Mbengue M 'The quest for a Pan-African Investment Code to promote sustainable development' *ICSTD Bridges Africa* volume 5, issue 12.
[280] http://www.uneca.org/aligning-pan-african-investment-code-cfta-2017 (accessed 15 June 2017).

4.2.1.1. THE CONTINENTAL FREE TRADE AREA

The purpose of the CFTA is to create a free trade area among the member States of the AU.[281] Following the launching of negotiations for a CFTA by the AU summit in June 2015, negotiations are planned for two phases: the first, expected to be concluded by the end of 2017, covering trade in goods and trade in services; the second will deal with the issues of investment, intellectual property rights, and competition policy.[282] It has been suggested at the recent conference hosted by the United Nations Economic Commission for Africa (UNECA) that the PAIC will form the investment chapter of the CFTA.[283]

The PAIC has been facilitated by UNECA.[284] The overarching objective of the PAIC is to achieve growth that is more inclusive and widespread through promotion and protection of investments, leading not just to equality of treatment and opportunity for investors, but also to reduction of investment and trade barriers.[285]

It has been suggested that some member states might wish to set up a totally independent institution for the CFTA, such as a specialized agency of the AU, which would have an entirely separate legal personality but could be governed through the AU's policy organs.[286] This initiative would ensure proper implementation and a more fluid and successful approach. It has also been suggested that to give the obligations in the CFTA legal certainty and predictability, it will be important to establish a dispute settlement mechanism that would be compulsory and binding as well as fast and

[281] http://www.uneca.org/aligning-pan-african-investment-code-cfta-2017 (accessed 15 June 2017).
[282] http://www.uneca.org/aligning-pan-african-investment-code-cfta-2017 (accessed 15 June 2017).
[283] http://www.uneca.org/aligning-pan-african-investment-code-cfta-2017 (accessed 15 June 2017).
[284] http://www.uneca.org/aligning-pan-african-investment-code-cfta-2017 (accessed 15 June 2017).
[285] http://www.uneca.org/aligning-pan-african-investment-code-cfta-2017 (accessed 15 June 2017).
[286] Economic Commission for Africa *Assessing Regional Integration in Africa VIII: Bringing the Continental Free Trade Area About* (2017) 122.

efficient.[287] Pending the establishment of the African Court of Justice and Human Rights, it has been proposed that the AU Assembly could either convene a commercial chamber in the existing African Court of Human and Peoples' Rights or establish a specialist ad hoc committee to hear appeals from the decisions of the CFTA Dispute Settlement Committee.[288] This is a positive step to establish dispute settlement on the continent, however is it is disheartening to note that the suggestion is that it be state to state disputes.

4.2.1.1.1. The Pan African Investment Code

The preamble of the PAIC states that, it recognises the need for a comprehensive guiding instrument on investment for all AU member states.[289] This is a step in the right direction however regional integration in Africa remains problematic.[290] This is evident in the PAIC which takes note of the AU Constitutive Act and its aims towards regional integration.[291] Yet in the same breath it recognises the right to regulate of member states with a view to meeting national policy objectives and to promoting sustainable development objectives.[292]

The PAIC states that it is desirous of creating national and continental coherence in investment policymaking while taking into account the existing regional agreements on investment and UNCTAD's Investment Policy

[287] Economic Commission for Africa *Assessing Regional Integration in Africa VIII: Bringing the Continental Free Trade Area About* (2017) 122.
[288] Preamble of the draft Pan African Investment Code.
[289] Preamble of the draft Pan African Investment Code.
[290] Preamble of the draft Pan African Investment Code
[291] Preamble of the draft Pan African Investment Code
[292] Preamble of the draft Pan African Investment Code

Framework for Sustainable Development.[293] While the objective of the PAIC is to become a guiding instrument, one cannot fathom how this will be done while other regional investment agreements remain in place that may contradict the guiding principles.

Article 3 of the PAIC attempts to clarify the position on relationships with other investment agreements but there still remains ambiguity. Article 3 states that the PAIC does not affect the rights and obligations of members under other investment agreements.[294] Currently there are over 3324 IIAs worldwide.[295] To date, African countries have signed around 971 IIAs, which corresponds to about a third of all IIAs signed worldwide.[296] As stated in Chapter three, there are already issues with overlapping agreements and the myriad of BITS that currently exist, they cause forum shopping and adding to that problem will not make dispute settlement easier.

Article 3(2) endeavours to redeem this by stating that member states may set a period in which all BITs will be reviewed and the PAIC can become the replacement and binding instrument for all intra-African investment.[297]It is interesting to note that, it states here that it applies to intra-African trade agreements yet in the scope of application, it was clearly stated that the PAIC applies to investors and their investments in the territory of member states.[298]Chapter 3 of the PAIC recognises developmental needs of the respective member states and accordingly makes provision by allowing member states to harmonise at their developmental level.[299]

[293] Preamble of the draft Pan African Investment Code.
[294] Article 3(1) of the draft Pan African Investment Code.
[295] World Investment Report 2017
[296]http://investmentpolicyhub.unctad.org/IIA (accessed 14 June 2017).
[297] Article 3(2) of the draft Pan African Investment Code.
[298] Article 2(1) of the draft Pan African Investment Code. The code defines "investor" as any national, company or enterprise of a Member State or a national, company or enterprise from any other country that has invested or has made investments in a Member State.
[299]Article 18 of the draft Pan African Investment Code states that the process of harmonizing the investment regimes among Member States takes place with due respect for national policy objectives and the level of development of individual Members States. There shall be appropriate flexibility for Member States to prescribe

The PAIC attempts to deal with dispute settlement in chapter 6 but fails to address this pertinent issue comprehensively. It begins by encouraging member states to handle disputes initially through consultations, negotiation or mediation.[300] This is a noble call that aligns with UNCTAD's Investment Policy Framework for Sustainable Development.[301] State to state arbitration has been delegated to established African public forums or alternative dispute resolution centres.[302] These institutions are not named or defined in the PAIC; they are left for the parties to decide. It is only if parties are in dispute over this clause that they can refer the matter to the African Court of Justice (ACJ), which does not actually exist.[303] Dispute settlement remains a contentious issue which needs to be clearly defined. The fact that the ACJ is not in existence and that the current judicial organ of the AU deals specifically with human rights abuses compounds the problem. This is a highly contentious issue and is likely to be the basis of claims contesting the jurisdiction of the court. The EAC in 2015 had similar issues with their East African court of justice; however they rectified the issue by signing a protocol to cover trade and investment matters.[304]

The PAIC also provides for ISDS, however it must be in line with the member state's domestic policies and there must be consent from the state party.[305] The PAIC attempts not to interfere with existing IIAs but stating that disputes

their national List of scheduled investment sectors open for liberalization, in line with their development situation.

[300] Article 41 of the draft Pan African Investment Code.

[301] UNCTAD's Investment Policy Framework for Sustainable Development,

[302] Article 41(1) of the draft Pan African Investment Code.

[303] Article 41(2) of the draft Pan African Investment Code; The African Court of Justice was originally intended to be the "principal judicial organ of the Union" (Protocol of the Court of Justice of the African Union, Article 2.2) with authority to rule on disputes over interpretation of AU treaties. A protocol to set up the Court of Justice was adopted in 2003, and entered into force in 2009. It was, however, superseded by a protocol creating the African Court of Justice and Human Rights , which will incorporate the already established African Court on Human and Peoples' Rights and have two chambers — one for general legal matters and one for rulings on the human rights treaties.

[304] Mwanza W 'The East African Court's jurisdiction over investments matters and what it means for Community's legal instruments' March 2015, available at http://www.tralac.org/discussions/article/7126-the-eac-court-s-jurisdiction-over-investment-matters-and-what-it-means-for-the-community-s-legal-instruments.htmlnad (accessed 13 June 2017).

[305] Article 42(1) of the draft Pan African Investment Code.

arising under specific agreements shall be governed by the existing agreements.[306] The PAIC encourages non-binding alternative dispute settlement mechanisms in the first six months of a dispute arising.[307] Should the consultations fail the dispute may be resolved through arbitration, subject to the applicable laws of the host State and subject to exhaustion of local remedies.[308] The PAIC reverts back to the customary international law position where domestic remedies had to be exhausted before proceeding to an international tribunal. Where ISDS proceeds it may be conducted at any established African public or African private alternative dispute resolution centre such as the KIAC. Arbitration shall be governed by the UNCITRAL rules. [309] The parties are left to decide which centre is to deal with the matter and once a place is chosen it is final and the decision shall be binding. This is encouraging as the PAIC at least aims to strengthen arbitral institutions within the continent.

This code fails to address relevant issues that are currently faced with investment dispute settlement. There is no appeal mechanism because the arbitration is not specific to any centre, however as a way forward the PAIC provides for counterclaims.[310] The fact that there is no designated body to deal with the disputes will only compound the issue of inconsistent decisions. However, the PAIC is not to be fully discredited as it has not yet been signed, there is still room for improvement.

[306] Article 42(1) (a) of the draft Pan African Investment Code.
[307] Article 42(1) (b) of the draft Pan African Investment Code.
[308] Article 42(1) (c) of the draft Pan African Investment Code.
[309] Article 42(1) (d) of the draft Pan African Investment Code.
[310] Article 43 (1) of the draft Pan African Investment Code.

4.2.2.THE TRIPATITE FREE TRADE AREA

The TFTA was launched in June 2015 and will come into force once ratification is attained in two thirds of the 26 member states of COMESA, SADC and the EAC. Negotiations on investment are scheduled to take place in the second phase of the negotiations, together with trade in services, competition policy and intellectual property rights.[311]

The notable clause in the TFTA is on dispute settlement as it establishes a dispute settlement body (DSB) to address issues pertaining to the agreement. It is still unclear whether this dispute settlement body will have jurisdiction over investment clauses which are still to be drafted and whether individuals will have locus standi. The TFTA DSB is fashioned after the World Trade Organisation DSB; in the same manner it can establish a Panel and Appellate Body.[312]

When the investment chapter is negotiated in the TFTA, this creates an opportunity for the replacement of 47 BITs in existence between African country members of the three groups.[313] Along similar lines, if investment protection provisions are included in the European Union economic partnership agreements on-going negotiations with regional African groups, this may potentially supersede 224 BITs between EU member states and individual African countries. This would represent an opportunity to phase out 81 per cent of the total number of BITs signed by COMESA countries.[314]

[311] Hartzenberg T 'Introduction' in Trudi Hartzenberg *et al Cape to Cairo: Making the Tripartite Free Trade Area Work* (2011) iii.
[312] Article 30 (2) of the Tripartite Free Trade Area Agreement, 2015.
[313] COMESA Investment Report 2013
[314] Such an approach is already envisaged in the EU context, where Regulation 1219/2012, adopted in December 2012, sets out a transitional arrangement for BITs between EU Member States and third countries. Article 3 of the Regulation stipulates that "without prejudice to other obligations of the Member States under Union law, bilateral investment agreements notified pursuant to article 2 of this Regulation may be maintained in force, or enter into force, in accordance with the [Treaty on the Functioning of the European Union] and this Regulation, until a bilateral investment agreement between the Union and the same third country enters into force."

4.2.3.COMESA

The Preferential Trade Area for Eastern and Southern Africa (PTA), established in 1981, became COMESA in 1993 in line with Article 29 of the PTA itself which called for the development of the PTA into a common market and eventually into an economic community.[315] COMESA was established primarily as a vehicle for trade and economic development, and its objectives are economically orientated.[316] It is interesting to note that one of the key objectives is to contribute towards the establishment, progress and the realisation of the objectives of the African Economic Community.[317]It is evident that the overall integration strategy of the African continent is important to COMESA members.

4.2.3.1. THE COMESA COURT OF JUSTICE

Article 7 establishes the COMESA Court of Justice (COJ) as one of the arms of COMESA, while article 19 affirms adherence to law in the interpretation and application of the COMESA Treaty.[318] The COJ is composed of seven judges appointed by the Authority, and whose function is to adjudicate on all matters referred to it pursuant to the COMESA Treaty.[319]Independence and impartiality are the highlighted features for qualification as a judge together with competence in their respective countries.[320] It is interesting to note that

[315] Preamble to the COMESA Treaty
[316] Article 3 of the COMESA Treaty.
[317] Article 3(f) of the COMESA Treaty. When COMESA was established, its main priority was the creation of a FTA by 2000, and this was achieved. In 2009, the COMESA Heads of State launched the COMESA Customs Union but this has yet to enter into force.
[318] Article 19 of the COMESA Treaty.
[319] Article 20(1) of the COMESA Treaty.
[320] Article 20(2) of the COMESA Treaty.

no more than two judges shall be nationals of the same member state.[321] This may be in order to retain independence of the COJ and to ensure there is no bias. The COJ is financed by the member states.[322]Tenure is granted for five years and judges are eligible for reappointment for a second term.[323] The judges are immune from legal action arising from the discharge of their duties.[324]

The COJ is granted exclusive jurisdiction over matters arising in and out of the COMESA Treaty.[325] In addition, the court has jurisdiction to give advisory opinions regarding questions of law relating to the Treaty.[326] Disputes between COMESA employees and the Authority may also be heard by the court.

Article 24 regulates state to state disputes, whereby member states that consider that the treaty has been breached by another member state of may refer the matter to the court.[327] In addition to this protection, member states may challenge any act or directive by the council that amounts to an infringement of the treaty or abuse of power.[328] The Secretary General is empowered to submit his findings to a member state on its failure to fulfil an obligation of the treaty.[329] The matter may be escalated to the Bureau of the Council which shall decide whether the matter is to be referred to the court or to the council.[330] Failing which the council may direct the Secretary General to refer the matter to the court for determination.[331]

[321] Article 20(2) of the COMESA Treaty.
[322] Article 42 of the COMESA Treaty.
[323] Article 21(1) of the COMESA Treaty.
[324] Article 39 of the COMESA Treaty.
[325] Article 23 of the COMESA Treaty.
[326] Article 32 of the COMESA Treaty.
[327] Article 24(1) of the COMESA Treaty.
[328] Article 24(2) of the COMESA Treaty.
[329] Article 25(1) of the COMESA Treaty.
[330] Article 25(2) of the COMESA Treaty.
[331] Article 25(3) of the COMESA Treaty.

The jurisdiction of the COJ extends to natural persons resident in any of the member states, who may refer for determination any act or directive by the council or a member state.[332] This is significant power given to individuals however it is limited by the fact that local remedies must have been exhausted. Once again an instrument reverts to the customary law position. This provision seems to exclude investors that are not from any of the member states. The COJ has extensive jurisdiction which includes arbitration in which the COJ has been chosen as a tribunal.[333]

Third parties are permitted to make submissions with leave of the court.[334]All judgements of the COJ can only be revised if it is based upon the discovery of some fact which by its nature might have had a decisive influence on the judgment if it had been known to the Court at the time the judgment was given.[335] Enforcement of pecuniary obligations is subject to the rules of procedure of the member state.[336] The court is empowered to prescribe sanctions member states that have defaulted in implementing its decision.[337] Decisions of the court have precedence over those of national courts of Member states.[338] The seat of the COJ is in Khartoum, Sudan, which may not have the capacity to handle disputes given the current state of affairs in this conflict zone.

[332] Article 26 of the COMESA Treaty
[333] Article 28 of the COMESA Treaty.
[334] Article 36 of the COMESA Treaty; A Member State, the Secretary-General or a resident of a Member State who is not a party to a case before the Court may with leave of the Court, intervene in that case, but the submissions of the intervening party shall be limited to evidence supporting or opposing the arguments of a party to the case.
[335] Article 31(3) of the COMESA Treaty.
[336] Article 40 of the COMESA Treaty.
[337] Article 34(3) of the COMESA Treaty.
[338] Article 29 of the COMESA Treaty.

4.2.3.2. COMESA INVESTMENT AGREEMENT

On 22 and 23 of May 2007 the twelfth Summit of COMESA Authority of Heads of State and Government, held in Nairobi, Kenya, adopted the Investment Agreement for the COMESA Common Investment Area (CCIA Agreement). According to COMESA, "the CCIA Agreement is a precious investment tool whereby the COMESA Secretariat contemplates to create a stable region and good investment environment, promote cross border investments and protect investment, and thus enhance COMESA's attractiveness and competitiveness within the COMESA Region, as a destination for Foreign Direct Investment (FDI), and in which domestic investments are encouraged."[339]

This investment agreement has been said to offer a new approach to ISDS that is sensitive to the realities of developing states and of the particular conditions that influence approaches to international commercial arbitration in Africa.[340] The CCIA Agreement represents a challenging new departure; it provides a system of investor-state arbitration that seeks to reconcile the concerns both of investors, African host countries and other stakeholders in the fair and effective resolution of disputes through regional dispute settlement mechanisms.[341]

The CCIA agreement has four parts. The first part details objectives, features, issues on transparency, general obligations, on COMESA and international multilateral agreements, institutional arrangements, implementation programmes and action. The other three parts of the agreement include rights and obligations of members and COMESA investors, on dispute settlement,

[339] Available at http://www.comesa.int/experts-discuss-revised-ccia/ (accessed 17 July 2017).
[340]Muchlinski, P, The COMESA Common Investment Area: Substantive Standards and Procedural Problems in Dispute Settlement (2008). SOAS School of Law Research Paper No. 11/2010.
[341] Muchlinski, P, The COMESA Common Investment Area: Substantive Standards and Procedural Problems in Dispute Settlement (2008). SOAS School of Law Research Paper No. 11/2010 12.

and a part on final provisions detailing how the CCIA agreement relates to other existing agreements, adoption of protocols, additional membership, withdrawal and renewal of membership, and ratification of the agreement.

The provisions relevant to dispute settlement show a departure from the traditional IIAs. In Article 8 of the CCIA member states are encouraged to accede to the New York Convention on recognition and enforcement of foreign arbitral awards, ICSID, MIGA and other multilateral agreements that protect investment. This presents a new feature already as member states are called on to reinforce investment protection by signing multilateral agreements. Although the provision is not peremptory it is surely a step in the right direction. The institutions within COMESA responsible for the administration of the agreement include the CCIA committee comprising of ministers responsible for investment in each member state.[342] Member states are tasked with submitting an implementation plan within a year of ratifying the agreement.[343]

It must be noted that this agreement only applies to investments of COMESA investors that have been specifically registered pursuant to this agreement.[344] It covers only disputes involving claims that have arisen since the entry into force of the agreement.[345] Consequently the CCIA Agreement has no retroactive force and claims arising before its entry into force will have to be dealt with by other means.[346]

[342] Article 7 of the CCIA Agreement
[343] Article 28(3) of the CCIA Agreement.
[344] Article 12 of the CCIA Agreement ;Caveat emptor
[345] Article 12 of the CCIA Agreement
[346] Muchlinski, P, The COMESA Common Investment Area: Substantive Standards and Procedural Problems in Dispute Settlement (2008). SOAS School of Law Research Paper No. 11/2010.

4.2.3.2.1. DISPUTE SETTLEMENT PROVISIONS UNDER CCIA

The CCIA agreement allows for both state to state dispute settlement and ISDS. However before either type of dispute settlement mechanism can be invoked the CCIA Agreement demands use of other dispute settlement techniques such as negotiation and mediation.[347] This provision provides a six month 'cooling off' period where parties shall seek to resolve matters amicably before a formal initiation of the dispute.[348] Failure to settle the dispute at mediation and negotiation level may result in the member state referring the dispute to various fora. The options range from an independent arbitral tribunal, to the COJ sitting as a court or as an arbitral tribunal.[349]

ISDS is limited to COMESA investors, who are also afforded a wide range of tribunals to refer disputes to. Forum shopping is specifically prohibited as investors are only permitted to bring claims to one of the fora at any given time.[350] The different fora include the host state's domestic courts, the COMESA COJ, ICSID, and ad hoc arbitration under the various rules.[351] Article 28(4) contains explicit consent to arbitration by member states through what is termed 'arbitration without privity'.[352] The host country makes an offer to all foreign investors which can be subsequently accepted by any investor involved in a dispute with that country, thereby obviating the need for a prior arbitration agreement between them.[353] The CCIA continues to introduce innovations with a transparency provision which allows for documents filed to be made available to the public, while also protecting the investor's confidential business information.[354] In addition to this, third

[347] Article 26(1) of the CCIA Agreement.
[348] Article 26(2) of the CCIA Agreement.
[349] Article 27 of COMESA CCIA.
[350] Article 28(1) of CCIA Agreement.
[351] Article 28(1) of the CCIA Agreement.
[352] Paulson J, 'Arbitration without privity' ICSID Review 232.
[353] Paulson J, 'Arbitration without privity' ICSID Review 232.
[354] Article 28 of the CCIA Agreement.

parties particularly amicus curiae are permitted to make submissions subject to the discretion of the tribunal.[355] Further to that states are permitted to counterclaim.[356]

The CCIA agreement offers the most radical solutions on investment dispute resolution on the continent. It is an instrument that once ratified will provide a more balanced approach to investment dispute settlement. It offers to the investor the choice of international arbitration based on a balance of rights and obligations between them and the respondent state. In this the CCIA Agreement can be viewed as a significant response to the concerns of investors about local remedies while at the same time structuring the available substantive types of claim to ensure that legitimate state rights to regulate are not unduly curtailed and that the rights and interests of significant third parties are not ignored.[357] This agreement essentially addresses the issues highlighted in Chapter 3.

While the CCIA presents a far superior investment instrument than any other on the continent, its biggest drawback is that it has not yet been ratified. It still remains a fossil in the archives of trade departments, and it might have been overtaken by events with the probable onset of investment chapters in the TFTA and CFTA. However, this agreement can still serve as a guiding principle for the drafting of those investment chapters. There are numerous aspects that can be drawn from the CCIA to be incorporated into the PAIC such as referring matters to African arbitral centres.

[355] Article 28(7) of the CCIA Agreement.
[356] Article 28 (9) of the CCIA Agreement.
[357] Muchlinski, P, The COMESA Common Investment Area: Substantive Standards and Procedural Problems in Dispute Settlement (2008). SOAS School of Law Research Paper No. 11/2010 12.

4.2.4.THE EAC INVESTMENT GUIDE

The East African Community (EAC) is a regional intergovernmental organisation of six East African states.[358] The Treaty for establishment of the EAC was signed on 30 November 1999 and entered into force on 7 July 2000.[359]The EAC countries established a customs union in 2005 and common market in 2009; they also signed a protocol for a monetary union in 2013.[360] The ultimate mission of the EAC is to widen and deepen economic, political, social and cultural integration in order to improve the quality of life of the people of East Africa through increased competitiveness, value added production, trade and investments.[361]

The EAC is in agreement about the need for cooperation in order to spearhead investment in the region. The aim is to harness the investment potential to promote economic growth and development in the region. The members of the EAC agreed to co-operate in the areas of investment and industrial development.[362] This co-operation seeks to, rationalise investments and make full use of established industries. This will in turn promote efficiency in production, as well as harmonise and rationalise investment incentives with a view to promoting the EAC as a single investment area.[363] To this end, an EAC Model Investment Code was drafted in 2002.[364] The Investment Code is not a binding legal instrument but rather a model whose features the EAC partner states may incorporate into their national laws.

[358] http://www.eac.int/about/overview (accessed 17 June 2017); The five member states of the EAC are Burundi, Kenya, Rwanda, Tanzania and Uganda. The Republic of South Sudan was admitted as the sixth member of the EAC at the 17th Ordinary Summit of the East African Community Heads of State on 2 March 2016 in Arusha.
[359] http://www.eac.int/about/overview (accessed 17 June 2017).
[360] http://www.eac.int/about/EAC-history (accessed 17 June 2017).
[361] http://www.eac.int/integration-pillars (accessed 17 June 2017).
[362] Article 79 – 8- of the EAC Treaty
[363]http://www.eac.int/sectors/investment-promotion-and-private-sector-development/investment-framework (accessed 17 June 2017).
[364]http://www.eac.int/sectors/investment-promotion-and-private-sector-development/investment-framework (accessed 17 June 2017).

Dispute settlement is addressed in article 15 of the Code; it states that investment disputes are to be dealt with in terms of domestic laws.[365] Yet the next article states that parties can submit disputes to ICSID unless they agree otherwise.[366] Clarke states that this may be contradictory as the alternative domestic remedies only exist if parties exclude international arbitration in the treaty.[367] It is interesting to note that currently Burundi is the only EAC member to have modified its legislation to align it with the EAC Investment Code.[368] However as the instrument remains non-binding and acts merely as a guide, a high level of compliance is not to be expected. This EAC code seems to have been superseded by the CCIA and ultimately the PAIC.

The EAC is a REC that has achieved the highest level of integration to date, within the continent. Investment falls under the monetary union and this will take considerable effort to achieve integration. Hence the EAC investment instrument serves as a guide, it is not binding. This approach may be more sustainable for African nations who more often than not lack the political will to conform their domestic laws. However, it does not provide an appropriate structure that instils investor confidence in the system. The most significant stride in the EAC is the intention to harmonise and rationalise investments, offering the regional bloc as one. This presents a significant departure from BITs which promote agreement between two countries. This will significantly increase the region's bargaining power.

[365] Article 15(1) of the EAC Investment Code 2002.
[366]Article 15(3) of the EAC Investment Code 2002.
[367] Clark V in 'Investment governance in the Tripartite Free Trade Area' in Trudi Hartzenberg *et al Cape to Cairo: Making the Tripartite Free Trade Area Work* (2011) 82.
[368] Clark V in 'Investment governance in the Tripartite Free Trade Area' in Trudi Hartzenberg *et al Cape to Cairo: Making the Tripartite Free Trade Area Work* (2011) 83.

4.2.5.SADC FIP

The SADC Member States amended Annex 1 of the SADC Finance and Investment Protocol (FIP) in August 2016. The amended version omits the fair and equitable provision and the ISDS mechanism as suggested in the model SADC BIT. The amended FIP also refines the definition of investment and investors, while still limiting its protection to member state investors. The FIP introduces exceptions to the expropriation provision for public policy measures. The national treatment provision is clarified with reference to "like circumstances". [369] The FIP includes detailed provisions on investor responsibility[370] and the right of host countries to regulate investment for the public interest.[371] These amendments have been ratified as the three quarters majority has been reached. What remains are the harmonisation of the regional instrument with the domestic laws, the FIP encourages harmonisation.[372]

The SADC FIP 2010 included a dispute settlement provision between the investor and the state. Article 28 stated that the investor had to exhaust local remedies before referring the matter to the listed options. The amendment leaves a lot to be desired as it omits to address the contentious issue of dispute settlement specifically. The FIP states that all disputes are to be handled in terms of the SADC Tribunal Protocol which is yet to be ratified.[373]

[369]Article 6 of the Amended SADC FIP 2016.
[370] Article 8 of the SADC FIP 2016.
[371] Article 12 of the SADC FIP 2016.
[372] Article 17of the SADC FIP 2016.
[373] Article 26 of the SADC FIP 2016.

The SADC FIP instead of presenting a radical instrument presents a watered down instrument that essentially takes away the protection of investors, with the omission of the fair and equitable treatment. This instrument fails to achieve a balance between investor and host state, instead it creates a system that is skewed in favour of the host state, which may deter investors. Especially since South Africa an economic hub in the SADC region has already started withdrawing from BITs, this may end up being the prevailing law. After stripping the investor of rights, the SADC FIP continues to direct disputes to the defunct and non-existent SADC Tribunal, which shall be discussed in detail below.

4.2.5.1. THE SADC TRIBUNAL

The SADC Tribunal was established to ensure adherence to, and proper interpretation of the provisions of, the SADC Treaty and subsidiary instruments, and adjudicates upon disputes referred to it.[374] It was established by the Protocol on the Tribunal, which was signed in Windhoek, Namibia during the 2000 Ordinary Summit, and was officially established on 18 August, 2005 in Gaborone, Botswana. The Tribunal consisted of appointed judges from Member States.[375]

After several judgements against the Zimbabwean government, the Tribunal was de facto suspended at the 2010 SADC Summit.[376] On 17 August 2012 in

[374] Article 16 of the SADC Treaty 1992.

[375] http://www.sadc.int/about-sadc/sadc-institutions/tribun/ (accessed 18 June 2017)

[376] http://www.sadc.int/about-sadc/sadc-institutions/tribun/ (accessed 18 June 2017); The plaintiffs in the case of *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* [2008] SADCT 2 (28 November 2008), all won cases against the Zimbabwean government in the Tribunal. This case involved the expropriation of private land without compensation, the Zimbabwe government was found to be in breach of Article 4 and Article 6 of the SADC Treaty 1992. However the government refused to implement the Tribunal's orders against it and persuaded SADC leaders, not only to stop the Tribunal accepting new cases and holding hearings [in August 2010], but also to stop appointing judges to keep the Tribunal operational [in May 2011]. This paralysed, but did not legally abolish, the Tribunal.

Maputo, Mozambique, the SADC Summit addressed the issue of the suspended SADC Tribunal. The SADC Summit resolved that a new Tribunal should be negotiated and that its mandate should be confined to interpretation of the SADC Treaty and Protocols relating to disputes between member States.[377]

The new Protocol makes provision for the repeal of the original Protocol, to become effective when the new Protocol itself comes into operation. The protocol requires two thirds ratification, to date only nine members had signed at the 34th SDAC Summit held in Victoria Falls Zimbabwe. Meanwhile, as has been the case for the last four years and on paper only, the original Protocol continues in force and the SADC Tribunal continues to exist, by virtue of the SADC Treaty of 1992.[378] Nonetheless it is a phantom court without judges, and unlikely to become operational in the near future.[379]

The previous protocol gave the tribunal wide-ranging jurisdiction. While the new Protocol seriously curtails this jurisdiction. It states simply that the Tribunal shall have jurisdiction to interpret the SADC Treaty and protocols relating to disputes between member states. This effectively limits the jurisdiction of the tribunal to state to state disputes only.[380] Erasmus states that this resultantly leaves the issues ambiguous, by failing to clarify on the technicalities.[381] ISDS is removed from the scope of the Tribunal which causes a regression in the development of the investment dispute settlement regime in Africa. Investors are essentially left at the mercy of their own states to espouse their claims; this is unlikely to happen given the politics involved. SADC has taken their own route diverging from all the other regional instruments including the PAIC.

[377] http://www.sadc.int/about-sadc/sadc-institutions/tribun/ (accessed 18 June 2017).
[378] See http://www.veritaszim.net/node/1151(accessed 18 June 2017).
[379] See http://www.veritaszim.net/node/1151(accessed 18 June 2017).
[380] Article 33 of the Protocol on the SADC Tribunal.
[381] Erasmus G The new protocol for the SADC Tribunal: Jurisdictional Changes and Implications for the SADC Community Law Stellenbosch Tralac 7.

Article 44 deals with enforcement and execution of decisions which already is a highly contentious issue given the history of SADC. It is stated that all decisions are binding and that states should comply.[382] Failure to comply means that matter may be referred back to the tribunal, and only if the tribunal establishes the existence of failure will the matter be referred to the Summit for an appropriate action.[383] This is weak and ineffectual compliance which may result in similar issues of compliance as the last tribunal faced.[384] The Summit which consists of the very states involved in a dispute will have to decide on an action. This is worrying as Summit decisions are taken by consensus making it possible for the recalcitrant member to veto proposals to implement tribunal decisions as Zimbabwe did in the Campbell matter.[385]

The new protocol seems to abolish the compulsory jurisdiction over all member states by giving them an option to withdraw from the protocol.[386] This makes it inconsistent with the SADC Treaty as the Tribunal is one of the fundamental organs.[387] It would also remove dispute resolution of investment disputes for countries that would have withdrawn, leaving them no recourse.

SADC purports to be a rules based system, yet they have failed to follow procedure in dismantling the Tribunal and bringing about a new one. They have out rightly disrespected the rights of SADC citizens.[388] The new protocol is fraught with inconsistencies. The lack of transitional arrangements creates uncertainty and questions the functionality of SADC.[389]

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[382] Article 44(1) of the Protocol on the SADC Tribunal.
[383] Article 44(2) of the Protocol on the SADC Tribunal.
[384] Erasmus G The new protocol for the SADC Tribunal: Jurisdictional Changes and Implications for the SADC Community Law Stellenbosch Tralac 10
[385]Erasmus G The new protocol for the SADC Tribunal: Jurisdictional Changes and Implications for the SADC Community Law Stellenbosch Tralac 10.
[386] Article 50 of the Protocol on the SADC Tribunal.
[387] Article 9 of the SADC Treaty 1992.
[388] Erasmus G The new protocol for the SADC Tribunal: Jurisdictional Changes and Implications for the SADC Community Law Stellenbosch Tralac 7.
[389] Erasmus G The new protocol for the SADC Tribunal: Jurisdictional Changes and Implications for the SADC Community Law Stellenbosch Tralac 7.

The SADC Tribunal has caused a serious indictment of dispute settlement on the African continent. The failure of the Tribunal stemming from the Campbell matter and the eventual dismantling of the tribunal is a cause for concern. The fact that the SADC FIP directs all disputes to this defunct non-existent body is disconcerting and will not achieve much in the way of investor confidence. This fails to solve the current issues faced in the investment dispute system. Instead of attempting to harmonise the region's laws like the EAC, each member state will continue signing BITs thereby exacerbating the continent's integration. A welcome approach would be directing investment disputes to existing tribunals on the continent.

4.3. CURRENT TRENDS IN INVESTMENT DISPUTES IN AFRICA

As stated in Chapter 2, Africa is home to multiple arbitration institutes. However, despite there being individuals with the relevant knowledge, skill and experience on international dispute resolution and competent institutions, which specialize in, or are devoted to facilitating international arbitration. The majority of international arbitrations has traditionally been administered by a handful of arbitral institutions based primarily in Europe, including, most notably, the International Chamber of Commerce and the London Court of International Arbitration. Other prominent regional arbitral institutions include the Singapore International Arbitration Centre and Hong Kong International Arbitration in Asia and the American Arbitration Association's International Centre for Dispute Resolution in North America.[390] With the possible exception of the CRCICA, Africa has in the past been without a prominent, home grown arbitral institution. There has been a general tendency by parties to a dispute doing business in Africa to go back to their home turfs to appoint arbitrators.[391] Most disputants prefer to appoint their non-nationals as arbitrators in international disputes, thus resulting in instances where even some Africans select non-Africans to be arbitrators.[392] Indeed, it has been observed that the near absence of African arbitrators in ICSID arbitration proceedings can in part be explained by the fact that African states predominantly appoint international lawyers to represent their interests.[393]A good example is the Kigali International Arbitration Centre (KIAC) where the panel of arbitrators mainly consists of non-Africans.[394] The above scenario thus raises the issue of bias. It has been observed that parties to disputes rarely select African cities as venues for international arbitration,

[390] Muigua K, 'Reawakening Arbitral Institutions for Development of Arbitration in Africa' 23.
[391]Muigua K, 'Reawakening Arbitral Institutions for Development of Arbitration in Africa' 23.
[392] Muigua K, 'Reawakening Arbitral Institutions for Development of Arbitration in Africa' 23; http://www.gtlaw-doingbusinessinafrica.com/2014/08/the-emergence-of-arbitral-institutions-in-africa/ (accessed 27 June 2017).
[393] Lew J, *Comparative International Commercial Arbitration*, (2003) 237.

[394]http://www.kiac.org.rw/IMG/pdf/final_panel_of_international_arbitrators_2017_.pdf (accessed 17 June 2017); Only 22 of the 62 arbitrators are African.

and this is so even for some international arbitral institutions or arbitrators, when asked to make the choice.[395]

An interesting dynamic that has added significantly to the field of international arbitration in Africa is the China Africa relations.[396] China is now a significant investor on the continent.[397] This has led to the establishment of a new international arbitration centre to resolve commercial disputes between Chinese and African parties in Johannesburg South Africa.[398] The China Africa Joint Arbitration Centre will provide an alternative to the China International Economic and Trade Arbitration Commission, which will likely be a welcome development for African parties who may be sceptical of holding arbitrations outside the continent.[399] The introduction of an investment dispute settlement system on the African continent has to start with capacitation of the existing institutional arbitration facilities, like the CRICA and KIAC.

[395] LexisNexis and Mayer Brown International LLP, "Arbitration in sub-Saharan Africa," p.1. Available at http://www.mayerbrown.com/files/News/937b1c45-31e5-437f-bbe339e5f01dd1d/Presentation/NewsAttachment/6fb0a0bf-0164-4c30a54d63eccc1dd65f/LexisNexis_2012_arbitration-in-sub-aharan-Africa.pdf

[396] Kidane W 'The China Africa factor' University of Pennsylvania Journal of International Law Vol 35 Issue 3, 2015 110.

[397] China's FDI stock in the region increased almost threefold between 2010 and 2015. UNCTAD's World Investment Report at 47.

[398] http://www.cietac-sh.org/CAJAC/arbitrate_informations_detail_E.aspx?id=153 (accessed 27 June 2017).

[399] Snider TR 'China Africa Joint Arbitration Centre Established in Johannesburg' September 18, 2015 available at http://www.gtlaw-doingbusinessinafrica.com/2015/09/china-africa-joint-arbitration-centre-established-in-johannesburg/ (accessed 27 June 2017).

4.4. CONCLUSION

The current IIA regime is known for its complexity and incoherence, gaps and overlaps. Rising regionalism in international investment policymaking presents a rare opportunity to rationalize the regime and create a more coherent, manageable and development-oriented set of investment policies.[400] In reality, however, regionalism is moving in the opposite direction, effectively leading to a multiplication of treaty layers, making the network of international investment obligations even more complex and prone to overlap and inconsistency.[401]

The chronology of agreements suggests that regional groupings have more harmonisation than the larger conglomeration of blocs; the SADC FIP was signed and ratified long after the COMESA CCIA which is still to come into effect. These initiatives express the determination of African countries to embark on IIA reform in order to make the policy framework for investment in Africa more balanced and more oriented to sustainable development.[402] However, they risk overlapping with one another, potentially diluting the impact of regional reform efforts and creating a more complex regime instead of harmonizing and consolidating it. It is therefore crucial to synchronize reform efforts at different levels of policymaking continental, regional and national. This requires coordination and cooperation among African countries in order to avoid overlap, policy inconsistencies and fragmentation[403]

[400] UNCTAD 'S World Investment Report 2017 130 (accessed 27 June 2017).
[401] UNCTAD 'S World Investment Report 2017 130 (accessed 27 June 2017).
[402] UNCTAD 'S World Investment Report 2017 130 (accessed 27 June 2017).
[403] UNCTAD 'S World Investment Report 2017 130 (accessed 27 June 2017).

The review of surveys taken of investors has confirmed that investors want a predictable investment climate. The predictability of the investment climate may be enhanced if domestic policies are incorporated into regional treaties.[404]It seems in the process of integration most of the improvements at sub regional levels have been lost and what results is a watered down code which will in essence have no effect on the existing spaghetti bowl of IIAs.

The CCIA is a significant example of what African states see as the proper approach to investment agreements. In this it should act as a counter-example to the developed country dominated models of IIAs and to offer a new departure for analysis of how future IIAs should be structured.[405] However its lack of implementation remains a huge African problem. The CCIA even presents the system with a tribunal to handle disputes. There is no political will to strengthen intra-African investment which these RTAs cover. The parallel existence of prior BITs and the more recent regional trade agreements with investment provisions has systemic implications and poses a number of legal and policy questions. These include questions on how to deal with possible inconsistencies between the treaties.[406] Parallelism is also at the heart of systemic problems of overlap, inconsistency and the concomitant lack of transparency and predictability arising from a multi-faceted, multi-layered IIA regime. It adds yet another layer of obligations and further complicates countries' ability to navigate the complex spaghetti bowl of treaties and to pursue a coherent, focused IIA strategy.[407]

[404] COMESA Investment Report, 2012 36.
[405]Muchlinski, P, The COMESA Common Investment Area: Substantive Standards and Procedural Problems in Dispute Settlement (2008). SOAS School of Law Research Paper No. 11/2010 33.
[406] The COMESA investment agreement, for example, states in Article 32.3: "In the event of inconsistency between this Agreement and such other agreements between Member States mentioned in paragraph 2 of this Article, this agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement.
[407] UNCTAD 'S World Investment Report 2017 130 (accessed 27 June 2017).

Although parallelism appears to be the prevalent approach, current regional IIA negotiations nevertheless present a window of opportunity to consolidate the existing network of BITs. The extent to which parties opt to replace several existing BITs with an investment chapter in one regional agreement could help consolidate the IIA network.[408] The only problem is that despite having all these regional investment agreements, investor state disputes against African states are mostly instituted by non-African investors. No matter how comprehensive the regional agreements there may be they still do not cover investors that come from outside the continent. The most prevalent problem is also that these regional investment agreements do not offer dispute settlement within the continent. With the exception of CCIA and the SADC FIP which rejects ISDS altogether, investors are given the option to choose which international forum they would institute their claim in, which is no different from the current BITs. There is a need for more harmonisation not only in principle but even when negotiating IIAs. Investment agreements should be negotiated by the regional groupings so that there can be more harmonisation. It is at this juncture that states can negotiate the dispute settlement system to be applied.

The PAIC presents a unique opportunity to harmonise investment instruments within the region. More so when it is set to be the investment chapter of the CFTA. Although the PAIC does not present a wholesome investment agreement, there is still room for improvement. Aspects from the CCIA can be incorporated into the PAIC, such as transparency and most importantly the function of the tribunal as an investment dispute settlement system. There is much that can be gleaned from regional investment agreements to be implemented on a continental level. However, this can only be done alongside reform in the AU to allow for seamless regional integration and creation of new institutions.

[408] UNCTAD 'S World Investment Report 2017 130 (accessed 27 June 2017).

Currently the African continent does not offer much in the form of investment dispute settlement. Except for a few arbitral centres which seem to lack the institutional capacity and as a result fail to boost investor confidence. Investment dispute settlement remains outside of the African continent, with even African governments opting for international legal counsel and selecting international arbitrators from the international tribunal panels.

There is a need to employ mechanisms that will help awaken arbitral institutions in Africa and demonstrate the continent to the outside world as a place with international arbitrators with sufficient knowledge and expertise to be appointed to arbitrate international matters.[409] The current myriad of regional investment agreements does not offer any concrete solutions to the issues faced by African countries in investment dispute settlement. The CFTA through its investment chapter presents a rare opportunity for the continent to establish its own investment tribunal.

[409] Muigua K, 'Reawakening Arbitral Institutions for Development of Arbitration in Africa' 23.

5. CONCLUSION AND RECOMMENDATIONS

5.1. INTRODUCTION

The main question to be answered in this research is whether the current foreign investment dispute settlement system is legitimate enough to address the developmental issues faced by African countries. It has been established that the current investment dispute settlement system was largely accepted by African countries under the belief that a stable system would attract foreign direct investment.[410] It has now become apparent as the investment dispute settlement system faces scrutiny that it fails to address the unique issues faced by African governments which are often found on the receiving end of huge damages claims. This is the final chapter of this mini-thesis. It presents a summary of the outcomes and the proposed recommendations

5.2. SUMMARY OF OUTCOMES

A comprehensive study of the current international investment dispute settlement regime has been done and it has been found wanting. African nations have grouped together in their blocs and have now started to come up with their own investment policies that address their specific needs. It has been noted that instruments like the CCIA and the PAIC include clauses which allow for developmental issues to be addressed. However, there is a need to harmonise investment policies across Africa as contradictions and overlaps are bound to follow. For example, the SADC FIP removes ISDS completely yet most SADC member states are also COMESA members and the

[410]Mann H 'Reconceptualising international investment law: its role in sustainable development' *Lewis & Clarke Law Review* Vol 17 (2013) 534.

CCIA provides for ISDS. The rise of regionalism in international investment relations may create a new momentum for COMESA countries to engage in regional dialogue on investment policies for development to find consensus on how to best ensure coherence between regional and bilateral investment agreements. This could lead COMESA countries to reconsider the relationship between BITs signed by individual COMESA countries and regional investment agreements such as the CCIA and the ongoing negotiations for a COMESA-EAC-SADC Tripartite Free Trade Area. These agreements provide an opportunity for COMESA members to phase out older BITs that no longer reflect the sustainable development priorities of COMESA countries. Also as many BITs signed by COMESA countries in the late 1990s are reaching their expiry date, countries have an opportunity to revisit their content and incorporate provisions that reflect the latest trends in international investment law.[411] The legal basis of the current investment dispute settlement regime is very multiplex, while many of the other international law dispute settlement mechanisms are anchored in well-defined treaty frameworks, investment disputes are not.

After careful study it was noted that while the African continent has comprehensive investment policies. The lack of political will to implement the policies has resulted in leaving the investment dispute settlement system on the continent deficient. The EAC guide and the PAIC offer investors the normal BIT dispute settlement options which include ICSID and ad hoc arbitration under UNCITRAL rules. This is in spite of the fact that Africa offers a host of arbitral institutions and well qualified arbitrators, such as the KIAC. There is no inclination on the part of investors foreign and local to have their disputes settled within the continent and also before African arbitrators. This is largely because investors fear bias and influence from host governments over the process.

[411] COMESA Investment Report 2013.

The TFTA which is set to begin the second phase of negotiations which include investment presents the sub-region a chance to harmonise their investment policies and to have a binding instrument. There seems to be unwillingness by African leaders to implement or be bound by instruments that promote intra-African investment, for example the CCIA remains unratified. As the TFTA is the trailblazer for the CFTA, within which the PAIC may be included as an investment chapter, this presents the continent with an opportunity to also include a regional investment court, similar to the tribunal set up by the CETA Agreement.

The call for reform in the investment dispute settlement system has largely been about the far-reaching implications of investor state dispute settlement.[412] This is the main issue amongst a myriad of issues. There are also issues to do with the contradictions between arbitral awards leading to inconsistent interpretation of investment protection standards and unpredictability of decisions.[413] The independence and impartiality of arbitrators and the costs and time of arbitral proceedings have also been raised as issues.[414] It is evident that the continent faces its own set of issues over and above the ones in the investment dispute settlement. It is clear that the current investment dispute settlement system is flawed and fails to address issues faced by governments. This is even more so in the case of African governments that face a unique set of challenges. These challenges include attempting to balance the flow of FDI and developmental needs in a country. As stated in Chapter 3 there are many issues that need to be taken into account when addressing issues in investment dispute settlement for African nations. They suffer untenable bias at the hands of arbitrators, of

[412] Carim X 'International investment agreements and Africa's structural transformation: A perspective from South Africa' *South Centre Investment Policy Brief,* Issue No 4 (August 2015) 5.
[413] Sornarajah M' *The International Law on Foreign Investment*' 3ed (2010) 320.
[414] Köppen A & d'Aspremont J, Global Reform vs Regional Emancipation: The Principles on International Investment for Sustainable Development in Africa, 6:2 *ESIL Reflection*.

which tribunals are made up mostly of European and American white males. For an investment court system to work for African nations it must be a solution that addresses the concerns facing these states.

5.3. RECOMMENDATIONS

The establishment of a regional investment court on the African continent would be ideal given the opportunities in the TFTA and the CFTA which are yet to negotiate the investment chapters. The tribunal established by CETA can serve as a prime example of how a regional court can be established and housed in the framework of the CFTA.[415] The CFTA can include an African Regional investment dispute settlement system housed within the CFTA. However, the process would have to be gradual.

The introduction of an investment dispute settlement system on the African continent has to start with capacitation of the existing institutional arbitration facilities, like the CRICA and KIAC. The TFTA can introduce dispute settlement with the option to have the disputes settled at these institutions under the UNCITRAL rules. Despite the fact that these centres offer mostly commercial arbitration, capacity can only be built with exposure to investment issues the same way the LCIA developed.

This investment dispute settlement system would be complemented by the establishment of an investment court system (ICS) in the CFTA. The PAIC as the instrument likely to be adopted as the CFTA investment chapter would house the ICS. CETA introduces a new ICS. The ICS will consist of a permanent and an appellate tribunal, which is a novelty in investment dispute settlement. Similarly, the CFTA can include the establishment of a tribunal

[415] European Commission- A future multilateral investment court, available at http://europa.eu/rapid/press-release_MEMO-16-4350_en.htm (accessed 20 December 2016).

that deals with investment matters. The tribunal will abide by strict rules regarding ethics to ensure that the members of the tribunal are impartial and independent. After the failure of the SADC Tribunal it is imperative that appointment of judges is done strictly and also to ensure the enforcement of decisions it should remain apolitical.

The task of the tribunal will be to hear claims of violation of the investment protection standards. The CFTA would like CETA not allow for parallel proceedings. This would make it impossible to try a case before the ICS and a national court or any other regional courts at the same time. This would solve the issue of overlapping jurisdiction. Once the ICS tribunal has rendered a decision, the decision must be final, and it cannot later be changed by the AU Commission. This would ensure enforcement and that member states would not be able to interfere, like the SADC Tribunal decision which caused the Tribunal to shut down. CETA has adopted the loser-pays system; the losing party will therefore be obliged to bear the costs of the winning party in an ICS case. This could also be adopted by the CFTA ICS to ensure that only genuine claims are brought and that frivolous suits would be penalised.

The idea is to establish a permanent body to decide investment disputes, with consideration of the development needs faced by African nations, moving away from the ad hoc system of ISDS. This multilateral investment court would adjudicate disputes under future and existing investment treaties. For the AU, it would replace ICSID and ad hoc arbitration included in the regional investment agreements.

While some commentators have suggested that a new court and appellate mechanism may simply lead to increased delays and costs before an aggrieved investor secures a suitable remedy for a breach of a treaty, in reality it could

do the opposite.[416] The new procedures could save time and costs. The ICS could provide a timeline for the Tribunal to render a final award after a claim has been submitted. Given the inefficiencies and delays faced at the African Court of Human rights, it is imperative that strict adherence to timelines is monitored and that reasons must be given by the Tribunal to the disputing parties for any extensions of time beyond the timeline. The new system could also facilitate enforcement of a favourable decision. Although acceptance of this system by host states may at first be problematic, it is expected that the CFTA will be ratified by most African states and the ICS can be contained therein.

All in all, Africa could benefit from having its own investment dispute settlement system. An ICS would address most of the issues faced in investment dispute settlement currently, with an appellate mechanism to ensure consistency. The ICS would also be sensitive to the unique issues faced by African countries. The continent would benefit greatly as the parties would also be more inclined to use counsel from within the region as opposed to the current system which propagates for poor governments to engage international counsel which cost more than their GDP.

[416] European Commission- A future multilateral investment court, available at http://europa.eu/rapid/press-release_MEMO-16-4350_en.htm (accessed 20 December 2016).

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