Fragmentation of Investment Codes in Africa: The Pan African Investment Code (PIAC) as a Centripetal Continental Force

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1. Introduction

In a world of complex layers of bilateral, regional and multilateral trade and investment arrangements, investment agreements are bound to, inevitably, overlap or contradict each other. This paper discusses the fragmentation of investment agreements, codes and protocols in Africa within the context of regional integration. The paper explores the role that the Pan African Investment Code can play in eliminating the negative effects of fragmentation of intra- African investment agreements.

The paper is presented in four substantive parts. The first part gives a general overview of fragmentation of Continental and sub-regional integration efforts in Africa, and its ramifications. The second part discusses the efforts in harmonisation of continental and sub-regional integration in Africa through the Draft Protocol on the AU Relations with Regional Economic Communities (RECs). The shortcomings of the draft Protocol are identified. The third part highlights the causes and effects of fragmentation of investment codes in Africa. The fourth part suggests the possible role that the PAIC can play in the harmonisation of investment codes relating to intra-African investments.

2. Fragmentation of Continental and Sub-Regional Integration Efforts in Africa

Bachinger and Hough observe that every African country is currently a member of averagely four different trade blocs, creating the famous spaghetti bowl of RIAs.[1] They further noted that the plan of the AU is to integrate the various RIAs into one large economy with the ultimate goal of unifying the continent and creating a United States of Africa by 2030.[2] For instance, most SADC members are also parties to an EPA with the European Union (EU) through the Southern African Customs Union (SACU). [3] South Africa is also a party to a free trade agreement with the EU.[4] The parties to SADC are also members of the COMESA, while some members of the EAC are also members of the SADC and COMESA.[5] The EAC, on its own, is also negotiating trade agreements with the EU.[6] SADC, EAC and COMESA members are also member states of the TFTA.

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[1] K Bachinger and J Hough, "New Regionalism in Africa; Waves of Integration" (2009) 32(2) *Africa Insight* 43-59, at 43-44. The AU Agenda 2063 is an ambitious plan for a prosperous Africa building on the African RECs based on a 25, 10, 5 year and short term plan for integrating the continent. The agenda envisages political Unity of the Africa will be culmination of the Economic and Political integration process characterised by a continental government and institutions by 2030. With the coming into force of the AfCFTA Agreement and the TFTA Agreements, the average membership of African nations in RECs may now be six. See also the Africa Regional Integration Index Report 2016 <https://www.tralac.org/documents/news/2771-com2019-africa-regional-integration-index-report-arii-2019-presentation/file.html.> accessed on 8th May 2019.

[2] ibid.

[3] R Kirk and M Stern. "The New South African Customs Union. Agreement 2005" *The World Economy 28(2) 169.*

[4] The SADC –EU Economic Partnership Agreement legal texts available at http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153915.pdf . Accessed on 5th May 2019.

[5] For example, Zambia, Tanzania and Zimbabwe are members of both SADC and COMESA. Tanzania is also a member of EAC.

[6] On the Economic Partnership Agreement between the EU and the EAC, see the status report at http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620218/EPRS_BRI(2018)620218_EN.pdf . Accessed on 5th May 2019. Ouma views the current deadlock in negotiating a new agreement as having been caused by matters "deeper than the merits of the Agreement concerned". She sees the ineffectiveness

The conclusion drawn from this complex web of a multiplicity of multilateral and bilateral trade agreements, involving the very same parties, is that it has been a source of divided loyalty.[7] It has created expensive engagements for poor African economies to maintain and confusion for transnational business people as to the applicable regime.[8] It has also encouraged trade deflection and negatively affected the attainment of multilateral trade in Africa, and as a ripple effect, on the global plane as well. [9] Mistry observes that dual or multiple membership of RECs creates complications and retards progress, as a country may become a conduit for leakage from one [regional] arrangement to another. [10]

A further layer of multilateral trade integration is in the form of the AfCFTA. The AfCFTA Agreement, the AEC, and the TFTA, all propose that member states should maintain memberships in COMESA, EAC and SADC while still pursuing integration at the continental level.[11] This may end up complicating and entangling the "spaghetti bowl" even further, so that one may not be able, at the end of the day, to tell the true existence, value or even difference between any of the RECs. They may all be lost in the complex web and drowned in the swamp of treaties and the myriad of protocols attendant thereto, both at the continental and sub-regional REC levels.

The maintaining of parallel REC structures while developing the AfCFTA and AEC may have been well meaning, mainly due to efforts at ensuring seamless transition at the end of the integration process. However, in the intervening period, the existence of several integration efforts pulling in different directions does not augur well for the timeous fusion and integration of the merging RECs into the AfCFTA and AEC.

Articles 4(2) (a), 6 (2) (a) of the AEC Treaty, the preamble TFTA Agreement, and Article 19(2) of the AfCFTA Agreement, expressly encourage the continued existence of and/or establishment of "future" RECs. Yet, the essence of the TFTA Agreement and AEC Treaty is to build a multilateral trading and economic system that cuts across the entire continent, as opposed to sub-regional trading blocs. It is, therefore, tempting to conclude that in their attempt sell the idea of the AEC and the TFTA, the drafters of both instruments sought to appease states' fixations, investment (in time, money and systems) and sentimental attachment to their respective RECs. The TFTA and AEC may have found acceptance but at the same time sacrificed and undermined the very objectives for which they were set up.

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of the decision-making process, as well as the lack of proper constitution of a representative body in the negotiations, as having facilitated the advancement of national interests over the collective interests of the East African Community, hence the stalemate. See, P Ouma, "The EU – EAC Economic Partnership Agreement Standoff: The Variable Geometry Question" (2019) <http://www.afronomicslaw.org/2019/05/30/the-eu-eac-economic-partnership-agreement-standoff-the-variable-geometry-question/> accessed on 30th September 2019 [1].

[7] Uzodike UO, "The Role of Regional Economic Communities in Africa's Economic Integration, Prospects and Constraints" (2009) 39(2) *Africa Insight* 26, at 36. Jelle argues that the AfCFTA presents African states with an opportunity for a better structured economic Agreement with the EU. This is a prospect the EU is already warming up to. With a larger market, it is hoped that the negotiating scales will tilt, or at least sway, in favour of Africa. See A Jelle, "With AfCFTA in Mind: New Dawn for Afro-EU Relations?" (2019) <http://www.afronomicslaw.org/2019/05/27/with-afcfta-in-mind-new-dawn-for-afro-eu-relations/> accessed on 30th September 2019.

[8] ibid.

[9] ibid.

[10] PS Mistry, "Africa's Record of Regional Cooperation and Integration" (2000) 99(397) *African Affairs* 570.

[11] Articles 4(2) (a), 6 (2) (a) of the AEC Treaty; the preamble TFTA Agreement and article 19 (2) of the AfCFTA Agreement.

To allow and actively encourage the setting up of new sub-regional trading blocs will, invariably, regress the realisation of both the AEC and TFTA. This is tantamount to taking three steps forward and two backwards so as to allow the new RECs to catch up with the integration process. In the end, the process will inevitably stall or run on the spot. The permissive language used in the AEC Treaty and the TFTA with respect to maintaining the existing sub-regional RECs while at the same time establishing new RECs is injudicious, misconceived and inconsistent with their overall continental integration objectives.

The cost of administering trade agreements and their dispute settlement organs is another significant hurdle. For example, all the TFTA members belong to at least 4 RECs, excluding bilateral and multilateral trade arrangements.[12] These arrangements require administration both internally (within the state), at the REC and the WTO levels. Additionally, the need to fund the operational costs of the trade arrangements, its secretariats and the bureaucracies' attendant thereto, is unsustainable particularly for frail foreign aid weaned and dependent sub-Saharan Africa states, which form the bulk of the AfCFTA.[13] Furthermore, these countries have to juggle their priority expenditure with the meeting of its many subscription obligations arising from the multiple trade arrangement memberships.[14] Consequently, many states are serial and chronic defaulters in meeting their treaty subscription obligations and as a result, the integration organs are poorly funded, slowing down the integration process. This is a reality which faces the AfCFTA Agreement and its organs including its dispute settlement mechanisms.

3. Harmonisation of Regional Integration Efforts in Africa: The Draft Protocol on the AU Relations with RECs

The Draft Protocol on the AU Relations with RECs is meant to offer a preposition that will either eliminate or at least ameliorate fragmentation and its effects as witnessed in economic integration.[15] The Draft Protocol seeks to advance the theme of harmonisation of the policies, operations, objectives and programmes undertaken by sub-regional RECs on the continent.[16] To this end, an entire structure, complete with a secretariat and technical committees, is set up to oversee the implementation of the Protocol.[17]

Though still at the draft stage, several concerns are apparent, even from a cursory reading of the text of the proposed Protocol. Firstly, the Protocol rightly notes that both the AEC Treaty and the AfCFTA Agreement are primarily meant to harmonise, coordinate and consolidate economic regionalism in Africa.[18] The AfCFTA Agreement also defines, in fairly clear terms, the relationship and hierarchical order of AU and REC norms.[19] The AEC Treaty is, in fact, succinct to this end by providing, in Article 6, the step-wise harmonisation process complete with milestones to be achieved within set timelines. Article 6 of the AEC Treaty contemplates the establishment of a FTA within ten years of the Treaty. Although the

[12] Bachinger and Hough, (n) 1, 43-44.

[13] UO Uzodike, (n) 7.

[14] ibid.

[15] Draft Protocol on the Relations between the African Union and the Regional Economic Communities <https://wits.worldbank.org/GPTAD/PDF/annexes/AEC_protocols.pdf.> accessed on 9th May 2019. According to O Kaaba and B Fagbayibo, this Draft protocol is unhelpful in advancing the rule of law on the continent since it is yet to be adopted and is largely ambiguous. See O Kaaba and B Fagbayibo, "Promoting the Rule of law through the Principle of Subdiarity in the African Union: A Critical Perspective" (2019) *Global Journal of Comparative Law* 27-51.

[16] See the Preamble, Articles 2 and 3 of the Draft Protocol.

[17] Chapter Two of the Protocol sets out its institutional framework.

[18] Articles 3 and 4 of the AEC Treaty; and the Preamble Article 3 and 4 of the AfCFTA Agreement.

[19] Article 19 of the AfCFTA Agreement provides that the Agreement shall prevail in the event of any inconsistency between it and any regional agreement.

AfCFTA came into being more than fourteen years after the AEC Treaty contemplated, it marked an effort to put in place the FTA envisioned under Article 6 (2) (c) of the AEC Treaty. However, the problem is that this critical step towards the AEC is coming at least 8 years late.[20] Furthermore, the Draft Protocol that is supposed to harmonise the relationship between the AU and RECs is coming midstream to the implementation of Article 6 of the AEC Treaty, and 10 years to the date earmarked for realisation of the continental economic community.[21] It does not help matters that the protocol is still in draft. The stark reality is that, at the current pace, it is unlikely that the AEC will be realised by 2030 as planned.

Secondly, while the Protocol is detailed on the socio-economic areas of cooperation and harmonisation, it is silent on the harmonisation, coordination and hierarchical relations between AU and REC dispute settlement mechanisms.[22] This is with particular reference to economic integration. On dispute resolution, the Protocol says nothing more than to confer jurisdiction upon "the Court of Justice of the Union" over disputes arising out of the interpretation or applicability of the provisions of the Constitutive Act of the AU, the AEC Treaty, the Protocol itself and the treaties establishing RECs.[23]

Thirdly, the Protocol will come into force upon endorsement by the AU Assembly of Heads of State and Government; and also when signed by the Chairperson and Chief Executives of at least three (3) RECs.[24] While it is appreciated that a minimum threshold for accession to the Protocol is necessary, a process meant to harmonise the economic communities of Africa into a continental vehicle must, out of necessity, carry along all the RECs. If not, there is always the lurking danger of sectional continental integration, which is inimical to the establishment of the desired continental market.

There have been significant developments since the Draft Protocol on AU Relations with RECs was prepared. For instance, the 26-member TFTA Agreement was concluded in 2015.[25] The TFTA is by far the largest sub-continental REC in Africa. The current draft of the Protocol only recognises 8 RECs in Africa.[26] A more current version of the Protocol should identify and appropriate a more central role to the TFTA, particularly as with regards to the economic integration of the continent. Significantly, the

[20] According to Article 6 (2) (c) of the AEC Treaty, a FTA should have been established within 10 years of the coming into force of the Treaty (1994), i.e by 2004.

[21] According to Article 6 (2) (a) of the AEC Treaty, the harmonisation of RECs should occur within 5 years of the 1994 (when Treaty came into force) treaty, i.e by 2000. The Protocol remains a draft 10 years since it was mooted.

[22] Article 2 of the Protocol defines the scope of its application to include implementation of measures in the economic, social, political and cultural fields including gender, peace and security. Article 2 (b) provides for the harmonisation and coordination of macro-economic policies in peace and security policies, agriculture, industry, transport and communication, energy and environment, trade and customs, monetary and financial matters, integration legislation, human resources, gender, tourism, science and technology, cultural and social affairs, democracy, governance, human rights and humanitarian matters.

[23] Article 32, the dispute resolution clause of the Protocol. Curiously the drafters of the Protocol seem to be oblivious of the merger of the AU courts and the creation of a single court hence their erroneous reference to the "Court of Justice of the Union", a non-existent entity.

[24] Article 33 of the Protocol.

[25] The TFTA; its objectives, structure and dispute resolution system; is discussed in Chapter 3.4.4 of this thesis. Nalule observes that the complete absence or even mere mention of the Draft Protocol in AfCFTA Agreement is telling of the commitment of AU member states towards continental economic integration. The AfCFTA being an effort at harmonising RECs in Africa should have specifically mentioned and related itself with the Draft Protocol. See, Nalule, "The Treaty Establishing the African Economic Community and the Agreement establishing the African Continental Free Trade Area: Some Relational Aspects and Concerns" (2019) <http://www.afronomicslaw.org/2019/08/14/the-treaty-establishing-the-african-economic-community-and-the-agreement-establishing-the-african-continental-free-trade-area-some-relational-aspects-and-concerns/> accessed on 23rd September 2019 [8].

[26] The Protocol seems to only make provision for eight RECs in Africa, namely: ECOWAS, COMESA, ECCAS, SADC, IGAD, CEN-SAD, AMU and EAC. See also the commentary by the AU <https://au.int/en/organs/recs> accessed on 23rd September 2019 in which only 8 RECs are named as being the subjects of the Protocol.

TFTA, a conglomerate of three established RECs in Africa, provides a viable and less protracted preposition to bringing together 26 African states at one go and through one REC.

Fourthly, the Protocol presents yet another example of top-to-bottom approach to economic integration in Africa. This approach is characterised by the creation of continental and sub-continental integration bodies. These were created by governments and technocrats without the input of the common people on the streets, whom these efforts are supposed to serve or benefit.[27] It has, therefore, been suggested that this approach has always spelt doom to the integration of markets in Africa because the common people do not own the process and hence feel far removed from it.[28] Fagbayibo aptly addresses this criticism, by suggesting that the debate and processes of regional integration should be moved from an elitist framing to the grassroots:

> *In addition, there is a need to "privatise" the process of regional integration by ensuring popular participation and an ample support base. For the success and sustainability of this process, it is imperative that the debate surrounding regional integration is moved from the elitist realm of technocrats, civil societies and the academia to a forum that seeks to inform the African populace about the benefits and the drawbacks of integration and to garner their opinions. The "common man or woman" in the streets of, inter alia, Kigali, Arusha, Kumasi and Maputo should be given an opportunity to contribute to this debate. The fact the majority of the continent's population is illiterate and impoverished makes the issue of popular mobilisation more important.*[29]

Proliferation and Fragmentation of Investment Codes in Africa Closely related to international investment arbitration is the viability of the various investment codes conceived and promulgated on the continent. Investment codes are meant to be blueprints for spurring economic activities through strategies that encourage foreign direct investment within the member states who subscribe to these codes. International arbitration is the most preferred mode of settling international commercial and investor-state disputes, hence the co-relation.

The EAC, SADC, ECOWAS and COMESA all have Investment Codes, Acts or Protocols.[30] The objective of these codes and protocols is to harmonise member states' investment policies and laws in alignment with the common regional codes. For example, Article 19, Annex 1 of the SADC Protocol on Finance and Investment (SADC-FIP) enjoins member states to harmonise their investment policies, laws and practices with the objective of creating a SADC investment zone.[31] To this end, Article 2 of the SADC-FIP elaborately provides that one of the key objectives of the Protocol is:

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[27] B Fagbayibo, "A Supranational African Union? Gazing into the Crystal Ball" (2008) *De Jure* 493-503, at 503.

[28] ibid.

[29] ibid.

[30] The EAC has a model Investment Treaty concluded in 2016 <https://www.eac.int/documents/category/investment-promotion-private-sector-development> accessed on 6th April, 2019; ECOWAS has a Supplementary Act on Investments (supplementary Act A/SA 3/12/08; <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3547/ecowas-supplementary-act-on-investments> accessed on 6th April, 2019. COMESA has a Common Investment Agreement, <https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/rei120.06tt1.pdf> accessed on 6th April, 2019. SADC has the SADC Finance and Investment Protocol (FIP), available at <https://www.sadc.int/files/4213/5332/6872/Protocol_on_Finance__Investment2006.pdf.> accessed on 6th April, 2019.

[31] The SADC-FIP discussed in detail in L Ngobeni and B Fagbayibo, "The Investor-State Dispute Resolution Forum under the SADC Protocol on Finance and Investment: Challenges and Opportunities for effective Harmonisation" (2015) 19 *Journal of Law and Development* 175-191.

> *Harmonisation of the financial and investment policies of the state parties in order to make them consistent with the objectives of SADC and ensure that any change to financial and investment policies in the state party do not necessitate undesirable adjustments in other state parties.*

Several issues arise with respect to the proliferation of investment codes in Africa. The first and most obvious one is that most member states of African RECs also have domestic investment laws and policies. Some of which are inconsistent with or in direct conflict with the regional codes or policies. For example, Mhlongo notes that the scope of definition, and exceptions, of "an investment" in the SADC-FIP and South Africa's Protection Investment Act 22 of 2015 are capable of multiple interpretations.[32] This is primarily with respect to the following cardinal principles of investment law: the right of establishment of investment,[33] fair and equitable treatment, [34]and legal protection of investment.[35]

The second problem is one associated with the multiple memberships by African countries of RECs with similar objectives. For instance, all the COMESA member states are either members of EAC or SADC.[36] All member states of SADC and EAC are also members of the TFTA, while Tanzania is a member of both SADC and EAC and is, therefore, subject to both the SADC-FIP and EAC Investment Code. All these regional organisations promote economic regionalism with very similar objectives, including the desire for a common investment policy throughout their respective regions. This leads to the problem of states being required to adopt several codes and protocols on the same subject and sometimes with conflicting objectives and provisions.

The Possible role of the PAIC in redressing Fragmentation of Investment Codes in Africa According to UNCTAD, 99 investor – state dispute claims have been filed against African States since 1987.[37] In most of these cases, African states have lost and been ordered to pay huge compensatory damages.[38] African countries have in turn raised several concerns about the traditional ISDS system, including the lack of legitimacy and transparency, exorbitant costs, and inconsistent and flawed awards.[39]

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[32]L Mhlongo, "A Critical Analysis of the Protection of Investment Act 22 of 2015" (2019) Forthcoming in *South Africa Public Law Journal* 1-25, at 8-18.

[33]L Mhlongo observes that Section 7 of the South African Protection of Investment Act provides that all investments must be established in compliance with the laws of South Africa. However, section 7(2) of the Act does not, however, create a right for a foreign investor or prospective investor to establish an investment in South Africa. While the State retains the sovereign right to regulate investments in its territory, general international law on foreign investment places obligations on states not to place unreasonable restrictions to foreign investment. Article 2(3) of the SADC FIP, in line with this general principle, prohibits member states from amending or modifying, without good reasons, or arbitrarily, the terms, conditions and any benefit specified in the code. See L Mhlongo, ibid, 10-11.

[34] While both the South African Investment Act and Annexure 1 of the SADC FIP provide for the National Treatment Standard (NTS), they do not directly provide for the Most Favoured Nation (MFN). Article 6 of the Annexure 1 of the SADC FIP provides that investors "shall enjoy fair and equitable treatment in the territory of any member state", on the other hand, South Africa's Investments Act requires that administrative, legislative and judicial process do not operate in a matter that is arbitrary or that denies administrative and procedural justice to an investor, L Mhlongo, ibid, 11.

[35] L Mhlongo underscores that section 2 of the Constitution of South Africa affirms its supremacy. This means that, in South Africa, the validity of international law is not measured against the rules of international customary law, but by the Constitution. As a result, she further observes, it will be difficult for foreign investors to invoke international investment law which may be seen to offend the South African Constitution. See, L Mhlongo, ibid, 13.

[36]M Kane, "The Pan African Investment Code: A good First Step, but more is Needed" (2018) *Perspectives on Tropical Foreign Direct Investment Issues* (Columbia Centre on Sustainable Investment) 1–3, 1. <http://ccsi.columbia.edu/files/2016/10/No-217-Kane-FINAL.pdf> accessed on 23rd September 2019.

[37]Investment Policy Hub <https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping> accessed on 7th April 2019.

[38]ibid. See also World Bank <https://icsid.worldbank.org/en/Documents/resources/2018ICSIDAnnualReport.ENG.pdf> accessed on 7th April 2019.

[39]T Chidede, "Investor – State Dispute Settlement in Africa and the AfCFTA Investment Protocol" (2018) at p.1-2. <https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html >accessed on 7th April 2019. See, for example the key findings and recommendations of South Africa in G de Carvalho "At the Table or on the Menu? Africa's Agency and the Global Order" (2019) Institute for Security Studies available at https://issafrica.org/research/africa-report/at-the-table-or-on-the-menu-africas-agency-and-the-global-order accessed on 20th November 2019.

In response to what they view as a system skewed against them, African countries have either attempted to backtrack from ISDS Treaty obligations, or to establish their own ISDS systems. Tanzania, for example, has enacted legislation that requires the use of domestic courts as the forum for ISDS to the exclusion of international arbitration.[40] The South African Protection of Investment Act, 2015 and the SADC FIP now require exhaustion of local remedies before engaging in international arbitration, be it under the UNCITRAL rules or ICSID.[41] While concerns over the ISDS system are not confined to Africa, most African countries are still parties to, and still conclude, BITs (with other African countries or external partners) which prescribe ICSID, UNCITRAL, ICC-ICA, LCA, PCA and LCIA as the ISDS fora.

There is, however, a discernible shift towards a regional and sub-regional focus in ISDS in Africa. For example, the SADC FIP and ECOWAS Supplementary Investment Act do not provide a specific ISDS forum but they make provisions for investors to use local remedies.[42] The EAC Model Investment Code prescribes mediation and investment Arbitration as the preferred state-state, and state-investor dispute settlement mechanism.[43] The COMESA Common Investment Agreement incorporates ISDS arbitration through the COMESA Court of Justice, Africa arbitration centres, as well as ICSID and UNCITRAL arbitral tribunals.[44] The greatest challenge is that African countries belong to more than one REC and are, therefore, obliged to subscribe to different sub-regional ISDS with different approaches, including whether or not to exhaust local remedies before resorting to the regional mechanism.

This is where the PAIC becomes useful. While the PAIC is not a panacea to all the problems afflicting ISDS in Africa, it substantially responds to most of the current concerns surrounding the subject. First, the PAIC provides for arbitration through African arbitration institutions governed by UNCITRAL Arbitration Rules, with the consent of the parties.[45] This, at least, eliminates the different approaches African states have taken on ISDS when concluding BITs among themselves.

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[40] In 2014, Tanzania was identified as a top destination for foreign direct investment in East Africa by UNCTAD. However, since the new government came into power in 2017, the Country has developed a rather combative stance towards foreign investment, particularly in the natural resources sector. Three controversial pieces of legislation have since been passed, namely: the Written Laws (Miscellaneous Amendments) Act 2017; the National Wealth and Resources (Permanent Sovereignty) Act 2017 and the National Wealth and Resources (Review and Renegotiation of Unconscionable Terms) Act 2017. Under Section 6(2) of the Review and Renegotiation of Unconscionable Terms Act provides that a contract that contains a clause that subjects the "state to the jurisdiction of foreign law and fora" is "deemed to be unconscionable." Under the new law, reference to "foreign fora' such as international ISDS arbitration relating to the Tanzanian government may, therefore, be unconscionable. Section 11 of the Permanent Sovereignty Act prohibits international dispute resolution mechanisms or any court or tribunal from exercising jurisdiction over extraction, exploitation or acquisition and use of natural wealth and resources. Jurisdiction is reserved for the domestic Tanzanian judicial or other bodies, established under Tanzanian law. Section 22 of the Public – Private Partnership (Amendment) Act, No. 9 of 2018 prohibits international arbitration and instead prescribes "mediation or arbitration adjudicated by judicial bodies or other organs established in Tanzania and in accordance with its laws". For a detailed discussion on the effect of these statutory amendments on FDI in Tanzania, see, M Masamba, "Government Regulatory Space in the Shadow of BITs: Tanzania's Natural Resources Regulatory Review" (2017) <https://www.iisd.org/itn/2017/12/21/governmentregulatory-space-in-the-shadow-of-bits-the-case-of-tanzanias-natural-resource-regulatory-reform-magalie-masamba/> accessed on 7th April 2019.

[41] L Mhlongo, (n) 976, 17. Ngobeni and Fagbayibo, note 31 above, at p. 176. The South African Minister of Trade and Industry, a strong proponent of the Protection of Investment Act, argues that doing away with international arbitration will increase the protection of investors and the economy. He further states that because of the long line of precedents on similar disputes domestically, and its rich heritage, the South African Judiciary is better placed in ensuring protection of investors through consistent and, therefore, predictable decisions. See, https://www.economywatch.com/features/south-africa-cancelling-foreign-investment.02-01.html accessed on 7th April, 2019.

[42] T Chidede, (n) 39, 2.

[43] Article 23 of The EAC Model Investment Code (2016). The Arbitration is to be conducted under the ICSID Convention and Rules, UNCITRAL Rules, the ICSID additional Facility Rules; or EACJ.

[44] The Amended COMESA Common and Investment Agreement, 2017. Articles 26, 27 and 28.

[45] Chapter 6. The 2016 Draft Treaty is available at https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf . Accessed on 7th April 2019.

Secondly, a dispute settlement that is predictable, independent and allows investors to enforce their rights remains crucial for foreign investors.[46] Legal certainty and respect for the rule of law is a non-negotiable minimum for an investor seeking to invest in a country. The AfCFTA investment protocol should expand to include disputes by individuals and not only inter-state disputes. [47]This access to ISDS should include non-African investors, otherwise disputes between such investors and African states will still be hosted in European capitals.

Like the COMESA Investment Agreement and the EAC approach, the PAIC should cascade its ISDS system through the sub-regional judicial organs. A harmonisation of the various sub-regional codes will be crucial in achieving this end. To overcome the perception that most African domestic courts lack impartiality and independence from their governments, the PAIC should provide for a waiver of the rule for mandatory exhaustion of local remedies, where it can be shown that it is either impossible or unnecessarily obstructive to procure its compliance.

It is in light of the problems discussed in the preceding part of this chapter that the Pan African Investments Code (PAIC) becomes an important tool in the quest for harmonisation of investment codes and protocols throughout Africa. The PAIC was primarily formulated as a tool to promote harmony in the investment strategy in Africa. Kane observes that the PAIC was developed by African experts and welcomed by policy makers:

> *as an opportunity to contribute to African industrial and structural transformation through a binding instrument that would effectively restore the balance between investors' rights and host states' obligations, take into account countries' sustainable development objectives, streamline the investor-state dispute settlement system (ISDS), and finally, overcome issues with the fragmentation of the international investment regime, due to the multiplicity of investment treaties and the diverse interpretive practice of arbitral tribunals.*[48]

Kane notes that in the course of negotiating the code, the original ambition of having a binding investment code to replace intra-African agreements was abandoned in favour of a "guiding text."[49] According to Kane, this choice of a soft law instrument will exacerbate the fragmentation of the investment law regime in Africa and, hence, impair one of the code's core objectives, that of the harmonisation of investment policy and regulation across the continent.[50] Furthermore, the benefits of not including the controversial fair and equitable-treatment provisions in the code, on the one hand, and excluding dispute settlement procedures from the scope of the Most Favoured National (MFN) Clause, on the other hand, is a vexing limitation particularly in the absence of a binding text.[51] As the PAIC code loses its treaty character, there

[46] T Chidede, (n) 39, 3.

[47]Article 28 of the AfCFTA Agreement restricts access to the dispute resolution mechanisms to state parties. Article 1 of the Protocol on Rules and Procedures on the settlement of Disputes defines "Complaining Party", "Dispute", "Party to a dispute" and "third Party" as state Parties to the Protocol, thus leaving no room for natural and corporate individuals. Article 5 as read with Article 6, of the Protocol, also provide that the Dispute Settlement Body (AfCFTA DSB) is only accessible by state parties.

[48]M Kane, (n) 36, 1.

[49]M Kane, ibid. Article 3 of the Code contemplates a non-binding instrument. The text of the Code is available at <https://au.int/en/documents/20161231/pan-african-investment-code-paic> accessed on 6th April, 2019.

[50]ibid, 2.

[51]ibid.

is no guarantee that these two provisions will not be re-introduced in new bilateral investment treaties negotiated by African countries.[52]

Ngobeni perceives the failure to include a post-termination survival clause in the draft PAIC as a fundamental weakness thereof.[53] Such clauses are meant to protect investors for a reasonable period after the termination of an investment agreement.[54] He also views the creation of double standards, with a lower protection threshold for intra-African investors, as discriminative.[55] Since the PAIC provides for dispute resolution at the national level, Ngobeni rightly advocates for harmonisation of the multifarious approaches in domestic investor protection.[56] The non-binding effect of the PIAC also presents a patent weakness since African states generally ignore model or soft laws.[57]

Although the PAIC itself is not without normative and structural weakness, it offers a beginning point for discussion on the harmonisation and consolidation of continental investment policies and ISDS. The harmonisation of RECs under the AU and the shift towards continental economic regionalism offers real motivation for the adoption of the PAIC by all AU member states. The first step, and perhaps the clearest sign of Africa's move towards continental economic regionalism, was seen in the establishment of the TFTA in 2015.[58] The TFTA Agreement advocates for the harmonising of programmes and polices within and between the three merging RECs.[59]The Agreement, in Article 36, also contemplates the conclusion of an investment protocol. Article 14 of the TFTA Agreement also requires members to design and standardise their trade and customs, documentation and information in accordance with internationally accepted standards. The AfCFTA Agreement also provides for an investment protocol, which will be finalised by 2020.[60] According to Ngobeni, this protocol will render the PAIC worthless.[61] Sub-regional protocols and codes sought to replace or harmonise domestic investment laws. It is, therefore, imperative that continental integration efforts under the AfCFTA, PAIC and AEC should proceed and harmonise investment protocols across Africa so as to further ease intra-Africa and foreign investment without the current fragmentation.[62]

4. Conclusions

In the spirit of harmonisation of African Investment laws, codes and protocols, and in line with the Preamble and Article 3 (c) of the AEC Treaty, it is proposed that all the sub-regional investment protocols be aligned with the PAIC so as to ensure harmony in African investment law. In terms of dispute resolution,

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[52]ibid.

[53]L Ngobeni T (2019) "The Relevance of the Draft Pan African Investment Code (PAIC) in Light of the Formation of the African Continental Free Trade Area" (2019) [2] <http://www.afronomicslaw.org/2019/01/11/the-relevance-of-the-draft-pan-african-investment-code-paic-in-light-of-the-formation-of-the-african-continental-free-trade-area/> accessed on 30th September 2019.

[54]ibid, L Ngobeni notes, for example, that the South Africa – Mozambique BIT has a 10-year post-termination survival.

[55]ibid, [6]. He further notes that this may encourage forum shopping by intra-African investors seeking establishment of their entities outside Africa so that they can benefit from favourable protection of their investments.

[56] For example, he argues that since PAIC does not guarantee access to international arbitration, while most BIT do. The indecisiveness on the choice of forum for dispute resolution is therefore viewed as a weak link. L Ngobeni, ibid, [2].

[57]ibid.

[58]See W Mutubwa (2017) "The COMESA –SADC – EAC Tripartite Free Trade Area Agreement and Regional Integration in Africa: achieving the African Economic Community Dream (2017) *Journal of cmsd* vol.1(2) [1-53].

[59] Article 4 and 5 of the TFTA Agreement.

[60] Article 4 and 7 of the AfCFTA Agreement.

[61]L Ngobeni, (n) 53 [7].

[62] ibid [5 and 9].

arbitration under the ACJ&HR and/or sub regional courts should be specifically included in the PAIC, as the preferred or prescribed method for resolution of all intra-African investment disputes.