

**RECONCEPTUALISING INVESTOR-STATE DISPUTE SETTLEMENT IN AFRICA:
CHALLENGES, DEVELOPMENTS AND SOLUTIONS**

**SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF THE MASTER OF LAWS
DEGREE, UNIVERSITY OF NAIROBI SCHOOL OF LAW**

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G62/12628/2018

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I, JAMES NGOTHO KARIUKI, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
BIT	Bilateral Investment Treaty
CCJA	Common Court of Justice and Arbitration
CFTA	Continental Free Trade Area
CIA	Common Investment Agreement
COMESA	Common Market for Eastern and Southern Africa
DTA	Double Taxation Agreement
EAC	East African Community
ECOWAS	Economic Community of West African States
EPA	Economic Partnership Agreement
EU	European Union
FTA	Free Trade Agreement
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
IOC	International Oil Company
ISDS	Investor-State Dispute Settlement
KIAC	Kigali International Arbitration Centre
LCIA	London Court of International Arbitration
OHADA	Organisation for the Harmonization of Business Law in Africa
PAIC	Pan-African Investment Code
PTIA	Preferential Trade and Investment Agreement
SADC	South African Development Committee
TFTA	Tripartite Free Trade Area
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
USMCA	Agreement between the United States of America, the United Mexican States, and Canada

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CHAPTER 1

INTRODUCTION

1.1 BACKGROUND

Investor-state dispute settlement (ISDS) is a form of resolution of disputes between foreign investors and the state that hosts the investment (host-state).¹ ISDS allows foreign investors to initiate dispute settlement proceedings against a host-state. This is normally through arbitration.² ISDS mechanisms are commonly provided for in agreements facilitating investment between two states (bilateral) or two or more states (multilateral).³ They can also be located in domestic laws or contracts.⁴ Both the foreign investor and the host-state must consent to ISDS before the proceedings may commence. Usually, the consent of the host-state is contained in the trade / investment agreement.⁵ The foreign investor consents to ISDS by submitting its claim to be resolved by ISDS proceedings.⁶

¹ International Centre for Settlement of Investment Disputes (ICSID), 'Background Information on the International Centre for Settlement of Investment Disputes (ICSID)' available at <https://icsid.worldbank.org/en/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf#search=BACKGROUND%20INFORMATION%20ON%20THE%20INTERNATIONAL%20CENTRE%20FOR%20SETTLEMENT%20OF%20INVESTMENT%20DISPUTES%20%28ICSI%20D%29> (accessed 29 December 2016)

² Gauthier A, 'Investor-State Dispute Settlement Mechanisms: What is their History and where are they going?' (2015) Publication No. 2015-115-E 1 available at <http://www.lop.parl.gc.ca/Content/LOP/ResearchPublications/2015-115-e.pdf> accessed 29 November 2019

³ Gauthier A (2015) 1.

⁴ ICSID, Background Information on ICSID' 1.

⁵ ICSID _Background Information on ICSID' 1

⁶ Singh S & Sharma S, 'Investor-State Dispute Settlement Mechanism: The Quest for a Workable Roadmap' (2013) 29 *Merkourios - International and European Law: General Issue* 91.

Recourse to ISDS as an avenue for resolving disputes between foreign investors and host-states (investment disputes) increased when the Convention on the Settlement of Investment Disputes between States and Nationals of Other States came into force in 1966 (ICSID Convention).⁷ The creation of the ICSID Convention was fronted by developed countries classified as developing countries had their reservations against it.⁸ The ICSID Convention is founded under the International Centre for Settlement of Investment Disputes (ICSID), which facilitates arbitration and conciliation of investment disputes.⁹ ICSID made two versions procedural rules that act as guidelines for the commencement and continuation of its proceedings. These include the the ICSID Convention, Regulations and Rules; and the ICSID Additional Facility Rules.¹⁰ The ICSID Convention, Regulations and Rules apply when a dispute is between an ICSID Convention contracting State and a national of another contracting State.¹¹ The ICSID Additional Facility Rules apply in disputes where only the home-state or the host-state is a contracting State.¹² In addition, ICSID can administer investment disputes under other rules such as the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) rules.¹³

Currently, there are many questions surrounding the legitimacy of ISDS as a mode of dispute resolution.¹⁴ Some of the criticisms raised on the ISDS process include inconsistent and unintended

⁷ Schreuer C Course on Dispute Settlement: International Centre for Settlement of Investment Disputes‘2003 9 Available at http://unctad.org/en/docs/edmmisc232overview_en.pdf accessed 30 December 2018 (hereafter Schreuer C (2003)).

⁸ Singh S & Sharma S (2013) 91.

⁹ Article 1 of the ICSID Convention.

¹⁰ ICSID, Background Information on ICSID, 3.

¹¹ Article 25 (1) of the ICSID Convention.

¹² ICSID Additional Facility Rules 2006 5 available at https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/AFR_English-final.pdf accessed 20 September 2018

¹³ CSID _Background Information on ICSID, 3.

¹⁴ Sornarajah M, ‘Starting Anew in International Investment Law’ (2012) 74 *Columbia FDI Perspectives* 1 available at http://ccsi.columbia.edu/files/2014/01/FDI_74.pdf accessed 12 October 2019 (hereafter Sornarajah M (2012)).

interpretations of treaty clauses, costly and lengthy procedures, lack of transparency,¹⁵ double hatting resulting in potential conflict of interest, institutional bias stemming from the fact that only investors can bring claims, and letting private arbitrators decide matters that derive a sovereign's right to pursue legitimate public policy objectives.¹⁶ among other criticisms

Several states have decided that the conventional ISDS regime is not consistent with their developmental priorities.¹⁷ These states have negotiated for trade agreements without ISDS mechanisms, or and have considered withdrawing, while some have actually withdrawn from the ICSID Convention or from IIAs; for instance Bolivia, Ecuador, Venezuela and Nicaragua.¹⁸ India and Indonesia also indicated, in 2013 and 2014 respectively, that they would review their IIA regimes.¹⁹

In Africa, the South African Development Community amended annex 1 of the Finance and Investment Protocol of the community. It omits the provision on the investor-state dispute settle mechanisms and replaces it with the utilization of local courts and tribunals in the settlement of investment disputes. The amendment also clarifies the national treatment provision as well as the investor responsibilities provision by emphasizing on the adherence of investors to the host state's socio-economic policy and regulations.²⁰ Furthermore, South Africa's termination of fourteen (14) of its forty-seven (47) BITs in light of the Promotion and Protection of Investment Act which was

¹⁵ United Nations Conference on Trade and Development, 'Investment Policy Framework for Sustainable Development' (2015) 84 available at http://unctad.org/fr/PublicationsLibrary/diaepcb2012d5_en.pdf accessed 7 December 2019) (hereafter UNCTAD IPFSD (2015)).

¹⁶ Jacobs BL 'A Perplexing Paradox: 'De-Statification" of "Investor-State" Dispute Settlement?' (2015) 30 *Emory International Law Review* 25 (hereafter Jacobs BL (2015)).

¹⁷ Jacobs BL (2015) 26.

¹⁸ Jacobs BL (2015) 26.

¹⁹ Kurtz J & Nottage L, 'Investment Treaty Arbitration —Down Under!l: Policy and Politics in Australia'(2015) Vol. 30 Issue 2 *ICSID Review: Foreign Investment Law Journal* 466 (hereafter Kurtz J & Nottage L (2015)).

²⁰ UNCTAD, Trade and Development Board, 'Reform of the international investment agreement Regime: Phase 2' (2017), 6.

accented by the South African President in 2015²¹ was significantly motivated by the departure from ISDS to international investments being governed by South African Law. As Africa anticipates to embark on the Continental free Trade Area (CFTA) project which will encourage more trade within African states the anticipated move should seek to borrow from the direction SADC is taking with respect to the focus on the host state's socio-economic policy and regulations as well as harmonizing a dispute resolution procedure that will be akin to the local recourses included in the Finance and Investment Protocol. The main variance will be that the term 'local' in the case of a dispute resolution mechanism within the CFTA will be within the African continent regardless of the host country. The emphasis will be the settlement of African disputes by Africans within Africa with little to no external influence. With regard to investment, this will be aligned with the overall intention of the project which is the creation of a single continental market for goods and services.²² This means that investment dispute settlement reforms will have to take a more contextualized approach giving more emphasis to investment policies in African states in a bid to encourage investment from within.

There are challenges particularly averse to African states in Investor-State disputes. For instance, the nature of the agreement in dispute is incapable of accommodating domestic policy reform in areas like the environment human rights and anticorruption For example, in the Morocco Nigeria BIT, although still not in force, the states have placed obligations upon investors with specific regard to compliance with local laws in human rights, the environment and anticorruption.²³

²¹ UNCTAD Investment Policy Hub available at <https://investmentpolicyhub.unctad.org/IPM/MeasureDetails?id=2828&rgn=&grp=&t=&s=&pg=&c=&dt=&df=&isSearch=false> accessed on 14 February 2019.

²² Talkmore Chidede, 'Investment policy reforms in Africa: How can they be synchronised?'(2017), Tralac (Trade Law Center) available at: <https://www.tralac.org/discussions/article/11779-investment-policy-reforms-in-africa-how-can-they-be-synchronised.html> accessed on 14 February 2019.

²³ Articles 13, 14, 15, 17, 18, 19, 20 and 24, Morocco-Nigeria BIT.

Furthermore, investor state dispute settlement mechanisms fail to recognise pertinent issues requiring further African contextualisation such as the importance of the protection of animal life in particular given Africa's rich wildlife on top of the general environmental concerns. For example, the draft Pan-African Investment Code expressly provides for the protection of not only human but also animal life or health.²⁴ As a result, the overall tendency of African state to lose on key claims can no longer be hinged solely on the merits.

1.2 STATEMENT OF THE PROBLEM

African states are particularly disadvantaged in Investor-State dispute settlements due to a lack of proper understanding and consideration of issues affecting African states by adjudicating arbitral tribunals in ISDS particularly with regard to their socio-economic development and the challenges therein buttressed by an overall limitation of the accommodation of domestic policy and legislative reform in favour of the Investors.

Some of the pertinent issues affecting the operation of ISDS in Africa include but are not limited to the poor representation of African arbitrators, the reliance to date on outdated IIAs that have not been updated to meet the current day developments and needs of African party states, the hefty financial risks associated with the participation of African states in the ISDS process as well as the possible financial threat in the form of damages that may prove to be too much for an African state to bear without a negative impact of the economy and issues stemming from the lack of transparency in the overall ISDS process.

For ISDS to develop within the African space, it is critical that these issues be addressed since they may form the foundation for the overall failure of the process especially within the African context.

²⁴ Article 14, Draft Pan-African Code, 2016.

Foreign investment has been a cornerstone of the development of a significant number of African states. Therefore, it would make perfect sense to streamline the most popular avenue for dispute resolution in international investment - being ISDS - so as to support foreign investment structures in Africa.

1.3 RESEARCH OBJECTIVES

The objectives of this study will be as follows:

- (a) To identify the legal and regulatory framework behind ISDS and critically examine key issues posing an inherent disadvantage to African states in ISDS.
- (b) An analysis of the trends and developments in IIAs and the ISDS process.
- (c) To reconcile the identified issues with the global trends and developments within the context of ISDS practice in African states.

1.4 RESEARCH QUESTIONS

- (a) From the current framework in place, what are the key issues posing an inherent disadvantage to African states in ISDS?
- (b) What are the trends and developments in IIAs and the ISDS process?
- (c) From the identified issues, how can they be reconciled with the global trends and developments within the context of ISDS practice in African states?

1.5 JUSTIFICATION OF THE STUDY

This study aims to make a case for a just and level playing field for African States in ISDS. It will provide information essential in understanding the challenges faced by African countries in the

ISDS process and how they can be resolved and/or mitigated by the current trends and developments in IIAs and the ISDS process.

1.6 RESEARCH METHODOLOGY

The underlying framework of this study of this study will be supported by legal research. Legal research is mainly qualitative in nature since the main content of reference will be the legal framework in place as well as quantitative assessments of the operation of the legal systems and the application of the same by experts in the field as well as analytical data that has been collected by institutions involved in ISDS practice globally.

As such qualitative methodological approaches that have been applied in this research. These approaches have involved critically reviewing the literature on Investor-State Disputes with a focus on Investor State Dispute Settlement in African countries, a critical review of the legal framework governing ISDS practice including but not limited to IIAs that state parties have entered into. The study will also seek to analyse the positions established in case precedent relating to ISDS as well as the rules and guidelines that have been put in place relating to the overall framework of IIAs with a particular focus on ISDS mechanisms.

Data collection will involve the utilization of both primary and secondary sources of data. Primary sources included the application of international conventions and local statutes within the respective states. They were useful in establishing the legal framework governing ISDS in African states vis-a-vis the legal framework of other jurisdictions. The secondary sources that were applied included textbooks, journal articles, media reports, conference papers and the internet/online libraries.

The data obtained is qualitative data. The secondary and primary data collected were analysed in light of the research objectives, study of the problem, hypothesis, the theories behind the topic and the overall justification of the study.

1.7 THEORETICAL FRAMEWORK

1.7.1 PROCEDURAL JUSTICE THEORY

According to Rawls, justice as the truth of thinking systems is the primary value of social intentions.²⁵ Rawls understands that justice is fair, preconceived for equal opportunity and freedom while explaining the Aristotle concept of retributive justice.²⁶

The principle of procedural justice clarified the procedural fairness which guarantees that the resolution of the case is appropriate to both sides.²⁷ So, even if people lose, when they experience fairness, they feel better.²⁸ Procedural justice fosters legitimacy by giving individuals the opportunity to speak and respect neutrally and trustworthily.²⁹ In Galligan's view, just proceedings made known to and acceptable by the parties lead, even if the result does not favor one of the parties, to fair and acceptable results.³⁰

In relation to this study, the procedural justice theory provides a standard of examining the extent to which on Investor State Dispute Settlement in African countries can meet the developmental

²⁵ Aristotle, *The Nicomachean Ethics*, translated by J A Thompson, (London, Penguin Books Ltd, 1976) 741.

²⁶ Rawls (n9) 52.

²⁷ Tyler T R Degoey P & Heather S, 'Understanding why the justice of group procedures matters: A test of the psychological dynamics of the group-value model' (1996) *Journal of Personality and Social Psychology* 70, 913–930.

²⁸ Blumoff H R and Tyler R T, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' (2011) *Journal of Dispute Resolution* 2, 3.

²⁹ Blumoff (n13) 5.

³⁰ Galligan J D, *Due Process and Fair Procedures*, (Oxford University Press, 1996,) 12.

priorities of the respective African nations.³¹ Particularly in Kenya, this would mean taking the principles of the Constitution into consideration particularly those envisioned in the Bill of Rights.³²

1.7.2 MODERNIZATION THEORY

The word modernization and its original meaning have been defined from different perspectives. One approach to the term modernization views it as a social transformation process³³, while another considers modernization not only a transformation, but also as a response to a transformation.³⁴

Modernization is a multidimensional process, according to Huntington, which involves transforming human opinions and activities.³⁵ But Halpern, who notes modernisation as a response to change, focuses on institutions' ability to effectively manage such changes.³⁶ Eisenstadt claims that globalization is the product of these two beliefs, though emphasizing at the same time the capacity of organizations to regulate or adapt to change.

Scholars have agreed that modernisation is a functional change in the traditional society. Therefore, modernisation means the transformation into modern society (industrial, secular and urban) from pre-modern (traditional, pastoral and agricultural) to modern.³⁷

³¹ Susan D. Franck, 'The ICSID Effect? Considering Potential Variations in Arbitration Awards' (2011) 51 VA. J. INT'L L. 825, 846

³² Constitution of Kenya, 2010 Chapter IV.

³³ Huntington S P, 'Political Order in Changing Societies, New Haven'(1968), *Yale University Press*, 14.

³⁴ Eisenstadt S N, 'Modernization: Protest and Change' (1966), *Patience-Hall Englewood Cliffs*, 112.

³⁵ Huntington S P, 'Political Order in Changing Societies, New Haven', 24.

³⁶ Halpern, M. 'The revolution of modernization in national and international society' (1966). in Carl J. Friedrich (ed), *Revolution*, New York: Atherton Press, 195, 178-214.

³⁷ Li Y, 'Revival of tradition or modernization? The perspective of subjectivity in the study of modernization theory and a critique of the functionalist approach' (2009), *Chinese Studies in History*, 43 (1), 61-71.

With this background on the theory it is clear that the advent of foreign investment in African countries is on one part a move on the African state to inject revenue so as to modernize the nature and activities of the state for example, infrastructural development and overall urbanization of localities within the African state and for the other part, to expand the capacity of the investor.

1.8 LITERATURE REVIEW

1.8.1 THE NEW GENERATION OF AFRICAN BITS AND REFORMED REGIONAL AGREEMENTS

According to Brower, since the 1960s, some the African countries have developed from capital importing to capital exporting ones. This trend towards an increase in foreign direct investment,³⁸ which have also been plagued by skepticism directed towards investment arbitration in recent years. Notaras and Bartle, trace a portion of the skepticism to high costs surrounding the arbitration proceedings which has led to the foundation of a new generation BITs.³⁹

It is the advent of this new generation of BITs as Brower puts it, that identify the current prevailing issues in the current state of IIA format and consequently, the practice of ISDS within those IIA's and attempt to remedy/remove them so as to inform the new generation of BITs as well as general IIAs.

³⁸ C N Brower and M P Daly, 'A study of foreign investment law in Africa: Opportunity awaits', in Andrea Menaker (ed), *International Arbitration and the Rule of Law: Contribution and Conformity*, ICCA Congress Series, 19, p. 503 at pp. 527-528.

³⁹ A Notaras and J Bartle, 'Arbitration in Africa; High Stakes and big claims in resolving disputes', *Legal Business*, (July-August 2015), p. 104, at p. 108.

Gaizzini pointed out that African countries are not that forthcoming with ratifying new BITs. In the last five years, 25 countries have entered into force.⁴⁰ Some of the BITs that have not entered into force include the Cameroon-Canada BIT, as well as the Canada-Nigeria BIT. This is because they aim at striking a balance between the interests of the state and the investor. Sustainable development is one of the key negotiation points in the formation of new agreements.⁴¹ Similarly, there is an explicit condition that states should not compromise in areas dealt with or related to health or the improvement or the maintenance of environmental standards in order to attract foreign investments.⁴²

Within the context of this study, Gaizzini literature is in line with the increase in consciousness of African states with the pros and cons of investment agreements. This in turn has necessitated the requirement for a cost benefit analysis and in particular, discussions on entering into IIAs that do not compromise the sovereignty of African states as well as provide for key aspects of investments in developing countries today such the primary of which being sustainable development.

Another example of one of the new generation BIT between African states is the Morocco-Nigeria BIT.⁴³ One of its key highlights deal with definition of investment, which includes the four Salini criteria⁴⁴ as well as defining what assets fall under investment as well as those which do not form part of the definition of investment, like money claims and other debt instruments.⁴⁵

⁴⁰ T Gazzini, 'Nigeria and Morocco move towards a "new generation" of Bilateral Investment Treaties', EJIL, (May 2017), available at: <https://www.ejiltalk.org/nigeria-and-morocco-move-towards-a-new-generation-of-bilateral-investment-treaties/>.

⁴¹ Canada-Cameroon BIT (signed 2014, not yet in force), Preamble p. 2; Canada-Nigeria BIT (signed 2014, not yet in force) p. 2

⁴² Canada-Cameroon BIT, article 15 (1); Canada-Nigeria BIT, article 15 (1).

⁴³ Morocco-Nigeria BIT (signed in 2016, not yet in force).

⁴⁴ Salini Test available at <https://www.acerislaw.com/the-salini-test-in-icsid-arbitration/> accessed on 30 October 2019.

⁴⁵ Morocco-Nigeria BIT Article 1 (3).

New generation BITs also impose obligations not only the state, as in the older BITs, but as well as foreign investors. For example, investors should put forward maximum feasible contributions to the sustainable development in the host state.⁴⁶ They should also maintain specific environmental standards following their establishment in the host state.⁴⁷ Furthermore, investments are also supposed to meet international standards of corporate governance⁴⁸ as well as steering away from corrupt practices.⁴⁹

As far as the substantive provisions are concerned, the Morocco-Nigeria BIT provides for all the main standards generally included in many BITs. It defines in detail fair and equitable treatment, as ‘the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principal legal systems of a Party’, and full protection and security as ‘the level of police protection required under customary international law.’⁵⁰ This broad approach can leave space for interpretation to arbitration panels and reveals a positive element to support control of investment projects.

To illustrate this new generation of BIT and the evolution of investment arbitration the Protocol on Finance and Investment adopted in 2006 by the Southern African Development Community (SADC) and the SADC Model BIT established in 2012 reveals a shift of perspective concerning investment arbitration. Specifically, the 2006 SADC protocol provides for recourse to investment arbitration upon a prior exhaustion of local remedies.⁵¹ It also guarantees protection to the investors

⁴⁶ Morocco-Nigeria BIT, Article 24 (1).

⁴⁷ Morocco-Nigeria BIT, Article 18 (1).

⁴⁸ Morocco-Nigeria BIT, Article 19.

⁴⁹ Morocco-Nigeria BIT, Article 17 (2) – (5).

⁵⁰ Morocco-Nigeria BIT, article 7 (2) (a).

⁵¹ Morocco-Nigeria BIT, Article, 28 (1)

from expropriation and nationalisation, accords fair and equitable treatment and includes a clause relating to the most-favoured nation treatment.

However, the 2012 SADC Model BIT,⁵² demonstrates key differences. For instance, it suggests that member states should not include ISDS as a means for resolving disputes, even though the member states may decide to do otherwise.⁵³ It also suggests the omission of the most-favoured nation clause as well as recommending against including the fair and equitable treatment provision. And suggests replacing it with the standard of fair administrative treatment, which is limited to the denial of justice claims. The SADC Model BIT presents this suggestion as a more restricted and careful manner than the fair and equitable treatment.⁵⁴

Notwithstanding the above provisions of the SADC Model BIT, some of the SADC member states have chosen to deviate from its provisions when drafting their new BITs. For example, the Japan-Mozambique BIT and the Canada-Tanzania BIT are fine examples of the last typology, since they both include the option of investment arbitration, as well as provisions relating to the most-favoured nation treatment.⁵⁵

It is clear from the above purview of the SADC Model BIT that there are a number of ideals that can be drawn from it that would inform some of the substantive parts of this study. However, reform within the context of international investment and consequently the ISDS process is best effected on a national level. It is good that SADC has managed to conceive a vision for investment beyond the current status quo but as clearly seen in the above paragraph member states may have

⁵² SADC Model Bilateral Investment Treaty Template with Commentary (2012).

⁵³ SADC Model Bilateral Investment Treaty Template with Commentary (2012), Article 29.

⁵⁴ SADC Model Bilateral Investment Treaty Template with Commentary (2012), Commentary to article 5, Option 2, p. 23.

⁵⁵ Japan-Mozambique BIT (signed 1 June 2013, entered into force 29 August 2014), Article 17.

differing interests hence consensus in the application and implementation of the provisions of the SADC Model BIT may be frustrated where interests between member states do not apply.

1.8.2 AFRICANISATION OF INVESTMENT ARBITRATION

This portion of the study will scrutinize literature on moves that have and continue to be made with respect to the development of investment arbitration as a form of ISDS in Africa. Consequently, it will lay out statistical information from the relevant institutions in Africa fronting the ‘africanisation’ movement. Attempts to ‘Africanise’ investment arbitration are on the rise. The movement towards regionalisation and continentalisation of international arbitration is dominant and aims to reverse the trend of exporting African cases overseas.

Throughout the history of investment arbitration, underrepresentation of African arbitrators has been a consistent issue. Out of six hundred and thirteen (613) cases registered under the ICSID Convention and the Additional Facility Rules as of 2017, 22 per cent involved an African state party.⁵⁶ And out of these, African arbitrators only represented by 4 per cent,⁵⁷ which translated to a total ninety (90) individuals, as contrasted with nine hundred and seventy nine (979) Europeans and three hundred and thirty seven (437) North Americans to the inclusion of Mexicans. Given the above position, changes in the current status up is foreseeable such as the visible expression of will of certain African states to improve the training in arbitration leading to the increase in for local arbitrators.

In promoting itself as a safe haven for arbitration, Mauritius is probably the leading country at national level. In 2008, it passed a new International Arbitration Act with a section dedicated to

⁵⁶ ICSID, Caseload Statistics on Africa, (2017), p. 7.

⁵⁷ ICSID, Caseload Statistics on Africa, (2017), p. 28.

investment arbitration, based on the UNCITRAL Model Law. The Permanent Court of Arbitration opened its regional branch in Mauritius in 2010, and the Joint Arbitration Center Mauritius-LCIA (LCIAC-MIAC) was established one year later. Mauritius was also the first country in the world to ratify the UN Convention on Transparency in Investor-State Arbitration in 2014, and successful initiatives are also going forward with the Chamber of Commerce to improve the arbitration center. This is all the more plausible with regard to the presence of Mauritius as a place of investment for many projects in Africa, both from French and English speaking countries.

Other African states such as Kenya, Nigeria, Ghana and Rwanda have modernised their arbitration law to become a better seat and venue for international arbitration. Kenya recently established the Nairobi Centre for International Arbitration⁵⁸ in 2013 under the Nairobi Centre for International Arbitration Act No. 26 of 2013.⁵⁹ Rwanda, for instance, has even established the Kigali International Arbitration Centre (KIAC) that offers arbitration services for both commercial and investment disputes.⁶⁰ Nigeria also supports various initiatives in arbitration, as well as the establishment of the Lagos Court of Arbitration, a centre for arbitration and alternative dispute resolution that was officially launched in 2012.⁶¹

At regional level, regional and inter-regional treaties form the African investment arbitration system. In 2007, the Common Market for Eastern and Southern Africa (COMESA) adopted the reformed COMESA Common Investment Area Investment Agreement in an attempt to attract investment from within and outside the region. The agreement has not yet entered into force and its full operation would enable an investor either to bring an investment dispute before the court

⁵⁸ NCIA Website available at <https://ncia.or.ke/> accessed on 14 February 2019.

⁵⁹ Nairobi Centre for International Arbitration Act No. 26 of 2013.

⁶⁰ Kigali International Arbitration Centre available at www.kiac.org.rw accessed on January 21 2019.

⁶¹ Lagos Court of Arbitration available at www.lca.org.ng. accessed on 19 January 2019.

of the host State, the COMESA Court of Justice or to pursue an arbitration procedure under the ICSID or UNCITRAL Rules of Arbitration.⁶²

The region of OHADA is currently expanding its scope to cover arbitration relating to investment. OHADA is made up of 17 African states, mostly French-speaking, and has already implemented the Commercial Arbitration Act. OHADA has recently revised the act to include investment arbitration as well. Furthermore, OHADA has also revised its arbitration rules empowering the Common Court of Justice and Arbitration (CCJA) to administer arbitration on the basis of an investment instrument, investment code or investment agreement. This revision is intended to respond to existing intra-African BITs that have already selected the CCJA as an option for an investor to arbitrate in investment disputes against the host state.

There is no regional investment agreement with the East African Community (EAC). However, in 2006, it adopted the Model Investment Code, which provides access to ICSID arbitration for investors. Although this instrument is non-binding, it shows the EAC's beneficial initiative in favor of international investment dispute arbitration.

However, in the Economic Community of West African States (ECOWAS), departure from investment arbitration is striking. In 2008, it adopted the Community Common Investment Rules which exclude international arbitration from the settlement of its ISDS, as the claims can only go before a national court or a competent national authority.⁶³

⁶² Investment Agreement for the COMESA Common Investment Area, Article 28 (1).

⁶³ ECOWAS' Common Investment Rules for the Community, article 33 (6).

Such African economic communities' solutions to investor-state arbitration may potentially impact future investments on a continental basis. The COMESA, the EAC and the SADC established the Tripartite Free Trade Area (TFTA) as a single market for half of African nations in 2015. While the TFTA is not an investment agreement, it could be the starting point for a future treaty on inter-regional investment.

Free movement of goods, services, businesses, persons and investment in Africa is being negotiated in the context of the Continental Free Trade Area (CFTA). The CFTA has so far been the culmination of six-year talks conducted under the framework of the African Union between African states. The CFTA will turn the entire African continent into a single market of 1 billion people with a combined GDP of more than US\$ 3.4 trillion if successfully established. The CFTA has yet to be concluded and further discussions are likely to include an investment section that will allow Africa to fulfill its goal to create a continental investment legal framework.

Finally, Africa is currently drafting a PAIC which would be utilised as a gap filler in the above-mentioned CFTA investment chapter. The 2006 draft PAIC notes that, according to the applicable law of the host country and the lack of local options, the right to arbitration for investment-state conflicts is contingent. Arbitration may also be conducted by an African Arbitration Center under the UNCITRAL rules for arbitration. The draft seems to promote Africa as the investment dispute center and therefore reverse the standard of African international export cases.

The above information goes to show that there is indeed a significant investment framework in Africa and that Africa and its constituent states is teeming with international investment opportunities with a sufficient institutional framework to back it up. From the forgoing, the development of ISDS within the African space is only a facet of the overall international

investment activity. PAIC, the most ambitious development above will see the unification of what is currently a state of plurilateral investment regimes in Africa, as well as consensus on the promotion the new generation investment scheme in Africa.

1.9 HYPOTHESIS

The challenges facing African states in ISDS practice can be successfully reconciled with the overall developments and trends in ISDS practice with the effect of mitigating and on some instances eradicating the aforementioned challenges. Implementation of the trends and developments within the African context will suffice as anchors for reform of ISDS practice in Africa.

1.10 CHAPTER BREAKDOWN

Chapter one: Introduction to the study: This Chapter gives a brief background of the study. It also identifies the problem as well as the research objectives and questions of the study in relation to the problem. A review of literature of the topic will also be addressed in this Chapter. The Chapter also lays down the theoretical framework of the study as well as hypothesizing the outcome of the study. Lastly, the. Chapter will outline the research methodology applied in the study.

Chapter Two: Issues affecting African States in ISDS: This Chapter critically examines key issues posing an inherent disadvantage to African states in ISDS. The key issues outlined will include the poor representation of African arbitrators in ISDS, current reliance on outdated agreements, legal and financial risks imposed on African states by IIAs and the ISDS process and the legitimacy issues pertaining to the practice the various parties to the ISDS process.

Chapter Three: Trends and Developments in IIAs and The ISDS Processes: This Chapter analyses the trends and developments in IIAs and The ISDS processes, as well as the effects arising out of the same. The trends and developments that the chapter will address will include the omission of ISDS as a dispute resolution mechanism, the establishment of standing tribunals, inclusion of provisions in IIAs requiring the exhaustion of local mechanisms, the imposition of limitations in the ISDS mechanism, reform measures on the conduct of arbitration practitioners, alternative modes of dispute resolution and the establishment of model IIA guidelines and local investment legislation.

Chapter Four: Reconciling The Global Developments of IIAs and ISDS Practice In Africa: This Chapter seeks to contextualise the developments and trends in IIAs and the ISDS process such as the omission of ISDS as a dispute resolution mechanism, the establishment of standing tribunals, including provisions in IIAs requiring the exhaustion of local mechanisms and the imposition of limitations in the ISDS mechanism among others. Their applicability will be assessed in light of the stated challenges outlined such as .the poor representation of African arbitrators in ISDS, current reliance on outdated agreements, legal and financial risks imposed on African states by IIAs and the ISDS process and the legitimacy issues pertaining to the practice the various parties to the ISDS process.

Chapter Five: Findings, Conclusions and Recommendations: This Chapter considers all that has been covered in the study and lay out the findings and recommendations on how to improve the current state of practice of ISDS in Africa.

2.0 CHAPTER 2

ISSUES AFFECTING AFRICAN STATES IN INVESTOR STATE DISPUTE SETTLEMENT

2.1 INTRODUCTION

Investor-state dispute settlement (ISDS) mechanisms have seen a plethora of developments since its inception. These developments stem from the primary aim of international investment agreements which is the protection of the interests of the investor and his investment by the host state.⁶⁴ However, these developments have not been actualized in equal measure across the globe. Developing countries that are host states have had a significant disadvantage since they significantly more (as respondents) compared to developed nations as host states when disputes arise.⁶⁵ At the same time there has been a significant increase in the participation of developing countries in international investment which in turn has resulted in their increased participation in ISDS.⁶⁶ There are a number of reasons for this, the most apparent of which include the prioritization of the growth of the developing country's economy as well the governments' obligation to meet basic standards of living of its citizens. However, developing countries in Africa have begun to take into consideration aspects such as sustainable development and have enacted legislation in line with the same which initially, was not given enough attention in IIAs as they ought to be according to the *IISD Model International Agreement on Investment for Sustainable*

⁶⁴ Schreuer, Christoph. "Investments, International Protection." *Max Planck Encyclopedia of Public International Law* (2011) 2.

⁶⁵ Roderick Abbott, Fredrick Erixon, and Martina Francesca. Ferracane, 'Demystifying Investor-State Dispute Settlement (ISDS)', ECIPE Occasional Paper No.5/2014, 9.

⁶⁶ Agosin, M. R., & Machado, R. 'Foreign investment in developing countries: does it crowd in domestic investment?' *Oxford Development Studies*, 33(2), (2005).149-162, 14.

Development, 2005.⁶⁷ As a result the investor may claim a violation of a provision in the IIA and commence ISDS.

This Chapter seeks to identify these issues with a particular focus on key African states that have been affected and have seen an element of the issues reflected in their engagements with foreign investors. This Chapter will also make reference to international precedent by international ISDS bodies as well as a brief highlight on the development of International Investment Agreements (hereinafter referred to as ‘IIAs’) and their effect on African states.

2.2 BACKGROUND OF ISDS

In the above introduction, reference has been made to IIAs. These are treaties that are the products of negotiations between two or more states with the aim of creating right of investors as well as obligations on the part of governments of the party state.⁶⁸

IIAs usually provide for ISDS which has already highlighted, avail an avenue for recourse for investors against the host governments. Most agreements include international arbitral provisions as the main choice of dispute resolution.⁶⁹ The proceedings are conducted by international arbitral tribunals who preside over the presentation of the parties’ cases, followed by a final binding determination made by the same tribunal.⁷⁰ Given that IIAs date back to 1959, it is only in the past

⁶⁷ Howard Mann, et al., *Int’l Inst. for Sustainable Dev., ‘IISD Model International Agreement on Investment for Sustainable Development’: Negotiator’s Handbook* (2d ed. 2006)4.

⁶⁸ International Investment available at <https://www.investopedia.com/terms/i/international-investing.asp> accessed on 22 May 2019.

⁶⁹ UNCTAD Series on International Investment Agreements II, *Investor-State Dispute Settlement: A Sequel*, UNITED NATIONS New York and Geneva, 2014 UNCTAD/DIAE/IA/2013/2, 13.

⁷⁰ International Arbitration Procedure available at <https://www.international-arbitration-attorney.com/international-arbitration-procedure/> accessed on 22 May 2019.

twenty five years where investors have begun submitting claims for monetary damages against governments.⁷¹

IIA's manifest themselves in a number of ways. They include: Bilateral Investment Treaties (BITs);⁷² Preferential Trade and Investment Agreements (PTIAs)⁷³ i.e. Economic Partnership Agreements (EPAs)⁷⁴, Free Trade Agreements (FTAs)⁷⁵; and International Taxation Agreements i.e. Double Taxation Agreements (DTAs).⁷⁶ Of the above, BIT's are the most popular by relative comparison with the other forms of IIAs mentioned above.⁷⁷

The consequence of international agreements on African states (and some developing nations beyond the continent)⁷⁸ is the absence of and/or inadequate legal and policy provisions that protect the interests of the state.⁷⁹ These interests usually develop from the protection of public interest in relation to the terms of investment outlined in the IIA⁸⁰ and even more commonly, environmental

⁷¹ Mercurio, B. (2014). International investment agreements and public health: neutralizing a threat through treaty drafting. *Bulletin of the World Health Organization*, 92, 520-525, 1.

⁷² The US-China Business Council, Bilateral Investment Treaties: What They Are and Why They Matter, available at <https://www.uschina.org/reports/bilateral-investment-treaties-what-they-are-and-why-they-matter> accessed on 21 May 2019.

⁷³ Andreas R. Ziegler, Preferential Trade and Investment Agreements (PTIAs) and the Bilateralism/Multilateralism Divide in: Rainer Hofmann, Stephan Schill, Christian J. Tams (Ed.) *Schriften zur Europäischen Integration und Internationalen Wirtschaftsordnung*, vol. 31, 187.

⁷⁴ Economic Partnership Agreements: <http://ec.europa.eu/trade/policy/countries-and-regions/development/economic-partnerships/> accessed on 16 May 2019.

⁷⁵ Free Trade Agreement <https://www.bdc.ca/en/articles-tools/entrepreneur-toolkit/templates-business-guides/glossary/pages/free-trade-agreement-fta.aspx> accessed.

⁷⁶ Double Taxation available at https://www.investopedia.com/terms/d/double_taxation.asp accessed on 19 May 2019.

⁷⁷ Guzman, A. T. (1997). Why LDCs sign treaties that hurt them: Explaining the popularity of bilateral investment treaties. *Va. j. Int'l L.*, 38, 639, 1.

⁷⁸ South American states.

⁷⁹ Food and Agriculture Organization of the United Nations Rome, Trends and impacts of foreign investment in developing country agriculture Evidence from case studies, 2013, 65.

⁸⁰ Arcuri, A., & Montanaro, F. (2018). Justice for All: Protecting the Public Interest in Investment Treaties. *BCL Rev.*, 59, 2791, 2804.

issues relating to the promotion of sustainable development.⁸¹ Many African countries can be classified as developing countries.⁸² This means that given the above considerations, foreign investment benefits such as the additional income accrued from licensing as well as the foreign exchange benefits of internationalizing trade are preferable to the host state since it promotes overall socio-economic growth. This is only an example of the issues affecting African states in IIAs which are eventually transferred to ISDS once a dispute arises.

2.3 ISDS IN AFRICAN STATES

It is well known that there was a period in the history of most African states where they were subject to colonial occupation. At the time those African states did not enjoy individual sovereignty and the agreements with respect to the territories at the time were under the title and authority of their colonial occupants at the time.⁸³ Given that IIAs date back to 1959, at that time, a significant number of African countries were still under colonial rule and therefore did not enter IIAs in their own capacity.⁸⁴

After gaining their independence in the mid-1960s, African countries ailed economically. They believed that by opening up their markets to international investment, would improve their

⁸¹ Manjiao Chi, 'Sustainable Development Provisions in Investment Treaties- An empirical exploration of the sustainable development provisions in BITs of LDCs and LLDCs' *United Nations- Economic and Social Commission for Asia and the Pacific (ESCAP)*, 2018, 62.

⁸² Human Development Report Office, United Nations Development Programme '*Human Development Report 2018*', 22–25.

⁸³ Settles, J. D.. The impact of colonialism on African economic development, (1996) University of Tennessee Honors Thesis Projects. 3.

⁸⁴ Ocheni, Stephen, and Basil C. Nwankwo. "Analysis of colonialism and its impact in Africa." *Cross-Cultural Communication* 8, no. 3 (2012): 48.

economic situation. Consequently, for the above reason and others, they accepted ICSID Convention.⁸⁵

Under the ICSID Convention, it is worth noting that the first international arbitration was against an African state, Morocco.⁸⁶

Aron Broches, the World Bank general counsel, made a statement regarding the African regional meeting held in Addis Ababa. He shed light upon African states and their involvement in the discussions racing up to the adoption of the final draft of the ICSID Convention.⁸⁷

Out of thirty-one countries invited, only twenty-nine countries attended the meeting. Broches reports that there was a general consensus on the purpose of the ICSID Convention from an African perspective.⁸⁸ Also from the report, African states wanted to expand the jurisdiction of ICSID even further, so to include, disputes arising between an investor and state-controlled operations and development boards and not only investor-state disputes.⁸⁹ It was also proposed that the term ‘investment’ needed a more detailed definition in order to provide more clarity as to the jurisdiction of ICSID.⁹⁰ The participants from the African states also supported that the jurisdiction of ICSID

⁸⁵ W. Kidane, ‘The China-Africa Factor in the Contemporary ICSID Legitimacy Debate’, 35 U. Penn J.Int’l L. (2014), p. 559, at pp. 585-586, 585.

⁸⁶ *Holiday Inns SA and others v Morocco*, ICSID Case No. ARB/72/1.

⁸⁷ ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention*, vol. II-1, Washington, (1968), pp. 239-240, 295.

⁸⁸ ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention*, vol. II-1, Washington, (1968), pp. 239-240, 296.

⁸⁹ ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention*, vol. II-1, Washington, (1968), pp. 239-240, 296.

⁹⁰ Antonio R. Parra, *The History of ICSID*, OUP Oxford 2012, 65.

should be expanded to other kinds of disputes, besides the indemnification of expropriation. A Nigerian delegate even suggested the strengthening of enforcement of ICSID awards⁹¹

Consequently, 45 countries in Africa became members of the ICSID Convention and thereafter concluded several BITs with various countries around the world.⁹² The first BIT between two African countries was between Egypt and Somalia in 1982.⁹³

In enforcement, a majority of African states, African state members of the ICSID Convention, have ratified the New York Convention. This is an important factor in arbitral award enforcement outside the ICSID structure.⁹⁴

Following from the above, it was clear that African states supported an international regime for investment arbitration given their need to attract foreign investments. African states actively negotiated and concluded BITs with other capital-exporting states in order to attract foreign direct investment.

⁹¹ICSID, History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention, vol. II-1, Washington, (1968), pp. 239-240, 296, 259.

⁹² K Daele, 'Africa's track record in ICSID proceedings', Kluwer Arbitration Blog, available at <http://arbitrationblog.kluwerarbitration.com/2012/05/30/africas-track-record-in-icsid-proceedings/> accessed on 17 May 2019.

⁹³ United Nations Economic Commission for Africa, 'Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration', (February 2016), 20.

⁹⁴ M Ostrove, B Sanderson and A L Veronelli, 'Developments in African Arbitration', GAR, available at <https://globalarbitrationreview.com/chapter/1139890/developments-in-african-arbitration> accessed on 12 May 2019.

2.4 ISSUES AFFECTING AFRICAN STATES IN ISDS

2.4.1 POOR REPRESENTATION OF AFRICAN ARBITRATORS IN ISDS

It has been blatantly clear over the years that the sphere of arbitration practice has been analogized to the phrase '*male pale and stale*'. However this reference is warranted since the practice has been predominated by the individuals and groups who meet these characteristics mentioned above.⁹⁵

In the context of this study, the above phrase analogizes the non-inclusion and non-participation of African practitioners in ISDS. In particular, arbitration, the most popular ISDS mechanism as of the moment is evidently underrepresented in relation to the number of African arbitrators appointed to international tribunals to arbitrate on international matters in general ⁹⁶

It is noteworthy to highlight that there is no shortage of qualified international practitioners within the continent to participate in ISDS i.e. as the arbitrator or counsel of either party in the proceeding. Africa has the requisite personnel and/or expertise to occupy ISDS opportunities arising out of Africa. According to statistics obtained from the Chartered Institute of Arbitrators as at 2017, a total of 2,483 of its 15,000 members based in Africa. 51.3% (i.e. 1,250) of these are in Nigeria. Kenya follows by a distance with 25.65% (i.e. 637) members; followed by South Africa with 4.67% (i.e. 116) of the membership; and Egypt 4.18% (i.e. 104) of the membership.⁹⁷

SOAS University of London interviewed African arbitrators between 2012 and 2017 and noticed that 41,1% of African experts were arbitrators in at least one domestic dispute with 17,8% of

⁹⁵ Joseph Mamounas, 'ICCA 2014. Does "Male, Pale, and Stale" Threaten the Legitimacy of International Arbitration? Perhaps, but There's No Clear Path to Change', Kluwer Arbitration Blog, April 10 2014 available at <http://arbitrationblog.kluwerarbitration.com/2014/04/10/icca-2014-does-male-pale-and-stale-threatenthe-legitimacy-of-international-arbitration-perhaps-but-theres-no-clear-path-to-change/> accessed on 12 May 2019.

⁹⁶ SOAS Arbitration in Africa Survey, 'Domestic and International Arbitration: Perspectives from African Arbitration Practitioners, 2018, 17.

⁹⁷ SOAS Arbitration in Africa Survey, 'Domestic and International Arbitration: Perspectives from African Arbitration Practitioners, 2018,15.

African practitioners who were arbitrators in at least one foreign dispute. In ten domestic disputes 10% of African professionals sat in arbitration against 5% of African practitioners sat in ten international referees.⁹⁸

It is evident from the statistics of appointment of African based arbitrators that there have been relatively few appointments in international matters. There is no consensus as for the reasons for non-appointment. There are a number of false assumptions substantiating the above statistics such as the assumption that African arbitration practitioners lack in lacking in expertise and experience.⁹⁹ It is clear though that there is available capacity for the participation of African arbitrators in international disputes and in particular international investment disputes.

In *Jivraj vs Hashwani*, the supreme court of the United Kingdom (UK) effectively brought appointment discrimination in the arbitral sphere to light. Although the basis of said discrimination was based on religion, it can be considered a stone throw away from active prevention of African practitioners based on the parties' choice which is objectively discriminatory. The crux of the case was that the parties entered into an arbitration agreement which prescribed the appointment of three arbitrators where a dispute arises. The agreement also stipulated that all three arbitrators should be from the Ismaili community. The counsel of one of the parties indicated that they wanted a non-Ismaili arbitrator. This was opposed by the other party claiming it was contrary to the provisions of the arbitration agreement thus the reference of the matter to the UK courts.¹⁰⁰

⁹⁸ SOAS Arbitration in Africa Survey, 'Domestic and International Arbitration: Perspectives from African Arbitration Practitioners, 2018,15.

⁹⁹ SOAS Arbitration in Africa Survey, 'Domestic and International Arbitration: Perspectives from African Arbitration Practitioners, 2018, 8.

¹⁰⁰ *Jivraj v Hashwani* [2011] UKSC 40.

The Supreme Court held that the matter fell outside the scope of an employee in relation to the protections accorded to them in the Employment Equality (Religion or Belief) Regulations 2003.¹⁰¹ This was contrary to the holding of the Court of Appeal where they held that arbitrators are in fact employees for the purposes of the regulations cited above.¹⁰²

From the above case it is clear that the scope of discrimination can also be institutionalized and does not only arise outside the scope of what is prescribed by the law and the judicial system. It is also clear that parties may tailor provisions to favour their interests which may be objectively discriminatory.

Notwithstanding the above, one of the key cornerstones of ISDS practice through the forms of dispute resolution available is the aspect of party autonomy. It is however not as clear cut since International Arbitral institutions recognized in international investment agreements may have a default panel that will preside over the process Parties still have the option of choosing an arbitrator of their choice but they do not have to. For example, in ICSID matters, parties are not required to select arbitrators from their panel of arbitrators.¹⁰³

2.4.2 OUTDATED AGREEMENTS

The 90's saw a surge in the popularity of international investment agreements. In particular, over 200 BIT's with access to ISDS were signed in each of 1994, 1995 and 1996.¹⁰⁴ Over time, there has been contention with international investment agreement design. UNCTAD has been releasing

¹⁰¹ Employment Equality (Religion or Belief) Regulations 2003.

¹⁰² *Jivraj v Hashwani* [2011] UKSC 40.

¹⁰³ ICSID, Selection and Appointment of Tribunal Members, available at <https://icsid.worldbank.org/en/Pages/process/Selection-and-Appointment-of-Tribunal-Members-Convention-Arbitration.aspx> accessed on 08 May 2019.

¹⁰⁴ <https://www.iisd.org/itn/2018/10/17/reforming-investment-treaties-does-treaty-design-matter-tarald-lauald-berge-wolfgang-alschner/>.

a series of reform packages which aim at, among other items, the protection of the interests of the state amid concerns that the agreements were leaning too much towards the protection of the investor to the exclusion of the host state.¹⁰⁵ Furthermore, the reforms also aim at opening up the provisions ISDS mechanisms by including clauses improving the current form of dispute settlement as well as considering other avenues for dispute resolution such as the utilization of local litigation as a first step for sensitive matters¹⁰⁶

For example, according to the UNCTAD Report 2018, about 120 BITs have been replaced by others or bilateral TIPs. The revision of a BIT can be centered around the inclusion of new policy issues, a revision of the overall philosophy of the treaty, conformity with new global standards, or even a consolidation of multiple old BITs and replacing them with plurilateral IIAs which gives the reviewing parties an opportunity to modernize the agreement and reduce fragmentation of the overall IIA network.¹⁰⁷

In Africa, a challenge arises in relation to intra-African BITs. There are 165, signed by the end of 2016, 38 of which are in force. While reforms are underway, the fate of the old generation BITs is still unaddressed. The new regional IIAs in Africa do not replace older intra-African BITs. This will create a scenario where there will be an overlap of provisions arising from the layering of treaties which could be resolved by the replacement of the existing BITs before the implementation of any new IIAs in the region.¹⁰⁸

¹⁰⁵ United Nations Conference On Trade and Development, UNCTAD's Reform Package for the International investment Regime (2018).

¹⁰⁶ United Nations Conference On Trade and Development, UNCTAD's Reform Package for the International investment Regime (2018), 47, 48.

¹⁰⁷ United Nations Conference on Trade and Development (UNCTAD), UNCTAD's Reform Package for the International investment Regime (2018), 77-92.

¹⁰⁸ United Nations Conference on Trade and Development (UNCTAD), The World Investment Report 2017 (WIR17), 130.

IIA revision in Africa greatly assists the resolution of any anticipated dispute by updating provisions to meet current global standards as well as streamlining the provisions of the agreement to lessen ambiguities as well as update the ISDS mechanism in place which in turn will provide a greater foundation that may be relied upon in the dispute resolution process.

2.4.3 EXPOSURE BY HOST STATES TO LEGAL AND FINANCIAL RISKS

This affects the host state. Basically, the host state opens itself up to the risk of liability with regard a dispute that has not been held in their favour. However, this risk is does not come as surprise given the nature of legal proceedings. The problem arises from the effect it poses on developing countries in Africa. The danger posed is the sheer quantum of damages that may be imposed upon a state and the effect that has on the economy of the state in a bid to offset the damages reason this is a more prevalent issue in developing countries is that they may not have the necessary resources to offset the liability imposed upon them by an international tribunal.¹⁰⁹

In order to mitigate the financial risks as highlighted above, host states are limited then it comes to amending legislation to promote the interest of the public and/or aimed at achieving general sustainable development goals because it may open them to the risk of claims from international investors (regulatory chill).¹¹⁰ The investor cannot make a claim for direct losses, however a host state may be in contravention of a provision in the agreement (like a BIT) between an investor's state and a host state such as the clause on the promotion and admission of investments in the host state or the clause on the protection and treatment of investors_which provides for the protection

¹⁰⁹ International Institute for Sustainable Development (IISD), *Assessing the Impacts of Investment Treaties: Overview of the evidence*, September 2017, 12.

¹¹⁰ International Institute for Sustainable Development (IISD), *Assessing the Impacts of Investment Treaties: Overview of the evidence*, September 2017, 11.

of investments made within the territory of the host state by preventing unreasonable and discriminatory measures among other items that may fall in line with protection of the investor.¹¹¹

2.4.4 LEGITIMACY ISSUES: LACK OF TRANSPARENCY, INDEPENDENCE AND IMPARTIALITY

There has been a long running debate as to where to draw the line between public policy/public interest and the privatization of dispute resolution mechanisms where the former is relevant to the proceedings.¹¹² For example, an international oil company (IOC) which has submitted a claim against the host state in an international tribunal may have portions of the claim and/or the defence that relate to the wellbeing of the locality around the area where the IOC operates. There have been a number of instances where IOC's have insisted on protecting their interests to the detriment of the public interest related development by the host state. For example in the case of *Total E&P Uganda BV v. Republic of Uganda*¹¹³, this involved contention by Total that Uganda imposed unsubstantiated tax on them contrary to the Netherlands - Uganda BIT (2000).

The other aspect to this point relates to the impartiality and independence of the tribunal in the dispute resolution process. Impartiality simply refers to the equal treatment based on objective criteria. In the ISDS setting, this translates to the utilization of the cases presented by the parties by the tribunal in coming to a fair and objective determination based on what they have tabled.¹¹⁴ This is not always the case. The impartiality of the arbitrators may be brought into question and a

¹¹¹ Article 2 & 3, Gambia-Swiss BIT, 1993.

¹¹² Farrow, Trevor CW. "Public Justice Private Dispute Resolution and Democracy." *CLPE Research Paper* 18 2008,2.

¹¹³ *Total E&P Uganda BV v. Republic of Uganda* (ICSID Case No. ARB/15/11).

¹¹⁴ Independence and Impartiality of Arbitrators in Investor-State Arbitration: Perceived Problems and Possible Solutions available at <https://www.ejiltalk.org/independence-and-impartiality-of-arbitrators-in-investor-state-arbitration-perceived-problems-and-possible-solutions/> accessed on 19th May 2019.

number of factors contribute to the skepticism associated with the assumed bias of the tribunal with respect to African states.

First, as already mentioned above, the initial correlation between the poor representation of African arbitrators in international tribunals and bias in decision making can be attributed to incongruence associated with members of the tribunal being well knowledgeable in the nature of the investment dispute but inept to the socio-economical -and to some extent-, political landscape of the host state which forms a justification for the cultivation of local expertise in international investment arbitration.¹¹⁵ Although the counsel for the host state may try and bring out their case, they are limited to sticking to the facts presented to them and the underlying agreements that substantiate the relationship between the host state and the investor like a BIT. International tribunals have a very limited discretionary scope which may prove to be detrimental to cases involving African states.¹¹⁶ International commercial arbitration being the most popular ISDS is by default structured to enhance privacy and thus the interest of the public and the social economic and political aspects that may arise from such interest will not see the light of day in an ISDS proceeding because the discussion (which more often than not has the potential to affect the public) will be protected under the guise of confidentiality.¹¹⁷

¹¹⁵ Talkmore Chidede, Investor-state dispute settlement in Africa and the AfCFTA Investment Protocol 2018 available at <https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html> accessed on 9 May 2019.

¹¹⁶ Park, W. W. (1999). Duty and Discretion in International Arbitration. *American Journal of International Law*, 93(4), 805-823, 11.

¹¹⁷ Arcuri, A., & Montanaro, F. (2018). Justice for All: Protecting the Public Interest in Investment Treaties. *BCL Rev.*, 59,2791-2824, 2798.

2.5 CONCLUSION

From the above it is clear that there are various challenges affecting ISDS that may have a greater impact on African states compared to other regions. It is also evident that there are some challenges that are specific to African states. These challenges may stem from notable gaps in the adjudication process of ISDS and others may arise as a result of how ISDS and the IIAs that contain them have developed over time, failing to take into account contextual details particularly when it comes to the application of ISDS in African states.

3.0 CHAPTER 3

TRENDS AND DEVELOPMENTS IN IIAS AND THE ISDS PROCESSES

3.1 INTRODUCTION

Over the years, there has been significant development in IIAs which have in turn influenced the course of ISDS mechanisms. Moreover, there has also been significant development in the ISDS processes as well as an ever growing archive of precedent that has developed from the number of cases that have been deliberated by international arbitral bodies. These cases have been instrumental in providing a practical perspective of the provisions in IIAs as well as the application and interpretation of the developments in these agreements and the ISDS process itself.¹¹⁸

In addition to the developments, the current IIAs have faced significant criticism and the popular choice of ISDS mechanism i.e. international arbitration is losing its credibility in some regions and some jurisdictions have opted out of the process all together.¹¹⁹

With respect to IIAs, some of the criticism revolves around the hostility and or impracticability of some of the provisions on host states. Taking into account that the underlying rationale of IIA's was the protection of foreign investments, it is no surprise that IIAs will significantly favour the investor in the foreign state.¹²⁰ However, regardless of the level of protection being offered by the

¹¹⁸ Investment Dispute Settlement Navigator, available at <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed on 12 September 2019.

¹¹⁹ European Federation for Investment Law and Arbitration, A response to the criticism against ISDS, 17 May 2015.

¹²⁰ Pia Eberhardt, Cecilia Olivet, Tyler Amos and Nick Buxton, 'Profiting from Injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom' *Corporate Europe Observatory (CEO)* 2012.at: <http://corporateeurope.org/sites/default/files/publications/profitting-from-injustice.pdf> accessed on 28 August 2019.

IIA, the sovereignty of the host state must still be upheld and a balance must be achieved between the exercise of sovereign power of the state and the protection of investments.¹²¹

This balance is particularly difficult to achieve in developing countries where there is a demand for both the potential economic benefits of foreign investments and a simultaneous necessity for national development in other areas like environmental protection and sustainable development that may not be necessarily favour investors (local or foreign). Restrictions contained in IIAs may inhibit development in these areas and thus consequently forms part of the rationale behind the trends and developments in this area.¹²²

Therefore, this Chapter will seek to identify the trends and developments in IIAs within the context of ISDS and expound on their necessity and their corresponding applicability. The Chapter will also identify practical applications of the aforementioned trends and developments by identifying agreements where they have been applied and in some instances, the effects of their application.

Consequently, the effect of this Chapter will be to provide a preview of the current landscape of IIAs and the ISDS process, the rationale behind the current state of practice as well as the underlying forces behind the developments within the sector.

3.2 DEVELOPMENTS IN IIAS AND THE ISDS PROCESS

3.2.1 OMISSION OF ISDS

The tide is turning against ISDS mechanisms. States are opting out of the ISDS process as a second look at the same has born the realisation that the process is no longer sustainable and is riddled

¹²¹ Chatham House, the Royal Institute of International Affairs, ‘Investment Treaties: A Debate over Sovereignty, Trade, Development and Human Rights’ (Meeting Summary) 2017, 2.

¹²² Wilhelm, Andrew, ‘State Sovereignty and Foreign Investors Rights: Persistent Imbalances from Cape to Hamburg’ May 23, 2014. at: <https://ssrn.com/abstract=2759820> or <http://dx.doi.org/10.2139/ssrn.2759820> accessed on 23 August 2019.

with issues.¹²³ This shift has been fueled by some of the demerits brought about by the ISDS mechanism that have consequently discouraged host states from further engaging in the process. There are a number of jurisdictions around the world that have shifted from the process and have reflected the same in a number of agreements these include countries like Brazil¹²⁴ as well as countries in Africa such as Ethiopia and South Africa.¹²⁵

So why opt out of ISDS? One of the main reasons fueling the abandonment of ISDS is the attribution of privileges to private investors that extend beyond those that are enjoyed under domestic law.¹²⁶ This has been greatly enhanced by the freedom that arbitral panels have been given to interpret the provisions of the international investment agreement expansively.¹²⁷

A good example of the expansive interpretation can be seen in the interpretation of the fair and equitable treatment provision. In the interpretation of fair treatment contention arises where the host state should not upset the expectations even sometimes where those are in the ordinary course of affairs of the host state.¹²⁸ Some of these include changes in taxation and/or the imposition of environmental changes that so happen to have negative. There have been numerous cases where

¹²³ Center for International Environmental Law, 'UNCITRAL Looks Narrowly at the Problems with Investor-State Dispute Settlement' at, <https://www.ciel.org/governments-look-narrowly-problems-undemocratic-investor-state-dispute-settlement/> accessed on 22 September 2019.

¹²⁴ Brazil-Ethiopia BIT.

¹²⁵ UNCTAD 'Reforming Investment Dispute Settlement: A Stocktaking' at <https://investmentpolicyhub.unctad.org/Publications/Details/1194> accessed on 20 August 2019.

¹²⁶ De Zayas, 'A 2015, Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order', p 17.

¹²⁷ Goldhaber, M.D 2015, 'Arbitration Scorecard: Deciding the World's Biggest Disputes', at <http://www.international.law.com/id=1202731078679/2015-Arbitration-Scorecard-Deciding-the-Worlds-Biggest-Disputes#ixzz45VlkXG6Y> accessed on 19 September 2019.

¹²⁸ Shakhari, S, 'Regulatory Chill': Taking the Right to Regulate for a Spin', *The Centre for WTO Studies* 2016, 23.

host states have had disputes brought against them as a result of changes in tariffs of the host state or tax exemptions have been withdrawn or changes to the regulations around a certain product.¹²⁹

Other reasons for opting out of ISDS by host states include the application of a catch all definition of investment¹³⁰, the constant threat of damages that tribunals can impose on governments which can in turn can lead to governments opting for regulatory chill as opposed to taking the risk of changing or imposing a new law at the risk of causing an ISDS challenge by an investor¹³¹ coupled with comparatively weak obligations for investors, among others.¹³² Opting out of the ISDS is not a solution in itself since it will have to be replaced by another process that will accommodate foreign investor disputes.¹³³ Some of these will be discussed below.

Some of the instances where the host state has opted out of the ISDS process include the case of the Ethiopia-Brazil BIT, Article 24.(1) of the BIT provides that subject to the exhaustion of the dispute prevention process, contracting parties will submit their disputes to an ad hoc arbitral tribunal.¹³⁴ The BIT still gives them the option to forward their matter to a permanent court for the settlement of investment disputes but the court will be subject to the provisions of the BIT which are but not limited to the adoption of the UNCITRAL rules which is applied to international commercial arbitrations.¹³⁵ However, the tribunal is still given the freedom to determine its own

¹²⁹ Public Citizen, 'Ethyl Corporation vs. Government of Canada: Now Investors Can Use NAFTA to Challenge Environmental Safeguards', <https://www.citizen.org/our-work/globalization-and-trade/ethyl-briefing-paper>

¹³⁰ Defining an "Investment Contract": The Commonality Requirement Of The Howey Test, 43 Wash. & Lee L. Rev. 1057 (1986), 11.

¹³¹ Bernasconi, N, Background Paper on Vattenfall v. Germany Arbitration. International Institute for Sustainable Development, 2009, 15.

¹³² United Nations Conference on Trade and Development, 'World Investment Report 2015', *United Nations*, 2015 154-155, 153,

¹³³ Christoph Schreuer, 'Do We Need Investment Arbitration?' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System – Journeys for the 21st Century Brill*, 2015, 879.

¹³⁴ Article 24(1), Ethiopia-Brazil BIT.

¹³⁵ Article 24(8), Ethiopia-Brazil BIT.

rules. Another notable inclusion is seen in Article 24(11) (c) where the agreement does not limit the burden of a decision imposing of monetary damages to the host to the exclusion of the investor.¹³⁶

As previously pointed out in the first Chapter, the South African Development Community (SADC) particularly in the SADC Finance and Investment Protocol have provided for the exhaustion of local remedies which will be discussed further below.¹³⁷ Notwithstanding the above, the agreement has given the parties a number of options to choose from. These include the submission of the dispute to the SADC Tribunal or ISDS under the ICSID Convention or an ad hoc tribunal. Where the parties do not agree to the above options, the parties will be bound to submit the dispute to arbitration under the arbitration rules of UNCITRAL.¹³⁸

3.2.2 ESTABLISHMENT OF STANDING TRIBUNALS

Some agreements have established tribunals of first instance that will be set up to hear disputes arising out of the agreement between the parties. The tribunal will be set up at the inception of the agreement and not when a dispute arises and who shall serve for a fixed term.

An example of the above can be seen in the Singapore-EU Investment Protection Agreement where Article 3.9 establishes a standing tribunal. The EU shall nominate two members of tribunal while Singapore shall nominate another two members. Thereafter, the EU party and Singapore shall jointly nominate two other members to the tribunal. The tribunal therefore consists of a total of six members. The members of the tribunal shall serve a term of eight years. The inaugural terms of

¹³⁶ Article 24(11) (c), Ethiopia-Brazil BIT.

¹³⁷ SADC Model Bilateral Investment Treaty Template with Commentary (2012)

¹³⁸ Article 28(3), SADC Finance and Investment Protocol.

three of the six members of the tribunal appointed immediately after coming into force of the agreement will serve for a term of twelve years.¹³⁹

The agreement also provides for the establishment of a permanent standing appeal tribunal which will be established to hear appeals from provisional awards issued by the tribunal. Upon entry into force of the agreement, Committee shall, appoint six members to the appeal tribunal. The procedure for appointment and the service terms of the same members are the same as that of the appointment and terms of the members of the tribunal.¹⁴⁰

A standing tribunal can be seen as a better alternative because the parties can jointly appoint the members of the tribunal thus enhancing impartiality and additionally promoting diversity in the tribunal.

Diversity in the constitution of the panel will result from each party appointing their arbitrator of choice of whom will most likely be from their own jurisdiction. In the case of African nations, this will be an opportunity for the parties to appoint arbitrators from their states or regions hence promoting the participation of African arbitrators in the sphere of international investment arbitration. This will greatly improve the recognition of the African space in arbitration through recognition and participation of practitioners from the continent.

Whether this will promote impartiality on the other hand is more difficult to ascertain as it is based on individual practitioners regardless of the composition of the tribunal as a whole. Notwithstanding the above, standing tribunals will have an impact on the impartiality of decisions made due to the early appointment in the absence of the dispute. This may affect the overall outlook

¹³⁹ Article 3(9), Singapore-EU Investment Protection Agreement.

¹⁴⁰ Article 3(10), Singapore-EU Investment Protection Agreement.

of the tribunal as their focus is not a particular dispute but the adjudication of dispute generally arising out of the agreement.

Standing tribunals may also save on time that would have otherwise been spent within the ISDS context on the appointment and overall mobilization of the panel. With a standing panel, disputes can be submitted immediately they arise and deliberation on the same will commence relatively quicker.¹⁴¹

With regard to the duration of service, taking the example of the EU - Singapore Agreement, eight (8) years can be interpreted as an appropriate period with regard to the stability of the tribunal.¹⁴²

This means that the tribunal may not have to be plagued by the potential bureaucracies associated with the appointment of panelists that may arise. A good example of the demerits of the same can be seen in the recent stall of the Doha negotiations of the WTO where there is currently a challenge to fill the vacancies in the appellate body owing to frustration by the United States of America.¹⁴³

3.2.3 PROVISION ON EXHAUSTION OF LOCAL REMEDIES

Another key development in the sphere of ISDS is the emergence of provisions in IIAs that provide for the exhaustion of local avenues of dispute resolution before making any claim under the ISDS mechanisms.¹⁴⁴ This provision places emphasis on the utilization of the remedies available in the host state as well as a bolster upholding the principle of sovereignty of the host state through its

¹⁴¹ Submission of the European Union and its Member States to UNCITRAL Working Group III, 'Establishing A Standing Mechanism for The Settlement of International Investment Disputes', 18 January 2019, 2.

¹⁴² Article 3.9 (5), Singapore-EU Investment Protection Agreement.

¹⁴³ The Path Forward on WTO Reform, <https://www.chathamhouse.org/expert/comment/path-forward-wto-reform> accessed on 12th October 2019.

¹⁴⁴ Newcombe, A. P. & Paradell, L., 'Law and practice of investment treaties: Standards of treatment'. *Austin: Kluwer Law International*. 2009, 24.

ability to adjudicate matters that arise within its jurisdiction.¹⁴⁵ This can be seen in Article 13 of the Belarus- India BIT¹⁴⁶

Article 15 of the same also makes it a condition that before a dispute is submitted to arbitration it must first be submitted to the relevant domestic courts or administrative bodies of the host state and must be done so within two years from the date on which the investor first acquired, or should have first acquired, knowledge of the measure in question and knowledge that the investment, or the investor with respect to its investment, had incurred loss or damage as a result.¹⁴⁷

The provision for exhaustion of local remedies under the Belarus-India BIT may not apply only where the investor can demonstrate that there are no available domestic legal remedies capable of reasonably providing relief in respect of the same measure or similar factual matters for which a breach of this Treaty is claimed by the investor.¹⁴⁸

The requirement for the exhaustion of local remedies is also present in the Agreement between the United States of America, the United Mexican States, and Canada (USMCA). Chapter 14 of the agreement discusses investment and in particular¹⁴⁹, Annex 14 D specifically provides for dispute settlement.¹⁵⁰

In light of the potential benefits this development may impact on the host state, this course of action is heavily protested by investors for a number of reasons. First, investors argue that the local mechanisms may be inherently biased in a bid to protect the interests of the host state thus affecting

¹⁴⁵ Martin Dietrich Brauch, 'IISD Best Practices Series: Exhaustion of Local Remedies in International Investment Law', *IISD Best Practices Series, January 2017, 2.*

¹⁴⁶ Article 13, Belarus- India BIT.

¹⁴⁷ Article 15, Belarus- India BIT.

¹⁴⁸ Article 15, Belarus- India BIT.

¹⁴⁹ Chapter 14, Agreement between the United States of America, the United Mexican States, and Canada (USMCA)

¹⁵⁰ Article 14.D.5, UMSA.

their impartiality.¹⁵¹ Second, it is also argued that the local mechanisms may at times lack the ‘necessary tools’ required to properly adjudicate the dispute. The latter may refer to the fact that the local adjudicators may lack the required expertise to aptly deliberate on the merits of the dispute.¹⁵²

In the African context, there is a lot of apprehension in the ISDS space on the capacity and the quality of the local courts of states within the continent.¹⁵³ However, this has not hindered the incorporation of the same requirement as seen in the case in the SADC Finance and Investment Protocol which prompts investors to seek recourse in domestic courts and judicial and administrative tribunals while limiting access to ISDS.¹⁵⁴ This can also be seen in the Draft Pan-African Investment Code (PAIC) which is meant to act a guiding investment instrument for African Union member states.¹⁵⁵ Additionally, the draft code also provides that arbitrations may be conducted at any established African ADR center.¹⁵⁶

This further promotes the utilization of local mechanisms beyond the scope of the available local avenues i.e. local courts.¹⁵⁷ It recognises the presence of African arbitral institutions and may promote a shift from the overreliance on seats and venues for arbitration outside the continent. In

¹⁵¹ Kavaljit Singh and Burghard Ilge (Eds), ‘Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices’, *Both Ends Nieuwe Keizersgracht*, Amsterdam 2016, 46.

¹⁵² Kavaljit Singh and Burghard Ilge (Eds) Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices, *Both Ends Nieuwe Keizersgracht*, Amsterdam 2016, 76.

¹⁵³ Leon E., Trakman Kunal Sharma, ‘Jumping Back and Forth between Domestic Courts and ISDS Mixed Signals from the Asia-Pacific Region in Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified’, *Oxford Scholarship Online* 2016, 4.

¹⁵⁴ Article 28(3), SADC Finance and Investment Protocol.

¹⁵⁵ Article 42, Draft Pan-African Investment Code.

¹⁵⁶ Article 42 (1) (d), Draft Pan-African Investment Code.

¹⁵⁷ Article 42 (1) (c), Draft Pan-African Investment Code.

turn this would promote the African institutions with respect to building a precedent banks in the respective African institutions.

3.2.4 LIMITATIONS ON THE ISDS PROCESS

3.2.4.1 LIMITATION ON THE SUBMISSION OF A CLAIM.

Recent IIAs are including provisions providing a period of time usually from the original cause of action after which a claim cannot be submitted. It prevents the submittal of delayed suits as well as curtailing the presentation of suits that have been overtaken by events and where the evidence that would have otherwise been available if the suit had commenced earlier is unavailable.¹⁵⁸

Various recent BITs and Multilateral Agreements have imposed time periods for the submission of claims. For example, the COMESA Common Investment Agreement (CIA) has put in place a three-year limitation with respect to submitting a claim from the date the investor first got knowledge of the breach and knowledge that the investor has incurred loss or damage.¹⁵⁹ The India Model BIT gives the aggrieved investor a period of 1 year from the date of acquiring knowledge that the investment of the investor has incurred a loss or damage. Within this period, the Investor should submit their claim to the domestic courts of the host state.¹⁶⁰ Where the investor has exhausted all local remedies, they can submit a notice of dispute under ISDS within 5 years from the date the investor first acquired knowledge of the loss and/or damage. The Argentina- Japan BIT imposes a three-year limitation period.¹⁶¹

¹⁵⁸ Time Limits to Initiate an Investment Arbitration, <https://www.acerislaw.com/time-limits-initiate-investment-arbitration/> accessed on 25 September 2019.

¹⁵⁹ Article 28 (2), COMESA Common Investment Agreement

¹⁶⁰ Article 15.1, India Model BIT.

¹⁶¹ Article 15.2, India Model BIT.

3.2.4.2 LIMITATION ON THE NATURE OF THE CLAIMS BROUGHT BEFORE ISDS

Limitations can also be imposed on the nature of claims brought under IIAs. These include claims that are time sensitive and would prompt lengthy proceedings.¹⁶² Other reasons for limitation of the nature of claims include the protection of the host state from receiving claims arising from actions that would be in the ordinary course of enforcing national security, environmental protection and even human rights.¹⁶³

For example, the Brazil-Ethiopia BIT exempts claims arising from national security measures, corporate social responsibility, environment, labour affairs, health and efforts combatting corruption and illegality.¹⁶⁴ The Dutch model BIT limits ISDS by excluding claims arising from corporate restructuring and fraudulent investments claims.¹⁶⁵

3.2.5 REFORM ON THE CONDUCT OF ARBITRATORS.

3.2.5.1 IMPARTIALITY.

Some IIAs have incorporated provisions to enhance the requirement for impartiality as well as the suitability of adjudicators in ISDS. For example, this can be seen in the Belarus-India BIT expressly provides for impartiality, independence and free from any existing or potential conflicts of interest.¹⁶⁶ Further, it requires that arbitrators shall on an ongoing basis disclose in writing any circumstances that may raise doubt as to their independence and/or impartiality. Parties also have

¹⁶² Carefully Defining and Limiting Access to ISDS, <https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/5-investment-provisions/5-5-preventing-and-resolving-investment-related-disputes/5-5-1-carefully-defining-and-limiting-access-to-isds/> accessed on 15 August 2019.

¹⁶³ Kinda Mohamadieh, 'The Future of Investor-State Dispute Settlement Deliberated at UNCITRAL: Unveiling a Dichotomy between Reforming and Consolidating the Current Regime', *Investment Policy Brief, The South Centre*, Geneva 2019, 7.

¹⁶⁴ Article 24 (3), Brazil-Ethiopia BIT.

¹⁶⁵ Protocol on Public Debt, Netherlands Draft Model BIT.

¹⁶⁶ Article 19 (1), Belarus-India BIT.

an opportunity to challenge the impartiality of an arbitrator. The BIT also lists circumstances that would create justifiable doubt to the independence/impartiality of an arbitrator.¹⁶⁷

3.2.5.2 DOUBLE HATTING

Double hatting can be defined as the combination of multiple roles in investment arbitration. Specifically, it refers to the practice of simultaneously merging the roles of arbitrator and counsel in separate disputes.¹⁶⁸ It can also be expanded to include those who also shift between roles as expert witness or the secretary to a tribunal.¹⁶⁹

The investment space has taken cognizance of the above activity and has begun to condemn the same. As a result, some BITs have expressly prohibited the practice. For example, the EU-Singapore BIT provides that former members of the standing tribunal and the appeal tribunal at the end of their term shall not become involved in any manner whatsoever in the investment disputes pending before the end of their term or investment disputes that are clearly connected with disputes concluded or ongoing, that they have dealt with before.¹⁷⁰

3.2.6 ALTERNATIVE DISPUTE RESOLUTION MECHANISMS.

Recent IIAs have begun to incorporate provisions that give the parties an opportunity to resolve disputes before subjecting them to arbitration/adjudication, the most popular avenues of dispute

¹⁶⁷ Article 19 (10), Belarus-India BIT.

¹⁶⁸ Double Hatting Under New Scrutiny, <https://www.jus.uio.no/pluricourts/english/news-and-events/news/2017/2017-08-06-gar-double-hatting.html> accessed on 30 September 2019.

¹⁶⁹ Malcolm Langford, Daniel Behn and Runar Hilleren Lie, 'The Revolving Door in International Investment Arbitration, *Journal of International Economic Law*', *Oxford University Press*, 2017, 20, 301–331, 309.

¹⁷⁰ Annex 7, EU- Singapore BIT.

prevention are negotiation and mediation.¹⁷¹ Some IIA's have even gone to the extent of prescribing rules of procedure with respect to the mediation process.¹⁷²

A number of IIAs provide for opportunities for negotiation and mediation between parties. For example, in the COMESA Investment Agreement, Article 26 provides for negotiation and mediation. The parties can seek to resolve dispute by themselves (negotiation) during the cooling off period. This is the period between the date a party may formally initiate a dispute and the date of the notice of the intention to initiate a claim.¹⁷³

Thereafter, where there has not been any resolution from the negotiation, the parties shall seek the assistance of a mediator still within the cooling off period.¹⁷⁴

Other ADR methods can also be found in the EU Singapore Investment Protection Agreement which provides for an amicable resolution agreed between the parties. Where an amicable solution is not reached, one of the parties may request for consultations with the other party. Additionally, at any time, the parties may agree to recourse to mediation.¹⁷⁵

3.2.7 MODEL BIT/LOCAL LEGISLATION

Some countries have come up with models that they apply across various IIAs subject to variations that may be occasioned by the parties to the IIA. These model agreements form a policy baseline from which a host state intends to apply. This gives investors and other parties to IIAs a preview

¹⁷¹ ICSID Investor-State Mediation <https://icsid.worldbank.org/en/Pages/process/adr-mechanisms--mediation.aspx> accessed on 27 August 2019.

¹⁷² Annex 10, EU-Singapore Investment Protection Agreement.

¹⁷³ Article 26, COMESA Investment Agreement.

¹⁷⁴ Article 26 (4), COMESA Investment Agreement.

¹⁷⁵ Articles 3.26 and 3.27, EU-Singapore Investment Protection Agreement.

of the host state's expectations with regard to specific aspects of the agreement such as their preferred dispute resolution mechanism.¹⁷⁶

On the other hand, states have either alternatively or concurrently adopted local legislation that applies to investment both locally and internationally. This addresses one of the main criticisms of IIAs which is the prevalence of foreign investors to the detriment of local investors.¹⁷⁷ The local legislation also provides additional protections for the host state.

An example of the application of local law on foreign investment can be seen in South Africa with the adoption of the Protection Investment Act. This act has sought among other things to have disputes resolved by a local court.¹⁷⁸ From a host state's perspective, this may be considered as a positive development since it may prevent the potential subjection of the state before an international tribunal and the associated costs that may at times dent the overall economy of the state.

However, from an investors' perspective, this may have the effect of making the investment environment more hostile since in the case of a dispute, the local modes of dispute resolution may lack the desired objectivity and may lean in favour of the interests of the host state since they form part of the host states themselves.¹⁷⁹

The main intention of the Protection Investment Act is to strike a balance between the public interest and the rights and obligations of investors. IIAs have always been perceived to be pro-

¹⁷⁶ Kunzer K, 'Developing a Model Bilateral Investment Treaty'. *Law & Pol'y Int'l Bus.*. 1983; 15.273.

¹⁷⁷ Food and Agriculture Organization of the United Nations Rome, 'Trends and Impacts of Foreign Investment in Developing Country Agriculture', 2013, 150.

¹⁷⁸ Section 13 (4), Protection Investment Act.

¹⁷⁹ Protection of investment: How safe are South Africa's 'investments?' at <https://corgovinstitute.com/protection-investment-safe-south-africas-investments/> accessed on 12 October 2019.

investor and recent developments such as the Protection Investment Act come in to mitigate this perceived preference. It has been argued that the above act will be prejudicial to International investment as it will reduce the confidence of foreign investors in investing in the South African space.¹⁸⁰

3.3 CONCLUSION

From the above it is clear that there has been a significant shift in the nature of IIA's and the ISDS process in recent years. A significant portion of this shift can be seen in the incorporation of provisions and procedures that offer further protections to the host state. More so, the efficacy of ISDS mechanisms have been brought into question to the extent that some countries have chosen to omit ISDS provisions in their IIAs.

It can therefore be concluded from an assessment of the above trends and developments that the shift of IIAs and ISDS processes is in favour of a more balanced investment atmosphere where neither the host state or the foreign investor feel prejudiced by their agreement. This as hypothetical as it may seem is the overall end goal of the above trends and developments. The next chapter will attempt to contextualise the above developments in light of the challenges faced in the African investment space.

¹⁸⁰ Protection of Investment Act becomes law and may deter foreign investment, at <https://www.bbrief.co.za/2018/07/16/protection-of-investment-act-becomes-law-and-may-deter-foreign-investment/> accessed on 23 September 2019.

4.0 CHAPTER 4

RECONCILING THE GLOBAL DEVELOPMENTS OF IIAs AND ISDS PRACTICE IN AFRICA

4.1 INTRODUCTION

In the previous Chapters, this study has provided a purview into some of the key challenges facing ISDS practice in Africa. The study further scrutinised IIAs and ISDS practice globally with a focus on the main trends and developments in the area. This Chapter will seek to contextualise the developments outlined in Chapter 3 by assessing their applicability in light of the stated challenges outlined in Chapter 2.

This Chapter will also generally discuss the overall progression of IIAs and ISDS practice in Africa and thereafter, a discussion will ensue on the potential solutions and recommendations on the way forward in the practice.

4.2 MITIGATING POOR REPRESENTATION OF AFRICAN ARBITRATORS.

One of the challenges outlined in Chapter 2 of this study is the fact that there is a poor representation of African arbitrators in ISDS. As already explained, arbitration is the most popular mode of dispute resolution within the ISDS space¹⁸¹ This makes them key participants in the overall international investment regime. Chapter 2 also shed light on the fact that there is no shortage of African practitioners to fill in the opportunities arising within and outside of Africa.

¹⁸² Furthermore, overall discriminatory assumptions such as the idea that African arbitrators are

¹⁸¹ SOAS Arbitration in Africa Survey, 'Domestic and International Arbitration: Perspectives from African Arbitration Practitioners, 2018, 17.

¹⁸² SOAS Arbitration in Africa Survey, 'Domestic and International Arbitration: Perspectives from African Arbitration Practitioners, 2018,15.

not qualified enough as well as recent developments that have seen appointments on the basis of belief¹⁸³ have fueled the discriminatory trend of appointments which have in turn limited the appointment opportunities for African arbitrators. There are a significant number of cases arising from African states or with members of African states as participants in the proceedings.

While parties in most IIAs are still free to select their representation in ISDS, there is still a stigmatisation barrier within the participants that not only are there arbitrators that are not qualified enough, that there are also no arbitrators from African states who can handle with the investment issues arising as they apparently fall outside of their scope of experience in entirety which is not true. Somali Judge Yusuf, the newly appointed president of the International Court of Justice reiterated the position of African arbitrators the ICCA Congress in Mauritius in 2016 where he referred to the ‘arbitration under the acacia tree’, calling for better representation of African arbitrators in Africa-related disputes to give the system legitimacy.¹⁸⁴

In light of the above status quo, how can the above be mitigated? One of the avenues that has been discussed in Chapter 3 as one of the developments is the establishment of standing tribunals. The effect of standing tribunals in the appointment of African arbitrators especially in African matters is the fact that the appointment process is a state to state discussion prior to the commencement of any dispute arising from the IIA between them.¹⁸⁵ Therefore, where an African state is involved, there will be a high likelihood that the state will select the best of their own and/or from within the region to constitute the panel.

¹⁸³ Jivraj v Hashwani [2011] UKSC 40.

¹⁸⁴ Michael Ostrove, Ben Sanderson and Andrea Lapunzina Veronelli, ‘Developments in African Arbitration’, *The Middle Eastern and African Arbitration Review* 2018 Law Business Research, 22.

¹⁸⁵ Nathalie Bernasconi-Osterwalder, ‘State–State Dispute Settlement in Investment Treaties’, *Best Practices Series - October 2014 International Institute for Sustainable Development* 2014, 4.

Inherent biases may be an anticipated issue in this case owing to the fact that a national of one of the parties is on the arbitral panel.¹⁸⁶ However; impartiality of arbitrators is an unequivocal requirement that will have to be emphasised in the IIA or in the choice of rules governing the ISDS process and enforced accordingly This should not be a bar in the appointment of arbitrators as their duties stem from their independence of thought which should be respected throughout the proceeding. This is still seen in practice as parties will, in the case of a three arbitrator panel, usually appoint an arbitrator from the same nationality with the third appointee coming from a neutral jurisdiction.¹⁸⁷

Notwithstanding, the potential for inherent biases, prevention of impartiality can also be accommodated in the constitution and the appointment process of the panel as seen in the EU-Singapore Investment Protection Agreement where a six-member panel will constitute two members appointed by each contracting state with the remaining two to be jointly appointed by the contracting states.¹⁸⁸

The issue of perceived preference of arbitrators from outside the continent under the guise that African practitioners are inexperienced and/or unavailable¹⁸⁹, can also be mitigated by the establishment of standing tribunals. It can be argued that, the duration of service of the members of the tribunal play a significant role in allowing the individual practitioners to gain the necessary experience. Where the periods are long enough, an arbitrator will have had enough time to deal with a significant number of ISDS matters and at the end of his or her stint, they ought to have

¹⁸⁶ Ilhyung Lee, 'Practice and Predicament: The Nationality of the International Arbitrator', *Fordham International Law Journal*, Volume 31, Issue 3, 2007, 603.

¹⁸⁷ Michael Pryles, *Assessing Dispute Resolution Procedures*, (7 AM. REV. INT'L ARB. 1996), 280.

¹⁸⁸ Article 3.9, EU-Singapore Investment Protection Agreement.

¹⁸⁹ Kariuki Muigua, Promoting International Commercial Arbitration in Africa, Paper Presented at the East Africa International Arbitration Conference, held on 28-29 July 2014, at Fairmont the Norfolk, Nairobi.

gathered a significant amount of experience that will objectively put them in a better position where they will get better recognition on an international scale

For example, the EU-Singapore Investment Protection Agreement has an appointment period of eight years.¹⁹⁰ This can be interpreted as a sufficient period of time to gather the requisite experience. This is also dependent on the actual number of cases have been heard so far.

4.3 NEW DIRECTION ON OUTDATED AGREEMENTS

Another challenge that was raised in Chapter 2 of this study is the fact that a number of IIAs are outdated and they still contain archaic provisions that are ultimately detrimental to the interest of the host state.¹⁹¹ The effect of these provisions are clearly seen in IIAs between a developed country and a developing country. As African states majorly constitute developing states, this is an issue that is prevalent in IIAs with African states as a party. For example, provisions touching on the definition of ‘investment’¹⁹², ‘fair and equitable treatment’¹⁹³ and the ‘most favoured nation’ treatment.¹⁹⁴

One action that has been adopted to remedy this is updating of outdated agreements on the basis of established model international agreements like model BITs as well as halting further engagements on new IIAs pending review of a state’s investment policy. A number of African countries have issued moratoriums on the conclusion of new BITs like Botswana, in 2013, citing

¹⁹⁰ Article 3(10), Singapore-EU Investment Protection Agreement.

¹⁹¹ Florentine Sneij, ‘Are IIAs old-fashioned? How consistency in the use of public policy fosters the object and purpose of investment agreements’, *Uniform Law Review*, Volume 21, Issue 2-3, 2016, Pages 197–215, 1.

¹⁹² Rodney L. Moore, ‘Defining an "Investment Contract": The Commonality Requirement Of The Howey Test’, *43 Wash. & Lee L. Rev.* 1057 1986, 11.

¹⁹³ Kläger, R. ‘Fair and Equitable Treatment’ in *International Investment Law*’ Cambridge Studies in International and Comparative Law 2011. *Cambridge: Cambridge University Press*, 113-114.

¹⁹⁴ Suzy H. Nikièma, ‘The Most-Favoured-Nation Clause in Investment Treaties IISD Best Practices Series’ *The International Institute for Sustainable Development* 2017, 10.

implementation challenges and Namibia, in 2014, halting any future BIT negotiations until a new investment policy is implemented.¹⁹⁵

Another example of updating the old generation IIAs can be seen in the adoption of provisions of the Mauritius Convention on Transparency in Treaty based Investor-State Arbitration (the Mauritius Convention on Transparency) which came into force in 2017. This will form part of treaty based ISDS mechanisms once ratified by a state and so far Mauritius has ratified the same and it already applies to the Mauritius-Switzerland BIT¹⁹⁶

Egypt has also adopted new foreign investment rules that include provisions reviewing the way in which FDI inflows are accounted for as well as broadening the definition of foreign direct investment to reflect the current international practice.¹⁹⁷

4.4 MITIGATING LEGAL AND FINANCIAL RISKS IN ISDS IN AFRICA

Legal and financial risks associated with the exposure to ISDS pose a challenge particularly for African states. This can be seen in the instances where developing nations are exposed to hefty costs associated with the ISDS process which include but not limited to the tribunal fees and the costs of representation.¹⁹⁸

More importantly, the most significant financial risk as already elaborated on in Chapter 2 is the effect of the imposition damages as part of the decision of the arbitral tribunals on host states i.e.

¹⁹⁵ UNCTAD, 'Recent Developments in The International Investment Regime'', *IIA Issues Note, Issue 1*, May 2018, 9.

¹⁹⁶ Mauritius Convention on Transparency in Treaty based Investor-State Arbitration at <https://www.arnoldporter.com/en/perspectives/publications/2017/10/the-mauritius-convention-on-transparency> accessed on 12 September 2019.

¹⁹⁷ Egypt: Adoption of new foreign investment rules at <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3401/egypt-adoption-of-new-foreign-investment-rules> accessed on 17 September 2019.

¹⁹⁸ International Institute for Sustainable Development (IISD), 'Assessing the Impacts of Investment Treaties: Overview of the evidence', 2017, 12.

where a tribunal makes a determination in favour of the investor and the host state is obligated to pay an amount that may have an overall detrimental effect on the overall financial capability of the developing nation.¹⁹⁹

As a remedy to the above situation, the inclusion of a provision on the exhaustion of local remedies may remedy this issue. This is because parties will be required to seek recourse in the local dispute resolution facilities in the host state before proceeding to an ISDS process.²⁰⁰ This will substantially lower the costs of the proceedings since there will be no obligation to settle the arbitrators fee since the matter is being heard by the public funded judicial systems established in the host states.

Similarly, parties may also include provisions in their IIAs that direct that disputes be presents to an arbitral body within the host state or within Africa. This can include the local and regional arbitral centers as proposed in the Draft Pan-African Investment Code.²⁰¹

For example, disputes arising within the East African region may opt to select the Kigali International Arbitration Centre (KIAC) to conduct the arbitration²⁰² or a local arbitral institution like the Nairobi Centre for International Arbitration for matters were Kenya is the host state.²⁰³

In the case of preventing regulatory chill which as previously explained, is an effect of the legal and financial risks associated with the ISDS process,²⁰⁴ IIAs can provide that specific sectors

¹⁹⁹ International Institute for Sustainable Development (IISD), ‘Assessing the Impacts of Investment Treaties: Overview of the evidence’, 2017, 11.

²⁰⁰ Newcombe, A. P. & Paradell, L., ‘Law and practice of investment treaties: Standards of treatment’. *Austin: Kluwer Law International*. 2009, 24.

²⁰¹ Article 42 (1) (d), Draft Pan-African Investment Code.

²⁰² Kigali International Arbitration Centre at <https://www.kiac.org.rw/>, accessed on 14 July 2019.

²⁰³ Nairobi Centre for International Arbitration, at <https://www.ncia.or.ke/> accessed on 15 July 2019.

²⁰⁴ International Institute for Sustainable Development (IISD), ‘Assessing the Impacts of Investment Treaties: Overview of the evidence’, 2017, 11.

cannot form the subject of the ISDS. This means that parties cannot bring claims in certain areas as the IIA limits them from doing so.²⁰⁵ For example, in the Brazil – Ethiopia BIT, as explained in Chapter 2, claims arising out of actions that are a consequence of national security measures, corporate social responsibility, environment, labour affairs, health and efforts combatting corruption and illegality.²⁰⁶

By limiting key provisions that parties may bring a claim against, this can allow the host nation to be free from limitations in developing progressive policy in an area even if it means that the effect of the said policy will have a detrimental effect on a foreign investor. Particularly, in Africa this is important since there is a significant portion of the states that are in the process of developing their legal framework to accommodate their overall development.²⁰⁷

4.5 ADDRESSING LEGITIMACY ISSUES IN ISDS IN AFRICA

Impartiality and transparency are essential factors in the ISDS and dispute resolution mechanisms generally. In the African context, impartiality in other forms of dispute resolution are prevalent. Judicial systems are undergoing reform so as sieve out the pivoted adjudicators in the overall protection of impartiality.²⁰⁸ Similarly, transparency refers to the openness in the presentation of one's case as well as clarity in the determining factors that led to the final decision of the adjudicator in the dispute resolution process.²⁰⁹ This also translates to the publication of judicial

²⁰⁵ Time Limits to Initiate an Investment Arbitration at, <https://www.acerislaw.com/time-limits-initiate-investment-arbitration/> accessed on 25 September 2019.

²⁰⁶ Brazil – Ethiopia BIT.

²⁰⁷ Trade and economic reforms in Africa, at <http://www.fao.org/3/y4671e/y4671e0i.htm#fn192>, accessed on 17 August 2019.

²⁰⁸ Motsamai Molefe, 'An African perspective on the partiality and impartiality debate: Insights from Kwasi Wiredu's moral philosophy', *South African Journal of Philosophy Volume 36, Issue 4*, 2016, 12.

²⁰⁹ Nathalie Bernasconi-Osterwalder and Lise Johnson, 'Bulletin #2 Transparency in the Dispute Settlement Process: Country best practices' *The International Institute for Sustainable Development*, 2011, 1.

decisions from courts. Kenya for instance, has an established online portal where all the decisions of the high court and above are published available for the public to scrutinize. The absence of such a mechanism for publication may hinder public participation in matters that affect the general public.²¹⁰

Where the IIA has provided for the procedure for the same an arbitral tribunal may not take into account exceptional circumstances that may have arisen that prevented the host state from abiding to the laid out procedure. For example, one such exceptional circumstance may be actions in line with sustainable development where a host state may take measures to mitigate the environmental damages in an area that so happens to be instrumental in the activity of the investor. The strict interpretation in the absence of contextualization can eventually translate to an impartial approach in the determination of a dispute.²¹¹

In light of the above, parties to an IIA may adopt express provisions in the agreement governing the impartial conduct of the arbitrators in the process which can be incorporated as one of the items to include while updating outdated agreements. This can be seen in the Belarus - India BIT where not only does the agreement expressly provide for the impartiality of the arbitrator, it also provides for an avenue for challenging the independence and impartiality of the arbitrator.²¹²

The other issue on transparency is with respect to the overall ISDS practice and the corresponding publication of decisions arising out of past cases. Significant progress has been made in this respect through the Investment Policy Hub under UNCTAD. This platform has managed to keep a

²¹⁰ Kenya Law, at <http://kenyalaw.org/kl/> accessed on 23 September 2019.

²¹¹ Kariuki Muigua, Promoting International Commercial Arbitration in Africa, Paper Presented at the East Africa International Arbitration Conference, held on 28-29 July 2014, at Fairmont the Norfolk, Nairobi.

²¹² Article 19 (1), Belarus-India BIT.

database of the cases that have been adjudicated.²¹³ However, this does not form the entirety of the precedent due to the confidentiality requirement in some of these cases.²¹⁴ This is still contentious since the issues being discussed form part of public policy and/or the effect of the proceedings will have a significant impact on the affairs of the host state which will translate to the citizenry of the same state. This this can be demonstrated in the case of Cortec Mining v The Republic of Kenya where if the if the matter was determined in favour of the investor, this would have seen a financial implication of over 200 billion Kenyan shillings imposed on the Government of Kenya which would have been indirectly transposed to the taxpayers.²¹⁵

The nature and structure of ISDS has been formulated along the lines of international investment arbitration and the bodies responsible for facilitating the processes.²¹⁶ Arbitration by its nature is confidential and as a result, ISDS processes may not only have a consequential effect on the public, but also the very nature of the proceedings may touch on public policy.

For instance, where an investor brings a claim within the ISDS sphere stemming from the fact that the host state failed to renew a their licence to operate a waste disposal facility owing to environmental concerns, this would raise issues of public interest as a consequence of the actions of the facility on the residents of the area.

It is important to note the efforts that have been made to improve transparency in the ISDS process.

One such stride is seen in the formulation of the United Nations Commission on International

²¹³ UNCTAD, Investment Policy Hub under at <https://investmentpolicy.unctad.org/> accessed on 24 October 2019.

²¹⁴ Confidentiality and Transparency - ICSID Convention Arbitration <https://icsid.worldbank.org/en/Pages/process/Confidentiality-and-Transparency.aspx> accessed on 23 October 2019.

²¹⁵ Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya, ICSID Case No. ARB/15/29.

²¹⁶ Brower, Charles N., and Stephen W. Schill. "Is arbitration a threat or a boom to the legitimacy of international investment law." *Chi. J. Int'l L.* 9 2008: 471.

Trade Law (UNCITRAL) of Rules on Transparency in Treaty-based Investor-State Arbitration (hereinafter the “Transparency Rules”) which came into effect on 1st April 2014. Their application is subject to the inclusion of the rules in the treaties. Thereafter, the parties cannot derogate from the application of the rules when a dispute arises.²¹⁷

The rules allow for the publication of information and documents in the arbitration process. At the beginning of the arbitral process i.e. when the notice of arbitration is issued, the economic sector involved, the name of the disputing parties and the relevant investment treaty under which the claim is being made will all be published. Additionally, both the claim and the defence will be published as well as any further written submissions that the parties submit to the pane. The orders and the final award must also be published. Where applicable, the transcript of the hearings will also be made public.²¹⁸

4.6 CONCLUSION

From the above attempt at reconciliation of the issues affecting ISDS in African states and the available remedies and mitigation measures in place it can be concluded that overall the situation in African states are not foreign to the rest of the world and can be resolved to a significant extent by the general trends and developments. African states are still within a development phase with respect to ISDS practice. Development does not take into account the frequency in which African states appear as parties to ISDS disputes. Instead, development in ISDS practice within Africa in the context of this study refers to the level of awareness of the substratum of the issues arising from the IIA leading to their involvement in ISDS in the first place, coupled by the level of participation by practitioners from the continent. More so, ISDS practice also includes the salient

²¹⁷ Transparency FAQs (UNCITRAL) available at <https://uncitral.un.org/en/texts/arbitration/transparency/faqs#when>

²¹⁸ UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

aspects of the participation of a developing state and that of an investor from a developed state and the potential issues that may arise as discussed in the previous Chapters.

5.0 CHAPTER 5

FINDINGS, CONCLUSION AND RECCOMENDATIONS

5.1 INTRODUCTION

This Chapter will first address the outcome of the study by further scrutinizing the research problem and the questions raised by the problem. The Chapter will thereafter draw deductions from the above findings that would effectively form the conclusion of the study. It is at this stage that the hypothesis of the study will be tested with the actual outcome of the study. Finally, the chapter will propose ways forward with the aim of addressing the research problem and the corresponding research questions raised. It will take into account the status quo established from the study and attempt to structure avenues that will seek to move from the research problem onto greener pastures.

5.2 FINDINGS

The findings flow from the research questions posed in the study. Therefore, this segment of the Chapter will reiterate the research questions stemming from the research problem elaborate on the results of the study conducted to address the aforementioned questions posed.

The questions posed in the study were:

- a) What are the key issues posing an inherent disadvantage to African states in ISDS?
- b) What are the trends and developments in IIAs and the ISDS process?
- c) From the identified issues, how can they be reconciled with the global trends and developments within the context of ISDS practice in African states?

5.2.1 WHAT ARE THE KEY ISSUES POSING AN INHERENT DISADVANTAGE TO AFRICAN STATES IN ISDS?

From the above study, it has been pointed out that the state of ISDS in Africa faces a number of challenges that have a corresponding effect of creating a state of disadvantage for African states. With respect to this issue, the study unraveled a number of challenges facing the state of IIAs and ISDS in Africa.

The study first established that there is a significantly disproportionate representation of African arbitrators in ISDS. The study highlighted key statistics to corroborate this issue. The poor representation of Africans in the main facets of the practice (the role of the arbitrator and the role of counsel) has resulted in the subsistence of a wrong perception that African practitioners in international arbitration are scarce while the actual reality on the ground is that there is indeed sufficient capacity within Africa with respect to the number of practitioners. The low representation of African arbitrators also fuels another misguided perception that African practitioners lack the requisite expertise to participate in ISDS. These perceptions have in turn gone full-circle making them have the effect of perpetuating the poor representation of Africans in ISDS.

The study also established that there is the continued reliance on outdated agreements by countries in Africa. Some of the agreements that were entered into contained provisions that were inherently detrimental to the host state such as vagueness in the definition of investment as well as the absence of provisions promoting sustainable development given that a majority of the African nations are developing nations.

It was also found from the study that there are risks around the legitimacy of African practitioners with respect to the lack of impartiality and transparency in the ISDS space. The study established that this particular issue may be more widespread beyond Africa however its inclusion was key in that these are issues that have been a growing concern within the development of ISDS in Africa.

5.2.2 WHAT ARE THE TRENDS AND DEVELOPMENTS IN IIAs AND THE ISDS PROCESS?

The study found that there has been a series of developments in the field of ISDS that have had a significant impact on the practice. Chapter 3 of the study discussed some of those developments the findings of which will be discussed below.

The first development that was discussed in the study is the omission of the option of ISDS from IIAs. By omitting this option, parties to an IIA will have to be subjected to other options of resolving their dispute such as the adoption of ad hoc arbitral panels as well as a provision to be subject to the local dispute mechanisms of the host state as will be highlighted below.

Another development is the establishment of standing tribunals. These are tribunals that are constituted by arbitrators appointed by the states that are party to the IIA in a manner in which will promote an objective and impartial baseline for their arbitral duties. As discussed, a standing tribunal will not only save the parties time, but also the resources that would have gone in to the sourcing and the appointment of the tribunal as well as the resources that would have been lost during the period when the arbitrators are being appointed.

The third development is the establishment of a provision for the exhaustion of local remedies. This provision may not be favourable to the interests of the investor as there is the underlying presumption of bias with respect to the adjudication of the dispute utilizing the resources of the

host state. Notwithstanding, the requirement for the exhaustion of local remedies will have the effect of lowering the financial burden/risk associated with the ISDS process. The ISDS process may also benefit from this provision since the local courts may settle some of the issues in the dispute leaving fewer issues for the ISDS process to handle. It provides an avenue for sieving trivial and straightforward issues from deliberation at the ISDS level. This provision will also prompt the acknowledgment and respect of the sovereignty of the host state by recognizing its internal dispute resolution systems and only submit a claim to the ISDS process only where they fail to address the dispute entirely.

The study also highlighted the limitation of the ISDS process and divides the discussion into two factions. The first addresses the limitation of the ISDS process by limiting the time when a claim can be submitted. By limiting the time for the submission of a claim to the extent outlined in the study above, this prevents delays on the overall ISDS process associated with technicalities linked to the formation of one's case as well as the intentional delay of proceedings so as to prejudice the other party. Limitation of the time of submission of a claim also incorporates time sensitive matters such as matters touching on the environment where the same is being degraded and the passing of time will only worsen the situation on the ground. The second faction is that limitations can also be placed with regard to the nature of the claim being submitted to the ISDS process. An IIA may bar claims touching on certain areas to be subject to the ISDS process. This has seen to give a bit of leeway to avoid 'regulatory chill' by the host state on bona fide actions that are in the interest of the public as well as those that are in line with the overall development of the host state and/or, those that are in line with the global sustainable development goals.

Action has also been taken with respect to the conduct of arbitrators in ISDS. There have been additional safeguards surrounding their practice such as the provision on further inclusions in IIAs

prescribing guidelines on the impartiality of arbitrators. Additionally, there has been a trend where the same individual will act as an arbitrator in one matter and then act as the counsel of another arbitration where there are similarities/links in the nature of the parties or the fact that particular aspects of the disputes are related. This had been dubbed as ‘double hatting’ which has been recognized as an issue and action is being taken to prevent the same by the establishment of provisions that aim to disqualify those who have had multifaceted roles in different disputes that have common aspects affecting their objectivity.

Recent IIAs have begun to incorporate provisions on dispute prevention and other forms of dispute resolution mechanisms in addition to the ISDS process. As discussed above, a provision of other avenues may benefit the eventual ISDS process (if it gets to that point) by reducing the number of issues that would have already been sorted out in the other methods of dispute resolution that have been provided for. The most popular avenues that have been applied to ISDS is negotiation and mediation procedures.

Model agreements and local legislation on international investment is also a notable development in the ISDS process and overall IIA engagements. Model international agreements give parties to the agreement as well as investors a preview of what the state prefers to include in their engagement under the agreement. This saves on the time taken to negotiate the terms of the agreement and it also announces the investment preferences of the host state beforehand. Local legislation on the other hand may be interpreted as a way to further integrate international investment engagements into the activities of the host state. This can be interpreted as extending the benefits and obligations accorded to foreign investors to local investors as well. Local legislation may also form a foundation for the establishment of local institutions that will be handling international investment matters.

5.2.3 FROM THE IDENTIFIED ISSUES, HOW CAN THEY BE RECONCILED WITH THE GLOBAL TRENDS AND DEVELOPMENTS WITHIN THE CONTEXT OF ISDS PRACTICE IN AFRICAN STATES?

The study has established that nexuses exist between the developments and trends that have been outlined and the challenges facing African states in ISDS that have been discussed above. Parallels can be drawn with respect to solving/mitigating of some of those challenges by adopting some of the trends and developments outlined in the study.

With respect to mitigating the poor representation of African arbitrators in ISDS, the study drew parallels with the establishment of standing tribunals. The party states appoint the members of the tribunal and this would be an opportunity for African states to pick from their own pool of expertise to fill in their portion of the panel where an African state is involved. Their appointments do not necessarily have to be from the same country. The appointments may also be regional within the African continent. These appointments will be an opportunity for African arbitrators to practice on an international level gaining more experience and recognition enabling them to gain more visibility in the international ISDS arena.

Outdated agreements have been subject to updating over recent decades the basis of these updates can be drawn from the overall development of the ISDS space. Consequently, a nexus can be drawn between the presence of outdated agreements and the establishment of model international agreements such as model BIT's. This will provide a basis for the updating of the outdated agreements to incorporate the new preferences of the party states to the IIA.

Legal and financial risks linked to the participation of African states in ISDS can be mitigated by the inclusion of provisions in IIAs requiring the exhaustion of local remedies. This will in turn

provide an avenue for resolution if the investment dispute through relatively cheaper means as well as providing for a possibility for the complete resolution of the dispute at this stage eliminating the need to subject the dispute to the ISDS process. Investment disputes can also be placed before local or regional arbitral centers as opposed to the popular international centres outside the continent. This will aid in raising the profile of the local or regional institutions as well as improving the precedent bank and consequently their recognition internationally.

The mitigation of the occurrence of ‘regulatory chill’ can be put in action through provisions limiting sectors in which a dispute can be brought creating regulatory room on the part of the host state to implement policy in the interest of the public in the exempt areas. Examples provided in the study include national security, corporate social responsibility, environment and labour affairs among others.

Issues surrounding the legitimacy of the practitioners (issues touching on impartiality and transparency) can be addressed by the inclusion of express provisions in the IIA addressing the impartial conduct of dispute resolution practitioners in ISDS. This falls within the ambit of updating if IIAs. Transparency on the other hand can be addressed by imposing measures regulating the same as one of the items to include while updating the agreements. The study made reference to the UNCITRAL Transparency Rules that party states may choose to incorporate in their IIAs.

5.3 CONCLUSION

From the study above, it can be concluded that the challenges facing African states in ISDS practice can be reconciled with some of the trends and developments in the global practice of ISDS and the state of IIAs. The effect of the above reconciliation is the mitigation of the negative effects

arising from the aforementioned challenges and for some, providing an avenue to completely eradicate the challenges altogether. This conclusion of this study aligns with the hypothesis established at the beginning of this study.

5.4 RECOMMENDATIONS

This portion of the study will flow from the above findings of the study with respect to the three ambits discussed above with a focus on the last one which reconciles the issues identified in the study with the trends and developments. Thereafter, avenues will be proposed to initiate the implementation of the recommendations.

It was found as explained above that there are various issues affecting Africa states in ISDS. It would therefore follow as a recommendation from this study that a comprehensive review, with the aim of identifying the extent of which the issues that have been identified in the study has affected individual African states as well as the extent of the effect of the issues in each state.

a) A Comprehensive Database on Qualified African International Arbitrators

This would involve identifying local statistics on the number of qualified international arbitrators in one African state. From this, a cogent database will be established so as to have qualified personnel on standby as the issue is reconciled with the establishment of standing tribunals. The database will form the pool from which the qualified personnel to constitute the tribunal will be sourced.

b) An Assessment of IIAs Aimed at Identifying Outdated Provisions

Additionally, the African state should identify the number of IIAs they have entered in and assess them individually so as to identify those that still contain provisions that would be out of date and

mark them for discussion within the context of the formulation of model international agreements such as model BIT's that will form the rubric for international investment in the African state.

c) Assessing Legal and Financial Exposure before and within the subsistence of the IIA

With respect to legal and financial exposure, African states should exercise more caution in entering new agreements and take time to assess the legal and financial effects of entering into the IIA. Concurrently, upon expiry of existing IIA, the states may take time to propose amendments that will mitigate this issue before renewing the IIA and carry on the same legal and financial risks. Mitigation as discussed above may be done by the inclusion of provisions on exhaustion of local remedies, imposing limitations on the scope of matters that can be brought to ISDS as well as provisions that will lace matters before local or regional arbitral centers as opposed to the popular international centres outside the continent.

d) Incorporation of Guidelines on Transparency Independence and Impartiality

As pointed out in the study, there are a number of guidelines and rules that prescribe for transparency, independence and impartiality such as the UNCITRAL Transparency Rules It would therefore be apt for states engaged in IIA's to incorporate these provisions so as to regulate the same

5.4.1 AVENUES FOR IMPLEMENTATION OF THE RECCOMENDATIONS

Now that it has been established that the recommendations can be incorporated to mitigate and in some instances eradicate come of the challenges indicated in the study above, this segment will attempt to propose practical avenues in which the recommendations mentioned above can be implemented.

Implementation on a continental scale may prove to be a challenge due to the variance of investment related interests by African states in addition to the varied decision making avenues in each state. It would therefore be more practical to address implementation on a national level with the anticipation that multiple African states will individually consider the recommendations.

5.4.1.1 INITIATION OF REFORM NEGOTIATIONS.

Party states to an IIA providing for the resolution of disputes through ISDS may engage in negotiations aimed at altering the relationship under the agreement. These negotiations should be initiated by the African party to the agreement or either party where both parties to the IIA are African parties. Intra-African IIAs may prove to be easier to reform since it would be in the interest of either party to preserve their ability to encourage room for further development of their economies since they are highly likely to fall within the category of developing nations. IIAs between developing countries and developed countries on the other hand may prove to be harder to negotiate for amicable provisions for the African developing state since it would be in the interest of the developed state to provide the utmost level of protection for its investments and those of its citizenry even if it means curtailing the overall development of the African state.

The outcome of the negotiations may be futile but this potential futility may not even be ascertained if no conversation is initiated in the first place. In a nutshell, the first step to solving a problem would be the acknowledgment and communication of that problem. In light of this, African states should take up the initiative to begin the conversations on reform in anticipation of actual reform action when the opportunities arise such as the expiry of the duration of the IIA where it may be renewed with amendments or the express termination of the IIA with the intention renegotiating a replacement.

5.4.1.2 BOLSTERING THE LOCAL LEGAL FRAMEWORK ON ISDS IN AFRICAN STATES

By establishing a local framework on international investment and particularly ISDS, African states will have a baseline to negotiate from as opposed to the imposition of terms by foreign states taking advantage of the absence of a policy/legal or a practical position on the choice and procedure of dispute settlement as well as the overall framing and interpretation of IIA provisions.

In light of this, the ideal action points for African states would be the adoption of a model investment agreement incorporating the ideal terms that would form the basis of negotiation for IIAs. Alternatively, model IIAs can be amended to incorporate the updated negotiation position of the African state.

Concurrently or alternatively, African states may also enact local legislation on investment with the aim of creating a firmer binding regulatory footing that will apply to any investor within the territory of the investing state. Investors will have to be subjected to the local regulatory regime hence negotiation in this case will be more limited than the former (the model IIA option) posing the risk of creating a hostile investment environment.

5.4.1.3 CREATING AN ENABLING ENVIRONMENT FOR AFRICAN PRACTITIONERS

The above avenues for implementation address two main aspects of reform the first being reopening the negotiation table while the other relates to reinforcing the legal framework in place in African states to accommodate the trends and developments. The last avenue for implementation pertains to the actual practitioners from Africa. Inasmuch as the study has unraveled the fact that there are a significant number of practitioners from Africa, African countries are yet to fully embrace the ISDS avenue of preference for dispute resolution, arbitration, on an institutional level.

Training with respect to arbitration still proves to be a financial hurdle hence limiting the number of locals who will take up the practice. At the same time the attitude towards arbitration has not been entirely supportive as courts are likely to interfere with the merits of a matter hence frustrating enforcement.

The creation of an enabling environment will consequently increase the number of practitioners which will result in a larger pool of practitioners who will have a greater impact on the overall development of the arbitration practice in their states and consequently a greater appreciation of the ISDS practice.

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